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# Law in Convention Theory: Regulation in Regularities

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## Abstract:

Law has been considered in the approach of economics and sociology of conventions (EC/SC) as a tool enabling the actors to consolidate the regularity they aim for in their coordination. A first part presents the specific perspective on law that EC/SC develops, renewing institutionalist approaches in economics and sociology. It underlines the distinction between legal rules and behaviors, and suggests a conception of law as a frame for collective actions. A second part analyzes the place of law in economics and sociology of conventions as it emerges in the first works of this approach, and evokes the conception of law as an investment in form. A third part considers court action as a possible break in the continuity of conventions, from a “regime of adjusted actions” to a “regime of dispute in justice”. The fourth part sheds light on the historical dynamics of law, using the example of labor law in a perspective of several “worlds of law”. The fifth part presents the critical character of recent research, in face of the neoliberal de-institutionalization.

## Key Words

Law, conventions, regulations, institution, legislation, coordination, judgement, litigation, state, intermediaries

## 1. Introduction

The approach of economics and sociology of conventions (EC/SC) has profoundly renewed the analysis of law within institutionalist approaches, considering it as a tool enabling the actors to consolidate the regularity they aim for in their coordination. As can be seen in the special issue of the *Revue économique*, EC/SC starts from the conceptual analysis of the convention defined by Lewis as a *regularity* in a coordinated collective action:

“A regularity, R, in the behavior of members of a population P, when they act in a recurrent situation, S, is a convention, if and only if, for each example of S, for the members of P:

Each conforms to R;

Each anticipates that all others will conform to R;

Each prefers to conform to R on the condition that others do so.

Since S is a problem of coordination, the general conformity to R results in a coordination equilibrium.” (Lewis 1969:42)

This theoretical conceptualization means that the convention is based on the intentional coordination of agents collectively aiming a common regularity, in contrast to the use of this term by Weber for whom the convention is close to a collective automatism escaping mostly to the conscience of the agents.

By proposing to grasp the convention as a *regularity* in the behavior of the members of a population, that overcomes a coordination situation, the approach of the economics and sociology of conventions (EC/SC) has opened a new way of understanding economic and social activities. Indeed, it implies considering the intentional activities of individuals aiming at repeating, through their coordination, an observable regularity. In doing so, contrary to a dominant orientation in sociology, this approach refuses to relate this regularity to the regulation of behaviors produced by normative systems – in which one must count notably law, but also morality, religion, etc. Conversely, in the face of the economic paradigm of an equilibrium or a “social contract” resulting from the confrontation of individual behaviors attributable to *homo oeconomicus*, these regularities indicate coordination practices between actors that can go as far as intentional cooperation but without being necessarily described in a preliminary document such as a contract. It means that “convention” in EC/SC, has not the same meaning than that of “convention” in jurisprudence which is synonymous to contract. So, in a certain context of action (or a certain group), the convention stabilizes expectations and reduces uncertainty about the behavior of the others without being reducible to a plan assigning each agent to a completely programmed action.

How can the place of law in convention theory be conceived, with regard to the priority given to *regularities* over regulations? What insights into law can be drawn from the research that accompanied the birth of the EC/SC movement in the 1980s?

Certainly, the law is presented here first as a corpus of rules called “legal”, because they have to do with “the Constitution, the codes, laws, decrees, etc.” (Jeammaud 1990: 127). But, by returning to the etymology of the terms “rule” or “norm”, legal rules are less a matter of

monitoring the conduct of individuals, than of the *model* by which individuals can orient and evaluate their actions and their situations.

Law manifests itself in many ways in the course of economic coordination, for example in the form of a contract setting out the terms of a transaction, or in the form of control by representatives of the public authority. It also forms the basis for court actions, which are themselves governed by procedural rules. Finally, it appears as the product of a legislative activity based on a deliberative practice that sometimes goes as far as the elaboration of categories determining new fields of social activity.

The result, for EC/SC, is that the priority is given to identifying conventions as regularities. Thus, law emerges in the analysis only in a second stage, by integrating it into the examination of the support points allowing the actors to coordinate themselves with each other in the same way as other objects such as tools, machines, products, etc. It is then included, unlike material objects, in the category of intellectual objects (*objets idéels*) by being attachable to what EC/SC pioneers envisage as "investments in forms" (Eymard-Duvernay and Thévenot 1983). The task of the economist or sociologist of conventions is then, in the first place, to identify the relevant norms and legal categories that manifest themselves in situations as economic and social regularities carried by a collective activity. It is then to consider the diffraction of the legal order in contact with other normative orders mobilized by the actors on a daily basis. This sometimes results in divergent conventions of interpretation of legal rules, that is to say, a plurality of "maxims of conduct" that the agents draw from them (Weber 1977), the confrontation of which can lead to court action and a lawsuit.

Thus, the approach of EC/SC to law also implies considering law as much as a corpus of rules, as a procedural device – itself subject to the rules of judicial procedure – organizing the confrontation of contradictory legal qualifications of the convention. In this sense, law is the lever likely to shift the convention from a *regime of adjusted actions* (*action en justesse*) based on the adjustment of individual activities without questioning the convention since the coordination realizes the regularity, to a *regime of dispute in justice* symbolized by the lawsuit organizing the confrontation of points of view based on the identification of a failure of the coordination that leads agents to identify differences in the meaning of the convention. Such a process manifests itself through the use of specialists (lawyers, consultants), corporate legal services (intervening in the framework of financial services, accounting, human resources) or even institutions representing the personnel (works councils, trade unions). It leads to consider the mobilization of legal categories in the *qualification* of the facts required for court action, when the ordinary functioning of conventions is called into question (Bessy et al. 2011; Didry 2015).

The objective of this chapter is to review the various ways in which law has been considered in the development of convention theory, by examining the different research programs to which the legal object has given rise in this field. A first part presents the specific perspective on law that EC/SC develops, renewing institutionalist approaches in economics. A second part analyzes the place of law in conventions as it emerges in the first works of this approach. A third part considers court action as a possible break in the continuity of conventions. The fourth part

sheds light on the historical dynamics of law, using the example of labor law. The fifth part presents the critical character of recent research. This historical opening on law in the EC/SC approach was notably evoked in a special issue (Diaz Bone et al. 2015) that will be extended here.

## *2. A specific perspective on law*

EC/SC has introduced a particular conception of law as a tool or an “investment in forms” that questions its uses in the convention. This specificity leads to the consideration of questions of justice raised by the agents, which justifies collaborations with jurists and sociologists of law.

### *2.1. A renewal of institutionalism in economics*

Orthodox economic theory tends to relate economic coordination to the model of market equilibrium, resulting from variations in the price of traded goods. In the Hayekian perspective, the price appears to be a synthesis of information on the production of goods, making it possible to guide economic coordination towards an optimal level. Conversely, for Friedrich Hayek (1967), state initiatives in the area of money and credit or through the development of legislation introduce disturbances into the economic information summarized by the prices, in particular by pushing producers towards forms and levels of production that are out of step with consumer demand. In this sense, public activities cause fluctuation, even crisis, for the economy.

Faced with this normative reductionism of orthodox economics aiming at the realization of an optimum fixed by theory, EC/SC intends to start from an empirical investigation of economic activities. This leads to uncovering of the plurality of forms taken by coordination between individuals, by making coordination (by price on a homogeneous good) a particular case in the set of possible conventions. However at the same time a critique emerges in EC/SC concerning the conditions of possibility of economic coordination based solely on the knowledge of prices, by underlining the importance of technical and normative devices so that interactions can be repeated. EC/SC's perspective on law is an extension of this interest in the plurality of forms taken by conventions, as well as in the place that rules take as a basis for adjustment between individuals involved in a convention (Chaserant and Thévenon 2000).

Unlike what is proposed by regulation theory (Boyer 2006), law is not conceived here as the result of macroeconomic determinants. Indeed, this theory has been largely based on the identification of a monopolistic mode of regulation succeeding a competitive regulation. Questioning the relevance of a liberal theory of market equilibrium to analyze economic dynamics, this monopolistic regulation is seen as the result of a negotiation between the representatives (unions, employers) of social groups. The institutional compromises feed into protective legislation that sets the conditions of exchange, labor contracts and product prices on a general scale within the framework of mass production and consumption. It should be noted, however, that this macro-structural approach has evolved by considering sectoral regulations or even intermediate levels that make it possible to apprehend the transformations

of legal categories and their economic uses according to a historical perspective specific to the institutionalist tradition (Commons 1934).

Without abandoning any macro-social approach, EC/SC aims more at the analysis of coordination with diverse, contingent, variable and evolving forms, in which legal forms constitute references without necessarily presenting themselves immediately as explicit motives for the agents engaged in the coordination. In other words, for EC/SC, law as a normative production of state organizations such as the parliament for legislation, the courts for justice, is inscribed in the course of interactions. It is inscribed, for the participants in the conventions, in a set of reference points for their activity, such as the uses or the norms and the technical devices.

It is important for the EC/SC's research programs to link "practice", "coordination" and "convention" according to a situated rationality, making it possible, for example, to denaturalize the notions of state and firm by seeing them as sets of coordinated practices. It leads to the refusal to assimilate law to a program of coordination in the activity of production. EC/SC shares this point with the American neo-institutional approach distinguishing between "legal order" and "private order" (Williamson 1985), but with reservations. Far from reducing productive activities to an organization defined by a discipline based on the prohibition of certain behaviors, such as *guile*, EC/SC aims to shed light on the reality of actors' practices in the development and evolution of conventions. In this *situated* dynamic of conventions, the legal rule is insufficient to stabilize interactions but is first and foremost a reminder when agents identify a failure in the convention, with the constant risk of a gap between the generality of legal rules and the specificity of conventions. Indeed, overly legalistic behavior risks rigidifying relations, depriving the actors of the adjustment resources required by the situation, according to a form of pragmatism.

It is also important to distinguish this perspective from that developed by the *Law and Economics* school (Posner 1973), which is based on a reduction of law to a set of rules that determine costs and premiums for the actors in a process of optimizing their own interests. For the *Law and Economics* approach, law is only a factor influencing prices and costs, reducing economic analyses to the sole consideration of prices as an optimal synthesis of information on productive coordination, in accordance with a Hayekian epistemology. In the EC/SC perspective, conventions are conceived as the intentional coordination of individual activities, without these being reduced to a common standard such as money or utility. These individual activities are based on various devices which themselves are only reduced to a monetary standard on the occasion of an accounting inventory or the liquidation of a company.

The interest in law in EC/SC starts from the existence of a normative corpus that the actors are likely to appropriate in the course of a repeated coordination. Meanwhile, it does not lead to assimilating legal rules to *institutions* defining profit opportunities for *organizations* in the manner of Douglass North (1990). Indeed, law is presented both as the basis for contracts, agreements and compromises between actors and as the material from which organizations are constituted, such as companies, with corporate law in particular, or trade unions, with labor law. The task of the EC/SC is then to analyze the processes by which, in a given configuration,

legal norms and categories adjust – or do not adjust – to other normative orders (professional, moral, religious, political, etc.) mobilized by the actors on a daily basis.

From the perspective of EC/SC, the concept of convention corresponds first of all to a regularity that can be observed in the coordination of individual activities that is repeated in the absence of objections from the participants. Thus, the presence of law in this coordination does not necessarily give rise to an explicit formulation. Law must be elucidated by the actors, by considering the translation operation by which the actors appropriate the rules of law in the form of "maxims of conduct" (Weber 1977). In this elucidation of the law taken as a framework for the activity of the participants in the convention, it is important to distinguish the *convention* (as a coordination of individual activities) from the *contract* (as an interpersonal agreement). According to EC/SC, the contract – as a legal act – contributes to organizing the relations between the parties, for example between a worker and an employer, and to reducing them to reciprocal *obligations* established by the contractual stipulations. But it is part of the participation of the contracting parties in a larger coordination in which, for example, workers and employers interact – the contract of employment fixing reciprocal commitments that they will be able to mobilize in the course of the convention –, but also the workers among themselves. The contract as a juridical act does not, therefore, boil down here to a complete program of actions to be performed by the contracting parties; it establishes the "law of the parties". The contractual *incompleteness* – in contrast to the completeness attributed to it by economic orthodoxy – (Reynaud 1988) is due to the "open texture" of the obligations, the value of which must be related to the conventions in which the contract is embedded. This is the position that Christian Bessy adopted on the contractualization of the employment relationship, by envisaging the extension of the contractual order as an increasing formalization of employees' activities, which are reduced to objectives fixed by the employer (Bessy 2007: 42-48).

## 2.2 A multidisciplinary approach integrating lawyers

The approach to law in EC/SC leads to a loosening of the relationship between rule and conduct, by moving away from the current vision of law as an "order" privileging the imperative character of the rule assimilated to a constraint on individual conduct through the threat of a sanction. Indeed, in situations, law is more or less present in the minds of agents who aim primarily at participating in a collective action that conforms to expectations – for example, the realization of a product or a service –, that is, by being assimilated to a regularity. This suggests an affinity between EC/SC's approach to law and a Weberian perspective on law (Diaz-Bone et al 2015), distinguishing a theoretical analysis of law by professors from an empirical point of view on what happens to law as a more or less explicit motive in the minds of actors engaged in social life. The presence of the law is thus, in certain respects, a *reference*, an intellectual model (*modèle idéal*), through its inscription in the situation (with the signature of a contract, the presence of a safety instruction, etc.). The law is then likely to give rise to a questioning of the normal character of the course taken by the situation – of what it should have been – with

regard to the reference that the legal rule constitutes for the actors and their representatives, notably in the framework of a court action (Jeamaud 1990).

It is a real research program on law that is undertaken in the perspective of EC/SC, both in an investigation of the references to law in the usual situations observed, and by questioning the legal scope of these references in the context of a lawsuit initiated by the actors. The issue here is not to elucidate the social sources of law, in a classical perspective of sociology of law inspired by Georges Gurvitch's theory of "social law" (1932). It is to describe the relevant law in the collective action, starting from the doctrinal scope of the legal rule and relating it to the "maxims of action" that the actors draw from it.

### *3. The law in conventions, a question of actions' adjustment*

While EC/SC's thinking on law began with the question of labor legislation and social policies (Thévenot 2012), it became almost concomitantly interested in the analysis of product quality regulation (Eymard-Duvernay 1989). This symmetry of analysis is due to the development of the notion of "investment in form" (Eymard-Duvernay and Thévenot 1983) and the interest for "intermediaries" who articulate different logics of action.

#### *3.1. Labor as a privileged field for EC/SC*

EC/SC's reflection on labor is mainly based on a criticism of labor law and of the role of employers and unions in its negotiation. It aims to overcome the tension between an analysis of regulation in the sociology of industrial relations and that of inter-individual matching in a market framework, on the side of labor economics. It is a form of breaking with these two approaches that appears through the uncovering of a plurality of modes of adjustment between agents emerging under the term "work" (Bessy and Eymard-Duvernay 1995).

Work is not a general activity whose conditions are regulated exclusively by labor law, setting a minimum wage, a maximum duration, safety instructions, health monitoring, etc. It is an eminently collective activity, in which what prevails is the realization of a product or service (Salais 1989) and in which a process of permanent adjustment between the actors emerges. This led, during the 1980s, to an initial reflection on work based on approaches from different disciplinary horizons (industrial relations, management, labor and training economics). The need to move away from a general vision of work was aroused, by taking the categories of labor law as an indicator of the realities of this social practice. Thus, the examination of bargaining practices in the workplace is not limited to collective bargaining between unions and employers, but implies returning to the activities of workers in the course of work, informed by legal frameworks, accounting devices, line work job sheets, etc. (Salais and Thévenot 1986: 3). An approach to work in terms of EC/SC is developing, making it possible to account for the various modes of adjustment between workers that diverse analyses identify, both on product quality (Eymard-Duvernay 1989) and on work itself (Salais 1989).

This close observation of work makes it possible to go beyond the polarization between an approach of social confrontations at the heart of industrial relations and a critique of the

rigidities affecting the labor market. It leads to the identification of a plurality of conventions, indicating different types of coordination and opening up the dynamic analysis of a set of "possible worlds of production" defined by Michael Storper and Robert Salais (1997). To do this, these researchers rely in particular on accounting indicators that make it possible to identify productive specificities that are congruent with certain types of convention. From this perspective, law manifests itself through the existence of legal frameworks such as, in particular, the employment contract or collective agreements, both in their possible normative effects and as the circumscription of relatively stable productive units (branch, firm).

Thus, the contract binding a worker to an employer does not simply consist in a delivery of work by the employee under the authority of the employer. It also appears to be the necessary condition for the worker's access to a work community based on the dimensions of cooperation and coordination that work as a collective activity oriented towards the realization of a product implies. Thus, the jurisprudence of the French Court of Cassation concerning the identification of the employment contract has been based on the criterion of the legal subordination of the employee to the employer. However, its evolution shows that this does not mean that the work is reduced to the employer's prescriptions, by assimilating this legal subordination to the employee's belonging to a service organized by the employer.

### *3.2. Law as an investment in form*

Given the situated nature of legal devices in economic activities, it is enlightening to link the law to the notion of "investment in form" developed by François Eymard-Duvernay and Laurent Thévenot (1983) in an analysis that first focused on industrial work. Indeed, "investments in form" include the elaboration of legal or organizational rules, as well as the conception of cognitive artifacts (categorizations, statistical coding) and the production of material equipment, to which the notion of investment is traditionally attached. The central idea is that these investments in form, characterized by different degrees of objectification, stability and generality, contribute to a regularization of collective activity, by directing individual behaviors towards a common goal, the realization of a product. They define the range of possible actions in the work, while orienting towards a search for improvement through a deepening of "organizational learning" (Favereau 1989). The reference to the notion of "form" refers to the idea of the capacity of these "objects" to be placed in equivalence, to enter into a relationship with other objects according to the ordering of resources constituting a "production world" or a "nature". Thus, the hypothesis of a plurality of ways of "making equivalence", referring in particular to the "common higher principles" in the model of the *Economies of Worth* (Boltanski and Thévenot 2006), suggests distinguishing different convention-based forms serving as support for the argumentation mobilized in ordinary disagreements in order to settle them. It is true that legal frameworks (by their generality) sometimes appear in EC/SC as being rather congruent with convention-based forms close to industrial and merchant worlds, based on standardized forms (Storper and Salais 1997). But they remain no less operative in more situated worlds of production, such as interpersonal and immaterial worlds (in Storper and Salais' terminology).

Given the different types of repeated coordination that can be observed in the workplace, the legal rules thus take on different connotations depending on the contexts in which they are used. Indeed, the rules only become relevant in the activity if they take on a significance linked, for the actors, to specific circumstances such as the signing of a contract, a managerial decision that is difficult for the employee to accept, or the existence of a danger noted in the document provided for this purpose, or established by the occurrence of an accident at work. It is likely that the rules will be invoked to justify the multiple adjustments between agents (workers among themselves, with representatives of management, of the administration, etc.) that their engagement in work as a collective activity requires. However, numerous empirical studies oriented in this direction (Bessy 1993; Chateauraynaud 1991; Dodier 1989; Reynaud 1992) show that it is not enough to elaborate legislations, whether it concerns working hours, dismissals, recruitment, salaries or any other area, for it to be applied in the specific context of a firm. This leads to renewed reflection on the effectiveness of the law, or even its efficiency, that takes in account the constant evaluations produced by agents in their work, without sometimes finding it necessary to mobilize a legal rule (Chatel et al. 2005).

### *3.3. Legal intermediaries as actors in the operationalization of legal rules*

Empirically, this orientation has led to the study of "*intermediaries of the law*" and, in the first place, to the study of state agents such as labor inspectors. The pioneering work is here the paper by Nicolas Dodier (1989) on the imperative of safety in the workplace, based on the analysis of negotiations between labor inspectors, company managers and staff representatives. The result, on the part of the inspectors, is an activity of "accommodation" aimed at making observation of an infraction or non-compliance with the rules as an element of negotiation in the search for improvement with a view to preventing the occurrence of new accidents. They are in a position of an "intermediary" aiming at the diffusion of a legal rule, comparable to that of salespersons promoting a new product or technical process (Bessy et al. 2011).

The function of these "intermediaries" is to "operationalize" the law, by making it into a mechanism designed to control possible excesses that could undermine the durability of the convention. This leads to reconsider the scope of measures that are often assimilated to public regulation as the result of state intervention intended to prevent certain practices, through the binding action of a body of civil servants such as labor inspectors. The administrative authorization of dismissals for economic reasons, which prevailed in France from 1975 to 1986, provides a good illustration. Indeed, studies by EC/SC have shown that this legislation – far from limiting employers' recourse to economic dismissals – could facilitate them, through its congruence with the objectification of jobs and qualifications in certain forms of productive coordination close to the industrial world (Bessy 1993). In a similar way, the inspectors' control of the criteria for establishing an order of dismissals tends to limit the risks of labor conflict linked to collective dismissal, by reducing its execution to the characteristics of the individuals in terms of diplomas, seniority and family responsibilities.

### *3.4. Labor market intermediaries as actors of access to conventions*

EC/SC's original questioning on labor law was part of a more general reflection on public policies in the field of employment, starting from a conception of unemployment as the expression of an imbalance between supply and demand in a labor market. But, far from limiting itself to an econometric evaluation of these policies, taking for granted the reduction of labor to a commodity, EC/SC's approaches to this question have aimed to analyze the scope of the legal mechanisms produced by these policies in the diversity of labor conventions and production worlds. This approach can be seen, for example, in the creation of hiring incentives designed to promote access to employment for "target" populations, in the form of social contribution reductions (Aucouturier 1994). In this framework, the pathway to employment itself refers to the forms taken by labor conventions, arriving at specific ways of communicating the jobs available and evaluating the workers who are candidates for them.

In a complementary manner, the search for employees by an employer reveals less a market transaction than the matching of vacant positions with available workers. This search takes various forms, ranging from the publication of job advertisements, or the dissemination of information to public employment agencies, to an informal communication similar to word-of-mouth. The evaluation of candidates can be done through the diploma, through a "test" such as a "probationary period", or through a passage on a fixed-term or temporary contract before the opening of a permanent position. It thus takes multiple forms, reflecting the diversity of intermediaries in the labor market (Eymard-Duvernay and Marchal 1997), in relation to the jobs to be filled and the labor conventions in which they are situated. This plurality of intermediations contributes also to a diversity of modes of discrimination in employment, as discrimination cannot be reduced to its legal definition alone (Ghiradello 2019).

## *4. The conventions in the test of the court action*

Beyond the references to law in ordinary situations, the analysis focused on the way in which the law is mobilized in legal actions and therefore the constitution of cases in which the experts also mobilize their capacities of perception. The approach thus makes it possible to study the modalities of different forms of judgment and their articulation. It implies studying the legal professionals, through their training and organization.

### *4.1. From conventions to "cases": the law as a means of court action*

Through its attention to the coordination between individual activities, EC/SC leads to renounce a common conception of social groups as pre-existing entities by envisaging collective mobilization as the coordination of protest activities that can emerge in the very course of the production process. Thus, one of the contributions of EC/SC is to move away from the very established vision, in the field of industrial relations, of a conflict between the two social groups (or classes in a Marxist-inspired conception) that constitute employers and employees, seen as a prerequisite to any productive activity. This conflict between social forces (commonly seen as the crucible of labor law through large-scale movements such as strikes) is then related to a prior activity of identification and qualification of failures that affect specific conventions,

bringing to light characterized forms of abnormality that call into question the continuity of work. The process here is similar to that of *denunciation* identified by Luc Boltanski (1984) from a corpus of letters to the newspaper *Le Monde*. Boltanski analyses the conditions of admissibility of these denunciations by the journalists, by identifying a form of coherence between the facts and the alleged arguments, which suggests the existence of great argumentative registers in the expression of a *cause* likely to mobilize public opinion.

This orientation thus implies an attention to individuals, both through their activity and through the way they apprehend it. The challenge is then to grasp the shift from the agents' commitment to the convention to a questioning of its course. The law frequently constitutes the lever of this questioning by the agents of the injustice that manifests itself in the deviation from a "normality", by engaging the passage from a convention-based regime of action to a regime of *dispute in justice* (Boltanski and Thévenot 2006). Certainly, the judicial decision aimed at closing disputes, based on a narrowly circumscribed set of rules, differs from ordinary judgments that participate in economic conventions and whose closure is never final (Thévenot 1992). For the people involved in the action, the entities with which they are dealing are only very rarely in a general form capable of being understood in the legal universe. But the mobilization of the law is at the center of *criticism*, as an activity of judgment making explicit the *unacceptability of reality* for the actors by confronting contradictory representations of conventions. It constitutes the matter of *cases* that overturn the conventions (Chateauraynaud 1991), whether they are economic conventions, or even sometimes state conventions. It contributes to expressing the disorder of the situation and by attaching it to a "city", a "world", or even a "register" of argumentation in the search for a justification. The cases thus correspond to a setting in "causes" according to argumentative registers evoking the "cities" identified by Boltanski and Thévenot (2006), or the "possible worlds of production" for Storper and Salais (1997).

#### *4.2. The mobilization of the law as a lever for collective mobilization: the cause of employment*

In the field of economic dismissals, the abolition of administrative authorization in France from the 1980s onwards removes the intermediation work carried out by the labor inspectors, leading to a legal activity of interpretation and appropriation of new legislation by the employees' representatives. The mobilization of this law thus opens the possibility for employees and their representatives to challenge the dismissal procedure before the courts. The increase in the number of court decisions annulling dismissal procedures throughout the 1990s accompanied and encouraged the collective mobilization of employees and their representatives (Didry and Tessier 1996). This process has two dimensions. At the level of economic activities, in a first dimension, the cancellation of collective dismissal plays an immediate role in the evolution of practices and conventions. At the same time, in a second dimension, it corresponds to a new way of understanding economic dismissals at a political level, by conceiving employment as a form of common good in the face of organizational adaptations oriented towards the financial valuation of the company's assets.

Against a vision, common in the trade union world, of court action as an ultimate recourse in a situation dominated by a "balance of power" unfavorable to the employees, this juridical dynamic sheds light on a legal and political work of mobilizing public opinion around a "cause". The economic scope of the restructurings is submitted to discussion, through the criticism of their productive rationality. This judicial dynamic implies also a re-reading of unemployment that takes place, by considering unemployment from the point of view of "unemployment conventions" in the firm (Salais 1989) that the restructuring project carried by the employer calls into question.

Legal decisions punctuate the social movements that are triggered by restructuring, by "questioning" their inevitability, sometimes by triggering them and, more often, by reviving them through the "second breath" that comes from the feeling of having won a victory in court or, conversely, by ending a movement. They direct social movements towards symbolic or spectacular actions, aiming at raising public awareness – beyond the not very effective strike against a redundancy project.

#### *4.3. From cases to conventions: things in court*

In the context of lawsuits over professional fault (Chateauraynaud 1991), the qualification – or even the quality (of a person, that of the employee, is at stake and it calls into question his or her ability to participate in a productive activity. The employee's defense responds to her employer's questioning, before magistrates within French labor tribunals (*conseils de prud'hommes*). These lawsuits give rise to debates marked by the examination of technical and material elements. Sometimes, these exchanges are extended by a visit of the magistrates to the workplace, in order to grasp *in concreto* the responsibility of the employee. The "case" thus remains attached to the conditions of the professional activity, by making it impossible to form a legal argument purified of its factual elements. It leads to summon the material dimensions of work before the judges, by a displacement of the judges on the workplaces.

The approach initiated by Chateauraynaud concerning to professional fault is extended to the field of counterfeiting cases, by moving the question of qualification to participate in a convention-based universe onto the field of things (Bessy and Chateauraynaud 1995). Faced with the question of the authentication of a thing, the judicial decisions designate a dispute on the broad outlines of the cases. However, they also reveal that the exercise of one's senses by an "expert" is indispensable for deciding the disputes. Thus, the expertise mobilized before the justice suggests a sociology of the perception, by shifting the question of the authenticity from the realm of the auction rooms to the current perception of the things.

#### *4.4. The analysis of legal professions*

Legal activity in itself has been studied, through the form and diversity of legal judgments – for example in the judicial and penal administrations (Henneguëlle 2017) – by analyzing the skills, training and careers of legal professionals. The study of the legal profession (Bessy 2015b; Bessis and Chaserant 2019) makes it possible to apprehend the "quality" of law or justice (or of the rule of law). Indeed, it leads to the identification of different conventions of quality of work for lawyers, in order to clarify the scope of the regulations governing this profession.

Finally, it reveals the decisive role they play in the making of law both at the national level, to the detriment of the role of the legislator, and at the international level.

Beyond traditional legal practices centered on litigation, the analyze of different legal professions (lawyers and Intellectual Property consultants, see Bessy 2022, notaries, auctioneers) shows a shift towards consulting activities within increasingly capital-intensive structures that reinforces the segmentation of markets for legal services. However, this consulting activity, which is more lucrative than representing clients in a lawsuit, requires economic expertise, which legal professionals who are also surrounded by renowned economists must be trained in. The training of these professionals is thus undergoing a significant evolution, with an opening up to economics that increasingly requires a dual curriculum that increases training costs. This attention to the training of legal professionals remains to be studied in depth, to see in what way this training distances them from the law in its classic form in a state governed by the rule of law. Indeed, it is likely that this training reinforces the need for these lawyers to amortize its increasing cost by turning to the more remunerative market segments that constitute corporate demands. This suggests that EC/SC should grasp the absorption of the practice and production of law into an economic rationality oriented towards maximizing the profitability of firms.

## *5. Historical dynamics of law and conventions*

Throughout history, the transformation of state intervention has led to changes in the modes of production and mobilization of law. Starting from the "state conventions" distinguished by Storper and Salais (1997), we can highlight the construction of a welfare state and its questioning from the 1980s with the international circulation of legal standards marking a new hegemony of commercial law.

### *5.1. State production of law in the emergence of a "Keynesian convention of the state"*

This interest in the legal rule captured in conventions goes hand in hand with an openness to the mobilization of law, in the regular activities within which it is inscribed, as a point of support to bring what happens in the convention, to what should be in consideration of the rule. It also leads to this shift into a regime of legal dispute that the mobilization of the law is likely to operate, from the regime of adjusted actions in convention. Thus, starting from the field of labor agreements, EC/SC's first research considered the way in which legal rules take on their full scope to lead to legal action.

It is therefore appropriate here not to reduce the "case" dimension to a simple legal question posed before a court, by broadening the perspective to a more conflictual dynamic carried by collective mobilizations. The strike marks a work stoppage, accompanying a reflection of the actors on the ordinary practices, which are lodged in the current course of work. It opens the way to the search for "investments in form" intended to organize the return to work under conditions suitable for the actors, for example through the signing of a collective agreement (Didry 2002). It can sometimes lead to a reform of the legal frameworks themselves, through

the political capacity to influence parliamentary activities, as in the case of the spread of strikes at the time of the French Popular Front in 1936 (Didry and Salais 1995).

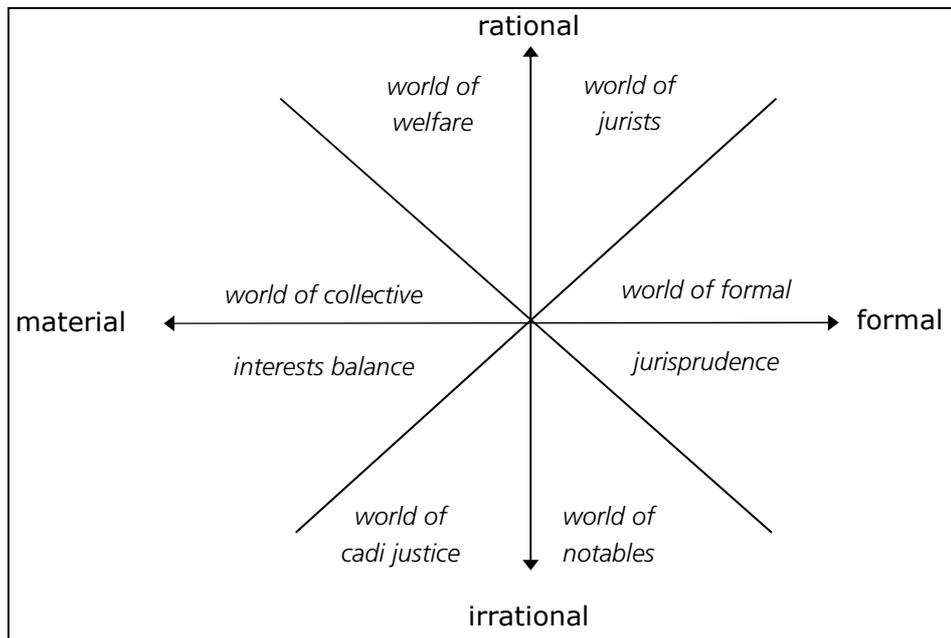
This process in itself presupposes the prior existence of a legal framework defining collective agreement, which implies elucidating the conditions of a legislative and judicial development from the emergence of this new legal category at the beginning of the twentieth-century in France. A similar process can be found also in the case of unemployment. Before becoming a legal status entitling people to compensation, unemployment emerged in France in the 1890s from debates fueled by surveys conducted by public bodies such as the *Office du Travail*. It took "shape" as a statistical category, accompanying a conversion of the view of work itself through the importance it took on the occupation of a position in a workplace (*établissement*). It thus testifies to an evolution in the normative production of the state, around the goal of "full employment" which characterizes the "Keynesian convention of the state" identified by Salais et al. (1999 [1986]). In other words, Keynesian policy is not simply a matter of "state intervention" alternating with a minimal form of liberal state. It is based on a *convention of the state* whose progressive emergence should be analyzed, starting with the "detour through history". The analyze of this emerging convention has been extended to Great Britain (Salais and Whiteside 1997) and Germany (Zimmermann et al. 1999), identifying specific paths and cross-influences for each country.

### 5.2 "Law worlds" and state conventions

State production of law corresponds to a "reform" activity aimed at modifying existing rules, as shown by the case of labor law analyzed by Didry (2002, 2016) for France. It emerges from debates initiated by statistical and monographic surveys, which bring together social actors and jurists, before the parliamentary discussion of a bill. It implies a confrontation with existing law, by criticizing the justification of legal frameworks inherited from an initial legislative work and tested in the jurisprudence. Thus, the elaboration of a labor code around the institution of the contract of employment (*contrat de travail*) takes place in France from a critique of the jobs lease (*louage d'ouvrage*) inherited from the Civil Code (Didry 2016). It accompanies the institution of labor, in parallel with the identification of unemployment, by contributing to circumscribing a domain of activities qualified as *work/labor* (*travail* in French) and thus, to determining the field of labor conventions (Salais 1989).

Heuristically, the elucidation of this legislative activity suggests the existence of possible worlds of law that are revealed in debates oriented towards the critique of a rational formal law (Weber 1978). It can be conceived from the general grammar of the Civil Code inherited from the French Revolution, as limiting the rational character of law to fields of social activity circumscribed by specific codes (commerce, agriculture, mining, labor) (Didry 2002). These possible worlds could be presented in a in a two-dimensional plane, where a first axis is based on the tension between a rational orientation (aiming at the defense of a unified law), and a an "irrational" orientation aiming at the situated resolution of current disputes of actors. Another tension between a "formal" orientation (aiming at judicial decisions resulting from legal proceedings), and a "material" orientation (aiming at establishing moral norms, emerging in society such as Sunday rest or the creation of pensions).

Graphic: Worlds of law



(Didry 2002:39)

On this basis, six possible worlds of law emerge. (1) The world of jurists corresponds to the concern to maintain a law centered on fundamental principles. (2) The world of formal jurisprudence is based on considering the court decisions for interpreting the law. (3) The world of the justice of notables is based on court decisions justified by precedents (Common Law). (4) The world of *cadi* justice consists of arbitration by respected man (*cadi* in Muslim countries). (5) The world of the balance of social interests corresponds to a form of institutionalized "social dialogue". (6) the world of welfare refers to the aim of public policies oriented towards an adjustment of the macro-economic situation, for example with a view to full employment (Didry 2002).

These possible worlds of law can be thought of, as pointing to possible paths in the long-term dynamics of *state conventions* (Storper and Salais 1997). Thus, the convention of the *situated state* indicates a public activity in situation, which is manifested by the role of political actors in economic conventions (as arbitrators, spokesmen in public arenas etc.). Thus, it corresponds in part to the *worlds of notables' law* and *cadi justice* at the heart of early twentieth-century legal production. The *world of the balance of interests* reflects a strong influence of collective actors, unions and companies. It partly overlaps with *the world of welfare policy*, which opens up to an *external state convention* – the Keynesian state convention (Salais et al. 1999 [1986]) – guided by a policy of full employment in the context of an intensification and concentration of economic activity. In contrast, the *legal world of the jurists* indicates a form of conservatism close to Hayekian liberalism, aiming to limit legislative production, and is closer to *the convention of the absent state*.

### 5.3 Globalization of trade and international circulation of legal standards

The state conventions considered from the worlds of production (Storper and Salais 1997) provide a historical reading grid that makes it possible to grasp the most contemporary developments. A cycle is sketched out from the convention of the *situated state* at the beginning of the 20th century, to the convention of the *external state* (which can be assimilated to the Keynesian convention of the state) and after to the convention of the *absent state*, which emerges from current reforms that tend to call into question the categories of labor law. This cycle suggests going beyond the framework of nation-states, following the cross-country paths between France, Great Britain and Germany, which lead to relatively similar situations in these countries in the post-war period (Salais and Whiteside 1997; Zimmermann et al. 1999). This indicates more broadly the existence of an international dynamic around labor law, in the context of the first globalization initiated in the second nineteenth century. This dynamic is manifested by the creation of an International Association for the Legal Protection of Workers in 1900, a foreshadowing of the creation of the International Labor Organization (ILO) in 1919. Conversely, the fading of the "spirit of Philadelphia" that presided over the restoration of the ILO at the end of the Second World War (Supiot 2010) paved the way for a World Trade Organization marking a new hegemony of commercial law relayed by large transnational law firms.

This evolution is well highlighted by Pistor (2019) who shows the decisive role played by *global lawyers* in the legal transformation of a simple asset (land, knowledge, etc.) into capital that can be valued on an international scale, even going so far as to call into question state sovereignty. However, if this overarching posture on economic evolutions proves to be heuristic for considering the dynamics of current globalization, it does not consider the reflexivity of the legal intermediaries who contribute to this dynamic by adjusting their activities to the local, national and supranational contexts. To address this difficulty, the analysis of legal intermediaries from the perspective of EC/SC shows empirically how their activities contribute to an extension of markets for legal services on an international scale (Bessy et al. 2011). The interactions between specialized lawyers, intellectual property attorneys and patent office agents make it possible to grasp the emergence of a legal market in this field (Bessy 2022).

More generally, the intensification of contractualization practices indicates how the use of law as a tool contributing to the retreat of collective frameworks in economic relations: firms, industrial sectors or, again, public administrations. One may wonder, moreover, whether there is not an effect of the performativity of the economic theory of contracts, the extreme case being self-executing contracts that would do without any regulatory institution. This self-regulatory perspective is experiencing a revival today with the developments of artificial intelligence (AI) in predictive justice and contractual engineering, in the sense of the use of algorithms in legal judgments substituting for human reasoning (Pistor 2019).

Numerous studies have shown the limits of this approach, highlighting in particular the weakening of judgment operations and the creation of a *low-cost* law that can lead to the reinforcement of injustices. Simon Deakin and Christopher Markou (2020) warn about the opacity of the operations resulting from machine learning, which are not made explicit (*deep*

*learning*), and dismiss the reflexivity of jurists essential in the rule of law. This predictive justice also proves to be particularly harmful to economic conventions, as it is based on the average of past practices, which it tends to fix rigidly, without being able to cope with the uncertainty of constantly changing coordination.

## *6. The economic and social criticism of recent EC/SC research*

Recent developments in EC/SC seek to analyze the consequences of an increasingly marked neoliberal orientation, underpinned by a contractual philosophy. The questioning of the contractualization of economic relations, which began in the early 2000s, continued with a reflection on "property rights" and forms of self-regulation leading to the privatization of the public.

### *6.1. The capabilities approach, a renewal of the convention-based approach?*

The "capability approach" developed by Amartya Sen (1999) marks a new stage in EC/SC research on legal arrangements. Indeed, this approach invites us to re-evaluate the functioning of conventions insofar as its continuity is sometimes due less to a real commitment on the part of the agents than to their incapacity to question it. The discrimination suffered by women, or even minorities, is due to this sort of naturalization that accompanies conventions that function as long as they are not questioned or criticized (Ghiradello 2019). Conversely, it leads to seeing the law not simply as a reference point for action, or even as a guarantee for the future that stabilizes the expectations of the actors, but as the basis for the freedom of the actor, both in his participation in the functioning of conventions and in their questioning. Thus, the capabilities approach developed by Sen has made it possible to question the contributions of European policies to the development of people and territories. It has also revealed the consequences of a neo-liberal orientation that is becoming increasingly marked in European institutions, giving priority to the competitiveness of companies over social rights. In this perspective, reforms are limited to the reduction of guarantees offered to workers, aiming to achieve indicators that are unrelated to economic and social needs (Salais 2010).

This capacity of individuals as a capability for choice, self-fulfillment and self-esteem, and capacity for achievement does not only correspond to a form of social recognition of individuality, locking the individual in on himself (De Munck 2006). It also supposes, as a capability for collective choice, a dimension of participation in the evolution of conventions and intervention on the disorders that can affect them. Institutional arrangements thus play a crucial role in providing individuals with a "capability", particularly for collective choice. In this perspective, the critique of liberalism goes beyond the reduction of the margins of the social state. The review of Thatcher's policies shows how the closure of public childcare services, in favor of the monetization of family allowances, affects women's capacity to participate in the workforce. At the same time, a review of social dialogue practices in the training policies of certain companies reveals approaches that resemble "managerial" investments oriented towards employee development, drawing the features of a "enabling" organization

(Zimmermann 2014). The firm is then considered as a set of convention-based practices giving rise to multiple learning processes.

### *6.2. The firm and economic theory: between corporate governance, co-determination and the institution of the commons*

This more endogenous conception of law is a strong point of EC/SC in the face of all the economic approaches that adopt either a purely exogenous conception of the legal rule, imposed from outside, or a purely endogenous one, as the result of a process of contractualization. It evokes the opposition mentioned by Olivier Favereau (1989) between the rule-constraint and the rule-contract, which is present in the neo-classical conception of the rule. In both cases, the rule is conceived in a way that is external to the action

A good illustration of the rule-contract is given by Milton Friedman (1970), who sees shareholders' rights over the firm as the justification for their monopolization of its results. For Favereau (2021), the title of this 1970 article – "the social responsibility of the corporation is to increase its profits" – is a perfect provocative illustration of the convention of the "absent state". Friedman's aim was to delegitimize attempts to make the firm bear a social function and to affirm its private nature. The neoclassical economist suggested an underlying contractualization mechanism between the shareholders and the managers of the firm, according to an "agency" model in which the former would be in the position of "principal" and the latter in that of "agent" (principal/agent).

The criticism of this conception of the firm as *corporate governance* is based on the observation that the democratization and capacity for innovation of the firm resulting from its implementation are undermined. For (Favereau 2021), the legal language of property is not adapted to thinking about the firm and the corporation. It follows that, since it cannot be appropriated, the corporation (or the enterprise) is not entirely a private matter. Thus, employees should exercise within it – through representatives – a right of control over the power of control that is exercised over them, through the combination of corporation law and labor law. The recognition of this democratic participation in the life of the firm is already evident in the systems of co-determination found in many continental European countries.

Beyond the firm, adopting the heuristic perspective of the commons, the collective work coordinated by Bessy and Margairaz (2021) questions the dynamics of the three major institutions of the (capitalist) economy: property, labor and money, as well as their interweaving to lead to different modes of organization of activities and democratic life. This book contributes to the construction of an analytical framework that allows for the precise study of modes of government, property structures, and the evolution of economic activities on different time and space scales.

### *6.3. Criticism of incentive theory and of public privatization*

The state itself can fade away, by creating "independent" authorities to which it delegates the competitive regulation of different sectors of activity, such as in monetary and financial matters, or in network industries. This rearrangement of the public actor indicates the

emergence of a convention of the absent state, at a macro-social level. More generally, one of the challenges of EC/SC's work is to uncover the source of inspiration represented by theoretical developments in orthodox economics, in the elaboration of devices characterizing the convention of the absent state. Thus, the economic theory of incentive regulation appears as the justification for the development of "public-private" partnerships. The European Commission's competition practices indicate an evolution in the theoretical influences that guide this policy, from German *ordo-liberalism* based on public regulation of competition, to the *laissez-faire* search for efficiency promoted by the second Chicago school (Marty 2015). These developments of orthodox economic theory have been widely disseminated through the collaboration between large business law firms and consulting firms founded by economists, particularly in the field of competition law. However, this incentive regulation is not limited to the areas most concerned by the dismantling of the state. It can be found in environmental policy, with the construction of a European market for CO<sub>2</sub> emissions creating a space for transactions and speculation for economic actors based on numerous investments that have given substance to the new goods that are the tons of carbon (Knoll 2015).

The contractual political philosophy underlying this approach tends to favor forms of self-regulation. It encourages experts in each field of activity to produce their own standards for controlling the activities of professionals, thus bringing about a privatization of standards, as in accounting (Chiapello and Medjad 2011), finance or intellectual property (Bessy 2022). Beyond the transformations of the law itself, these evolutions outline a "government by standards" based on a privatized government and a permanent manipulation of standards Thévenot (1997).

## *7. Conclusion*

EC/SC leads to the discovery of law in its uses made of it by the actors, both to find their references in the coordination required by conventions, and to discuss the ruptures that can affect them. The mobilization of law in social and economic life sheds also light on its development, both in order to grasp the development of coordinated activities which are based on conventions, and to understand the weight of legal actions in the clarification and questioning of economic and social practices. Thus, a collective learning process is taking shape both in the deepening of conventions and in the knowledge of law that jurisprudence make possible by opening up new fields of interpretation of legal rules.

This leads to a more complex historical perspective, in which the evolution of legal standards restructures the dynamics of economic activities. To do this, it is necessary to consider the very conditions of production of these norms, both in their legislative and jurisdictional dimensions, by envisaging a historical plurality of "worlds of law", as well as the conventions of quality of legal work. All of these developments have provided the necessary hindsight for a critical approach to the most recent forms of neo-liberalism, particularly in terms of the functioning of the company, the labor market and the conditions of production of norms and standards that call into question the foundations of a democratic life oriented towards the common good.

Finally, the place of law in EC/SC lies in its normative scope. It could be that the pragmatic program of an arrangement of the institutions of economic coordination (company statutes, co-determination) places EC/SC in the situation that was that of liberalism in the 1940s. For this purpose, it remains to invent a contemporary equivalent of what the Mont Pelerin Society was for liberal thought in the face of Keynesian domination. In this alliance of social research, EC/SC would be able to put its empirical approach at the service of progressive reforms to build the foundations of an economy able to face the chronic crises of neoliberal capitalism and the challenges of the resulting environmental degradation.

## Cross References

Conventions. Meanings and Applications of a Core Concept in Economics and Sociology of Conventions

Convention Theory Applied to Law

Investments in forms

Conventions of the State, statistics and public action on a national and a subnational scale

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