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Conventionalist's Perspectives on the Political Economy of Law. An Introduction

Rainer Diaz-Bone, Claude Didry & Robert Salais*

Abstract: »Konventionentheoretische Perspektiven auf die politische Ökonomie des Rechts. Eine Einleitung«. This introduction and the contributions of this HSR Special Issue "Conventions and Law from a Historical Perspective" present the conception and analysis of law from the perspective of the French institutionalist approach of the economics of convention (EC). From the pragmatic viewpoint of EC, law is regarded as an institution through which actors "identify" the situation in which they interact regularly. Law can be seen as a "guide" in the coordinations in which actors are engaged and committed. So law is not conceived as simple external constraint for economic action because law has to be interpreted and mobilized by competent actors. Therefore, EC understands law as internal to situational coordinations. From its beginnings (three decades ago), EC has included the analysis of law into its institutional research. Also from its beginnings, EC has developed a transdisciplinary approach, refusing the traditional "division of law" between history, sociology, economics, and law science. The introduction presents some main concepts (as convention of State) and positions of EC in the analysis of law. This introduction also relates EC's perspective to neoliberalism, economic neo-institutionalism, new historical institutionalism, and the Weberian sociology of law. The contributions of this HSR Special Issue are presented. They cover overviews about EC's research on (mainly economic) law, empirical applications, and theoretical considerations about law from a conventionalist perspective.

Keywords: Economics of convention, institutions, law, economic action, neoliberalism, economic neo-institutionalism, new historical institutionalism, conventions of State, sociology of law.

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1. Introduction

The transdisciplinary approach of the *économie des conventions* (economics of convention, in short EC) has been established over the last three decades. From its beginning, EC has introduced a pragmatic as well as a historical perspective on economic coordination and economic institutions. In France, this approach is a prominent part of the so-called new social sciences (Diaz-Bone and Salais 2011).

Within three decades, many researchers have contributed to EC, and in France, one can nowadays speak of a second generation. For one decade now, the international recognition for EC has been rising, and in many European countries, researchers apply this approach now in their analyses. So today, EC has internationalized as an approach in the fields of economic history, economic sociology, historical political economy, and others. It is important to highlight this special integrative character of the EC. It is transdisciplinary in character – bringing together economists, historians, sociologists, and statisticians. And it does not separate the historical analysis of law from the study of other spheres (Bessy 2014). EC is one of the few approaches in the field of political economy which kept and developed an integrated non-reductionist historical perspective on the complex relation of law, economy, State, and competent actors in situations of coordination and (law) production (Diaz-Bone 2011, 2015 in this HSR Special Issue; Didry 2012, 2013; Bessy 2013).¹

From its beginning, EC has also included law in its analysis. Examples are: the collective study about the invention of unemployment by Robert Salais, Bénédicte Reynaud and Nicolas Baverez (1999); the study about the invention of collective contracts in France done by Claude Didry (2002); or the analysis of the contractualization of labor relations (Bessy 2007).² All these studies and contributions conceive law as an institution which has to be interpreted and mobilized by socio-historical actors in situations.³ From the perspective of EC, actors have to make sense of law, interpret its meaning, and pragmatically apply it as institution. While the field of law has its own autonomy of development (see below), law as an institution is not to be conceived as an external constraint to action and coordination. EC conceives law (as any institution) as internal to action and coordination open to interpretive and situational adoption by competent actors. Consequently, for the historical analysis of law, EC analyzes the meaning of law from the standpoint of coordinating actors referring their action to conventions of coordination. Actors should be understood not

¹ See also the contributions in Favereau 2010 and in Bessy, Delpuech and Pélisse 2011.

² See also as a resource the contributions of EC in the 2012 special issue "Conventions, law and economy" in the online journal *Economic Sociology – European Electronic Newsletter*, ed. Diaz-Bone.

³ See for the differences between institutions and conventions Salais 1998 and Diaz-Bone 2012.

only as the so-called “economic,” “social,” or “political” actors, but as including ordinary persons at work or not, professional lawyers, experts, civil servants, and so on, depending on the situations at stake.

EC assumes that law is a category through which actors identify the situation in which they interact regularly; in a way, law can be seen as a guide within the coordinations in which actors are committed. Thus, dynamics can emerge from insensible changes, hard to perceive for the actors themselves. But, from a historical perspective, such a change is also hard to perceive for the historian. One solution is to see law as a means for the expression of disruptive situations in the conventions, opening to suits, negotiations or, at least debates, as an interrogation by the actors themselves on the problems encountered by the coordination implying to make the conventions explicit, to confront several horizons of meaning in order to express the problem and to find a solution. Thus, judicial decisions or agreements produced in a negotiation can be interesting material for the investigation of conventions and of the dynamics.

Reciprocally, jurisprudence, as a set of “remarkable” decisions or agreements, is a material used by lawyers to assess the meaning of law by knowing how law is mobilized by the actors, and in what way this mobilization leads to enriched interpretations of law. It opens an investigation of the specific dynamic of law itself by exploring its meanings from the perspective of an “open texture” of the rules (MacCormick 1978, 2005), and by contributing to the renewing of the legal categories. It leads to “juridical work” (Didry 2002) in which public action and the State are seen as policy makers constraining individual behaviour by their decisions in order to restore an equilibrium or to achieve an optimum. Public action cannot be seen as a simple *decision* changing by constraint and incentive of individual behaviors in the search of a renewed equilibrium, as it is from the point of view of either social choice theory in economy or, more generally, in political science. It has to be taken as a *production* of renewed rules that influence current conventions by bringing to the actors new rights, and, as categories, enable actor to shed new lights on their situations of coordination.

From an EC perspective, history lies – in a way – at the confluence of these two dynamics by taking into account the presence of the law, and thus often of the State in the course of the conventions. It means that, on the one hand, taking institutions seriously, one cannot reduce economic history to the macroeconomic performance of national economies as in the perspective of Douglass North (1990, 2005), and has to take the way actors in specific conventions use and interpret law into account. On the other hand, it also means that law is *not* the result or the reflection of economic situations and dynamics taken as an explicative variable of law “in last instance” (according to what we could call “economism” either Marxist or neoclassical).

2. A Renewal of Economic History

2.1 A Classical Division of Labor between Economic History, Sociology and Law

From a classical perspective, law is seen as the consequence of an economic development that creates problems affecting the reproduction of the system. It is meant to help overcome what could be called negative externalities such as the misery of the working class, or the threats on the market mechanisms issued by the concentration of firms. Thus, economic history establishes facts such as technical innovations, growth of the GDP, or the concentration process. Labor law, for instance, appears as a regulation reducing the exploitation of the workforce, through limiting work duration, stabilizing wages, and creating security nets such as social insurances in case of illness, work accident, or unemployment. It brings an answer to the “social question” by introducing new guarantees based on the wage (Castel 2003). The increasing purchasing power of the workers leads to a new equilibrium, in a Keynesian economic perspective.

In the same way, antitrust legislation issued at the beginning of the 20th century in the US is conceived as a tool orienting the economic development by maintaining competition. It has successively tackled cartels on prices, vertical concentration and horizontal concentration, orienting the growth of the firms toward financial conglomerates (Fligstein 1990).

2.2 The Elimination of Law by the Neo-Liberalism of the 1990s: A Theoretical and Political Orientation

This classical division of labor has been under attack by the new economic Chicago school.⁴ Theoretically, law is conceived as a state regulation perturbing the price mechanism and overall economy efficiency through artificially high transaction costs. The Coase theorem establishes the higher efficiency of an amicable arrangement over suits and, of course, law as a manifestation of the State (Coase 1960, 1988). It grounds the law and economics perspective developed by Coase (1960) and Posner (1973), for whom the litigation in society must be handled in favor of economic efficiency instead of searching justice through law implementation. The economics of transaction costs is at the core of this neo-liberal attack against every State activity in pushing economic rationality and the need for a control of individual misbehavior to a new step. The basis of the transaction cost approach is an extreme individualist rationality conceived as leading to individual guile transcending any common good, and implying sanction mechanisms against this permanent risk in the coordinated activities.

⁴ See the contributions in Mirowski and Plehwe 2009.

But instead of justifying a monitoring activity of the State to address this threat on any coordination, individual guile invalidates the efficiency of the market mechanism itself, and explains the success of organizations as a form of endogenous control of the individuals. The individual guile as a market failure threat is finding, through the spontaneous economic mechanism, a balance between contractual and organizational governance. Thus, the economy has to be freed from any external regulation, as it has its own that leads to an optimal efficiency.

The ultimate value – if it can be called a value – is efficiency of the whole economy where the spontaneous share between market and organization is able to contain individual guile through internal coercion mechanism. Even competition regulation becomes harmful as it prevents a spontaneous, and more efficient, balance between contractual and organizational governance. The main State policy through military coups or democratic elections, from Pinochet to Reagan and Thatcher, is to eliminate any State actions up to the antitrust regulations (Mirowski and Plehwe 2009; Davis 2010). The convention of the State that has to be shared between actors is paradoxical, for the only admissible State's action should be devoted to eliminate itself: in the terms of Storper and Salais, to be “absent,” though sometimes terribly present. This political turn marks the victory of the new Chicago school over the old one, and challenges the “ordoliberal” doctrine (Salais 2013). Ordo-liberalism was born in the 1930s in Germany and was applied in the postwar period, after the implication of the “Konzerne” (group of companies) in the Nazi regime was denounced. Ordo-liberalism, differentiated from Hayekian conceptions, pleads in favor of the freedom of exchange between participants to the market, and is more than pure competition. For ordo-liberals, the State should impose rules maintaining some equality between actors (hence against trusts), not only for economic reasons, but also for the sake of democracy. But, after the neo-liberal turn, democracy itself seems to be an obstacle for the maximization of efficiency (Salais 2013).

One can conceive this victory of neo-liberalism over liberalism and ordoliberalism as a global trend of the privatization of former public owned economic institutions.⁵ Neo-liberalism also tries to privatize law and to privatize the control of the economy as a formerly public sphere. Christian Bessy (2012) has demonstrated how the upcoming of big law companies supports this trend. Thereby, law as a common institution which is accessible to everyone – and which is the sphere of public control of the economy – is systematically undermined by private companies.

Outside a political project, the Coasian doctrine (at the core of the new Chicago school) also offers a base for a historical explanation of the economic

⁵ Here, we have a kind of “convergence of system” between – on the one side – post-socialist countries where the oligarchic elites privatize the enterprises which were built up in the foregoing socialist era and – on the other side – capitalist elites privatizing the legal foundations of the economic sphere.

dynamics owing to the Williamson's analysis of the multiple governances that provides economic efficiency. The development of economic organizations can be seen as a spontaneous economic reordering, the antitrust regulation did not block. Such a doctrine challenges the classical economic history and its echoes in sociology and law, by giving the priority to independent economic mechanisms outside and even against any State activity.

2.3 The Contradiction of Neo-Institutionalism

Neo-institutionalism has been presented by Victor Nee (2005) as an innovative synthesis between neo-institutionalist economics and economic sociology, emerging from the idea of a "social construction" of markets and the concept of "embeddedness" issued by Granovetter (1985). Economists as Williamson have shown the limits of market transactions for the control of individual guile, and the merits of the organizational governance mechanisms in an optimization efficiency program (Williamson 1985, 2000). In an apparent opposition, the concept of embeddedness was central in the functioning of market mechanism. Network analysis provides instrumentation to identify social communities based on "strong ties," in order to isolate the individuals able to connect different communities, create "weak ties", and exploit the loyalty of individuals embedded in communities. Embeddedness can be interpreted as a spontaneous structural control over the individuals exerted through moral pressure, equivalent to the price sanctions of the organization in Williamson's perspective. What is institutional here is the finding of alternatives to market mechanism that support it. But State and law, as its production, disappear behind internal sanctions, either economic or moral. The true actors of the neo-institutionalist world are the "entrepreneurs," either as organizers or as bridge between network communities. State activity is dissolved in the competition of networks put in motion by "entrepreneurs," and seems to be useless in a historical explanation focusing on the only action of these modern heroes. Thus, the active dimension of institutions, as the act to institute, vanishes behind spontaneous structural changes, and the market transactions are naturalized, even as "embedded."

2.4 The NHI Solution

Though often entangled in the neo-institutionalist constellation North has brought a new dimension based on the "challenge of Polanyi" (North 1977). In highlighting the "disembedding move" identified by Polanyi's *Great Transformation* (Polanyi 2001), North underlines the historical emergence of the market seen as a challenge that Polanyi has not addressed. The move toward a self-regulated market is seen by Polanyi as the result of a State action, namely the enclosure process, but supposes that transactions function spontaneously in transfers of property rights outside any State intervention. It leads North to redefine institutions not as structural envelopes constraining individuals' be-

havior, but as *frameworks* constraining individuals' opportunities in *interactions* (North 1990, 2005). Thus, the main transaction tool – contract – is not a simple promise, but is first grounded in commercial codes of conduct, and then in law elaborated by the State, especially after the parliament's victory during the Glorious Revolution in UK. It enables the new historical institutionalism (NHI) to analyze the place of the State in fixing the “rules of the game” played by the economic actors, firstly in national contexts.⁶ It explains why NHI is focused on national economies' performances as spurs of different modes of communication between the “actors” and the State.⁷ The “institutional matrix” defined by the complex “State-economic actors” explains the evolution of laws as the “rules of the game,” but remains in fact a black box in which actors interact with the State through lobbies symbolized by the American system. Economic actors are mostly organizations represented by entrepreneurs, they run business or cooperatives and trade associations. Thus, organization is another black box where coordination problems between the individuals are supposed to be solved or denied.

3. The Originality of EC in the Treatment of Law and the State

EC offers a wide range of researches starting from the coordination of the individuals in interaction, opening the black box of organization or community. But, even if “EC postulates a pragmatist competence of actors to coordinate their interactions to achieve a common goal” (Diaz-Bone and Salais 2011, 8), it addresses law and the State alongside different formulas.

3.1 Law as an Object of the Civic World: Boltanski and Thévenot

In the best-known version of EC, Boltanski and Thévenot (2006) consider interaction as ongoing coordination threatened by critiques. The continuity of coordination then suggests the reference of the actors to a “superior common principle” enabling coordination to resist the critique, i.e. the risk of demobilization of the actors and of disaggregation of the interaction. It means that interaction oscillates between continuity regimes – close to routines, but where actions remain aligned with the world into which actors situate them – and disputes in justice implying justifications and evolution of the common principle grounding the coordination. Thus, disputes appear as privileged moments to analyze the principles in competition, and the way they recompose to resist critiques.

⁶ On the difference between NHI and what Nee calls “neo-institutionalism” see Didry and Vincensini 2009.

⁷ See for further critique on NHI Diaz-Bone and Salais 2011.

The juridical dimension is one of the multiple possibilities of opening a “dispute” through the mobilization of courts so that jurisdictions are a good place to see the confrontation of argumentations expressing the several principles in balance. It enables the formalization of judgments in order to operate more informally in the daily interactions (Thévenot 1992). A good example of this approach can be found in the research of Chateauraynaud (1991) on the malpractices handled by the French labor courts (*Conseils de prud’hommes*). Jurisdictions are the field of an explicit confrontation when “affairs” take a certain extent, but remain external to the multiple principles shared by the actors. They become a frame for the expression of “disputes” without considering their relation to the State, and pave the way for renewed “compromises” between the orders of worth identified by the authors without considering the effects of the justice decision, i.e. the mandate addressed to the power forces in order to restore the situation as it should have been according to the laws.

The power of the State is taken as having a specific order of worth in which people are ordered according to their reputation following Hobbes’ conception: it has to be seen with Elias’ “Court society” in French absolutism (Elias 1983). Law finds a place in another world, the civic one, as an instrument of control of the interaction or a levee for the critique from this world. But it remains external to the other worlds, such as the commercial world based upon an incorporated ability to contract or the industrial world based on organizational rules established by the engineers.

3.2 Conventions of the State (Salais)

Another EC approach can be found in Robert Salais’ analysis of the unemployment (Salais, Baverez and Reynaud 1999), going back to research on social classification and categorization in which EC originates (Desrosières 2011a). Social classification and categorization are part of the work of statistics, as the need for knowledge on society for the State’s sake; Alain Desrosières (2010, 2011b) has shown etymology’s proxy between State and statistics. Interaction and coordination are to be found not only in economic activities, but also in the State’s organisms where the economic activities are analyzed and observed in order to identify new categories for census and elaborate public actions upon the data gathered. This conception of the State appears close to the Durkheimian conception of the State as “the social brain,” evolving from the reflection on economic interaction. One of the first occurrences of the notion of “convention” is to be found in the “Keynesian convention of State” (Salais, Baverez and Reynaud 1999), emerging from the identification of unemployment as an economic phenomenon and leading to policies aiming at “full employment.”

Through the intervention of the State, these categories impact economic interactions as cognitive tools for the actors to analyze their situation of action in order to benefit from public compensation in the case of unemployment or

social security. They are *institutions* as they *institute* actors as wage-earners and unemployed persons, and can then orient economic conventions towards new “worlds of production.” But the action of these categories is not mechanical, and corresponds to a complex process between economic conventions and what Storper and Salais (1997) consider to be “State conventions.” The change of State conventions is anchored in general crisis that derives from specific problems of coordination emerging in economic situations such as in firms’ restructuring (Salais 1992). It impacts these concrete situations through new frames and resources which may or may not be mobilized by actors in the economic conventions in which they participate. In conceiving several “State’s conventions,” which are revealed in general crisis, Storper and Salais (1997) introduce another level of uncertainty in economic activities which opens a diversity of possible economic developments. If State intervention can be seen as a form of “State convention,” the “corrective state,” economic criticisms of this intervention as in the case of law and economics or of neoliberalism can be integrated as the “absent State convention.” The “situated State convention” can be seen as a possible expression of “EC’s politics” in searching for public tools enabling people to deal with their specific coordination problems in their “concrete” economic situation.

3.3 EC and the Weberian Sociology of Law

If law can be conceived as a form of these social categories elaborated by public organisms, it implies considering other dimensions of such categories. The first one is the effect of law in the current interactions, not only as a regulation, i.e. as some direct intervention of state agencies, for example police or inspectors, but also as a reference, a frame *qualifying* the relations between the persons involved and defining the situation in which they act. This dimension prevails in the case of the contract or the society, specifying what type of contracts (commercial, labor, sale, rent contract) or what type of societies (association, civil society or corporation) people refer to. It could be called a “horizontal” effect of law, i.e. the way people refer to it in the relation with one another.

The second dimension could be characterized by the *instituting* function of law after the situation is qualified, i.e. the position assumed by the people in the relation. For example, the employment contract leads to the identification of an employee and an employer, the corporation to the identification of a board and of the CEO, etc.

The third dimension corresponds to the mobilization of law in courts, seen as a step in a “dispute,” but which also implies a juridical qualification of the contentious affair most of the time. The mobilization of the law is an action of a person involved in an economic convention, which expresses the need for an expression of the coordination problem encountered in the convention.

The fourth dimension is the judicial decision, settling the affair submitted to the judge. But it opens also the possibility for one of the parties to request the use of police force for the execution of the decision. It means that law is not only the expression of what could be called, in a Bourdieusian perspective, the symbolic violence monopolized by the State, but implies the use of the force also monopolized by the State (Bourdieu 2014).

Law – as a reference for the actors in economic conventions – implies a lot of people in its elaboration, its current use, its judicial mobilization and its judicial implementation at the request of the parties. The Weberian approach is useful to analyze these several dimensions in which law is entangled (Weber 2013).⁸

- 1) The distinction between the juridical and the sociological points of view on law means that lawyers do not monopolize the knowledge of juridical rules, but that every individual is interested – potentially or actually – in law matters. Ordinary people, Weber says, reconstruct juridical rules as “maxims of action” (“*Handlungsmaximen*,” Weber 1977) in the situation they act. He takes the example of a house owner expecting property law to provide a good argument in court to get the neighbor’s chimney down for hiding his access to the sun. Law can thus identify a trouble in the convention and be used to convince the judge to deliver a decision that remedies this trouble. Then, the judge is expected to be uncorrupted, i.e. assessing the situation in the “interest of law,” under the control of the jurisdictional system and in coherence with the “juridical point of view” developed by law professors.
- 2) This implies an organization of justice and legislation in relation to the State as a monopoly of the physical force. The State, through the presence of policemen (Weber calls them as “spiked helmets”), is required for the possibility of peaceful economic transactions. It is required for the execution of the judicial decisions, for the guaranteeing of the situation of judges as public servants, and even for the stabilization of a law professors’ corporation.
- 3) This organization means that law creates the expectation of a State’s intervention by the ordinary people in contentious situations; it means that the State is conceived as present in every interactions.⁹
- 4) But this organization, based on the action of human beings, with different values, is evolving. Firstly, it is the result of a historical evolution seen by Weber as a dynamic of “formal rationalization” of rules and of jurisdictions. Secondly, this organization evolves, through the lawsuits of the people, the new laws adopted by the parliament (in a democratic regime) and the reorganization of jurisdiction. For example, the creation of a specific jurisdiction for labor litigation can alter the formal character of justice in underlining the

⁸ See Diaz-Bone 2011 for the relation of Weber’s work and EC.

⁹ The same idea of the “presence” of the State in situations of coordination is developed in Storper and Salais.

question of the “uses” planned by the law itself (for example the article 1135 of the French Civil Code). The legal establishment of collective agreements can also provide mixt commissions to settle issues on their implementations.

5) Thus, Weber suggests that formal rationalization is not the ultimate organization of law: law can evolve within certain limits to less abstract rationality, in giving more space to concrete or material facts or reversely in focusing on formalization of the affairs. Law can then be understood as a State production, along several orientations established by the legislative power but also explored by the affairs submitted to justice. This complex activity echoes to Salais’ “State conventions” (Storper and Salais 1997; Salais 2013) and can be seen through the perspective of the “worlds of law” approach (Didry 2002, 2012).

All of this obliges to avoid any mechanistic implementation of law, and to take into account the way law is produced by the legislative and the judicial activity that relies itself on the way ordinary people conceive law in their ordinary social activities. Law is a specific institution that applies to all interactions, but its form of implementation has impacts on the legislative activity which often stands on the jurisprudence, i.e. the way existing law is implemented owing to the selection of remarkable cases made by lawyers.

4. The Contributions in this HSR Special Issue

The articles in this HSR Special Issue “Conventions and Law from a Historical Perspective” continue a series of issues in *Historical Social Research* devoted to EC.¹⁰ Again, this collection presents overviews, theoretical elaborations and empirical applications – now devoted to the conventionalist analysis of (mainly economic) law.¹¹ The first article written by *Rainer Diaz-Bone* offers an introduction and overview to EC’s contributions to the analysis of law from an institutionalist and methodological point of view. *Claude Didry* has analyzed new forms of labor law which emerged in the interwar period. He applies the theoretical concept of investment in forms to law, showing how actors learned

¹⁰ Starting in 2011, the HSR Special Issue “Conventions and Institutions from a Historical Perspective” offered introductions, theoretical considerations and empirical applications of this French approach (Diaz-Bone and Salais, eds.). In 2012, a follow-up HSR Focus was published offering discussions and further considerations (Diaz-Bone and Salais, eds.).

¹¹ A selection of these contributions has been presented in a panel at the 2014 conference of the Association française d’économie politique (AFEP) at the Ecole normale supérieure de Cachan (Paris) on 2nd of July 2014. The panel labeled “Conventions and law from a historical perspective” presented lectures from Michela Barbot, Frédéric Marty and Claude Didry.

to get used to labor contracts.¹² *Christian Bessy* also analyzes the form of labor contract and its history. He emphasizes its endogenous conception, and demonstrates how one can relate different principles of justice to the dynamics of the labor contract leading to a “strategic use” of law in labor. Another historical analysis is offered by *Michela Barbot* on the history of property rights. She inspects the analysis given by NHI, and argues that important questions are left open from EC’s point of view, implying a more pragmatic investigation on mixt configurations between medieval and modern laws. *Frédéric Marty* focuses on the European Union. He studies the dynamics of competition law questioning the interpretation of an ordo-liberal convention as foundation of this law. He works out how conventions in competition law have switched under the influence of the new Chicago School. *Edward Lorenz* has studied the role of conventions in the British ship building industry. His contribution studies work coordination and the role of conventions based on work subcontracting arrangements for competitiveness. Thereby, the difference of rules and conventions comes to the fore, a difference which is important for the analysis of law as well. The role of law in the creation and performance of a special market is studied by *Lisa Knoll*. She analyzes the market for CO₂ emission rights. She highlights the constitutional role of bureaucracy for the market and the way CO₂ emissions become more or less relevant for the firms’ management. The British unemployment insurance and the problems to invent it, is reconstructed by *Noel Whiteside* for the time period between 1911 and 1934. Whiteside focusses on the role of categories of claimants, how they were established and how they changed. *Simon Deakin* presents theoretical reflection on juridical concepts and their coevolution with social relations. He emphasizes the function of juridical concepts to bridge between empirical facts and legal norms. *Robert Salais* has drawn a socio-political diagnosis out of his extensive historical analysis of the emergence of the European Union (Salais 2013). In his contribution to this volume he argues about the problem of the neoliberal order in the European Union and the victimization of its original democratic project. He has identified the problem of what he calls “a-democracy,” i.e. forms of democracy void from any true democratic practices, and provides some examples such as in labor law.

¹² This concept of investment in forms was early invented in EC by François Eymard-Duvernay and Laurent Thévenot (Eymard-Duvernay and Thévenot 1983a, 1983b; Thévenot 1984).

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