

### When the history of property rights encounters the Economics of Convention: some open questions starting from European history

Barbot, Michela

Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

GESIS - Leibniz-Institut für Sozialwissenschaften

#### Empfohlene Zitierung / Suggested Citation:

Barbot, M. (2015). When the history of property rights encounters the Economics of Convention: some open questions starting from European history. *Historical Social Research*, 40(1), 78-93. <https://doi.org/10.12759/hsr.40.2015.1.78-93>

#### Nutzungsbedingungen:

Dieser Text wird unter einer CC BY Lizenz (Namensnennung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier:

<https://creativecommons.org/licenses/by/4.0/deed.de>

#### Terms of use:

This document is made available under a CC BY Licence (Attribution). For more information see:

<https://creativecommons.org/licenses/by/4.0>

---

# When the History of Property Rights Encounters the Economics of Convention. Some Open Questions Starting from European History

Michela Barbot\*

---

**Abstract:** »Die Geschichte der Eigentumsrechte trifft auf die Economics of Convention. Einige offene Fragen aus Sicht der europäischen Geschichte«. The aim of this article is to analyse the relationships between law and conventions with regards to an issue still little explored in the perspective of the Economics of Convention (EC): the history of property rights. Focusing on Continental Europe, the main key points of the recent debate on property rights' long-term evolution will be outlined, which are basically developed along the lines of the New Historical Institutionalism theories (NHI). After discussing the NHI approach to legal institutions, it will be demonstrated how even the soundest criticisms to this approach do not exhaust the list of open questions on the relationship between conventions and property rights. These questions are mainly related to the problems of uncertainty and to the connection between property rules, their interpretation and their legitimization. By defining these questions, it will be shown how the EC perspective could contribute to providing a more complex interpretation – and therefore historically more pertinent – of the long-term changes of one of the major legal institutions of western capitalism.

**Keywords:** Property rights, 19th-century codifications, economics of convention, new historical institutionalism, legal enforcement, uncertainty, legality, legitimacy.

---

## 1. Introduction

---

The aim of this article is to analyse the relationship between law and conventions with regards to an issue still little explored in the perspective of the Economics of Convention (EC): the history of property rights.<sup>1</sup> In particular, I will mainly focus on my principal field of research, related to the European countries belonging to the Roman and Civil Law tradition. The choice of this geographical area will also enable me to avoid the disproportionately Anglo-

---

\* Michela Barbot, IDHES ENS-Cachan, 61 avenue du Président Wilson, 94235 Cachan Cedex, France; michela.barbot@ens-cachan.fr.

<sup>1</sup> Regarding modern economies, Christian Bessy's (2006) analyses on intellectual property constitute an important exception.

centric viewpoint which still dominates literature on this subject (Béaur et al. 2013). Property rights, in fact, are a classic theme of Western European economic historiography.<sup>2</sup> Starting with the analysis of Enclosures in England, the first investigations into the industrial revolution contributed to the formulation of a thesis which sharply distinguishes between property “rights” and property “wrongs” (Scott 2003), where the “good” property right has been pre-eminently identified as the right to complete, absolute and exclusive individual ownership formalised in Continental Europe during the 19th century.

Since the 1970s, following the New Historical Institutionalism (NHI) analyses inspired by Douglass North’s works, interest in this field has gradually shifted from the issue of the efficiency of property rights to the efficiency of the way in which they are enforced, opening the way to a deeper analysis of the relationship between legal rules and the actors who interact with them.<sup>3</sup> Moving on from an efficiency-oriented interpretation, and essentially remaining anchored to the assumption of the Rational Choice Theory (Diaz-Bone and Salais 2011; Diaz-Bone 2012), the empirical researches based on the framework of the NHI have drawn a certain amount of criticism among legal and economic historians (Congost 2003; Harris 2003; Ogilvie 2007; Congost and Santos 2010). In this article, I will firstly summarise what is known about the history of property in Western Continental Europe from the Middle Ages to the 19th century transformations (section 2). Then, in section 3, I will outline the main key points of the recent debate on this subject, basically developed along the lines of the NHI theories. On the one hand, I will discuss the approach of the NHI to legal institutions, and on the other I will demonstrate how even the soundest criticisms to this approach do not exhaust the list of open questions on the historical evolution of the relationship between conventions and property rights. These questions are mainly related to the problems of uncertainty and conflicts about ownership, to the role of objects in defining the rights to appropriation, and to the connection between property rules, their interpretation and their legitimization. Section 4 will illustrate how these open questions could be explored with the help of the EC. By defining these research questions, I will show how the EC perspective could contribute to providing a more complex interpretation – and therefore historically more pertinent – of the long-term

---

<sup>2</sup> Suffice it to mention the work carried out by Adam Smith, Karl Marx, Max Weber and the classic institutionalists, as well as Marc Bloch’s famous thesis on agrarian individualism (Bloch 1930). For an overview of the interpretations on property rights and economic development, see Getzler (1996).

<sup>3</sup> However, this does not mean that the theory of the existence of property rights and property wrongs has been totally discarded. On the one hand, it is still found today in a great deal of historical research (see section 3); on the other, economists studying the connection between property rights and efficiency have for a long time recommended private property as best for economic growth (De Soto 2000), claiming that its non-definition erodes market activity, and this claim has become the centrepiece of IMF and World Bank policymaking (Stiglitz 2002).

changes of one of the major institutions of western capitalism. In conclusion, I will also briefly discuss the importance of a historical-conventionalist analysis of the most important producer of rules and legal incentives: the State.

---

## 2. Property Rights before the 19th-Century Codifications: An Overview

---

Any long-term analysis of the evolution of property rights in Continental Europe cannot but start from a crucial fact: this evolution is characterised by a definite formal discontinuity, caused by the 19th-century codifications, and especially by the French Civil Code of 1804. This Code was promulgated throughout the Napoleonic Empire and served as a model for the legal codes of more than 20 nations throughout the world. It was the first modern legal code to be adopted throughout Europe (Halperin 2003). Article 544 established private, absolute and exclusive property as the main form of property legally possible, at the expense of the other two major regimes that had prevailed since medieval times: collective property (the Commons) and dissociated property (the *Dominia*, from the Latin *dominium*: Grossi 1992). Unlike the Commons, in which ownership was – and still is – shared by the members of a group or a community, the medieval and early modern *Dominia* clearly separated property rights into two distinct levels, an eminent right (*dominium eminentis*) and a usage right (*dominium utilis*), that could be divided and attributed to several individuals or institutions.<sup>4</sup> In spite of this difference, both the Commons and the *Dominia* accorded an undisputed primacy to the actual possession over formal deeds (Grossi 1981; Conte et al. 1999). This meant that, in the case of disputes, the real use of an object could legally prevail over the presentation of written agreements and formal entitlements (Cerutti 2003; Barbot 2011).

Disregarding these two legal systems, the Code Napoléon formalised a strong anthropological change in the relationship between the objects and the subjects of property. While article 544 of the Civil Code recognises property as a sacred, inviolable and exclusive subjective right, on the contrary, the previous legal concepts of property, on the contrary, were entirely centred on the “nature of things” (Hart 1961; Grossi 1992) and regarded property rights as objective and infinitely divisible entities. Following the Commons and the *Dominia* systems, in fact, a single asset could have various owners, and any of the owners could own even infinitesimal parts of the rights of *usus*, *abusus* or *fructus*

---

<sup>4</sup> One for the most common contractual forms of this property dissociation was the emphyteusis, whose origins go back to Roman law. The emphyteusis contract created a physical separation between the *dominium eminentis* of a piece of land and the *dominium utilis* of the buildings constructed on it (Faron and Hubert 1995).

existing on it.<sup>5</sup> Especially in the case of the *Dominia*, these portions could, in turn, be entirely or partially sold, subleased or conveyed from one generation to another.<sup>6</sup> Then, the same asset could be involved in a large number of transactions, which required the coordination of all the actors who held a right to it.

This does not mean, however, that prior to the 19th century, exclusive and individual ownership – that is the simultaneous possession by the same subject of the three rights of *usus*, *abusus* and *fructus* – did not exist. On the one hand, it was simply one option from among a number of institutional alternatives available.<sup>7</sup> On the other hand, the exercise of this right was often restricted by some legal devices, such as primogeniture or entail (*fideicommissum*), which subordinated the interests of individuals to those of preserving their kinship.<sup>8</sup>

All of these characteristics had important consequences on the overall structure of the *Ancien Régime* societies. One of the most significant effects at the economic level was that wealth was identified more by the actual use and possession than by the formal ownership of an asset (Todeschini 2004; Alfani and Barbot 2009). Taking this concept of wealth into account, many systems of direct taxation consequently affected the users more than the formal proprietors of land and houses (Ruggiu 2009; Barbot et al. 2014). Moreover, the relevance of the “nature of things” meant that one of the most common conventions used to determine the economic value of goods was their intrinsic value. This quantity was determined by experts, usually organised in guilds and professional bodies, whose task was to identify and explicit the objective qualities relevant to the evaluation.<sup>9</sup> As a result of the combination of a large number of criteria (among which, for example, the assessment of the quality of the raw materials and of their state of preservation), the intrinsic value was never defined unilaterally, but always established and calculated by experts in the context of “the

---

<sup>5</sup> The three legal categories of *usus* (i.e. the right to use a thing), *fructus* (the right to the proceeds of a thing) and *abusus* (the right to dispose of a thing) were at the basis of the Roman conception of property: Halperin (2008).

<sup>6</sup> Many examples of these numerous divisions, especially in Italy, are to be found in Chauvard (2003) and Barbot (2008).

<sup>7</sup> It is important to point out that in contractual practice, private property could be linked to Commons and *Dominia* within the same transaction. These phenomena, in turn, make it difficult to empirically distinguish between private and non-private forms of property (Béaur et al. 2013).

<sup>8</sup> The entail and the primogeniture were two inheritance practices used to exclude certain heirs and preserve the family estate. The combination of these legal devices generated a property restriction by limiting the inheritance to the owner's first descendant (Bellavitis et al. 2012).

<sup>9</sup> Bert De Munck (2011) has shown that, at the end of the seventeenth and eighteenth centuries, both the convention of intrinsic value and the power of the guilds to define product quality became obsolete because of epistemological transformations. In this regard, it is possible to explore also the hypothesis that these changes were in some way linked to the gradual establishment of the contractual practices of exclusive private property, which occurred in various parts of Europe and began to emerge precisely in the eighteenth century (Barbot 2008; Béaur et al. 2013).

circumstances” (Barbot 2012). In their evaluation, these experts make use of two technical devices very familiar to the EC: measurement and qualification (Grenier 2003; Barbot et al. 2010).

Within the societies of the *Ancien Régime*, the social “value” of people was also determined on the basis of numerous criteria of classification.<sup>10</sup> Among them, property rights played a dual role. On the one hand, the numerous kinds of collective or divided ownership contributed to creating social hierarchies which only partially overlapped the stratifications made by age, income, gender or profession (Brewer and Staves 1996). On the other hand, the entitlements on land and real estate produced several forms of social inclusion by interacting with the citizenship through the juridical mechanisms of residence.<sup>11</sup>

---

### 3. From the “Property Rights-Property Wrongs” Dichotomy to the Problem of Enforcement

---

Opening the way for the triumph of a legal culture centred on people rather than things, and on the exclusivity rather than the divisibility of property rights, the 19th-century codifications led to a formal change which was achieved in different ways, depending on the local context. However, despite the great variety of historical experiences, the evolution of property rights in Europe has been analysed at length in terms of the fundamental primacy of the absolute property rights of individuals, thought to be the most appropriate legal form to facilitate the birth of capitalism, compared to all the other “property wrongs” existing in the course of history.

During the 1960s, a similar dichotomy also emerged in economics, in the context of the debate generated by the theory on the so-called “tragedy of the Commons”. According to this theory, elaborated by Garrett Hardin in a famous article in *Science* (1968), in a society with a population growth, the depletion of a shared resource by individuals, acting rationally on the basis of their self-interest, acts contrary to the group’s long-term interests by depleting the common resource. In this sense, collective rights on natural resources already contain the seeds for their “tragedy”, which could have been avoided by granting individual rights.

Douglas North’s initial research, developed shortly after the formulation of Hardin’s theory, was also based on the “property rights-property wrongs” thesis, but then his position became less specific and more complex. As I have already

---

<sup>10</sup> On professional classifications, see Judde de Larivière and Hanne (2011).

<sup>11</sup> In the case of Italian cities during the *Ancien Régime*, I have been able to demonstrate that the different forms of the management of urban and real estate (short-term leases, emphyteusis, exclusive property, etc.) were in turn connected to different “degrees of citizenship” (Barbot 2013). For an analysis of the connections between citizenship and property, see also Cerutti (2012).

re-called, the NHI theory on legal institutions has undergone various changes over the last forty years.<sup>12</sup> More precisely, at least three different stages can be identified.

(1) In a first stage, during the 1970s, legal rules – and in particular property rules – are essentially viewed as a precondition for the development of the markets. The question at this stage is how a given regime of ownership affects resource allocation and economic performance, and precisely how the most efficient regime is envisaged in the exclusive property of individuals. The most emblematic work at this stage is undoubtedly Douglass North and Robert Thomas' book from 1973, entitled *The Rise of the Western World. A New Economic History*. In this work, the authors attempt to identify the elements that allowed the Western European economy to rise to affluence in the early modern era. The key to growth is an efficient legal system: efficient in the sense that the system of property rights gives individuals incentives to innovate and produce and, conversely, inhibits those activities (rent-seeking, theft, arbitrary confiscation and/or excessive taxation) that reduce individual incentives. In their own words,

ideally by providing proper incentives, a fully efficient economic organisation would ensure that the private and social rates of return were the same for each activity and that both were equal among all economic activities. In such a situation each individual would desire to maximize his wealth and would have the exclusive right to use his land, labour, capital and other possessions as he sees fit; also that he alone has the right to transfer his resources to another, and that property rights are so defined that no one else is either benefited or harmed by his use of his property (North and Thomas 1973, 91).

North and Thomas then claim to trace the reasons for the divergent paths of growth in Europe in the success or failure to impose an efficient legal system of well-defined individual property rights. At the time, the prime examples of success in these fields were the 16th and 17th centuries' Dutch and English economies in comparison with the coeval stagnation of France and the decline of Spain. In his next book (1981), North even more explicitly supports the thesis of the existence of good and bad property rights, applying the theory of the tragedy of the Commons to the entire prehistory of the world:

Prehistoric man employed labor in conjunction with natural resources to produce his living. Natural resources were initially held as common property. This type of property implies free access by all to the resource. Economists are familiar

---

<sup>12</sup> These changes, in turn, are linked to the degree in which Douglass North increasingly distanced himself from the assumptions of neo-classical economics. The emphasis on the articulation between cognitive processes and institutions (Knight and North 1997), in fact, caused him to move further away from the neo-classical research programme. Although of considerable importance, I will not discuss this issue here, as, empirically, North's changes of viewpoint have not significantly influenced the historical research based on his framework. For an analysis of the relationship between NHI and the neo-classical economy, see for instance Bessy (2002).

with the proposition that unconstrained access to a resource base will lead to its inefficient utilisation. This inefficiency, as the demand for the resource increases, eventually leads to the depletion of the resource. This instance is an example of incentive failure caused by property rights inadequacies (North 1981, 80).

(2) In a second phase (roughly from the beginning of the 1990s), two major developments are to be found in the neo-institutionalist framework. On the one hand, the works of Elinor Ostrom (1990, 2005), refuting the inevitability of the tragedy of the Commons, show that exclusive individual private property is not always the most economically efficient legal form.<sup>13</sup> On the other hand, increasingly influenced by the developments of the neo-classical theory of property rights (Demsetz 1967), the focus of NHI's authors' moved from the identification of good and bad property rights to the problem of the efficiency of their enforcement. Following so called Coase-theorem (Coase 1960), the central explanatory variable is now unequivocally identified in the transaction costs, i.e. "the costs of protecting property rights and policing, specifying and enforcing agreements" (North 1990, 220). The problem of enforcement, in turn, increasingly encourages NHI framework to focus not only on the rules, but also on the actors who interact with them. In this phase, Douglass North perfects his theory introducing the distinction between "institutions" (the formal or informal rules of the game) and "organisations" (the actors or players in the game). According to North, "it is the interaction between institutions and organisations that shapes the institutional evolution of an economy" (North 1994, 7). It is important to note that, for North, the rules that count within this interaction are the formal ones: laws, contracts, regulations, constitutions. On the contrary, the informal institutions (i.e. conventions, norms of behaviour, and self-imposed codes of conduct) are considered as immutable cultural features which do not react immediately to changes in formal rules, and whose rates of transformation are so slow as to be immaterial, producing 'path dependency' phenomena (North 1990).

(3) In the third and final stage (from the 2000s), the main issue is to understand exactly why people follow – or not follow – the rules of the game, and how to create effective controls and incentives able to steer institutional change along the path of economic growth. In this phase, NHI offers two major answers to these questions. The first is clearly explained in Douglass North's most recent works. The increasing attention he pays to legal and contractual enforcement and the recognised primacy of formal rules leads him to apply his analysis more and more to the major agent responsible for the definition and protection of the legal rules: the State. Already in 1981, North stated that "a theory of the State is essential because it is the State that is responsible for the efficiency of the property right structure, which causes growth or stagnation or economic decline" (North 1981, 17). In the latest book by Douglass North,

---

<sup>13</sup> Various historians have similarly illustrated the conditions which could have made the commons in England economically viable: see for instance Allen (1992); Clark (1998).

John J. Wallis and Barry R. Weingast (2009), the role of the State is increasingly underscored, to the extent that it becomes the outright protagonist of a global story of the entire history of the world. Moving on from Max Weber's definition of the State as holder of the monopoly of the use of legitimate force (Didry 2006), the variable which makes it possible to understand economic development in a historical perspective is envisaged in the minimization of violence by State organisations, and institutional change is thought to result from a shift in the interests or knowledge of the political actors that govern the States and shape the "rules of the game".

Alongside North's essentially State-oriented explanations, other neo-institutionalists have insisted rather on self-enforcing mechanisms set in motion by individuals in their interactions at a micro-level. In particular, Avner Greif (2006), making use of the game theory, has focused on North's blind spot theory, that is on the analysis of enforcement produced by informal institutions, social norms and beliefs prevailing in situations characterised by a lack of State structures, as is the case in European pre-state societies. Starting from the same question posed by North on the understanding of factors at the roots of the rise of western economies, Greif dates the institutional foundations of European development back to the Middle Ages. The reason is that, at the time, "the structure of society in the West was centred on interest-based, self-governed, non kin-based urban organisations" – in particular the merchant guilds – which fostered an "individualistic culture", crucial to the development of capitalism (Greif 2006, 26). With Greif there is a further evolution in NHI's approach to legal institutions: the most relevant research object is no longer how the rules are legally and contractually enforced, but rather the individual motivations and self-incentives to follow them. It is interesting to note that North's State-oriented perspective is corrected and adjusted by Greif with a more radically individualistic and rational choice-oriented approach, which identifies the maximization of individual interests as the basic reason for the respect of legal rules.

---

#### 4. From the Economics of Convention to the Politics of Conventions: Towards a Conventionalist Analysis of Property Rights

---

Empirically applied in a considerable amount of research,<sup>14</sup> the NHI developments (even going beyond the intentions of their early promoters) have been in some way absorbed into the prevailing interpretation of the history of property rights in Europe, in which the mainstream property rights-property wrongs dichotomy has not really been completely abandoned. According to this inter-

---

<sup>14</sup> See for instance North et al. (1996).

pretation, the development of Western capitalism would have its roots in two main institutional processes, whose different rates of implementation, in turn, would explain the divergence in the growth of European countries (as well as the divergence between the West and the rest of the world):<sup>15</sup> the spread of a culture based on individualism and self-interest, and the formation of national States oriented towards the defence and enforcement of individual's property rights. In countries with slower economic growth, these processes would be hindered for a long time by a variety of factors, among which one of the most important is the persistence of the non-exclusivity, plurality and inadequate definition and certification of property rights. These elements seemingly had the effect of encouraging the multiplication of disputes over property, causing high transaction costs, reducing individual initiative and, in the end, hindering the creation of a system of taxation functional to reallocate efficiently the resources available.

In the last decade, this interpretation, although still dominant, has been challenged both in the field of economic and social history, and in that of legal history. The analysis of these criticisms is extremely interesting because each of them raises – often without solving them – some knotty theoretical-methodological questions making it feasible to outline a possible conventionalist research agenda on the history of property rights.

(1) The first critical point, which can easily be dealt with from the perspective of the EC, is the hypothesis that *Ancien Régime* economies were characterized by a high level of uncertainty which depended on the non-exclusivity and the pluralism of the Commons and the *Dominia* systems (Rosenthal 1992). In recent years, research carried out in the field of micro-history has refuted that this uncertainty had no remedy, revealing the crucial role played by the numerous medieval and early modern local courts in the certification and ex post definition of property rights (Ago 2002). Some of these studies have also shown that, in general, uncertain property rights are not always so problematic and may even be advantageous for the actors, allowing them to operate more strategically in the interstices opened by the plurality and non-exclusivity of the legal norms. These discoveries, while certainly important, are, however, limited by the fact that they move from the same definition of uncertainty that is assumed by the approaches from which they wish to distance themselves. Both in the view of the NHI, which considers it as a nuisance, and in the view of those who consider its advantages, uncertainty is reduced to its neo-classical definition, which, in brief, interprets it as a state of incompleteness composed of two distinct elements: the natural uncertainty connected to the physical environ-

---

<sup>15</sup> A framework quite similar to the one developed to analyse the European intradivergence has indeed been used also to explain the so-called "Great divergence" between the West and the East, and notoriously between Europe and China (Pomeranz 2000; Greif and Tabellini 2010; Rosenthal and Wong 2011).

ment, and the critical uncertainty caused by the foreseeable difficulties of individuals. As many members of the EC have pointed out (Favereau 1988; Salais 1998a; Thévenot 2002a), this idea of uncertainty has two main drawbacks. On the one hand, it tends to reduce the actors' critical capacity merely to being able to implement rational strategies and carry out maximizing calculations, and, on the other, it considers the activities of identification, measurement and qualification of the assets purely as sources of transaction costs and factors which disturb economic life.

The historicization of the category of uncertainty, which is essential in order to analyse its long-term effects, would instead mean having to carry out two operations particularly consistent with the EC approach. The first one is to abandon the object-subject cleavage underlying the neo-classical definition, in favour of an analysis that takes together – rather than separately – the critical uncertainty of actors and the natural uncertainty linked to the external world. This operation would be extremely useful to examine in depth the logics of two legal regimes intrinsically “objective” like the medieval and early modern Commons and *Dominia*, centered “on things, more than on human beings” (Grossi 1992, 22). In this perspective, the analysis carried out within the EC on the role of material objects in providing support to the dynamics of action and coordination (Conein et al. 1993; Thévenot 2002, 2006; Bessy 2002) would make it possible to overcome a limitation existing in many of the works based on the NHI approach: their inclination to analyse property rights regardless of the characteristics of things they are specifically concerned with. Whether they are material assets (such as land or artefacts) or more intangible assets like licenses or patents, the concrete features of the objects of property are only marginally taken into consideration by NHI to explain the institutional dynamics. What is important for NHI explanation, in fact, is essentially the interaction between the rules and the players, in the form of enforcement or self-enforcement of the most economically efficient institutions.

A further problematic aspect connected to the way NHI deals with uncertainty is the negative way that it regards conflicts, the intensity of which is essentially viewed as a dangerous source of transaction costs. Undoubtedly the *Ancien Régime* property system, made of a highly stratified bundle of rights, left the way open for countless causes for litigation among the many who were entitled to rights on each single asset. Not always, however, did these disputes – although they generated costs – harm coordination. On the contrary, they could contribute to opening new opportunities of action, leading to a redefinition, re-negotiation or even to a change in the rules of the game. The potential and possibilities created by such disputes have never, or hardly ever, been explored by scholars of property rights, who instead have emphasised the inefficiency linked to the numerous disputes which abound in the judicial archives of the

*Ancien Régime*.<sup>16</sup> From the point of view of the EC, these archives, indeed, constitute an extraordinary opportunity to accede to the actors' interpretations of law, as it is precisely in case of disputes that the articulation between the legality and legitimacy of legal rules is more apparent (Boltanski and Thévenot 2006).

(2) We now come to the second important critical point in the interpretation of legal institutions provided by NHI. This critical element has been well-described by Ron Harris in an article devoted to the relationships between legal history and the neo-institutionalist framework (2003). According to Harris,

NHI historians often abstract the legal system into three elements: property rights, contracts and state enforcement [...]. The meaning of these rules is taken to be predetermined and does not require an ex post interpretation or exercise of discretion before implementation in concrete disputes. The institutional structure of the judiciary in these cases is taken to be simple and irrelevant and usually no conflict is observed between spheres of jurisdiction or bodies of law. The legal profession is non-existent or facilitative. Abstractions such as these are problematic when applied to systems with a long and complex history such as England, the European continent, or the Atlantic states of the US. In these areas, the arrangements that deal with what economists consider to be property rights or contracts are fragmented and scattered among various compartments of the system of juridical norms. Each piece, or legal rule, interrelates with the other, at times, seemingly unrelated pieces in a thick legal-historical context (Harris 2003, 339-40).

In this passage, Harris highlights two important limitations in NHI's approach to legal rules. On the one hand, this approach tends to stylise the reconstruction of the legal historical context of which these rules are part, keeping only its very basic elements (which in this way become sort of ahistorical 'black boxes'). On the other, it omits the question of the interpretation of rules at two distinct levels. Firstly, at the level of the actors subject to the rule, because it limits their field of action to the alternative between compliance (by means of external enforcement or internalization through social norms and beliefs) or deviance from them. And, secondly, at the level of the entire legal system, because it crystallises and reifies the rules, obscuring the ongoing process of modification and adaptation carried out by jurisprudence (Didry 2002) and by legal experts (Bessy 2007, 2012) within the situations in which these rules are actually implemented or mobilized.

To overcome these two limitations, the analysis of the ways the legal norms are appropriated and reshaped in contractual, judicial and jurisprudential practices is undoubtedly an essential operation. This operation, however – especial-

---

<sup>16</sup> The same connection between conflicts and inefficiency, indeed, should be more precisely and extensively tested. In the case of the history of rights on irrigation canals in Northern Italy, I have, for example, been able to show that the rise of an agrarian capitalism in this area took place at a time when the number of disputes was increasing rather than diminishing (Barbot 2014).

ly in the case of property rights – must also take into consideration the role of normative authorities who, with their action, largely contribute to giving form and substance to juridical rules. We have seen that NHI, in general, considers the role of the State in relatively minimal terms: the predominant driving force of government elites is recognised in the minimization of violence and conflicts, and the main task of these elites is envisaged in the definition and protection of the most efficient property rights. NHI's approach then gives most weight to explanation in terms of transaction costs or power strategies, and once again it achieves this by considering a single space of calculation, which brings it closer to standard economic calculation. On the contrary, the EC framework considers a plurality of spaces of calculation and gives the greatest importance to the problems of the interpretation and legitimization of rules. From this perspective, the EC might help to escape from the reductive reading of law proposed by NHI, provided, however, that it integrates in its framework an analysis of the dynamics of political power in a very long-term perspective. The understanding of the role of central and local governments in the production, enforcement, legitimisation and even in the limitation of the rules<sup>17</sup> is indeed a major key to the explanation of the evolution of a legal institution with strong political features like property right. In this light, the work done by the EC on the construction of statistical categories by State bodies (Desrosières 1993) and the analysis of the different *conventions d'état* existing in contemporary politics (Salais 1998b) have significantly improved our knowledge of State and political dynamics in the last 150 years (Vitale 2006). However, much still needs to be done to build a larger “politics of conventions on power and authority in a long-time perspective” (Thévenot 2012, 28). Of all the aspects of the historical relationship between conventions and property rights, this, in my opinion, is the greater challenge to the EC, because it means acquiring the tools with which to read the extremely long, dense and complex processes that have directed the evolution of governments' intervention in Western Europe from the modern age to the present day.<sup>18</sup> This last task is still largely to be carried out, and it outlines for the EC a very stimulating research agenda at the intersection of history, political science and law.

---

<sup>17</sup> See for example the mechanism of public expropriations, with which the State claims the right to not protect but to infringe on individual private property (Barbot et al. 2012).

<sup>18</sup> This subject is a classic theme in European historiography in the 1970s (see for instance Shennan 1974 and Tilly 1975). However, these publications rarely dealt with the question of property rights and their interaction with the dynamics of the formation of national States.

---

## References

---

- Ago, Renata, ed. 2002. *The value of the norms*. Roma: Biblink.
- Alfani, Guido, and Michela Barbot, eds. *Ricchezza, valore e proprietà in età preindustriale (1400-1850)*. Marsilio: Venezia.
- Allen, Robert. 1992. *Enclosure and the Yeoman. The agricultural development of the South Midlands, 1450-1850*. Oxford: Oxford University Press.
- Barbot, Michela. 2008. *Le architetture della vita quotidiana. Pratiche abitative e scambi immobiliari a Milano in età moderna*. Marsilio: Venezia.
- Barbot, Michela. 2011. Incertitude ou pluralité? Les conflits sur les droits fonciers et immobiliers dans la Lombardie d'Ancien Régime. In *Faire la preuve des droits sur le sol. Droits et savoirs en Méditerranée*, ed. Julien Dubouloz, Alice Ingold and Antonio Stopani, 275-301. Roma: École Française de Rome.
- Barbot, Michela. 2012. Between market and architecture: The role of the college of engineers, architects and land surveyors in real estate pricing in 16th-18th century Milan. In *Nuts and bolts of construction history. Culture, technology and society*, ed. Robert Carvais, André Guillaume, Valerie Nègre and Joel Sakarovich, 237-44. Paris: Picard.
- Barbot, Michela. 2013. La résidence comme appartenance. Les catégories juridiques de l'inclusion sociale dans les villes italiennes sous l'Ancien Régime. *Histoire urbaine* 27: 29-48.
- Barbot, Michela. Forthcoming. What the dominia could do: Enfiteusi and other forms of divided property rights in Lombardy from the 14th to the 20th century. In *Les pratiques emphytéotiques en Europe*, ed. Gérard Béaur, Rosa Congost and Pablo Luna. Turnhout: Brepols.
- Barbot, Michela, Jean-François Chauvard, and Luca Mocarrelli, eds. 2010. M. Questioni di stima. Special Issue of *Quaderni Storici* 135.
- Barbot, Michela, Luigi Lorenzetti, and Luca Mocarrelli, eds. 2012. *Property rights and their violations. Expropriations and confiscations in Europe and its settlements, 16th-20th centuries*. Berne: Peter Lang.
- Barbot, Michela, Matteo Di Tullio, and Marie-Lucie Rossi, eds. 2014. *Pratiche e teorie estimative in Europa*. Special Issue of *Cheiron*.
- Béaur, Gérard, Philipp R. Schofield, Jean-Michel Chevet, and Maria Teresa Pérez Picazo, eds. 2013. *Property rights, land markets, and economic growth in the European countryside (13th-20th centuries)*. Turnhout: Brepols.
- Bellavitis, Anna, Jean-François Chauvard, and Paola Lanaro, eds. 2012. Fidéicommissis. Procédés juridiques et pratiques sociales (Italie-Europe, Bas Moyen Âge-XVIIIe siècle). *MEFRIM* 124 (2).
- Bessy, Christian. 2002. Institutional embeddedness of economic exchange: convergence between new institutional economics and the economics of convention. In *Conventions and structures in economic organizations*, ed. Olivier Favereau and Emmanuel Lazega, 79-92. Edward Elgar: Cheltenham.
- Bessy, Christian. 2006. Réformer la propriété intellectuelle pour mieux réguler les marchés? *Revue d'Economie Industrielle* 116: 153-64.
- Bessy, Christian. 2007. *La contractualisation de la relation de travail*. Paris: L. G. D. J.

- Bessy, Christian. 2012. Law, forms of organizations and the market for legal services. *Economic sociology\_the European electronic newsletter* 14 (1): 20-9 <[http://econ.soc.mpifg.de/archive/econ\\_soc\\_14-1.pdf](http://econ.soc.mpifg.de/archive/econ_soc_14-1.pdf)>
- Bloch, Marc. 1997 [1930]. La lutte pour l'individualisme agraire dans la France du XVIII<sup>e</sup> siècle. In *La terre et le paysan. Agriculture et vie rurale aux XVII<sup>e</sup> et XVIII<sup>e</sup> siècles*, ed. Etienne Bloch, 257-319. Paris: Armand Colin.
- Boltanski, Luc, and Laurent Thévenot. 2006. *On justification*. Princeton: Princeton University Press.
- Brewer, John, and Susan Staves, eds. 1996. *Early modern conceptions of property rights*. New York: Routledge.
- Cerutti, Simona. 2003. *Giustizia sommaria. Pratiche e ideali di giustizia in una società di Ancien Régime (Torino XVIII secolo)*. Milano: Feltrinelli.
- Cerutti, Simona. 2012. *Étrangers. Étude d'une condition d'incertitude dans une société d'Ancien Régime*. Paris: Bayard.
- Chauvard, Jean-François. 2003. Rendita, diritto e morale. Proprietari e inquilini in Età moderna. *Quaderni storici* 113: 305-23.
- Clark, Gregory. 1998. Commons sense: common property rights, efficiency, and institutional change. *Journal of Economic History* 58: 73-102.
- Coase, Ronald. 1960. The problem of social cost. *Journal of Law and Economics* 4: 1-44.
- Conein, Bernard, Nicolas Dodier, and Laurent Thévenot, eds. 1993. *Les objets dans l'action*. Paris: EHESS.
- Congost, Rosa. 2003. Property rights and historical analysis: What rights? What history? *Past & Present* 181: 74-106.
- Congost, Rosa, and Rui Santos, eds. 2010. *Contexts of property in Europe. The social embeddedness of property rights in land in historical perspective*. Turnhout: Brepols.
- Conte, Emanuele, Vincenzo Mannino, and Paolo M. Vecchi. 1999. *Uso, tempo, possesso dei diritti. Una ricerca storica e di diritto positivo*. Torino: Giappichelli.
- Demsetz, Harold. 1967. Toward a theory of property rights. *American Economic Review* 57 (May): 347-59.
- De Munck, Bert. 2011. Guilds, product quality and intrinsic value. Towards a history of conventions? *Historical Social Research* 36 (4): 103-24 <<http://www.ssoar.info/ssoar/handle/document/36317>>.
- De Soto, Hernando. 2000. *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*. New York: Basic Books.
- Desrosières, Alain. 1993. *La Politique des grands nombres: histoire de la raison statistique*. Paris: La Découverte.
- Didry, Claude. 2002. *Naissance de la convention collective, débats juridiques et luttes sociales en France au début du XX<sup>e</sup> siècle*. Paris: EHESS.
- Didry, Claude. 2006. Droit, histoire et politique dans la sociologie de Max Weber. In *La légitimité de l'État et du droit. Autour de Max Weber*, ed. Michel Coutu and Guy Rocher, 91-114. Laval: PUL.
- Diaz-Bone, Rainer. 2012. Elaborating the conceptual difference between conventions and institutions. *Historical Social Research* 37 (4): 64-75.
- Diaz-Bone, Rainer, and Robert Salais. 2011. Economics of convention and the history of economies: Towards a transdisciplinary approach in economic history.

- Historical Social Research* 36 (4): 7-39 <<http://www.ssoar.info/ssoar/handle/document/36326>>.
- Faron, Olivier, and Étienne Hubert, eds. 1995. *Le sol et l'immeuble: les formes dissociées de propriété immobilière dans les villes de France et d'Italie*. Roma: École Française de Rome.
- Favereau, Olivier. 1988. Probability and uncertainty: "After All, Keynes was right". *Oeconomia* 10: 133-67.
- Getzler, Joshua. 1996. Theories of property and economic development. *Journal of Interdisciplinary History* 26: 639-69.
- Greif, Avner. 2006. *Institutions and the path to the modern economy: Lessons from medieval trade*. Cambridge: Cambridge University Press.
- Greif, Avner, and Guido Tabellini. 2010. Cultural and institutional bifurcation: China and Europe compared. *American Economic Review (Papers and Proceedings)* 100 (2): 135-40.
- Grenier, Jean-Yves. 2003. Une économie de l'identification. Juste prix et ordre des marchandises dans l'Ancien Régime. In *La qualité des produits en France (XVIIIe-XXe siècles)*, ed. Alessandro Stanziani, 25-53. Paris: Belin.
- Grossi, Paolo. 1981. *An alternative to private property: Collective property in the juridical consciousness of the nineteenth century*. Chicago: University of Chicago Press.
- Grossi, Paolo. 1992. *Il dominio e le cose: percezioni medievali e moderne dei diritti reali*. Milano: Giuffrè.
- Halperin, Jean-Louis. 2003. *Le Code Civil*. Paris: Dalloz.
- Halperin, Jean-Louis. 2008. *Histoire du droit des biens*. Paris: Economica.
- Hardin, Garrett. 1968. The tragedy of the commons. *Science* 162: 1243-8.
- Harris, Ron. 2003. The encounters of economic history and legal history. *Law and History Review* 21 (2): 297-346.
- Hart, Herbert L. A. 1961. *The concept of law*. Oxford: Clarendon.
- Judde de Larivière, Claire, and Georges Hanne. 2011. Occupational naming conventions: Historicity, actors, interactions. *Historical Social Research* 36 (4): 82-102 <<http://www.ssoar.info/ssoar/handle/document/36316>>.
- Knight, J., and Douglass C. North. 1997. Explaining economic change: The interplay between cognition and institutions. *Legal Theory* 3: 211-26.
- North, Douglass C. 1981. *Structure and change in economic history*. New York: Norton.
- North, Douglass C. 1990. *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press.
- North, Douglass C. 1994. Economic performance through time. *American Economic Review* 84 (3): 359-68.
- North, Douglass C., and Robert Thomas, eds. 1973. *The rise of the Western World: A new economic history*. Cambridge: Cambridge University Press.
- North, Douglass C., Lee Alston, and Thrainn Eggertsson. 1996. *Empirical studies in institutional change*. Cambridge: Cambridge University Press.
- North, Douglass C., John J. Wallis, and Barry R. Weingast. 2009. *Violence and social orders: A conceptual framework for interpreting recorded human history*. Cambridge: Cambridge University Press.
- Ogilvie, Sheilagh. 2007. Whatever is, is right? Economic institutions in pre-industrial Europe. *Economic History Review* 60 (4): 649-84.

- Ostrom, Elinor. 1990. *Governing the commons. The evolution of institutions for collective action*. Cambridge: Cambridge University Press.
- Ostrom, Elinor. 2005. *Understanding institutional diversity*. Princeton: Princeton University Press.
- Pomeranz, Kenneth. 2000. *The great divergence: China, Europe, and the making of the modern world economy*. Princeton: Princeton University Press.
- Rosenthal, Jean-Laurent. 1992. *The fruits of revolution: Property rights, litigation and French agriculture, 1700-1860*. Cambridge: Cambridge University Press.
- Rosenthal, Jean-Laurent, and Roy Bin Wong. 2011. *Before and beyond divergence. The politics of economic change in China and Europe*. Cambridge: Harvard University Press.
- Ruggiu, François-Joseph. 2009. Gli usi delle fonti fiscali di Età moderna nelle storiografie inglese e francese. In *Ricchezza, valore e proprietà in età preindustriale (1400-1850)*, ed. Guido Alfani and Michela Barbot, 349-69. Marsilio: Venezia.
- Salais, Robert. 1998a. A la recherche du fondement conventionnel des institutions. In *Institutions et conventions. La réflexivité de l'action économique*, ed. Robert Salais, Elisabeth Chatel and Dorothee Rivaud-Danset, 255-91. Paris: EHESS.
- Salais, Robert. 1998b. Action publique et conventions: état des lieux, in *Les métamorphoses de la régulation politique*, ed. Jacques Comaille, 55-82. Paris: LGDJ.
- Scott, Anthony. 1983. Property rights and property wrongs. *The Canadian Journal of Economics* 16: 555-73.
- Shennan, Joseph H. 1974. *The origins of the modern European state, 1450-1725*. London: Hutchinson.
- Stiglitz, Joseph E. 2002. *Globalization and its discontents*. New York: Norton.
- Thévenot, Laurent. 2002a. Conventions of co-ordination and the framing of uncertainty. In *Intersubjectivity in economics*, ed. E. Fullbrook, 181-97. London: Routledge.
- Thévenot, Laurent. 2002b. Which road to follow? The moral complexity of an “equipped” Humanity. In *Complexities. Social Studies of Knowledge Practices*, ed. John Law and Annemarie Mol, 53-87. Durham-London: Duke University Press.
- Thévenot, Laurent. 2006. *L'action au pluriel. Sociologie des régimes d'engagement*. Paris: La Découverte.
- Thévenot, Laurent. 2012. Convening the company of historians to go into conventions, Powers, Critiques and Engagements. *Historical Social Research* 37 (4): 22-35 <<http://www.ssoar.info/ssoar/handle/document/37963>>.
- Tilly, Charles. 1975. *The formation of national states in Western Europe*. Princeton: Princeton University Press.
- Todeschini, Giacomo. 2004. *Ricchezza francescana. Dalla povertà volontaria alla società di mercato*. Bologna: Il Mulino.
- Vitale, Tommaso. 2006. Convenzioni, economia morale e ricerca sociologica. In *Sociologia del lavoro, special issue on “Le convenzioni del lavoro, il lavoro delle convenzioni,”* 104, ed. Vando Borghi and Tommaso Vitale, 7-39. Milano: Franco Angeli.