***Law and society under the tropism of the neoliberal explanation: contemporary elements***

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For those who use it, the term "neoliberalism" (and its derivatives) is used today to explain all or part of the way the world goes today. By using it, we intend to agree implicitly - and almost automatically - with those who are listening to us on a form of observation or criticism of the way the world goes. Very often, to speak of neoliberalism is to denounce it at the same time. The term is therefore very convenient, and we often use it to avoid having to say more. The convenience of the term is matched by its elasticity: it can be used whatever we are talking about: economics of course, politics, law, culture, education, health, even humanitarian action, literature, etc. Everything is covered by the term.

Everything seems today to be analyzable through the prism of neoliberalism, this new "world's reason", as Pierre Dardot and Christian Laval tell us (*The New Way of the World. On Neoliberal Society*, 2013). To speak of neoliberalism about everything can reveal a facility of language, even intellectual laziness. But it is also the sign of what I call *a way of seeing*, *saying and deciding the world*, that crosses all social spaces, and that makes us more and more unable to establish and believe in their differentiation, even intellectually. Wherever we look at it, the way the world goes is called "neoliberal" by some and by others.

It seems to me that intellectuals and scientists are not the only ones concerned by this relative inability to differentiate between economic, social and cultural phenomena and spaces: all of them seem to be subjected in the same way to a march of the world, the so-called neoliberal way. And if there is an alternative, it would only be in a form of violence towards what seems to impose itself irremediably. In any case, there is always a violence in trying to think something else and differently than what is usually thought by everyone - or almost everyone.

Law, as an institutional and normative whole and as a specific modality of social organization, does not escape a very identifiable - but clearly difficult to analyze - *way of seeing, saying and deciding the world*, whether we call it "neoliberal" or not. In passing, it should be noted that the term "neoliberalism" - the origin of which I will return to later - does not initially aim to analyze the world, but to recompose it, and is therefore a "programmatic" rather than an analytical term. The shift is interesting: the success of the term lies in the fact that few people today claim to have a neoliberal program, whereas many use it to denounce it. Still, when the word has been chosen in the late 1930s, law as a set of rules was an important element.

It is well known that the term "neoliberalism" emerged at the end of the famous *Lippmann colloquium* held in Paris in 1938 around this personality: Walter Lippmann, author of a book entitled *The Good society*. *An Inquiry into the Principles of the Good Society* (1937), proposed to renew liberalism, and it was the French professor of philosophy and journalist Louis Rougier who saw this as a pretext for organizing an international meeting at which Jacques Rueff, Friedrich Von Hayek, Ludwig Von Mises and William Ropke were present, among others, the later having a decisive role in the evolution of liberalism Michel Foucault would later underlight (*Naissance de la biopolitique*. *Cours au collège de France, 1978-79,* 2004). In the

discussions and in the writings of the various protagonists of the conference, many reflections concern or put forward the law. I will limit myself here to a few brief elements.

In the preface to his book, Walter Lippmann thanks economists (Hayek, Von Mises and also Keynes), but also a theorist of international relations (Graham Wallas), and jurists, including Roscoe Pound, promoter of a realistic reading of law, and MacIlwain, author of a famous article entitled *Government by Law* (1936, *Foreign Affairs*). In the proceedings of the *Lippmann colloquium*, and in particular in the final agenda, we read that "it is for the State to determine the legal regime that serves as a framework for the free development of economic activities". In his book *Les Mystiques économiques* (1938, Médicis), Louis Rougier, the organizer of the conference, proposes a legal order such that the possibility of free competition is always safeguarded. Not only is law not absent from the neoliberal project, but it even seems to play a concrete role. The works of Friedrich Von Hayek show it evidently. In the project of neoliberal recomposition of the world, law thus has a pivotal role. At this point, and in order to better grasp the scope of the recomposition project, that is, what resonates each time the term "neoliberalism" is used, identifying the reasons for the choice of term proves to be particularly fruitful: for example, "positive liberalism," "renewed liberalism," "reconstructed liberalism," "left-wing liberalism," and even "individualism" have been proposed. According to economist and journalist Bertrand Rothé, in a 2015 article ("Le néolibéralisme naît à Paris"*,* 2015, *Marianne*), "neoliberalism" wins out because *it requires less implication than the other terms*. In spite of a substantial project of recomposition of the society, it is a question of naming it *by engaging the least possible things.* This is an analysis that opens up many perspectives, because it seems to me to evoke what has actually happened, by way of nomination: *a way of saying the world that implies as little as possible what it is about*. A doctrinal and programmatic term, "neoliberalism", in becoming a term of analysis, has obviously retained this character of saying as little as possible that engages those who use it. I would go so far as to say that by denouncing neoliberal practices with this term, we are most often prolonging neoliberal thought. For it is indeed *a way of seeing, saying and deciding the world* that says as little as possible, and yet about almost everything. The observation of the evolution of law goes in the same direction.

Wherever one looks at law, one can thus be led to consider the spectrum of the neoliberal paradigm: whether we are talking about the different branches of law (when they are distinguished, as in French law) - private law, public law, civil law, commercial law, administrative law or constitutional law - whether we start from the different categories or notions of law - contracts, norms, family, legal acts, punishment or even the more recent notion of state of exception (the Brazilian jurist Rafael Valim titled a small opus in 2018 *State of Exception. The legal form of neoliberalism*, L'harmattan) - it seems that each time we can consider the evolution of law as a manifestation of neoliberalism. In the various works that illustrate it, it is most often a question of placing everywhere the emphasis on the notion of competition, and rightly so, through the conversion of any space of diffusion, communication and exchange into a "market" to be regulated. In this sense, law in its entirety "goes through it".

The success of these transformations has serious societal basis: in fact, we are all involved in these transformations, that is to say with our real support I believe. The question is *how it happens?* If neoliberalism is *a way of seeing, saying and deciding the world*, then law, in the

neoliberal paradigm, would have a general structure, an organization, a common way of appearing, whatever it is talking about, that corresponds to it. From this point of view, it seems to me that two things characterize law today in its evolutions: its relation to language and its relation to rules. Whatever the domains of law considered, these two points are identifiable, and they also cross all social spaces. In this respect, analyzing the neoliberal evolutions of law through its language and its relation to rules places the analysis of law at the core of the social sciences, in that it identifies structures of thought that are quite widely shared. More than identifying neoliberal "techniques" or effects, the analysis that starts from language and the relationship to rules allows us to find our bearings in what makes the bed of a so-called "neoliberalism".

### *1. Thinking the contemporary relationship of law to language*

Men and women live the world only by speaking it, and his language is thus determining. We can therefore remind that language is never the neutral dress of a society: it is in part what constitutes it, and its evolutions should not be taken lightly. Law, we are told from the very first years of law studies, is a language, in the sense that it produces and deploys itself through a language that is specific to it. This specificity of the language of law is even the cause of many worries for students, and a source of fear for those who are not familiar with it. But what strikes me in observing the evolution of law is precisely the fact that it tends today to curl up in a language that is not its own, a language that is completely "mainstream" one might say, that is to say, a language that is very widely shared beyond the law and that could come under the features of the neoliberal way the world goes. The law defines, says and decides the world with the same words as economic operators, humanitarian associations or artists, and this is not without reason. I will take two examples of the use of these "mainstream" terms by the law, at the very core of the neoliberal vision of the world: by resorting without any real limits to the semantic register of "trust" and "risk", two terms that are closely linked, the law displays itself as the unfailing ally of a certain vision of the world. Starting from the analysis of French law, I realized that these two terms had today a quasi-identical spectrum in American or English law (about which I won't go further here).

For several decades now, we have in fact seen an exponential penetration of the vocabulary and register of "trust" in the public sphere, visible in the vocabulary used in legal texts and in the discourse of political and administrative authorities. One only has to look at the titles of recent laws and regulations in the case of France. I must precise that if one can translate the French term *confiance* used in rules by "confidence", I prefer to always translate it by "trust" to be more speaking. We can quote the law of June 21, 2004 *pour la confiance dans l'économie numérique et relatif aux prestations de cryptologie* (for *trust* in the digital economy and relating to cryptology services), the law of January, 28 2005 *tendant à conforter la confiance et la protection du consommateur* (aimed at strengthening trust and consumer protection), the law of July 26, 2005 *pour la confiance et la modernisation de l'économie* (for trust and the modernization of the economy), the executive order of December 28, 2011 *relatif au dispositif de « tiers de confiance »* (relating to the "trusted third party" system ), the executive order of January 18, 2012 *relatif au référencement de produits de sécurité ou d'offres de prestataires de services de confiance* (relating to the referencing of security products or offers from trusted service providers), the executive order of March 27, 2015 *relatif à la qualification des produits*

*de sécurité et des prestataires de service de confiance pour les besoins de la sécurité nationale* (on the qualification of security products and trust service providers for national security purposes), the executive order of October 18, 2016 *fixant les conditions dans lesquelles est donnée l'information sur le droit de désigner la personne de confiance* (setting the conditions under which information is given on the right to designate the trusted person), the law of September 15, 2017 *pour la confiance dans la vie politique* (for trust in political life), the executive order of October 4, 2017 *relative à l'identification électronique et aux services de confiance pour les transactions électroniques* (on electronic identification and trust services for electronic transactions), the law of August 10, 2018 *pour un Etat au service d'une société de confiance* (for a State serving a trustworthy society), the law of July 26, 2019 *pour un école de la confiance* (for a school of trust) and recently the law *visant à améliorer le système de santé par la confiance et la simplification* (to improve the health system through trust and simplification).

"Trust" seems to play a role in legitimizing and validating the institutional speaking: but it only recovers what does not originally belong to it. Historically, the appeal to trust concerns private activities and not public action, which theoretically did not need it. In this respect, the capitalist economy could not have developed without the trust granted, or to be granted, to something that does not exist, perhaps not, or not yet. A bank can lend money it does not have, brokers can speculate on something that will never have any tangible materiality, companies can be given a value that has no relation to the reality of their activity and the people who work there, new companies can sell a product that does not yet exist. To "trust" is to give credit.

The artificial and mechanical creation of value from the register of trust - we speak of "trust capital" - allows the almost limitless deployment of an arsenal of devices and actors theoretically dedicated to it. The appropriation of "trust" by the institutional speaking, alongside the private and the economic speaking, is therefore not purely formal, since it benefits as a system of legitimization of action, *a kind of creation of value from what does not exist*.

The history of the register of "trust" is linked to that of "risk". It was also private actors who understood and initiated the logic of risk the earliest, intended to limit the risks incurred by entrepreneurial structures. The term, coming from the Latin *resecare*, *resecum*, to cut, that which cuts, is etymologically the pitfall, the risk therefore, incurred by goods transported by ship. The development of commercial exchanges made possible by navigation has put the idea of risk at the center of commerce, which is basically only conceived in relation to a loss of profit. Thus, like trust, the invocation of risk is a historical driving force behind the development of a capitalist economy to which the state quickly became linked. Fundamentally commercial in its essence, risk has therefore also invaded the public arena as it has accompanied the evolution of a globalized market society.

More precociously than for trust, the vocabulary of "risk" has been the object of public norms since the First World War (generating in its wake a whole series of texts on the risks linked to armed conflict: risks of bombing, risks of maritime warfare, stockpile risks, monetary risks), and has evolved without interruption (work accidents, or "old age" risks). The idea of risk prevention is more recent since it dates, in the law, from the end of the 1970s. Taking again

example of France, we can quote the 1976 law sur *le développement de la prévention des risques professionnels* - on the development of occupational risk prevention – the 1985 law sur *la protection des travailleurs contre les risques professionnels dus à la pollution de l'air, au bruit et aux vibrations sur les lieux de travail* - on the protection of workers against occupational risks due to air pollution, noise and vibrations in the workplace - then the 1991 law *en vue de favoriser la prévention des risques professionnels* - to promote the prevention of occupational risks). Later, "risk" is invoked by the law to justify control logics (as by 1991 law sur *le contrôle et la prévention des risques professionnels causés par les substances et agents cancérogènes* - on the control and prevention of occupational risks caused by carcinogenic substances and agents).

Today, the idea of taking risk into account is almost an obligation for any activity, including legal activities. It is relayed in this sense by the activity of standardization which determines the criteria for taking risks into account, via the famous *ISO standards*.

Promoted at all levels and especially today in the public arena, promoted by associations, organizations and currents of all kinds, in short, completely normalized in the social arena, risk management policy was theorized by one of the founders of the *Chicago school of economics*, Frank Knight. In 1921, he published *Risk, Uncertainty and Profit*, which aimed to shed light on the conditions of competition and their optimization to avoid losses.

The linguistic register of "risk", like that of "trust" - one need only observe the laws and public speeches - is not merely formal: it carries with it practices. Indeed, I have not taken the example of trust and risk at random. At the same time, these terms are omnipresent in the contemporary vocabulary of the law, they stem from a logic that is both commercial and capitalist, and, finally, strictly speaking, they make the law, or rather, they make the law, in such a way that resorting to them supposes a decision, almost logical, natural even, in the sense that it does not need reflection; it imposes itself, in the manner of the law.

### *2.Understandig the contemporary relationship of the law to what rules the world*

The law, in the neoliberal paradigm, claims to only *say* the rules, that is to say to transcribe them as they are, *more than it would do them*, with the help of the register of "trust" and "risk".

Since it is a question of establishing trust, fallibility and the hope of making up for it are hunted down everywhere. I will take here only one example, that of *authenticity*, a centuries-old legal notion, which has long relied in countries like France on specific actors, such as notaries, court clerks or bailiffs. Today, in order to promote trust, the legal system emphasizes reliability and certification mechanisms developed by machines and computer systems, such as the famous *blockchain*, which is considered a source of trust, and which legislation, particularly European legislation, now promotes. Through trust, legal norms do not determine what machines should do, but what they actually do or can do. The arrival of blockchain in the technological landscape has quickly led to the law adapting the conditions of authentication and validation of legal transactions to what has been dictated by the machine, that is to say to its law.

In passing, there is a loss, which is obviously not named, since it is always a question, in the neoliberal paradigm, of saying as little as possible about what is happening, while allowing it to happen: indeed, one moves quite clearly from a system in which the valid character of an operation recorded in an authentic act was not legally contestable, via its actors (even if the personality and the work of these actors could be discussed), to a system in which it is not a question of knowing whether the operation is valid, but of knowing whether the operation has actually taken place, which is not at all the same thing.

As far as risk is concerned, the same type of observation can be made. All areas of the life of the social body, whether private, economic, institutional or several at the same time, are now affected by the policy of "management of risks", that is to say, of what has not yet occurred and of which we do not know if it will occur.

The mere invocation of risk, whether technical, environmental, terrorist or sanitary, possibly combined with the logic of urgency, appears more and more to be *a sufficient legal argument* for the legality and legitimacy of action, whatever it is institutional or not, but moreover when it is institutional. *It makes the law*. As an example, this is very evident in the decision rendered by the French Constitutional Council on July 9, 2020 concerning the law organizing the end of the state of health emergency, by which it validates the possibility given to government authorities to close establishments open to the public or to ban demonstrations and public meetings, *without any other argument than the presumed intention of the legislator* "to remedy the increased risk of contamination presented by the public frequentation of these places" and the "increased risk of spreading the epidemic due to the punctual meeting of a significant number of people coming, sometimes, from distant places". No analysis of the reality of the situation but an acceptance of the one presented, no linkage of the measures envisaged with the intention declared by the legislator, no questioning of the measures not taken which would have possibly avoided a lesser infringement of the rights and freedoms protected by the constitution (freedom of movement, expression and demonstration, freedom of trade), and finally not even the outline of a balancing between the restriction of the rights and those put forward (the protection of health, which moreover is not formulated here as a right) to justify it. *A statement about risk is thus a legal argument.* This means that anything can be decided that responds, in the imagination acceptable to the majority, to good "motives", in a "good society". Trust and risk are good motives as they are considered vital in a good society that law must realize. In short, the exaltation of risk highlights the dilution of all other principles in support of the law: it is almost the sole basis for the law, for the choices and decisions made, since it almost contains them within itself.

Whether it is a question of trust or risk - but I could have taken other examples, such as that of "transparency", or even of "truth" - the law presents itself as submitting to *their* rule: no further explanation, no real decision, only a mechanism, which has the effect of masking the initial choices, that of basing legitimacy on trust and risk. This is the effect of language and its practice in the neoliberal paradigm: the concealment of our subjectivities, under the prism of the indisputable principles and mechanics of the "good society". Subjectivity is very often presented as a risk, which demands that it be eliminated. What appears subjective is debatable, and in the neoliberal paradigm, it is precisely a matter of saying as little as possible to limit the discussion; thus, what is debatable is not good; subjectivity then is not good; what is law must not be questionable; subjectivity can’t make law; men and women, even

throughout community can’t objectively make law with their subjectivity. This is a condition for making rules. Authentication by technology, as we have seen above, has been promoted and is even often claimed to limit the effects of decisions made by the so-called old and traditional ministerial public officers. In concrete terms, it is a question of eliminating the possible effects of a human decision, even if it means masking it. The help of so-called "intelligent" science and machines, i.e. strictly those that do not need human intervention to act as man wishes - or is supposed to wish - is presented as progress. The idea of men and women, as for lawyers, "augmented" by the machine, is positively connoted. This also explains the progression of the fixed-scaling and the lump-summing of court decisions ("*barémisation*" and "*forfaitisation*" in French), in the name of the "risk" of the subjectivity of judges.

At this stage, to my advice, what must be retained, is that, in the past, through law, men and women gave themselves the feeling of wanting to master the world by giving themselves laws. But today, they submit the law to what they pretend to believe are laws that are imposed on them in the implicit name of a "good society", carried along by the language of "trust", "risk", "transparency" or "truth". Indeed, who would not want a "good society"?