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Economics of Convention as the Socio-Economic Analysis of Law

Christian Bessy interviewed by Rainer Diaz-Bone*

Christian Bessy is CNRS-researcher at the Ecole normale supérieure (ENS) at Cachan and works at the laboratory "Institutions and historical dynamics of economy" (*Institutions et dynamiques historiques de l'économie*, IDHE). He belongs to the French movement of "economics of convention" (in short EC) and has written many articles and three books, *Les licenciements économiques. Entre la loi et le marché* (1993), *Experts et faussaires. Pour une sociologie de la perception* (together with Francis Chateauraynaud, 1995) and *La contractualisation de la relation de travail* (2007). Bessy also has co-edited three books *Les intermédiaires du marché du travail* (together with François Eymard-Duvernay 1997), *Des marchés du travail équitables? Approche comparative France/Royaume-Uni* (together with François Eymard-Duvernay, Guillemette de Larquier and Emmanuelle Marchal, 2001) and *Droit et régulations des activités économiques et institutionalistes* (together with Thierry Delpuech and Jérôme Pélisse, 2011). Christian Bessy has recently published an article in the issue 14(1) of this Newsletter (Bessy 2012).¹

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RDB: You are a representative of the second generation of the socio-economic institutionalist movement of the economics of convention (EC). Could you describe the pathway of your formation and career?

CB: From the outset, my training was marked by interdisciplinarity because my studies of economic sciences have been supplemented by lessons in law, but also in the history of economic thought, which prepared me very early for an epistemological reflection on my basic discipline and in particular on the economic theories of value. On the other hand, my studies at the ENS de Cachan allowed me to assimilate a variety of quantitative techniques that I could quickly put to the test. These academic studies have also allowed me to deepen my knowledge of monetary phenomena and of the Keynesian approach which emphasized their conventional dimension. It took little that I continue my thesis in monetary analysis, but I opted for the labor economics by writing a PhD thesis on the regulation of

economic dismissal under the direction of François Eymard-Duvernay, which in the mid-1980s was interested by the diversity of employment relationships.

I had the chance to do this PhD thesis at the CEE (Centre d'études de l'emploi – Center for employment studies), which was at the time an organization for studies and research (under the tutelage of the Ministry of labor) which brought together researchers from several disciplines of social sciences. The research work done at CEE was based mainly on statistics, but there was also a tradition of field-work by the CEE and this quite naturally let me focus to make interviews with labor inspectors (following the advice of Nicolas Dodier) and managers of human resources to analyze how they argue their decision of economic dismissal and in particular how they justify the selection of the dismissed employees following different logics of action.

I came in contact with the "Economies of worth"-approach (Boltanski/Thévenot 2006 – first edition 1987) when I was a young student and this has been a great intellectual experience for me to cope with this model of justification of action (subject to some criticism at the time). I gradually familiarized myself with the idea of the social construction of social facts (in particular the construction of statistical categories). My law professors taught me about the relationship between morality and law, or legitimacy and legality. And the reflection on the construction of the category "dismissal for economic reasons" in France (following Robert Salais' track on the "invention of unemployment", see Salais/Baverez/Reynaud 1999) was a remarkable insight to investigate tensions between the statistics and the monographic investigation and how it could articulate them. But this reflection on different forms of coordination then led me to reflect on the strategic use of conventions that some players may make, by analyzing procedures of recruitment (with François Eymard-Duvernay and Emmanuelle Marchal) and affairs of counterfeits (with Francis Chateauraynaud).

RDB: As a transdisciplinary approach EC is known to include the analysis of law in its political economy. Could you describe how EC analyzed law in the field of economy? What was the agenda of EC's "economic sociology of law"?

CB: EC has integrated the analysis of legal rules as other approaches did, which are interested in the way institutions are structuring economic exchanges and which avoid different forms of functionalism – as approaches do who are searching for optimal institutions or for the minimization of transaction costs. This integration results from EC's empirical interest for public policies, especially in the field of employment and concurrence and from the interest in the ways of their evaluation. Therefore, EC has developed a whole methodology for the analysis of law, of the genealogy of juridical categories (lawsuits, trials and forms of knowledge they generate) and of the usage actors make in situations – thereby examining the different juridical doctrines as well as their relation to economic arguments. EC has always been in search for the continuity between the two disciplines because of EC's interest in operations of qualification. These are at once present in juridical judgments and in legitimating judgments (Thévenot 1992, 2012). EC has been interested in the study of the play of interpretation of rules with reference to conventions, but also in shared experiences which are not made explicit and in the question of justice analyzed in the theoretical frame of a pluralist theory of justice.

From this standpoint, EC has followed the work of the early American institutionalists, which were highly influenced by the pragmatist philosophy. Here, the institutionalist John R. Commons is the important example but he used concepts and a methodology with took much more into consideration the century of the social sciences. Like other institutionalist approaches, EC studies the constellations of cognitive artifacts, legal instruments (like contracts). The latter are designed and used by the legal professionals and play an important role of mediation between legal statements and the dispositives, which actors invented for their purpose of coordination. This is why the analyses of what we called the "intermediaries of law" is so important (Bessy/Delpeuch/Pélisse 2011). They are privileged starting points for the articulation between different logics of action in their everyday practice to define what law is.

The actual work of our team (Olivier Favereau, Franck Bessis, Camille Chaserant and Sophie Harnay) about the evolution of the lawyer's profession (see Favereau (ed.) 2010) shows the complex entanglement between the evolution of law (it is becoming more individual, more processual and more global) and the organizational forms of lawyer activities.

This work gives a good illustration of EC's program as a socio-economic analysis of law which not only takes into account the contributions of the sociology of professions but also the political and legal philosophy. The reason for this is the aim to analyze the ideological questions and the emergence of the European law at the macro level. This program integrates also research on the new legal status of enterprises and on the regulation of recruitment procedures.

RDB: You mentioned the notion of "intermediaries" (intermédiaires). You applied this concept also in your research on the market of photographers (Bessy 1997). Is it restricted to persons as "intermediaries"? Could you explain this concept and how it is used in EC's specific methodological approach?

CB: Yes, in fact, with the notion of market intermediary we refer in first instance to professionals that participate in constructing and sustaining markets. They play an active role in defining rules of transactions and in defining frames for the evaluation of qualities of products and persons. Intermediaries contribute to in the creation of a common knowledge that makes the well functioning of markets possible. This knowledge is distributed between persons and objects. It is cognitive artifacts defining formats that make possible the accumulation of information (Hutchins 1995). In the case of labor markets, occupational classifications, job advertisements and CVs, aptitude tests and interview techniques can be regarded as intermediaries ... So one can interpret persons and objects as intermediaries – joining the sociology of translation of Michel Callon (1991) although he distinguishes "intermediaries" – which only transfer information –, and "mediators" – which play a more active role of translation that has an always uncertain outcome. Economists try to understand what we call market intermediary by using the notions of "middleman", "broker", "market-maker" or "match-maker". But here the emphasis is on the reduction of market imperfections and very little is said about the operation of quality categories structuring the information. Instead, a lot is said about the articulation of different logics of action or about the adjustment of general rules in special situations of action. It is especially this idea of mediation and articulation between different worlds which made EC and the actor-network theory (ANT) developed by Callon and Latour much closer approaches at the end of the 1980ies – even if EC is more interested in the analysis of quality questions and questions of justice as ANT is. From a methodological standpoint the analytical practices of both were very close. On the one hand the analysis of intermediaries constitutes a perspective on different logics of action. On the other

hand the mobilized cognitive artifacts open the pathway not only to these logics of actions but also to the analysis of their dynamics, their transformation as we have shown in our studies of job advertisements and labor contracts. We were interested to find the artifact which could be collected easily and which also offered systematically an empirical richness. We had an economic concern about this.

RDB: What is your perspective on the role of cognition for the economy and what is the contribution of EC to the inclusion of cognition into institutional analysis?

CB: This issue is extremely general but also fascinating. In fact, it is also the question about rationality because it examines the way our knowledge explains our actions and it questions the level at which we take decisions – at the individual or the collective level. The question addresses also the problems of learning, of transmitting and of memorization of knowledge from the moment on where knowledge can not be reduced to representations but has to be conceived as based on experience and in particular as based on our environment (Bessy/Chateauraynaud 1995; Bessy 2003). EC's contribution is critically related to the neoclassical approach in economics, which considers omniscient individuals, able to explain their choices because of perfect knowledge of their preferences, of existing constraints and of the environmental opportunities. This kind of individual is also capable to give up some part of its liberty, its "subjective rights" because it has to account for common rules. All this requires calculative capabilities of the individual that individuals can – logically – not have. Friedrich Hayek has underlined the cognitive limits of individuals and the impossibility of perfect social intelligence (economist's models included) and this way he has criticized such a constructivism which justifies the intervention of the state as a maximizer of the collective welfare (aided by economic specialists). Hayek preferred the more spontaneous selection process of norms by the "market".

EC has criticized the idea of a "contrat social" which would be transparent to the individuals and which could be continuously (re)negotiated. Instead, EC regards individual's capacities as fundamentally "incomplete" in the sense that individuals can not permanently deliberate in a completely transparent relation. One can not reduce the social objects to the individual level and it is necessary to recognize a certain form of autonomy of the social and of common beliefs (which also constitute the autonomy of the social). Individuals then can stick to these common

beliefs following very different motifs and applying more or less deliberative processes.

You can find the notion of the limited cognitive capacity related to a form of procedural rationality in the work of Herbert Simon. But this theorist of cognition models the information processing using an individualist concept of how representations are elaborated. But this elaboration is also a collective one when several actors and cognitive artifacts are involved in the process. The distributed cognition-approach permits to take into account not only the collective processes of the elaboration of representations (and the relational character of cognition) but also to better understand the relation between the individual representations and the collective representations, the institutions, arisen from history and the ongoing experience, that can be incorporated into the cognitive artifacts or – if not – into the memories of individuals.

But – symmetrically – because of the limited capacities of memorization, the institutions and the associated social relations fix the cognitive processes of the memory (and of forgetting), of classification and – more general – of learning logical concepts (see Mary Douglas 1986). This way EC and also other institutional approaches (see for the new economic institutionalism, NIE, the contribution from John Knight and Douglass North 1997) adopt a much more complex point of view on the relation between cognition, rationality and institution.

RDB: What are the consequences of this complexity for the methods used by EC and the methodological strategies of EC?

CB: When I interpret your question from the methodological standpoint of EC, then the answer we would give is to defend a methodological pluralism. Thereby, every method is always the object of a questioning – this has by the way led some of the founders of EC to develop a critical perspective on the usage of statistical methods because reductions realized by the processes of statistical coding and because of the application of econometrics that brings in the questioning of the underlying assumptions of causal links between two variables. All this explains why numerous studies applied correspondence analysis allowing for the construction of typologies which clarify the contrasts of different forms of coordination – especially in the domain of labor relations or organizational forms. Personally, I tried to go further in explaining the belonging of single individuals to a type by searching for explaining factors (see my article written together with Daniel Szpiro about the diver-

sity of labor contracts, 2011). But this statistical practice has not prevented me from being sensible for the problems of the construction of statistical data analyzing survey data. Together with other researchers I developed questionnaires. And in such a development, the main issue is to find the trade-off between using robust measures and leaving "space" for researchers and interviewed persons for their discretion and initiative. What matters is the fact that the building of variables is the result of a construction that must be well controlled by the researcher. The precedent realization of qualitative studies prepares in a better way the "passage into the quantitative", but for any empirical method used, you will always find the problem of the imposition of cognitive categories by the researcher. The methodological constraints of EC's proper research program are therefore very costly.

RDB: You mentioned the new economic institutionalism (NIE). What are the differences in the research on contracts, dismissal and contractualization (of labor relations) between EC and the work Oliver Williamson has done on it?

CB: Before underlining the differences I would like to emphasize certain convergences (and see in more detail for the convergences of new economic institutionalism and EC, Bessy 2002). From a theoretical perspective it is important to take into consideration the critique Williamson addressed to the "legal centralism". Its too formal character inhibits an adequate regulation of labor relations which are characterized by uncertainty and which are an engagement in idiosyncratic relations. He tried to demonstrate the superiority of a legal model fundamentally based on the private order and therefore on a form of self-regulation based on collective negotiations or more informal rules in enterprises. He defends a form of "legal pluralism" or "contractual pluralism" relying on the typology of contracts proposed by the lawyer Macneil (1978). It's this – surely very general idea – of a plurality of "institutional settings of transactions" and of a truly interdisciplinary analytic construction focused on actor's practices. In this aspect Williamson's approach convergences with EC. By the way, the construction of data bases about contracts is a methodology developed by the new economic institutionalism and I was sensitized for it because of my frequent participation at the international conference of ISNIE2 and my work done together with Eric Brousseau about technology license contracts (Bessy/Brousseau 1998). But in difference to license contracts the labor contract is characterized by a relation of subordination. For this the power of the employer is constrained by state law – especially in

France. The analytical difference between NIE and EC results for EC in the fact that different contractual forms do not correspond to different forms of equilibrium (assuming the same logic of strategic calculation) but to different labor conventions. It does not prevent both approaches to have difficulties to take into account power relations.

RDB: With regard to the book "Droit et regulations des activités économiques", which you co-edited, what are current trends and perspectives in the field of the "economic sociology of law"?

CB: The collection of articles in this book pose the question about the character of the relation between law and economic action: is the relation exogenous or at the contrary is it endogenous? Thereby, the articles present the critiques and the contributions of the sociology of law (in particular from the US) and of institutional economics (in particular of EC) – with regard to an exogenous conception of law. The articles emphasize the way economic actors operate at their level the reconstruction of categories and of legal rules and they emphasize also the mediating role of the "intermediaries of law", supports and dispositives which equip their actions and frame the situations. The privileged object of knowledge is the legal experience of the economic actors. The start with the intermediaries of law needs to be grounded because their activities have shown important evolutionary changes. The construction of the European internal market endangers the "quality" of the performances of legal services, maybe the quality of law if the ongoing process of liberalization is driven to its extreme (Favereau (ed.) 2010; Bessy/Delpeuch/Pélisse 2012). To say it in another way: does the regulation of economic activities, in which in particular the enterprises (able to pay higher fees to engage the best lawyers) are interested, has to include the legal requests of underprivileged private persons? Another perspective is to study the ways how ethical and fundamental individual rights are applied as well in the development of law as in the intervention of the regulating authority or the judge. Effectively, the economic theory of incentives offers an extremely powerful tool able to "endogenize" different objects – the respect for certain values and ethical principles included. If one regards legal judgments as equipped with a specific status, then it is necessary to consider the elements of the argumentation which are lost by the economic calculation or scientific proof because law pursues possible contradictory goals and because there is arbitrage between rules of different nature. All in all one can not evaluate all the consequences from an economic perspective using explicit given

criteria in domains where criteria of economic efficiency are not really pertinent (as education, culture, health, environment ...). The analysis of court decisions in these domains permits showing how the judges are able to work out compromises between economic liberties on the one side – which are elements of the construction of the internal European market as the freedom of settlement, free circulation of market goods and of services – and other fundamental social rights on the other side. So we have to turn towards the pluralist theory of justice defended by EC.

RDB: Before you mentioned the work you did with Francis Chateauraynaud. Together you co-authored the book on experts and forgers ("experts et faussaires"). How does this co-operative work relate to economic sociology and EC?

CB: Our collaboration started at CEE where Francis did his PhD thesis about the "faute professionnelle" supervised by Luc Boltanski. We became naturally close because I worked on the selection of dismissed employers with reference to the model of the "economies of worth" (Boltanski/Thévenot 2006) – this approach was very present at the CEE in these years. Also the analysis of labor law and in particular the role of dispositives and objects in the coordination were common research interests. And it was exactly the role of objects in the model of economies of worth which – from our point of view – was handled in a problematic way because objects could be affected by a great uncertainty or they could try to take on the appearance of conventional forms as in the case of counterfeits. This perspective has brought in the question how conventional criteria are strategically used. These conventional criteria have a great power in the process of coordination. At the intersection of the sociology of judgment and EC we observed the activities of auctioneers in order to grasp the practical operations sustaining the qualification of objects in cases where identification, characterization and evaluation of objects have been problematic. After long time of research about the authentication of objects in different domains, this research materialized some years later in the book *Experts et faussaires* (Bessy/Chateauraynaud 1995). From the standpoint of the "normal" disciplines of this time our book was barely conventional. Maybe it will be still more improbable in our times in which the effects of specialization in the disciplines are more comfortable for contemporary research projects. We worked out a theory of expertise which allows to understand the modalities how the categories of judgment are established. The ethnography of the auctioneer's preparation to estimate the values were important. And it is not by accident that in

France the word "prise" is used – although this usage is not aware – it echoes at "priser" (to price), in fact to fit a price to objects. This brings up the idea of a two-sided process of attention to and valuation of objects, the passage of perception to representation or qualification of objects. Our approach was developed in a huge empirical program proposing to start from moments of proof in which the "bodily anchorage" of intersubjective judgments or conventions necessary for authenticating actions. Without these, actors were not able to identify, classify and organize the signs into a hierarchy – therefore, right from the start the importance of the strategic engagements and games of experts and forgers. By opening a realistic way to the center of pragmatist sociology, the "théorie de la prise", has launched multiple research programs and the study of the evaluation process of objects is the first probation. In economics, and in difference to the numerous applications of the "economics of singularities"-approach (Karpik 2010), it is always the question of learning, of the role of backstage capacities and practical knowledge in the production of individual or collective "rationality", which has coined the principal perspectives of our developments. Rediscovering the role of the "prises" in the functioning of organizations is done by analyzing the interplay of memorizing and transferring the knowledge, which is characterized by its tacit dimension as well as by the incremental technological innovation (Bessy 2003). In the framework of the "théorie de la prise" and the concept of distributed expertise, which it makes possible, studies on the protection of innovation (and its different alternatives) or on the collective management of intellectual property rights have been grounded (Bessy/Brousseau 2006). More generally, to start from the "prises" of objects enables one to take into account all the intermediaries which participate in the construction of markets: mediators, experts or prescribers, all of them can exploit the informational imperfections in a strategic way (Bessy/Eymard-Duvernay 1997).

RDB: What is your future research agenda?

CB: It is this reflection about market intermediaries that I deep further today with Pierre-Marie Chauvin. We show how intermediaries contribute to define valuation through their different activities and impulse conventions that can improve the coordination of actors, but also reorganize the markets in different ways. These changes raise the issue of the valuation power of market intermediaries, their legitimation and the eventual regulation of their activities.

Legitimation is a big theoretical issue and we can advance different legitimatizing sources beyond the legitimacy of the convention used by the actor: the “symbolic capital” of the intermediary (bourdieusian perspective) or a network of aligned actors that is produced by different operations of mediation (latourian perspective). These different approaches of legitimacy can be considered as alternatives but a clear-cut distinction of this kind may be difficult to make in empirical markets. The question of the explanation of the diffusion of conventions represents a problem that constitutes a discussed topic within “Economics of convention”. I have personally discussed this question (Bessy forthcoming) in a critical comment of André Orléan’s book *L’empire de la valeur* (Orléan 2011). That also raises the issue of theories of value in economics and economic sociology. I presently organize a seminar in IDHE called *Value, price and politics* in order to underline the political dimension of different valuation process, with an interest to different kinds of “market”, including the market for contemporary art. This is also a coming back to the politics of authenticity and of authentication that we have coped with in our book *Experts et faussaires* (*Experts and forgers*) (Bessy/Chateauraynaud 1995) and of which we prepare a second edition. I have already mentioned my future research concerning law and the role played by lawyers in the emergence of legal norms. I can only add that I will be particularly interested concerning intellectual property rights.

Endnotes

*The interview was done in French, the translation was done by Rainer Diaz-Bone.

1This interview continues the series of interviews in this newsletter with representatives of this French approach. See the interviews with Laurent Thévenot (2004, 2006), Robert Salais (2008), Olivier Favereau (2012) and Claude Didry (this issue).

2<http://www.isnie.org/>

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