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Article

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economic sociology_the european electronic newsletter

Provided in Cooperation with:

Max Planck Institute for the Study of Societies (MPIfG), Cologne

Suggested Citation: Didry, Claude; Diaz-Bone, Rainer (2013) : Contributing to a pragmatic institutionalism of economic law: Claude Didry interviewed by Rainer Diaz-Bone, economic sociology_the european electronic newsletter, ISSN 1871-3351, Max Planck Institute for the Study of Societies (MPIfG), Cologne, Vol. 14, Iss. 2, pp. 61-68

This Version is available at:

<http://hdl.handle.net/10419/156011>

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Contributing to a Pragmatic Institutionalism of Economic Law

Claude Didry interviewed by Rainer Diaz-Bone

Claude Didry is senior researcher and director of the research laboratory "Institutions and historical dynamics of economy" (*Institutions et dynamiques historiques de l'économie, IDHE*) at the Ecole normale supérieure de Cachan. He was a member of the research group "Institutions, employment and political economy" (*Institutions, emploi et économie politique, IEPE*) which was founded by Robert Salais (IEPE was the precursor of IDHE).¹ Claude Didry published many articles in the fields of economic sociology, sociology of law, industrial relations. He authored *La naissance de la convention collective* (2002) and *Le moment Delors* (together with Arnaud Mias, 2005), he has co-edited a series of books as *Le Travail et la Nation* (together with Peter Wagner and Bénédicte Zimmermann), *L'entreprise en restructuration* (together with Annette Jobert, 2010), *Renewing Democratic Deliberation in Europe* (together with Jean De Munck, Isabelle Ferreras and Annette Jobert, 2012). He also co-edited the special issue *Droit et conflit du travail dans l'Angleterre du New Labor* (together with Aristeia Koukiadaki, 2011) of the journal *L'homme et la société* (no 182). Claude Didry has recently published an article in the issue 14(1) of this newsletter (Didry 2012).²

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RDB: How were you trained as an economic sociologist and how did you become part of the economics of convention (EC)?

CD: I came to social sciences by chance and completed a master in econometrics. But through the reading of Durkheim I discovered sociology as a science dealing with "social facts": it was a turn for me, in my training at the Ecole normale supérieure (Rue d'Ulm). I focused on the importance of the "professional groups" reform announced by Durkheim, and its influence on the French system of industrial relations in a memoir under the direction of Luc Boltanski at the EHESS. My memoir was the basis of my meeting with Robert Salais in 1990, for a special issue of a journal on the "discovery of the social fact" (Didry 1990).³ It was, in fact, the opportunity to discover the "économie des conventions". But I read also *L'invention du chômage*

(Salais/Baverez/Reynaud 1999), and it enabled me to make a link between the idea of the theory effect (used by Bourdieu about Marx, applied by me to Durkheim) and the plurality of conventions at the core of the theory of Robert Salais (1989). In the research group "Institutions, emploi et politiques économiques" (IEPE), directed by Robert, I met Antoine Lyon-Caen, Law Professor at Nanterre (Paris X), who became, with Robert, my director in a PhD on the juridical construction of the "convention collective". In an historical perspective, I meant to analyze together the production by lawyers of a new category, the "convention collective", and its mobilization by the economic actors through the lawsuits gathered in the "jurisprudence". Lawsuits were taken as "reality tests" ("épreuves de réalité"), through which actors discovered the divergence of possible worlds or conventions implied by their coordination and were obliged to make such conventions explicit.

RDB: In the book you mentioned – Naissance de la convention collective (Didry 2002) – you applied the model of "worlds of production" and the concept of possible worlds to the analysis of juridical work. Could you explain this new application of a model from EC and its consequences for a better understanding of law?

CD: I discovered something very important: at the beginning of the twentieth century, workers and employers didn't work outside the law. The Code civil was a reference for them. This means that nothing like a pure labor market outside the law existed, so labor law couldn't be seen as a pure creation fulfilling a vacuum, but has to be seen as an answer to problems addressed in the grammar of the Code civil. The project of legislation on "convention collective" was then formulated on the basis of these juridical problems encountered in lawsuits, i.e. on litigations formulated in juridical terms and in specific productive situations. The Salais' concept of "world of production" has been for me an important tool to apprehend the diversity of these situations, in which work can be analyzed as an activity oriented toward the realization of a product, and where a plurality of labor conventions are operating. With strong contrasts between, for example, the Lyon's silk industry (dominated by domestic workshops) and the mines in the north of France, and with heterogeneous forms of organization

in the same "world of production": for example domestic workshops together with plants, such as in the case of a small town of silk weavers, Chauffailles, where the first lawsuit constituting the "jurisprudence" on collective agreements took place. Lawsuits specify the moment in which labor conventions encounter concrete and sometimes material problems, at the light of the juridical categories, under the evaluation of a judge, i.e. someone who has a disinterested knowledge of the law. For the historian and the sociologist, it is a "trace" of these moments where actors are feeling obliged to qualify such problems in juridical terms and to explicit their views of the conventions. In the case of the "convention collective", the main problem was to understand in what way agreements ending a strike could be applied to individuals, in frequent situations where no union existed, and where the freedom of individual contracts guaranteed by the Code civil enabled employers to avoid such an application. The couple "strike and lawsuit" was the trace of a problem in labor conventions, for which the lawsuit in itself brought a narrative of the problem in legal terms. For example, the divergence between wages in the domestic workshops and in the plants, in the case of Chauffailles judged by the "Cour de cassation" in 1893. So, the debate was based on a juridical problem and the discussions firstly took place in the circle of lawyers analyzing the jurisprudence with their specific point of view focused on law interpretation, different of the point of view of the actors or of the social researcher focused on the concrete problem of the world of production.

I interpreted this debate as the process of production of a new legal category, providing the economic actors with a new reference to express the problems encountered by the concrete coordination in their work, i.e. putting to test the conventions they were part of.

In the production of this new category, several ways of conceiving law were confronted and had to be coordinated. This revealed several possible worlds in the real world of the law, leading me to an analogy with the articulation of a plurality of possible worlds of production in the real worlds of production analyzed by Salais. It opened also for the economic actors several ways of seeing law in the worlds of production, discovering new possibilities, addressing new problems.

RDB: Could you sketch out principle elements of EC's view on economic law, what economic law is? And does EC offer contributions to a sociological theory of economic law?

CD: It is hard to isolate in law what one could name an "economic law", maybe for France could we take the example of the "Code de commerce" as a business law. But even in this case, the Code de commerce applies to contracts and implies principles mentioned in the Code civil as the general law of the contract, it implies also the right of attacking the decisions of the "tribunaux de commerce" in courts of appeal and the court of cassation, i.e. the common civil jurisdiction.

Law remains a complex set of rules that make sense in the economic situations. Thus, EC brings in a perspective on *law in economy*, i.e. on how people in economic situations mobilize and interpret law as a tool for the understanding their situations and what is wrong inside them. This means that, contrary to the "law and economics" movement, there is nothing like law on the one hand and economic mechanisms on the other. It means also that, contrary to the williamsonian neo-institutionalism, law is not a regulation embedded in an organization dictating the individual behaviors.

With EC we reach a specific sociology of law in the sense of Max Weber. We find in EC's perspective the weberian distinction between two complementary points of view on law: first a theoretical or "juridical" point of view mainly developed by the lawyer and analyzing the meaning of a juridical rule as part of a system. Second an empirical or "sociological" point of view as "what becomes the rule in the community" (Weber 1978a).

Contrary to the classical sociology of law that we can find in Georges Gurvitch's writings under the name of "droit social" (which is conceived as a product of non-juridical social forces), law is here present in the individual's social activities and expectations.

RDB: In the course of the interview you addressed to the way EC explains the emergence of economic institutions. Could you say some more about your methodology how to study and how to explain institutions from a historical perspective?

CD: Methodologically, EC implies a new division of labor in the social sciences. The first challenge is to break the "Berlin wall" between, on the one hand, economy as the science of freedom and rationality and, on the other hand, sociology as the science of obligation and conformity. There is nothing like the spontaneous order of the market looking for the secure harbor of the institutions, when things turn wrong in economy. The concept of "institu-

tion" does not mean discipline of the individual behaviors. It means a common reference in the coordination of the individuals through which they can discern their complementarities and their differences. The second challenge is to break the wall between political science, as the science of the State, and sociology, as the science of the "civil society". For example, "governance" as a way to discuss the monopoly of the State and its association with "civil society" in the decisions designing the future state of the society, is not the good answer, insofar it remains in a "decisionist" scheme. The State is not only to be conceived as the monopoly of the use of force, it is also the organ of a "social thought" (Durkheim) playing an essential role in the assessment of institutions and their elaboration as social categories for the social and economic actors. This leads to the third challenge, overcoming the "technical aspects" of juridical sciences, in order to be able to see law as a source of information on society and economy, for the actors and the researchers. The fourth challenge is to take history as something larger than the succession of periods portrayed by the reading of archives, in order to understand it as the dynamics emerging from the practices of the actors. This leads to a "reflexive" history of economic and institutional dynamics, in which the archives themselves are seen as the result of practices, without naturalizing economic categories as the market, the capital, the labor, the firms...

RDB: In the development of your pragmatic institutionalism of economic law you combined the work of Max Weber with EC's notion of worlds of production. What was the reason you made use of Weber's theory and what is the advantage of the result if compared to Weber's classical sociology?

CD: The reading of the weberian sociology is shared by two interpretations: one focuses on the rationalization process, the other focuses on the conflict between values. Iron cage of bureaucracy against anarchy? It leaves room for imagination!

Weber's sociology of law seems to give little space to fantasy as it has been seen as a specific rationalization: formal rationalization. It echoes the positivistic view of law, later symbolized by the theory of pure law by Hans Kelsen, as a way to understand the historical roots of this juridical positivism (Kelsen 1967). It means the conception of law as a systematic organization of juridical rules, produced in the end by the jurists.

But if you read the last chapters of Weber's *Sociology of Law* (Weber 1978a), things are more complicated nowadays: formal rationality of law is not the end of history; it is always submitted to criticisms. The first criticism comes from the "material" side, i.e. from the feeling of a contradiction between ethical justice and the effects of the positive law in society. Weber finds it in the influence of neothomism on certain jurists, who claim for just prices in transactions guarantying the dignity of men as God's creatures, against the enforcement of misery by the formal law based on contractual freedom. He finds it also in socialism as the claim for the rights of work and workers against individual property. The second criticism targets the ideal systematicity of law at the light of social practices. It is symbolized for Weber by Comte's positivism and implies a "legal realism" in front of the evolution of practices and the problems this poses to law. These criticisms don't cancel jurists' work, as the permanent systematization of the juridical rules, but they give space to reforms, especially in a parliamentary republic. Weber suggests it in his very courageous articles at the end of World War I, on government and parliamentarism in Germany (Weber 1918b). He says that the parliament produces "sophisticated laws", as a result of a discussion process.

This gave me the idea of two dimensions that could enable me to describe the production of new laws in a parliamentary republic: one based on the tension between the material and the formal, the other based on the tension between rationality and irrationality. This naturally echoes the dimensional space of Salais and Storper's "worlds of production" (Storper/Salais 1997). It suggested me to identify what I called "worlds of law", as a way to see law and to propose improvements (see attached graphic). On the material side, I identified three "worlds" in function of their "rationality": the world of welfare sees law as a mean for policies answering ethical and macro-social issues, the world of the collective interests balance sees law as the basis for autonomous negotiations and agreements, the world of "cadi justice" focuses on individual disputes resolutions and sees law as an indication for identifying "uses". On the formal side, the world of the jurists sees law as part of a system of rules (formal rationality), the world of formal jurisprudence sees law as a mean for coherent juridical decisions and the world of notables sees law as the basis for the training of the lawyer that echoes the Common law regime based on the reference to precedents.

In this scheme, you can imagine reforms in each of the worlds but in a parliamentary republic a majority has to be

found which satisfies other worlds' view. This takes the form of a discussion on a project, which can find its majority after amendments. It can also enable to analyze the way politics apprehend the uses of law by the economic and social actors and formulate law propositions: for example, through macro-indicators in the world of welfare, through "hard cases" in the world of "cadi justice", through identification of juridical contradictions or adverse effects for the world of jurists... But the scheme I proposed is above all heuristic, it is a way to analyze law as the result of debates i.e. the encounter of several argumentations in which researchers have to identify worlds of law.

RDB: In your reconstruction of the worlds of law (Didry 2002) you analyzed historical discourses to reconstruct the birth of new economic laws. What, from your point of view, is the role of these discourses for the development of economic institutions – such as economic laws?

CD: Collective agreements are too often seen as an obvious solution to the not less obvious problems of capitalism. In this perspective, one task remains: observe how a collective "nebula" of social thinkers and politicians could push the necessary reforms, through a form of a "great coalition" of the men "of good will", in front of the evidence of a hypothetic "social question".

But if so, why so many debates, why so many hesitations, why politics?

Because the problems themselves are not so obvious, they depend on the way you read reality, on your "episteme". That is why I insisted on different epistemes, and on different ways of identifying the need for reforms that echoes together to the way economic and social actors could see their own situations, and to the discussion of the lawyers assessing the consequences of the change they intend to introduce in law.

I believe, Durkheim's reading of the social world starts with the discovery of society inside the individual interactions through law and work. The problem here is the *social need for justice* in the contracts, especially the labor contract that leads to the proposition of professional groups as a procedure to solve this problem: what is important is the election of representatives by the workers to find legitimate solutions. It has to be seen in context with the proposition of "conseils du travail" emanating from socialist deputies, as Alexandre Millerand and Arthur Groussier. Social Catholicism starts from the misery of the workers,

and identifies the *need for social justice* guaranteeing the dignity of man that capitalism has kept remote from God. What is important here is the protection provided by the collective agreement, as a form of regulation. Le Play's disciples such as Paul Bureau identify the need for collective discipline that can be provided by a strong union organization, complementarily to Le Play's "patronage". They were close to the English union model.

I think, the way Durkheim saw things was the core of the "convention collective" reform, with this strange idea of "groupements" able to conclude a "convention collective" you find in the 1919 law. It is exotic for people like us, who use to see the "convention collective" as a union contract.

Today, we could take EC as what you call a "discourse" among several ones, such as the diagnosis of a post-industrial society (in the sense of Touraine or others), or the neo-liberal economic theory. I think that Robert Salais had this intention in the European Programs he conducted to propose reforms at the EU level, but you know it's a complicated question, since Weber...

RDB: Similar to François Ewald who analyzed in his famous study on the genealogy of the welfare state the juridical discourses about the insurance law at the end of the 19th/beginning of the 20th century, you systematically analyzed the juridical debates about the convention collective (Ewald 1986). But in difference to Ewald who (as the last assistant of Michel Foucault at the Collège de France) relied naturally on Foucault's notions of discourse and governmentality, you started with the model of worlds of law. Now you mentioned the Foucaultian notion of episteme which denotes a deeper cognitive schema (Foucault 1994) and in your book "Naissance de la convention collective" you use the notion of "registers of argument" – some more discourse analytic notions.

How did you combine the analysis of the juridical discourses and registers of arguments with your starting point of worlds of law?

And how did you advance explanatory power for EC's analytical perspective?

CD: The "discourses" on society and its reform I heuristically present as "episteme", have to be seen in two ways. On the one hand, they draw meaning or interpretations of the juridical rules for the economic actors, especially

through the action of organizations such as firms, political parties, unions or even religious groups. It evokes what Ewald calls "l'expérience juridique" (Ewald 1986, p. 29), which has its plural: a plurality of epistemes for a plurality of "expériences juridiques". On the other hand, they indicate fields for reforms i.e. a legislative work that take the form of debates in and around the Parliament.

I would add, to clarify my position toward Ewald and Foucault, that under the rule of law, the notion of "governmentality" addresses the problem of an inadequate conception of the state. It reduces history to the evolution of the government and of the discourses through which its action is conceived, leading to the exclusion of the legislative power and of the diverse experiences of the economic actors. It leads me to the heuristic idea of "legislativity", to integrate the legislative and judicial debates in the analysis of the social development. The different epistemes I identified, through the discourses on society, are acquainted to the worlds of law I derived from the reading of Weber's sociology of law: they could be seen as "regimes of legislativity". Take the case of Durkheim's proposal on professional groups, I see it as an organization of a more general claim of justice, and thus as a new way of judging which evokes the "cadi justice". If I take the case of Social Catholics, their claim for rules guaranteeing the dignity of human beings is related to policies (for example on time duration, minimum wages) controlled by an administration, evoking the welfare world. The focus on union, which can be found in the analysis of some of Le Play's disciples, is related to the world of the balance between collective interests, built on the representation of these collective interests by unions.

But the story doesn't end here. We have to go to what happens in the labor conventions, which draw a plurality of economic dynamics based on the coordination of the actors, i.e. entrepreneurs, firms and workers. Convention means for me coordination from the point of view of individuals, who believe they share a common knowledge. Strikes and processes are motivated by the need to make this common knowledge explicit, to find common bases for the coordination at stake. Juridical rules are taken as the categories used by the actors through the lights of the epistemes I identified, for the narration of their search of common bases, for the building of concrete registers of argument to make explicit the "trouble" in the coordination and find solutions to make the coordination practicable again. The explanation of economic development lies in

the motives of the actors, i.e. in their commitments in conventions.

RDB: Could you explain how IEPE and IDHE developed and what are their main research fields?

CD: IEPE was created by Robert Salais in the aftermath of *L'invention du chômage* (Salais/Baverez/Reynaud 1999). The project was to come back to the social and economic actors, the way they make history not only as adaptation to macro-trends but as choices and realizations in situations. It took statistical data as shading light on these situations, at a specific time in a specific space, in order to draw what Weber calls a "Gedankenbild" (thought-image).

The 1992's research Robert Salais made on a set of firms subsidized by the "Fonds national de l'emploi" (to finance pre-pensions) and by the "Fonds industriel de modernization" (to finance innovative investments) in the 1980ies was a milestone in IEPE. It classified these firms on the basis of their accounting variables, and identified "typical firms" for a further inquiry on the motives of their managers, union representatives, workers and, in the end, the economic conventions at stake ... It reverses the common view on statistics in which monograph is the testing phase before collecting data. It is for me a form of a "pragmatic turn" in statistics.

It explains why IEPE's working papers were monographs of firms observed in disruptive historical periods for their future, in which the meaning of the firm for the actors was at stake. See for example Salais (1994) for the publication of some of these monographs.

I believe, IDHE ("Institutions et dynamiques historiques de l'économie") is pursuing this project, linking – since its creation in 1997 – the members of IEPE with economic historians and sociologists of the Parisian region. Its denomination is a program in itself because it means taking institutions, especially law and money, as categories for the actors. It aims at identifying the plurality of the economic trajectories of firms, territories and economic conventions (especially labor conventions and financial conventions), drawn by the social and economic actors.

RDB: Please introduce your current work in this transdisciplinary research organization of IDHE. And what are your interests for future research?

CD: My researches have addressed two main issues in the last years: First the development of European institutions on the field of industrial relations and social Law. This socio-historical analysis focused on the "European Social Dialogue" launched by Jacques Delors in 1985, that paralleled the identification of a "Single Market" based on the interpenetration of the national economies (Didry/Mias 2005; Didry 2009). Here again, the production of social rules at the European level is at stake – such as the 1994 directive on European work councils and the 1999 directive on fixed term contracts. Second firm's restructuring. We focused on the way economic and social actors mobilized legal rules and procedures, with a special interest for the action of works councils and unions in the discussion of the management projects. This leads us to analyze situations in which "labor conventions" were put in question and made explicit by the actors, in order to find compromises between the parties.

My main project is now to deepen the research on the relation between law and work, in order to see how labor law – in the French case – with a "Code du travail" adopted in 1910, leads the actors to the identification of a special sphere of activity called "work". My intuition is that (as the category of unemployment) work is not simply given with capitalism, but has been progressively "discovered" by actors initially anchored in domestic activities. It has to be seen together with the "discovery of work" as it was the case for the Algerian uprooted peasants identified by Pierre Bourdieu and Abdelmalek Sayad, in their sociology of war time Algeria (Bourdieu/Sayad 1964). It also means that work in a capitalist society is not reducible to the discipline imposed by the employer to the worker, but implies a commitment of the worker in the collectivity he discovers through his work. One conclusion for today could be that work, though less visible at the macro level, is a growing preoccupation of the individuals in their life.

Endnotes

¹See for the working papers of IEPE

<http://www.idhe.cnrs.fr/spip.php?rubrique121> .

²This 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 Christian Bessy (this issue).

³See the special issue *A la découverte du fait social* of the journal *Genèses Sciences Sociales et Histoire* (December 1990).

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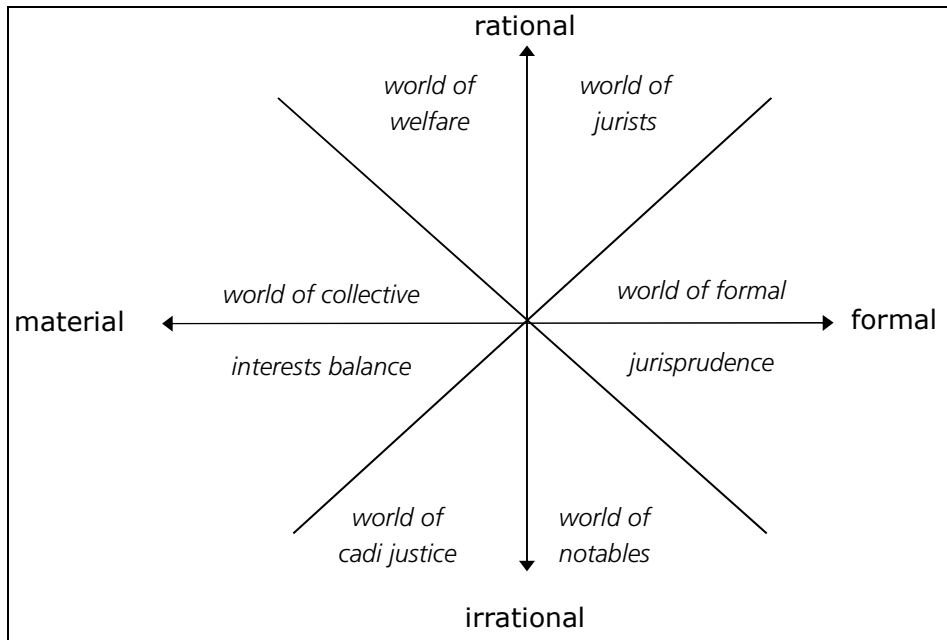
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Appendix

Graphic: Worlds of law



(Didry 2002:39)