Economic perspectives on the history of law: Property rights in business history[1]

Ulrike Schulz

Introduction

The insight that law plays a significant and enforcing role in the economy is widely undisputed. However, when it comes to the question of the ways in which law intervenes in and influences economic processes, and how law prefigures the organizational structures of economic institutions, we still do not know that much. We might know, for instance, the legal framework within a business firm, but know little about how agents within the firm use it to gain profit or to solve business problems. Behind this gap, one can see that law has a quality that generates the duality of structure and agency as Anthony Giddens delineated in his structuration theory almost thirty years ago (Giddens 1984). Property is

1 This article is a shortened version of one chapter of my PhD dissertation in which I discuss methodological questions. In my dissertation, I analyzed the business history of the *Simson* company in Suhl/Thuringia between 1856 and 1993. The study focuses on the change of property rights arrangements under different political systems. It asks which political, socio-economic, and cultural circumstances bring actors to recognize property rights, and what the consequences are for the business performance of the company. The dissertation was part of the research project *Structural Change of Recognition in the 21st Century* at the Institute of Social Research in Frankfurt/M. http://www.ifs.uni-frankfurt.de/forschung/anerkennung/index.htm. I want to thank my advisors, Thomas Welskopp, University of Bielefeld, and Adam Tooze, Yale University, New Haven, for their constant support and their willingness to share their expertise with me.

one of the most concise examples of this characteristic of law. On the one hand property receives rights, legal instruments or structures. On the other hand property is radically dependent on the contexts agents are able or powerful enough to enforce, secure, and institutionalize within property rights. Whereas economists tend to disregard the general problem—namely the fact that law always reflects specific contexts—and assume that the quality of property is neutral, historians and sociologists find it crucial to study the different structural settings and social contexts in which property finds its forms. From a historical or sociological perspective, law can be seen as one of the core topics that might be able to bridge the gap between economists and (economic) historians as well as social scientists.

In the following, I propose a methodological framework for the analysis of economic property rights in businesses. I want to show what the legal framework of »property« within firms is like, and how one might analyze several processes of juridification of property rights between interacting agents. I refer only to the business level within companies. In contrast to microeconomics, I do not refer to the systemic level and also not to the macro-level concerning the influence of constitutional law on market economies. In a first step I describe the basic aspects of property rights theory (PRT) in order to demonstrate the abstract core of property. PRT offers a controversial, but also fruitful approach to studying social practices, processes of juridification, and institutional changes in different property regimes within firms. At the same time, I will point out the problems resulting from economists' belief that it is possible to leave out social dimensions. My wish is to combine the theoretical and methodological implications of PRT, using the concept of »recognition« as a link between the social and structural dimensions of property. In conclusion, I propose a model for economic and business historians which reflects governance structures within firms.

The abstract core of property: Assigning agents specific scopes of action and decision-making capacities

Ever since the conceptualization of property rights theory (PRT) in the late 1960s, it has persisted as one of the most controversial, but nonetheless constitutional, elements of the research curriculum of new institutional economics (NIE). Since that time, the approach has been transferred into the specific research agendas of both economics and social sciences. The economists Harold Demsetz and Armen A. Alchian wrote the founding texts of this approach. These texts are today considered »classical« PRT, having influenced the works of later economists, namely Svetozar Pejovich, Eirik Furubotn, and Rudolf Richter in the 1970s, as well as Douglass C. North and Oliver Williamson in the 1980s and 1990s (Coase 1937: 386–405; Coase 1960: 1–44; Demsetz 1964: 347–359; Furubotn and Pejovich 1972: 1137–116; Furubotn and Pejovich 1973: 273–302; North 1988; Williamson 1990; Richter and Furubotn 2003: 87–132). In the field of (economic) sociology, the works of Michel Callon, Neil Fligstein, Neil Smelser, Richard Swedberg, Peter A. Hall, and David Soskice should be mentioned. Their highly influential books all experimented with analytical problems of property in different organizations (Callon 1994; Fligstein 2001; Smelser and Swedberg 1994; Hall and Soskice 2001).

Today's scientific debates stem from these author's canonical texts, which continue to be influential (Eggertsson 1990; Colombatto 2004; Jongwook and Mahoney 2005: 223–242). Their relevance for other academic branches and fields has since been proven. PRT was also influential for the German scientific discussion. The debates in Germany began in the 1970s, flourished in the 1980s, and ended relatively abruptly in the early 1990s (Schenk 1978; Buhbe 1980; Schüller 1983; Riekhof 1984; Budäus 1988; Elsner 1986; Kaulmann 1987). Given PRT`s wide adoption and applicability in many fields, many economists' harsh objection to the theory is astonishing (Neumann 1984; Erlei et al. 2007). The approach has been called naïve, ideological, and a useless interpolation of neoclassical theorems (Voigt 2002). Some even went as far as to declare that the only value of PRT was its object of research: property and prop-

erty rights as determinants for economies as well as for political systems. One reason why economists kept such distance to the approach was the internal dispute about the objective of economic theory in general. Neoclassical economists rejected PRT because they were (and still are) more familiar with explorations of formalized mathematical solutions. They were essentially uninterested in any attempt to bolster their theoretical frameworks with empirical details (Furubotn and Richter 2003: 161–200). This criticism was indeed justified regarding some aspects of PRT. For instance, PRT's scope of application was never conceptualized satisfactorily. It also remained unclear whether the approach was applicable to microeconomic or macroeconomic frameworks. Despite such deficits, PRT helped to promote its subject: property as an analytical variable appeared again in academic curricula. Some even spoke of a »new foundation of an economic theory of property« (Feldmann 2005: 80).

Regarding the field of economic and business history, it appears that neither discipline was very much interested in the approach. Especially in Germany, economic historians seem to have mostly adapted the negative dictum of neoclassic economics (Borchardt 1977: 139–160; Hutter 1979). Since then, only Alfred Reckendrees and Clemens Wischermann have added substantial contributions with regard to theoretical and methodological questions concerning property rights (Wischermann 1993: 239–258; Reckendrees 2004: 272–290). Especially Reckendrees valued the PRT approach especially as a methodological contribution to economic history, studying both its theoretical and methodological implications into historical settings.

Property is one of the core problems of economics. To this day, many economists and social scientists are trying to integrate the category of »property« into their theoretical framings and methodological tests (Eckl and Ludwig 2005). However, no one has yet found a satisfactory general solution for the integration of property into their models. The reason why property is such an analytical challenge lies in its direct dependence on context (Siegrist 2006: 10). This is the fundamental explanation of why it will remain impossible to reduce property to its pure economic functions (Plumpe 2009: 27). When it comes to the question of property,

economists as well as social scientists must take into account social, cultural, political, and institutional implications. Therefore, there is a great amount of literature that provides insights concerning the formation, characteristic traits, handling, protecting, and adaptation of highly specific property rights in different institutional contexts, while a universal formula cannot exist.

Consequently, most definitions define property rigorously as a legal, all-embracing, and absolute right *in rem* (Richter and Furubotn 2003: 95). This notion draws solely on the legal definition of property; one example is the system of rules for a constitutionally protected system of (private) ownership in society. The overarching legal system is without a doubt of great importance. Nevertheless, this understanding of property misses the abstract core of the matter. The Anglo-Saxon understanding of property provides a more complete and comprehensive approach. It understands property as a system of rules concerning social relations. This means that it does not necessarily and always have a physical counterpart in movable or immovable objects. First and foremost, property is a person-to-person relationship between at least two agents (Stephanians 2005: 133). As a result, property is viewed as a bundle of rights that precedes the scope of action as well as the scope of decision-making. These in turn determine the consumptive and productive uses of resources and fix the social hierarchies between agents. The bundle of rights is furthermore partitioned into rights of disposition and rights of use. Such a differentiation is useful, because it distinguishes between rights of enforcement and selling rights on the one side and rights of use on the other side (Heinsohn and Steiger: 43). Rights of disposition include rights of use, but not the other way around. If one speaks of property rights, one is always speaking of both rights of disposition and rights of use.

At the center of such an understanding of property stands the social negotiation process between at least two different (though not necessarily individual) agents. The social negotiation process is the decisive criterion in a complexly structured arrangement of legal rights, social practices, and cultural norms. Property rights, for example, can come into

existence without any legal expression, resting only on the strength of social and cultural norms and conventions. If this notion of property rights is taken seriously, one will not find a constitutive, durable, and compulsory ownership structure in business companies. But what will we find instead?

The link: »Recognition« as a key concept in property rights theory

As stated above, the abstract core of property lies in its assignation of a specific scope of action and a specific scope of decision-making capabilities to agents. In PRT, this assignation is set as both a restriction to and an exclusion of third parties/agents. This means that property rights limit the specific scope of action of other agents. The character and extent of these limited and specific property rights determines both incentives and the economic value of resources. In economic theory, ideally every property right in the entire bundle is assigned to exactly one agent, which will most commonly be an individual person. However, in the real world such a clear-cut relation does not exist; property rights are mostly unspecific (Richter and Furubotn 2003: 88). There are two main reasons for this. Firstly, negotiation processes and the allocation and control of property rights generate so-called transaction costs (Coase 1960: 1–44). Secondly, in most arrangements there are preexisting limitations of agents' access to property rights. Allow me to give one example to illustrate this problem. Let us imagine an individual who owns a parcel of land. Although this person is allowed to do a lot of things with his or her property, some activities are not allowed. For example, she does not have the right to install a commercial waste incineration plant. She must also accept that she might have neighbors who own the pathway to a nearby lake that crosses her land. Taking a broader look at his or her rights, he or she cannot ban airplanes flying overhead. And if the community plans to build a retirement home 500 feet away that will likely increase traffic and noise near her property, there is again nothing she can do about it. All of these factors, to greater and lesser degrees, influence the economic value of his or her property in both the near and long term. Furthermore, there are always other agents who, depending on the circumstances and societal constellations given, will oppose or support

the economic initiatives of others. This means that a specific and real arrangement of sanctions and gratifications for the exchange of property rights comes into existence (Eschenburg 1978: 13). Property rights never exist by themselves; the economic resources secured by property rights always have a relational value. As a result, the system of ownership—constituted by the bundle of rights of disposition over and use of property—is steadily evolving; rights are constantly negotiated and re-evaluated.

Until this point, the general assumptions concerning property and property rights are undisputed among economists. However, when it comes to bolstering them with empirical data, the theory's proponents mostly step back and thrust empirical findings aside. Questions of substance—such as those that concern agents, the social negotiation process, or processes of juridification—are excluded. Consequentially, the answers to the above-mentioned problems have been highly reductionist and have convinced neither neoclassicist economists nor social scientists. There is no need to go into further detail here as it is well-known that the majority of questions concerning the social dimension are hidden behind a rational, autonomous, self-interested, wealth-maximizing individual actor, the classical homo economicus (Plumpe 2004: 31–57). These homines economici are able to combine and redistribute their property rights as long as they want and without any interference from others until they achieve maximum benefits for themselves. This model does not account for (historical) change, power-relations, or negotiation-processes because the causal mechanism of the theory is reductionist and self-directed. As Harold Demsetz puts it: »Property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization« (Demsetz 1964: 347).

The problem can be exemplified using the classic example of the fishermen (Callon 1998). A chemical plant is polluting a river and destroys its fish stock. The pollution therefore has consequences for the local fishermen's rights of use. The fishermen sue the plant for damages and demand compensation. According to the PRT and Coase theorem respectively, the manager of the firm will now weigh two options. Is it more

economical for the business to install a filter or to properly compensate the fishermen? Depending on this cost-benefit analysis, one of the two options will be chosen. On the one hand, such an explanation is substantial and can be observed in reality. On the other hand, the implicit and generalized presumptions are highly problematic. The direction of the negotiation process has been set by an a priori and normative criterion of efficiency. The behavioral assumption of self-interest is restricted to an extremely limited concept of homo oeconomicus. Firstly, all the individuals taking part in the bargaining processes aspire—quasi automatically—towards the most economically efficient solution and towards ensuring the exclusiveness of their property rights. Secondly, the individuals are adapting themselves—again quasi automatically—to the continuously changing economic and environmental conditions with which they are confronted (Elsner 1986: 330). In sum, the actions of agents are explained by methodological individualism, and the targets of the agents' action are explained by the utility function in a given system of property rights (Tietzel 1981: 224). Within such a model, negotiation and enforcement processes between agents are mostly not questioned (Libecap 1989: 4–5). Conflicts of interests, coalition- and group-building, and power-relations are excluded. There is, for instance, no differentiation between agents with formally codified property rights and agents with real power (Schüller 1983: 33).

But from an economic historian's point of view, one cannot exclude the systematic investigation of the forms through and conditions in which agents have tried to enforce their property rights. The same is true for the general context, i.e. the investigation of specific historical institutional environments. Only if one combines both dimensions can one observe the dynamics and the institutional changes of property rights, their direct dependence on contexts. The exchange of property rights can only be differentiated when the researcher analyzes the changing constellations between agents, including when and how they are trying to gain access, control, and benefit from property rights (Siegrist 2006: 32). If we now apply this to the fishermen example, we find that it is anything but clear that the fishermen would be willing to accept compensation

and in return agree to abandon their profession. Even if compensation were more cost-saving for the chemical plant than filters, it most likely would not be a long-term solution to the problem. First, one must determine the holder of property rights to the river. Most likely, these are not fully specified because rivers are public property. If so, the fishermen would have to win the interest of the community, competitors on the market, or the environmental protection office. Most likely, the fishermen would try to take their grievance to other—more powerful—agents since the opposing agents in this bargaining process over property rights are not of equal strength. Even if the fishermen were successful, their case would likely be appealed and negotiated, perhaps at higher governmental levels. In any case, every new negotiation would produce new transaction costs, most probably incalculable and in excess of the original damages. In the course of the process, interest will generally shift, relocate, and rescheduled (Richter and Furubotn 2003: 132).

If we take these insights seriously, it becomes obvious that the prerequisites contained in the classical property rights theory model are too normative and insufficient for the interrelated questions and complex methodological demands of business and economic historians. Historical work must be interested in the reconstruction and analytical description of concrete institutional arrangements. The latter are constituted by agents with specific, context-dependent rationalities and confronted with several constraints that affect their scope of action. This leads us to the question of how the underlying concepts of PRT can be operationalized in historical studies. Applying the property rights approach to business history allows us to analyze processes of negotiating the allocation and enforcement of property rights between external and internal agents, and to see the effects of these processes on the legal structure, production processes, organization, and economic success of companies.

To judge the performance and economic activities of a firm, the reconstruction of the specific and contingent scope of action for agents enforcing their property rights plays a prominent role. The question is how and under which political, social, and economic circumstances they were able to enforce, secure, and institutionalize their property rights. The

assignment of property rights to agents is enforced by agents through negotiation processes, secured by (incomplete) contracts, and institutionalized *ex post* by legal institutions. This differentiation makes it necessary to grasp the assignation of property rights as agents' scope of action (Reckendrees 2004: 288). The analysis of specific and real assignations of property rights to specific agents differentiates, firstly, between various agents (such as managers or employees) holding specific property rights and, secondly, specifies the power relations between them. This is why the pure assignation of property rights in a formal and legal sense is not an indicator for the true scope of action of the bundle of property rights. Negotiation processes and codification of property rights have a reciprocal relationship. Additionally, there are more variables in this negotiation process that can change the tide of negotiation. The allocation of property rights also depends on the expected gain for agents, the number and heterogeneity of the negotiating parties, the legal system of the nation-state, and the mechanisms of allocation in a given economy.

If one takes these variables into account, the enforcement of property rights turns out to be the key question. Property holdings are measured according to specific economic, political, and societal conditions that frame the *recognition of agents*. Economic risks rise for agents if their property rights are not recognized. The importance of the question can be observed in the remarkably distinct semantics of *recognition* in the texts of both its proponents and critics. Interestingly enough, there has never been an impulse to theorize and operationalize the concept of recognition within the question of property. With Werner Plumpe, I understand recognition as a function of distinction. From a historical perspective, one must reconstruct social practices of recognition/non-recognition in historical change (Plumpe 2008). Following Werner Plumpe, one has to take three »constitutional moments« into consideration: Firstly, the *semantic moment*: According to historical semantics, one must analyze communication practices to detect the various meanings of distinction and decision-making preferences. Secondly, the *moment of institutional change*. This means the *ex post* institutionalization of the decision-making practices of agents. It is also means focusing on the question of when deci-

sions are followed by a real change in the practice of agents. From this perspective, the organizational rebuilding of existing institutions or establishment of new institutions can be seen as an indication of historical change. Thirdly, *the moment of practical distinction* in the action of (historical) agents, i.e., what they really did. Plumpe here describes the historical practices of agents doing business in everyday life according to their specific rules (Plumpe 2009: 30–35).

Having taken these three *moments of recognition* into consideration it is possible to analyze rights of disposition and rights of use as interdependent interactions between legal rights and institutional settings on the one hand, and as a product of legal interpretation, conflicting interests, and agents' exercise of their scope of action on the other hand. As a result, recognition can be seen as the decisive link between the two fundamental levels of property: property in its structural dimension, i.e. property as a legal institution, and property in its action-theory dimension, i.e. property as a negotiation process. This insight has consequences for any methodological framing of PRT. In the following I will use an abstract experimental design to model the insights provided by PRT and analyze property rights structures within a firm.

Property rights structures in firms

Taking the insights discussed above into account, three interdependent variables must be included in any experimental design if it is to be methodologically as well as theoretically sufficient for analyzing the property rights structure of a firm: the (individual) agent, the social negotiation process, and the (*ex post*) process of juridification. Finally, one must determine the consequences of the definition, organization, and structure of property rights within the firm.

The (individual) agent

The nationality, ethnicity, and social belonging of agents can be relevant in terms of their rights of attribution and their chances of being recognized by a state, a community or a society. Societal status and social capital greatly enhance the ability of agents to acquire valid property rights. When defining »agent,« one must also take into account that

agents who are involved in negotiation processes over property rights are often not autonomous. They speak in most cases on behalf of a group or on behalf of the aims of institutions such as a state, a professional body or a business firm. Moreover, these agents—or the groups they represent—may vary by cultural norms and social conventions in the process of negotiation. Multiple agents exist both within and outside of each firm. As Thomas Welskopp has suggested, firms are not only material-based, stationary combinations of factors of production, but also social arenas of severe conflicts between changing (and unequal) players, strategies, rules, and frontlines (Welskopp 1996). In this social arena, a vast variety of internal as well as external agents are negotiating for their interests, possible gains, control, and positions of power as regards the company's economic resources. As a result, the state and its organizations, economic pressure groups, and even competitors can wield much influence concerning the structure, organization, and economic performance of a business firm.

The negotiation process

In most cases, agents are not equal when they face each other and begin to negotiate. The achievements of a negotiation process are most often not in accordance with the overarching normative legal framework—such as the market or business—in which they occur. Though every agent aims to apply legally fixed rules and standards—or at least pretends to—in reality every agent simply tries to expand her own scope of action and to delimit the action of others using any means possible. Depending on the number of agents involved, the level of information and expertise, the expected gain, the power relations, and other factors, agents are able to exclude others or to install a new constellation of participants in the negotiation process (Libecap 1989: 26–31; Libecap 2004). *Ex post* juridification may, but does not necessarily, follow.

Not only are the agents unequal in a negotiation, but they need the recognition of a third party—often the state—to reach their aims. The negotiation process contains a systematic and specific group-building process with regard to recognition. If two agents negotiate property rights, forming the basic social constellation called the dyad, a third agent or

party is needed to recognize and settle the negotiation process. Only if a third agent recognizes the property rights in question can those rights be economically valued and the process of the codification of rights effected. In most cases, the state is the authority for fixing and legalizing the negotiation process, but public agents do not necessarily need to act as the legislative body, they only need to be able to exercise the state monopoly on the use of force (North et al. 2009; Sened 1997; De Soto 2000). Nevertheless, in the majority of cases, the state legitimizes the property rights negotiated *ex post* by exercising jurisdiction. The generation of group building processes via a third party is a well-recognized postulate devised by the German sociologist Georg Simmel (1908). It is the *triad* and not the *dyad* that constitutes the basal constellation of sociality. The triad legitimizes reciprocal action between an *I* and a *you*. Sociologists therefore see the triad as a necessary condition of societal processes and the formation of institutions. The crucial point here is that *recognition* stands at the very center of such a social constellation. As Gesa Lindemann puts it:

> The third [agent] is the condition for a compulsion for recognition. […] This compulsion for recognition sets limits for each agent, which can be seen as socially mediated limits: Not B alone, but B and C decide, whether or not A is a legitimate agent. (Lindemann 2006: 82)

The third agent modifies the societal process by entering the negotiation process, but does not constitute the negotiation process and conflict. This insight correlates exactly to the definition of property as explained above, and prefigures the process of juridification (see fig. 1).

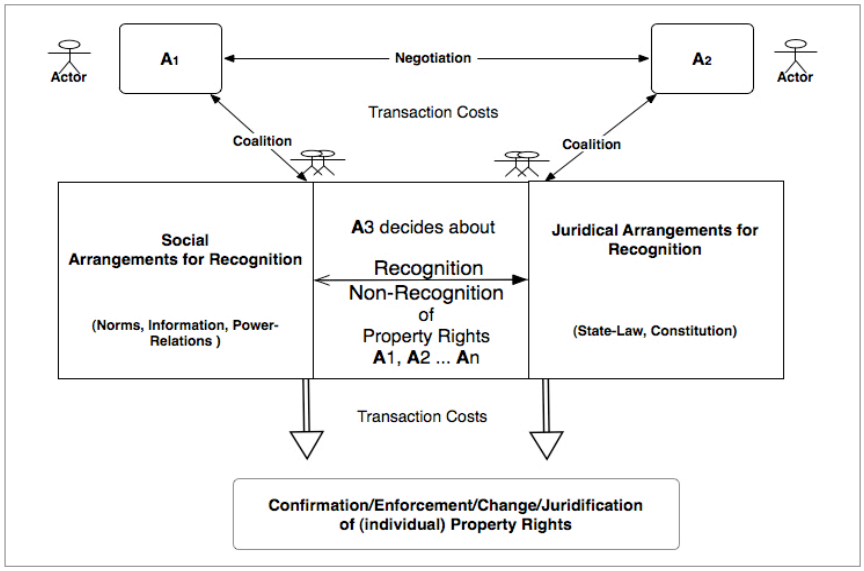

Fig. 1: The negotiation process over property rights

To summarize, agent 1 and agent 2 want to change their property rights. Agent 1 wants to secure her established property rights and agent 2 wishes to change those rights in her favor. Agents 1 and 2 can both act as individuals or they can speak in favor of a group, organization, or public body. Before they enter into the negotiation process, they both have a specific status and an empirically measurable capacity to fight for their interests. Parallel to the partition of property rights into rights of disposition and rights of use there are, I propose, two spheres of recognition: (1) a sphere of social recognition, e.g. power or cultural norms, and (2) a sphere of legal recognition, e.g. a constitutionally secured individual property right such as a title. It is important to note that the allocation of property rights for agents 1 and 2 is dependent on these two spheres as regards the agents' chances of enforcing their property rights and the associated scope of action of these rights. It is also essential to keep in mind that in the moment the agents both enter the negotiation process, transaction costs incurred. That means that the initiation of the negotiation itself and the invocation of the third party are costly. This may interfere with the negotiation process or interrupt it entirely. Another contingent factor is the time it takes for all parties to negotiate

over the property rights in question. That is why the negotiation process is sometimes inefficient in an economic sense. Finally, as discussed above, the way in which the negotiation process proceeds and the determination of which agents' rights will be recognized lays not in the hands of agents 1 and 2, but in the hands of agent 3. Agent 3 is the agent with the decisive authority to sanction or confirm the property rights in question. This third agent, through very specific social and legal arrangements of recognition, leads the negotiation process into a qualitatively new direction. The third agent arbitrates conflicts, strengthens coalitions, and in the end decides which rights will be allocated to which agent.

The process of juridification

It is important to note that the legal sphere does not trump the social sphere of recognition. But it is worth mentioning that the law as such can be seen as an *ex ante* recognition procedure, whereas legal enforcement after the negotiation process can be seen as *ex post* recognition of the agents. The negotiation may modify former principles of law. Legal titles are not superior to power relations. They are not, in the philosophical sense, normative, but are set *ex ante*. That is why laws, contracts, and legal norms are also a subject to interpretation and therefore generously contingent (Siegrist 2006: 19). For instance, laws can be dispensed to enact justice as well as tort. It is not necessary to call on the state as an overall authority; there are countless ways for businesses to undercut legal norms as well as laws. A prominent example is the handling of intellectual property rights in firms. We won't ever detect all the innovators in firms who have never profited from their inventions, regardless of the legal protection provided by patent laws. After the property rights in question in the example above have been modified, rejected, or confirmed, the process of juridification—institutionalizing the new/former property rights—begins. The new or established property rights must be secured and controlled by another authority. This process is another *ex post* procedure and again incurs transaction costs. In other words, the process of juridification is a process of institutionalizing reciprocal recognition.

The question now arises as to how these insights can be integrated in a research agenda for business historians? The proponents of classical PRT were always interested in the firm as one of the crucial organizational forms of market economies. In the definition of the firm suggested by PRT, the firm not only combines material factors, but also generates products via a network of contracts. In virtue of these contracts, firms are able to arrange and control the production of a plant more effectively and cost-efficiently than markets. Firms replace the competition on markets while they transform external agents into internal agents (Alchian 2006: 151–178; Hart and Moore 1990: 1119–1158; Kaulmann 1984; Williamson 2002: 117–195; Richter and Furubotn 2003: 339–406). PRT therefore pays attention to the legal, social, and structural aspects of the firm. To reiterate, these insights are very helpful for methodological input, but is still only an ideal model and the proponents of PRT never went beyond it. This model refers only to the classical privately (family-)owned firm in market economies. In reality this is only one, almost marginal, model. Nonetheless, it can offer a vantage point to explain why firms continuously experiment with their organizational form, production factors, capital accumulation, and human resources (Picot 1981: 174). But if historians try to adapt this model to historical frameworks, they quickly realize that this contract theory model leads to the same blockades as the neoclassical models. What Werner Plumpe has said about the modeling procedures of new institutional economics is also true for PRT. PRT does not overcome the static structure of its precedents, but rather enlarges it, simply adding organizational costs to the price of production in the neoclassical model (Plumpe 2005: 18).

Returning to the discussion of *homo oeconomicus* above, for almost the same reasons PRT offers historians an idealized, structured guideline. PRT neglects the social impact of structure and in consequence the dynamics of change. There are almost no answers to those questions that interest historians most: Why do firms survive? What are the decision-making processes in companies? What impact does external political decision-making have? How are these decision-making processes implemented and enforced in the corporate body of firms? (Plumpe 2003). In

my opinion, sociology as well as economic and business history could provide an impetus for integrating the social perspective in order to combine the dimensions of structure and agency (Maurer 2008). In the following I propose a method of solving the problem of structure and agency in firms. In this, I rely on a definition of the firm oriented toward behavioral science proposed by Richard Cyert and James March (Cyert and March 1995). Their so-called coalition theory sets the focus on agents operating inside and outside companies. At the very center of this framework is an analysis of decision-making processes in firms. Cyert and March define the firm loosely as a collective of agents who are forced to operate in an arena of diverse and conflicting goals. My focus on business history is informed by the action-theory oriented approaches of Werner Plumpe and Thomas Welskopp (Plumpe 1992; Welskopp 1994; Welskopp 2004; Welskopp 2004a).

As a first step, we must give up some standard ideas about the firm. I propose that the firm is not an entity with a solid location and strictly defined borders delineating inside and outside space. Rather, I proceed from the assumption that a firm is a combination of two operational sides. On one side is (1) the corporation or capital strain side and on the other is (2) the plant or production side. These two sides are interconnected by various contracts and mutual control and together constitute the firm. While the capital strain side is immaterial, flexible, and versatile, the production side is characterized foremost by its materiality and by spatial restrictions. The capital strain side is composed of all agents that participate in financing the firm. These agents are not necessarily on-site or working together. In contrast, the production side is constituted of fixed capital and has in the main a specific location. This refers to the real estate, plant buildings, equipment, staff, etc. Tied-up capital configures the material and logistical conditions of the production side; it has the character of fixed capital. In addition, tied-up capital begins to assume a more and more independent existence and reality in time and space. It increasingly acts on the conditions of the location itself, on the accumulated technical and commercial knowledge of the management and staff, on the commercial environment of the branch the firm be-

longs to, and therefore on the specific conditions of the market and marketing structure.

The analytical distinction between the capital strain side and the production side is highly influenced by the works of Thomas Welskopp. Welskopp designated the tension between capital and material as the *corporate disposition* of a firm. He sees the decision by capital lenders to invest in a plant as a highly decisive and delicate act, because after the investment, their capital is very bound to materiality (Welskopp 2004). Immediately investors begin to lose power, the power to decide over capital employment and production targets. From this moment on, investors can no longer exercise their unilateral control over their capital. In fact, their measure of controlling or taking part in decision-making processes in the plant is quite limited. This fact is anything but banal, because the material side now becomes more and more autonomous from the capital investors who preserve the organization (Welskopp 2004: 197). This model of the firm represents an important step forward. It takes seriously both the structure and agency of a firm, and—moreover—combines them in a systematic manner. We can prove this by returning to the insights gained from the discussion of property rights structure and property regimes above.

The central characteristics of the corporate disposition of firms, e.g., the differentiation between the capital strain side and the production side, match exactly with the potential assignment of property rights to agents, namely, the rights of disposition and the rights of use. The agents financing the firm are located on the capital strain side and have rights of disposition. They may also hold and exercise rights of use on the material side of the firm, for instance as managers in a company with limited liability. Agents with the rights of disposition over property in the context of a firm have above all the right to sell, bequest, and liquidate the firm. In other words, they hold the rights to release their capital out of the firm. Agents with rights of disposition over property can also put their capital into a firm and only share the value. In cases where agents with rights of disposition are engaged in the management of the firm, they can also employ their leverage to decide over capital employment

and production targets. But only in this case do they have the real power of disposition assigned to them quasi automatically, as a seemingly self-evident fact. From a historical perspective, this case is anything but common, because activities on the capital strain side are highly constrained by the agents on the production side. On the latter side are situated agents with property rights of use. Analogously, they hold the rights of organization (*ius abusus*), the rights of usage (*ius usus*), and the right of gains from the plant (*ius fructus*). Holding these rights, they do not have the power to decide over capital employment and production targets. But they control the production side of the firm and therefore, in practice, have significant power and control. And if the agents of rights of disposition over property fail to regularly exercise their rights, agents with the rights of use ensure that the company's tied-up capital is preserved as long as possible. One of the main and most exciting results of my studies is the realization of how long a firm can perform successfully in the complete absence of agents with rights of disposition over property (Schulz 2011).

Fig. 2 illustrates the structure of the firm, differentiating between the capital strain side (corporation) and the production side, as well as between agents with specific property rights (plant). Following the model in fig. 2, one can precisely assign every agent to property rights within the firm. This is the main achievement of this model. It lays a basis for understanding the negotiation process and, finally, the outcome of legally enforcing the positions secured by the agents.

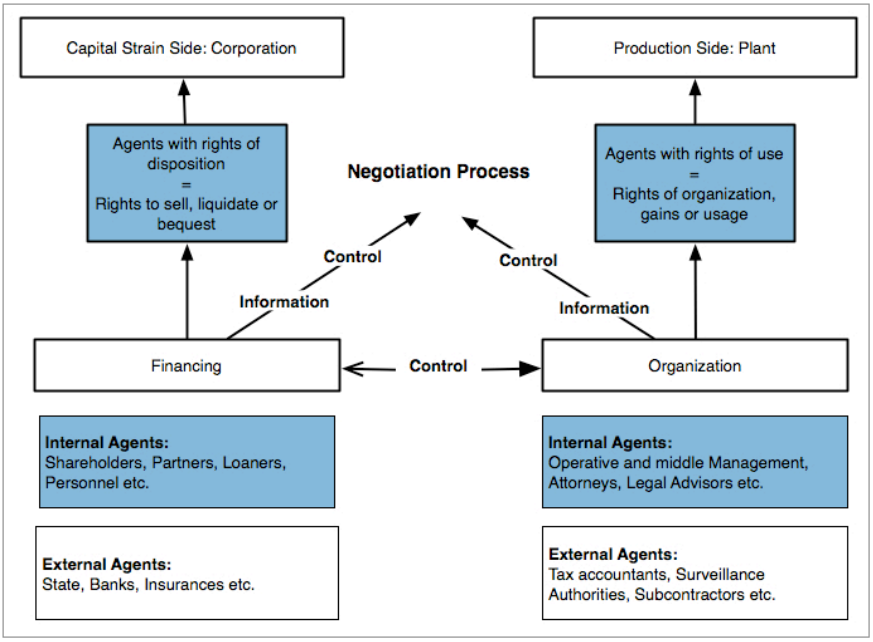

Fig. 2: The organization of the firm: The interrelation between the capital strain side and the production side

Agents with rights of disposition over property are situated on the capital strain side. They acquire disposition and control over the capital investments in the plant. Please note that there is an additional differentiation into internal and external agents to indicate the specific position of each. Internal agents with rights of disposition mostly exercise rights of use in the sense of entrepreneurship (Casson 2010). They are responsible and directly liable for decisions about the strategic direction, goals, and market position of the plant and the company. In most cases, agents with rights of disposition over property are part of a family of entrepreneurs or managers with capital investments in the firm, such as partners or members in joint partnerships or, to a far lesser extent, stockholders. Agents with rights of disposition invest directly in the plant and represent their own interests by controlling their capital. Normally, their structural position in the corporation is dependent on the legal form of organization (property rights as legal form). The measure of control and power they can acquire is also dependent on the negotiation process between all agents with interests in the firm, regardless of their specific

rights. Not only do agents with rights of use limit those with rights of disposition, but also external investors such as banks, insurance companies or even the state. The negotiation process between internal and external agents with rights of disposition over property is key to the survival of the company, because this is how the cash flow is secured.

Parallel to this, agents with property rights of use need to be differentiated as regards their specific rights of use, organization, and gains. Ideally there is no hierarchy between these various rights. Hierarchies come into play depending on the control and therefore, power the specific rights of use provide each agent. This defines the scope of action agents have on the production side. This differentiation can be especially important when it come to the analysis of firms in economic systems such as central planning systems. Only if one can differentiate between agents can one track decision-making processes in the planning system as well as in the plant. In general, middle or operative management, assistant managers, legal advisors, and attorneys hold the strongest property rights of use on the production side of the firm. They are the direct representatives of agents with rights of disposition over property and therefore can make decisions about the organization. Because of their advantage as regards information, they usually obtain a lot more control over the activities of the plant than their principals. As Alfred Reckendrees and others have argued, the principal agent approach can now be fully integrated in the analysis of property rights in companies (Reckendrees 2004: 218; Jongwok and Mahoney 2005: 241). In this sense, managers, skilled laborers, and foremen are among those agents with property rights of use, because they have expertise and knowledge in their departments. Likewise, similar to the capital strain side, there are also external agents with property rights of use, among them tax accountants or surveillance authorities. Although uncommon, the decisions of these agents can decisively affect the economic performance of both sides of the firm. The same is true for subcontractors. Again, this effect can be observed most often in central planning systems.

In sum, agents with property rights of both disposition and use participate in the economic activities of the firm. They affect the financing,

controlling, and organization of the firm. They all have a specific and empirically assignable scope of action that is interconnected with their specific property rights. The negotiation process concerning property rights is most continuously observable between agents on the capital strain side and those on the production side of the firm. The structural position and power relations between these agents are empirically assignable. The outcome of this negotiation process is control over the assets of the firm. Agents who occupy decisive control positions can normally act as the legitimating and sanctioning power between agents with property rights of disposition and those with rights of use. Such controlling positions dictate the operating range of the property rights. Only nominally the owners, agents with property rights of disposition hold these central control positions. In the social arena of the firm, agents with property rights of use can acquire and hold also very strong rights that work almost like rights of disposition.

Conclusion

In analyzing the corporate disposition of companies, I have relied on a combination of several theoretical and methodological approaches: the economic and legal conceptualization of property; insights of PRT as discussed above; the problem of recognition; coalition theory; and the methodological frameworks of economic historians Thomas Welskopp and Werner Plumpe. In my study, I have demonstrated that the overarching importance of property is constituted by its ability to assign a specific scope of action and decision-making capacity to agents. Hence, property should not be reduced to an autonomous, self-referential analytic category. Rather, property needs to be understood as dependent upon the respective social contexts in which it is appears, for instance in a firm. In such an environment, property is shaped according to the specific circumstances evolving from various social constellations and structural arrangements. Correspondingly, the juridification and institutionalization of property rights takes place at the very end of a longer or shorter process of negotiation between agents, as this article has shown. In firms, these negotiation processes are highly institutionalized and routinized. That is one reason for their stability. At the same time I argue

that the legal constitution of property rights in firms needs to be understood as the temporary result of a continuing and contingent social process.

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Dr. Ulrike Schulz, Assistant Professor of History, University of Bielefeld, ulrike.schulz@uni-bielefeld.de.