When third parties are hard to find: In search of lost institutions[1]

Romain Laufer

Introduction: Preliminary Observations

The introduction of managerial norms in the realm of legal jurisprudence has given rise to some very vehement criticism bordering on excommunication.

Paul Martens, President Emeritus of the Belgian Constitutional Court writes, in the preface of a book entitled *The New Management of Justice and the Independence of Judges*:

> "Doesn't any lawyer attached to the essence of his discipline have a duty of insurrection in the face of this masked invader that is management? Can he welcome without protest the commodification of his office, the marketisation of his production, the commodification of his soul?"[2]

Similarly, Pierre Legendre, a French legal historian Professor Emeritus at the University of Paris 1 Panthéon-Sorbonne and Honorary Director of Studies at the École pratique des hautes études (Vème section, Sciences religieuses) writes: "Management is a word without a homeland that means whatever you want it to mean"[3] and "[g]lobalised management comes up against this huge, unacknowledgeable and unmanageable question of whether we can buy traditions, religions or the minds of peoples and convert them into market objects?"[4]

It must be acknowledged that social sciences have not been the object of such repudiation.

This difference in treatment is probably due to the essentially normative nature of the results of social sciences, whose function is to produce general knowledge about the behaviours they study, knowledge that is expressed in the form of laws or norms. These norms may readily be utilised by law when needed to decide on the legality of (past) cases under scrutiny. This complementarity expresses itself in the very names given to the corresponding disciplinary fields of study, such as "Law AND Economics" or "Law AND Society"; such developments attest to the growing importance given by law to the normativity of social sciences.

The same is not true of management, the primary purpose of which is not to produce norms but (future) individual actions, actions which, according to the

---

[1] "Quand le tiers est aux abonnés absents, à la recherche des institutions perdues", *Revue Internationale de Droit* Économique, 2018, pp. 333-350.

[2] Benoit Frydman and Emmanuel Jeuland (eds.), *Le Nouveau Management de la Justice et L'indépendance des Juges,* (Paris: Dalloz, 2011), p. 5.

[3] Pierre Legendre, *Dominium Mundi: L'Empire du Management, Mille et une nuit*, (Paris: Fayard, 2007), p. 42 (quotes in this paper are translated by the author).

[4] *Ibid*. 51.

© *African Yearbook of Rhetoric* 9, 2019, Online ISSN 2305-7785:
Romain Laufer, "When third parties are hard to find: In search of lost institutions", pp. 86-97.

principles of rational-legal authority supposed to characterise contemporary societies, rely on their submission to a legal order.[5]

If the mention of the emergence of management in the field of legal normativity is the object of scandal, it is because it subverts the principle according to which social actions are supposed to be subject to a legal order whose effectiveness is guaranteed by the principle whereby ignorance of the law is no excuse, and whose efficiency ultimately relies on the monopoly of legitimate violence which, according to Max Weber,[6] belongs to the State. The contradiction implied in the intrusion of managerial norms in the realm of legal norms expresses itself in the fact that it is designated by an oxymoron, the notion of "soft law",[7] which bears witness to the fact that what results from it is less the complementarity than the confusion between law and management.

The issue of the emergence of management in the space of competing normativities will be considered successively from two points of view: (1) the next section will be devoted to describing the irresistible extension of the scope of managerial normativity, an extension that moves it from the field of complementarity — as long as the hierarchical relationship between law and management is respected — to a situation of confusion as this hierarchy is challenged and the differences which define it are transgressed; and (2) this confusion leads to a situation of uncertainty that Mary Douglas considered in an article entitled "Dealing with Uncertainty", published in 2001.[8] This article encourages us to move on from the issue of "how institutions think", which is the title and topic of the work she published in 1986, to the question of knowing "how institutions can be the object of thought", which is the subject of the following section.

The Emergence of Management in the Space of Normativities: Experience Report

The limits of the available space lead me to seek the most concise way of reporting the main opportunities for expanding managerial normativity that I have been able to experience as a professor and researcher since the early 1970s. The feedback on these various episodes revealed that the same five-phase master narrative was repeated over and over again: (1) transgression of a limit; (2) contestation, conflict resulting from this transgression; (3) production of a theoretical hypothesis used to account for the necessity of this transgression and its resulting crisis; (4) definition of the form taken by the expansion of managerial normativity made necessary by this crisis; and (5) negative reactions towards this theoretical approach, denial, absence of any reference to the notion of crisis.

It is to be feared, in these times of pragmatism, that the negative reactions of the fifth phase will only appear as the logical consequence of the excessively

[5] The opposition between past and future actions characterises, according to Aristotle, the opposition between forensic and deliberative rhetorical genres. However, Aristotelian rhetoric differs from modern rhetoric by the prominence attributed by the latter to forensic rhetoric, as is shown in the work of Chaïm Perelman. See "Actualité de l'empire rhétorique, histoire, droit et marketing" in G. Haarcher (ed.), *Chaïm Perelman et la Pensée Contemporaine,* (Bruxelles: Bruylant, 1993).

[6] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds. G. Roth and C. Wittich, (Berkeley: University of California Press, 1978), p. 56.

[7] Linda Senden, *Soft Law in European Community Law,* (Oxford: Hart Publishing, 2004); Conseil d'Etat, *Etude Annuelle 2013 du Conseil d'Etat – Le Droit Souple*, (Paris: La Documentation Française, 2013).

[8] Mary Douglas, "Dealing with Uncertainty", *Ethical Perspectives*, 8(3), 2001, pp. 145-155.

theoretical nature of the approach taken. Even in the land of Descartes, mistrust towards theory cannot be underestimated.

The most effective way to overcome it could be to suggest that the theory be considered as a fiction, a proposal that even the most sceptical would not think of refusing. During one of his courses at the Collège de France, historian Patrick Boucheron actually proposed a definition of fiction that exactly corresponds to the role that theory plays in the process described above: "Fiction is the magnifying glass that allows us to perceive — but after the fact — the warning signs of our present situation."[9]

It should be noted that it is the presence of denial and amnesia thus made possible that enables us to understand how the use of theory can provide us with a means of perceiving, after the fact, the warning signs of our present situation.

We shall only report on two such experiences, one concerning management in general, and the other marketing in particular. Both were a direct result of my participation in the specialised course on "Management of Public Organizations" as part of third-year student education at HEC business schools in 1973 and 1974.

From a managerial viewpoint

1. The first phase is constituted by the transgression which results from the fact of claiming to apply to the public sector methods that were deemed to come from the private sector.
2. This transgression provoked a highly ambivalent reaction, an expression of the conflict between the presence of a desire to see public management improve and the rejection of what appeared to be the intrusion of methods from the private sector.
3. The use of theory made it possible to account for both the rejection of and the need for this transgression. In this case, it was by considering the history of the three-period administrative law criterion, as described in the public law treaties of the 1950s (public authority, public service, crisis of the criterion), which shed light on why the violation of the public/private limit — which had been considered scandalous up to then (since it violated the limits defined by the administrative law criterion) — had become unavoidable (due to a crisis recognised by the law itself). This crisis could then be interpreted as a crisis of legitimacy, since it became difficult for a social actor to know with which norms he was supposed to comply.
4. The definition of management as a normative system (1980).

   The crisis concerning the administrative law criterion implies that the public/private limit is now no longer determined either by the status of the actors (public authority) or by the purpose of their actions (public service), but by the methods used, which is a procedural criterion involving management. It became necessary to define both public and private management independently of the sector, since it was the choice of methods that was thus supposed to determine the sector and not the other way around. Weberian theory opened up the possibility of considering management in relation to the

[9] Patrick Boucheron, "Avant la Représentation", *Cours du 9 janvier 2018.* Retrieved from: https://www.college-de-france.fr/site/patrick-boucheron-course-2017-2018.htm [Accessed 19 October 2019].

role that written procedure plays in the ideal type of bureaucracy. It should be noted that treating a private business as a bureaucracy corresponds to the meaning that the English word "administration" has in the expression "business administration".

Management can be defined as a method of resolving intra-organisational conflicts that consists of a set of norms and procedures conventionally accepted by organisation members. It constitutes what may be called a quasi-juridicial system insofar as this method of resolving conventional disputes remains subordinate to common law, which can always be brought into play in the last instance.

Conflict resolution in an organisation assumes the existence of an administrative language that describes all the actions that could lead to a dispute. Any administrative language requires the specification of three conditions (syntactic, semantic and pragmatic, to use the dimensions of Charles Morris's definition of the sign), three dimensions that can easily be found in the definition of management provided by Chester Barnard in his founding book *The Functions of the Executive*.[10]

The syntactic condition requires that, in this language, the organisation be author of the action (this corresponds to the role that Barnard attributes to the "fiction of superior authority"[11]).

The semantic condition assumes that organisation members think that this language represents the world well (it is the need for an adjustment between individual and collective representations of the world that leads Barnard to oppose the "formal" and "informal").

The pragmatic condition (which can also be referred to as the legitimacy condition) considers that those who use this language believe that their interest, the interest of the organisation and the interest of society are globally compatible (which leads Barnard to distinguish the notions of "effectiveness" and "efficiency"[12]).

Once the definition of the notion of administrative language had been established, the notion of management could be defined as the particular form taken by this language during the development of private companies, particularly in the United States, where the private sector occupied such an institutional place that it would lead, from the end of the nineteenth century onwards, to the development of educational courses in management at the Wharton School of Commerce and Finance as well as the Harvard Business School. It then became possible to characterise public management by the public character — i.e. visible in the public space — of the organisations concerned (which had become too large to be able to escape public view behind the "invisible hand" of the market which was supposed to legitimise them). Henceforth, the image of the corporation in the eyes of the public had to be managed.

[10] Chester I. Barnard, *The Functions of the Executive,* intro. K.R. Andrews, (Cambridge: Harvard University Press, 1968).
[11] *Ibid.* 170.
[12] *Ibid.* 19.

5. Negative reaction and denial.

This denial is expressed by jurists themselves, as shown by the reading of contemporary administrative law manuals. Thus, the issue of the crisis of the criterion could be elegantly raised by Yves Gaudemet, who wrote: "The search for the administrative law criterion has given rise to abundant and almost continuous reflection .... Today the discussion seems somewhat exhausted."[13] It could also be the subject of a more laborious denial by Didier Truchet,[14] who wrote: "[The contours of administrative law] are ... blurred and shifting ... You have to accept this fact, without exaggerating the practical inconvenience of this uncertainty"[15] and elsewhere: "Administrative law, for the time being, leaning on constants and open to change, retains its legitimacy and its necessity remains intact ...."[16] Indeed, this is all the more true because if "[t]he changes just described modify the contours and rules of administrative law, they are most often beneficial because they adapt and improve it".[17] While these texts bear witness to the persistence of the crisis of the criterion, the least that can be said is that they do not really encourage its study. This is a useful reminder that every history is as much about amnesia as it is about anamnesis.

The marketing issue

1. Transgression. The idea of a marketing professor's participation seemed impossible to colleagues setting up a "management of public organizations" major. They said that "marketing is political".
2. This conflict needed to be overcome to ensure my continued participation in our joint project.
3. The answer to this question gave rise to a theoretical book written with sociologist Catherine Paradeise and entitled *Marketing Democracy: Public Opinion and Media Formation in Democratic Societies*, which attested to the political nature of the issue.[18]

The essence of the theory was a single sentence that stated that marketing could be defined as the modern (bureaucratic) form of sophistry.

Marketing and sophistry are the subject of the same criticisms, which can be divided into five points: (1) they do not believe in the truth, there are only opinions; (2) they are mercenaries who sell their services to the highest bidder; (3) they are technicians who destroy culture, using the power of traditions instead of respecting them; (4) they are polymaths who claim to have a single technique (rhetoric) that can serve any purpose; and (5) finally, they are foreigners (as a matter of fact, if marketing can feel at home in the United States it may be because in the United States virtually everyone comes from abroad, at least marketing had not been invented by natives).

Beyond this negative content, marketing and sophistry share the same positive content: they are two action techniques which, like any action

[13] Yves Gaudemet, *Droit Administratif,* (Paris: L.G.D.J., 2018), p. 40.
[14] Didier Truchet, *Droit Administratif*, (Paris: Thémis, PUF, 2017), p. 22.
[15] *Ibid.* 38.
[16] *Ibid.* 22.
[17] *Ibid.* 21.
[18] Romain Laufer and Catherine Paradeise, *Marketing Democracy: Public Opinion and Media Formation in Democratic Societies*, (New Brunswick: Transaction Books, 2016), pp. 2-9.

technique, are deployed on three levels: (1) the level of knowledge, subjective empiricism, opinion; (2) the level of means of action: rhetoric; and (3) the level of purpose: success (radical pragmatism).

The difference related to bureaucracy, which is deployed along these same three dimensions, is manifested respectively in the form of opinion polls, media communication and, finally, cybernetics.

It remained to be shown that two worlds as different as Ancient Greece and the modern world could experience two such similar phenomena. Everything opposes these two periods, except for what can be called the ideological situation which, in both cases, corresponds to a crisis of common beliefs. Hence the need to theoretically define the common beliefs of modern times, and to account for their crisis. This is possible through the neo-Weberian notion of the "system of legitimacy" and, first of all, by the definition of three ideal types: the charismatic system, the traditional system and the rational-legal system. Each of these systems is composed of a cosmos on which is defined a dichotomy between the source of legitimate power (which plays the role of a "third party") and the place where this legitimate power is applied, this dichotomy being perceived through "special glasses". Charisma corresponds to a cosmos upon which the dichotomy between the sacred and the profane is defined, the glasses of faith allowing us to perceive this dichotomy. Tradition is characterised by the dichotomy between traditional culture and the nature that must be subordinate to it, a dichotomy that may be perceived through the glasses of respect. Finally, the rational-legal system corresponds to a cosmos on which is defined a dichotomy between nature (in the modern meaning of a nature that obeys laws) and the culture that must be submitted to it, the glasses of science allowing us to perceive the dichotomy between nature thus defined and culture.

4. The crisis of legitimacy corresponds to the confusion between the source of legitimate power and the place where this power is applied. To use Jean-François Lyotard's words in *La Condition post-moderne*, this corresponds to the end of the meta-narratives: narrations relative to the sacred, tradition or nature. From this point on, instead of starting from a principle, we must start from the beliefs people have in charisma, tradition and reason. The collection of these beliefs constitutes the elements of an argumentation that can be addressed to those very individuals who have stated them and who, as a result, are hardly in a position to resist their persuasive value. This method, which combines arguments from the fields of *Pathos* (charisma), *Ethos* (tradition) and *Logos* (reason), corresponds to what Aristotle defines as the "rhetorical technique". Marketing then appears as this dimension of managerial argumentation targeting public opinion, which becomes necessary in the event of a crisis of legitimacy, i.e. a crisis in the definition of *a priori* legitimate arguments which result from the existence of common principles accepted by all.

The question of rhetoric necessarily led to the consideration of Chaïm Perelman's work, which marks the return of rhetoric in both philosophy and law following a long period of condemnation. It is interesting to note that the history of norms recounted in *Logique juridique*[19] follows the same three periods

[19] Chaïm Perelman, *Logique juridique,* (Paris: Dalloz, 1977).

as the history of the administrative law criterion: a period characterised by a hermeneutical approach is followed by a functionalist and sociological approach, ultimately leading to the reign of the "new rhetoric".

5. The reluctance exhibited towards this approach has been reflected in several ways: for example in philosophy, by the way in which Jean-François Lyotard managed — through the notion of postmodernity — to keep the idea of the crisis of modernity at bay; in sociology, by the way in which conventionalist approaches were able to rely on the postulation of the constitution of sufficiently stable compromises and, even in management, by the way in which this technical field prefers to define itself in the categories of science, be it the science of the artificial, despite the indeterminacy of models based on open systems, i.e. entities whose limits are undetermined by definition.

It is probably because such denials become more difficult to sustain as time goes on that Mary Douglas, fifteen years after publishing a book entitled *How Institutions Think* in 1986,[20] wrote the following in an article entitled "Dealing with Uncertainty" in 2001:[21]

> "Certainty is not a mood, or a feeling, it is an institution: this is my thesis. Certainty is only possible because doubt is blocked institutionally: most individual decisions about risk are taken under pressure from institutions. If we recognize more uncertainty now, it will be because of things that have happened to the institutional underpinning of our beliefs. And that is what we ought to be studying."[22]

Thus, after writing *How Institutions Think* she indicates that it is now necessary to study the institutional foundations of our beliefs, i.e. after having reported on how we are thought by institutions, it becomes necessary to know how institutions can be the object of thought, or in other words to produce a theory of institutions within the framework of rational-legal legitimacy.

When Do We Need to Move on from the Issue of Knowing "How Institutions Think" to the Question of Knowing "How Institutions Can be the Object of Thought"?

It is somewhat paradoxical to consider that the crisis of legitimacy systems — a crisis that appears to correspond to the pure triumph of pragmatism expressed by the emergence of management in the space of normativities — must be translated into a demand for theory. It is therefore worth recalling how Oliver Wendell Holmes concluded an article entitled "The Theory of Legal Interpretation": "But although practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end."[23]

Therefore we must now apply ourselves to examination of the main premises that govern the actions of practical men, while trying to answer the following two questions: (1) Why do practical men need theory? (2) Is it possible to specify the characteristics of such a theory?

---

[20] Mary Douglas, *How Institutions Think*, (Syracuse: Syracuse University Press, 1966).
[21] Douglas, "Dealing with Uncertainty".
[22] *Ibid*. 145.
[23] Oliver W. Holmes, "The Theory of Legal Interpretation", *Harvard Law Review*, 12(6), 1899, pp. 417-420.

The need for theory

Mary Douglas does not simply define certainty as an institution; she explains why this institutional certainty is necessary for life in society:

> "We need certainty as a basis for settling disputes. It is not for intellectual satisfaction, not for accuracy or prediction for its own sake, but for political and forensic reasons."[24]
> "The real problem is not knowledge but agreement."[25]
> "In a liberal democracy certainty has sinister aspects. It needs authority to back interpretation and control dissent."[26]

These words echo the way in which Alexis de Tocqueville writes, in a chapter of *Democracy in America* entitled "Of the Principal Source of Belief among Democratic Nations": "Thus the question is, not to know whether any intellectual authority exists in an age of democracy, but simply where it resides and by what standard it is to be measured." [27]

In modern democracies, dogmatic ideas reside in the law. As for how to measure it, it is expressed in the effectiveness of the principle that "ignorance of the law is no excuse".

Is it possible to construct such a theory?

It is not enough to have convinced oneself of the necessity of the existence of a shared institutional system of symbols for it to exist; it is necessary, in addition, to be able to demonstrate the possibility of its existence. We shall consider three successive objections that can be addressed to the hypothesis of the existence of such a theory: the complexity of the world that a small number of symbols must be able to account for; the large number of citizens who must agree on the same set of symbols; and finally — even more problematic — the self-contradictory nature of the very notion of institutional theory.

1. "Despite the complexity of the world"

The notion of a system of legitimacy, in its most general form, implies the existence of a shared set of symbols whose function is to resolve conflicts that may result from any social action (including conflicts relative to the question of knowing what is meant by the personal pronoun "our" in the expression "the institutional foundation of *our* beliefs"; in what follows, we shall refer to the notion of "society"). This system of shared symbols constitutes a representation of social life. It can be broken down into the following six points:

i) It is simple and formalised, so that it can be easily shared by all members of the society concerned. It is an ideal-type as understood by Weber.
ii) It may be used to code "reality", i.e. to give a normative description of social actions enforceable against third parties, making it possible to explicitly specify who is wrong and who is right in any conflict relating to these actions.
iii) The structure of this description is such that compliance with the rules of its syntax implies a promise (of happiness, justice, success, salvation, etc).

[24] Douglas "Dealing with Uncertainty", p. 146.
[25] *Ibid.*
[26] *Ibid.*
[27] Alexis de Tocqueville, *Democracy in America Volumes I and II*, trans. H. Reeve, intro. J. Epstein, (New York: Bantam Classic, 2000), p. 518.

iv) The existence of this system of symbols, which constitutes a theory of social action, is so important that it is made mandatory by law. Law enforcement is one of the main functions of modern nation-states, which in Max Weber's words have a monopoly on legitimate violence. Social theory is seen less in terms of its truth than in terms of its necessity, as enshrined in the legal principle that "ignorance of the law is no excuse". It constitutes what may be called a "normative phenomenology of common sense", or in other words, a representation of how things should appear to members of the society concerned.

v) The descriptions of the actions produced by this system must be far enough away from "reality" to be able to cover all the concrete situations of life in their diversity and change (which is shown *a contrario* by the example of "work-to-rule" situations).

vi) On the other hand, these descriptions must be sufficiently similar to "reality" to be considered as acceptable representations of this reality.[28]

If this minimal level of similarity (or recognition) is not reached, uncertainty increases: we can say that there is a crisis of the system of legitimacy. It is the occurrence of such crises that constitutes the history of the system of legitimacy, a history that makes it possible to specify what may have happened at the level of "the institutional foundation of our beliefs" for the feeling that the world is ever more uncertain to have spread.

Let us add that what allows the relationship between the shared system of symbols and the extreme diversity of the situations it governs, i.e. between the norm and the fact, is neither deduction nor induction, nor even abduction, but subsumption: whatever is considered a norm as such by the individuals concerned, conforms to that norm. This leads to a second objection, no less formidable: how is it possible to ensure the convergence of such a potential multitude of perceptions?

2. Despite the cognitive limitations that characterise citizens

While the principle that "ignorance of the law is no excuse" makes it possible to affirm the possibility of the existence of a simple theory allowing the resolution of social conflicts, it cannot, on its own, ensure that all citizens actually know it. Once again, it is law that offers us the means to further our investigation by enabling us to specify for each member of society the way in which their experience of ordinary life — the place of moods and feelings — can be related to what could be called their "normative life", as defined by their individual membership of an institutional order — an order that manifests itself in the form of a *normative phenomenology of common sense* — of which law constitutes, as we have seen, an essential component. To analyse the modalities of the encounter between these two worlds — that of ordinary life and that of normative life — we may simply consider more closely how the principle whereby "ignorance of the law is no excuse" is translated in practical terms.

[28] It seems that the six characteristics thus defined can be related to the six categories by which Norberto Bobbio defines the concept of legitimacy: (1) legitimacy; 2) legality; 3) justice; 4) validity; 5) effectiveness; 6) efficiency), by arranging them into two related lines, one being a "political" line (legitimacy, justice, efficiency) and the other a "legal" line (legality, validity, effectiveness). V.N. Bobbio, "Sur le Principe de Légitimité" in "L'idée de Légitimité", *Annales de Philosophie Politique*, 7, 1967, pp. 47-60.

The question of whether we actually know the law is one that is confronted by common man in the event of a conflict, whether with others or with oneself (which corresponds to what is known as a moral dilemma). Based on this, we either think we know the law and the temporary uncertainty that results from the conflict quickly fades away, or we become aware of our own ignorance and uncertainty appears to threaten "the institutional foundation of our beliefs". At least this would be the case if *the normative phenomenology of common sense* that is law did not offer us a way out of such an embarrassing situation. Indeed, it would be underestimating the common sense and realism of normative systems to believe that they confuse an imperative with an indicative, or the fact of being supposed to know something with the fact of actually knowing it. To make a practical connection between the ordinary world and the normative world, everyone just needs to know that they can ask for help and assistance from those who are supposed to know the law, whether they are judges or lawyers. All the certainty required by the institutional system then lies in the relationship between those who are supposed not to be ignorant of the law and those who are supposed to know it. This relationship is known as trust. It should also be pointed out that this is not just any form of trust: for the system to provide each person with the degree of certainty that is appropriate for an institution, this trust must be absolute (which corresponds well to the legal notion of irrefutable presumption) or, as it is also said, it must be blind. This is probably why Kenneth Arrow, winner of the 1972 Nobel Prize in Economics, saw fit to define trust as an "invisible institution".[29] To say that trust is invisible is to say that it escapes all empirical definitions and the relativism that characterises them: it is a dogmatic trust, quite different from the notion of "confidence".

3. Despite the self-contradictory nature of the notion of institutional theory

It should not be forgotten, however, that the very possibility of a theory of institutions comes up against another formidable obstacle: the potentially self-contradictory nature of its object. Indeed, what is institutional is by definition characterised by the fact that it is taken for granted. For its part, theory — whose etymology refers to the Greek *theoria*, which means "contemplation" — implies distancing oneself from the object under consideration. Institutional theory seems to be unable to do anything better than to destroy the object of its study.[30] In other words, the dogmatic nature of institutions cannot withstand a critical examination of the basis for our beliefs. It is hardly surprising then that the need for such a critical examination only becomes apparent when, as Mary Douglas pointed out, something has affected "the institutional foundation of our beliefs". This is what happens when a state of institutional crisis manifests itself through the multiplication of conflicts linked to the absence of *a priori* agreement on the definition of acceptable actions and the loss of trust in the distinction thought to exist between those who are supposed not to be ignorant of the law and those who are supposed to know it. This is accompanied, as we have seen, by the penetration of legal norms by non-legal norms, for example those that stem from managerial logic.

[29] Kenneth Arrow, *Les Limites de l'organisation,* (Paris: Presses Universitaires de France, 1976).

[30] It may be noted that this situation seems to echo, on the social sciences side, Heisenberg's indeterminacy principle in the field of physics.

In response to such transgressions of normative spaces, and the conflicts that necessarily result from them, we are led to produce a theory based on the notion of a system of legitimacy whose definition makes it possible to perceive — but after the fact — the warning signs of the current crisis of our beliefs, a theory whose paradoxical character is such that it can only emerge the very moment it is defeated, i.e. in times of a legitimacy crisis.

Because of its self-contradictory or, to say the least, paradoxical nature, both trying from the point of view of reason and threatening from the point of view of social order, any theory of this kind must expect to be met with denial.

By Way of Conclusion

To conclude, we can mention some consequences associated with the emergence of management and marketing in the space of competing normativities, first from the point of view of institutional theory, then that of management theory and finally that of the paradoxical forms that norms can take in these times of crisis.

The history of institutionalism may be used to verify the fit between the development of theoretical approaches to the notion of institution and the crises of legitimacy systems that make them necessary, as well as the denials that accompany them. As far as institutionalist approaches are concerned, the most common form of denial consists in adopting the point of view of conventionalism: the price paid for the fact that "the real problem is not knowledge but agreement" is the necessity to rely on a belief, a belief in the possibility of doing without any shared dogma.

A similar denial can be seen in the way in which economists of the neo-institutionalism school, for example, avoid accounting for the very history that is nonetheless implied by the prefix "neo", and for the eclipse suffered by these approaches since the time of Veblen, Mitchell and Commons, whose "old" institutionalism first developed as a criticism of what the market economy had become in the United States by the end of the nineteenth century. Similarly, interest in institutionalist approaches to law is reflected in a renewed interest in the works of Maurice Hauriou or Santi Romano, without excessive attention being devoted to the crises that led them to develop such an approach. This makes it possible to consider their theoretical propositions as solutions to the problems posed by crises of legitimacy rather than as symptoms of such crises.

From a managerial viewpoint: As long as there is trust between those who are supposed not to be ignorant of the law and those who are deemed to know it, management can rely on a conventional agreement relating to the syntactic, semantic and pragmatic dimensions required to define a well-functioning administrative language, the institutional value of this conventional language being ensured by the possibility of referring to common law in the event of disagreement. The crisis of legitimacy is manifested by the fact that, from now on, the answers given to each of the three dimensions of the definition of management are replaced by as many questions. The question concerning the syntactic condition is that of knowing who the author of the action is, which corresponds to the question of governance. The question concerning the semantic condition is that of knowing what happens to the representation of the action, which corresponds to the question of transparency. Finally, the question concerning the legitimacy of actions is that of the social acceptability of their consequences, which corresponds to the question of corporate social responsibility (CSR).

From a normative viewpoint: The crisis of legitimacy sees the emergence alongside "normal norms" that are distinct from the facts they are supposed to govern, of "paradoxical norms" that are defined by their self-contradictory character. Such is the case of transparency (which requires that one be able to show what lies behind what is shown), of the precautionary principle (which is what happens to prudence when the norms of prudence are violated), and flexible law (whose name conjures up references to Salvador Dali's "Soft Watches").

The place of marketing, its relationship with both sophistry and the crisis of the rational-legal system of legitimacy can be measured at three levels: at that of language by the fact that the word of the year chosen by the Oxford Dictionary in 2016 was "post-truth"; at the political level by the intensive use that the President of the US democracy has been able to make of the expressions "fake news" and "alternative facts"; and finally, at the scientific level by the awarding of the 2017 Nobel Prize in Economics to Richard Thaler for having given a scientific status to the notion of the "nudge".[31]

Translated from the French by Delphine Libby-Claybrough.

~ Hautes Etudes Commerciales, Paris ~

[31] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness,* (New York: Penguin, 2012).