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Note from the editor

Dear reader,

Ten years ago the first editor of this newsletter *Richard Swedberg* demanded for an economic sociology of law (Swedberg 2002 in *Economic Sociology* – Electronic European Newsletter 3(3), 47-52). It is evident that law is a fundamental institution for any economy. After classical sociology had included the analysis of law as a task for a general sociology, sociology of law and economic sociology separated. Afterwards, modern economic sociology almost completely neglected to include law in its studies of economies.

The current issue – ***Conventions, Law and Economy*** – is devoted to the analysis of the interrelation of law and economy (also economics). This is done from the perspective of the main strand of new French economic sociology: the so-called "économie des conventions" (economics of convention, in short EC). From its beginning in the 1980ies its research objects such as economic organizations and markets, labor relations (contracts, unemployment, qualification, salaries), quality conventions (logics of coordination and production), official statistics were also related to law as institution. EC nowadays integrates the analysis of economic situations as well as the analysis of political economy (on national and international level). It has developed in the Parisian region over almost three decades and one can speak of a second generation of this scientific movement. The claim is: EC has contributed to such an economic sociology of law as Swedberg demanded for – as the contributions in this issue will demonstrate. Thereby, EC included the analysis of law into its analysis of economic institutions. This was done on the ground of its pragmatic socio-economic theory of (economic) coordination between competent (economic) actors.

In the first contribution *Laurent Thévenot* sketches the ways EC approaches the analysis of law and he also presents more recent developments in the analysis of law. He works out the suitability of EC to analyze law, because EC focuses in general on how actors coordinate in a way they judge as proper and justifiable and on how actors "qualify" states, products, actions or persons. Law mediated coordination and the interpretation of juridical rules therefore are part of the research field of EC. But in contrast to positivistic and internal studies of laws, EC examines the pragmatic reality of law in economic coordination and how competent actors evaluate and apply juridical rules. Thévenot relates the approach of the plurality of orders of justification to the regimes of engagement ("engagement in the familiar" and the "engagement in plan") to show how rules are pragmatically adapted by actors in different everyday situations. Nevertheless, Thévenot applies EC also to the macro level.

Claude Didry proposes to analyze the emergence of collective contracts ("conventions collectives") from the point of view of coordinating actors. He traces the development of the collective labor law in France from the 19th century on. He interprets the emergence of collective contracts in the Paris region in the 1930ies as an answer to organizational problems of coordination in the course of production. Didry argues that the labor convention approach changes the perspective on industrial labor organization by including the historical processes of the emergence of self-reflexive and self-questioning collectives. For Didry economic institutions – as labor law and collective contracts – are not pre-given external constraints to economic action but the result of historical processes wherein competent actors try to "make sense" of their economic coordination in a plurality of "worlds of production".

Christian Bessy applies the EC-approach in the analysis of the market for legal services. On the basis of qualitative interviews he identifies different combinations of lawyer-client relations, of quality conventions and organizational forms of the law firm. Bessy sketches also newer trends such as the upcoming of the big international law firms and of network cooperation in this market. He critically assesses new tendencies of legal services because they promote an individualistic notion of law and its privatization.

Emmanuel Charrier and *Jérôme Pélisse* study the role of economists as experts in law courts. Charrier and Pelisse conceive these experts as intermediaries of law. Using survey data and qualitative interviews they study the conventional basis of their practices as well as their participation in the elaboration and translation of conventions.

In the interview with *Olivier Favereau* one of the founders of EC and his work is presented. The current issue includes some reviews which complement the focus on EC. Two of

them are directly related to the analysis of law in economic fields. The third book reviewed is a fundamental contribution to the socio-economic theory of (economic) value.

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Law, Economies and Economics: New Critical Perspectives on Normative and Evaluative Devices in Action

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The metamorphose of contemporary economies rests on a deep transformation of modes of coordination. The rationale behind this change is usually presented as the substitution. Horizontal democratic coordination of informed and responsible individuals would replace former authoritarian and paternalist politics. For their information, regulative procedures or instruments play an unprecedented role in this new political economy. This paper is dedicated to recent research on the relations between law, economies and economics, benefiting from the French approach of the *économie des conventions* (economics of convention, in short EC) and its new developments. A first section recalls why EC is adjusted for the analysis of law in action, and made possible a long-standing cooperation with law scholars. A second section introduces new analytical developments that help to situate legal regulations among a variety of guarantees and engagements which take place in economic and social life. They contribute to the critical clarification of new normative and evaluative devices which are involved in contemporary policies, in EU in particular.

1. The comparative advanatages of EC when analyzing law in action

In French, *convention* is the proper legal term for any covenant and, in English, it designates agreements between countries. Although EC offers a wider understanding of the notion than the legal one, it also deals with frames of agreement that help to coordinate behaviors in uncertain conditions and the perspective of failure or dispute. Hence, EC is able to situate law regulations among a wide variety of coordination modes used in economic and social life. Each of the specialized disciplines of economics and sociology has developed its own models of coordination. When meeting the empire of law, each of them often attempts to reduce law to its models. It tries to unveil the genuine coordination supposed to be hidden by law formalities. EC departs from these attempts by a more law-friendly approach. This paper benefits from a series of collaborative research programs with law scholars which testify to this friendliness.**1** Partnership arose with law scholars who were interested in the dynamics of legal judgment and its justificatory bases. They departed from a dogmatic and strict law positivism which emphasizes the letter of the law and downplays the process of implementation in a particular situation. By contrast to those who pretend that law does not contain values, these scholars open law epistemology to cognitive foundations including value judgments (Perulli 2010).

EC analysis of coordination takes also in consideration actors' cognitive and evaluative competences (Diaz-Bone 2011), allowing a parallel between justification in everyday situations and in law (Thévenot 2006, chap.6). The Economies of worth framework, which strongly contributed to EC and to cooperation with law scholars, accounts for the plurality of legitimate justifications which refer to the common good ("orders of worth"), and for the dynamics of compromise required to locally appease the strenuous relationships between several of them (Boltanski and Thévenot 2006). Labor law implementation involves a wide range of justifications which the judge has to "balance". This plurality follows that of economical organizations built on compromising arrangements between conventional modes of coordination which differ from one "model of production" to the other (Eymard-Duvernay 2004). The *industrial* order of worth is prominent whenever the interest of the productive organization – not of the shareholders – and its technical efficiency are at stake. The civic order of worth that endorses collective egalitarian solidarity is involved, together with industrial productive efficiency, when justifying collective agreements (*conventions collectives*), social protection or collective restructuring programs (*plan social*). Giving priority to seniority in lay-off procedures, or taking into account salaried employees' attach-

ment to the firm involve still another order of worth, *domestic*.

In legal judgment, the "rule or proportionality" federates a range of justifications in search for compromises, as in the European Convention on Human Rights. Discrimination cases demonstrate that the British state looks for such compromises between the right to freedom of speech and expression and Muslims sacred religious sentiments. Both a practitioner and a legal theorist, Leader developed a framework which accounts for a plurality of justifications which law judgments refer to (Leader 2000, 2005). Two of them converge with orders of worth: the "civic" one is based on fundamental egalitarian rights and largely overlaps the *civic* order of worth; the "functional" one is close to the *industrial* worth and places value on the efficient functioning of the productive organization.

Yet pluralism among legal justifications may be less reflectively integrated. Looking at multinational companies investing in the global economy, Leader observes a kind of *de facto* pluralism which merely results from separate specialized bodies of law which regulate commercial companies, investment and trade (Leader 2010). It poses a threat to basic labour rights. In contrast to this non reflected upon tacit pluralism, Leader pleads a "civic pluralism". Like other internationally recognized fundamental rights, labour rights would have the same weight as part of an emerging constitution of civil society. The category of fundamental rights helps to host a plurality of justifications within a legal framework, although individual rights do not fully capture the virtuous interdependencies that lead to a common good and related order of worth. They can contribute to include in the constitution, as in the Spanish one enacted in 1978, the egalitarian solidarity of *civic* worth in the domains of health, education and security (Lyon-Caen and Champeil-Desplat 2001).

Observing jurisprudence, law scholars noticed that the weight of the market order of worth is rising at the expense of the *domestic* and *civic* orders of worth. The European Court thus questioned labour law protections of employees on the motive that they impeded *market* competition and the benefits of moving the production from one European country to another (Perulli 2010). Even the *industrial* worth that places value on the core productive organization of the firm is presently loosing ground against *market* worth (Sachs 2012). In the large domain of public services and utilities, this change of weight between market and civic orders of worth is clearly visible in EU regulations and jurisprudence, questioning the possibility to contain the overwhelming increase of the market worth (Thévenot 2001). In the British case, most public services agents have to submit their activities to "market testing" and only a very limited core of public services remains, not for its own worth but as an exception to marketization: judicial and legislative powers, and activities that infringe fundamental individual freedoms (Lyon-Caen and Champeil-Desplat 2001). This marketization also aims at eradicate helpful relationships that used to complement the anonymous collective solidarity of *civic* worth and be aggrandized in the domestic order of worth, making the difference between "doing someone a service" as a good turn and "offering a service to a customer". More generally, *domestic* worth has a significant place as a source of law when it refers to customs and traditions, and also in legal judgments that place value on seniority (Thévenot 2006, chapter 6).

A last reason why EC is well fitted for the analysis of law comes from the notion of qualification which it borrowed from legal judgment. The judge has to *qualify* the factual situation, i.e. to select and format the relevant (from *relevare*: raise up) evidence to state that a certain regulation applies. Similarly, human and non human entities have to qualify for a conventional order of worth for their being involved in this convention of coordination which is thus a convention of quality. This is the way EC's realistic approach to coordination is based on the shaping of the material environment, and not limited to values or argued discourse. Even before EC, the framework on "investments in forms" put forward the trans-format-ting of the world which is needed for a formal rule to be implemented and for coordination to operate (Thévenot 1984).

2. Law in reality, among a variety of guarantees and engagements in everyday life

Sen's notion of capability (1985) contributed to a remarkable progress in the evaluation of rights implementation. It helps to contemplate the distance to be filled between the availability of an individual right and the possibility of its being enforced in a particular situation. Yet, it develops within a vocabulary of functioning, objective, choice, freedom, still too close to law to account for the whole chain of transformations of the person and his/her environment that are needed for law enforcement in reality. To deal with them, we posit the guarantee that legal conventions offer holders of rights and obligations within a range of

possible guarantees which rely on extra-legal capacities in everyday life. Instead of linking directly such guarantees to mutual trust, or to converging mutual expectancies that conventions assume, we look for a source of guarantee in the person's commitment with oneself which brings assurance and on the ground of a convenient environment. We chose the terms "engage" and "engagement" to designate such convenience (Thévenot 2006, 2007). These terms are still congruent with the legal vocabulary used to characterize the individual involvement. However, law focuses on the person's disposition while the category of engagement also underlines the need to prepare the ground, to get the surrounding conveniently prepared for a certain engagement or commitment to operate. With this analytical frameworks, we can identify which engagement law, economics or sociology respectively assume as principal, and their added specifications or limitations (Thévenot 2008). Light is shed on the contrasted and reductive evaluation which each offer of law in effect, bringing support to the alternative and more comprehensive category of "law realization" (*réalisation du droit*) which legal scholars developed (Lyon-Caen and Affichard 2008).

Below formal guarantees: engaging in personal familiar convenience

The *regime of engagement* with the world and with oneself which originates personal convenience in *familiarity* is particularly distant from legal conventions. Therefore, focusing on practical aspects of this *familiar engagement* usually leads to a critical evaluation of the formalities of law. Economics offers limited insights into this way of engaging with the situation: Richard Nelson's and Sidney Winter's evolutionary theory of economic change rests on the category of routine; Oliver Williamson's transaction cost economics is based on investments in specific assets. By contrast, economic sociology has paid close attention to "informal practices" that generate trust while differing from the formality of market prices and legal contracts, notably in contemporary Russia where they combine (Barsukova and Radaev 2012). Sociology is more accustomed than economics to elaborate on this familiar engagement. Yet, theories of practice which refer to habits, habitus and bodily experiences usually conceive them as collective and shared – "social" in this limited meaning. They miss two related features which are highly significant to understand the source of *familiar* trust or guarantee: the idiosyncrasy of the practical habituation; the needed prolongation of the habituated body in personally accommodated surroundings. One finds one's bearings, as commonly said, in one's *familiarized* surroundings by placing peculiar markers and arranging things for oneself in order to make them fitting and to get a proper hold on them. Engaging with a *familiarized* environment creates a confident convenience on which a mode of coordination with others can be built that is neither collective nor social in the usual sense, but highly personalized and only gradually expanded from one close link to another. Network representation does not fully capture the incomplete transitivity from one link to another, neither the role played by intermediaries in the transition and mutuality of *familiar* convenience. Eymard-Duvernay showed that such intermediaries transform recruitment evaluating procedures to make them more receptive of personal accommodation with work environment, and less discriminatory (Eymard-Duvernay 2012). Olivier De Schutter (2006) observed that anti-discriminatory law extends in this direction to take into account disabilities. A European directive (2000/78, November 27, 2000) imposes "reasonable accommodation" as a modification to a work environment that enables a person with a disability to perform the job. It meets the above-mentioned characterization of *familiar* engagement and acknowledges that guarantee depends on the person engaging with a convenient environment, as a visibly rough floor when fear of falling is threatening (Lyon-Caen and Affichard 2008).[2] Sophisticated combinations of the formality and public detachment of law with informal and personally accommodated practices and environments raise new challenges for research.

More about law and policies core categories of will, autonomy, project, contract: engaging in an individual *plan* with a functionally convenient environment

The vocabulary of individualization is widely used when legal conventions, institutions, organizations and policies are getting closer to persons. It brings confusion between two characterizations of individual or personal agency. What we have seen of the personal confidence which is gained by engaging in *familiarity* with accommodated surroundings, contrasts with the self-assurance which is associated with the idea of autonomy and supported by a different *regime* of engaging in a *individual plan*, or project. A collective research program on welfare and educational policies getting closer, ran by Marc Breviglieri and the author, used this differentiation of engagements to observe and analyze how accompaniment support has to take care of *familiarity* as a preliminary step in the transformations aiming at an autonomous self-projected individual (Breviglieri, Stavo-Debauge, and Pattaroni 2003;

Breviglieri 2009; Thévenot 2012). Less intimate and less dependent on a past idiosyncratic path, *engaging in an individual plan* is future oriented. Assumed by what is called will, the self-assurance of being able to project oneself in time to come depends on engaging with functionally formatted surroundings. By comparison to the former regime of *familiarity*, this one involves more objectivity. The relevant environment is made up of common functional objects instead of personal grips on subjectively identified pieces of affordance. Although individually undertaken, plans and functions are sufficiently impersonal to be referred to by common names – which is not the case of routines – and to foster joint plans coordination. In ethnographic observation, we observed that skilled social, educational or health workers manipulate the format of the setting into a functionally structured environment to induce a change from pure *familiar* confidence to *planning* autonomous self-assurance.

Leader named "consensual" the justification met in judicial judgments that do not refer to any specification of the common good but only rest on the mutuality of several individuals being engaged in a joint plan (Leader 2000).**3** More generally, liberal law takes for granted the engagement in a plan which gives consistency to the individual will, without consideration for the formatting of the environment that facilitates this engagement. Willfulness is looked for in investigations, and judicial acts are understood as expressions of the will which produce legal effects. New European welfare policies are oriented – almost exclusively – towards this engagement when they promote activation, individual autonomy and responsibility, projects and contractual agreements, enlightened consent. Surrogates of US welfare programs are also dominated by this engagement, as demonstrated by fine-grained ethnographic analysis (Eliasoph 2011). The differentiation of regimes expands on critical theory, exposing the colonization of other engagements by a dominant one, and the resulting pressure or oppression which one regime of engagement exerts upon another and which critique of power relations and domination does not usually account for.

Law and economics reducing planned action to an objective output: the two stances when engaging in conventions and conveniences

Neoclassical economics assumes that no other engagement that the *plan* governs human action. On the other hand, far from fully acknowledging this regime, it restrictedly specifies the notions of will, project or consent within the market coordination framework. All plans or options to be individually chosen are presumably marketed. Apart from the unrealistic cognitive burden of optimization which weighs down the individual for the choice of an optional transaction plan, this economics relies on the formatting of the reality into market options. This hypothesis remains usually implicit. It appears only at fault, when information about the quality of market goods is found asymmetric. This hypothesis is *de facto* buttressed by the huge present-day apparatus designed to guarantee quality conventions, through standardization and certification (Busch 2011). A similarity between this conventional objectivity and the legal one helps to bridge the gap between the two disciplines in the Law and economics literature. Both also reduce the movement of action, with its tentative attempts in time and space, to a punctual decision confused with an immediate output, like in spot markets. As a result of these two short-circuits, the projected plan – or will – merges with the objective output, without any concern for the inquietude of the plan in action and its unsure endeavors.

On the contrary, the concept of engagement offers a systematic view of the dynamical regime comprising two contrasted stances: "closed" or "open" eyes (Thévenot 2006, 2009). Research on coded forms before Economies of worth pointed to "the paradox of coding": users of coded forms complain about the excessive reduction brought by formality (Thévenot 2011b). All institutions give rise to such a paradox, and the notion of engagement shows that the same tension is inherent to any commitment. On the one hand, once invested in, a convenient form is bolstered by a blind confidence that favors coordination. The quietude of conforming to it demands that we close our eyes to other forms of possible coordination that are thus sacrificed. The moment our eyes are opened, in the course of the tentative efforts to carry the engagement through adversities, the second stance of the regime appears, accompanied by doubt, suspicion and inquietude.

A hermeneutical understanding of this contrast highlights the tension between the letter of the convention and the opening of its interpretation.**4** It illuminates the open process of the legal judgment which economists disregard when they reduce law in action to the letter of the law. The resulting evaluation of law efficiency views the regulation as a simple functional mechanism which puts constraints on market coordination (Affichard/Lyon-Caen/Vernac 2010). With its time perspective, the notion of engagement opens a more pragmatist than hermeneutical avenue of research, in the sense it makes room to the unforeseeable adjustment to

the environment and not only to interpretation. But American pragmatism did not positively consider the closed eyes stance of the convention or engagement, when one sticks to its letter (Thévenot 2011a). And encompassing both stances is needed to properly criticize the evaluative turn that nowadays interlinks law, politics and economics.

Law, politics and economics in the evaluative turn: a critical appraisal of *governing by objective objectives*

The globalized evaluative turn hinders criticism since it is supposed to offer citizens a more realist account of the effect of laws and policies, providing them with an evidence-based information. For the format of this evaluation, engagements are fragmented into small *plans* that in turn are reduced to their objectives. The objectives are in turn confused with the objective quantification of their fulfillment, which is mistaken for the final aim. Preempted by a ready-made evaluation that is included in the package of the policy, any challenge is forced to borrow this imposed format to present evidence and, in the end, the policy and the good in question.

Focusing on an objective objective is also intended to be politically open to diversity which gives rise to a variety of ways to reach it. The present day European harmonization of policies and law involves considerable effort to cope with the diversity of domestic legal systems and institutions. Retreating from the ambition of unification, European integration has been constantly based on the notion of "coordination" which brings us back to our research program. In 1951, the very first step of the European Coal and Steel Community implied to "coordinate" investments and trade. Half a century later, the Open Method of Coordination (OMC) is imposed on all European Union as a general policy evaluation procedure based on objective and standard statistical indicators that would foster, through comparative results, convergence. Standards and statistics build conventional equivalence between elementary plans which, submitted to the general evaluation of their technical efficiency, qualify for the order of *industrial* worth – not the market one. To be a tool of government for such an *industrial* polity, standards and statistics need to be unified and centralized, as for skill and training qualifications in 1970-80 France (Thévenot 2011c). As noted by Affichard and Lyon-Caen (2005) in their critical appraisal of OMC and the "Lisbon strategy for jobs", standards and statistics cannot be tools to govern an *industrial* EU. For lack of centralization and standardization of statistics, the "adjustment of statistical indicators to the local rules of each domestic labor market" is missing. Statistical indicators – as the employment rate – would rather govern a *market* EU with the emphasis placed on labour flexibility (Salais 2004).

As for policies, the European harmonization of law retreated from the ambition of unified principles for the *common* good to the format of plan engagement supporting "directives", with a focus on its objective, and possibly the objective measurement of this target (Porta 2008). In the case of law, the reality which is grasped by the objective objective is not the domestic economy, but the domestic legal system to which EU law has to be transposed.

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The globalized evaluative turn takes only into account a reduced form of engagement in a *plan*, of which it confuses the dynamics with a measurable objective. This evaluation is unaware of the place of *justifiable* engagements in the common good, such as *civic* solidarity in the public services, or industrial efficiency in the firm. Neither can it take in consideration the *familiar* engagement which is primordial to the person's consistency. Involved in the implementation of welfare, health and education policies, it is also assumed by the last developments of anti-discriminatory law. Putting all the emphasis on the objective ignores the "eyes open" stance of the engagement regime that characterizes the actor's concern with questioning and searching. It remains masked by the encoded indicator that is given for objective. More than the performativity of the coded form, economic sociology has to critically bring to light the complex series of reductions which oppress conveniences and conventions, through new normative and evaluative devices promoted for their unprecedented realism.

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Endnotes

1 Since its creation in 1992, the small structure of the International Institute for Comparative Studies (Institut International pour les Etudes Comparatives: IIPEC), chaired by the law scholar Antoine Lyon-Caen and directed by Joëlle Affichard, has played an important role in fostering collaborative research programs between law, institutional economics and sociology. An international European network of law scholars was involved together with young PhD law students, senior members of the EC movement (François Eymard-Duvernay, Olivier Favereau, Robert Salais, Laurent Thévenot) and junior economists and sociologists as well. On the topics that this paper addresses, see: Lyon-Caen and Affichard 2008; Lyon-Caen and Champeil-Desplat (eds.) 1998, 2001.

2 For the preparation of persons and their surroundings in the chain of "law realization" which action against ethnic discrimination requires, see Stavo-Debauge (2005, 2008). By contrast, the ministerial technical norms that regulate the implementation of authorized exceptions to the penal code articles penalizing abortion, in Brazil, rely on exacting requirements and trying preliminary interviews which "make non-criminal abortion services an inhospitable environment for the more familiar attachments and intimate experiences" brought in by an experience as personal as that of abortion (De Castelbajac 2009).

3 Yet Pascal Lokiec (2004) documented the current hybridization of contractual agreements that do also incorporate justifications for the common good.

4 Boltanski followed this path in his analysis of the "hermeneutic contradiction" associated to institutions (Boltanski 2009).

References

Affichard, Joëlle/Antoine Lyon-Caen, 2004: From Legal Norms to Statistical Norms: Employment Policies Put to The test of Coordination. In: Simon Deakin/Olivier De Schutter (eds.), *Social Rights and Market Forces: Is the Open Method of Coordination of Employment and Social Policies the Future of Social Europe?* Brussels: Bruylant, 145-163.

Affichard, Joëlle/Antoine Lyon-Caen/Stefan Vernac, 2010: De l'analyse économique à l'évaluation du droit du travail. Quelques leçons d'un programme de recherche. In: Antoine Lyon-Caen Antoine/Adalberto Perulli (eds.), *Valutare il diritto del lavoro. Evaluer le droit du travail. Evaluate labour law.* Padova: Cedam, 59-75.

Boltanski, Luc, 2009: *De la critique. Précis de sociologie de l'émancipation.* Paris: Gallimard.

Boltanski, Luc/Laurent Thévenot, 2006 [1991]: *On justification. Economies of worth.* Princeton: Princeton University Press.

Barsukova, Svetlana/Vadim Radaev, 2012: Informal Economy in Russia: A Brief Overview. In: *Economic Sociology*, 13(2), 4-12.

Breviglieri, Marc/Joan Stavo-Debauge/Luca Pattaroni, 2003: Quelques effets de l'idée de proximité sur la conduite et le devenir du travail social. In: *Revue Suisse de Sociologie, 29(1),* 141-157.

Breviglieri, Marc, 2009: L'insupportable. L'excès de proximité, l'atteinte à l'autonomie et le sentiment de violation du privé. In: Marc Breviglieri/Claudette Lafaye/ Danny Trom (eds.), *Compétences critiques et sens de la justice.* Paris: Economica, 125-149.

Busch, Lawrence, 2011: *Standards. Recipes for reality.* Cambridge: MIT Press.

De Castelbajac, Matthieu, 2009: Governing abortion by standards. Abortion policies in Brazil since the late 1980s. In: *e-cuadernos CES 4,* 29-46.

De Schutter, Olivier, 2006: Three Models of Equality and European Anti-discrimination Law. In: *Northern Ireland Legal Quarterly, 57(1)*, 1-56.

Diaz-Bone, Rainer, 2011: The Methodological Standpoint of the "économie des conventions". In: *Historical Social Research 36(4)*, 43-63.

Eliasoph, Nina, 2011: *Making Volunteers: Civic Life After Welfare's End.* Princeton: Princeton University Press.

Eymard-Duvernay, François, 2004: *Économique politique de l'entreprise.* Paris: La Découverte.

Eymard-Duvernay, François (ed.), 2012: *Epreuves d'évaluation et chômage.* Toulouse: Octares.

Leader, Sheldon, 1996: Proportionality and the Justification of Discrimination. In: Janet Dine/Bob Watt (eds), *Discrimination: Concepts, Limitations and Justifications.* London: Longmans.

Leader, Sheldon, 2000: Three Faces of Justice and the Management of Change. In: *Modern Law Review, 6,* January, 55-83.

Leader, Sheldon, 2005: Two Ways of Linking Economic Activity to Human Rights. In: *International Social Science Journal*, 185, 541-550.

Leader, Sheldon, 2010: Labour Rights in the World Economy. In: Antoine Lyon-Caen Antoine/Adalberto Perulli (dir.), *Valutare il diritto del lavoro. Evaluer le droit du travail. Evaluate labour law.* Padova: Cedam, 113-122.

Lokiec, Pascal, 2004: Contrat et pouvoir. *Essai sur les transformations du droit privé des rapports contractuels.* Paris: L.G.D.J.

Lyon-Caen, Antoine/Joëlle Affichard (eds.), 2008: *L'évaluation du droit du travail : Problèmes et méthodes, Rapport final, Vol. I,* Rapport de synthèse. Paris: Institut International Pour les Etudes Comparatives, 120 pages.
http://iipec.eu/site/sites/default/files/evaluationdw_vol1_1.pdf

Lyon-Caen, Antoine/Véronique Champeil-Desplat (eds.), 1998: *Le service public et l'Union européenne.* Paris: La Documentation Française.
http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/964150200/0000.pdf

Lyon-Caen, Antoine/Véronique Champeil-Desplat (eds.), 2001: *Services publics et droits fondamentaux dans la construction européenne.* Paris: Dalloz.

Perulli, Adalberto, 2010: Evaluer le droit du travail. In: Antoine Lyon-Caen Antoine/Adalberto Perulli (eds.), *Valutare il diritto del lavoro. Evaluer le droit du travail. Evaluate labour law.* Padova: Cedam, 3-12.

Porta, Jérome, 2008: *La réalisation du droit communautaire. Essai sur le gouvernement juridique de la diversité, (2 volumes).* Paris, Ed. L.G.D.J et Fondation Varenne.

Sachs, Tatiana, 2012: L'intérêt de l'entreprise entre droit du travail et économie. In: Antoine Lyon-Caen/Quentin Urbain (eds.), *La crise de l'entreprise et de sa représentation.* Paris: Dalloz.

Salais, Robert, 2004: La politique des indicateurs. Du taux de chômage au taux d'emploi dans la stratégie européenne pour l'emploi (SEE). In: Bénédicte Zimmermann (ed.), *Les sciences sociales à l'épreuve de l'action. Le savant, le politique et l'Europe.* Paris: Ed. de la Maison des Sciences Humaines, 287-331.

Sen, Armartya, 1985: *Commodities and Capabilities.* Amsterdam: Elsevier.

Stavo-Debauge, Joan, 2005: Mobilising Statistical Powers for Action Against Discriminations : the Case of the United Kingdom. In: *International Social Science Journal,* 183, 43-55.

Stavo-Debauge, Joan, 2008: Faut-il s'en remettre aux pouvoirs de la statistique pour agir contre les discriminations et réaliser le droit ? La catégorisation ethnique et raciale en question au Royaume Uni et en France. In: Antoine Lyon-Caen/Adalberto Perulli (eds.), *Efficacia e diritto del lavoro.* Padova: Cedam, 163-194.

Thévenot, Laurent, 1984: Rules and implements: investment in forms. In: *Social Science Information, 23(1)*, 1-45.

Thévenot, Laurent, 2001: Les justifications du service public peuvent-elles contenir le marché ?. In Antoine Lyon-Caen/Véronique Champeil-Desplat (eds.), *Services publics et droits fondamentaux dans la construction européenne.* Paris: Dalloz, 127-143.

Thévenot, Laurent, 2006: *L'action au pluriel. Sociologie des régimes d'engagement.* Paris: La Découverte.

Thévenot, Laurent, 2007: The Plurality of Cognitive Formats and Engagements: Moving between the Familiar and the Public. In: *European Journal of Social Theory, 10(3)*, 413-427.

Thévenot, Laurent, 2008: Les sciences économiques et sociales et le droit : quels biens reconnus, pour quelles évaluations ? In: Antoine Lyon-Caen/Adalberto Perulli (eds.), *Efficacia e diritto del lavoro.* Padova: Cedam, 65-97.

Thévenot, Laurent, 2009: Governing Life by Standards. A View from Engagements. In: *Social Studies of Science 39(5)*, 793-813.

Thévenot, Laurent, 2011a: Powers and Oppressions Viewed from the Sociology of Engagements: In Comparison with Bourdieu's and Dewey's Critical Approaches of Practical Activities. In: *Irish Journal of Sociology, 19(1)*, 35-67.

Thévenot, Laurent, 2011b: On Engagement, Critique, Commonality, and Power, an interview by Paul Blokker and Andrea Brighenti. In: *European Journal of Social Theory, 14(3)*, 383-400.

Thévenot, Laurent, 2011c: Conventions for Measuring and Questioning Policies. The Case of 50 years of Policies Evaluations through a Statistical Survey. In: *Historical Social Research, 36(4)*, 192-217.

Thévenot, Laurent, 2012: Des institutions en personne. Une sociologie pragmatique en dialogue avec Paul Ricœur. In: *Ricœur studies/ Etudes ricœuriennes, 3(1)*, 11-33.
http://ricoeur.pitt.edu/ojs/index.php/ricoeur/article/view/136/59

Labour Law as Social Questioning: the Contribution of the "Labour Conventions Approach" to a Different History of Socio-economic Institutions

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The "labour conventions approach" developed by Robert Salais (Salais 1989, 1994a; Storper/Salais 1997) explores a way of writing the history of socio-economic institutions that starts with what is, for Marx, the most obvious manifestation of capitalism, "an immense collection of commodities."**1** At the heart of the method is the realization of the product, that is to say not only its production but also the reality test which for him is the "satisfaction of human needs" (Marx 1976). If capitalist society presents itself as "an immense collection of products," it is in the sense of an enormous collection of "worlds of production," that is to say, of social collectivities. The identification of "labour conventions" aims at unravelling the tangle of repeated interactions that occur in these "worlds of production." It is as if a collection of social groups appeared on the marketplace, reflecting the existence of a complex division of labour across society as a whole.

But starting with the existence of "worlds of production" identified through their "products," the "labour conventions approach" raises questions about the organizational forms taken by productive activities and the institutional foundations on which they are based. For example, in the context of an "industrial district," it is not uncommon for productive activity to develop from small units in which work and family life merge. How can one explain, therefore, the crystallization of what is today the dominant form, that is the company and its correlate, the employee? Is the institutional dimension of this process linked to the constitution of an hierarchical space escaping from the functioning of the labour market (Williamson 1985), or to the existence of a legal framework defining the "rules of the game" through which the interacting links between individuals are made and unmade (North 1991)?

This question does not really arise in classical social history since the division between employees and business leaders is taken as a given, inherent to capitalism. This primary partition is the starting point of a centralization of hierarchical power held by employers in accordance with a dynamic of concentration of capital based on efficiency which is both technical (reduction of production costs from the perspective of Marx) and informational (reduction of transaction costs from the perspective of Williamson). Labour law appears as a response to the "social question" posed by the division between employees and employers (Castel 1994) and as an element in the resolution of the "organizational problem" posed by the emergence of large firms (Williamson 1985). It is seen as an "institution" in the sense that it helps limit abuses, uncertainties and inefficiencies in the labour market.

The "labour conventions approach" leads to a different historical perspective, starting with freedom of trade established by the rule of law. It raises questions about the institutions which define the relationships between people who contribute to the realization of these products by refusing to take the employee and the company as given entities. From this point of view, *L'invention du chômage*, ["The Invention of Unemployment"] (Salais/Baverez/Reynaud 1986), represents a major advance in analysing the institutional framework from which the actors themselves apprehend the relationships they have forged in the realization of a product. This book demonstrated the historicity in France of a category such as unemployment and correlatively that of the employment contract. Following my meeting Robert Salais in 1990, it would lead me down the path of "historical sociology of labour law" abandoning the orientation of Bourdieu with its focus on building social groups through legal categories**2**, thus integrating a "sociological point of view" on law as a motive of action for the agents (Weber

1978), that is to say how the actors mobilize legal norms in their social activities. Indeed, labour law is itself a historical product, whose crystallization is not only linked to the protection of workers or to optimizing company organization. It corresponds to a specific evolution of "institutions" as "the rules of the game" (North 1991) in the relations between producers, allowing players to see themselves as "employees" or as "employers." It therefore does not contribute to defining the best organization or "governance" of work but rather to the actors themselves questioning the company organization outlined by the collective group of employees.

After returning to the "labour conventions approach", I will start from the French case to consider the crystallization of the employment contract starting with the legacy of the Civil Code and then to the current consequences of existing labour law in the workplace.

1. From worlds of production to labour conventions

1.1. The product as a starting point

In Salais' view, the product represents a collective activity of transformation of a world both natural and social. It testifies to the existence of deliberate individual activities guided by a common purpose and which, through their coordination, leads to a product that will be subjected to the "reality test," that is to say, the fact of finding it a buyer.

The product is the starting point of an investigation which goes back through time to unravel the web of social interactions and individual activities which lie at its origins. But in the early stages of this investigation, very little is known about those who participated in its production. Who should be included in this "world of production"? Are they artisans, employees? Can we even say that they have "worked" to realize this product, when productive and family activities are so mixed together? We simply feel that these individuals have contributed to its production, and this has resulted in their remuneration. One imagines that if the product is sold, or at least allows the one who has advanced the funds to get back his investment with a surplus, the cycle will start again at a more or less sustained rhythm.

1.2. Productivity conventions

In this probable but still uncertain cycle leading to the realization of a product, we discover a set of individuals who have laboured to mine coal, to melt the metal parts and assemble them, spinning silk, cotton … weaving, making clothes etc. Events unfurl more or less as planned, according to the instructions given, the competence of colleagues or the quality of raw materials. But it is still necessary to deal with these accompanying uncertainties, to adjust the coordination with others in order to arrive at a satisfactory product which may find a buyer. Here, I think, we are touching on what Salais (1989) calls the "conventions of productivity," according to which individuals more or less know how to adjust to each other in dealing with various technical and social uncertainties, what to do depending on the equipment, the reactions of colleagues and what has been learned from past experiences. The notion of "convention" means that these adjustments to uncertainties are not limited to the instructions of a boss or a superior but suppose a form of initiative on the part of the actors – an initiative in their own activity participating in the division of labour and allocation of tasks among group members.

1.3. The conventions of unemployment

A second source of uncertainty in the realization of the product lies in its ability to find a buyer. Manufactured goods may remain for some time without finding a buyer and may not ever find one, or, inversely, they may arouse widespread enthusiasm. These fluctuations are the subject of a learning experience enabling producers to anticipate the rhythm of manufacturing, preparing for either over- or under-production. Thus, in an industry such as the garment trade, it is known that the approach of winter leads to increased sales and generates increased activity in garment shops and among home seamstresses. In the automotive industry of the Belle Époque, seasonality was reversed, with fine weather being conducive to an increase in car sales (Fridenson 1972). Thus, worlds of production are characterized by specific social rhythms anticipated by the actors and leading in the early twentieth century to seeing unemployment on a professional basis. This touches on a business management question which is just as sensitive for merchants and industrialists as it is, more broadly speaking, for all producers. This uncertainty about the product "finding a buyer" is partially reduced by a form of collective experience concerning expected quality and volume. It involves a division between the intention of

developing, or at least of maintaining, a group of firms and workers with the capabilities necessary for the manufacture of products, and that of retraining the workers and restructuring the firms. The forms taken by this division are the "conventions of unemployment," the concept of "unemployment" here being a broad one, going beyond the historical category considered in *L'invention du chômage* (Salais/Baverez/Reynaud 1986).

2. Challenges posed by the "invention of unemployment": the historicity of the employment contract

The "labour conventions approach" lays the foundation for a rethinking of economic dynamics having the merit of leaving open the institutional conditions of the individuals who take part. It therefore leads to questioning the place of these institutional dimensions, which characterizes in my view its strong singularity in relation to an approach to capitalism starting from the division between workers/employees and employers/capitalists. An identification of "productivity conventions" is an aid in understanding productive activities as a form of coordination which therefore does not rely on the authority of a central individual, the employer or the capitalist, but rather on the adjustments made by a plurality of actors. "Conventions of unemployment" reflect a "denaturalization" of unemployment as the immediate expression of economic fluctuations inherent in a market society. I would like to emphasize this point, returning to the scope of the *L'invention du chômage* in this denaturalization of unemployment.

2.1. Invention of unemployment or the birth of the unemployed?

To speak about *the invention* of unemployment has little meaning in a classical view of industrialization seen as a succession of "industrial revolutions" related to technical developments and organizational innovations. The product here plays only a secondary role in relation to the social relationship regarded as thus consubstantial to capitalism: wage labour. From this starting point, production relates immediately to "work", that is to say, the activity of "workers" who are under the orders of an "employer" who in return for their "work" pays them "wages". When sales stagnate or fall, the "employer" no longer makes a profit and reduces production thus laying-off redundant workers. The worker works or does not work. "Unemployment" is not strictly speaking "invented," it is "identified" as a specific cause of involuntary deprivation of work compared to other factors such as lack of professional skills, illness, disability or old age. On this basis, in the views of Topalov (1994), the Naissance du chômeur ["birth of the unemployed"] corresponds to the birth of a political and social "category" identifying a new social group and related to a policy of mitigating workers suffering through the implementation of specific relief funds and job placement institutions.

A history emerges from *L'invention du chômage* which differs from the problematic category of "without a position" or "without employment" due to "other accidental lack of work" from the 1896 census (Salais/ Baverez/ Reynaud 1986: 33). While the statistician views unemployment as a lack of a position in a workplace, the answers provided by census figures show a complex set of women who were unemployed or in "unknown situations," differing significantly from the figure of the "unemployed" man formerly hired in workplace. A surprising link is thus made between female unemployment and home work that disorganizes the "statistician's model" and reflects the difficulty of the actors themselves in understanding their situation starting from the category of "without a job". Indeed, the occasional lack of work for a woman working at home did not necessarily mean unemployment, conceived of as the rupture of a relationship with an employer, leading women to abstain from declaring themselves as being "without position" or as "unemployed" since they did not see themselves as being in this situation.

The existence of a "floating population" linked to the category of "unemployment" is related to another category which in this same period was the subject of a good amount of legislative and legal thinking: that of an "employment contract." While it is possible to conceive of an inter-individual legal relationship between a worker and a "head of an enterprise," the situation became more complicated concerning those described as "isolated," that is to say, those who worked at home, frequently for intermediaries or "middle-men". One of the questions in the debate on the employment contract that took place at that time specifically addressed the regulations for workers working at home who sometimes were described as "independents." The employment contract was one of those tools used to identify the existence of a legal relationship between a merchant contractor and a worker, with the responsibilities of the former towards the latter gradually accumulating in terms of payment of wages, insurance against work accidents or of health and safety conditions.

This helped limit the "isolated" category without eliminating the complex situations in which the division between employers and employees remained unclear, as in the case of precision lathe cutting in the Arve Valley (Salais/Storper 1997).

2.2. Before the employment contract: the regime of the job contract [louage d'ouvrage]

With *L'invention du chômage* we can see the possibility of productive activity in which the coordination of producers does not necessarily require an employment contract. This raises questions concerning the institutional frameworks of this productive activity going back to how the available legal tools are mobilized by the actors in the realization of a product at the centre of a "world of production." Often the Revolution is thought to have played a destructive role, establishing individual freedom by eliminating the collective regulations of the corporations and prohibiting collective forms of action which could bring them back. The Allarde decree and the Le Chapelier law of 1791 are taken as the founding acts of a regime, paving the way for a "liberal modernity" (Castel 1994) which is characterized by the abstention of the State and the reconstitution of the private guardianship of the employers over the workers. This analysis ignores how the players adopted the laws of the Revolution, codified in the Civil Code. As shown by Cottereau (2002), work relations were not reduced solely to the "service contract" [louage de services] in Article 1780 of the Civil Code. The actors themselves linked this to the complex architecture of the "job contract" [louage d'ouvrage] which, in addition to the service contract, included transport contracts and "quotes and markets" [*devis et marchés*], which together cover Articles 1780 to 1799 of the Civil Code. This legal architecture reflected the workers' demand to establish a "real job contract" in which workers undertake a job at a "fixed price" in line with rates commonly accepted in the professional world.

The Lyon silk industry appears, in this respect, as an exemplary "world of production" in which the *canuts* [silk weavers] and shop masters were those who took the job orders, demanding a rate which fixed prices in advance. They presented themselves as "entrepreneurs," hired by the *négociants* [merchant-contractors], using in turn the services of *compagnons* [journeymen workers] and those, less formalized, of members of their own families. This architecture of work relations reveals a sharp division between merchant-contractors and workers, the merchants being in charge of the various operations in the production of a piece of silk, from spinning to weaving and dyeing. Meanwhile, the workers world, in turn, was characterized by a significant heterogeneity with the corporatist division between "master" (shop master, worker sub-contractor [*ouvrier façonnier*]) and compagnon, in addition to the diffusion of the work in the countryside. This world was not devoid of collective regulations. Thus, in Lyon the demand for a rate was regularly advanced by the shop masters, as evidenced by the insurrections of 1831 and 1834.

This institutional architecture, while it has an affinity with the worlds of production close to the *fabrique collective* [collective workshop], can be found in more "industrial" universes such as in the mines or the steel industry. This was particularly the case in the mines of the Nord Pas de Calais region, but also in the mines of Saint-Bel (Grange 1994). This was also true in the steel industry, where the owners occasionally hid behind the ability of certain workers to recruit "helpers," thus avoiding their liability in case of an infringement of the legislation on child labour or health and safety conditions. In a "labour conventions method," a system of "job contracts" [*louage d'ouvrage*] emerges around the figure of the shop master or labour sub-contractor [*marchandeur*] which immediately puts the product at the centre of group discussions where the "configurations of meaning" take shape through which actors come to see their identities and their participation in a common world. Indeed, these discussions focused primarily on the "rate" for jobs as the basis of an agreement between the parties in a job contract, between the contractor and contractee, which might in turn lead to signing a service contract between the contractee and the workers.

The "corporatist grammar" based on the duality between compagnons [journeymen workers] and masters was never really erased. Beyond the particularism of corporations, it entered the general language of contract law established by the Civil Code. It forged links between workers on the basis of a common condition based on the fluctuating relationship *compagnon*-master (in the case of Lyon) and the remuneration of the compagnon according to a fixed proportion of the job rate signed by the master. This solidarity manifested itself in strikes that brought together all workers in opposition to the contractors, merchants and industrialists. It resulted in the rates and professional customs which develop in a given world of production with the weakness represented by the ambivalent attitude of sub-contractors considered as intermediaries. Gradually, the existence of these intermediaries was called into question due to the downward pressure on working conditions

which may result from too much competition. They were sometimes considered *"marchandeurs"* [labour sub-contractors], practicing *"marchandage"* [labour sub-contracting], a practice made illegal by the decree of March 2, 1848. Work accidents, but also the bankruptcy of marchandeurs, raised the problem of labour contractors in relation to workers in "service contracts." Child labour laws heightened this responsibility, placing the labour contractors within the scope of a juridical offense and generating the need for the formalization of the legal relationship between the workers as a whole and the labour contractors.

"Corporatist grammar" could also be found in British Common Law, but in a more accentuated form through the residual aspects of the Master and Servants Act maintaining the "crime of desertion" with respect to the worker who wants to leave his master (Deakin/Wilkinson 2005). Moreover, the distinction between masters and merchant-contractors was not as sharp as evidenced by the case of the London silk industry where many masters were also shop owners (Hupfel 2010). This resulted in sharper antagonism between masters and workers. This antagonism fed the demand for equality of individual rights, in contrast to the relatively egalitarian and collective dynamic observed in France.

2.3. The birth of labour law as a reverse questioning of law and worlds of production

The role of intermediaries in France was questioned throughout the nineteenth century, with milestones such as the prohibition of *marchandage* [labour sub-contracting] in March 1848, but also that of child labour starting from the 1841 Guizot Law, the first of a long series. Salais (2011) suggests that in France this critique of *marchandage* is the basis of a reflection on the specific character of the identified link between workers and job contractors (merchants-contractors, factory owners) compared to a purely market link, that is to say similar to that of a sale between a consumer and a merchant. This criticism led to a gradual abandonment of the reference to the "job contract," [*louage d'ouvrage*] discarding the model of a "workers sub- enterprise" (sections 1787 to 1799 Civil Code) to focus on the "service contract" [*louage de services*] (Article 1780), as a general model of the employment relationship. The service contract became the legal matrix of work relationships in the face of the legal need to identify the accountability relationship that developed between job contractors [*donneurs d'ouvrage*] and workers within a broader institutional evolution in which the term of work itself was being clarified. With many situations in which production took place at home, providing additional resources to small farmers in the regions of large manufacturing towns (the silk industry in Lyon, ribbon production in St. Etienne, cloth in Rouen, and linen in Cholet, etc.), entire families became involved in production. It then became necessary to refine the concept of work itself, as something distinct from the family activity by excluding children and, to a lesser extent, women (prohibition of night work of women by the law of 2nd of November 1892).

The debates that took place in the Superior Labour Council [*Conseil Supérieur du Travail*] and the Legislative Studies Association [*Société d'Etudes Législatives*] (between 1904 and 1906) tended to identify those elements based on the "service contract" which would form the substance of an "employment contract." Thus, the "employment contract" was defined in relation to the situation of the artisan who offered his work to the "public." However, unlike the commercial contract of the artisan, the employment contract is characterized by an exclusive and therefore lasting link between one "employee" and one or more given "employers" (Didry 2002). From this developed a profoundly transformed legal grammar of labour relationships: while the job contract (*louage d'ouvrage*) referred to a community relationship between a group of producers (under the direction of a *marchandeur*), the employment contract is characterized by an *individual* relationship between a worker and one or more employers. This language provides the basis for an analysis of the *legal subordination* of the worker, which certainly leaves open the possibility of an assertion of the employer's authority over the latter, but simultaneously recognizes the worker as someone with rights in relation to his employer, able to question the employer's responsibilities.

This new juridical status did not find any immediate consecration in the law (even if it played an important role in the adoption of the Labour Code in 1910), but it played a key regulatory role in the transformation of work relationships in a situation marked by the growth of large factories. It cannot be reduced to a simple "reflection" of the technical evolution which gave rise to the formation of large production units. It also helped to clarify the situation of workers at home, as in the case of home-based garment workers at the heart of the law of 1915 establishing a "minimum wage." This was not only a law which protected against the damaging effects on wages of competition between

seamstresses. It also required the systematic registration of wage rates by the job contractors, that is, besides the army, the large department stores. It was supplemented by a second law in 1917 which established, for the same seamstresses, the "English week," that is to say, consecutive rest days on Saturday and Sunday. These laws introduced a radical transformation in an industry initially dominated by piecework, establishing a quasi-wage link between seamstresses and department stores without eliminating the concept of "entrepreneur" which is a possible professional classification of the activity of seamstresses in the agreements of 1936 (Machu 2011).

3. From the employment contract to the company

These institutional changes could put into question the essential point of the "labour conventions approach" i.e., which considers all the participants in a "world of production" as actors. If workers are bound by an individual contract with an employer, they are placed under the authority of the latter and their role as "actors" may be reduced. The employment contract represents a fundamental change in the "legal grammar" of work relations. However, it must be considered in relation to the irreducibly collective dimension of work. It tends to show the structural duality which this contract embodies, insofar as in this modern labour law "next to its contractual dimension, the labour relation ... is linked to industrial relations." (Jeammaud 1990: 4, translated by the author). Thus, the juridical classification of an individual relationship between the worker and the employer opens an investigation into the coordination of these workers amongst themselves, as a permanent capacity to cope with the uncertainties that arise in the production process regardless of the employer's instructions. This coordination which employees experience in their work is the basis, I believe, of the new demands for "workers' control" [Contrôle ouvrier] (Dehove 1937) which came forward in the great strikes of the Popular Front and continued into the on-going debates on labour law in the frequent cases of restructuring leading to a reduction of company jobs.

3.1. Collective agreements of the Popular Front

The employment contract affects how productive actors see their relations, that is, their "configuration of meaning." This explains the close association that I have noted in the legal debates of the years 1904–1906, between employment contract and collective agreement (Didry 2002). The "collective agreement" was defined as a contract regulating the conditions of individual employment contracts. The question of compensation, a central point at the time when it set the "rate" of "jobs," was then integrated into the broader question of work organization itself, linked to the regulation of its duration, whose genesis was the Sunday rest day (1906) and the 8 hour day (1919). This work organization made the distinction between "skilled workers" [*ouvriers professionnels*] and "unskilled workers" [*ouvriers specialisés*] established during the War in the arms industry and which led to the question of workers' *skills*, making it possible to establish a series of minimum wages.

Collective agreements negotiated in the aftermath of the great strikes of the Popular Front (May–July 1936) developed out of the "institutional apprenticeship" that had taken place on the basis of the legislative progress of the first decades of the century. The analyses done by Robert Salais and myself, in line with an historical "labour conventions approach" led us to identify a "world of production" crucial to the dynamic of these strikes and the subsequent collective bargaining: the defence sector and more specifically that of aeronautics (Didry/Salais 1995). Since the early 1930s, this sector had been marked by a very strong dynamic of development in a general context of crisis and unemployment. It had to face the contradictions brought forth by the renewal of the forms of work organization that had been practiced during the First World War in a universe dominated by the figure of the skilled worker whose work was fettered by full compliance to the foreman's instructions and authority. The revival of aircraft production faced difficulties in developing large scale production in a world dominated by many small manufacturers. In this context, the worlds of the metallurgical industry in Paris and St. Etienne lend themselves to a group examination of the productive organization supported by the unions.

The collective agreement in the Parisian metal industry in July 1936 was the first response to these organizational problems, with the establishment of a scale of skills based on the duality skilled/unskilled worker (*ouvrier professionnel/ouvrier specialisé*) and the subsequent negotiation of a convention for employees, technicians, foremen and engineers. As shown by Salais and Storper (1997), the negotiation of this "pilot" agreement of the Parisian metal working industry contributed to the crystallization of a world of production characteristic of what was considered the "splendour of the Paris region" based on the companies at the centre of the subsequent innovative dynamic of the

aeronautics industry and more generally of "State production." The law of 24 June 1936 and the "model" agreement of the Parisian metal working industry tended to set a form of work organization around the duo "skilled/unskilled worker," from which an explanation of the specific features of different modes of production becomes possible. These legal references help reveal unique worlds of production, especially in less "industrial" cases such as that of the precision lathe cutters of the Arve Valley who are divided between workers in small workshops and home workers (Didry 1998a).

3.2. The dynamics of corporate restructuring

The "labour conventions approach" leads to a reflection on the genesis of both the work contract and of the company from which progressively emerges the figure of the "entrepreneur" gradually demanding control over the organization of work. This figure develops in the early years of the twentieth century in a context in which the company's identification as an employer is accompanied by questions both as to its strategies in the organization of production as well as to its choice of products. This questioning is at the centre of many historical monographs produced by the research group Institutions, Emploi, et Politiques Économiques ["Institutions, Employment and Economic Policy"], directed by R. Salais during the 1990s (Salais 1994b). It can also be found in research undertaken by R. Salais on corporate restructuring in the 1980s leading to collective redundancies and assistance from the Fund for Industrial Modernization (Salais 1992). This set of surveys reveals another dimension of the "labour conventions approach": the plurality of possible worlds of production which can be present within the same company. In other words, if the company and the employment contract are the main institutional frameworks of activity in a "world of production," the same company may experience evolution of production describing a trajectory between the different possible worlds of production which are outlined by labour conventions (Salais 1994a).

During these restructuring processes, labour law provides the basis for interrogating the nature of conventions operating at work, not only through a reconsideration of the company's strategy identifiable in its financial data, but also through the mobilization of workers. The works council [comité d'entreprise] becomes a place for debate leading actors to question the expected evolution and therefore existing labour conventions, prior to considering the conditions for the possibility of new forms of production that emerge from it. Here again, the "labour conventions approach" means freeing ourselves from the conception of the company as a management unit under the authority of a "boss", to consider it as a work collective whose members come to question their activities. The lawsuits involving works councils in situations of mass redundancies enabled me during the 1990s to identify a plurality of registers of criticism of corporate management in the debates and forms of worker mobilization, revealing the texture of the labour conventions that are forged in the productive activity of relevant companies (Didry 1998b).

In the context of financialization, marked in France by the search for the "factoryless" company centred on design and conception, and, more generally, by a blurring of company boundaries, it could be suggested that the "labour conventions approach" is losing its relevance. Restructuring is taking a dramatic turn in which the initial "critical" registers are increasingly difficult to apply in the face of managerial determination to cut jobs considered too expensive. However, dynamics of negotiation are emerging, not only to consider the fate of the dismissed employees but also to define the substance of the company through its work, around agreements to clarify its general outline in the future, whether this is through the "forward management of employment and skills" [gestion prévisionnelle de l'emploi et des competences] or, more directly, through the determination of "economic and social units" [unites économiques et sociales] (Didry/Jobert 2010). Given these dynamics, the "labour conventions approach" has helped me better understand the issues of collective mobilization and debate deeply rooted in the productive dimensions, leaving behind a macro-social analysis which held these "micro-mobilizations" to be a negligible quantity and concluded that there was a progressive disappearance of the labour movement. It has the great advantage of removing the prisms of great social visions such as the "post-industrial society," and "post-Fordism," to return to the reflections and analyses of those who through their work in the company have measured its possibilities.

Conclusion

Based on the regularities that emerge in productive activities, the "labour conventions approach" has contributed to a profound renewal of socio-economic history, leaving behind the analysis of a linear evolution that identified a succession of historical periods such as Fordism or post-Fordism. At the same time, it has generated a new per-

spective on labour law, compared to classic social history with its postulate of an irreducible confrontation between workers and capitalists leading to the development of a body of measures protecting against the most extreme forms of exploitation. It has enabled an analysis of the historicity of the categories of employees/workers and capitalists/bosses/employers, considering juridical frameworks as historical categories contributing to the construction of a "horizon of meaning" by the actors themselves. What emerges is a history open to a plurality of inextricable economic and social dynamics in which the future is difficult to predict but which can be seen in the activities and projects of individuals who, while trying to shed light on their practices, contribute to the transformation of the institutional and therefore juridical frameworks of their experience. Labour law is thus an element in a complex process of development in which, to the experiences and questions which actors develop starting from these categories, responds the continuous evolution of jurisprudence and legislation.

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Endnotes

1 "The wealth of societies in which the capitalist mode of production prevails appears as an 'immense collection of commodities'; the individual commodity appears as its elementary form." (Marx 1976: 125).

2 "Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular." (Bourdieu 1987: 838).

References

Bourdieu, Pierre, 1987: The Force of Law: Toward a Sociology of the Juridical Field In: *Hastings Law Journal 38 (5)*, 814-853.

Castel, Robert, 1994: *Les métamorphoses de la question sociale, une chronique du salariat.* Paris: Fayard.

Cottereau, Alain, 2002: Droit et bon droit, un droit des ouvriers instauré puis évincé par le droit du travail In: *Annales Histoire et Sciences Sociales 57 (6)*, 1521–1561.

Deakin, Simon/Frank Wilkinson, 2005: *The Law of the Labour Market: Industrialization, Employment and Legal Evolution.* Oxford: Oxford University Press.

Dehove, Gérard, 1937: *Le contrôle ouvrier en France. L'élaboration de sa notion. Ses conceptions.* Paris: Librairie du Recueil Sirey.

Didry, Claude, 1998a: Arbitration in Context: Socio-Economic Conditions and the Implementation of the Law on Conciliation and Compulsory Arbitration In: Noel Whiteside and Robert Salais (eds.), *Governance, Industry and Labour markets in Britain and France, the modernising state in the mid-twentieth century.* London: Routledge, 163–178.

Didry, Claude, 1998b: Les comités d'entreprise face aux licenciements collectifs, trois registres d'argumentation In: *Revue Française de Sociologie 39 (3),* 495–534.

Didry, Claude, 2002: *Naissance de la convention collective, débats juridiques et luttes sociales en France au début du XXe siècle.* Paris: Editions de l'Ecole des Hautes Etudes en Sciences Sociales.

Didry, Claude/Annette Jobert (eds.), 2010: *Les restructurations industrielles entre politiques, droit et relations professionnelles.* Rennes: Presses Universitaires de Rennes.

Didry, Claude/Robert Salais, 1995: Troubles sur les produits d'Etat et écriture des conventions collectives In: Annie Jacob et Hélène Vérin, *L'inscription sociale du marché.* Paris: L'Harmattan, 110–134.

Fridenson, Patrick, 1972: *Histoire des usines Renault.* Paris: Seuil.

Grange, Annie, 1994: *La gestion des mines de pyrites de Saint-Gobain à Sain-Bel Entreprises et histoire 6*, 67–86.

Hupfel, Simon, 2010: *L'évolution comparée des manufactures de soieries de Lyon et de Londres, 1789-1848. Une approche institutionnaliste.* PhD in Economy. Lyon: Université Lyon 2.

Jeammaud, Antoine, 1990, Les polyvalences du contrat de travail In: *Les transformations du droit du travail.* Etudes offertes à Gérard Lyon-Caen. Paris: Dalloz, 299–315.

Machu, Laure, 2011: *Les conventions collectives du Front Populaire, construction et pratique du système français de relations professionnelles.* PhD in history. Nanterre: Université Paris-Ouest-Nanterre-La Défense.

Marx, Karl, 1976: *Capital, vol. 1.* London: Penguin.

North, Douglass C., 1991: Institutions In: *Journal of Economic Perspectives 5 (1)*, 97–112.

Salais, Robert, 1989: L'analyse économique des conventions du travail In: *Revue économique 40 (2)*, 199-240.

Salais, Robert, 1992: Modernisation des entreprises et Fonds National de l'Emploi. Une analyse en termes de mondes de production. In: *Travail et Emploi 51 (1)*, 49-69.

Salais, Robert, 1994a: Incertitude et interactions de travail : des produits aux conventions In: André Orléan (eds.), *Analyse*

économique des conventions. Paris: Presses Universitaires de France, 371–403.

Salais, Robert, 1994b: Pièces pour un dossier sur les grandes entreprises de la Belle Epoque In: *Entreprises et histoire* 6, 5-10.

Salais, Robert, 2011: Labour-Related Conventions and Configurations of Meaning: France, Germany and Great Britain prior to the Second World War. In: *Historical and Social Research 36 (4)*, 218–250.

Salais, Robert/Nicolas Baverez/Bénédicte Reynaud, 1986: *L'invention du chômage.* Paris: Presses Universitaires de France.

Storper, Michael/Robert Salais, 1997: *Worlds of Production: the action frameworks of the economy*. Cambridge MA: Harvard University Press.

Topalov, Christian, 1994: *Naissance du chômeur, 1880-1910.* Paris: Albin Michel.

Weber, Max, 1978: *Economy and Society.* Berkeley: University of California Press.

Williamson, Oliver E., 1985: *The Economic Institutions of Capitalism.* New York: The Free Press.

Law, Forms of Organization and the Market for Legal Services

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The legalization of economic and social relationships has entailed the growth of legal services and has progressively changed the way that they are organized. More recently, historical rules of organizing the legal profession, in the form of a 'professional order' (bar association), have recently been undermined by the European Commission (2005) because they restrain competition useful to the construction of a market for legal services. Although this project of liberalization has not succeeded, professional orders have been ensured to renegotiate certain rules (prohibition on advertising, multi-disciplinary or fees issues).

From the case of the French professional order, the purpose of this article is to analyze these institutional changes and their setting up in new forms of organization**1**. Beyond (and linked with) economic factors, like the globalization of business activities, there are legal factors, like the increasing complexity of law (Hadfield 2000). We would like to show that these changes are also the result of a more individualistic concept of law referring to a liberal political philosophy in which politics, in the sense of the management of the tensions between different common goods, is replaced by the enforcement of 'individual rights'.

The activities of lawyers are subject to social and organizational constraints, but reciprocally, the profession and the organization also constitute its support. This will be our analysis in the first part, starting from the notion of different sources of legal inventiveness, diverse modes of business development and their organizational supports. We will then examine how the emergence of new forms of organization, based on a more corporate logic, calls into question the professional rules. From an analytical point of view, we stress the normative dimension of these activity models and thus the expectations of the actors each one other, by referring to a plurality of common goods or "conventions of quality" (Boltanski/Thévenot 2006; Eymard-Duvernay et al. 2006). The idea is also to connect them more generally to different concepts of law.

In a second part, we put emphasize on the emergence of organizational forms linked to the creation of markets for legal services in which law firms act as mediator in the absence of properly defined positive law. That will lead us to adopt a more endogenous definition of law (rule-setting), making it possible to see the close connection between litigation and provision of advice, which has become today predominant. Beside we link these organizational changes to a more individualistic concept of law, in particular by distinguishing between the various "causes" that can be defended by lawyers, which refer to diverse models of state intervention.

In conclusion, we will lead up finally to the consideration of two axes of analysis, which in turn will facilitate building a typology of the firms: the discretionary power of the lawyer towards his client and the narrow coupling of litigation and legal advice. This typology is referred to different ways of organizing the profession, and, more generally, different concepts of law and politics.

From an empirical point of view, we rely on semi-structured interviews of about thirty lawyers belonging to different 'firms' (organizations, cabinets) in terms of size, location (Paris/province), and legal domains (business and corporate law, labor law, family law).

1. Legal inventiveness and forms of organization

It may be surprising to speak about legal inventiveness in a universe that is strongly structured by positive law and in which judges are supposed to apply the law. From this point of view, this concept would undoubtedly be more relevant within the framework of Common Law, which some commentators agree to emphasize its adaptability to socio-economic changes, allowing greater economic efficiency (Posner 2003). However, even in the tradition known as Civil Law, the incompleteness of legal rules implies a very large amount of interpretation by the judges,

as well as by the whole set of law professionals (lawyers, consultants, etc), whose interactions contribute to stabilizing case law in a given context. It is because the context can vary that the law must also adapt itself and evolve. It is also because the context can vary on a temporary basis (following a crisis) that the law must adapt to the situation (in the event of drought, the law of water use is modified). It is also necessary to take account of particular cases, and other considerations of justice or equity (Bessy, 2007).

Concerning the inventiveness of the lawyers' work, we simply retain a difference in degree between the two legal traditions. This is by more readily stressing the emergence of new fields of law, in particular related to economic globalization and to the decline of State intervention, and to the growth in consulting activities about litigation, or to the development of alternative dispute resolution other than lawsuits.

1.1. Various dimensions of the inventiveness of lawyers

Far from taking place in a universe where legal decisions are perfectly foreseeable, the lawyers' work consists in thinking up new solutions to often complex problems. In this sense, we can say that the lawyers' activity, according to E. Lazega (2001), "is knowledge-intensive, in the sense of a `knowledge-in-action' accumulated through experience and reflected by a 'sound judgment' – a term often used by colleagues to characterize the quality of professional work". This activity based on knowledge and experience, rather than on heavy investments in technical equipment, does not exclude any incorporation of knowledge in cognitive artifacts conceived at various organizational levels. In this perspective, our interviews have sought to point out different supports of the lawyers' activities in order to restore the distribution of knowledge among individuals and between them and their social-material environment (Hutchins, 1995).

The inventiveness of lawyers can occur at the time of the court hearing (strategy taking account of the "strengths" of the opposing party, rhetoric used for persuading judges, choice of the "means") and at the level of advice (writing a contract, doing a transaction, conceiving means of compliance to law in organizations,…).

This inventiveness contributes to an "economics of singularities" (Karpik 2010) in which emerges the style of a lawyer or of a firm (when disciples borrow from the Master), or working methods of a firm, professional cultures, schools, families ("I went through such firm"). The acquisition of skills through experience is not separate from the idea of sharing values concerning the very activity of lawyers. This narrow gap between the cognitive and normative dimensions of training constitutes a strong source of professional identification.

At a later stage, a lawyer builds his reputation within his professional circle based on his style and methods; his reputation allows him to attract new associates and new clients (for example as regards criminal law). It is also a basis for a lawyer's professional pride, the defense of a practice that is close to love of art (or the law), or the quest for excellence.

Nevertheless, to be detached from this individualistic figure of the lawyer, close to a writer, it is important to stress that the emergence of new solutions is seldom the fruit of the effort of just one player. It results from work shared between several players, between the latter and their socio-material environment (role of cognitive artifacts, collections of cases, etc) and in particular by the sharing of a language which allows to work out new "legal approaches", to change from real-life experience to legal arguments and qualifications (Bessy/ Chateauraynaud 1995). These last are not inevitably recognized or accepted by the others, and in particular by the judges, which is why the lawyer must be able to handle rhetoric in order to persuade his listeners.

The art of persuasion also favors negotiation, a fast-expanding activity with the growth of the "Alternative Dispute Resolution" (arbitration, mediation, transaction) and of the "transactions" handled by business law firms. These transactions require a "true talent for negotiation, a sense of consensus,… so as to create a relationship with the opposing party, the opposing colleague. It is very important and it is very valued by clients" (lawyer in a large British business firm).

The style of the lawyer, which is the true mark of his personality, but also his talent as a negotiator, constitutes the main basis of his reputation, and of the attachment of his clients and his staff. A form of organization for legal activity already stands out in our mind, which corresponds to the traditional, excellent firm, based on the reputation of its founder, and where litigation remains the main activity or, in any case, the most formative for young lawyers. The great criminal lawyers are now given less media coverage than renowned business lawyers whom one entrusts with questions of honor and of fortune. These renowned firms

appreciably expanded by diversifying their activities in order to meet the needs for advice of the large CAC 40 companies, but acting in court remains the horizon of advice. Generally, concerning the working of the profession, they are rather careful, choosing moderate deregulation. In particular, they do not call into question restrictions on advertising, results-based fees and conflicts of interests. In fact Parisian firms charge very high fees.

Far from working alone, the lawyers use resources supplied by organizational structures which grow more and more, making impossible the exercise of the profession in an independent way. In order to understand the emergence of new forms of organization in the activities of law firms linked with the creation of markets for legal services, it is useful to characterize the organizations which, according to the model of a large law firm, work according to a true corporate logic.

1.2. Firms that provide legal services

The "large Anglo-Saxon firms" in general were used as a foil in the arguments of the majority of our interviewees and were said to cause many of the evils from which the profession suffers. However, if we take up again the arguments of the founder of a French business firm (of medium size), his remarks are more moderate. We can base ourselves on his arguments to draw a "negative" picture of the main features of a large Anglo-Saxon firm and the 'conventions of quality' from which he justifies or criticizes the worth of persons and objects.

He advances the personalization of service and the culture of litigation, two elements considered true competitive advantages of his firm against the more "industrial" activity of the Anglo-Saxon firms. These latter are marked by a strong division of labor among the lawyers, in particular between the provision of advice and litigation. Thus he refuses to take part in tenders and tries to avoid all means of pinning down his work: invoicing by hour, guides and classifications, brochures, all that could bring it closer to a service provider dependent on the client. He intends to keep his independence of judgment in order to defend the true interest of his clients, and in this sense he is opposed to contingency fees. Lastly, he grants much importance to avoiding conflicts of interest and adds to the formal definition of these conflicts some thoughts on loyalty towards his clients.

Our interlocutor highlights two different quality conventions, which can be distinguished by the resistance or not to any form of formalization of the quality of service, in particular using assessment tools specific to a given market. On the contrary, the remarks of the manager of a large international business firm instance a large dependence on the client (a consequence of the model of the very diversified business firm) and, more generally, on the market. "These are the market constraints" is the recurring statement of our interviewee, constraints that push them to accept conflicts of interests: refusal of "exclusive instructions" coupled with contingency fees. There is the example of the sale of a company where many bidders are competing. The firm can have its teams work for different bidders in order to minimize its risk of loss, which supposes setting up 'Chinese walls' between the competing teams.

Another form of organization of the activity can be created around a "big case" bringing together three or four senior partners, in order to define a strategy with the client. In the example given by our interlocutor (the sale of a company), you do not see very clearly the borderline between the search for legal guarantees and economic decisions. The law is then instrumentalized to the benefit of the economy, which is also seen in the fact that the double training course became a must, which, on account of short supply, entailed a rise in associates' salaries over recent years. Another consequence of the handling of "big cases" that require the involvement of several associates or teams or departments, is the implementation of a corporate logic, the pooling resources, clients in particular, and salaries.

The representatives of these large firms say that they are not affected by the creeping liberalization of the market for legal services, in which they take part, and see in a favorable light the different steps towards deregulation of the profession (advertising, contingency fees, opening up of the firms' capital and more). Inside the domain of business law, we are thus confronted to two very different way of exercising the profession, of connecting the "market" and the political action of the lawyers. But before go further on this issue, it is important to examine the economic factors explaining the modes of development of law firms.

1.2. Organizational constraints: from firm to networks

The main features of business firms are their increasing size, with specialization by department, and geographical coverage in various countries, which is increasing in extent.

This form of organization of legal activity is justified economically (in reference to the problems of the firm's boundaries) by economists such as L. Garicano and T.N. Hubbard (2009). They start from the notion that these law firms make specialization easier within themselves because they constitute a means of information, more efficient than the market, on new businesses opportunities. In short, the law firm itself constitutes a market intermediary, each lawyer being encouraged to pass on the client to a colleague when the advice activity of is outside his field of expertise. That can lead to a virtuous circle of information sharing concerning clients, knowledge, incomes and profits of the firm. This strong sharing of resources encourages the division of labor. Moreover, the activity of advice to clients encourages diversification of fields of law, because of the interdependence between the fields where advice given (which can lead to team work); whereas the activity of litigation is more compartmentalized.

Thus, authors show that litigation lawyers, who work in fields centered around litigation (criminal law, divorce, insurance,…), do it in very specialized firms in which clients themselves, through their network of personal relations, bring new cases to the most famous lawyers in their field.

Between these two logics, there is place for a hybrid form of organization: while evolving within a large firm, lawyers at the head of specialized departments own their clients, which ensures mobility towards other firms, where they sometimes bring their whole teams. This personal capitalization of clients, which is always a source of tension within firms, seems more developed, according to our interlocutors, in the United States than in the United Kingdom. In any case, it is evidence that uncertainty on the quality of the provision of legal services makes networks of interpersonal bonds critical to channel clients towards the lawyers (Karpik 2010).

But these various organizational logics should not mask the role of advice networks that transcend the borders of firms. Beyond the intra-organizational study starting from the study of the way of working of a large US business firm, E. Lazega (2001) shows the importance of inter-firm "advice networks" in the research of legal solutions. These networks function like practice communities based on rules of reciprocity, exchange of knowledge, but which are not free from considerations of status and strategic stakes. These rules of exchange rest on the existence of a professional model (or its functional equivalent), capable of controlling entry into the profession, of sharing certain training expenditures and of solving litigations between lawyers as well as between the latter and their clients.

These inter-firms "advice networks" take a more and more structured form which can be explained by both the will of firms to follow their clients (in particular multi sites companies) in different geographic places and the quick evolution of law requiring high-level and hyper-specialized expertise. The domain of labor law offers a good illustration of this mode of network organization.

Indeed, all our interviewees who practice in this field stress the rapid development of labor law, so that they seek new solutions when case law is not stabilized. This legal innovation, incremental by nature (some people find the term innovation too extreme), is facilitated by a certain specialization in the field and a form of organization that allows the fast exchange of information based on common databases and training seminars. This organization can be increased by membership of a network on a national scale or European scale, which facilitates maintaining links with correspondents who exchange information, provide professional advice, transmit or accept files, litigation they can follow or act for in court within the jurisdiction of its bar association. This mode of network organization, especially developed by the firms working on behalf of employers, somehow follows the development of the large groups or multi-centered firms; these seek to take on the exclusive services of a law firm that will be able to handle files, via its network of correspondents, for its entire territory and for all requested services. As regards labor law, one can also see the adequacy with the new authorities representing employees (Central Works Council, European Works Council) and the signature of agreements, or cases as regards employee representation, which is followed and settled by the company's law firm.

There again, the agents themselves refer to niche firms which are competing through networks. Intensification of competition created a form of "race for the niche" in a specialized area of labor law that is in turmoil, as though there exists a race for patents in the field of technological innovation. The idea is that the first who registers the patent wins the whole market linked to the new product or process. In the same way, in labor law, the one who first finds the "new product" is likely to be acknowledged as the hyper-specialized firm on this matter and thus to attract the greatest number of clients in this new market**2**.

This logic of attachment of clients, primarily made up of multi-national companies, based on the brand of a network of firms, has been extended to other legal professionals than lawyers. That raises the issue of multidisciplinary structures of activity, which are forbidden in France, and that of advertising restrictions. The debate on advertising was based on attacking international networks that advertise law firms**3**.

Beside, this redefinition of professional standards constitutes an important limit to self-regulation by the profession. This applies in particular to what relates to "conflicts of interests", of which E. Lazega (2001) shows that they can only increase as the size of the firms increases. This raises the question of the invention of a form of regulation negotiated between the profession and the State, by which a form of external control could prevail. Indeed, the limits of opportunist behaviors regulation within firms (shirking: to steal a client or to leave with clients), which disturbs the accumulation and division of the human and social capital of the organization, hinder compliance with strict ethical rules by which the legal profession regulates itself.

2. Forms of organization, building and nature of law

We propose to link these organizational changes to a legal regulation which lies on a contractual process whose standards are defined by the large firms, in the absence of a truly applicable law. This role of mediation played by lawyers can be characterized according to different process of construction of legal rules and of their meaning. This mediation role contributes to a more endogenous construction of law and leads to consider lawyers as 'law intermediaries'**4**. But, these organizational changes can also be interpreted in reference to a more individualistic concept of law.

2.1. The role of mediator for large business firms

The interest of the analysis of Emmanuel Lazega (2001) is not only to highlight the links between forms of organization and the market for legal services, but to do it in relation to the contribution of large business firms to the very definition of the rules of law. Thus multiple representations, at the origin of potential conflicts of interest, can still have the advantages of a form of unofficial arbitration.

This role of mediation would be particularly important in international, commercial contracts in the absence of true business law and stabilized market rules. The large business firms can be regarded as powerful players for globalization. Because they are permanently in "conflicts of interests", they have an important power of arbitration in commercial contracts between multinational firms (they hold information about the two sides) and play a part in respect of them or in their possible renegotiation.

This role of go-between has also developed in finance and in particular in big international mergers and acquisitions. In the absence of applicable law, the large law firms provided standards for documents, contracts and written agreements, procedures, and have at the same time contributed to building the international financial market and the market for law. In becoming experts in the field, "opinion leaders", they take part in national or international regulation, especially as regards stock exchange law (Quack 2007). In this way, large business firms constitute necessary stages for international business and finance, which confers on them a position of strength vis-à-vis their clients and the international regulation authorities.

To fine tune Lazega's analysis, we would stress that private international law, through the impetus of international conventions and Community law, conveys both in conflicts of laws and jurisdictions, a large variety of solutions that are within a continuum between two poles: individual will (the contract) and various neo-statutory ways of control (police laws, exclusive jurisdictions, the theory of legal rights or fundamental rights) to take up again the argument of one lawyer. The actual border between private law and public law is redefined. The same holds for labor law.

We would like now to put forward some additional analytical elements in order to analyze the links between the organization of legal activities and the development of law, which results in having a more endogenous notion of law.

2.2. An endogenous law

One can refer here to the approach of L. Edelman (2003), an American sociologist of law, who defends an endogenous notion of law. She shows how the practice of law professionals, concerning civil rights as regards employment in the United States, fits in with a double process of "managerialization" of the law and "legalization" of organizations at the crossroads between the legal and organizational fields. Because of the abstract and ambiguous

character of these civil rights, lawyers in particular, by means of their consulting activity, collectively build models of compliance with the law that integrate organizations' objectives of efficiency and profitability.

Lawyers make known changes in the law and the new risks run by organizations because of patterns of litigation. They write in websites or professional newspapers and give training courses to other lawyers and managers, which are so many means for the objectivity of lawyers' quality. They may also work as consultants for non-specialized lawyers and especially for in-house legal counsel within organizations. In this way, they maintain very close links with both corporate management and with other management consulting firms. This activity makes it possible to single out "models" of compliance with the law and to assess better the possibilities of a lawsuit and the responsibility of companies. In this respect, they can exaggerate the threats (sources of legal insecurity) represented by the law, in order to enhance their power and their status within the companies, in particular in matter of dismissals.

As these constructions of the law become institutionalized, they gradually affect other protagonists in the employment relationship (including the judges) and the way in which they understand the significance of the law and rational conformity to the latter. Edelman raises the risk of inefficiency of the law in the sense that it does not achieve its initial objectives as regards, for example, the fight against discrimination. A whole set of compliance tools (e.g. internal arbitration) acquire a formal aspect without true, substantial content.

Such an analysis, stressing the irrigation of the fabric of the law through organizational practices, can easily apply to the other fields of law and of regulation of business activities which make refer to general principles (health, competition, bankruptcy, and environment). Developed within the framework of legal, liberal logic and common law, it can be used in a "civil law" country, although the roles of the courts and the training of the magistrates are different. The development of fundamental social rights, close to American civil rights as regards employment, gives way to the same type of involvement of French labor law firms that "europeanize" themselves via their networks. The influence of law firms on the definition of case law constitutes one of the main dimensions of their legal inventiveness, which in a way partakes of building the common good, but which is not devoid of challenges and conflicts between various groups in society.

2.3. A more individualistic notion of law

The international extension of lawyers' activities raises the question of their regulation by supra-state authorities, such as European institutions, which do not have true sovereignty. From here comes a policy of deregulation of the legal profession that does not truly propose re-regulation which would imply defining common values likely to set up a true political community. This is the idea of normative coherence between the internal practice of the profession and external philosophy likely to set up a society. The deregulation policy only calls for an increase in the competition mechanisms that make the clients kings. However, one might think that, behind the idea that "clients" can achieve a high quality service at the best price, there is also the idea that the client is able to define his rights, to put forward his claims to this or that right; which leads to permanent competition between each one's claims to his right, without any political authority determining a priori a hierarchy among rights.

The lawyers are then enlisted in this competition, being able to be used as mediator between parties with competing claims, just as easily being able to make equitable standards emerge, such as, conversely, defending the rights of the strongest to the detriment of those of the weakest. In the absence of a true professional model that gives life to a discussion space in which "causes" or "principles of justice" are debated or defended (Boltanski/Thévenot 2006), it then becomes more problematic to assess the quality of lawyer's services on a "macro" level.

From this view point, it seems to us that the emergence of new "professional practices", which are not well clarified, is to be related to a more individualistic notion of law (each one seeking to defend his right via his lawyer), preferring the "Alternative Dispute Resolution" (in short ADR, i.e. arbitration, mediation, transaction), where the lawyers tend to be negotiators between divergent individual interests, rather than interpreters of substantive law or mediators between local and general interests. One of the consequences of the "ADR" is to "privatize" the law (and justice), which then loses its characteristic of being a "public good" and an incentive to prudent behaviors. Another consequence is to limit the public and democratic debates concerning values.

These professional changes can also be connected to a more procedural notion of the law, based upon the idea of a greater autonomy of the actors in the process of building

rules (with an increased number of negotiation agreements as in labor law, or all kinds of pacts or charters), showing up the withdrawal of the State in the definition of substantial rights. These rights facilitated the fight against social inequalities and were thus strongly associated with an overall political plan, relying on a powerful administration and public funds. The transformation of "administrative bodies" into "agencies" which contract between them or with "private partners", by referring to objectives to reach, gives a good illustration of more horizontal social relationships and of the predominance of incentive mechanisms upon the regulations (administrative rules or statutory decrees). From a general point of view, these processes of contractualization, in which lawyers can play an essential role, contribute to the redefinition of the different concepts of "contract" and "legality" (Supiot 2003)[5].

One can wonder whether we get closer to the traditional role of lawyers defending a form of political liberalism, namely a moderate intervention by the State, the promotion of civic freedoms and good representation of the interests of civil society (Halliday/Karpik/Feeley 2007). But the defense of the modern rule of law, based on autonomous individuals having fundamental rights, can take different forms and refer to diverse concepts of political freedom. For instance, the English-inspired political freedom, which distinguishes the spontaneous activities of civil society and the limited responsibilities of the State, is different from our model of political freedom (in continental Europe) where the State acts as guarantor of the common good, and the development of substantive law aims at establishing a set of priorities between various categories of common good that are always open to debate.

The risk of an individualistic notion that regards law as an individual freedom (or empowerment) is to make a misleading amalgam between all the "rights to", in not dissociating the rights which refer to possibilities of action, such as the right of expression or freedom to do things, from rights relating to things that can be allotted, not without competition, and which pose problems of social justice, of the distribution of resources.

Defending "individual rights" without being forced to go back to one form or another of common good is likely to invalidate the existence of a professional model that facilitates deliberation around a plurality of values. As a young lawyer working in a business firm puts it, what brings lawyers together is the fact that they all seek to defend the position of their client in the name of the (purely subjective) principle that everyone has the right to be defended.

It is thus important to distinguish between the various "causes" that can be defended by lawyers, which refer to various political philosophies and models of involvement by the State. A difference must be made between the "causes" which lead to legislative production (statutory law) giving *a priori* real rights to individuals, accompanying by public measures providing material resources to make these rights effective, and those which are not instituted; The latter aim at assure minimal guarantees in situations of "crisis", in respect to ethical principles. According to this second perspective, the lawyers appear as defending ethical norms which are not respected. Intervening after the emergence of injustices, they recall to the members of the society their duty to honor their "imperfect obligations"[6].

In fine, the intervention of lawyers can also generate an increasing "judicialization" of economic and social relationships if the lawyers do not play their role of arbitrator between the state of the law, always likely to be manipulated by one of the two parties, and the means of cooperation arranged by these parties in order to control their daily interaction (Bessy 2007). We can think that the risk of strategic use of law is especially high as the benefit of economic interest is stronger.

3. A plurality of law firms

In conclusion, we can propose a typology of the firms around their respective positioning on two main axes characterizing their activities and their relationships with their clients, and by connecting this position with their concept of the profession and, more generally, the law.

We can ground the typology of firms by using the concept of "quality conventions", produced by economics of convention and neo structural sociology. Both empirical and theoretical research has shown that competition through quality, in order to achieve stability in a viable market environment, requires an implicit agreement on the type of quality valued by clients. Indeed each case evokes a different perception of quality by the client: *inspired* quality (client's expectations centered on creativity), *industrial* quality (client's expectations based on efficiency), *market* (or *merchant*) quality (client's expectations centered on obtaining the international standard at the best cost), *civic* quality (client's expectations related to a certain vision of

general interest expressed by lawyer), *domestic* quality (client's expectations related to his confidence in the lawyer's ability to handle his personal file completely).

Figure 1, see Appendix

A first axis posits the firms that develop legal strategy together with their client, against those firms that have a greater discretionary scope to set up files and whose main activity is rooted in litigation. This opposition does not rest completely on the nature of the clients of the firms (companies, private individuals) or on fields of the law.

It takes up the distinction suggested by L. Karpik (2010) between a "traditional professional system" and a "private professional system". In the "traditional professional system", the "market" and the political action of lawyers are linked since they provide personalized services that can be in various forms and be produced with a concern of individual and collective independence, and supervised by control systems that allow adjusting the risks, which the lawyer will allow the client to run, to the available confidence. For Karpik, the risk today with the "private professional system" is that "politics", in the sense of defense of fundamental freedoms or the building of new "causes", disappears while there only remains regulation of the economic activity of lawyers, starting from the removal of impediments to competition.

On our side, we emphasize the risk that "politics" is reduced to the only possibility of each client of defending his right as he sees fit, without necessarily going back to a form of common good guaranteed by the State.

The hypothesis that we have advanced in this contribution is that the diffuse evolution towards a "private professional system" lies on an individualistic political and legal philosophy, in the sense where this liberal philosophy consecrates "individual rights". On one side, these individual rights are mainly the results of a contractual process in which each party seek to negotiate according to his proper interests. On the other side, it belongs to each one to reinforce his right and to have recourse to courts in order to claim justice. In such a configuration, we understand how certain actors seek systematically to acquire legal guarantees, in particular according to the importance of their (economic) investments, and thus have recourse to the advices of a lawyer. They contribute to the setting up and extension of "markets" for legal services.

A second axis makes it possible to oppose the firms according to whether they closely connect "the provision of advice" and "litigation", by more or less creating case-law in a precise field, a niche; and those where these two activities are disconnected, practicing either of them, or the other, but in cases that remain relatively simple and which are suited to a form of standardization of the service: legal monitoring for the "provision of advice", divorce by mutual consent or legal aid, for the "litigation".

In the fields of business firms, one can oppose the "well known French firms" that defend in a very personalized way the interest of their clients, by carrying out "tailor-made" work and by inventing new legal solutions, and the "large Anglo-Saxon firms", which follow standard procedures allowing the coordination of players over wide markets. This opposition itself is built by lawyers, in particular those who attack market logic in the name of a convention of quality that takes the interest of the client more into account, with reference to a form of "public good" or a widening of the private interests, leading to a form of agreement and allowing to safeguard a cooperative relationship. This attack on the "market" also argues in favor of moderate deregulation of the profession.

When these two axes are crossed, four ideal-types of firms are obtained (see Figure 1 in Appendix) even if, in practice, all the firms combines different forms of coordination of their activities.

- The **cause lawyers** who build and defend causes, and who appear in a position of authority in their field of expertise. These lawyers seek to innovate at the legal level and to influence the building of the law in order to protect the most unprotected. This is in this sense that the civic dimension is predominant.

- The **traditional lawyers** who work in relatively simple litigation, like legal aid, while taking care of setting-up of files and by exerting their discretionary power. When the relationship with their clients is more and more close, that leads to a *domestic* quality of the service.

The two other types of firms act more in the form of a co-production of their clients' legal strategy, which tends less to go beyond the request expressed by the client. The risk of manipulation of the law for the benefit of economic interest is stronger.

■ The **large firms providing standard advice** organize their activity in the manner of a company and services providers that seek to meet the needs of their clients by standardizing their methods, or while keeping in line with the standards of the law market, in order to increase their productivity by a certain division of labor (*industrial* quality). Clients are attached to the brand of "the firm" or the "network" rather than to the partners. They are large Anglo-Saxon firms that are highly diversified with offices all around the world, French firms specialized in the provision of advice and creating network bonds with other consulting professionals. They call into question the most of the professional rules and favor the emergence of a *market* order.

■ The **"haute couture"** firms are the source of a new private professional system based on both the provision of advice, seeking to answer accurately to the needs of clients, and on the search for new legal solutions, in the absence of well-established applicable law. Their activity as skillful negotiator or referee is developed in configurations where it is important to maintain a cooperative framework between the players. And in this sense, they become experts in their field and develop client loyalty. The maintenance of this capacity for expertise and permanent legal inventiveness (see supra, § 1.1) is a limit to the diversification (and standardization) of their activities, and supposes forms of on-the-job training.

To conclude, we can wonder whether the current professional Order is able to manage, to give meaning to the variety of these organizational forms. In any case, its diffuse decline due to the predominance of a market order risks calling into question the quality of the rule of law. Or said in another manner, is the governance of economy and regulations of markets must be the main objective of the legal system? An author like Hadfield (2000) shows that in a such legal system driven by corporate demand, this is the business client group that ultimately determines pricing in the market for legal services at the expenses of the less wealthy personal client group. That raises the issue of achievement of justice in society.

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Endnotes

1This contribution is part of the final report of a collective research launched by French CNB (National Association of Bars) which has been directed by O. Favereau (2010). This report shows the interest of professional order (versus a market order) for managing the quality of legal service.

2According to Hadfield (2000), complexity and unpredictability of law are "responsible for the winners-take-all dynamics that structure successive tournaments among lawyers, tournaments in which winning may reflect only negligible quality differences in fact".

3We can refer to the three large international networks: Ernst & Young, Price Waterhouse and KPMG, which include legal, auditing and consulting departments.

4We have particularly developed this notion of 'law intermediary' in the analysis of the regulation of economic activities in order to point out the fact that legal professionals contribute to the link between different normative orders (Bessy/Delpeuch/Pélisse 2011).

5The reflection followed by A. Supiot, in this paper, overtakes the distinction between 'law' and 'contract' in order to take into account the emergence of new conceptions both of the law (legislative power whose one part is transferred to the social partners) and of the contract which, in the absence of contractual liberty, becomes an enslavement device. The author underlines that this enslavement is likely to concern, not only, the employees, but also, all the actors, including public administration, via a set of norms and indicators who condition their behaviour.

6This is the concept of "rights" defended by A. Sen (2004) when he seeks to analytically extend the "Human rights" to "economic and social rights" without passing by their prior legislative codification in order to avoid the legalisation of ethical norms.

References

Bessy, Christian, 2007: *La contractualisation de la relation de travail*. Paris: L.G.D.J., collection Droit et Société.

Bessy, Christian/Francis Chateauraynaud, 1995: *Experts et Faussaires.* Paris: Métailié.

Bessy, Christian/Thierry Delpeuch/Jérôme Pélisse (eds), 2011: *Droit et régulations des activités économiques.* Paris: L.G.D.J., collection Droit et Société.

Boltanski, Luc/Laurent Thévenot, 2006: *On justification. Economies of worth.* Princeton: Princeton University Press.

European Commission, 2005: *Progress by Member States in renewing and eliminating restrictions to Competition in the area of Professional Services.* COM(2005) 405.

Edelman, Lauren, 2003: *Law at Work: An Institutional Approach to Civil Rights. Discussion paper.* Standford: Center for Advanced Studies in the Behavioral Sciences.

Eymard-Duvernay, François/Olivier Favereau/André Orléan/Robert Salais/Laurent Thévenot, 2006: Valeur, coordination et rationalité: trois thèmes mis en relation par l'économie des conventions. In: François Eymard-Duvernay (ed.), *L'économie des conventions - méthodes et résultats.* Vol. I: Débats, 23-44. Paris: La Découverte.

Favereau, Olivier (ed.), 2010: *Les avocats entre ordre professionnel et ordre marchand.* Paris: Lextenso-éditions.

Garicano, Luis/Thomas N. Hubbard, 2009: Specialization, Firms, and Markets: The Division of Labor Within and Between Law Firms. In: *Journal of Law Economics and Organization 25(2)*, 339-371.

Hadfield, Gillian K., 2000: The Price of Law: How the Market for Lawyers Distorts the Justice System. In: *Michigan Law Review 953.*

Halliday, Terence/Lucien Karpik/Malcolm Feeley (eds), 2007: *Fighting for political freedom.* Onati International Series in Law and Society. Portland: Hart publishing.

Hutchins, Edwin, 1995: *Cognition in the wild.* Cambridge: MIT Press.

Karpik, Lucien, 1995: *Les avocats: entre l'Etat, le public et le marché (XIIIème- XXème siècle.* Paris: Gallimard, Bibliothèque des sciences humaines.

Karpik, Lucien, 2010: *Valuing the Unique: the Economics of Singularities.* Princeton: Princeton University Press.

Lazega, Emmanuel, 2001: *The Collegial Phenomenon: the Social Mechanisms of Cooperation among Peers in a Corporate Law Partnership.* Oxford: Oxford university press.

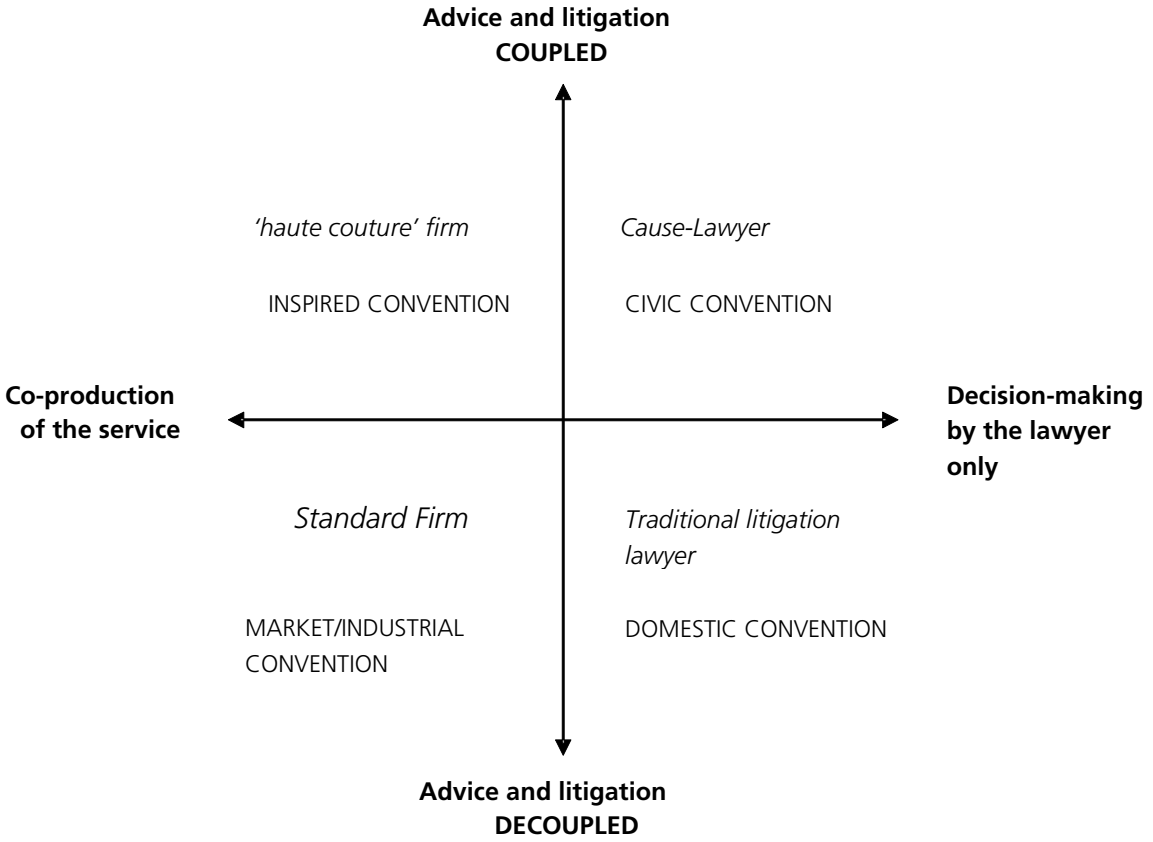
Posner, Richard, 2003: *Economic Analysis of law (6th edition).* New-York: Aspen.

Quack, Sigrid, 2007: Legal Professionals and Transnational Law-Making: A case of Distributed Agency. In: *Organization 14(5),* 643-666.

Sen, Amartya, 2004: Elements of a Theory of Human Rights. In: *Philosophy and Public Affairs 32(4)*, 315-356.

Supiot, Alain, 2003: Un faux dilemme: la loi ou le contrat? In: *Droit social 1*, 59-71.

Appendix


Advice and litigation
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'haute couture' firm
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only
Standard Firm
Traditional litigation
lawyer
MARKET/INDUSTRIAL
CONVENTION
DOMESTIC CONVENTION
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Conventions at Work: On Forensic Accountant's Intermediation

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The way business is shaped by conventional norms and controlled by legal regulation has been the object of much investigation. Neo-institutional studies have offered in-depth inquiries into organizations to show how accepted social conventions modulate competition and the interactions between economic partners within the business world (Rizza 2008). *Economics of convention* (in short EC), despite its difference with neo-institutional approaches (Favereau 2011), has insisted on the importance of these conventions (Diaz-Bone/Thévenot 2010), to understand the models of firms, the stock market exchanges, the functioning of market professionals or recruitment. This has also proven true concerning the practices of accounting and business management (Hopwood/Miller 1994; Chapman/Cooper/Miller 2009; Chiapello/Gilbert 2009). More recently, economic sociology as EC had developed their interest for the role of law and the articulation between conventions and legal rules. Swedberg (2009) introduce comments to a special issue of this newsletter, proposing two topics that need to be better understood, Roman law and financial law, two legal environments that we develop exactly in our contribution. Towards EC and derivating from the observation that firms are not legally grounded (contrary to societies and labor), recent works develops the necessity to rethink the great deformation of firms, their legal responsibility and who own them (Favereau 2012). Other works analyze the role of intermediaries as lawyers or judges, and how such specific professional markets are working or transformed in last years (on business lawyers, see Bessy 2012 in this issue).

The aim of this study is thus to examine the often overlooked and yet essential category of forensic expert witnesses in accounting, finance and business management known in France as French forensic experts in economics ("FFEE"). As professionals in business litigation, these experts are regularly appointed for business valuations, asset accounting and profitability analyses, inquiries into partnership disputes and business misconducts, criminal financial flows tracking, such as unfair competition: their reports are summoned to inform and advise judges on the facts underlying a business dispute. Because they are regularly appointed by the judges**1** and provide, directly or not, an assessment of the fairness of business practices, this paper will show that FFEE are also key players in the definition of the conventions governing business in France. They are not only specialists inscribing an expertise within a specific field of Justice. They are at the very heart of business and already have a professional activity as accountants, statutory auditors, finance managers, and so on. By focusing on FFEE and their activities, this study illuminates the role and practices of unknown but key actors, symbolizing typically "intermediaries of law" highlighted by the contributions in Bessy, Delpeuch and Pélisse (2011) and participating to the elaboration and transformation of business and judicial conventions.

1. Methods, data, theoretical framework

To analyze who the accredited forensic experts really are and what they really do, several methods and types of data were used in an initial comparative study on forensic expert witnesses in economics, psychiatry and linguistics (Pélisse/Charrier/Larchet/Protais 2012). Sent to nearly 1000 FFEE identified through the 35 lists of the appeal courts and the supreme court, a detailed questionnaire was returned by 144 experts. Regarding the information readily available on the lists concerning the age, sex, seniority and location of all the accredited experts in finance economics of France, these 15% appear as broadly representative of the whole.

A second type of data was obtained through extensive interviews with 15 experts on the lists of the appeal courts of Aix-en-Provence, Lille, Lyon, Paris and Versailles. Five judges, three of them were responsible for the experts listed by the appeal court, were also interviewed to gather the views of the courts.

We used the theoretical framework of the EC to illuminate these data. Indeed, this perspective allows us to understand how, in each trial and mission, FFEE have to manage, help and equip the ways one or many conventions "pass a test" and contribute to the evolution, stabilization or changes of the convention(s). In this sense, forensics in economics are not only intermediaries. They are also active mediators between the judge and the parties and the aims of this paper is to enter into the ways they assume and develop this role which transforms them as depositary of conventions of business (for the judge) but also conventions of justice (for the litigants). In this sense, this position makes forensics in economics more than a filter and rather a turntable and an analytical key entry point to study the intertwined business and judicial conventions of economic life, if we consider conventions as "general principles of good and fair, grounded in provisions which allow to evaluate situations" (Eymard-Duvernay 2009).

2. The French legal forensic model: a lack of conventions?

For over two centuries now, judges in France have relied on specialists in economics, commerce and finance, to answer their queries and help them determine economic facts under litigation (Charrier 2007; Charrier/Labelle 2009). In 1913, these specialists formed an association of forensic accountants next to the *Trial Court of the Seine*, before forging several other associations, such as the largely dominant national association of forensic accountants (CNECJ), the national association of forensic experts in business and technical services (CNEACT) or the national association of experts in finance and business auditing (CNEFD). As Dumoulin (2007) has clearly shown, the activity of the members of these associations is largely codified by law. The rule of law is thus the first influence on the practices of forensic witnessing, since it builds the institutional framework of forensics and defines the ideal expert.

In the German context, all forensic experts are civil servants. In general, in the Anglo-Saxon context, each party provides their own experts. Because of this, the legal framework of forensic witnessing in France is considered as very specific (Jasanoff/Lynch 1998; Prichard 2005; Labelle/Saboly 2008; Charrier/Escobosa/Leclerc 2011). Indeed, it articulates the continental position, which relies on expertise initiated, controlled and conducted solely for the benefit of a judge, while at the same time depending on an accredited pool of specialists from each area of expertise that a judge may require. The three main features of this unique system emerge from the texts of the various codes framing French procedures and justice (Moussa 2008; Dumoulin 2007).

The first feature is that forensic experts are, above all, technicians, hired to assist judges on technical and non-legal issues. Because they have the adequate specialized and scientific knowledge, they are able to forward learned opinions and to collect, organize and assess information, by adequately managing the evidence adduced by the complainants and defendants. Unlike Anglo-Saxon experts, however, they cannot make a profession out of treating the financial aspects of litigation.

The second feature concerns the existence of lists of experts, from which judges can freely draw. Every year, the French courts of appeals compile and update these lists, accrediting for five years specialists by field of activity: medicine, construction, psychiatry, economy & finance, etc.; and then by sub-specialty: neurology, acoustics or corporate finance, for example. Anglo-Saxon experts, on the other hand, do their best to be identified by lawyers, even if they cultivate objectivity and technical competence to be admitted as genuine forensic experts, and not just as witnesses before a judge (Dwyer 2008).

The third important feature concerns the extremely detailed jurisprudential and procedural framework within which forensic examinations are to be carried out. Without detailing the whole procedure here, one can note that, at the term of their missions, FFEE must submit a report to the judge. In civil and criminal cases alike, these reports are theoretically purely informational: they may be brought to bear witness during a trial or they may be purely and simply shelved. Moreover, the experts are not commissioned to attempt to reconcile the parties involved, even though their work may eventually do so. Again, the situation of Anglo-Saxon experts differs: most of their work takes place in court, while they are publicly supporting their reports or answering the questions of the adverse party during cross-examination.

Finally, a series of normative texts draw up a model for forensic expertise, which typically resembles the "decisionist" model of expertise defined by Habermas (1978). "Based on an axiological divide between the one who decides and the one who advises, and taking for granted the subordination of the second to the first, it has become an archetypal form, a sort of pre-theory spontaneously

mobilized to describe forensic expertise and more broadly any kind of expertise" notes Dumoulin (2007, p. 26). At a European level too, as goes to show a decision by the *Court of Justice of the European Community* (Penajora, March 17, 2011), forensic experts are plainly defined as experienced service providers. Such definitions keep expertise under strict control, by ultimately imposing an absolute subordination of all experts to their missions.

In sum, what draws the legal framework of expertise in France is an expert who help the judge by illuminating the facts – and only the facts –, without any role of qualification neither interpretation. In this view, there is finally no conventions in this activity, which is absolutely framed by the rule of law, letting to the expert a sole technical expertise grounded on his professional skills and his specific knowledge of accountant, finance manager or economist.

3. A practical and ambiguous status oscillating between various representations

Yet, as L. Dumoulin (2007) has also shown, the model represented in the legal texts, supported by the expectations of magistrates and by the expert associations, is neither empirically nor heuristically valid. Indeed, FFEE necessarily express, more or less openly, several technical options, which are also choices having conventional background. The missions resulting of trials are peculiar occasions for the specialist of accounting or economy appointed by a judge to open the black boxes that are the figures or other measures considered as objectiving or describing the reality of firms or business relations. Experts have to seek information, evaluate their relevance, put to test them and make numbers talk, even unmask realities beyond arguments and columns of figures. In other words, FFEE express the conventional nature of the management tools and the reductionist operation, which transmutes reality into figures.

By making this activity, FFEE import value judgments, which have several possible effects. They have to present written reports characterized by neutrality. For that, they conclude often their demonstration by relating two or more options for the judge, letting him the decision, even if the experts can highlight or even influence one reasoning more than one other. Experts stage-manage their neutrality by presenting the plurality of possible judgments depending how they consider the facts, e.g how they interpret them and the information they have for their mission.

As to the judges, though they are indeed the only judges and are in no way legally bound by the expertise, they are nonetheless dependent of the reports they have commissioned and are submitted, at least in part, to the authority of science and specialized knowledge. The conventional role of forensic in economics is thus not only inscribed in their activity but also real through the influence they could have on the judge, that is to say on the judicial decision and finally the law.

Even the recent and important decision of Penajora mentioned above reveals more ambiguous than the simple expression of the decisionnist model of expertise. Indeed, the *European Court of Justice* questioned if the French forensic expert could influence the judicial verdict of the judge. Its negative answer is explicitly due to Mr. Penajora specialty (translator and interpreter), which is, for the main experts and judges, not real legal experts (see chapter 4 written by Larchet in Pélisse 2012). In other words, the question is of great interest for main forensic experts, showing that their participation to the verdict needs to be asserted, despite the codes prohibitions of such possibility. The present status of forensics is thus really debated, revealing how various conventions could regulate this activity.

It follows that the general figure of FFEE oscillates between two opposite representations. The first and most common is that of a technical specialist, a connoisseur of the habits and customs of his art, a provider of skills for the benefit of justice. From the perspective of legal specialists (Frison-Roche/Mazeaud 1995), the "decisionist" model leads to identifying the expert as a fair-minded professional, anxious to serve the institution. The second common representation of the expert is that of a judge's delegate, a person in charge of the resolution of the dispute from a technical perspective. From this point of view, the FFEE conclusion settles the factual dispute between the parties. Experts can thus be accused of usurping the role of the judge and benefit from the legitimacy of the judiciary. They become notables, identified by their unique social position rather than their professional skills.

Such opposing representations are of particular importance when it comes to specialists in accounting, management and finance. Indeed, is it not said today that finance governs society? Even the law and its institutions must today be economically efficient. This economic rationale implies that every decision, every ruling has a cost – if not a price – and is thus of the competence of accountants. It can be imagined that FFEE could play the first role within the ex-

pert/judge couple. To rise these opposite representations or even fears, the perspective of EC could exactly be fruitful. Indeed, it offers theoretical concepts, tools and reasoning which allow to understand what are doing concretely the experts, how they play a role of intermediary and active contributor of the conventions, if we define them as "collective frameworks upon which the players are supported in their conflicts and assessments in public" (Diaz-Bone/Thévenot 2010). Experts influence particularly the ways legal compliance is considered, defined, and used by the parties and the judges (Edelman/Stryker 2005). Because the sense of compliance is intertwined between business sphere and legal norms, forensics in economics are discrete but key actors, with others, whose contribute to the managerialization of the law and the legalization of the business (Edelman 2011). But what are concretely doing the experts?

4. What are experts doing? From a business to a craft

The judicial missions given to FFEE are various, though most involve monitoring and verifying the standards of business relations. Three main types of mission thus structure the activity of FFEE.

The first one consists in establishing the accounts between litigious parties; that is to say, to observe and quantify the liabilities of both. Such missions can require a high level of technical accounting, such as when quantifying the respective business activity of partner companies. 33% to 50% of all missions fall into this category (including or not divorce and inheritance cases) and ¾ of the experts reporting it as 1 out of 2 appointments by year. This first type of mission should be distinguished from another type, which essentially calls for the intervention of an accountant: this is the case in 5.4% of missions during which FFEE are summoned to comment on the quality of annual accounts. Missions tracing financial flows likely to be of a criminal nature (abuse of corporate assets) are a third type, representing 2.5% of cases. It is thus already obvious that missions requiring pure accountancy skills represent but a minority of all missions, yet accountants represent the majority of the experts engaged in forensic economics (see below). These forensic missions can be highly complex affairs, which reach into the very heart of the business world. An expertise and its conclusions thus contribute to the definition of the standards of good business conduct and to how conflicts between parties can be resolved.

Yet, in 1 out of 3 cases, experts are commissioned to compute economic damage due to partnership dissolutions, industrial incidents, family disputes, construction litigations, unfair competition and so on. This type of mission, during which financial specialists contend with accountants, is at the heart of expertise. More explicitly than in the "settling the accounts between parties" type of mission, experts must enquire into the way business strategies are managed, can be predicted, are anticipated, are built.

Auditing of companies represents the last and least frequent type of mission commissioned by judges (13%). This involves the possible intervention of several competing groups of experts, each offering a different way of broaching business valuation. The perception the judges have of such cases and their judicial decisions will thus depend on the specializations and particular competencies of the experts involved and on the ways and means of their audits. But, most of the time, what makes a difference – and also clearly indicates what is expected of experts in general –, has less to do with the specific professional abilities of experts in accounting or those in finance, than to the skills and knowledge that either can have.

Like for forensic accountant in common law, skills and activities needed for these missions are not those that the professionals make use of most in their usual professional activities. As shows the way judges appoint indifferently specialized experts, the real skills expected from FFEE have very little to do with their professions. In other words, different and specific conventions are used and performed by accountants and auditors when acting as legal experts. For example, timeliness is of importance, as 40-hour missions can take up to 18 months to accomplish. According to FFEE having answered the questionnaire, a quarter of all missions last between 4 and 6 months, while another quarter last between 13 to 18 months, and this regardless of the number of hours of the mission itself. This spread in time implies strict scheduling, requiring from the expert a capacity to build, stick and report an agenda that depends largely on the attitudes of litigious parties, and not, as in accountancy and auditing activities, on predictable season from one year to the next. Beyond their technical knowledge and regardless of their professional skills as accountants, auditors, managers in banking or finance, experts must also have organizational, procedural and relational skills and knowledge.

These skills are different from those required in professional context: accountants keep and organize accounts, assist

companies in implementing the good management and legality of its daily practice, develop budgets and forecasts, book annual accounts of corporations, audit them, and so on. It is a very organized occupation, which uses software tools and paper procedures, framed by standard attitudes and tasks and guaranteed by the periodic quality controls of the order of accountants (Ramirez 2005). It is also an occupation that "produces" without the need for much contact with clients. Moreover, though accountants must be able to justify their recommendations in the face of the law, their work remains somewhat opaque. This is also true for auditing, an activity occupied by most accountants and forensic experts. Auditing is even more "invisible" than accounting and even more standardized and empowering, and is in no way limited to certifying accounts, or sitting on board meetings. The time scales of their missions, destined to reach their term with an audit report or the closing of the accounts, are also very marked. The high degree of normalization, the importance of technical and computer-assisted accounting and auditing tools, the responsibilities of these professionals who have an obligation of discretion concerning their work, encourage the deployment of a bureaucratic organization and industrial conventions. Set methods, the division of labour, delegation, reporting are the daily means of the professional practice of such experts in their main activity (Power 1997). Experts involved in management, business valuation or finance, know all about these issues and some are even engaged in similar industrialized organizations during their usual professional activities.

Forensic expertise, on the other hand, is quite different. In the French legal system, the accused must be able to contradict the allegations they face, transforming any expertise into a collective affair, led by the commissioned expert, but influenced by the lawyers of the parties or the parties themselves. Indeed, experts depend wholly on information that the parties are willing to give them. Moreover, the contradictory principle requires dialogue. Experts, even though preceded by their reputations or experience, are under the obligation to hear the arguments exchanged, to explain their own reasoning and to specify the sources of the usages they base their recommendations on. Each and every mission is conditioned by situations, which are absolutely unique. This uniqueness is also true in the eyes of the law and is guaranteed by the involvement of lawyers supporting their customers. In forensic matters, unlike accounting, only the objective is known at the onset of the mission, the means of achieving this goal is not normalized.

Consequently, forensic matters are difficult to delegate, as all missions require in-depth knowledge of a technical field, practical experience and the ability to enter the judicial arena. Communication skills could well be the key to FFEE, who must be able to skillfully handle requests for extensions in deadlines or for further financial support, when briefing judges on the opposite claims and in order to secure the payment of their own fees. Recourse to a court order, when a party is recalcitrant to transmit the information required, is not, however, a common practice. 26% did say they resorted to a judge's summons, while 56% stated explicitly that they refused to do so. Finally, the specific technical, procedural and social skills, necessary to any forensic activity implies that FFEE are personally invested in the management of their missions: they are the master craftsmen appointed by judges. In other words, as their professional milieu is governed by the logic of the industrial convention and requirements, FFEE are rather engaged in a regime (in the sense developed by Thévenot 2006) mixing the logic of the *domestic convention* dominated by personal commitment or even tradition, and the logic of the *network convention* where specific, relational, and procedural more than economics skills are very important to obtain missions, be commissioned by judges and influence business and judicial ways used to solve conflicts.

5. Who are experts? A milieu crossed by professional conventions

To understand the conventional roles and the conventions structuring this milieu of experts itself, it is thus necessary to describe sociologically, even if shortly, these professionals. Despite variegated individual trajectories and differing stakes within the worlds of finance, accounting and management in economics, forensic experts form a relatively homogeneous group. They are generally accountants, who have had some form of legal training during their higher education: 71% of FFEE are marked as specializing in accounting, and more than 1 in 5 of those having answered the questionnaire had some form of legal education. The strong dominance of accountants is accompanied by a certain uniformity in the individual profiles in terms of gender (91% are male), age (the average age is 57) and qualifications (most had postgraduate degrees, 4 or 5 years of higher education, and some even had a PhD). Finally, the forensic experts questioned work, for their vast majority, in an independent practice (86%), removed from all technical networks or associations (77%), employing fewer

than 10 people and with a small turnover (51%). The clientele of these practices is qualified as nondescript (79%), generally consisting of small or very small businesses (64%), most of which were family run (61%). There are, however, some experts employed by bigger companies, financial institutions, or academic institutions. These are mainly the experts in finance, who operate in such environments as senior executives or managers specialized in a banking or actuarial activity. Some experts also mentioned a clientele of very large groups and international companies (23%) and 17% of them reported belonging to a consortium of law firms (4%) or to a network (13%).

The field of financial experts in common law countries differs from the one identified. Working naturally within a team and organizing their work according to their specialties and not as a secondary activity, forensic accountants are specialists within a professional group, rather than a caste within a professional body (Williams 2002). On the contrary, being a FFEE is, for the vast majority of all experts, a secondary activity, incidental to a main occupation. Only a few experts, often accredited by the French supreme court, are engaged in a greater number of missions and at a much larger scale than average. They have made themselves known by engaging in the transmission (training) and management (associations) of the know-how and social networks of their specialty and they have banked on accreditation by a public authority. These common traits to the actors of FFEE promote certain mimetic practices, imposed by the formal distance maintained between judges and experts, and by a small set of technical procedures shared by all forensic experts. Expert associations, bringing together more than two out of three FFEE, play a role in the matter, by filling in the uncertainty in which experts are left concerning the expectations of the law. Skills are shared and to some extent formalized, but most knowledge is transmitted during regularly held informal exchanges among peers, and sometimes in the presence of magistrates, by these associations.

Finally, we see the necessity of conventions at three stages of this activity of FFEE. The legal framework, even if it formally prescribes a very strict decisionnist model subordinating totally the experts to the judge, doesn't allow for understanding the real activity of FFEE and actual, even unknown, influence on the trial, its temporality, argumentative structuration or, sometimes, final decision. In other words, informal but structured conventions are used by the judges (in the formulation of their mission and what they are waiting) as the experts (in their actual activities and how they write their reports) to use the expertise at the benefit of the judicial truth and close litigation. One can thus understand the conventional way adopted by the judge to choose whose expert he needs from the FFEE list, that is to say why the judges appoint embedded and well-known professional in the milieu of forensic expertise. Through this social milieu and its very shortly description, we show finally how the conventions and the definition of what is legal compliance, at the intersection of business worlds and judicial institutions, are diffusing between FFEE and from them to the judges. In sum, forensics in economics bears and translates business conventions to the judges and help these conventions to be reinterpreting in terms of judicial decision. But they translate also reciprocally judicial conventions towards the world of business.

6. Conventions at work: the forensic translator's role from business conventions toward judicial decision… and reciprocally

Indeed, the first movement described above is more or less evident, even if we show how and through what sort of mediation or mechanisms (like actual activity very different of the classical activity of the professional or a very singular social milieu), the business conventions are translated into the judicial world of trial and rules of law. But what we aim at showing to conclude is the reciprocal role developed by FFEE to translate the judicial conventions into the business world, during the "little trial" which is the expertise.

Expertise is the time for dialogue between the expert, the parties and lawyers in the identification of appropriate financial evidence. But it is also a doubt period: sometimes the expert is faced with a dilemma when he "feels" technically the damage, but at the same time he thinks that the trial rules will not favor the "victim." For example (coming from personal survey of one of the authors, involved in the field), a publisher wrongfully terminated the contract binding him to an advertising agency. A lower court and then an appellate court conclude that such a termination was wrongful. A chartered accountant is given a mission to quantify the increase in customers contractually promised, and to estimate the loss suffered by the advertising agency. The expert calls numerous meetings notably because the conduct of the expertise is slowed by delays, due either to the agency (reluctant to disclose detailed forecasts and information concerning its sector of activity) or to the editor (who only provided figures, when summoned to do so, on the years under its new advertising agency). To over-

come the blockage, the expert directed questions straight to the trade association, which circulates very general information. During the meetings, the expert presents tables with the information he has managed to gather, noting their deficiencies, and commenting at each time what he has had to deduce. During the final meeting, the expert explains that ultimately, the advertising agency had hardly uncovered any customers under the terms of the contract but that it had managed to very quickly compensate this loss in profits after the contract was broken. The discussion at this meeting is very heated, the advertising agency noting that the publisher would not be punished for his wrongful termination on the grounds that the agency had managed to cope with the incident. After final submissions, the Expert concludes that there was virtually no loss of benefit for the agency, given the way its affairs developed afterwards. But his report also assessed, in case the court was interested solely in the contractual relationship between the parties, which benefits the agency might have made had such benefits not escaped it.

This example identifies several characteristics of financial expertise. Indeed one can see the expert asks the methodological framework in which he asks the parties to prove their claim. He leads them by this methodological framework to do calculations and document their claims against a judicial perspective that takes into account the economic knowledge of the company. The expert has also led to implement pro-active means for collecting information despite reluctance of the parties: there are characteristics of the managerial dimension of expertise and the fact that the expert works anymore by methodological means than by technical means. The debate at the last meeting also reveals the gap that can exist between an economical approach (*market convention*) and a judicial approach (*civic convention*), which is driven by the legal expert. Indeed the expert assessed that the victim made losses because of the guilty according to financial criteria, he also quantified that the victim was able to achieve such profits despite the fault of the guilty. The expert, in charge of legal dimensions, links the losses and profits that the victim realized, with respect to a unique enterprise perspective. As a result the expert notes that the victim did not suffer injury. Nevertheless it is a form of windfall to the guilty because the victim was initially damaged and was able to compensate by reorganizing its firm. And we notice that the expert, perhaps uncomfortable with this situation, chooses to report the judge what would be the loss quantum if the judge was sticking to the only relationship between the two parties, without taking into account the ability that the victim had to cope with the injury suffered. This case reveals thus how the forensic expert is not only about informing the judge with business conventions (financial losses and profits); but also about guiding parties with judicial conventions or the civic convention (enterprise compensation). And this role of guidance is perhaps as important as the information for the judge: we have indeed to remember that judges are always free to reject the analyses and conclusions of the commissioned experts. Dumoulin (2007) has stressed the strategic use that judges make of forensic reports, which involves an ability to "pick and choose", undermining the apparent influence of forensic experts. Moreover, by law, very few experts receive a copy of the ruling following their reports.

Finally, as mentioned by FFEE in the questionnaires and interviews and confirmed by the judges, contacts between judges and experts during missions are rare. These are limited almost exclusively to procedural issues concerning the confidentiality of certain documents, the reluctance of a party to provide necessary information, a discussion on the scope of the mission, the deadline and budget of the expertise. All the technical issues are left to FFEE. Thus, though experts know that they are acting on behalf and under the supervision of judges, they also understand that this control does not concern their technical expertise, and that this will generally not be commented by the judge, whether the latter is satisfied or not. FFEE are thus quite free to fulfill their missions, as they feel fit. Is this not, however, how one distinguishes an expert from a very knowledgeable person: the fact that he or she is also capable of bringing interlocutors to an acceptable solution without needing to call on the commissioner?

The story described above has also shown an expert active in his relationship intermediation, which suggests another argument to the judge giving him the relevant technical information. This pro-activity is also observed for market damages (an injury that judges seem insensitive and whose experts are trying to take over the calculations of the parties) and audit methodology (when expert considers the damages evidence from the review of the organization and procedures of the company more than through the documentation of traces).

We can thus conclude that the conventional dimensions of this activity and milieu of expertise are essential to understand how business and justice meets in France. This role and this activity are – as other intermediaries – very essential to structure and evolve the conventions regulating business

relations, particularly when their conflict dimension deports the actors to the courts. With a radiating influence, beyond mere legal rules governing business relations and also affect the current uses, forensics in economics contribute clearly to the changing conventions on which economic actors can use to interact.

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Endnotes

1Following Durand-Barthez and Langlart (2012), the global turnover of FFEE exceeds 500 million $ per year.

References

Bessy, Christian, 2012: Law, forms of organization and the market for legal services, in: *Economic Sociology – European Economic Newsletter*, this issue.

Bessy, Christian/Thierry Delpeuch/Jérôme Pélisse (eds.), 2011: *Droit et régulations des activités économiques. Perspectives sociologiques et institutionnalistes.* Paris: LGDJ.

Chapman, Chris/David Cooper/Peter Miller (eds.), 2009: *Accounting, organizations, and institutions: essays in honour of Anthony Hopwood.* Oxford: Oxford University Press.

Charrier, Emmanuel, 2007: De la reddition des comptes des commerçants à l'appréciation du gouvernement de l'entreprise: l'évolution du rôle des experts comptables judiciaires depuis le Code de commerce de 1807. In: Perette Rey (ed.), *Bicentenaire du Code de commerce 1807-2007 – les actes.* Paris: Dalloz, 135-153.

Charrier, Emmanuel/Labelle, R., 2009: Expertise comptable de justice et juricomptabilité. In: Bernard Colasse (ed.), *Encyclopédie Comptabilité Contrôle Audit.* Paris: Economica, 773-781.

Charrier, Emmanuel/Francisco Escobosa/Guylaine Leclerc, 2011: *L'expertise en comptabilité finance*, colloque L'expert de justice en Europe, Compagnies près les Cours d'Appel du Grand-Est, Reims, 8 avril, http://www.canal-u.tv .

Chiapello, Eve/Patrick Gilbert, 2009: La gestion comme technologie économique. In: Philippe Steiner/François Vatin (eds.), *Traité de sociologie économique.* Paris, PUF, 325-366.

Diaz-Bone, Rainer/Laurent Thévenot, 2010: La sociologie des conventions. La théorie des conventions, élément central des nouvelles sciences sociales françaises. In: *Trivium 5*. URL: http://trivium.revues.org/3626. German version: URL: http://trivium.revues.org/3557 .

Dumoulin, Laurence, 2007: *L'expert en justice: De l'invention d'une figure à ses usages.* Paris: Economica.

Durand-Barthez, Pascal/François Langlart, 2012: *Choisir son droit. Conséquences économiques du choix du droit applicable dans les contrats internationaux.* Paris: L'Harmattan.

Dwyer, Deirdre, 2008: *The judicial assesment of expert evidence.* Cambridge: Cambridge University Press.

Edelman, Lauren B., 2011: L'endogénéité du droit. In: Christian Bessy/Thierry Delpeuch/Jerôme Pélisse (eds.), *Droit et régulations des activités économiques*. Paris: LGDJ, 85-110.

Edelman, Lauren B./Robin Stryker, 2005: A sociological approach to law and the economy. In: Neil J. Smelser/Richard Swedberg (eds.), *The Handbook of Economic Sociology*. New York: Russell Sage Foundation.

Eymard-Duvernay, François, 2009: Les enfants des cités en économie. In: Marc Breviglieri/Claudette Lafaye/Dany Trom (eds.), *Compétences critiques et sens de la justice.* Paris: Economica, 173-186.

Favereau, Olivier, 2011: "New institutional economics" vs "economics of conventions". In: *Economic Sociology – European Electronic Newsletter 13(1)*, 22-27.

Favereau, Olivier, 2012: Chapitre 1: synthèse des travaux. In: Roger Baudoin (ed.), *L'entreprise, formes de la propriété et responsabilités sociales.* Lethellieux, pp. 17-104.

Frison-Roche, Anne-Marie/Denis Mazeaud, 1995: *L'expertise.* Paris: Dalloz.

Habermas, Jürgen, 1973: *La technique et la science comme idéologie*. Paris: Gallimard.

Hopwood, Anthony/Peter Miller, 1994: *Accounting as social and institutional practice.* Cambridge: Cambridge University Press.

Jasanoff, Sheila/Michael Lynch, 1998: Contested identities: Science, law and expert practise. In: *Social Studies of Science 28(5/6)*, 675-686.

Labelle, Réal/Michèle Saboly, 2008: Forensic accounting in France: Emergence and development. In: *Journal of Forensic Accounting 9(1)*, 83-94.

Moussa, Thierry, 2008: *Droit et pratique de l'expertise.* Paris, Dalloz.

Pélisse, Jérôme/Emmanuel Charrier/Caroline Protais/Keltoume Larchet, 2012: *Des chiffres, des maux et des lettres. Une sociologie de l'expertise judiciaire en économie, psychiatrie et en langues.* Paris: Armand Colin.

Power, Michael, 1997: *The audit society: Rituals of verification.* Oxford: Oxford University Press.

Prichard, Fred, 2005: *Experts in civil cases: An inside view.* New York: LFB Scholarly Publishing.

Ramirez, Carlos, 2005: *Contribution à une théorie des modèles professionnels. Le cas des comptables libéraux en France et au Royaume-Uni. Thèse de doctorat en sociologie.* Paris: EHESS.

Rizza, Roberto, 2008 : Néo-institutionnalisme sociologique et nouvelle sociologie économique: quelles relations? In: *Revue Interventions économiques [online] 38*. URL: http://interventionseconomiques.revues.org/292

Swedberg, Richard/Laura Ford, 2009: Law in economy and society: Introductory comments. In: *Economic Sociology – European Electronic Newletter 10(3)*, 3-8.

Thévenot, Laurent, 2006: *L'action au pluriel.* Paris: La Découverte.

Williams, John W., 2002: *Playing the corporate shell game: the forensic accounting and investigation industry, law, and the management of organizational appearances: Ph. D. in Sociology*. York University: Toronto.

To Move Institutional Analysis in the Right Direction

Olivier Favereau interviewed by Rainer Diaz-Bone

Olivier Favereau *is professor of economics at the University of Paris X-Nanterre. He is one of the founders of the French institutionalist approach of the "économie des conventions" (economics of convention, in short EC). This pragmatic approach has developed in the last decades as a major part of the new French social sciences which have become also an important international approach in economic sociology. Olivier Favereau has published many foundational publications. He co-edited "Conventions and structures in economic organization" (together with Emmanuel Lazega, 2002), "L'activité marchande sans le marché?" (together with Armand Hatchuel and Franck Aggeri, 2010) and he is the editor of "Les avocats, entre ordre professionnel et ordre marchand" (2010). In 2011 he published the article "New institutional economics versus economics of conventions" in the issue 13(1) of this newsletter.*1 favereau@u-paris10.fr

You are one of the founders of the economics of conventions. Could you describe the way you got engaged into this socio-economic movement?

The apparent beginning was the working group during 18 months, which lead us to the special issue of "Revue économique" (march 1989), called "the economics of conventions". We were six, all trained in economics, but some leaning to sociology (François Eymard-Duvernay, Laurent Thévenot) or philosophy (Jean-Pierre Dupuy, and partly myself). I met my co-authors in 1984 either through a colloquium at INSEE, or through seminars at the Ecole polytechnique, both of which were attempts to combine rigorous economic thinking with other social sciences, in order to grasp the role of rules and institutions. During the years 1983/6, giving a copy of my own thesis (written in a rather lonely mood) was a very efficient means to make acquaintance with all these guys – and indeed to get new permanent friends!

So your question becomes: how did my thesis (in macroeconomic theory, since the subject was "the level of unemployment in a growing economy") drive me towards what will be this part of the socio-economic movement called "the economics of conventions"?

A first answer was simply my naive discontent (from a realist point of view) with the modeling of the labour market, as a demand/supply apparatus. That simply does not function like that. We need organizations, institutions, rules, etc…

The specific status of conventions needs a second answer. I have always been Keynesian – and convinced that some of the deepest Keynesian ideas have not yet been exploited: that was the case of the notion of "convention" to deal with radical uncertainty, forbidding numerical probabilities. But economists need formal models. Therefore, I was searching for non-probabilistic models of uncertainty. Then I began to study modal logics, especially the modern semantics of possible worlds. And I discovered that one of its founders, the American analytical philosopher, David Lewis, has also written a small book called "Convention: a philosophical study", in 1969, using game theory. So there seems to be a substantial connection between coordination, rules and the way human beings tackle uncertainty – and that clearly requires the joint work of several social sciences.

EC has been established in France since the 1980ies. Today EC is the core of new French economic sociology, it's a new socio-economic approach and an accepted – although heterodox – economists approach in France and it worked out a new pragmatic institutionalism.

How did EC succeed in France – institutionally and cognitively (in the way it has positioned itself against other approaches)?

What you call the "success" of EC calls for a careful and rather prudent diagnosis.

As for economics, EC was immediately (and rightly) perceived as a forthright criticism of mainstream: first for its radical change of the most basic assumptions (interpretive, rather than only computational, rationality; coordination, by means of rules and norms, rather than through the sole

role of prices); second, by its non-imperialist connection with other social sciences. So the reaction of orthodox economists was not really friendly (mainstream is logically averse to pluralism): either scornful indifference, or recourse to standard game theory to deal with conventions, along Lewis' formal lines – but without his philosophical background, and indeed his own dissatisfaction with his 1969 definition of convention (which lead him to a new one, integrating collective representations but unfortunately neglected by most commentators).

As for sociology, the reaction was of course quite different. In a sense, EC could be considered as one new branch of sociology, therefore competing with the established ones (e.g. Bourdieu's school). Inversely, within the emerging field of economic sociology, EC could not but appear as a partner, driving the cart in the same direction – if not with the ordinary wheels. The cooperation with economists was both a help (at last, there exist some economists ready to work on a par with sociologists) and an impediment (the entry into economic sociology was a rebuttal of standard economics, not a natural extension of sociological analysis).

Finally, management researchers were unexpectedly the social scientists who greeted EC in the most straightforward way, simply as a new set of analytical tools, available for deconstructing coordination problems inside organizations and especially business firms, and enabling researchers, as well as practitioners, to have a new look at collective learning.

Harrison White is one of the main representatives of new economic sociology. In 1981 he initiated this movement in the US with his article "Where do markets come from?" (White 1981). In 2000 there has been a meeting between representatives of EC and Harrison White in Paris. I guess the result is the publication of two books ("Conventions and structures in economic organization", 2002 edited by Olivier Favereau and Emmanuel Lazega and "Markets from networks" in 2002 written by Harrison White). Could you explain how this meeting was organized and how do you evaluate this exchange between EC and Harrison White? Which outcomes are most important to you?

I was lucky enough to read White's 1981 paper before the end of my thesis, at a time when I had realistic models of financial markets (with Keynes) and labour markets (with Piore and the American institutionalists), but not of goods markets. So White's model of competing business firms in a space of quality/prices ratios was a providential gift, stressing firms rather than markets.

But the essential step of the encounter between White and EC came with the bold hypothesis of François Eymard-Duvernay, translating Boltanski's and Thévenot's "cities" (Boltanski/Thévenot 2006) into "quality-conventions" (domestic, merchant, industrial, etc.). When we had a talk on White's model, he noticed that the types of quality associated with each of the areas of viable markets (as exemplified by technical features of production and consumption) were coherent with his own typology of quality conventions. Then with a third man, Olivier Biencourt, who made his thesis on the mathematics of White's model, we closely scrutinized the connection and concluded that it was not an artefact (Favereau/Biencourt/Eymard-Duvernay 2002). Indeed, our 2002 chapter gave us an opportunity to better understand both White's sociology of markets and the logic of conventions, in a central part of capitalist economies.

The last step of the encounter would be to make it completely clear why a theory of action as White's structural one could be such an analytical partner with a style of economics, proceeding from methodological individualism (but in a Weberian understanding epistemology). My tentative answer would be two-fold: first, a judgment on quality belongs to the class of normative judgments (that brings White near EC); second, the collective representation of a structure is an element of the structure (and that brings EC near White).

In the 1980ies you introduced the concept of* collective cognitive dispositive *as a collective representation in organizations and markets (Favereau 1986, 1989a, 1989b). This way EC opened towards cognitive sciences – years before it was done in mainstream economic institutionalism (as Douglas North did in the 1990ies). Could you sketch your motivation to criticize established notions of contract, rule or rationality by inventing and using this concept in institutional analysis? And – looking back – what are the main insights about cognition and collective cognitive dispositives, EC has gained since then?

I introduced the notion of *dispositif cognitif collectif* to offer an alternative view of rules. For the orthodox economic theory, rules are formalized either as pure constraints or as rational choices (contracts or quasi-contracts). In both cases, they are "in the head" of economic agents, they are part of the individual representation of the world (with a complete description of the possible future states

of nature). This is correlated with a severe misunderstanding of the nature of rules.

- "dispositive" or "device", as Foucault has shown, means that rules are indeed a complex set of entities, a mix of representations, statements, material objects, power relationships, etc…

- "collective" means that rules at least implicitly define (the satisfactory functioning of) a collectivity, to which the rule-follower (or rule-breaker) belongs. Therefore, it is nonsense to speak about rules in a strictly individualistic and positivistic ontology (a rule is a normative entity). Here we are influenced of course by Wittgenstein's second philosophy.

- "cognitive" means that rules are inversely a means to explore the type of collectivity to which we belong, its internal working, what can be achieved, individually and collectively, by participating to its functioning. "Cognition" here implies both reflexivity (we quite generally have a critical look at the relevance of the rules we are following) and, at a higher level, interpretation (application is neither a mechanical nor a computational operation). These two properties play an essential role in the success or failure of what management researchers, such as Argyris and Schön, call "organizational learning".

The three main insights to be drawn from that reading of rules are (i) the full acknowledgement of the facts that economic agents are consciously and actively interested in coordination, and that they do not act within a collective entity without building mental models of it; (ii) (as a consequence of (i)) the epistemological necessity of admitting a third sphere of reality – intersubjective – beside the objective (the material world) and the subjective (preferences, expectations, etc..) ones, as many philosophers have admitted, from Karl Popper to Charles Taylor or Vincent Descombes; (iii) (as a consequence of (ii)) the analysis of the major economic crises (1929, 2008), as breakdowns of the prevailing regime of intersubjectivity and normativity (Boltanski/Chiapello 2007).

Classical economic sociology integrated the analysis of law as important rules. In modern economic sociology this is rarely done. EC did and you edited a report about lawyers (*Les avocats, entre ordre professionnel et ordre marchand*, Paris 2010). How does EC approach law and what are main contributions of EC to the analysis of law?

If EC, which stresses the coordinating power of rules, is a coherent programme of research, it must develop a specific approach to legal rules (more generally law), since they are such an important subset of the generic category "rule". Obviously "law and economics" has been quite an active field of research for the last decades, and it is convenient to contrast the conventionalist approach to law with the mainstream one (with its two sides, one founded on optimizing formal microeconomics and the other using a discrete comparative methodology – the "transaction-cost" paradigm). For a neutral observer, "law and economics" is at best an attempt to bring back questions of law within the standard economic model, using only rational agents (calculative rationality: e.g. cost-benefit analysis) and some sort of equilibrium (Nash or supply/demand). Those traditional tools may be useful to cast complementary light on some minor points implying law but how could they say anything relevant through assumptions on the function and the nature of law so much at variance with what philosophy of law has been exploring for years and years?

EC calls for the opposite of the so-called "economic analysis of law": a law-like analysis of economics. In our economic models, we must leave space for the functioning of legal rules, but in a way which is respectful of what is law for ... lawyers. For instance, law consists in deontic sentences, which need to be interpreted. That means that homo economicus is not only a computer, he is speaking, and that changes a lot in the methodological equipment of the economist (much less for the sociologist). One obvious element is that "efficiency" is not the sole normative value, according to which the quality of law has to be appreciated. To say the least, "equity" or "justice" should also be mentioned. So law is essentially a means of solving conflicts of values (individual interest being one of these values), in a democratic society. In this particular sense, it's indeed a technology of coordination.

The specificity of that technology is that decisions to solve these kinds of conflicts have to be explicitly argued, along very determinate lines (our preferred references here would be Hart, Dworkin, and Latour). We do not follow the cynical sociology of law provided by Bourdieu: it's not so easy to offer good justifications, but we are perfectly aware of the bad "conventions" of judgment that may influence the interpretations of the judges. I am currently working on the strange assumption behind "shareholder value": the shareholders are supposed to be the owners of the corporation. For any serious lawyer, it's plainly wrong

in corporate law. The shareholders own their shares, and that gives them some powers, but no "property rights" on the assets of the firm. So, you see, the fact that conventions have some normative features does not make it impossible to have "bad" conventions. We owe this fundamental point to three young scholars, Philippe Batifoulier, Guillemette de Larquier, and Ariane Ghirardello.

Our work on advocates is a corollary of our EC approach to law. Law should not be considered as a commodity like any other: with Lucien Karpik, we concluded it's too important to be dealt with by markets and too complex to be dealt with by states. Its link with the common good (more than its nature of public good) explains the recourse in democratic societies to that very special historical construction: a professional order.

You mentioned the levels of market and state. Early EC was criticized for being a micro level approach (not prepared to the analysis of economic and other social phenomena at the macro level) and also for ignoring power in the institutional analysis. How do you respond to these criticisms today?

It is true that we initially privileged the micro-level, maybe because we thought that our colleagues and friends of "regulation theory" were already very active at the macro-level but precisely our intuition was that they did not have the micro-economics for their macro-economics. The world recession opened by the subprime crisis has changed the landscape, because it makes us remind, on one hand, of the 1929 great depression, and, on the other hand, of the fact that, after all, the first conventionalist economist is ... Keynes. As André Orléan and I have noticed from the beginning (and even before, through our theses), Keynes introduced a powerful concept of "convention" in the chapter 12 of his "General theory of employment, interest and money" and it gives nothing less than the key to the understanding of persistent mass unemployment, as in the years 1929/39! Mass unemployment is a macro-economic phenomenon, to be explained by a macro-economic dysfunctioning, condensed in the connection between the "real" sector of the economy (firms, jobs, output ...) and the financial sector. The latter is too greedy in its demand of return from the former in order to lend him money. The heart of the economic problem, for Keynes, is simply that we do not know what the future will be. Needless to say that it is in complete contradiction with the deepest tenets of mainstream economics. Therefore, there is no such thing as a "fundamental value" for financial assets and the interest rate is purely "conventional". Sometimes very "bad" conventions are pervading the minds of economic agents. And nothing is more difficult to move than a convention – partly because a majority is not aware of it (there is an inherent tendency to "naturalize" conventions). Here begins to appear the extreme importance of "ideas" and of the possibility of public debate and public criticism. The problem of social science and especially of economics is that economists are not made of a different stuff than the economic agents. So there may be also very bad conventions among economists – Keynes, in order to qualify mainstream economics, coined the term "orthodox", i.e. a religious term. He was right: all this is about defining what deserves to be considered as "reality" (God's privilege!). I am close, here, to the last books of Luc Boltanski.

Finally, for Keynes, a state of crisis is due to a pair of bad conventions: the first expressing an excessive power of the financial sector, the second expressing an excessive power of some normative ideas on how the economics should work (free markets, minimal State, predominance of financial evaluations, exaltation of selfish material rationality, depreciation of public interest, etc.).

I have introduced the notion of "power", which was the last part of your question, but through a special entrance. With Keynes, I stressed the role of a macro-system (financial sector, of which a major element is the financial market) and, above all, the role of "ideas", i.e. the cognitive framework, used by dominant groups to "institute" reality and to exploit it to their benefit, consciously or unconsciously. That does not mean we ignore the more common sense of power, which is the right to give orders – indeed we are the only economists to adopt the judicial model of labour contract (an authority relationship), after the pioneer paper of Herbert Simon (1951). The message is rather that we should not forget the necessary extension of the notion of "power" to the "power of evaluation", which is the real mark of the powerful people or groups. It is the present field of research of François Eymard-Duvernay.

In 2006 François Eymard-Duvernay edited a two volume collection of papers which were elaborations of the big conference titled „Conventions et institutions: approfondissements théoriques et contributions au débat politique" (2003) about EC (Eymard-Duvernay 2006a, 2006b).2 Conferences and the following publications played an important role for the development of EC – since the first meeting "Les outils de gestion" in 1984 (Salais/Thévenot 1986). In 2009 there was another conference titled "Conventions: L'intersubjectif et le

normatif" which you directed.3 Could you summarize the most important topics and results from your point of view?

These two meetings were of a very different character. The 2003 conference, in the arch of La Défense (a paradigm of architectural modernity), was a very big international meeting, which organized systematic discussions with well-known representatives of the other trends of institutionalism and of economic sociology (Richard Swedberg and Harrison White, for instance). It was also planned to survey all the empirical applications of the conventionalist research program. The 2009 meeting belongs to the mythic series of "Cerisy colloquia". They take place in a medieval castle, in a remote part of Normandy and their logic is opposite to that of standard academic conferences. It gathers during five or six days not more than some dozens of researchers, invited by the organizers, because they deem that some field of inquiry or some question is on the point of being ripe, and that the interaction between the researchers may hopefully produce a positive collective result. An unusually long time is devoted to each talk – and to the discussion following it.

After having said that, I am afraid you will probably be disappointed by my summary of the results of that "Cerisy colloquium" on "Conventions: Intersubjectivity and Normativity". With this abstract title, we wanted to reaffirm conventions as a theoretical tool to study what the subprime crisis has started to reveal in the capitalist world: a major dysfunctioning in the architecture of ideas and norms which support the working of the economy.

Five of the six authors of the 1989 issue of Revue économique were present – but I prepared the program with young colleagues, and the first achievement of that week in Cerisy was that we all (old or young) discovered a new generation, fully involved in "conventionalist" researches, with a common spirit, highly critical of the mainstream economics, and not at all discouraged by its prevalence.

The main result, I think, is the importance of that form of power which consists in fixing values and especially criteria of value. Many empirical studies (on labour, finance, macroeconomic policy, health, law, corporate governance, culture, statistics, European economics, consumption, etc.) showed first that efficiency as much as equity require a plurality of criteria of evaluation, second that we have been submitted for the last thirty years to the dominance of only one, always quantitative and as often as possible financial: we have to subvert that regime of intersubjectivity and normativity sometimes called "neo-liberalism". So the book in preparation – collecting the papers of the colloquium – will be entitled "Les conventions de l'économie en crise", which has a double meaning: the crisis of the economic conventions & the economic conventions during the crisis.

For round about a quarter of a century EC has developed in France and today its founders are internationally recognized. You mentioned the young colleagues and the "new generation". From outside of France one can have the impression of a "second generation" too – although it is not well recognized outside of France. What is your perspective of this second generation in regard of its research focus(es) and its contributions to the development of EC as a scientific movement?

What is common to the first and the second generation is, I think, the shared principle that re-integrating the three dimensions, strictly differentiated by mainstream economics (coordination, rationality, values), is the good way to renew social science research, especially of course in economics. Indeed it is now applied to new fields by our young colleagues: law & economics [F. Bessis, C. Bessy, C. Chaserant, S. Harnay], psychological economics [R. Koumakhov], corporate social responsibility [S. Montagné, N. Postel, A. Rebérioux, R. Sobel], typology of business models [O. Biencourt, G. de Larquier], ecology [G. Plumecoq], professional traditions and occupations [P. Batifoulier, F. Bessis, C. Bessy, B. Martin, D. Urrutiaguer], sociology of uses and consumption [E. Kessous, K. Mellet], role of the intermediaries on the labour or goods markets [G. de Larquier, E. Marchal, D. Remillon, G. Rieucau], ubiquity and ambiguity of ethics in economic life [P. Batifoulier, A. Ghirardello, J. Latsis], urban economics [A. Lemarchand], political theory [A. Loute], European policies [G. Raveaud], health and family policies [P. Batifoulier, J. P. Domin, O. Thévenon, the pioneer role being played by M. Gadreau], etc. – just to give a short non-exhaustive sample of the "young generation".

However, in spite of its informativeness, my list has a major weakness. It does not give a clear idea of what drives my younger colleagues, through the empirical and theoretical works whose variety should be by now obvious.

My impression is that the new generation is as much critical as ours but not in the same way. They are less interested by the theoretical fight against mainstream economics (partly because it may be more dispersed now, and there-

fore more difficult to grasp) and more interested by the connection with the other trends of institutionalist social science. Quite an impressive sign of this move may have been given by the foundation of a new professional association: "Association Française d'Economie Politique". Within two years it has gained more than 400 members. Its head is André Orléan (a conventionalist!), and its spirit is not so much heterodoxy as pluralism. I think most of my younger colleagues belong (like me) to that new association. That apparent convergence does not mean the second generation has renounced its own specificity. Rather it implies that we have to develop a positive alternative to mainstream economics, of which EC will be a central piece, but with still too many black holes – the other trends of heterodox economics have opened the way, and we have a lot to learn (if not to borrow) from their accomplishments.

One element, already introduced in my review of Cerisy 2009, gives the impetus: human beings live in a world where there is a plurality of values or better, of valuation powers.

First, promoting and protecting this variety of criteria is a decisive step to criticize the capitalist system, at a time when we have lost faith in a possible global revolution. That may seem disappointing, but we must be aware of the implication: capitalism should be studied as such, at least in some part of the theory. A provocative shorthand for that program would be to elaborate a conventionalist re-reading of Marx and Polanyi.

Second, it gives us a hint toward a new research program about the correspondence between micro and macro-levels: rules (including conventions) are of course the essential mediation, but not in the structuralist fashion. Here the specificity of EC is strongly posited. Human beings are not ants, they are somehow actors in the process of going from micro to macro, and vice-versa, because they are able to change rules, through collective action and individual deviations. Looking for the micro-economic foundations of macro-economics (or the opposite) should not any longer be separated from the question of social change and economic dynamics.

Third, stressing the variety of valuation practices explains why the new generation is so much interested in empirical work, which requires discovering new quantitative tools and qualitative protocols, coherent with EC's basic assumptions on rationality, coordination and values.

Fourth, that overall program (at least as I see it, after many discussions with P. Batifoulier, F. Bessis, N. Postel and many others) may seem unreasonably ambitious. But one thing was constantly stressed: the point is not to look for a radically new theory, but to move a theoretical language in the right direction. And changing a language is something which can only be done gradually, pragmatically, and collectively.

Endnotes

1This interview continues the series of interviews in this newsletter with founders of this French approach. See the interviews with Laurent Thévenot (2004) and Robert Salais (2008).

2Conventions and institutions: Theoretical foundations and contributions to the political debate", 11th to 13th of December, Colloquium at the Institute International de la Défense at Paris.

31st to 8th of September 2009, Colloquium at Cerisy.

References

Boltanski, Luc/Eve Chiapello, 2007: *The new spirit of capitalism.* New York: Verso.

Boltanski, Luc/Laurent Thévenot, 2006: *On justification. Economies of worth.* Princeton: Princeton University Press.

Eymard-Duvernay, François (ed.)**,** 2006a: *L'économie des conventions. Méthodes et résultats. Vol. 1: Débats.* Paris: La Découverte.

Eymard-Duvernay, François (ed.)**,** 2006b: *L'économie des conventions. Méthodes et résultats. Vol. 2: Développements.* Paris: La Découverte.

Favereau, Olivier, 1986: La formation du rôle des conventions dans l'allocation des ressources. In: Robert Salais/Laurent Thévenot (eds.) (1986): *Le travail. Marchés, règles, conventions.* Paris: Economica, 249-268.

Favereau, Olivier, 1989a: Marchés internes, marchés externes. In: *Revue économique 40(2)*, 273-328.

Favereau, Olivier, 1989b: Organisation et le marché. In: *Revue française d'économie 4(1)*, 65-96.

Favereau, Olivier, 2011: "New Institutional Economics" versus "Economics of Conventions". In: *Economic Sociology – European Electronic Newsletter 13(1)*, 22-27.

Favereau, Olivier (ed.), 2010: *Les avocats, entre ordre professionnel et ordre marchand.* Paris: Lextenso editions/Gazette du Paris.

Favereau, Olivier, forthcoming: Les *conventions de l'économie en crise*.

Favereau, Olivier/Emmanuel Lazega (eds.), 2002: *Conventions and structures in economic organization. Markets, networks, hierarchies.* Cheltenham: Edward Elgar.

Favereau, Olivier/Olivier Biencourt/François Eymard-Duvernay, 2002: Where do markets come from? From (quality) conventions! In: Favereau, Olivier/Emmanuel Lazega (eds.), *Conventions and structures in economic organization. Markets, networks, hierarchies.* Cheltenham: Edward Elgar, 213-252.

Salais, Robert, 2008: Economics of convention – its origins, contributions and transdisciplinary perspectives. Robert Salais interviewed by Rainer Diaz-Bone in Berlin. In: *Economic Sociology – European Electronic Newsletter 9(2)*, 16-23, available at: http://econsoc.mpifg.de/archive/econ_soc_09-2.pdf

Salais, Robert/Laurent Thévenot (eds.), 1986: *Le travail. Marchés, règles, conventions.* Paris: Economica.

Simon, Herbert, 1951: A formal theory of employment relationship. In: *Econometrica 19(3)*, 293-305.

Thévenot, Laurent, 2004: The French convention school and the coordination of economic Action. Laurent Thévenot interviewed by Søren Jagd at the EHESS Paris. In: *Economic Sociology – European Electronic Newsletter 5(3)*, 10-16. available at: http://econsoc.mpifg.de/archive/esjune04.pdf

White, Harrison C., 1981: Where do markets come from? In: *American Journal of Sociology 87(3),* 517-547.

White, Harrison C., 2002: *Markets from networks. Socioeconomic models of production.* Princeton: Princeton University Press.

Book Reviews

Book: André Orléan, 2011: *L'Empire de la valeur. Refonder l'économie. Paris: Seuil.*

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As the title of his book indicates, André Orléan (AO) wants to refound economic theory with the help of a new understanding of value. After centuries of debate about value, this is a big and optimistic project. Whereas many people, among them a sizeable share of economists, see the need for a radical revision of mainstream economic theory, one may be sceptical about the potential contribution of a theory of value to such a project. Nevertheless, rethinking value is what AO suggests, his main idea being that economic values should be understood as social constructs, just like the moral, esthetique, religious, etc. values found in the domains of other social sciences.

The book has three parts. In the first, "Critique de l´économie", AO discusses traditional value theories and relates their deficits to the notion of value as a "substance". By contrast, in his own approach, value is to be a relation and money is used to express value. In the second part, "L´institution de la valeur", AO elaborates his understanding of money: It answers the social need for a common medium of economic evaluation. In contrast to traditional attempts to explain money as the outcome of purely instrumental, rational actions, however, AO emphasizes that economic evaluation takes place not only as cool rational calculation, but is subject to emotional, normative, or traditional forces. Thus, economic value is closely related to other forms of value, moral, religious, cultural, esthetic, and so on. Given that economic value is only one kind in a whole universe of values, it is possible to place economic thought in a shared framework ("cadre unidisciplinaire") in which values are seen as social institutions by all social sciences. As institutions, values are rooted in something AO calls "l´affect commun", a feeling shared by all players in a given social field. It empowers them to act in unison, generating a specific extra force that is called "la puissance de multitude". In the third part, "La finance de marché", Orléan sketches an analysis of financial markets to demonstrate the fruitfulness of his approach in contrast to the orthodox theory of "efficient" financial markets. Relying on Keynes, Orléan presents financial speculation as a pure bootstrap process, without foundations in any "objective value". By pursuing liquidity as such and relying on conventions to cope with uncertainty, participants in financial markets come to act in unison. As their interactions drive positive feedback processes, they regularily produce bubbles and the ensuing crises. The book ends with a "Conclusion générale", a summary of the differences between traditional economic thought, with its restrictive reliance on individualism and utilitarian instrumental rationality, and AO´s own perspective, aiming for an understanding of economic value as a subspecies of the common values underlying all social life. Like any value, economic value is to be seen as the result of collective production, as an institution allowing us to live together.

In what follows I will discuss two major issues that AO addresses with his book: the critique of value theory (1) and the concept of money and the way it is related to concepts of value in general (2). I will skip the discussion of financial markets and the drive for liquidity as their constitutive characteristic. I think that AO´s analysis is seriously incomplete in its one-sided emphasis on positive feedback mechanisms feeding bubbles. Buyers and sellers of "financial products", lenders and borrowers, do have conflicting interests generating negative feedback, too, for example by hedging or speculating à la baisse. But AO´s analysis of financial markets is only loosely connected to his suggestion to refound the theory of value, so whatever reservations one may have about the former does not necessarily affect the assessment of the latter.

1) AO´s main argument against traditional value theories, be it the classical labor theory of value or marginal utility theory, is that they present value as a "substance" inherent in economic objects (goods, commodities). While there are some practioners of value theory who use a vocabulary in which "value" is indeed described as some kind of substance**1**, I nonetheless think that this critique is largely beside the point. To explain prices has always been the reason for constructing a theory of economic value, from Adam Smith´s observation of the seeming paradox that high use value can be combined with low exchange value (and vice versa) to Debreu´s general equilibrium "theory of value" in which the "relative price" of any commodity depends on the state of the economic system as a whole. But neither labor nor utility are substances. Labor is a pro-

cess, performed by individuals or collectives to produce useful things. To move beyond this description and maintain that products are "embodiments" of labor is a conceptual construction intended to explain their prices. It may (but must not) lead to the misconception that such a nonthing as "congealed labor" is the "substance" of value. Utility refers to a relation between individuals (or collectives), and objects that have properties making them desirable for these individuals (or collectives). Outside such an agent-object relation, there is no such thing as utility. Again, there may have been economists who suggested that utility is inherent in objects as such and that their scarcity is a fact of nature, but that was and is simply a misunderstanding of utility. In short, I think it is wrong to discard traditional value theories, whether of the labor or the marginal utility kind, because they operated with notions of value as "substance". Such misconceptions could be easily repaired in both cases without damaging the content of these theories as explanatory projects.

A better reason for following AO in the renunciation of traditional value theories is that they are attempts to explain prices by abstracting from money. The primary observable facts to be explained by economic theories are prices, mappings of commodities as quantities of money, generated in operations of buying and selling. Traditional value theories approach this explanatory problem by putting the empirical fact that money is always involved in such transactions in brackets, maintaining that the really important and interesting explananda are the underlying "real" exchange rates between commodities and commodities. In retrospect and with a little hermeneutic charity, one may understand why such abstraction from money seemed a good idea: To accept money use as a defining part of the starting problem of economic theory implies a level of reasoning of much higher complexity than explaining pairwise barter transactions by relating them either to the agents´ productive efforts or their beliefs and desires. Money enters as a third entity into agent-goods-agent relations. With its own background in the legal and political order, money is exposed to social forces that lie beyond the conceptual reach of the standard simplified construction of a system of pairwise barter constellations that is taken to determine "relative prices". Thus, while the theoretical strategy of abstracting from money seemed to be dictated by the need to "divide up the difficulties", such dividing has unfortunately meant that money never made its return into the main body of (micro)economic thought. Instead, the undue abstraction from money was justified with the afterthought that money is "neutral". As AO and many other heterodox economists rightly point out, this traditional procedure has had most damaging consequences for both economic theory and economic policy. In sum, rather than rejecting traditional value theories for thinking in terms of "substances", the substantial reason for rejecting them should be that they have entangled many generations of economists in the impossible project of explaining money prices via abstraction from money.

Such a rejection would have been well in line with the critique of general equilibrium theories by Benetti/Cartelier (1980), to which AO positively refers. Benetti/Cartelier show how value theories are based on a physical analogy ("l´hypothèse de la nomenclature") and suggest as a remedy: Start all economic reasoning by taking money as given and describe and analyze economic transactions by tracing the movements of money. At the start of his book, this appears to be the direction in which AO is moving, too. He describes value as purchasing power ("la valeur se trouve recherchée pour elle-meme, en tant que pouvoir d´achat universel" (p.12) and money as the institutional foundation of value and exchanges ("dans notre approche, la monnaie joue un role essentiel. Elle est l´institution qui fonde la valeur et les échanges."(p.13)). Thus, when one reads that there are no expressions of value except monetary ones ("Il n´y a d´expression de la valeur que monétaire" (p.29)), one is led to expect that, for AO, values simply are the same thing as money prices. If so, we might as well drop the term "value" from the economist´s vocabulary. It is redundant. However, instead of getting rid of the whole rat´s nest of discourses on value, AO adds a new one. Why?

2) In part 2, we find out. In its opening chapter on money, AO presents a thought experiment on "la genèse conceptuelle de la monnaie". He starts from an assumed setting in which agents are involved in commodity production and exchange, but have no money. (They are in a state which AO calls "la separation marchande".) This is a popular device in theories of money, found in approaches as divergent as Marx and recent neoclassical search models. Agents cannot acquire the commodities others are bringing to an assumed market by simply offering their own. Barter is impossible except in the rare instances where two agents find themselves in the condition of a "double coincidence of wants". Trading on credit is impossible because there is no institution sanctioning the break of commitments. How can they get out of this dilemma? (The dilemma is, of course, a fiction constructed by the theorist who assumes that agents act as private producers in a division of labor despite having no plausible hopes that

they can find others to exchange what they produce for what they need). Under the assumed pressure to invent some social tool that allows them to trade, agents begin to construct a monetary system by converging on the use of selected goods for indirect exchange. This is a Mengerian story according to which the most marketable goods are singled out for use as means of exchange by a group of market participants, with some having this good idea in the first place and the others imitating the successful. AO´s version of this story contains some additional ideas: He adds more details on the role of imitative behavior ("mimesis", with convergence to the use of "biens liquids" as the result of – a largely unexplained – process of "mimetic polarization", cf. p.74f.); he introduces money not only as a means of exchange, but also as the unit of account (adding the strange proposition that the only objective estimate of the value of money is the "one" of the unit of account which serves as the starting point of price formation, p.173); in Durkheim´s concept of social facts as external, supraindividual forces that exert moral authority so that individuals can become social beings (p. 203), AO finds for some backing in sociology for his aversion against methodological individualism. To apply this Durkheimian proposition beyond issues of shared morality to the theory of money, AO introduces a new name for the force responsible for the fusion of individuals into collectives: "la puissance de la multitude" (p.204). He then constructs an analogy between the installation of religious symbols and the ascription of monetary functions to some collectively selected good. In modern economies, this process results in the production of generally recognized "liquidity": "le bien élu" is what everybody wants and needs, because it is not only used for an unambiguous definition of the value of all other goods, but also needed by everybody for the access to commodities.2

In this account of the "conceptual genesis of money", the origin and nature of the collective forces assumed to be driving the construction of a monetary system, namely, "l´affect commun" and "la puissance de la multitude", are mostly left in the dark. According to AO, these forces have power over individuals and allow them to become social beings. But is this Durkheimian account of social facts consistent with the simple and plausible assumption of – weak – methodological individualism that there is no location for intentions, desires and beliefs other than the minds of individuals? Instead of somehow anchoring social facts in actions of individuals, AO suggests to move in the opposite direction. Because money is in some mysterious way endowed with the extra-power of the "multitude", it turns into a supreme ruler and reins over its subjects in its "empire". ("De meme que, dans l´ordre politique, le souverain est celui qui capte l´affect commun a son profit, la monnaie est souveraine dans l´ordre marchand par le fait qu´elle tient les sujets sous son empire, en tant qu´elle est l´autorité première par la grace de la puissance de la multitude investie en elle" (p.212f.)). In other words, money not only acquires the properties of an agent, a being capable of intentional behavior, but it is deemed to be the supreme agent in all matters economic. Thus, we learn that the title of the book, "L´empire de la valeur", is not meant metaphorically, but literally: Value has an empire and money is the sovereign. The description AO gives of his project at the start of the book, namely, to understand the "value of commodities in its autonomy", "an autonomy it obtains due to money, so that we can see value in its majesty, in the fullness of its power" (12f.), is not just a flowery way of saying that everybody needs and wants money in a fully monetized economy. Nor is it a way of saying that such an economy pushes the people who make it work into a state of alienation that can be alleviated once they recognize that the forces ruling them are their own productions. Rather, AO tells us that people are governed by money and that economic theory should depict that state of affairs.

This is not the place to discuss the merits or deficiencies of methodological individualism. However, in AO´s argument, it is rejected a bit too condescendingly and at the cost of endowing non-agents like money objects with the powers of agency in a rather mystifying way. It is one thing to maintain that the desire for money rules supreme in the commodity world (p.13), a proposition shared by observers of money use ever since Solon and Aristotle. But it is quite another thing to forget that a force that owes its power to the contributions of many individuals acting in unison (the "multitude") must at the same time be something that can be changed or abolished by those very individuals. AO´s contention to the contrary relies on examples from Durkheim, Mauss and others of the sources and overwhelming force of collective beliefs in so-called primitive societies. By contrast, modern societies have developed in processes of rationalization, secularization and individualization, as classical sociologists, including Durkheim, have taught us. These social developments imply that traditional group identities, whether based on common descend or shared beliefs, religious or political, have become precarious in contemporary societies. To put it differently: It is still happening every day that some speaker says "we", referring to collective intentions and a group proclaimed to act in unison. But in many social contexts everyday experiences

suggests that any individual included in such a "we" by the speaker may refuse to be part of the "we". This is not an abstract philosophical point irrelevant for the discussion of AO´s book on economic value and money. Rather, the irony is that the monetization of societies was one, if not the decisive factor in the destruction of the kind of self-evident group identities that play such an important role in AO´s understanding of value and money. In other words, AO´s emphasis on what economic value has in common with other kinds of values, all being social constructs rooted in shared feelings, may be a good corrective for misplaced objectivism in mainstream economic thinking. But it is unlikely that money use is as firmly based in some unquestioned common belief as are traditional religious attitudes. People have had to learn that money use is plagued with uncertainties and generates its own crisis. If they live with it, nonetheless, it is not because they believe in some oikodicy, but rather for lack of a plausible alternative.

Finally, a point on intellectual style: Given his emphasis on "collective production", the underlying "affect commun" and the "puissance de multitude", as an antidote to – presumably mostly Anglosaxon – individualism and utilitarianism, one is surprised that Orléan is not more explicit on how his own work relies on such collective production. As Bourdieu has noted, economics is such a wide field that you can find a heterodox critic for every orthodox conjecture within the discipline itself. So it is unfortunate that AO does not introduce in more depth the broader intellectual background of his own work in France (for example, there is no reference to Bourdieu despite strong parallels in the rejection of mainstream economics) or the more recent English literature with similar concerns[3]. He thus comes across as the lonely prophet, *vox clamans in deserto*. The book is long enough as it is, of course, and one cannot really ask an author to make all his sources completely transparent. However, economic theory has always been an undertaking in which the mainstream is accompanied by a strong, if cacaphonic, chorus of heterodox economists. It would have been helpful for AO to clearly position himself in that field. Without that it is difficult to claim originality for yet another new alternative approach, and, alas, even more difficult to hope that it will have an impact on the mainstream to refound itself.

In sum, AO´s book offers many interesting and unusual observations of the state of economic thought. The contrasts to the traditional architecture of economic theory are sometimes striking, especially in the attempt to construct linkages to sociology and anthropology for a better understanding of economic institutions. But for the project of a refoundation of economic theory, AO offers only some first steps. Rejecting traditional microeconomics and its value theory by pointing out its various conceptual weaknesses, empirical irrelevance, non-realistic assumptions, etc., is not enough. A refoundation requires an alternative "vision", to use Schumpeter´s term, of the contemporary economy, a comprehensive and refinable picture of what it is all about. To present it as the "empire of value", with money as the "sovereign" in the ubiquitous chase for "liquidity" is an interesting conjecture, but we need to see more.

Endnotes

[1] Marx being a case in point – but one might argue that Marx, a well-versed Hegelian, used the term "substance" tongue in cheek.

[2] AO´s conceptual apparatus is vague at this point: Is this a commodity theory of money? That would be implied in the Mengerian perspective, where the most marketable goods are used as as means of indirect exchange. Why else would AO call the object selected as the money object a good ("bien")? But then his account of money is seriously incomplete because we need to understand why modern forms of money are non-goods (in the standard sense of the term referring to means of consumption or production).

[3] For example: "(I)n a social theory of value, money is the embodiment of value; but precisely because it is socially instituted, its invariance cannot be predicated on any ´natural´ ground, and must continually be shored up and reconstituted by further social institutions, such as accountants, banks and governments." (Mirowski 1990: 712)

References

Benetti, C., Cartelier, J., 1980: *Marchands, Salariat et Capitalistes.* Paris: Maspero.

Bourdieu, P., 2005: *The Social Structures of the Economy.* Cambridge: Polity.

Mirowski, P., 1990: Learning the meaning of a dollar: Conservation principles and the social theory of value in economic theory. In: *Social Research, Fall 1990*, 689-717.

Book: Favereau, Olivier (ed.), 2010: *Les avocats, entre ordre professionnel et ordre marchand.* Lextenso éditions.

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This book originates from a survey conducted by the French Bars Association (Conseil national des Barreaux) lead by Olivier Favereau. Heterodox economists (Franck Bessis, Camille Chasserant, Sophie Harnay, Christian Bessy) and economic sociologists (Lucien Karpik and Emmanuel Lazega) have combined their theoretical approach to markets in order to analyse a question raised by the bar association: what would be the consequences of liberalizing the legal services market? This question was brought to attention after the European Commission published two reports that argued that the liberalization of the legal services market would be the best way to decrease prices and thus benefit the consumer. In these reports, liberalization sounds with the end of self-regulation by professional bodies. Self-regulated professions are seen as cartels opposed to fair and healthy free competition. Such an assumption overlaps the practical interests of the French bars, largely threatened by the liberalization, and the theoretical interests of academics who have been some of the strongest critics of orthodox economic theory. Investigating the case of the French professional regulation of legal services allows the academics to answer the European Commission reports and to deal with the more general use of orthodox economics for recommending public policies changes. The questions addressed by the book are threefold: How strong are the conclusions of the European Commission? What are the characteristics of the legal services market? Is market-based liberalization or professional-based regulation more suited for the characteristics of this specific market?

The first question can be answered by an in-depth theoretical discussion about the hypothesis and results of the European Commission reports. In the first chapter, Camille Chasserant and Sophie Harnay use both classical economic theory and more recent economic approaches to challenge the way the Commission reports leads to recommend liberalization. Their conclusion is a claim for an empirical study of the legal services market as the European Commission Reports are lacking in this area. Subsequently, the following chapters deal with this empirical inquiry based on 27 interviews conducted with lawyers from a variety of law offices and law firms. This empirical data is analysed in order to highlight the characteristics of this market. In the second chapter, Emmanuel Lazega emphasizes the existence of collegiality and networking in the law profession. A typology of the lawyer's professional practices is presented by Christian Bessy in the third chapter. In the fourth chapter, Franck Bessis sheds light on the way that the bar is a mean for lawyers to have reflexivity upon their professional practices, which cannot be achieved in a market-driven organization. In the last chapter, Christian Bessy compares the legal services market with the legal labor markets and focuses on the professional education and training of lawyers. The empirical results presented in these 4 chapters are used to test the consequences of the liberalization versus the benefits of self-regulation. They conclude that professional regulation is superior to liberal deregulation.

The main arguments developed in the book are the following. On a theoretical basis, the European Commission conclusions are false. The European Commission has misused the classical economic theory. For example, following the most classical theory, the bar association cannot be compared to a cartel. Moreover, the European Commission has neglected recent economic results that serve as a balance against traditional assumptions. For instance, advertising creates not only easier competition but entry barriers. Finally, the European Commission focuses on price competition and thus ignores the competition on quality. If the effects of liberalization on prices are ambiguous, it is certain that the quality of the legal services would be lowered by liberalization.

Empirical data shows how quality is achieved (or not). Quality is divided in two different and at times conflicting categories: micro-quality refers to the quality perceived by consumers; macro-quality refers to the participation of lawyers to law and justice as public goods. Subsequently, lawyers who satisfy most their clients are not necessary those who contribute the most to the rule of law. The typology of professional practices underlines different conventions of legal services quality (conventions de qualité). One of them, the market convention (convention marchande) is shared by law firms. It is close to the model of legal services advocated by the European Commission. But this convention tends to favor micro-quality against macro-quality. If it were to become the prominent convention, following the European Commission recommendations, it would affect the rule of law. For the authors, a balance between the different conventions of quality within the legal services market is one condition for both micro and macro quality. A professional body, like the bar, allow-

ing to deal with the micro/macro quality conflict is another condition. Yet, the authors do not conclude that current professional rules enforced by the bars are the more appropriate. They could certainly be improved in order to promote more quality and better prices. They request another empirical study dealing with this issue.

The aim of this book is ambitious and salutary. It copes with current economic and political trends in the European community that tends to be unchallenged. Sociologists have already warned about the consequences of liberalization on the quality of professional services like health or education (Allsop and Saks 2007, Kuhlman and Saks 2008). E. Freidson, in a seminal book (Freidson 2001) typifies two forms of work/services organization: Consumerism as an organization driven by market laws and consumer's demands, professionalism as an organization lead by professional rules and self-regulation. He points out that professionalism is threatened by consumerism and should be protected. But his work has sometimes been criticized as a protection of professions and a return to functionalism, when sociologists believed in professions' discourse about their ideal of serving clients and public good. Indeed, the confusion between professional discourse and professional reality has been noticed by other sociologists (Larson 1977, Johnson 1972), whose conclusion where close to those of the European Commission: professional discourse is a way to state and maintain a monopoly on economic activities. The only way to escape from this trap seems to pay attention to what professionals do and not only to what they say. This book follows this principle in going in depth with the quality of legal services, both by the critical review of the European Commission reports and by the fine knowledge about legal activities. The first chapter is certainly the most surprising and convincing as it attacks classical economic theory on its own terms. Other chapters are more predictable as they mix and renew previous well-known studies of Lucien Karpik, E. Lazega, O. Favereau and C. Bessy. Though, they construct a well-grounded description of legal services and lawyers work, which can face and challenge the European Commission recommendations. One can only regret the scope of the survey. Had there not been the previous inquiries of Karpik or Lazega in the legal field, the 27 interviews would be considered as too small of a sample for such ambitious assertions.

References

Allsop, J. and Saks M., (eds), 2007: *Regulating the Health Professions.* London: Sage publications

Freidson, E., 2001: *Professionalism. The Third Logic.* Cambridge: Polity Press.

Johnson T., 1972: *Professions and Power.* London: Macmillan.

Kuhlman, E., and Saks, M., 2008: *Rethinking Professional Governance. International Directions in Healthcare.* Bristol: the Policy Press.

Larson, M.S., 1977: *The Rise of Professionalism. A Sociological Analysis.* Berkeley: Univ. of California Press.

Book: Christian Bessy, Thierry Delpeuch and Jérôme Pélisse (eds.) 2011: *Droit et régulations des activités économiques: perspectives sociologiques et institutionnalistes.* Paris: LGDJ.

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Institutional scholars have focused for a long time on interrelationships between law and regulations on the one hand and economic activity on the other, debunking the natural propensity of human beings to truck and barter (Adam Smith) as a naturalizing myth for a transaction mechanism that requires a rather sophisticated infrastructure (cf. Polanyi 1944, Commons 1924). They have shown that homo oeconomicus has to be facilitated by a legal infrastructure that fundamentally forms his specific rationality. Despite this long-standing intellectual tradition, the current dominant approaches to the question of the mutual relationship between law and economics, be it the law and economics approach or the new economic sociology (s. Kirat's contribution in this volume for a detailed explanation), treat law as exogenous to the economy and the rationality of market actors.

In contrast, this collection of essays by French and American historians, economists, sociologists, legal and management scholars heavily builds on these institutional traditions, choosing as its particular point of entry the laws in action, rather than the law in the books. This leads them to consider the interplay of professional, organizational and ideational forces of the evolution of laws that structure economic activity pursuing venues laid by the theory of conventions, the economic neo-institutionalist perspective and the perspective of law and society.

The very first contribution, Stanziani's genealogical study of competition laws and the regulation of future markets in France and Europe points to the historically contingent struggle over the categorization of permitted vs. forbidden

economic activities. Rather than being explained by simple categories such as civil or common law, he points to the direct practical problems such a distinction imposes. Judges had to distinguish in judicial practice between speculative and just prices, requiring pragmatic decisions to a metaphysical problem. Their failure to prevent a speculative crisis in 1885 led to the abolishment of anti-speculation laws in France, not the acceptance of speculation itself. Kirat's chapter traces the historical reasons why the empirical analysis of the interplay of law and society, present in the work of Commons as well as Weber was lost upon American economists as well as most American sociologists, who by choosing neoclassical economics as their nemesis accepted the exogenous nature of law to economic activity. Didry and Vincensini, on the other hand detail how the institutional economist North grappled with the challenge posed to institutional economics by the Polanyian approach, revealing a sophisticated framework, which plays on the dichotomy of institutions that seek to structure economic activities vs. organizations as institutional entrepreneurs that learn to use the rules to their advantage and seek to transform the institutions, thereby providing a theoretical venue to think about the endogeneity of law.

The volume then goes on to inquire how general, abstract laws and regulation can structure concrete economic activities and points to the work of adaptation, of translation and transformation of the intentions of these texts in economic practice. The paradigmatic contribution of Lauren Edelman emphasizes the ambiguity and obscurity of legal texts and the engagement of the regulated organizations in defining what these laws exactly require of them. Given that laws are enacted in an asymmetric society (Coleman 1982), in which organizational actors have much greater means to shape the interpretation of these rules, the law in practice might come to have opposed effects to what the lawmakers initially intends as organizations exploit the ambiguity and obscurity of the law to transform it in their favour. They do so in organizational fields, by employing professionals of compliance that shape the interpretation of these rules. Under situations of legal uncertainty, organizational innovations are adapted which benefit managerial interests. The locus of this managerialization of the law resides in the daily application of the law and in the establishment of common interpretations about what a law is supposed to mean (Edelman). Bessy and Favereau's contribution on the changing labour market regulation in France complements these insights of Edelman's approach well in that they problematise the lack of legal realism in the influential proposals of economists for labour market flexibilization. The predominant individual approach in labour economics leads to the individualization of workers and the equalization of workers with enterprises as equal partners in the exchange. It thereby ignores the advantages of expertise residing with employers which is used to disadvantage the marginal workers the reforms are supposed to help.

The logical extension of the specific case of Edelman (Title VII of the Civil Rights Act) is the focus on the professionals of compliance whose professional purpose is to facilitate the enactment of these rules in the organization and the question if they are bending the rules/ shaping their application in favour of the corporation? In the second part of the volume we find studies devoted to these actors and the conditions under which they operate that provide some evidence for this hypothesis. As the methodologically sophisticated study of the Parisian commercial court system (a public private partnership) shows, we find this potential for bias not only in the application, but also in the generation of law, hidden under organizational rules established to prevent it. With the help of a vacancy chain analysis, Lazega et al show that despite rules to the contrary, judges with a background in banking and finance occupy a central place in the application of bankruptcy rules.

Marc Lenglet's contribution on deontologists in brokerage houses is fascinating, as it encapsulates many of the defining problems of compliance professionals, such as the translation of an abstract text into a concrete situation under time pressure and the interpretive questions related to it. His empirical examples speaks to the uncertainty in these moments, but remains silent on the question if the professional working conditions of deontologists in brokerage firms leads to the continuous re-interpretation of rules in favour of the space of manoeuvre of the brokerage firm. Stryker's contribution on the role of industrial psychologists in interpreting and shaping the application of the Civil Rights Act against discrimination is a counter-example in which scientists as compliance professionals shaped the interpretation of the law in favour of black employees. The involvement of (social) scientists in the case of Stryker and of Montagne in changing the interpretation of laws forcefully demonstrates the ethical implications of social-scientific work.

The third part is devoted to the historical genesis and practical generation of judicial tools that structure the interaction between compliance professionals and the law. The study by Torny on circulaires epitomizes the emphasis of

the volume on the malleability of the law by focusing on a text which challenges as much current practices by professionals as it is challenged by them, allowing the state to start a debate about grievances, while exculpating it in the time in which a solution is sought.

Montagne's study on the standard of prudence for US-pension funds shows with impressive clarity the struggle of different interests at work in reshaping the meaning of prudence, from substantial to procedural to mere communicative duties. The creation of intersubjectively valid norms is characterized by the struggle between the interests of different actors. Of particular interest in this case is the fact that models of rational agents in financial economics were used by judges as reasons for reducing consumer protection. Marty's contribution as well as the one of Chiapello and Medjad's work show the acute awareness of the performative aspects of accounting, which undergirds the political importance of accounting standard setting, as these rules shape rationalities of economic action. These approaches to accounting show a fruitful way of combining the institutional approach to law and economics with the approach of performativity as developed by Callon and Muniesa, because the political debates surrounding the generation and implementation of laws are analyzed explicitly.

Criticism: To edit a volume of this size with this number of accomplished researchers is a major achievement. However, while the empirical objects of study are largely similar, the researchers aren't all pursuing the same research programme or even asking the same questions. For example, the convincing portrayal of Western banks in Bulgaria as forces of a re-judicialization of the credit business in the contribution by Delpeuch and Vassileva raises at the same time the unanswered question in how far these banks were using their power to institute a legal framework in their favour regarding consumer protection and usury laws. The introductory chapter is quite complex and difficult to read, and might have been more appropriate as a final chapter, especially given that the introductions to the different parts of the volume are already very helpful in guiding the reader. Given the often implicit dialogue with performativity studies that is pervading several chapters and the final chapter's long debate of performativity studies, one is led to ask oneself why there is no direct contribution of this school of thought in the book? It seems more relevant to this volume than the contribution of Suchman, for example. Lastly, the role of state regulators in this volume remains underdeveloped, providing the picture of the state as a site to be conquered rather than an actor to be reckoned with.

Conclusion: This volume forcefully demonstrates the fertility of the hypothesis of the dynamic endogenization of laws by the economic actors it seeks to guide and thereby provides a critical approach to the formulation, interpretation and implementation of laws in the economic realm. Its emphasis on intersubjectively shared norms as the outcome of the struggle of antagonistic logics is most appropriate and its focus on the role of compliance professionals in this process opens up important research sites to understand these dynamics, linking the sociology of professions and economic sociology in an interesting way. It thereby offers a more accurate understanding of economic activities, which often are driven by the creative compliance to new rules. Last but not least, it might offer economic sociologists a path to produce more policy-relevant work, a characteristic which has been found wanting (Lounsboury and Hirsch 2011).

Disclaimer: To summarize a volume of 17 chapters in a few pages is a thankless task, especially when dealing with a particularly rich collection of essays in terms of empirical material as well as theoretical insights. I ask the authors as well as the reader to appreciate the need for abbreviation.

References

Coleman, J. S., 1982: *The Asymmetric Society.* 1st edition. Syracuse, N.Y: Syracuse University Press.

Commons, J. R., 1924: *Legal Foundations of Capitalism.* London: MacMillan.

Lounsboury, M. and P. Hirsch (eds.), 2011: *Markets on Trial. The Economic Sociology of the U.S. Financial Crisis.* Bingley/UK: Emerald Group.

Polanyi, K., 1944: *The Great Transformation.* Boston: Rineheart & Company Inc.

Ph.D. Projects in Economic Sociology

Corporate Governance and Bank Regulation: Evidence from the Italian Cooperative Banking System

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The aim of this dissertation is to shed light on the behaviour of banks in order to provide useful advice on how to regulate and supervise them with respect to their size, legal status, disciplinary mechanisms and their organisational specifics. To make the study feasible, the author focuses on cooperative banks, namely those operating in Italy, and compare them with standard commercial banks. On average, cooperative banks are small institutions with a distinctive management and governance system. These banks are characterized by conservative profit allocation policies and safe business strategies. The European Association of Cooperative Banks (EACB) defines them as a 'beacon of stability in a rapidly changing environment'. According to Angelini and Cetorelli (2003), such banks are somewhat similar to credit unions in the US: they operate in 'market niches' and thus have extra market power.

Should all banks be regulated and supervised equally? A number of scholars argue in favour of an international financial supervision and regulation, and for a specific, universal regulation of banks (Eatwell and Taylor, 2000; Alexander *et al.*, 2005). However, one may ask whether such a regulation is adequate for small, local banks that operate on a local or, at best, at a national level. Indeed, distinguished scholars, economists and policy-makers such as Dani Rodrik (2009) recently argued that a global financial regulation is not feasible; instead, nations and national authorities should be in charge of implementing regulations on the basis of some 'sensible rules'.

This dissertation draws on Dewatripont and Tirole's (2003) argument that an adequate regulation of the banking sector must start from a definition of what banking is and why is regulation needed in that sector. The project comprises three articles on the topic of corporate governance in Italian cooperative banks and their regulation. The articles are listed in the following order:

■ The article *Competitive Advantages and Challenges in the Italian Cooperative Credit System* argues that in Italy, cooperative banks play a major role in the financial system and the economy. They provide credit to individuals and households, as well as capital to small local firms operating in sectors such as agriculture. These banks often relate to a cooperative credit network that grants them an adequate level of competitiveness in the Italian market. By effectively implementing democratic principles of governance and by focusing on relationship banking, they foster responsible behaviour, which has proved to be crucial in times of crisis. The paper covers both the competitive advantages (resulting, for instance, from a prudential and safe business model, and from a business philosophy based on social relations and trust) and the challenges faced by cooperative credit banks in Italy. Finally, it suggests that a better understanding of their specifics would help to highlight the contribution of a sound cooperation to economics.

■ The second article, titled *Profitability of Italian Cooperative and Commercial Banks during the Financial Crisis* evaluates the performance of Italian banks with respect to their business models and the typology of their activities in the 2006-2008 period, a period of major financial distress. A model is provided on the basis of a number of financial and economic variables to account for return on equity, asset quality, and typology of activity and liquidity. Results suggest that Italian cooperative banks – both popular banks and cooperative credit banks – have been able to accumulate capital and provide credit to customers despite the ongoing crisis. Conclusions in the paper suggest that cooperative banking in Italy should be encouraged due to its positive contribution to economic development and financial stability (at least during the first wave of the crisis). It is nonetheless argued that cooperative banks should be supervised as effectively as commercial banks since they are far from being immune to failure.

■ Finally, the last paper titled *Governance specifics in cooperative banks. Or, why do managers in Italian cooperative banks 'survive' longer* investigates management turnover in Italian banks by means of a survival analysis method. The study tests whether management turnover differs according to different types of banking groups – for instance cooperative and commercial banks, and whether top managers in cooperative banks are more likely to stay

on longer in their managerial position. Additionally, results confirm that the juridical form of banks significantly relates to management turnover: cooperative banks show a superior survival probability in comparison to other banks. On the other hand, results show that in Italian banks, management turnover is less frequent for managers with a high level of education and with honorific titles. Top managers in cooperative banks tend to survive longer than top managers in commercial banks also when bank performance is below average.

What the three papers manage to show quite clearly is that different banks and banking groups behave differently and are governed differently. They pursue different goals (in Italian cooperative banks profit-making is essentially matched by social goals), different business strategies, they operate in different market segments (for example, in contrast to commercial banks, cooperative banks do not engage so much in the interbanking market); and they have different risk-taking attitudes and perceive risks differently. Here it shall suffice to say that the failure of single cooperative banks – particularly those that operate locally – can hardly be seen as a source of systemic failure, as in the case of commercial banks. It does not come as a surprise then that cooperative banks are supervised somewhat differently to commercial banks. Finally, different banking groups have reacted to the crisis differently: cooperative banks have been less exposed to the first wave of the crisis which developed internationally. Instead, they have suffered during the second (ongoing) wave of the crisis when problems emerged at the level of local economies.

A key concept that thus clearly emerges from the three papers is that of diversity in banking. It is a concept that the reader should bear in mind when reading the dissertation as it may help him or her to better follow the papers. It is important to recognize the organizational and institutional differences of different types of banks. In the past decades, too little attention has been paid to institutional diversity in banking at the level of policy-making and in scholarly research: contributions from both economic sociologists and institutional economists would be particularly valuable and useful to better address these issues and shed new light on them. Unless such differences are adequately accounted for, policy-makers and financial supervisors will not be able to provide the kind of regulation in which the "rules" will allow different banks to play the "game" fairly. Some participants might be disadvantaged or even excluded from fair competition, which would go against the principles of a sound market economy.

In conclusion, the present dissertation supports the idea that diversity should be given adequate attention in banking and economics as this would prevent the kind of thinking in mainstream economics which was one of the main reasons for the 2007-2008 financial crisis. This would in turn help to distinguish between the *quantity* and the *quality* of rules, and help to recognize that "better" rules rather than simply "new" ones are currently needed in the regulation of financial markets and banks. The research here is limited to the Italian market. It is nonetheless the belief of the author that its arguments might be equally valid for other countries in the European Union, something that he wishes to test in his future research.

References

Alexander, Kern, Dhumale, Rahul and Eatwell, John, 2005: *Global Governance of Financial Systems.* Oxford: Oxford University Press.

Angelini, Paolo and Cetorelli, Nicola, 2003: The Effects of Regulatory Reform on Competition in the Banking Industry. In: *Journal of Money, Credit and Banking, 35(5)*, 663-684.

Arner, Douglas W., 2007: *Financial Stability, Economic Growth, and the Role of Law.* Cambridge: Cambridge University Press.

Axelrod, Robert, 2006: *The Evolution of Cooperation.* New York: Basic Books.

Boeri, Tito, 2009: *La crisi non è uguale per tutti.* Milano: Rizzoli.

Cornforth, Chris J., 2004: The Governance of Cooperatives and Mutual Associations: A Paradox Perspective. In: *Annals of Public and Cooperative Economics, 75(1)*, 11-32.

Čihàk, Martin, Maechler Andrea, Schaeck Klaus and Stolz Stephanie, 2009: *Who Disciplines Bank Managers?*. IMF Working Paper WP/09/xx.

Dewatripont, Mathias and Tirole, Jean, 2003: Efficient Governance Structure: Implications for Banking Regulation. In: C. Mayer and X. Vives (eds), *Capital Markets and Financial Intermediation.* Cambridge: Cambridge University Press.

De Benedetto, Maria, Martelli, Mario and Rangone, Nicoletta, 2011: *La qualità delle regole.* Bologna: Il Mulino.

Eatwell, John and Taylor, Lance, 2000: *Global Finance at Risk: The Case for International Regulation.* New York: New Press.

Fonteyne, Wim, 2007: *Cooperative Banks in Europe: Policy Issues.* IMF Working Paper WP/07/159.

Gutierrez, Eva, 2008: *The Reform of Italian Cooperative Banks: Discussion of Proposals.* IMF Working Paper WP/08/84.

Rodrik, Dani, 2009: A Plan B for Global Finance. In: *The Economist,* March 12.

Stefancic, Mitja, 2010: Competitive Advantages and Challenges in the Italian Cooperative Credit System. In: *Studi Economici, 102* (2010/3), 89-106.

Stiglitz, Joseph E., 2008: *Social Democratic Principles: Towards a New Financial Architecture.* Brussels: FEPS.

Zazzaro, Alberto, 2004: Aspetti proprietari delle banche e attività economica: possiamo affidarci a Coase?" In: *Analisi giuridica dell'economia 1,* 11-30.

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