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Theory of the Norm Unit

The Requirements of the Pragmatist Turn and the Redefinition of the Concept of Law.

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1) Introduction

Philosophical research, J. Coleman[1] recently rightly said, is an exercise that develops austerely and modestly, like a variation on a well-worn theme rather than like the chimerical construction, often too prized today, of a new system for itself. It does not prevent advances or shifts. As the musical metaphor shows, the quality of the variations expresses itself when, on the basis of a well-worn theme, they open to stimulating and even sometimes destabilizing interpretations[2], thus revealing a new face of what already seemed well known.

Of course, this consideration also applies to philosophical thought on law. Perhaps, it even acquires a wider significance here than elsewhere. A brief look at its history during the last century seems indeed to testify that the 'variations' usually considered to be particularly 'inspired' come from authors who are especially aware of the necessity to let themselves be taught, not only by the past of their own discipline, but also by another background debate: the meta-theoretical debate of epistemological reflection.[3]

There are many indications that a moment may be approaching that would be favourable for the emergence of such a new variation. It would be mainly linked to the debate provoked by the decision of some to revisit traditional issues of legal theory in the light of the recent pragmatist[4] renewal in epistemology.[5]

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[1] "Real philosophers not only learn the history of their discipline; they internalize it. They are not embarrassed by the fact that there is an important sense in which nothing is new in philosophy. They are not embarrassed working and reworking familiar themes. What distinguishes good philosophers from others is not that they invent new paradigms" (J. Coleman, *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory*, 2001, Oxford, Oxford U.P., pp. IX-X).

[2] "Great blues players first make it clear to us that they are playing a blues...then they go off, play around and through the familiar, connect dots in unusual, sometimes awe-inspiring ways, then bring us back to the familiar again, thus deepening our understanding and showing us the extraordinary possibilities inherent in what we already know" (*Ibid.*, p.X).

[3] To limit ourselves, indeed, to two of the most striking advances in legal positivism in the last century, do we need to recall the importance of Kelsen's relation to logical positivism and to the neo-Kantian renewal of the late 19th century and, thirty years later, Hart's relation to the philosophy of ordinary language?

[4] The term 'pragmatist' is often the object of a less than rigorous usage in the, mainly American, legal literature. It is often used in a 'sceptical' perspective as in Dworkin or as in several contemporary writers who refer, moreover often in a rapid and exegetically problematical manner, to the pragmatism of Rorty. This is not the meaning we give here to the expression 'pragmatist'. Indeed, as Coleman, one of the main initiators of this project of a pragmatist approach to legal theory, says, "legal academics typically draw, for their understanding of philosophical pragmatism, upon the work of Richard Rorty, John Dewey, and William James (and the latter two are themselves often seen through Rorty's interpretation of them). These are not my roots or my sources. The sources I draw from include, most prominently, Wilfrid Sellars (especially his view of semantic content as inferential role), W.V.O. Quine, Donald Davidson, and Hilary Putnam" (J. Coleman, *Ibid.*, , p.6 n.6). According to the 'holistic' (internalist or, to use an expression more directly related to Putnam, pragmatist) perspective initiated by these authors, the meaning of a concept is analysed "in terms of the inferential role it plays in the variety of practices in which it figures"; and, at the same time, these "inferential roles our concepts play reveal the holistic web of relations in which they stand to one another, and it is this web that determines a concept's content" (*Ibid.*, p.7; for more developments on this, see below §2.1.2.).

[5] Perhaps one of the first expressions of this movement was the debate initiated by B. Leiter and J. Coleman with H. Putnam and published in the inaugural issue of *Legal Theory* (1 *Legal Theory* (1995), pp. 5-80; see also *infra* §2.1.2.2.2. for an analysis of Putnam's positions at the occasion of this debate). Even if the explicit link to epistemological debates or to a pragmatist approach is not always attested and despite effective differences in

One of its most representative and developed expressions is Coleman's project of 'pragmatic conceptualism'[6] and his proposal of what we could call a 'pragmatist turn' in the philosophy of law. As a consequence, we will take it as the starting point for our own reflections. Certainly, this proposal of a 'pragmatist turn' has antecedents. The 'interpretivist' or hermeneutic turn which has oriented numerous recent researches in the philosophy of law already manifests a will to respect a form of epistemological internalism which anticipates this project of a pragmatist approach to legal theory. In the same way, beyond legal philosophy, the 'anti-foundationalist' trend which has characterised a significant part of American legal scholarship since the sixties also anticipates this project, although in a still more implicit and less elaborated way. However, this project presents a specificity that explains its potential fruitfulness.

This specificity is due primarily to the clarification introduced in current legal theoretical debate by this project (and, more widely, by the movement of which it is a privileged expression). Thanks to a patient rereading of the present results of positivist research on law (or of some of the background elements which contribute to measure their reach[7]), a reinterpretation of the theoretical significance of opposing theses has been made which helps to value the effective stake of many current debates. In particular, as we shall see, it allows an understanding of why the 'interpretivist or hermeneutic' turn in legal philosophy and, more generally, the central place given to the question of the judge in the present reflection on law do not produce the critical denunciation of legal positivism that their promoters still too often attribute to them today.

But this first specificity only reflects a second, deeper, one. Of course, simply listening attentively to past teachings already helps to relativize strongly the effectiveness of the advances promised by several movements in current legal thought. That, however, is not enough. The profit of the 'pragmatist turn' is mainly due to its reformulation of these teachings (and of the questions which underlie them) in the light of a meta-theoretical, that is, epistemological, reflection. As the term indicates, the *pragmatist* project, by using the theoretical light of the recent epistemological debates of analytic philosophy, leads one to '*re-link*'[8] legal theory with a *theory of judgment*. Clarifying the concept of law comes down to understanding this practice by which a social group produces a shared normative meaning. Thus, this understanding necessarily presupposes some understanding of the process by which a meaning is produced in (social) reality. Such is the stake of a theory of judgment: it aims to think about the conditions of possibility of the operation (that is the action, the practice) by which a judgment produces a meaning.[9] In reconstructing the conditions of the

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methodology and in the content of hypotheses, works of authors such as S. Perry, S. Shapiro or B. Zipursky can be related to this movement, besides Leiter's and Coleman's works. (See below for references to some of their works).

[6] We use the excellent expression proposed by B. Zipursky ("Pragmatic Conceptualism", 6 *Legal Theory* (2000) pp.457-485) which seems to be explicitly endorsed by Coleman (*op. cit.*, p.10 n.12); recall that this methodological approach is not however shared by all the authors who, to different degrees, participate in the movement identified here (thus, see, for instance, on the differences between this form of conceptualism proposed by Coleman and Zipursky and that proposed by Leiter, J. Lenoble & M. Maesschalck, *Toward a Theory of Governance. The Action of Norms,* London, Kluwer Law International, 2003, pp.296 ff.).

[7] Indeed, besides J. Coleman's, B. Leiter's or S. Shapiro's works on Hart's theory, the importance of Leiter's works on legal realism (which have led to the reinterpretation of its epistemological significance, see B. Leiter, "Legal Indeterminacy", *Legal Theory*, 1 (1995), 481ff.; "Legal realism and Legal Positivism Reconsidered", *Ethics*, 111 (January 2001), 278ff.) and of S. Perry's works on Holmes (see below n.97) must be underlined.

[8] We use the expression 're-link' deliberately because a careful rereading of the legal and political philosophical debates in German idealism (especially those between Kant and Fichte) reveals, against the usual reductive interpretations, an analogous will to 'link' the analysis of the conditions of possibility of governance by law with an analysis of the conditions of possibility of the operation of judgment.

[9] Epistemological reflection thus here has the meaning of a theory of judgment and not the methodological and more reductive one of 'reflection on the method to be respected in order to produce scientific knowledge' that a certain philosophy of science has too often given it.

effectuation (that is, of the application) process of a judgment, epistemological thought thus provides a necessary and privileged access to highlight the conditions of possibility of the practice by which a social group produces and 'recognizes' a normative authority, that is, the conditions of possibility of governance by law. The pragmatist turn, suggested mainly by Coleman in legal philosophy, makes the debate concerning these presuppositions explicit and analyses it in the light of criticisms of mentalism (linked among others to Quine's and Putnam's work) which embody the main trends of current epistemological thought.[10]

It is the explicit reference to this epistemological requirement that explains the fruitfulness of the pragmatist turn suggested by Coleman. Certainly, as we have already indicated, many authors had for a long time revisited traditional questions of legal philosophy in the light of the philosophy of language, Quine's and Wittgenstein's[11] holistic approaches included. The internalist approach Dworkin attempts to develop on the basis of his hermeneutic perspective is one revealing example. But, as we will observe below with regard to Dworkin, the profit of the pragmatist turn, such as is suggested by Coleman, is due to the effects attached to this explicit reference to epistemological arguments. This explicit reference not only leads to a *redefinition* of the basic issue of legal theory as being the question of the conditions of emergence of a social practice (were it interpretive) of adhesion to a shared normative meaning. But, moreover, it also leads to the highlighting of a double insufficiency of current legal theories. Firstly, an insufficiency of the hermeneutic theories[12] which, although often wishing to denounce the inconsistency of legal positivist theories with regard to an holistic approach to meaning, are themselves unable to specify and to respect the requirements of such an approach. Secondly, a parallel insufficiency of the present representations of legal positivism[13] which, in spite of their correct intuition of the necessity of a conventionalist approach to law, are unable to reconstruct adequately all the conditions of emergence of such an approach.

Here the stake of our own reflection appears. While underlining the important results achieved by the pragmatist turn in legal theory, we would want to extend it on behalf of the epistemological requirement this turn attempts to embody. Drawing support from the especially developed version of this turn recently presented by Coleman, we will try to apply to it what H. Putnam describes, in a metaphor used to explain his analysis of the limits of cognitivist theories, as "the trick attributed to adepts in jiu-jitsu of turning an opponent's strength against himself".[14] In other words, we would like to show in which sense Coleman's explicit epistemological project involves requirements that demand a deepening, or even a modification, of his proposed pragmatist reformulation of current legal positivist hypotheses. These modifications concern the manner of understanding the conditions of possibility of the conventional social practice by which a social group produces and recognizes normative authority. We will show why a non-mentalist approach to the operation of judgment obliges the extension of the requirement of what Hart calls the 'internal point of view' specific to this practice of recognition beyond simply the public authorities in charge of the application of rules (that is, mainly the judges). Our hypothesis is that a correct comprehension of the requirements of the epistemological holism claimed by the pragmatist turn forces a questioning of a presupposition common to both the hermeneutic and positivist approaches. This presupposition consists in conceiving the operation of production of a normative authority mainly through the operation of production of law by the judges. We will specify

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[10] See, on J. Coleman's presentation of these main trends, below n.70.

[11] See, for some representative references to such works, below n.26.

[12] And, we could add, a similar insufficiency, beyond strict debates of legal philosophy, of the anti-foundationalist approaches of American legal scholarship.

[13] Notice that, in redefining in epistemological terms the effective reach of recent versions of legal positivism, authors connected to this project of the pragmatist turn simultaneously clarify the exact nature of the arguments which have to be challenged by everyone who wants, rightly in our view, to denounce the insufficiency of legal positivist theories, at least in their present state.

[14] H. Putnam, *Representation and Reality*, Cambridge (MA), MIT Press, 1988, p.XII.

below the exact content of these modifications and their technical consequences, concerning mainly the question of the normative or descriptive nature of legal theory or the correlative question of the moral dimension of the concept of law. But, to underline, from the outset, the practical stake of the change realized by these modifications, a final introductory remark can be illuminating.

Indeed, if these modifications result from the explicit relation which the pragmatist turn forces one to *re-establish* between legal theory and the theory of judgment, they lead themselves, in return, to the *re-establishment* of a second relation: this one between legal theory and what social scientists used to call the theory of governance[15]. Besides, this second relation is also explicitly (although, in our view, incompletely) introduced by the pragmatist turn. Not so much because Coleman or Zipursky have built up their reflection on the basis of a confrontation with the Law and Economics approaches. Nor because Shapiro or Coleman explicitly refer to recent theories of action, the importance of which for the current social science debate is well

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[15] This debate is linked to the search for regulatory arrangements for collective action more able to 'maximise' the satisfaction of the constraints of the public interest (For a reconstruction of this debate and its philosophical analysis, see J. Lenoble & M. Maesschalck, *op. cit.*). The renewal of this search in the sixties, especially in the US, is notably expressed by the use made of the notion of 'governance' to qualify what is traditionally called 'regulation' (in economics or in political science) or 'government' (in law or in political philosophy). As R. Mayntz indicates, 'governance is the type of regulation typical of the cooperative state, where state and non-state actors participate in mixed public/private policy networks' (R. Mayntz, "Common Goods and Governance", in *Common Goods. Reinventing European and International Governance*, (ed. by A. Heritier), 2002, Lanham-New York-Oxford, Rowman & Littlefield Pub., p.21). This new orientation in the approach to questions of 'regulation' rested on the observation of the insufficiency both in traditional forms of hierarchical control (command-and-control regulation) and in the form of self-regulation based on the sole recourse to the market mechanism (coordination of collective action by the simple competitive aggregate of individual preferences). It has especially been carried out by economics (although in close relation with social psychological research on *bounded rationality*). However, it has not remained without echo in legal thought. Indeed, the reflection on a necessary transformation in the governance arrangements of our social democracies has developed since the fifties and sixties in the US in relation to the shortcomings of the institutional arrangements put in place by the New Deal to ensure an effective realisation of fundamental rights. In order to respond to this insufficiency, it was first proposed to have recourse to judges in order to ensure a better effective respect for fundamental rights. The judge was put in the position of the therapist of the regulatory process in order to create the conditions necessary for the effective realisation of the respect due to those rights. In order to deploy the means necessary for this new judicial activism (inaugurated by the celebrated case of *Brown v Board of Education* in the Supreme Court in 1954), the judges were endowed with modes of intervention which led to a significant transformation of the exercise both of the judicial function (the creation of 'public law litigation', see on this, A. Chayes, "The role of the judge in public law litigation" 89 *Harv. L. Rev.* 1281 (1976); O. Fiss, "The Forms of Justice", 93 *Harv. L. Rev.* 1 (1979); R. Marcus, "Public Law Litigation and Legal Scholarship", 21 *Journal of Law Reform* 647 (1988)) and of the administrative function. The idea is to condition the rationality of public policies elaborated by the administration to the possibility given to all concerned interest groupings to enlighten the authority and to participate in the elaboration of regulatory compromises. This will lead the judge to subordinate the legality of administrative interventions to the respect for all the procedural conditions guaranteeing this participation. R. Stewart, "The Reformation of American Administrative Law", 88 *Harv. L. Rev.* 1667 (1975). This first response to the perceived need to improve and transform our arrangements for the coordination of collective action accordingly concerned the jurist since it called into question the exercise of the judicial function. This explains why it is expressed, within American legal theory, by an intense critical reflection on *Legal Process Theory* and the synthesis this had believed it was possible to propose in response to the insufficiencies both of Langdell's formalism and of the realism of the thirties in their manner of understanding the operation of the judge (H.M. Hart and A.M. Sacks, *The Legal Process. Basic Problems in the Making and Application of Law*, (W.N. Eskridge and P. Frickey (eds)), Foundation Press, Westbury, 1994; and also, on certain forms of a new attempt at a critical synthesis, E. Rubin, "The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions", 109 *Harv. L. Rev.* (1996), 1393-1438). In parallel, in a more sociological, or even economic or political, perspective, numerous reflections also developed aiming to interpret the transformations of law induced not only by this first response to the crisis of our social democracies, but also by the subsequent responses which the critiques of this first reform inspired in social science researchers. In this last case, the legal reflections expressed a more direct link with contemporary debates in the social sciences on the theory of governance. Indeed, many among them attempted to import into legal reflection theoretical models developed by the social sciences—whether it is a matter of the reflections of the neo-institutionalist economists in the line opened by Coase, or of those of the sociological theories of self-regulation or of Habermas's theory of communicative action, or again of the 'experimentalist approaches of deliberative democracy such as those currently developed by J. Cohen, M. Dorf and C. Sabel (see on this, below §2.2 and especially n.100, 102 and 106).

known. But, above all, because, according to the pragmatist reformulation of Hart's rule of recognition, a correct comprehension of the conditions of possibility of the specific cooperative action by which the law is produced requires that the necessity of some specific institutional settings be included among these conditions. However, the opening of the analysis of the concept of law to neo-institutionalist thoughts which are at the core of current social science debates is only sketched out. It does not lead, moreover, to a questioning of the usual basic premise of current approaches to legal philosophy, which consists in 'immunizing' the analysis of the concept of law against reflections of the theory of governance (or of political philosophy). But our hypothesis is, on the contrary, that such immunization has to be criticized for epistemological reasons. By encouraging us to improve our comprehension of the epistemological requirements of the analysis of the social practice by which a society produces normative authority, the pragmatist turn, finally, opens up to its own deepening and to a renewed perception of the conditions of possibility of governance by law. Such a deepening, as we will try to prove, justifies the opening of the analysis of the concept of law to current social science debates, that is, to the normative question of the desirable rearrangement of our forms of production of norms.

Our argumentation is developed in two steps. In a first step, we show why the pragmatist turn, in the synthesis presented by J. Coleman, highlights well the insufficiency both of the interpretivist critiques of positivism and of the presuppositions of the theory of collective action, which pervert Hart's formulation of rule of recognition (§1). In a second step, we show why this pragmatist reformulation of the conventionalist definition of law should be deepened in favour of a 'genetic' approach to the practice by which a social group produces normative authority.[16] We also show the consequences of this deepening concerning the necessary opening of legal theory to the question of the desirable transformation of our forms of the production of norms (§2).

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§1   From a hermeneutic critique to a pragmatist redefinition of the rule of recognition

The principal critiques addressed to positivist theses, at least since these have become progressively dominant within legal theory, have generally been based on their inadequate understanding of the operation of the application of the normative judgement. Positivist approaches would express an insufficiency linked to an epistemologically deficient construction of the operation of judgement that every theory of the norm necessarily presupposes. Very often, certainly, the critiques have not been explicitly formulated on the basis of such a philosophical background. But this presentation seems to us to be doubly advantageous. Not only does it seem to us to capture the real philosophical scope of the critical intuition that has fed this recurrent revival of the critique of positivist approaches since the end of the nineteenth century. But it has the advantage especially of formulating the question in terms that will allow us to measure the limits of this critique while opening up the way to a reformulation of the correct intuition that this critique tries to express.

Such is indeed our hypothesis. At the same moment when the critique has often correctly intuited the insufficiency of positivist theories of the operation of the application of a normative judgement, it has itself remained tied to a restrictive interpretation of this same operation. For this reason, this critique has missed its target and has been able to be validly rebuffed by the positivists. To the contrary, **a *shift* in the manner of constructing the**

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[16] As we indicate below (infra §2 and n.53), it is in order to underline the importance of the consequences linked to a specific attention to the conditions of possibility of the conventional practice by which a social group produces normative authority and to their epistemological background that our approach is described as 'genetic'.

question of the application (effectuation) of a judgement and a *more extended conception* of the levels where this question is posed within the theory of the norm would allow us to see in which direction the positivist approach to law would require to be extended. The hypothesis seems to us to be all the more fruitful because it is inscribed in the profound dynamic of the debate within contemporary legal positivism.

Indeed, the most recent reformulations of the positivist analysis of the concept of law—and, more precisely, the pragmatist reformulation of Hart's rule of recognition—implicitly express the increasing perception of the need for a better respect by legal theory for the recent gains by action theory. That this pragmatist reformulation itself remains linked to a too partial construction of the conditions of possibility of action does not prevent us emphasising the important gain it brings to current legal philosophical reflection. Beyond allowing a deepening of the internal dynamic of positivist research, it sets in motion its own extension by highlighting the utility of a deepening of the question of the conditions of possibility of the social practice constitutive of normativity. It is the same project that defines our own hypothesis, as we shall see below (§2). But before analysing this 'pragmatist' reformulation of Hart's rule of recognition, and the extension it calls for, we must firstly return rapidly to the critiques addressed to legal positivism in relation to its insufficient understanding of the operation of application internal to every normative judgement.

As has already been indicated, this critical current, which endures to the present day, conceives the question of the operation of the application of a norm in restricted terms. The criticism that is indeed often addressed to the positivists is linked to the way in which they would conceive of the operation of the judge. The operation of application internal to every normative judgement is conceived on the basis of the model of the judicial operation.[17] In fact, this critique has seen two successive expressions, which we qualify respectively as the realist critique (1) and the hermeneutic critique (2). While these are well known, it is useful to recall them succinctly. This will effectively allow us to understand the reasons that motivate the 'pragmatist' correction of Hart's concept of law (3).

1.   *The realist critique*

Especially emerging from the sociological and realist theory of law, this critique aims to denounce the scientific inexactness of the definition of law proposed by the positivists. This, to take up N. Bobbio's formulation, depends upon this judgement of fact: "It is in fact true that the law in force is a collection of rules of behaviour which, directly or indirectly, are formulated and validated by the State".[18] Such a judgement, observe the realist and sociological critics, is inexact *in fact* because it ignores the 'creative' power of the judge in charge of the application of these rules. Such critiques are very rightly denounced. As L. Green opportunely recalls, they are "the product of confusion; lawyers often use 'positivist' abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists".[19] But, in addition, these critiques are logically unfounded. Two arguments may be recalled here.

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[17] See on this, below §2.1.2.2.3 .

[18] N. Bobbio, "Sur le Positivisme", in *Mélanges Paul Roubier*, Paris, Dalloz, tome 1, 1961, pp.61-62.

[19] "Legal positivism", *Stanford Encyclopedia of Philosophy*, 2003, http://plato.stanford.edu/entries/legal-positivism/, p.2. In the same spirit, L. Green notes further that if the first positivists (Bentham and Austin) had in their approach to the nature of law essentially emphasised the idea that the law was 'the command of a sovereign backed by force', "by the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law" (*Ibid.,* p.1).

A first counter-argument has been well summarised by N. Bobbio. Certainly, he observes, as we have already underlined with L. Green, "the creation of law on the part of the judge…is a reality…against which ethical arguments are blunted like arrows against a wall. Even the most faithful and orthodox partisans of legal positivism can do nothing other than accept this reality: the 'mechanistic' theory of interpretation is abandoned by nearly everyone. Kelsen himself was a good example".[20] But, Bobbio immediately remarks, this fact does not in any way invalidate the positivist theory of the sources of law that reduces the law to rules. Indeed, there are two possibilities. *Either*, as many authors propose, one reduces the qualification of sources of law only to the facts that the legal order describes as producing general obligatory norms. But, in this case, even if through the decision of the judge "the law in force in a given country is modified, completed, adapted to new situations, one is nevertheless not authorised (where evidently the institution of precedent does not exist) to inscribe this decision among the sources of law. The decision of the judge is, in effect, only obligatory with regard to the parties. If it takes the form of a general maxim that tends to become obligatory through the practice of the courts, "then the source of law in this case is custom and not the judge". *Or*, as for example Kelsen proposes, one extends the qualification of sources of law so as to include also individual norms. In this case, the judicial decision obviously constitutes a source of law. But "this elevation does not depend on the discovery of the creative power of the judge, because the decision is an individual norm both in the case where it is the product of the power of the judge and in that where it is a pure application of a general norm".[21]

A second counter-argument was presented by H.L.A. Hart in 1961 in *The Concept of Law*. One knows the extent to which Hart highlighted the fact that the creative power of the judge resulted from the impossibility of every rule to enunciate its own cases of application. This definitively rejects every theory of law that, under the cover of an excessive conceptualism or formalism, would deny or minimise this source of uncertainty in order to restore a mechanical concept of interpretation. But, he observes, it is also necessary to reject the opposite extreme which, under the form of a sceptical theory, would consider that "talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them".[22] It is not only that such a perspective must itself recognise even the existence of the organic secondary rules of courts or legislative authorities. It is also and especially the case that it does not account for a second dimension that the theory of language has allowed to be highlighted and which rests on the distinction between 'mention and usage'.[23] Indeed, what is specific to the behaviour of those who make use of 'norms' of law, either as ultimate addressee or as public authority in charge of their application, derives from the fact that those norms "are *used* as rules not as descriptions of habits or predictions".[24] By reducing norms to predictions, one does not account for what is attested in the manner in which one makes use of them when one applies them. This obviously does not invalidate the fact that judges often reason in a purely intuitive fashion. But a sceptical perspective confuses two distinct things: "the question whether a person, in acting in a certain way, thereby manifested his acceptance of a rule requiring him so to act' and, on the other hand, 'psychological questions as to the processes of thought through which the person went before or in acting".[25]

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[20] *Op. cit*, pp.67-68; and Bobbio takes up a formula of Carnelutti who emphasised in 1951 that it was necessary to recognise, following sociological theories, that "the decisive moment of the life of the law is the judgement" (p.68).
[21] *Ibid*.
[22] H.L.A Hart*, The Concept of Law,* 1961, 1994, 2nd edition, with a new postscript edited by P. Bulloch and J. Raz, Oxford, Clarendon, p.136.
[23] For this, and for the development which this distinction, emerging from the analytical philosophy of ordinary language, allows in relation to the distinctions which Kelsen tried to establish (notably the distinction between the point of view of causal explanation and the constructivist point of view which must be that of the science of law), see H.L.A. Hart, "Kelsen Visited", in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon, 1983, pp. 286ff.
[24] *The Concept of Law, op. cit*., p.138.
[25] *The Concept of Law, op. cit*., pp.139-140. H.L.A Hart very judiciously emphasises that the fact that our behaviour is often intuitive (and, thus, is not the result of an explicit calculation in the light of rules) does not

2.   The hermeneutic critique

A second form of debate, however, followed this first form of critique based on the 'creative power' of the judge. As has just been seen, no theoretical argument contrary to an understanding of what the law is in terms of 'rules' can be deduced from so-called sociological or realist approaches and the new insights they provide with regard to the mode of functioning of the operation of judging. But the intuition which has given rise to these approaches remains valid, certain theorists say today; on condition, however, of being reformulated and shifted.

The question is not, in effect, that of the creative power of the judge—which no one in any event seriously challenges. The simple fact of such a creative power does not invalidate *in itself* the recourse to the notion of the rule in order to account for the concept of law. The question would be, according to these theorists, whether a better analysis of the *way* in which the judge exercises this discretionary power would require the invalidation of the way in which current (positivist) legal theory defines the concept of law.

The best-known representative of this recent critique is R. Dworkin, even if it is not always he who has developed farthest the justifications and philosophical extensions it calls for.[26] Dworkin's argument is very simple. Judicial practice, he stresses, reveals that besides rules in the strict sense, the judge makes frequent use of 'principles' (which may or may not be expressed in the form of written norms). Moreover, the use of these principles constitutes a form of application of 'rules' in the full sense. But the importance of these principles (that is, the power to neutralise rules in the strict sense which their usage allows) and their mode of functioning leads, Dworkin observes, to a re-examination of our usual understanding of what law is, that is, of its conditions of identification or of existence. In this sense, a better understanding of the way in which the judge exercises his power of interpretation (identifies the 'meaning' of law) reflects on our understanding of the question of the validity of law, that is, of its conditions of definition.

Indeed, the dominant theory of law, Dworkin stresses, is infected by 'the semantic sting': "people are its prey who hold a certain picture of what disagreement is like and when it is possible. They think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are".[27] Because, he observes, all of our disagreements are not reducible to this single model. We utilise certain words, for example, to provide interpretations, often disputed, of a social practice in which we participate. In this last case, our agreements and disagreements are explained, not because we obey common rules, but because we share or diverge in our interpretations of the same material. And, Dworkin observes, the example of the 'rules' of courtesy within a society is particularly clear. The way in which the members of a social group judge the requirements of courtesy is a function of an 'interpretive attitude'[28] which refers these requirements to their constant reinterpretation with regard to the values they must serve. "Law is an interpretive

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prevent there being a veritable application of a rule: the proof of this is that if this behaviour is challenged, we will try to justify it through reference to the rule.

[26] Certain analyses inspired by Wittgenstein constitute today one of the most interesting orientations of this recent attempt at critical destabilisation of the analytical positivist approaches deriving from H.L.A Hart. See in this regard especially: D. Patterson, *Law and Truth*, Oxford, Oxford University Press, 1996; "Law's Pragmatism: Law as Practice and Narrative", 76 *Virginia L. Rev.* (1990) 937ff.; "Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine", 137 *U. Pa. L. Rev.* (1988) 335ff.; see also for a less critical perspective: B. Bix, Law, *Language and Legal Determinacy*, Oxford, Clarendon Press, 1993; P. Coppens, *Normes et Fonction de Juger*, Paris-Bruxelles, LGDJ-Bruylant, 1998; T. Endicott, *Vagueness in Law*, Oxford, Oxford University Press, 2000.

[27] R. Dworkin, *Law's Empire*, Oxford, 1986, reprinted by Hart Publishing., 1998, p.45.

[28] *Ibid.*, p. 47.

concept as courtesy in my imagined example".[29] Indeed, "legal philosophers are in the same situation as philosophers of justice and the philosopher of courtesy we imagined. They cannot produce useful semantic theories of law. They cannot expose the common criteria or ground rules lawyers follow for pinning legal labels onto facts, for there are no such rules… (Theories of law) are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice".[30]

If the law is thus an 'interpretive concept', it would follow, Dworkin deduces, that not only the Austinian positivist approach (reduction of law to a command) and the Kelsenian one (normativist approach), but also their more recent and more defined reformulation by H.L.A. Hart in terms of the 'rule of recognition', turn out to be unacceptable. For Hart, as one knows, law is explicable in terms of social facts. These are of a particular type: law is, in effect, made possible by a form of convention or of social practice which consists in an agreement of the official authorities in charge of the application of law on the criteria of identification or of existence of law. This practice can itself be formulated in terms of a rule, which Hart qualifies as the 'rule of recognition'. It is this conventionalist approach to the criteria of legality in terms of the 'rule of recognition' that R. Dworkin aims to criticise and invalidate. Such a conventionalist approach would lack the dual property that defines legal practice.

Firstly, the practice by which the law of a social group is identified is interpretive in nature. It follows, according to Dworkin, that every criterion of identification cannot be formally defined in terms of 'rules'.

Next, this interpretive practice expresses the necessary link between law and morality and also leads, as a consequence, to the invalidation of the positivist idea of a science of law that would be descriptive and not normative. The law, Dworkin stresses, is only effectively identifiable, whether by the judge or the scientist, through an interpretation of the requirements of the political morality of a social group: "Hard cases arise for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality".[31] The interpretive practice of what the law is thus itself returns, according to Dworkin, to the normative requirements of an institutional morality that is, at the same time, immanent in the community[32] and the object of a constant reinterpretation.

In this sense, therefore, as L. Green very rightly points out, Dworkin denounces the positivist theses: "He denies that there can be any general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its merits…A theory of law is for Dworkin a theory of how cases ought to be decided and it begins, not with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects".[33]

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[29] *Ibid.,* p. 87.
[30] *Ibid.*, p.90.
[31] *Ibid.*, pp. 255-256.
[32] Of course, this new form of natural law does not in any way restore the slightest belief in an a priori definable moral content or in the least moral intuitionism, which has nowadays become epistemologically difficult to accept. However, it is also clear that judgments concerning this political morality must be capable of claiming objectivity. Without this condition, Dworkin's theory becomes, in effect, incoherent.
[33] *Ibid.*, p.6. As Dworkin himself says, "arguments of legal theory are best understood as arguments about how far and in what way past political decisions provide a necessary condition for the use of public coercion" (*op. cit.*, p.96).

This hermeneutic critique of conventionalist approaches to law in terms of the 'rule of recognition' is itself today the object of decisive critiques, which, in turn, permit a fruitful deepening of legal positivism.

3.   Law and social recognition: a pragmatic reformulation of the rule of recognition

Among the numerous objections which have been addressed to this hermeneutic critique of legal positivism, and more precisely to Dworkin's version, we will only take up here the one formulated by Jules Coleman, which seems to us to be determining. Coleman obviously does not aim to challenge the descriptive contribution of the hermeneutic approaches to the operation of judging. On the contrary, one could say, Coleman effects with regard to the hermeneutic approaches to the judicial function the same shift that they had achieved with regard to the sociological or realist critiques of legal positivism. One will recall, indeed, that these latter critiques had wrongly believed they were able to denounce the reduction of law to a collection of rules by enhancing the 'creative power of the judge'. It was soon apparent that this critique, whatever the evidence upon which it was based, led to a dead end. The hermeneutic approach had, however, displaced and reformulated the critical intuition of an insufficiency of formalist approaches in the reduction of the concept of law to the idea of 'rule'. Dworkin obviously does not deny that the law is composed of norms (rules and principles) imposing reasons for action. But he proposes that a better understanding of the operation of the judge forces the abandonment of the positivist thesis that defines the criteria of 'validity' (of existence) of norms in terms of the 'rule of recognition'. The critique, therefore, relates to the definition of a concept of law in terms of 'rules'.

Coleman's approach consists in denouncing the inconsistency of Dworkin's critique (a). But, at the same time, he reformulates the notion of the 'rule of recognition' so as to annul definitively all relevance of that critique (b). Let us examine these two aspects of his reasoning.

(a) The objection addressed to Dworkin is the following. While Dworkin wrongly believes that defining law in terms a rule of recognition presupposes a 'semantic' approach to the criteria of validity of norms, he himself ultimately succumbs, in his approach to the operation of application in law, to an overly formalist approach to law.

As has just been recalled, the interpretive dimension of law would invalidate, according to Dworkin, the positivist project of a reduction of the conditions of validity (of identification) of law to a rule of recognition, that is, to the way in which judges determine the necessary and sufficient conditions for a norm to belong to a determinate legal system. Such a reduction presupposes, in effect, according to him, a semantic conception of law, that is, the idea that the criteria of belonging (the conditions of identification of law) can be formulated in a propositional form corresponding to the content of the convergent behaviours of the official authorities in charge of the application of the law. Such an approach is affected by the semantic sting because it supposes that there are formal criteria for the application of the term 'law', that is, for the identification of norms capable of being qualified as legal. Consequently, Dworkin observes, such an approach is incompatible with the idea of a law composed of moral principles that are, by their nature, capable of disputed interpretations.

Coleman very rightly emphasises that Dworkin's error is not to see that the 'rule of recognition' is not condemned to be interpreted in semantic terms: it is, in effect, capable of being conceived in a pragmatic way. In other words, Dworkin is right to denounce every semantic interpretation of the concept of law (that is, the idea that the meaning of the term 'law' could be formally defined in a propositional statement).[34] That, moreover, as Coleman

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[34] Coleman observes that "like Dworkin, the pragmatist believes that all legal standards and rules are in principle revisable—what they require or demand of us is subject to change'. This is another way of recognising the

emphasises, is no more than a denunciation already well constructed by Wittgenstein in his discussion of rule-following.[35] But Dworkin gives the rule of recognition a restrictive interpretation. He supposes that, for Hart, the rule of recognition is a convergent practice of judges, which states by itself the criteria of legality in a given group. Moreover, following such an interpretation, the rule of recognition is interpreted as a 'source thesis': the rule of recognition would define the 'conventional and social sources' that would allow the identification of the content of the law. Such a hypothesis is, however, not necessarily linked to a conventionalist positivist approach. Certainly, many positivists, including Raz, support such a semantic interpretation of the rule of recognition and of the definition of the criteria of legality. But one can defend the idea that the law is *in fine* defined by the social practices of judges (conventionalist and positivist approach) without in any way subscribing to the semantic interpretation in terms of a 'source thesis'. A social system can, in effect, consider that its positive law is no longer dependent only on identifiable formal sources, but on the conformity of its content to moral requirements. If legality is no longer defined only by its formal and conventional source, but also by its content, one understands that its identification is a function of disputed interpretations. Such is, moreover, the orientation that Hart is forced to defend and which Coleman takes up on his own account.[36]

But what does the rule of recognition mean, then, if the criteria of the identity of legality are no longer reduced to a propositional statement that would define the formal criteria (the formal and conventional sources) allowing the identification of the content of a particular legal order? In this case, the rule of recognition can no longer be defined except in a 'pragmatic' manner, that is, as referring to the use that is made of it. In this hypothesis, this rule is identified with a 'practice' of a type more complex than that whose meaning could be reduced to a propositional statement. Hart and especially Coleman characterise this practice by two elements. Firstly, this practice is that, not of all the addressees of legal norms in a social group, but exclusively of the official authorities in charge of their application.[37] Next, this practice must be of such a nature that it respects a twofold condition: to express the 'recognition of the obligatory character' of these criteria of legality with regard to the

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impossibility of reducing the meaning to a propositional content and the interpretive character of legal norms and of law in general. From this point of view, says Coleman, 'if we look at Dworkin's theory of legal content as instead an account of how judges should (and do) revise the law rationally when the law needs to be revised, then it is…a perfectly attractive and sensible theory" (J. Coleman, *Ibid.,* pp.171-172).

[35] "A related point, articulated first by Wittgenstein in his discussion of rule-following, is that the grasp of a rule—the ability to go on—cannot be exhaustively articulated in propositional form. Saul Kripke has explicated this point forcefully, showing that even the apparently hard-and-fast rule for our practice of addition cannot be stated in such a way that uniquely determines what we all know to be the criteria of correctness for that practice. There is always the possibility of interpreting a propositional expression of the rule of addition in an indefinite number of non-standard ways. Since in fact we all converge in interpreting it in the same way, our understanding of the practice must go beyond propositional knowledge" (*Ibid.*, p.81).

[36] In this regard, Hart speaks of *soft positivism*, Waluchow of *inclusive positivism*, and Coleman of *incorporationism* in order to differentiate themselves from the approach of the positivists who defend an *exclusivist* interpretation of the rule of recognition and who accordingly understand the *social thesis* of positivism as a *social source thesis*.

[37] This is one dimension, moreover, that Hart takes back to Kelsen. If the law only exists on the general condition that it is globally practiced, the validity of a rule is not a function of what is effectively practiced and recognised by its final addressee. It is only that in regard to the practice of the officials in charge of its application. "Thus, as Coleman says, while the rule of recognition can impose an obligation on officials (to evaluate conduct by applying all those rules that satisfy the criteria of legality set forth in it) only in so far as it is actually practiced, this conventional rule in turn grounds the claims of the rules validated under it to regulate conduct regardless of whether or not those subordinate rules are adhered to" (*Ibid.*, p.78). Similarly, "acceptance of the rule of recognition from the internal point of view by officials is a conceptual requirement of the possibility of law; acceptance from the internal point of view by the bulk of the populace is neither a conceptual nor an efficacy requirement. Even if they characteristically do, the majority of persons need not as a conceptual matter adopt the internal point of view toward the behavior by which officials validate law, nor toward the subordinate rules that are validated under the legal system. Of course, it may be desirable on efficiency grounds that a population treat law as legitimate or obligation-imposing, since fewer public resources might then be required to insure compliance" (*Ibid.*, p.76).

authorities in charge of the application of the law and to integrate the possible conflictual dimension of interpretations relative to the content of normative requirements.

(b) It is on this last point that Coleman considers it necessary to reformulate Hart's hypotheses. It is here also that he deepens the analysis of the concept of law with the help of the theory of collective action. The interpretive dimension of the concept of law requires, in effect, an avoidance of every overly 'mechanical' understanding of the way in which this convergent practice of judges relative to the recognition of what is held as law within a determined society is constructed. If one admits, in a pragmatist perspective, that the meaning of normative requirements (that is, the conditions for the existence of law) derive from the use made of them in practices where their recognition is attested by those in charge of their application, one has still to define the nature of this practice, that is, its conditions of possibility.

Hart has already clearly shown the nature of this social practice by stressing that one cannot understand it as a simple 'factual regularity': it is defined by an 'internal point of view' which expresses the fact that the actors of this 'convergent' practice recognise that they 'have the obligation' to conform to these conditions of legality.

But this internal point of view is not by itself sufficient, Coleman notes, to explain the existence of the obligation: "While the internal point of view explains how the rule of recognition can create reasons for acting, this does not yet explain how those reasons can be duties".[38] The understanding of the conditions of possibility of legal regulation therefore also requires an explanation of how a "rule can impose a duty. The solution to this problem requires that we return our attention from the psychological capacity to adopt a practice or a pattern of behavior as a norm, and focus instead on the normative structure of the pattern of behavior to which we commit. In other words…we must look beyond the internal point of view that officials adopt toward their practice, and consider instead the structure of the practice that rule governs".[39]

Hart undoubtedly understood this requirement well. But he failed to develop sufficiently its exact nature. What is the reason for this deficiency? Hart supposes, Coleman observes, that this convergent practice (the rule of recognition) results from the spontaneous search for coordination among the judges as if the possible conflicts of interpretation in law lead inevitably and automatically to the choice of a common conventional solution representing a Nash equilibrium (on the best possible solution or on one of the best possible solutions if, as Nash does, one considers that there are several possible).[40] The conception of the rule of recognition as a 'coordination convention' comes from an analysis of the concept of law

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[38] "If I can create a reason by adopting a pattern of behavior as a norm, then it would seem that I can subsequently extinguish the reason that norm provides simply by withdrawing my commitment to it. Yet it is the nature of duties that those bound by them cannot voluntarily extinguish them as reasons"(*Ibid.*, p.90).

[39] *Ibid.*, p.91.

[40] "While Hart was right to identify the normative structure of the practice of officials, he was wrong…to conclude that the rule of recognition represents, in effect, a Nash equilibrium solution to a game of partial conflict" (J. Coleman, *Ibid.,* p.97). Note that we had ourselves addressed a largely analogous critique to positivist theses, including Coleman's (J. Lenoble & M. Maesschalck, *op. cit.*, p. 283). This was because at the point when we wrote that critique we based it on Coleman's work prior to *The Practice of Principle.* Up until that work, Coleman still defended an interpretation of the rule of recognition in terms of '*coordination convention*'. He already conceded, however, with regard to his construction in terms of coordination convention: "I do not pretend that any of this is obvious or obviously correct" (J. Coleman, "Incorporationism, Conventionality and the Practical Difference Thesis", in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, (J. Coleman ed.), Oxford, Oxford University Press, 2001, pp.99-147, p.120). It is in deepening his analysis, thanks especially to the work of S. Shapiro and of M. Bratman, that Coleman, in *The Practice of Principle,* reformulated his argument (see *The Practice of Principle, op. cit.*, p.94 n.29). Even if the terms of the critique which we addressed to him in our book can therefore no longer be utilised as such, we shall see below (§2) that its content and its epistemological tenor nevertheless still remain valid and may be used against the reformulation which J. Coleman (or S. Shapiro) proposes of Hart's rule of recognition in his last work.

based upon the conventionalist model of David Lewis.[41] As S. Shapiro[42] has rightly indicated, "Lewis's model of conventions[43] provides the positivist with a powerful argument in favor of the claim that in every legal system, legal officials follow conventions when determining which authority structure to heed".[44] But, Coleman and Shapiro emphasise, the problems of coordination among (legal) authorities are more complex. It would not be reasonable to reduce them to this sole specific category of game which game theory qualifies as 'coordination games'[45] and which are resolved by the adoption of 'coordination conventions' of the type analysed by Lewis. Moreover, a convincing sign, Coleman still emphasises, of this irreducibility of the rule of recognition to the model of convention analysed by Lewis is that "such conventions do not seem to capture well the kinds of reasons officials have for acting as other officials. While it is true that the fact that judges apply certain criteria of legality can be a reason for any particular judge to do so, it is not simply the fact that others do so that explains the character of the reason that any particular judge has. A full explanation of the character of the reason any judge has to apply the relevant criteria will accommodate the fact that these criteria have been adopted as part of a plan or project (a legal system) that can serve valuable ends".[46] That is to say that the conventional practice by which the rule of recognition is constructed is of a more complex type than that which Hart had in mind. In this regard, by bringing out the properly hermeneutic dimension of this practice, Dworkin, even if he wrongly denounces the conventionalism of Hart's positivism, rightly perceives its insufficiency. This hermeneutic dimension does not of course involve the abandonment of the conventionalist thesis, but rather the deepening of the specific nature of the operation of construction of this convention. The conditions of possibility for the emergence of this practice are not reducible to a rational choice of an arbitrary convention, allowing the quasi-mechanical resolution of the usual problems of coordination such as, for example, those allowing resolution of the adoption of a traffic convention requiring that one drive on the right rather than on the left.

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[41] D. Lewis, *Convention*, Cambridge (MA), Harvard UP., 1969.

[42] S. Shapiro, "Law, Plans and Practical Reason", 8 *Legal Theory* (2002), p.391.

[43] On this occasion, S. Shapiro opportunely recalls the definition which Lewis gives of a convention: "A regularity R in the behavior of members of population P in a recurring situation S is a convention if and only if, in any instance of S:
    (1) everyone conforms to R;
    (2) everyone expects everyone else to conform to R;
    (3) everyone prefers to conform to R on condition that the others do, since S is a coordination problem and uniform conformity to R is a coordination equilibrium in S" (D. Lewis, *Ibid.*, p.58).

[44] The reasoning is easy to understand. "Because (1) the choice of an authority structure is a recurring coordination problem; (2) legal officials manage to solve these problems; and (3) conventions are common solutions to such problems, it is plausible to infer that legal officials solve their recurring coordination problems via conventions…The positivist argument concludes with the attempted demonstration that coordination conventions are able to create obligation. As we have seen, when a convention exists, general conformity to it generates expectations that similar behavior will continue" (S. Shapiro, *Ibid.*, pp.391-392.).

[45] These games have a particular structure generally described with the help of the model qualified as 'Battle of the Sexes' or as 'partial conflict game'. One of the essential characteristics of this type of game (for example, that where a woman and her husband agree to go to a show together but must decide simultaneously and without conferring when the man prefers to attend a boxing match and the woman the opera) is that the players have ex ante preferences such that the "players, while having divergent interests, gain more if they agree than if they do not" (B. Guerrien, *La Théorie des Jeux*, Paris, Economica, 2002, 3rd edition, p.54) and that this agreement is expressed by the adoption of an arbitrary convention in Lewis's sense. As Coleman indicates, "it would place an arbitrary and baseless constraint on our concept of law to stipulate that the social practice among officials necessary for the existence of a rule of recognition must always be representable as a game of partial conflict" (*The Practice of Principle, op. cit.,* p.94).

[46] *Ibid.*, p.95. As S. Shapiro (to whom Coleman makes explicit reference) says, "to claim that the choice of an authority structure is a recurring coordination problem commits one to holding that the players will see the solution to the game as arbitrary in the sense just described. But is this assumption plausible?…This, I think, is rather doubtful…In fact, I am not even sure that most Americans would view the United States Constitution as an arbitrary solution to a recurring coordination problem. My guess is that many would believe that they had a moral obligation to heed a text that had been ratified by the representatives of the people of the United States, regardless of what everyone else did" ("Law, Plans and Practical Reason", *loc. cit.*, p.393).

What, then, are these conditions of possibility? How should we understand the structure of this collective action? A detour, Coleman observes, via the debates of social theory and of the philosophy of action turns out to be both necessary and useful. Coleman believes that he is able here to call on the model developed by M. Bratman in the philosophy of action under the title of 'shared cooperative activity (SCA)'. Properly understood, this model of action does not belong to the law. But this form of shared cooperative action "might help us understand the nature of the practice of legal officials".[47]

The practice of recognition by which judges define the criteria of legal normativity within a social group can only be considered as a form of shared cooperative action. A shared cooperative action presupposes a 'shared intention'. However, as Bratman very rightly observes, such an intention is not an intention set down in minds: it is an attitude[48] that is expressed by a certain form of organisation of the cooperative practice. It is here that the conditions of possibility of this specific form of action become evident. In order that the cooperative dimension called for by this shared intention may be achieved, it is necessary, M. Bratman stresses, that different institutional arrangements are put in place. The organisation of such a cooperative action requires the establishment of an organisational framework so as to 'coordinate our intentional actions', 'coordinate our planning' and 'structure relevant bargaining'. These organisational conditions aim to enable the triple 'commitment' expressed by this 'shared intention': mutual responsiveness,[49] commitment to the joint activity[50] and commitment to mutual support.[51] And J. Coleman concludes: "The practice of officials of being committed to a set of criteria of legality exhibits these features. Judges coordinate their behavior with one another through, for example, practices of precedent, which are ways in which they are responsive to the intentions of one another".[52]

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§2 From a positivist approach to a genetic approach to the conventionality of law: a necessary deepening of the pragmatist theory of law

In a first stage, we shall try to show the theoretical limits of the pragmatist redefinition of the thesis of the conventionality of law, such as that proposed by Coleman (1). Highlighting these limits will allow us to show in what way the extension of the pragmatist approach they call for also means, not the abandonment of the *conventionality thesis*[53] in legal philosophy, but the

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[47] *Ibid.,* p.96.
[48] As M. Bratman notes, "shared intention, as I understand it, is not an attitude in any mind. It is not an attitude in the mind of some fused agents, for there is no such mind; and it is not an attitude in the mind or minds of either or both participants. Rather, it is a state of affairs that consists primarily in attitudes (none of which are themselves shared intentions) of the participants and interrelations between those attitudes" (M. Bratman, "Shared Intention", *Ethics*, 104 (October 1993), p.107.
[49] "In SCA each participating agent attempts to be responsive to the intentions and actions of the other' (M. Bratman, "Shared Cooperative Activity", *Philosophical Review*, 101/2 (April 1992), p.328.
[50] "In SCA the participants each have an appropriate commitment (though perhaps for different reasons) to the joint activity, and their mutual responsiveness is in pursuit of this commitment" (*Ibid.).*
[51] "In SCA each agent is committed to supporting the efforts of the other to play her role in the joint activity…These commitments to support each other put us in a position to perform the joint activity successfully even if we each need help in certain ways" (*Ibid.).*
[52] J. Coleman, *The Practice of Principle, op. cit.*, p.97.
[53] As Coleman very clearly says, according to the *conventionality thesis*, "legal authority is made possible by an interdependent convergence of behavior and attitude: what we might think of as an 'agreement' among individuals, expressed in a duty-imposing social or conventional rule (for Hart this is the rule of recognition)" (*The Practice of Principle, op. cit.*, p. 70-71.) Conventionality implies that the existence of the rule of recognition does not depend 'on substantive (moral) argument' (J. Coleman, Incorporationism, in *Hart's Postscript* (J. Coleman (ed.)), Oxford, Oxford UP (2001), p.116). This conception of the authority of the rule of recognition simultaneously provides the explanation of the question of legality: "The key idea of the conventionalist picture is that this rule (the rule of recognition) provides reasons because it is adopted by individuals in order that it guide their behaviour: guide their behaviour by directing them to apply certain criteria of validity determining the conditions of

abandonment of that positivist understanding in favour of a 'genetic' understanding. By 'genetic' understanding we mean an understanding which takes account of the conditions 'of production' of the convention by which law is defined, that is, the conditions of possibility[54] of this convention. In a second stage, the indication of these limits and of the extension it involves will allow us to show in which sense it is epistemologically justified that a link be made between the conceptual analysis of law and the 'normative' question of the necessary reorganisation of our governance arrangements (2).

1 Gains and limits of pragmatist positivism, or the requirements of the pragmatic turn in legal philosophy

1.1 The gains of pragmatist positivism

The pragmatist redefinition of the rule of recognition, such as that suggested by Coleman, presents a two-fold advantage in relation to Dworkin's hermeneutic position.

Its first advantage is that it clearly highlights the error of the critique addressed to conventionalist approaches according to which these ignore the 'interpretive' nature of the concept of law. As Coleman very rightly observes, an incorporationist conventionalist approach does not ignore this interpretive dimension. By supposing that every conventionalist approach to law necessarily involves a semantic theory of language, Dworkin does not perceive the possible pragmatist understanding of this conventionalist approach. The result, as has just been said, is that his critique with regard to positivist conventionalism is rendered without object.

But there is more. The result is also that he is unable to formulate correctly in epistemological terms the nature of the 'semantic trap' and, as a consequence, the conditions that must be respected by a non-semantic approach to the operation of judgement. This explains not only, as Putnam has well intuited and as we shall show below, why Dworkin himself falls into the error which he imputes to positivist approaches to law and which he believes he is able to avoid through his hermeneutic approach, but also why he is unable to construct the correct intuition which he has of the insufficiency of legal positivism.

It is here that the second advantage of the pragmatist redefinition of the rule of recognition appears in relation to Dworkin's approach. In effect, while remaining linked to a positivist approach to the *conventionality thesis*, this pragmatist redefinition proposed by Coleman sets itself on the path to its own epistemological radicalisation. What does this redefinition effectively entail? By reinterpreting the rule of recognition on the basis of Bratman's model of '*shared cooperative activity*', Shapiro and Coleman condition, as has been seen, the existence of law to that of the institutional arrangements which enable the establishment of a cooperative practice among those who are in charge of applying the law. Not only is law only determined by the recognition of those charged with its application. But the possible conflicts of interpretation implied by the plurality of possible interpretations by the tribunals charged with the application of the law are not resolved by a simple calculation of rational anticipation as in 'coordination' games. The establishment of an equilibrium solution necessitates a more complex form of collective action: it necessitates a cooperative action with a view to defining

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membership of other norms in the category 'law' – thus enabling those norms to claim a power to provide reasons for acting in virtue of their being law" (*Ibid.*, p.118).

[54] This is why we could also qualify such an understanding as a 'transcendental' understanding in the technical sense that Kant and Fichte have given to this term. In this perspective, however, it is necessary to note that these transcendental conditions are not to be understood as 'ideal conditions for the production of norms' (such is the perspective adopted by Kant who thus restores a mentalist perspective; on this, cf. infra) but as what one could perhaps henceforth call 'empirico-transcendental' conditions. We can also remark that such an approach in terms of 'empirico-transcendental conditions' touches B. Zipursky's concern with adopting an epistemological position which "restores a place for conceptualism in law while avoiding the conservative and transcendental tendencies of discredited formalist theories" (B. Zipursky, "Pragmatic Conceptualism", 6 *Legal Theory* (2000), p. 459).

in common the objectives judged to be acceptable. Moreover, this cooperative construction necessitates institutional arrangements with a view to ensuring the effectiveness of this 'shared intentionality' to construct a common action. As Bratman effectively says, the 'shared intention' cannot be understood in a mentalist fashion: it is not an 'attitude in the minds'. It necessitates institutional arrangements aimed at guaranteeing its effective realisation. We can note from this point that this necessity for institutional arrangements capable of enabling the cooperative nature of the collective practice already gives rise to the link that exists between the theory of the norm and the theory of governance.

1.2 Limits and reformulation of pragmatist positivism

A first indication already justifies us in asking ourselves the question of knowing if this redefinition of the rule of recognition proposed by Shapiro and Coleman is not also insufficient and does not itself ignore the epistemological requirement that it nevertheless implicitly carries. Is it not indeed significant that Coleman himself declares that his theoretical project does not involve particular attention to these institutional conditions of possibility of every cooperative action?[55] In effect, attention to these conditions - and especially to the epistemological reasons that justify them - would have allowed Coleman to perceive the insufficiency of his own reconstruction of the link between the law and practice of recognition. We thus arrive at the question of knowing whether the reproach of epistemological inconsequence that Coleman denounces in Dworkin[56] could not also be directed at him. Is it not the case that the pragmatist reformulation of the rule of recognition proposed by Coleman itself rests on a formalist and mentalist presupposition that his pragmatist project would nevertheless involve denouncing? It seems to us, in effect, that it needs extending in two directions.

First of all, if the rule of recognition consists in a cooperative practice, the institutional conditions necessary for the realisation of this cooperation do not amount to those defined by Bratman and taken up by Coleman. In other words, the understanding of the conditions of possibility of a cooperative action (SCA) such as proposed by Bratman, Shapiro or Coleman must, it seems to us, be deepened and reformulated. Next, this 'cooperative action' upon which law's existence depends not only concerns the official authorities charged with applying the law (that is, essentially the judges) but also concerns the citizens who are affected by the norm. And the reason for the necessity of this double extension is epistemological: it results from a correct understanding of the operation of the normative judgement, that is, from the way in which practical reason operates. Moreover, highlighting this necessity will allow us to understand that, at the epistemological level, Dworkin's hermeneutic approach and Coleman's pragmatist approach share the same mentalism and accordingly suffer from the same difficulty.

In order to show the extension that would be called for by the pragmatist redefinition of the rule of recognition, our reasoning will be in two stages. We will begin by showing how Coleman's own reasoning calls for this extension (1.2.1) in order next to draw out the specifically epistemological implications at the level of legal theory (1.2.2).

1.2.1. The necessary double extension of the pragmatist redefinition of the rule of recognition

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[55] "The particular form of interrelated responsiveness constitutive of shared intentions is not important for my purposes" (J. Coleman, *The Practice of Principle, op. cit.*, p.97).

[56] Coleman's argument consists in refuting the false opposition that Dworkin makes between interpretivism and conventionalism. But, as has been seen, Dworkin's difficulty in perceiving that interpretivism is not only not incompatible with but even implies conventionalism, expresses a more fundamental logical inconsequence which is epistemological in nature and which, unfortunately, Coleman does not construct. The argument thus consists in emphasising that Dworkin, because of his epistemological mentalism, is himself the victim of the semantic error that he believed he could denounce in the positivists. We shall come back below (cf. 1.2.2.) to this epistemological insufficiency of Dworkin's hermeneutic approach.

As we have just indicated, the reformulation that Coleman suggests of the way in which Hart formulates the rule of recognition appears to us to require a double extension. Firstly, if the rule of recognition consists in a cooperative practice, the institutional conditions necessary for the realisation of this cooperation do not amount to those defined by Bratman and taken up by Coleman (1.2.1.1). Next, this 'cooperative action' on which the meaning of law depends does not concern only the official authorities charged with the application of the law (that is, essentially the judges) but also concerns the citizens who are affected by the norm (1.2.1.2). Let us analyse the reasons explaining the necessity for this double extension.

1.2.1.1. A deepening of the approach to the conditions of cooperative action

For what reason does the approach to cooperative action proposed by Coleman express an insufficient understanding of the conditions of possibility of such an action? It is not a matter of questioning the point of departure of this approach. To the contrary, one can only register total agreement with the proposition which Coleman (and Shapiro), following Bratman, place at the basis of their analysis of cooperative action. Recall the formulation given by Bratman: "shared intention …is not an attitude in any mind. It is not an attitude in the mind of some fused agents, for there is no such mind; and it is not an attitude in the mind or minds of either or both participants. Rather, it is a state of affairs that consists primarily in attitudes (none of which are themselves shared intentions) of the participants and interrelations between those attitudes".[57] But, precisely, if one understands the full implications of such a proposition, one is led to consequences which oblige not only the extension of the institutional conditions necessary for the accomplishment of such an action, but also and especially the modification of the usual conventionalist approach which the positivists adopt to the concept of law.

In effect, if one admits that shared intention is not 'in the mind' of the actors but rather that it must be embodied in the institutional arrangements which make it possible, one can reformulate this same proposition in the following form: the resources provided by the capacities internal to the reason of the actors are not sufficient to ensure the realisation of the intentionality aimed at by cooperative action. This is accordingly to say that this intentionality is a function, for its realisation, of an internal limitation since it cannot find in itself - that is, in the simple internal capacities of representation of the intentional agent - the conditions sufficient for its effectuation. To put this in other words: every effectuation, within social reality, of such an intentional aim is a function of an *exterior to itself*.

But this reformulation allows one to highlight a more profound consequence of the proposition, which emphasises that shared intention does not exist in minds. In effect, it is not sufficient to stop at this last reformulation in terms of the conditions of possibility of the effectuation of every shared intentional aim *exterior* to reason. If one endeavours to understand fully what such a reformulation implies, one perceives straightaway that this idea of exteriority necessarily and automatically entails another proposition: no form, no representation of this intentional aim 'exhausts' all of the possible representations, all of the possible forms of this shared intention. *Each form (representation) given to a cooperative action is only one possible form among many others and none 'satisfies' the requirement of optimal realisation of the normative requirement of cooperation*. To put this in other words: the form given *spontaneously* to cooperative action, even where it respects the requirements of responsiveness 'to the interests, intentions, preferences and actions'[58] of the participants and of 'commitment to the joint activity and to mutual support' emphasised by Bratman, still remains a function of the background representation which the different agents have of their own preferences. To suppose that these representations *immediately* mobilised by the agents express an 'optimal' representation of the preferences of the participants to the joint

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[57] M. Bratman, "Shared Intention", *Ethics*, 104 (October 1993), p.107.
[58] J. Coleman, *The Practice of Principle, op. cit.*, p. 96.

action would come back to supposing once again that the conditions of realisation of intentionality are internal to this intentionality and, as a consequence, to ignoring the principle of exteriority mentioned above. In effect, this principle of exteriority implies that the resources internal to intentionality alone cannot suffice to ensure its effectuation in social reality.

In this sense, therefore, every representation of these preferences and, as a consequence, every form taken by co-operative action only constitutes one particular form among others of the realisation of the requirements arising from the shared aim of a common end.

But how does it happen that such an observation brings significant consequences? In effect, one could retort, it does not matter that such a representation is particular since, to the contrary, it would be illusory to want to define the conditions of a supposed ideal representation of the agents' preferences and, therefore, of an optimal form of cooperative action.

Certainly, one can never define such an optimal representation, because this would be to suppose possible, as has already been indicated, a form of intentionality which would find in itself the capacity to be realised - that is, to suppose possible an absence of the self-limitation of judgment. But the consequence is something else. In effect, does the only alternative to such an impossibility consist in supposing that the 'natural' limited capacities - that is, those which the participants deploy immediately in order to define their preferences and interests - are consequently to be taken as the only capacities available? It is such a supposition that underpins the position of Coleman (or Shapiro and Bratman), in so far as they take as *given* the particular representation that the agents make of their interests and preferences. How is it not seen, however, that, taking such a representation as a given fact, one ignores once again the epistemological principle which forbids supposing that intentionality would find in itself the capacities of its effectuation in social reality?

Even if one accepts the possible absence of an ideal representation of the preferences and, as a consequence, of an optimal form of cooperative action, it is a third position that is the only one to respect this epistemological principle. This position consists in taking account of the fact that the representation which agents formulate '*immediately*' of their intentions, interests and preferences (that is, in the absence of arrangements specially organised to bring them to reconstruct their interpretive frameworks) is only one particular selection among other possible ones and that 'attention' to this operation of selection would accordingly possibly allow the construction of other possible selections. The result would be an extension of the possibles and thus an 'optimisation' of the representations mobilised by the participants to the cooperative action, and therefore an 'optimisation' (which is not to say to attain an optimum) of forms of cooperative action. This extension of possibles would be linked to the establishment, beyond the arrangements already well highlighted by Bratman, of specific arrangements aiming to incite the actors to re-question their first perceptions of preferences and to question their possible redefinition by the enlargement of the interpretive frameworks *immediately* mobilised. There will thus be a drawing out of another 'particular' representation of the requirements of the common intentional aim but which will have the 'advantage' of having gained in 'extension' in relation to the particular forms which would not have taken account of the self limitation affecting the representation of the intentionality.

One could thus say that beyond the conditions of *responsiveness* and of *mutual support* emphasised by Bratman, incentives aiming to ensure a *reflexive learning* on the part of the agents would be necessary so as to allow them a reflexive return on the background representations which *immediately* orient their judgments.

The proposition that 'shared intention does not exist in the minds of the agents in a cooperative action' therefore has an epistemological significance which obliges us to supplement the way in which Bratman, Shapiro and Coleman conceive the nature of the

conditions of possibility allowing that the realisation of such an action is ensured. Is it not symptomatic, moreover, that the different examples which Bratman utilises in order to construct his philosophical understanding of the nature of a cooperative action are all examples where the meaning of the shared intention is always already given and takes a relatively simple form (singing together, painting a house together, etc)? Certainly, Bratman's analyses show well that the application of this meaning requires common construction arrangements. But by already giving himself a supposed given formulation of shared intentionality, Bratman has all the more difficulty in drawing out the radical epistemological meaning of his basic principle and its implications at the level of a theory of intentionality.

The deepening we have just suggested of the analysis of the normative requirements internal to the shared intention is not without consequences for an analysis of the concept of law. We shall come back to this. But one can already raise some questions with regard Coleman's usage of this concept of SCA (Shared Cooperative Action) in his theory of the rule of recognition. In effect, Coleman seems to suppose that forms of judicial organisation developed by all modern states would satisfy the requirements for the realisation of an SCA. Of course, Coleman would admit that these forms may have varied in time and space. Nevertheless, they would all be supposed to express, despite their diversity, the same consideration of the conditions of possibility specific to the SCA. But where would this spontaneous capacity of collective systems - to satisfy the requirement of a cooperative organisation of the authorities charged with the interpretation of the criteria of validity of the law - come from? If one takes account of the dimension of reflexive learning which we have noted, it would no doubt be necessary to be more circumspect with regard to whether our systems of judicial organisation satisfy the conditions of an SCA. Let us note incidentally that such a question would strongly support the current reflections of social theory that Coleman rightly seems to invoke in support of his own reformulation of the theory of the rule of recognition suggested by Hart. Whatever the limits,[59] it is indeed symptomatic to observe that every evolution of the current reflection of economic and social theory expresses the same concern to extend even further the nature of the incentives or the arrangements which must be put in place in order to realise cooperative equilibriums. Moreover, many authors, such as Argyris and Schön for example, expressly condition such equilibriums to forms of reflexive learning, even if their theory of reflexivity still does not adequately construct the epistemological framework it would require. Moreover, even if the observation is less theoretical than sociological, such prudence with regard to the question of knowing if every form of judicial organisation 'exhausts' all the conditions enabling an 'optimised' (and not optimal) satisfaction of the requirements of the realisation of a cooperation in the manner of interpreting the rule of recognition, would perhaps allow theoretical reflection better to account for the dynamic which characterises these forms of judicial organisation. In this perspective, different evolutions are indicative of the need sometimes felt by judicial actors themselves for a desirable adaptation of their modes of organisation. To limit ourselves to a single example, is it not the case that the important modifications linked to the introduction, in US law, of the civil rights injunction[60] following the decision in *Brown v Board of Education* expresses the need to reorganise certain forms of process to ensure a better construction of the 'perceptions' of the judge in disputes relative to certain public policies?

But the extension of the SCA approach called for by a more epistemological understanding of the conditions of possibility of the shared intention obliges theoretical shifts more significant than this questioning, ultimately quite secondary from a philosophical point of view, of the nature (sufficiently co-operative or not) of our forms of judicial organisation. In order to introduce them, we must first of all indicate that a second extension of the approach that Coleman proposes to the rule of recognition must again be effected.

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[59] See J. Lenoble & M. Maesschalck, *Toward a Theory of Governance. The Action of Norms, op. cit.*
[60] O. Fiss, *The Civil Rights Injunction*, Bloomington, Indiana UP, 1978; see also by the same author, The Bureaucratization of the Judiciary, 92 *Yale L. J.,* (1983) 1442ff.

1.2.1.2. A reinterpretation of the relationship between rule of recognition and practice of citizens in terms of cooperative action

For what reason is the consideration of co-operative action by the official authorities charged with the application of law too reductive to ensure a complete understanding of the conditions necessary for the realisation of this form of collective action by which a group is legally regulated? For what reason, therefore, does limiting oneself to this simple consideration lead to ignoring a conceptual requirement specific to the *guidance function of law*?

Ultimately, the reason that invalidates such a reduction is once again epistemological. Moreover, it is analogous to that which justified the first extension of Coleman's approach. As we shall show, such a reduction also rests on the presupposition of a supposed given capacity of the social group to make a common world, without the conditions of possibility enabling such a capacity being considered. In order to show how this presupposition operates in the approaches of Hart or Coleman, let us trace step-by-step the path of their reasoning.

We have seen that Hart - followed by Coleman - proposes that the existence of a legal system within a social group does not demand that the 'internal point of view' required of the authorities charged with the application of the law is manifest in the citizens. It is sufficient that the behaviour of citizens expresses a simple habitual and general practice of obedience to the law.[61] As Coleman recalls, "the majority of persons need not as a conceptual matter adopt the internal point of view toward the behavior by which officials validate law, nor towards the subordinate rules that are validated under the legal system".[62] In other words, it does not matter that the majority of the population 'feels obliged' or is considered as 'having an obligation' to respect legal rules.[63] To require citizens to adopt an internal point of view, Hart emphasises, would be to demand "that both (the bulk of the population) and the officials of the system 'accepted', in the same explicit, conscious way, a rule of recognition".[64] Such a requirement, Hart notes, is unrealistic because in every case in our complex modern states, "the reality of the situation is that a great proportion of ordinary citizens – perhaps a majority – have no general conception of the legal structure or of its criteria of validity…He may obey (the law) for a variety of different reasons and among them may often, though not always, be the knowledge that it will be the best for him to do so. He will be aware of the general likely consequences of disobedience: that there are officials who may arrest him and others who will try him and send him to prison for breaking the law ".[65] Hart clarifies his idea further in very explicit terms. In this hypothesis where, "only officials might accept and use the system's criteria of legal validity", the society "might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system". [66]

Certainly, it is not a question of refusing such a system the quality of a legal system, nor of criticising the elementary observation that the majority of citizens possess no global knowledge of the structure of law or of its criteria of validity. In the same way, Coleman is right to say that the general practice of obedience does not have to be the result of a conscious approach to judgment on the legitimacy of such criteria. In this sense, Hart and

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[61] "So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists" (H.L.A. Hart, *The Concept of Law*, *op. cit.*, p.114).
[62] "Of course, Coleman continues, it may be desirable on efficiency grounds that a population treat law as legitimate or obligation-imposing, since fewer public resources might then be required to insure compliance" (*J. Coleman, The Practice of Principle*, *, op. cit.*, p.76).
[63] On this distinction, see H.L.A. Hart, *The Concept of Law*, *op. cit.*, p. 88.
[64] H.L.A. Hart, *op. cit.,*p.114.
[65] *Ibid.*, p.114.
[66] *Ibid.*, p.117.

Coleman (in the same way as most of the positivists, and especially Kelsen) are right to emphasise that the existence of a legal system is not conditioned by the nature of the individual motivations that justify general and habitual application by the citizens. But, again, as in the cooperative action approach, does such an alternative allow proper construction of the problem and an identification of the conditions that allow such a general practice of obedience? Let us go back to the hypothesis which Hart suggests as particularly probative of his reasoning, namely that of a social group where the citizen members are identified as a flock of sheep and will go so far as accepting to be led to the slaughterhouse through simple obedience of an order backed by a sanction. What, in effect, is it necessary to suppose for such a social group and such a general practice of obedience to exist?

No doubt if one lived on a planet where the group members were 'lobotomised', one could understand the identical behaviour of obedience to the orders of the authority as simple behavioural reactions to an external stimulus. But in the absence of such hypothetical 'lobotomised' individuals, one must necessarily mobilise other propositions to account for such a generalised practice. It is necessary, in effect, to consider that the group members carry out at least three operations of judgment prior to their own individual decision to obey and to behave in a *sheeplike* manner. Firstly, the group member must anticipate the behaviour of the other group members and have sufficient reasons to believe that they will also behave like sheep, that is, in such a manner that he is himself justified, in cost-benefit terms, in subjecting himself to the police or dictatorial authority and in adopting a purely passive behaviour, even at the risk of being led to the slaughterhouse. Moreover, he must also effect a *reinforced* anticipation, that is, to suppose that the other members of the group will also effect an identical anticipation to that which he made regarding the 'passive behaviour' of the other members of the group.[67] Finally, he must also carry out a third form of anticipation: he must suppose that the authority to which he decides to subject himself will itself continue in future to behave in a manner conforming to its current function. In the absence of these anticipations you would not have a 'general and habitual' practice of obedience. The establishment of such a practice necessarily implies a dimension of time and a collective dimension, which can only be established in so far as, at the very least, the three anticipations discussed above are convoked. But if this is the case, it is surely clear that even in the most extreme form of a group whose members behave like a 'flock of sheep', every general and habitual practice of obedience accordingly presupposes a form of shared intention, that is, the adoption and the shared acceptance of a *common way of life*.

At this stage of the reasoning, one therefore finds a relationship between the form of action characteristic of the 'authorities charged with the application of the law' and the form of action necessarily mobilised by every general and habitual practice of obedience on the part of the citizens. Let us repeat: this relationship or this formal structure of analogy obviously does not imply that what 'motivates' the general practice and obedience of the citizens is a common reflection on the technical questions implied by the interpretation of the legal criteria of validity. But it is a question of highlighting the link that exists between this practice of majority respect and the possibility of causing the emergence, within the group, of a common culture of 'confidence' and of adherence to a way of life instituted by the institutional structure of the group. It is, therefore, a question of understanding the link that exists between this respect and the construction of a sufficiently common 'belief' enabling the practical acceptance by the majority of this instituted form of life. How should we understand the operation by which

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[67] Note the analogy of these reinforced anticipations with Bratman's observation in his analysis of *shared intention*: "In shared intention the constitutive intentions of the individuals are interlocking, for each agent has an intention in favor of the efficacy of an intention of the other. And the intentions of each involve a kind of reflexivity, for each has an intention concerning the efficacy of an intention of her own" (M. Bratman, Shared Intention, *Ethics, op. cit.,* p. 104. One can also recall here that, since 1796, Fichte constructed his philosophy of law (*Rechtsleher*e) on the basis of such a construction of these increased reflexivities which underpin every social combination; see especially on this, M. Maesschalck, *Droit et Création Sociale chez Fichte*, Paris-Louvain-la-Neuve, Peeters-Ed. de l'Institut Supérieur de philosophie, 1996.

is constructed this minimal confidence that the members of such a social group accord the authorities charged with the determination of normative requirements? As has just been seen, one cannot reasonably understand this operation in the absence of any reference to a condition of belief, that is, to a form of practical acceptance of a way of life. In this sense, the possibility of giving 'meaning' to the normative requirement (and, therefore, to the law) in social reality, that is, of 'applying' it, of having it produce effects in reality, is dependent on a 'will', on a 'common motivation' of the addressees of this norm and, therefore, on a common culture of the actors able to ensure an effective realisation of the normative requirements. The possibility of a 'governance by law' is conditioned by its 'practical acceptance' by those charged with respecting it and accordingly with ensuring its realisation in social reality.

Hart, Coleman (or Kelsen) are prevented from opening the black box constituted by the operation enabling the emergence of such a culture for the law. Moreover, they do not perceive the necessity of this conditionality and the form of cooperative action that it implies. And, by not constructing these conditions of possibility of every general and habitual practice of obedience in the majority of citizens, Hart and Coleman end up supposing as given a form of spontaneous capacity of every social group to establish a common way of life, that is, a capacity to create a community. Consequently, is it not the case that Coleman falls into the error which he denounces in Hart and which consists in analysing the rule of recognition in terms of a 'coordination convention'? In effect, as soon as one locates the dimension of shared intention that necessarily structures every general practice of obedience, the question arises of its possible realisation, that is, of its conditions of possibility. And one accordingly encounters the question of the conditions of realisation of every form of shared intentionality analysed above in the particular framework of the practice of recognition by the public authorities charged with the application of the law.

It is moreover suggestive to note that even Coleman's reasoning contains various indications that point to the necessary deepening of the way in which the positivists conceive the link between the concept of law and the practice of the citizens. We shall only note here two indications.

As has been seen, Coleman, in order to justify his pragmatist redefinition of the rule of recognition, explicitly takes up an argument developed by Shapiro. But is it not significant to observe that this argument, in Shapiro's reasoning, does not concern the behaviour of the legal authorities, but on the contrary relates to the way in which the citizens situate themselves with regard to the rule of recognition? In order to invalidate Hart's presupposition that the rule of recognition can be analysed as the solution to a simple 'coordination game', Shapiro effectively invokes the example drawn from the attitude of US citizens to their constitution: this is not perceived "as an arbitrary solution to a recurring coordination problem". It is in effect more realistic to consider, Shapiro notes, "that many would believe that they had a moral obligation to heed a text that had been ratified by the representatives of the people of the United States".

Next, a second indication, internal to Coleman's text, can also be noted. It is indeed interesting to note that Coleman is himself compelled to link his conception of a rule of recognition to a form of common deliberation of the group members on an initial rule of recognition relating to the institution of the 'officials'. In effect, Coleman has to deal with the objection of a vicious circle which risks affecting his pragmatist re-reading of the rule of recognition: the rule of recognition depends on the way in which the 'official authorities' act while, in return, "whether or not individuals are *officials* in the relevant sense seems to depend on the existence of a rule of recognition".[68] Coleman's response is as follows: "We must differentiate between two distinct roles that the same group of individuals plays in the

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[68] "After all, persons are officials in virtue of the laws that create officials. But those laws, we are told, are valid only if they are validated by the rule of recognition, which leads us back to where we started", *Ibid.*, pp. 100-101.

conventionalist story. First, some group of individuals – we do not call them officials and we need not identify them by reference to laws – choose to have their behavior guided by a certain rule. In other words, they take the rule as giving them good reasons for action. If that rule takes hold in the sense of establishing membership criteria in a system of rules, and if those rules are complied with generally…, it is fair to say that a legal system exists. If a legal system exists, then that rule which guides the behavior of our initial group of individuals is correctly described as the rule of recognition for that legal system. And those individuals who guide their behavior by the rule are thus appropriately conceived of as 'officials'. They are, in a sense, officials in virtue of that rule, but they are not officials prior to it (in either the factual or the logical sense)".[69]

But is it not the case that this response precisely expresses what we have highlighted, namely that the law only exists by mobilising a background practice which has the form of a cooperative action (deliberation on a rule which provides good reasons to act) among persons who are not 'officials'? Of course, Coleman, in the quotation, notes that it is a matter of the same physical persons ('two distinct roles that the *same group of individuals…*'). But this constitutes a restrictive hypothesis. Either, it is a matter of the hypothesis of a limited group that governs itself on the model of a direct democracy and where all citizens are both private citizens and official organs of power. Or, on the other hand, (and which it seems is rather the hypothesis envisaged by Coleman), it is a question of the group of individuals already invested by the group with the functional task of exercising normative authority. In either hypothesis, Coleman takes into account a 'restrictive' hypothesis where the group of physical persons charged with the exercise of the normative function is already defined. But how is the choice made of this group of persons whose respect for a common rule will be considered as constitutive of a rule of recognition? Coleman '*assumes*' this choice as a choice whose meaning is not questioned. Coleman is right to emphasise that this meaning (that is, the qualification 'official') does not itself depend on a rule. In this sense, his response to the objection of a vicious circle is quite precise. But, by not questioning further the conditions of possibility of this choice, he presupposes this choice as given. By 'assuming' it, he does not perceive that it is itself the result of an operation of judgment that is internal to the collective practice of construction of a way of living together. This choice is itself dependent on the way in which the 'common' belief which gives rise to this background convention is constructed, which one can qualify if one wishes as a 'social contract'. In this sense, the practice of *recognition* by the *officials* is itself the function of *an exteriority* that it enables.

1.2.2 The epistemological significance of this double extension and its consequences at the level of legal theory

The preceding analyses, and especially those devoted to the extension of the approach to cooperative action suggested by Coleman (or Shapiro) allows us to take an additional step in the reasoning. It effectively helps us to understand the extension called for by the epistemological framework of the 'pragmatic turn' judiciously effected by Coleman within legal theory. This extension leads, as we shall see, to a more extended understanding of the reflexivity of every operation of judgment (1.2.2.1). In return, this epistemological extension of the pragmatist approach allows us to throw new light on two key questions of the contemporary debate in legal theory: the question of an evaluation of Dworkin's critique of legal positivism (1.2.2.2), and the question of the judgment of application in law which constituted, as has been seen, the central vector around which has developed, for more than a century, the repeated attempt to denounce the inefficiencies of a positivist analysis of law (1.2.2.3). Let us also note that, from here on, this second question will allow us at the same time to reinterpret the question of the possible normative significance of the concept of law.

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[69] *Ibid.,* p. 101.

1.2.2.1 Pragmatism and the reflexive approach to judgment

It is one of Coleman's main merits (and indeed of the American legal philosophers he is close to, such as B. Leiter) that he constructs his theory of law on explicit and seriously intended epistemological bases. Such is the sense of his 'pragmatist approach' and of the four principal characteristics that define its epistemological specificity.[70] It is assuredly this pragmatist approach's respect for the epistemological requirement that explains the twofold gain of Coleman's theory in relation both to Hart and Dworkin. A more profound attention by Dworkin and Hart to the exact significance of the principles of semantic holism and of the revisability of beliefs would not, in effect, have failed to make them aware of the insufficiencies of certain of their theses and of the necessity to propose a better construction of them. Dworkin would have rapidly perceived that conventionalism in legal theory is obviously not incompatible, contrary to what he claims, with an interpretivist approach to the rule of recognition. Similarly, Hart would have been compelled explicitly to confront the question of the form and of the conditions of possibility of a collective action (coordination convention or cooperative action) capable of generating, at the level of the public authorities, a normative meaning identical for everyone. Moreover, one could note, it is Coleman's pragmatism and his correlative refusal of any epistemological mentalism[71] that allows him to open, with the help of Shapiro and Bratman, legal theory to the constraints of a non-mentalist understanding of the conditions of cooperative action. But it is here that we encounter the impact of our previous developments. In effect, the extension we have suggested with regard to the analysis that Coleman (or Bratman) makes of cooperative action is, in return, indicative of an analogous extension to be made in his approach to the 'pragmatic method'.[72]

One could be immediately surprised by our approach. Is it not curious, at first sight, that a reflection on cooperative action is judged to be transposable to the level of a theory of intentionality and of meaning? Although it is easily understandable that a non-mentalist approach to intentionality is utilised to understand better the conditions of construction of a shared belief in the framework of a cooperative action (such is, in the end, the approach followed by Bratman to analyse shared cooperative action), nevertheless it can appear curious to do the reverse and to transpose the lessons of a reflection on cooperative action to the level of an epistemological reflection on the conditions of semantic productivity of a judgement. In fact, it is not at all curious, because if one well understands the significance of the pragmatist approach such as Coleman presents it, one immediately perceives that the question of the semantic productivity of a judgment is, very properly, analysed in terms of cooperative action. The semantic holism and the rejection of mentalism consists precisely in considering that the meanings (that is, the intentional aims of the operation of judgement), far from being physical or computational entities located in the mind, are always dependent on the meaning of other elements[73] whose meaning cannot itself be supposed fixed and determinable by the application of formal rules. That is to say, therefore, as Wittgenstein and Putnam have clearly highlighted, that ultimately meaning is a function of usage and that this necessarily takes the form of a shared social practice. In this sense, the fixing of meaning -

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[70] These four principal characteristics, Coleman indicates, drawing support here from the works of Quine, Sellars, Davidson and Putnam, are as follows: "(1) a commitment to semantic non-atomism; (2) the view that the content of concepts is to be explicated in terms of their inferential role in the practices in which they figure…; (3) the view that the way in which a concept figures in one practice influences its proper application in all others, and, in this sense, practices are to be viewed holistically; and (4) a commitment to the in-principle revisability of all beliefs" (*Ibid.*, p. 6). We do not consider here, however right it may be, the fifth characteristic mentioned by Coleman (*explanation by embodiment*), which does not seem to us to be so important for our own developments.
[71] See, on the link between semantic holism and the rejection of mentalism (that is, of a position which consists in thinking "of concepts as scientifically describable (psychologically real) entities in the mind or brain", H. Putnam, *Repesentation and Reality*, *op. cit.*, p. 7), H. Putnam, *Ibid.*, chapter 1 "Meaning and Mentalism", pp. 1-18; see also, M. Maesschalck, *Normes et Contextes*, Hildesheim, Olms, 2001, pp. 242ff.
[72] *Ibid.,* p.6.
[73] As Coleman suggests, let us leave the question "open whether the whole semantic system enters into the meaning of every concept, proposition, and belief" (*Ibid.*, p.7, n.7).

or to put it in other words, the determination of the effects of meaning produced by operations of judgement - is a function of a form of cooperative action within social groups with a view to producing common beliefs. It is at the same time this reference of meaning to usage and to the social practices which express it that also allows an understanding of the principle of revisability of beliefs which Coleman places very rightly at the heart of the pragmatist approach. In effect, these cooperative practices where our common representations (beliefs) form simultaneously ensure the 'revisability', that is, the adaptation in function of the 'interests' - of intentionality - which 'motivated' us to make use of our judgments.[74]

But it is precisely on this point that it proves to be necessary to transpose, to the level of Coleman's pragmatist approach, our reflections at the level of his conception of cooperative action. In the end, the rejection of mentalism which results from semantic holism forces a further questioning of this 'black box' which Coleman leaves unexamined, relating to the conditions of this 'self-revisability of beliefs'. Everything seems effectively to happen, not only in Coleman, but also in the contemporary pragmatist approaches which he relies on – such as Putnam's -, as if this 'collective self-revision' resulted from the immediate fact of competences inscribed in the mind of the actors of every social group. But, as has been seen above, to suppose that these 'innate or immediate capacities' ensures such a revision, leads to two highly problematical suppositions. On one hand, this leads to restoring a mentalism that contradicts the holism of beliefs that Putnam has clearly seen was logically linked to semantic holism. On the other, and as a consequence of this mentalism, this allows the supposition that every operation of judgment finds in itself the capacities necessary to ensure, in so far as it is possible, the realisation of the intentionality that motivates its usage. Certainly, no social group can achieve the ideal 'revision' of its beliefs. In this sense, the capacities of human reason are certainly limited. But by failing to question the conditions of the operation of revision of beliefs, one comes to suppose that, in the framework of these limits, the best possible revision of beliefs within the social group is obtained by the simple immediate means of the competences internal to the operation of judgment. As we have seen above, such a supposition contradicts the very principle that motivates the mentalist rejection underlying the pragmatist epistemology.

In this sense, the rejection of mentalism forces the highlighting of what one could call the *reflexive* dimension of every operation of judgment. This reflexive dimension does not consist, as one generally understands it, in affirming the 'retrospective' competence of reason to return to its previous representations ('to effect a return on itself'). It aims, on the contrary, to propose that every 'application' of reason is supported by ('reflects') a background representation that the operations of reason by themselves do not allow to be reconstructed. It is this reflexive dimension which justifies, as has been seen above, the fact that the representation which the actors of a cooperative action formulate '*immediately*' of their intentions, interests and preferences (that is, in the absence of arrangements specially organised to bring them to reconstruct their interpretive frameworks) is only one particular selection among other possible ones and that an '*attention*' to this operation of selection would, therefore, allow the eventual construction of other possible selections. In other words, attention to the *contextual self-limitation* which results from the reflexivity affecting every operation of reason would allow an extension of the possibles and thus an 'optimisation' of the representations mobilised by the participants to the cooperative action, and, therefore, and 'optimisation' (which is not to say to achieve an optimum) of forms of cooperative action. This extension of possibles would be dependent upon the establishment, beyond the arrangements already clearly highlighted by Bratman, of specific arrangements aiming to encourage actors to re-examine their first perceptions of preferences and to examine their

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[74] Let us also leave on one side the question of the criteria of revisability which could possibly be considered as belonging to the specific (empirical, evaluative, etc.) nature of the various possible representations (see, Coleman, *Ibid.*, p.9, n.11).

possible redefinition by enlarging the interpretive frameworks *immediately* mobilised. There will thus be a drawing out of another 'particular' representation of the requirements of the common intentional aim which will have the 'advantage' of having gained in 'extension' in relation to the particular forms which would not have taken account of the self-limitation affecting the representation of the form of intentionality. One could thus say that beyond the conditions of *responsiveness* and of *mutual support* emphasised by Bratman, incentives aiming to ensure a *reflexive learning* of the agents would be necessary so as to allow them a reflexive return on the background representations that *immediately* orient their judgments. It is only when one has thus drawn the ultimate 'epistemological' consequences of the pragmatist rejection of mentalism and when one has drawn out, on this basis, the conditions of possibility of the self-revisability of beliefs that one can propose the principle of such a self-revision, that is, that one can suppose the normative requirements of the intentionality which guides this requirement of 'self-revision' of beliefs within a social group to be satisfied. Otherwise, this principle of revisability remains a 'black box' and implies, surreptitiously, the restoration of an epistemological mentalism which pragmatism, on the contrary, aims to denounce. Before analysing certain of the consequences flowing from this 'extension' of Coleman's pragmatist approach, a brief detour via the contribution and limits of Putnam's work again helps one understand this point better.

In effect, Putnam is undoubtedly the contemporary pragmatist who has made the best attempt to draw out the epistemological implications of semantic holism and the correlative rejection of mentalism. In this regard, as has already been indicated, he has clearly highlighted the 'logical' link that existed between the holism of meaning and the holism of belief that guided the social practices by which use was made of meanings. Moreover, Putnam has continued to note that this holism of belief would forbid the formal fixing of the procedures defining beliefs that order the usage by which every judgment takes its meaning effects. It is precisely in order to avoid going beyond the pragmatic limits of reason that he proposes that the fixing of shared beliefs can only result from a procedure of common construction by public exchange. In this sense, Putnam has explicitly and clearly perceived the constitutive link that existed between the semantic productivity of operations of judgment and cooperative action. But the reasoning must be followed.[75] Because, if it is right, the reflexivity implied by this holism[76] forbids supposing as constructed, by the simple means of the formal constraints of discursivity, the belief which conditions the meaning effects of what it needs to define as rational requirements. The establishment of the cooperative culture which conditions the adaptation of existing beliefs to those called for by reason therefore demands specific conditions of possibility.[77] Supposing that the simple means of the formal constraints of the ethics of discussion, that is, the simple formal game of public discussion, will ensure by itself the realisation of the cooperative culture it requires in order to make sense, neutralises and ignores Putnam's argument of the impossible formalisation of the procedures for fixing beliefs. Supposing that the simple internal means of formal constraints of argumented exchange assures the self-adaptation of beliefs ignores the fact that the possibility of argumented exchange is itself only made possible by a shared belief motivating the participants to make use of it.

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[75] In this sense, therefore, Putnam ultimately restores a schematic approach to normative judgement; see, on this, M. Maesschalck, *Normes et Contextes*, *op. cit.*, p. 312; and also J. Lenoble & M. Maesschalck, *Towards a Theory of Governance, op. cit.*, p. 304.
[76] That is, the fact that the conditions of possibility, by reason of being effected in reality, are a function of an exterior, as required by the rejection of mentalism implied by holism.
[77] It is in this sense, as has been seen, that M. Bratman has very well intuited this conditionality. Nevertheless, by not constructing its epistemological foundation which insists on the reflexivity of the operation of judgement, he misses certain of the conditions implied by the realisation of a cooperative action, among which, for example, that which consists in enabling the 'reflexive' return by each of the actors on his or her own perception of the context. The conditions are to be reflected both on the side of the institutional environment, which must guarantee that the deliberative negotiation mechanism ensures an effective integration of the various perceptions, and on the side of the 'capacity' of each intentionality to ensure the self-adaptation of the perception it mobilises.

In effect, the necessity for such a 'belief' - which the simple formal operativity of reason is therefore not sufficient to generate - expresses the *inferential reflexive*[78] relationship which conditions the possibility for reason to make sense, that is, the possibility for reason to be realised in the world.[79] Every rational aim of meaning can only be realised by its submission to a specific conditionality that the simple formal means of reason is not sufficient to guarantee. To *schematise* this capacity of realisation is to suppose that a rule, necessarily inscribed in the mind of the actors, guarantees its usage. In this sense, one restores a mentalism. The fixing of belief is itself a reflexive operation whose realisation can never be supposed to be 'regulated' by a supposed capacity of the subject. On the contrary, in the absence of arrangements aiming to organise the reflexivity of this operation of the common construction of an adaptation of beliefs to the critical requirements of formal reason, nothing guarantees that the application of these formal requirements will ensure the transformation of the world and of behaviours that they call for.

What is the gain for legal theory procured by such a 'reflexive' deepening of a pragmatist approach to judgment? We obviously will not come back here to the renewed approach which it allows to the conditions of possibility of this social practice by which the 'rule of recognition' constitutive of the criteria of definition of the law within a social group is interpretively defined and revised. Let us recall only that this deepening, which has taken the form of a double extension of the redefinition of Hart's thesis suggested by Coleman, was supported directly by a more adequate consideration of the conditions of possibility of the principle of revisability of beliefs and of cooperative action which assures their implementation. It is moreover for this reason that we have qualified as genetic this analysis of the concept of law, that is, as an approach which, in contrast to classical positivism, takes account of all the conditions which 'engender' the convention by which the law is defined, that is, the conditions of possibility of this convention.[80] We would like to show here the gain that this 'reflexive' deepening of the pragmatist theory of judgment allows in relation to the usual critiques addressed to positivism. In effect, if Coleman very rightly denounces the shortcomings of these critiques, he also simultaneously risks not perceiving the reformulation that they require and which would allow the validation of the intuition that they carry. In this perspective, two questions merit a rapid re-examination in the light of our epistemological observations: on one hand, Dworkin's hermeneutic critique and, on the other, as we have noted at the start of this paper, the question of knowing how to evaluate this intuition which animates reflection on law from the end of the nineteenth century onwards, namely the idea that the insufficiency of legal positivism would be linked to an insufficient understanding of the operation of application in law. As we shall observe, this last question will allow us at the same time to re-evaluate the false opposition between the descriptive and normative

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[78] The expression 'inferential' indicates that the reflexivity is not 'retrospective' and is not made possible by the effect of a rule 'lodged' in the mind of the agents. The reflexive operation is not deductive, but functions on the 'inferential' mode, that is, as the condition of possibility of meaning.

[79] To determine, with the help of its reason, an action to be accomplished signifies wanting to 'transform' the world in order to resolve a problem, that is, wanting to 'rationalise' the world. But as intuition allows immediately to be perceived, *wanting* to rationalise the world implies a certain 'culture', that is, a certain belief or adherence to a *way of life*: a life directed by reason. The transformation of the world implied by the action to be accomplished is only possible because one has accepted that the world can and must be rationalised. Every operation of reason, as Fichte says, experiences an impulse (*Anstoss*) which means that it is only able to produce effects in reality by drawing support from something which is not itself. It is not reason that justifies the belief in the capacity it would have to transform the real. But it is the opposite. The application of reason in the world is conditioned by the belief in its possible realisation. The effectuation of reason is supported, in the last analysis, on the belief, on the intuition of the power of reason to transform the real. The power of reason thus refers reflexively to an exterior that is not itself.

[80] This is why, as we have already indicated (see above n.54), we could also qualify such an approach as a 'transcendental' approach to law in the technical sense which Kant and Fichte gave to this term. Note also the extent to which this shift in relation to the positivist approach constitutes a shift analogous to that which, as Putnam observes, the "holism of meaning expresses, on the epistemological level, in relation to the "positivist attempts to show that every term we can understand can be defined in terms of a limited group of terms (the 'observation terms')" (H. Putnam, *Representation and Reality*, *op. cit.*, p.8).

approaches to law and to introduce the question of the necessary 'epistemological' link between the conceptual analysis of law and the theory of governance.

1.2.2.2. A re-evaluation of Dworkin's critique of positivism.

By indicating above the advantages of Coleman's approach with regard both to Dworkin and Hart, we have already noted the double insufficiency of Dworkin's critique of conventionalist positivism. Firstly, this critique is theoretically inconsistent: contrary to what Dworkin believes, an incorporationist conventionalist approach, far from ignoring the interpretive dimension of the rule of recognition, implies such a dimension. Such an implication, as one may easily understand, is directly linked to the pragmatist principle of the revisability of beliefs. Next, this difficulty of Dworkin's in properly grasping the pragmatist implication of the redefinition of the positivist thesis expresses his inability to formulate, in adequate epistemological terms, the nature of the 'semantic trap' that he denounces in the positivists. This second insufficiency explains why Dworkin himself falls into the error that he imputes to the positivist approaches to law and which he believed he was able to avoid by means of his hermeneutic approach. But it also explains why he is unable to construct the correct intuition that he has of the insufficiency of legal positivism. This is why, as has already been indicated, our hypothesis is that a common semantic insufficiency affects both Dworkin's perspective and the positivist conventionalism of Hart and Coleman.

Let us firstly take the question of the 'semantic' trap that Dworkin also falls into despite the fact that he believed he could escape by recourse to the hermeneutic model. At this stage of our developments, we are better able to understand how this semantic error manifests itself. In order to clarify our own idea, we cannot do better than start with the critical analysis that Putnam has made of Dworkin's thesis. This critical analysis, realised moreover at Coleman and Leiter's invitation, is very stimulating because it attempts to formulate this critique directly on the epistemological level. But at the same time as it very rightly denounces, in a philosophically elaborated way and in terms other than 'deconstructionist or Derridian', the formalist trap into which Dworkin falls, this critique nevertheless remains fragile and incomplete. Let us therefore take up Putnam's reasoning. It will allow us to show how the reflexive extension of Putnam's pragmatism that we have previously highlighted helps us to deepen and reformulate this critique.

The critique developed by Putnam relates to the epistemological presuppositions of Dworkin's theory of the 'one right answer'. Very obviously, this theory does not in any way mean a questioning of the eminently 'controversial' character of meaning in law. Putnam readily agrees that, in any event since *Law's Empire*, [81] "Dworkin now holds that in some cases there may not be a unique 'right answer' (reasons of both sides may be equally strong)". In this sense, it is therefore right that Dworkin abandons the principle of bivalance, that is, "the logical principle that a statement is either true or false – tertium non datur". But, Putnam very rightly notes, "*this* sort of failure of a unique right answer to exist is ubiquitous in language, and has nothing to do with the (unreasonably strong) form of bivalence that Dworkin continues to accept". What is, then, the form of bivalence that Dworkin continues to accept? "Dworkin's present position …is that for an answer to be 'right' just is for it to be the answer that is best supported by reasons.[82] If the fact that there may not be a right answer (in this sense) in some cases (because there may be a 'tie' in the strength of the reasons) meant that the logical principle of bivalence had to be given up, then the fact that there may

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[81] Dworkin's position was effectively less clear in *Taking Rights Seriously* (London, Duckworth, 1977); see, on this evolution of Dworkin's theory of the one right answer, J. Coleman, "Truth and Objectivity in Law", 1 *Legal Theory* (1995), pp.48-54.

[82] Note that this description by Putnam of Dworkin's position reflects what Dworkin explicitly says in *Law's Empire* (*op. cit.*, p. 412). In effect, after having said that he had obviously never "devised an algorithm for the courtroom", Dworkin, however, continues as follows: "I have not said that there is never one right way, only different ways, to decide a hard case".

be no right answer to the question 'Who is the tallest kid in the class?' because two or more kids may be tied for tallest would already mean that bivalence has to be given up! Bivalence would have never been accepted as a logical principle in the first place[83] if *this* sort of thing were a counterexample". But, as Putnam very rightly emphasises, "what *is* a problem for the principle of bivalence is that it entirely abstracts from – in fact denies – the possibility of what is called 'second order vagueness' – that is, the possibility that, not only may there be cases in which there is no determinate right answer, but that it may be *indeterminate which those cases are* (where vagueness ends may itself be vague, in other words)".[84] What Putnam denounces is therefore the presupposition of the existence of a rule that would allow us, at whatever level, to formalise the interpretive practice, that is, the operation that is constitutive of meaning.

But is Putnam's critique correct? He very rightly intuits that at a certain level of theorising Dworkin ignores not the holism of meaning, but the holism of belief, that is, the idea that there is no formal procedure for fixing belief. But this epistemological shortcoming of Dworkin cannot be formulated in the terms used by Putnam. Indeed, Dworkin certainly recognises what Putnam calls the 'second order of vagueness'. He would be the first to recognise that the 'controversial' character of law implies that one cannot determine by a formal rule what are the 'easy cases' and what are the 'hard cases'. Such a distinction, he would recognise, is itself the result of an interpretive practice and cannot consequently be formalised. It is not therefore at the semantic level of this 'second order of vagueness' that the 'reformalisation of the normative operation' of which Dworkin is the victim is expressed. It is on a third level that this 'reformalisation' appears. But this third level is inaccessible to Putnam because, as has been indicated above, of his insufficient perception of the consequences attached to a 'non-mentalist' approach to the operation of judgment. In effect, such an approach disallows the possibility that reason finds within itself the resources necessary for its own semantic productivity (that is, for its capacity to effect itself in social reality). As Putnam himself restores a mentalist presupposition (at the level of the capacity of the social group to ensure 'automatically' the revisability of its beliefs) and underestimates therefore the 'extension' of the reflexivity of every judgment, he does not see that it is on this pragmatic level that Dworkin reformalises the operation of normative judgment.

In effect, Dworkin's hermeneutic approach makes an effort to respect the link that exists between meaning and usage and to take account of the holism of usage. But, by not sufficiently constructing its epistemological conditions, he does not see the reformalisation of the operation of reason that his 'mentalism' implies. On which level does this mentalism appear? As an alternative to the hypothesis of the rule of recognition, Dworkin defines the conditions of legality by reference to a substantial morality supposed as shared by the social group and to an idealised judge who would be capable of ensuring its constant reinterpretation in view of the requirements of adaptation to the transformations of the social context. The judge is supposed to be capable of deducing the meaning of law from the requirements internal to the 'institutional morality' of the group to which he belongs. His hermeneutic approach presupposes as given the *rules in the mind of the judge* permitting him to subsume the variety of particular situations under the general categories of the

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[83] That is, the bivalence linked to the thesis "that for an answer to be right just is for it to be the answer that is best supported by reasons" (H. Putnam, "Are Moral and Legal Values Made or Discovered. Replies to Brian Leiter and Jules Coleman", 1 *Legal Theory* (1995), p. 76).

[84] H. Putnam, "Are Moral and Legal Values Made or Discovered. Replies to Brian Leiter and Jules Coleman", *loc. cit.*, pp. 76-77. This questioning by Putnam of the principle of bivalence obviously does not imply his acceptance of a sceptical position. On this point, Putnam, while philosophically criticising Dworkin, shares with him the same denunciation of Rorty or of what Dworkin inopportunely calls "legal pragmatism" (*Law's Empire, op. cit.*, p.151). This common denunciation of a 'nihilist' scepticism moreover explains why Putnam offers the following judgement with regard to Dworkin: "Far from seeing himself as more 'metaphysically realist' than Rorty, Dworkin, if I am right, would see himself as more metaphysically innocent (in a good sense) than Rorty. But Dworkin's innocence is obscured by his almost complete failure to discuss any of the metaphysical issues that Coleman lists" (that is, the questions relating to the theory of truth, *Ibid.*).

institutional morality (principles). In this sense, Dworkin mentalises the approach to normative judgment by inscribing, in the mental capacities of the judge, the rules permitting the deduction of the normative meanings of law from the requirements of the institutional morality and the expression, to use Paul Ricoeur's terms, of the injunction of historical reality.[85]

By always supposing as given an homogenous substantial morality in the social group and a judge capable of assuring its constant reinterpretation in view of the requirements of adaptation to the transformation of the social context, Dworkin supposes a rule of reason capable of guaranteeing the realisation of the 'right way' by which the meaning of normative requirements within the social group will be optimised. It is such a presupposition that Putnam aims to question as philosophically incorrect. This project, as Mark Maesschalck has clearly shown with regard to Putnam's internalist realism,[86] effectively implies not only an immanence of the interpretive practice in beliefs, but also the impossibility for the interpretive practice of defining procedures for fixing beliefs. It is precisely this that Dworkin ignores.[87] It is also this that explains why he *formalises* the operation of judgment and, as a consequence, why he falls into the 'semantic' error that he believed he was able to denounce in the positivists.

It is also on this same level that the gain of the pragmatist redefinition of the rule of recognition proposed by Coleman appears. As we have seen, this redefinition subordinates the capacity of the judges to define this rule to the existence of institutional arrangements enabling their cooperative production of a uniform interpretation. In this sense, one could say, Coleman tempers Dworkin's epistemological internalism by subordinating the supposed capacity of the social actors - in the shape of judges - to the incentivising exteriority of institutional arrangements guaranteeing the possibility of a shared intentionality. But, as has been seen, this way of understanding the 'limit' of epistemological internalism - and of its institutional expression - remains insufficiently extended and, for this reason, expresses the resurgence of a semantic error. In effect, as in Dworkin, Coleman's analysis also rests, in the last analysis, on the 'mentalist' supposition of a supposed given capacity of the group to assure the conditions of satisfying the requirements of governance by the law. A rapid examination of this question will allow us to see how our epistemological observations help to construct better this recurrent intuition of legal reflection according to which the positivist analysis has an insufficient understanding of the operation of normative judgment.

1.2.2.3. Positivism and the question of the judgment of application: the normative scope of

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[85] This reformalisation moreover also finds other expressions, which Coleman has clearly perceived. Coleman obviously subscribes, as has already been indicated, to the interpretive dimension of law. He explicitly recognises the descriptive clarification of hermeneutic approaches. Dworkin no doubt provides, Coleman emphasises, an adequate theory of the revision of the meanings of law by the judges. But even on this level of a description of the judicial function, Coleman wishes to radicalise this hermeneutic approach. Dworkin, Coleman notes, overestimates the ability of the legal hermeneutic to determine a unique meaning. By this theory of the one right answer, he underestimates the importance of uncertainty in law. Instead of supposing an 'holistic' rationality in law as Dworkin does, it would be better, on the contrary, to attribute to law a simply local or partial rationality. As Coleman indicates, "Understanding what the law is or means is not the same kind of project as understanding an individual's behavior – linguistic or otherwise. In order to attribute content to law, we do not have to treat all the law as consistent or as satisfying all the basic rules of deductive logic. Again, local rationality may be enough. Local rationality certainly fits better with the phenomenology of judging. Even if Dworkin is right that judges must posit the working hypothesis that there are rights answers to legal disputes, judges find themselves, more often that Dworkin acknowledges, adopting the view that in fact there is no determinate legal answer to the case at hand" (*Ibid.*, p.168). Besides, Dworkin's description of the legal hermeneutic poses still other difficulties such as that of being able to account for the role of "authoritative statements" which become in Dworkin simple "raw materials for the theory of legal content" (*Ibid.,* p. 166).
[86] M. Maesschalck, *Normes et Contextes*, *op. cit.*, p. 179.
[87] Another way of noting this epistemological insufficiency of Dworkin consists in emphasising his link to Quine's theory (to which moreover he makes at least two explicit references in *Law's Empire*). But, as Putnam has very rightly noted, Quine's position leads to ignoring the link between "meaning holism" and "the holistic character of belief fixation" (*Realism with a Human Face*, Cambridge (MA), Harvard UP., 1990, p. 283).

the concept of law

Contrary to what is claimed by the various formulations given to the critique of positivism, whether in their sociological or their more recent hermeneutic versions, the conventionalist approach does not in any way imply a denial of the interpretivist dimension of judicial work. Nevertheless, on the condition that it is reformulated, the intuition animating this recurrent critique remains true.

In effect, the extension of the approach to pragmatism that Coleman develops allows us to highlight an insufficient understanding of the operation of the application of judgment more radical than that which would relate to his approach to the operation of the judge. It is symptomatic that in legal theory the debate concerning the operation of the application of judgment does not seem to perceive that the question of application is not limited to the simple question of the application of a supposed existing norm. The sense given to the operation of application of a rule is reduced to the classic concept of application which corresponds to that normally used in ordinary language when one speaks of a judge who applies a rule or of a technical problem of application of a normative orientation judged to be desirable. The operation of application is supposed restricted to the hypothesis where the rule (or the normative orientation) is given. But by limiting oneself to this formulation of the question, one is prevented from formulating the problem in more epistemological terms. There is a more fundamental operation of application and one that already conditions the elaboration of the norm (or the determination of the normative orientation). The choice of the norm is, in effect, already the result of an operation of application. The 'form' (representation) taken by the norm results from the 'application' made of the rational requirement borne by the activity of judgment, which the members of a social group have decided to mobilize in order to resolve a problem of collective coordination. The question posed by this operation of application therefore concerns the conditions of possibility of the operation by which reason (activity of judgment) produces meaning effects in reality, that is, 'is applied' or 'is effected' in social reality.

Is it necessary to suppose that this application is entirely determined, in the last analysis, by the simple formal rules of rational activity (necessarily, therefore, located in the mind)? In such a perspective, the operations of application and of justification of judgment are ruled *by the same resources* and are therefore in a *symmetrical* relation. Such a perspective, as one will obviously understand, is that of mentalism. Let us note that this position does not prevent the fact that a certain autonomy can nevertheless be recognised in the interpretive activity of the operation of application.[88] Such a recognition, in effect, of a 'reversibility' of the operation of application on the operation of justification does not necessarily imply abandoning a symmetrical approach to the operation of judgment, that is, in the end, of a mentalist point of view. The hermeneutic theory expounded notably by Dworkin is a good example of this.

Or is it necessary, on the contrary, as required by a *non-mentalist* understanding of the semantic productivity of judgment, that the necessary conditions for such a productivity (therefore for the application of reason in the world) are not reduced to the simple formal rules of rational activity? It is then well understood that reason does not find in itself the conditions of its application in the world, that is, the capacity to produce meaning effects. In this second perspective, which is that opened by every holistic and pragmatist approach to the activity of judgment, one then highlights the *asymmetric reversibility*[89] of this operation of reason: while the two operations refer to each other, the resources necessary for the operation of application are not symmetrical with the formal rules which condition the

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[88] As has been seen, this has become a banal observation accepted by all in legal theory to recognise such an autonomous dimension to the interpretive activity of the authorities charged with the application of legal rules, including the rule of recognition.

[89] The expression is from M. Maesschalck's, *Normes et Contextes, op. cit.*, pp. 180 and 244. See also on this, J. Lenoble & M. Maesschalck, *Toward a Theory of Governance, op. cit.,* chapter 1, 3.1.1.

operation of rational justification. This 'asymmetric reversibility' only expresses what we called above the 'reflexivity' of every operation of reason, which alone protects one from the pitfalls of a mentalist epistemology. The activity of reason 'reflects', in effect, a 'perception' which reason itself cannot justify by its own formal rules but which nevertheless conditions its implementation: the 'choice' to adhere to a way of life according to 'reason'. In this sense, one could say: reason reflects itself in the sense that it reflects what it gives 'itself', namely the choice of reason as a way of life, the choice of a world as 'rationalisable', as 'transformable' according to the requirements dictated by the formal rules of reason. But this reflexivity that we have just described at the speculative level is more easily understood if one translates it to the more 'concrete' level of the theory of the norm. As we shall see, we find again here the reflections already formulated above with regard to Bratman's theory of cooperative action.

A non-mentalist reflexive approach to judgment can only be attained if one opens a 'black box' left unexplored by current theories of the norm due to their restrictive approach to the operation of application of a normative judgment. This black box concerns the conditions of realisation of the aim that underlies every action of elaborating a norm. This aim consists, in effect, on the basis of the perception of a problem to be resolved, in defining the 'rationalisation' of the world called for, according to the conception of the authors of the norm, by the resolution of the problem. Of course, it has become common sense to highlight the limitations of the cognitive capacities of human reason. But the 'contextual' limitation that we want to highlight here due to the reversible and asymmetric nature of the operation of application is of another nature.[90] The asymmetry implies, in effect, that the application of a norm in social reality necessitates the mobilisation of resources that are not provided by the simple formal operation of reason.

At the base of every rational decision or of every voluntary action, there are two - and not one, as is usually supposed - operations of selection (or of choice). There is obviously the choice of the transformation that appears to be rationally required (that is, of the solution to the problem that is judged to be most rational). But, this choice is itself only possible because it depends upon a previous operation of selection which relates to the way of 'perceiving' the 'context' in relation to which the problem to be solved will be defined and the *usage* that will be made of the solutions envisaged by the actors called to apply them will be determined. The asymmetry is marked here by highlighting the background upon which every operation of justification necessarily depends. The second operation of selection - which conditions the first - is not resolved by the first. It therefore calls for specific '*attention*' if one wants to realise the objective sought which consists in accomplishing the best rational action possible in order to deal with the problems to be resolved. In effect, there is only a possible 'transformation' of the world - and therefore of the *effective realisation of the intentional aim of every norm* - if one takes account of this second conditionality and organises a specific procedure of adaptation and of construction of a common perception of the context. It is a question of procedurally organising the adaptation of the existing perceptions of the actors concerned with a view to naming the significance and the nature of the insufficiencies to be regulated and of the problems to be resolved.

It is necessary, therefore, to articulate two inseparable processes. It is a matter firstly of guaranteeing the incorporation of the formal rules which condition the rational acceptability of the solutions to be brought to deal with the inefficiencies of existing situations of life. But the determination of the meaning effects produced by the solutions to be constructed is a

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[90] No doubt several authors have already integrated a limitation of rationality at this level of formality (Gödel's theorem, procedural rationality in Habermas's sense always allowing a re-launching of argumentation, procedural rationality in H. Simon's sense). But the limitation of the formalism of reason is also marked on a second level and acquires another sense than that of 'limits of cognitive capacities'. To limit myself to the sole level of formal processuality of the formal justification of the rule of my act is not sufficient to account for the conditions of the semantic productivity of this rule.

function of what one will select as being a context on the basis of which to perceive the insufficiencies to be resolved and the solutions to be constructed. To suppose that this context is given or that the actors concerned immediately and naturally identify their interests and the significance of new constraints motivating the search for new solutions is precisely to ignore the structure of every judgment which is that the adaptation of perceptions is not dependent on the formal rules of judgment alone. Similarly, it cannot be supposed that the 'perception of context' is identical among the various authors/addressees of the norm. It can no longer be supposed that their common adherence to the solution judged to be the most rationally acceptable automatically implies a convergent transformation of the perceptions of the context and, as a consequence, a uniformisation of what will motivate the use they will make of the norm to which, nevertheless, they adhere. A specific activity with a view to organising a common perception of the context must be organised. It will then allow an increase in the number of 'possibles' on the basis of which the solutions judged to be the most rational to meet the insufficiencies of the 'context' will be selected.

This second order of conditionality is usually obliterated because it is posed as evident or supposed as determinable a priori. If one supposes this capacity of adaptation of the common perceptions of the actors in a collective action to the 'requirements of context' as given, the problems of governance obviously become less complicated. In this perspective, it is immediately supposed that the actors possess the capacities to translate, by their interaction, their normative expectations into the effectiveness of action. The supposition of a *mental capacity* (*mentalism*) of translation into reality of the goals pursued guarantees this equilibrium solution. It is considered that the 'supposed given content' of the goals aimed for by the authors of an action will be able to be translated into the effective content of action. But, supposing such a capacity as given consists precisely in ignoring the reflexivity of the operation of normative judgment. To the contrary, a better construction of the *theory of the norm* forces the invalidation of such a supposition and, as a consequence, the posing of the necessity for incentives able to promote the emergence of this 'capacity' to identify the normative objectives to pursue in common.

It is in order to respect this epistemological requirement (which is therefore located at the dual levels of the theory of judgment and the theory of the norm) that we have suggested extending the pragmatist approach to the concept of law suggest by Coleman and substituting for the positivist approach a *genetic* approach to the conventionality of law. Such an approach allows a different light be shed on both the question of the descriptive or normative status of the theory of law and the analysis of Coleman (or more broadly of the positivists) with regard to the conditions of existence of law in a social group. Of course, it cannot be a question of subordinating the definition of law to some external 'normativity', as suggested by the classical theory of natural law. No one can seriously contest the impossibility for the theorist of defining what would be 'the' rationally desirable way of life. That is not the question.[91] Moreover, even in its internalist version, Dworkin's critique of positivist 'descriptivism' is difficult to accept because it itself fails to take account of the 'reconstructive and descriptive' status of its own analysis of the concept of law. From this point of view, Coleman was right to emphasise, in Dworkin, "the confusion between the content of the concept of law and the content of the law of a particular community".[92] But conversely, Coleman, because of his positivist and non-genetic approach to the conventionality of law, does not perceive the normative dimension internal to the content of the concept of law and the irreducibility of this normative dimension to the prescriptive dimension. By 'prescriptive' dimension, one means that "distinctive feature of law's

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[91] By way of evidence, our critical examination does not aim to contest the conventional character of this social practice by which the 'confidence' in or the 'effective respect' for the official authorities within a social group is constructed. It seems clear to us that it is not a question for the conceptual analysis of law of conditioning the law to some outdated natural law which would aim to define the conditions of legitimacy of the social contract. The question is of quite another nature.
[92] *Ibid.*, p. 180.

governance" which "is that it purports to govern by *creating reasons for action*".[93] By 'normative dimension', I mean the requirement for procedural conditions allowing an 'optimised and common'[94] reconstruction of the representations mobilised by the creation of these 'reasons for action'. These conditions, as one has noted throughout our analysis of the conditions of cooperative action, are linked to the conditions of realisation of common intentionality aimed at by the social practice of recognition that is constitutive of the conventionality of law. Moreover, as has just been seen, an adequate epistemological understanding of the theory of the norm obliges a good construction of the nature of the intentional aim carried by every norm. Is it not, furthermore, symptomatic that Coleman, while taking up Bratman's analyses regarding the internal conditions of satisfaction of the shared intentionality which defines cooperative action, seems not to take up the distinction Bratman makes between 'prepackaged cooperation' and 'shared cooperative action'?[95] Certainly, Bratman does not entirely reconstruct the normative requirement implied by his own refusal of every mentalist approach to shared intention. But he still retains the idea of a possibility of the realisation 'in variable and progressive extension' of the requirement borne by such a form of action. It is this same idea of 'degrees of progressive extension' that we radicalise here in order to show its epistemological requirement and to draw out its consequences on the level of a normative dimension internal to the content of the concept of law. As one observes, such a normativity is not at all substantive nor even procedural in the sense of Habermas or of Rawls. The procedural requirement that it carries remains internal to a conventionalist approach to law and results from a 'descriptive or speculative' grasp of the conditions of possibility of the operation of judgment by which the rule of recognition of every social group is defined and interpreted.

Highlighting this normative dimension of the 'content of the concept of law' (and not of the 'content of the law of a particular social community') allows finally a last extension of Coleman's reasoning. In effect, it would oblige the extension of the conditions that Hart and Coleman define as 'conditions' which must be met in order to meet the requirements of a social regulation by the law. At the same time, this would allow the highlighting and overtaking of the somewhat idealised image to which this positivist approach leads and which consists in supposing that, from the establishment of the formal structure of the modern state, all the conditions required for the regulation of our societies have been assembled. This supposition is obviously linked to the fact that Coleman, following the dominant positivist approaches, considers that the existence of law, beyond the 'practice of recognition of law' by the authorities charged with its application, is only a function of the simple *effectiveness* of the respect for the decisions of these public authorities by the majority of the population. We do not come back here to the insufficiency of this analysis of the 'practice of respect for and of adherence to the organisation of a way of life' in terms of simple *empirical effectiveness*.[96] But it is interesting now to note that it leads also to an

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[93] *Ibid.*, p. 71.

[94] As we have seen above, an optimisation, that is, an extension of the representations, does not mean the illusory search for an 'optimal representation'.

[95] M. Bratman, "Shared Cooperative Activity", *Philosophical Review*, 101/2 (April 1992), p.339.

[96] As has been seen above, no majority practice of respect for an institutional structure can be analysed outside the aim and the perception of a common way of life that is judged to be rationally acceptable. One is also in a position to see the extent to which Dworkin rightly intuits this insufficiency of the positivists, even if he fails, because of his own epistemological shortcomings, to construct it adequately. It is in effect this insufficiency of the positivists that Dworkin attempts to highlight when he says that every legal system is linked to a form of institutional morality. By that he means, rightly, to emphasise that ultimately the existence of law does not depend on a factual practice that would be independent of a design for an acceptable way of life, of a form of collective action concerning good reasons for action. But in the same way that it is surprising that Coleman does not apply his model of '*shared cooperative action*' to the practice of 'effective respect for the law by the majority of the population', it is also surprising that Dworkin does not apply his "interpretivist" model to the determination of this institutional morality. In the same way that Coleman presupposes the choice of those who would be instituted as the 'official authorities' by the 'social contract' as given, so does Dworkin suppose as given the institutional morality that it will be for the judges to adapt interpretively according to the injunctions of the real. It is this that explains the somewhat naive omnipotence that Dworkin accords the judge in this mission in which it would be

idealised representation of the form of collective action by which a group aims to regulate its behaviour. Idealised,[97] because the form of empirical effectiveness to which Hart and Coleman (or Kelsen) refer is defined in such a way that it is supposed realised in the great majority of modern societies. Outside the limited and transitory case of revolution, the effectiveness of a political power on a territory would simultaneously express the fact that all the conditions that guarantee the accomplishment of the regulatory function of law are assembled. Except in situations of crisis and of temporary destabilisation, the conditions of satisfaction of governance by law are supposed as having been assembled from the point of the establishment of the institutional structures of the modern state (and independently, of course, of forms of government or of legitimacy - dictatorial or democratic, for example - which they serve). If one translates this into more technical language, one can say with Coleman that "regardless of the diversity of their aims or purposes, the shape and structure of mature legal systems are similar in the ways Hart claims they are: that is, as consisting in primary and secondary rules, including especially a rule of recognition, rules of change, and rules of adjudication".[98] This simple formal organisation of the state is thus supposed to embody the simple institutional conditions of emergence of this culture of law that conditions the accomplishment of the function of 'guidance of conduct' within the social group that defines the law.

By externalising under the form of an empirical effectiveness the condition of the respect for the decisions of the public authorities by the majority of the population, this is therefore not analysed as the meaning effect of a collective action finalised by a common perception of the 'reasons for action'. The possible 'constraints' which would result from an analysis of the conditions of possibility of the operation of judgment mobilised by this form of collective action are therefore not analysed in themselves. *It follows that this function of regulation by the law is supposed effected independent of every specific institutional arrangement that would mobilise the elaboration of the norm with a view to associating its ultimate addressees, that is, the citizens.* The question of institutional arrangements is exclusively reflected at the level of the official authorities charged with the operations of elaboration and application of rules. The question of the necessary adaptation of our current governance arrangements with a view to improving the conditions of participation of citizens in these operations cannot be posed and understood as resulting from a correct theoretical construction of their conditions of possibility.

No doubt, as we have seen, a 'genetic approach' to the conventionality of law and the 'normative' dimension of the concept of law which it allows to be highlighted already oblige a questioning of such an idealised image of the conditions of satisfaction of the function of governance of our modern societies by the law. But is it not the case moreover that our 'epistemological' argumentation finds a 'sociological' support in the simple observation of the concrete dynamic of our societies? Doesn't such an observation effectively oblige us to confirm the necessity of a more nuanced analysis of the requisite conditions under which the

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incumbent on him to 'say' what the best possible representation of the institutional morality in an ever-changing context would require.

[97] Notice, therefore, that this idealisation in the positivist approach is reminiscent, beyond its differences, of the type of 'mentalist' belief to which the idealised and illusory omnipotence that Dworkin accords the judge boils down to. Moreover, (even if our argumentation takes different ways and leads to a distinct approach to the 'normative' dimension of the concept of law), the observation made here is not without links, it seems to us, with certain of Stephen Perry's intuitions when he attempts to highlight a relationship in the 'normative' presuppositions of the approaches to the concept of law developed by Hart and Dworkin (S. Perry, "Interpretation and Methodology in Legal Theory", in A. Marmor (ed.), *Law and Interpretation. Essays in Legal Philosophy*, Oxford, Clarendon P., pp. 97-135; "Holmes v. Hart: The Bad Man in Legal Theory", in S. Burton (ed.), *"The Path of the Law" and Its Influence*, Cambridge (UK), Cambridge U.P., 2000, pp. 158-196).

[98] *Ibid.*, p.145. It matters little to note here that Coleman, without however proposing other conditions necessary for the exercise of the function of guidance of conduct which defines the law, nevertheless proposes that these conditions do not prevent the rule of recognition taking an "inclusive" form which includes 'political morality' as a condition of legality (pp.146-147).

law is 'capable of guiding conduct'?[99] We take part today in an attempt, in several domains, to reflect on a reorganisation of the procedures for the construction of normative solutions to compensate for the insufficiencies to which the usual procedures lead. But where do these insufficiencies come from if it is not from the fact that the *use* made of the norms by the addressees leads to unintended effects. Let us put this in other words. The meaning given to the norm at the time of its application in social reality (that is, at the time of its production of meaning effects) leads to the norm being rendered inoperative or ineffective with regard to the normative objective that the authority aimed to achieve. The whole debate on the 'theory of governance' for the past 40 years (whether in economics, with the suggestion of reinforcing the mechanisms of coordination by the market or of contractual cooperation, or in political philosophy, with the suggestion of reinforcing the mechanisms of participation and deliberation) results in the end from the same necessity to adapt our modes of construction of norms so as to take better account of the representations of the addressees of these norms and, as a consequence, the 'motivations' which condition the use they make of them. What this current reflection notably reveals is that where dissensions among the perceptions of the problem that the legal norm must attempt to resolve are greatest, the usual procedures of the construction and application of norms turn out to be 'inefficient' in guaranteeing an adequate resolution of the problem. The 'capacity' of public authorities to construct the solution and to identify the 'expected' meaning of the norm is, therefore, itself conditioned by a 'recognition' of this meaning by the ultimate addressees of this norm. In these contexts of strong disagreement, one accordingly understands the emphasis increasingly placed by the current theory of governance on the necessity to reflect the best arrangements capable of integrating this 'condition of recognition' and of enabling this cooperative construction of a common meaning. This indicates that the question of 'confidence' or of 'recognition by the private addressees of the rule of law' cannot be reduced to the simple classic question of the supposed adherence of the citizens to the authorities in charge of a determinate legal order (the condition of 'global' effectiveness identified by Kelsen, Hart or Coleman). Such a manner of understanding the 'recognition' by the citizens turns out to be reductive and inadequate to account for the condition of 'confidence', of 'motivation' or of 'perception' which conditions the operation of semantic productivity of a norm in social reality.

2. The concept of law and the theory of governance

One of the questions posed in this article was that of knowing whether or not it was epistemologically justified that the conceptual analysis of law remains sealed in relation to the 'normative' question of the necessary reorganisation of our governance arrangements. Is it justified that legal philosophy remains self-contained in relation to normative research on the theory of collective action that is at the heart of contemporary research in the social sciences?

One can see the extent to which these questions call for a negative response. Whatever the significant gains achieved by recent hermeneutic approaches to the judicial function and the pragmatist redefinition of the rule of recognition, a 'more reflexive' extension of the operation of collective regulation that defines the law turns out to be necessary. Legal positivism has certainly progressively tried to adapt its definition of law to a better consideration of the function of the application of rules. As we have already recalled with Green "by the mid-twentieth century, …its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law". In this sense, one could say that legal theory, by taking account of the reversibility of the operation of application, has progressively tried to integrate the reflexivity of normative judgment by which a social group attempts to act on itself in order to regulate its behaviour. By internalising

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[99] *Ibid.*

Kelsen's *Grundnorm* and emphasising the reflexive dimension of the rule of recognition, Hart has, from this point of view, made decisive advances. Similarly, the pragmatist redefinition of the rule of recognition proposed by Coleman and its explicit borrowing from the philosophy of action is part of the same movement. Moreover, this 'pragmatist' turn expresses the desire to integrate in a rigorous way in the definition of law the 'holism of usage' which Dworkin intuits but fails, as Putnam clearly saw, to analyse epistemologically.

However, by holding to a symmetrical approach to reversibility, the theory of reflexivity mobilised by these various approaches to law leads, at one moment or other, to attributing to the social body a 'capacity' of satisfying the rational expectations borne by its regulatory aim. The traces of this 'mentalist' presupposition, linked, in the last analysis, to a schematic approach to normative judgment, explain this focus on the simple function of the application of rules by the judge (or by the public authorities). Dworkin, and his somewhat naive idealisation of the judge as the organ guaranteeing the self-adaptation of the requirements of morality internal to the social group, is obviously the clearest example. But Coleman's difficulty in penetrating what remains the black box of the conditionality of the 'recognition' of rules by the members of the social group reproduces an epistemologically analogous error.

From this point of view, either the approaches inspired by the economic analysis of law - in any event the Coasian or Williamsonian versions – or the sociological approaches of self-regulation (which moreover describe themselves as 'reflexive') or again the approaches based on Habermas's formal pragmatics mark an advance in relation to the positivist or hermeneutic approaches to law (even if, conversely, these last approaches certainly have the advantage, principally for those linked to the debates sustained by analytical positivism, of constructing in a more rigorous manner the technical questions required by an analysis of the concept of law). It is also no doubt the case that these various 'critical' approaches, whether economic, sociological or philosophical (as in Habermas) remain weighed down by an insufficient epistemological construction of the theory of the reflexivity which they attempt to mobilise. It is obvious in the case of the economic analysis of law linked to rational choice theory or of the sociological approaches inspired by Luhmann's theories of self-regulation.[100] Albeit in a more subtle and complex way, a similar observation of reflexive insufficiency can also be addressed to Habermas.[101]

But at least these different 'critical' approaches express, implicitly or explicitly, the same intuition that a better understanding of the concept of law obliges one to overcome the reflexive insufficiency of the positivist or hermeneutic approaches currently available and to suggest that the regulatory function of law would require, for its realisation, an extension of the reflexivity of the institutional arrangements of governance.[102] Recall the critique

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[100] In these 'reflexive' approaches to self-regulation, everything seems to happen as if the 'capacitation' of the actors in a 'sub-system' was supposed to exist in itself and, therefore, was supposed inscribed in the sub-system, a little like the 'codes' which Teubner, following Luhmann, also supposes as 'given'. To suppose that the simple convocation of existing actors is sufficient to create the conditions for the elaboration of a solution adapted to the environment implies that the determination of the 'equilibrium' solution between the sub-system and the context would result from the simple application of rules mentally mobilised by the actors of the subsystem. Such a mentalist approach to action implies a denial of the reflexivity which Luhmann's functionalist approach nevertheless had the project of safeguarding. See also for the neo-institutionalist economic approaches, *Toward a Theory of Governance, op. cit.*, chap. 1.

[101] *Ibid.*, chap. 3.

[102] In the same perspective, they also have the merit of taking better account not only of the parallel evolution of the debate in the social sciences, but also of the evolution of positive law. The contemporary reflection of the social sciences on the necessary re-questioning of the traditional forms of coordination by rules is, in effect, expressed by the significant legal transformations of our modes of construction of rules in several important sectors where, in a more tangible manner, the difficulty in constructing collective choices is experienced. These transformations are directly linked to the search for legal arrangements ensuring better cooperation between decentralised actors. This explains the new reflections emerging, principally in the Anglo-American literature, on the phenomenon of the contract, notably in the line of thought opened by the theory of relational contracting initiated by I.R. Macneil ("Contracting Worlds and Essential Contract Theory", 9 (3) *Social and Legal Studies*,

addressed, in the seventies, by the economists to the jurists.[103] It consisted in denouncing the 'reflexive' insufficiency of the technique of governance by the 'rule' (the so-called technique of governance by 'command-and-control') and its inability to take account of the reversibility of the operation of application, that is, the dependence of the effects of a rule on the use that will be made of it by its addressees. This is also why the economists would suggest more 'decentralised' forms of our governance arrangements.[104]

Similarly, Habermas perceives the insufficiency of reduction of the conditions of validity of the law to the simple 'cooperative' organisation of the practice of the judges. Habermas perceives that the constraints imposed by the realisation of the 'function of governance' of modern law requires a reorganisation of our governance arrangements which goes beyond the simple 'cooperative' organisation of the judicial apparatus of the modern state or the implementation of the somewhat naive 'heroisation' (to use Habermas's felicitous expression) of the judge to which Dworkin's hermeneutic approach leads.[105] The procedures for the elaboration of rules must be adapted, in Habermas's view, in order to allow a better respect for the conditions of possibility of the normative judgment that the communicative theory of law and politics allows to be highlighted.[106]

Without in any way validating the whole Habermasian analysis, it is nevertheless the same route that we believe must be followed. A better understanding of the conditions of realisation of the normative requirement borne by the concept of law (that is, the conditions of realisation of law's guidance function) requires a critical evaluation of the reflexive insufficiency of our current governance arrangements, that is of our forms of production of norms. That is not say that one in any way challenges the *descriptivist* project of the positivist approach and the positivist denunciation of the normative approach of the usual forms of natural law. But this perhaps indicates the necessity of rethinking the link that inevitably exists between fact and value and of taking account of what Putnam calls "the collapse

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2000, pp.431-438). One can find an exemplary application in the ongoing restructuring of the regulation of the public sector (see notably in this regard J. Freeman, Collaborative Governance in the Administrative State, 45 *UCLA L. Rev.* (1997), 1ss.; (2000) 'The Contracting State', 98 *Florida State U.* L. Rev., 155 s; (2000) 'The Private Role in Public Governance', 75 *N.Y.U. L. Rev.* 543ss.; P. Vincent-Jones, (1999) 'The Regulation of Contractualisation in Quasi-markets for Public Services', *Public Law*, pp.304-327; (2000) 'Contractual Governance: Institutional and Organizational Analysis', *Oxford Journal of Legal Studies*, 20(3), pp.317-351; see also, C. Scott (ed.), *Regulation*, Dartmouth, Ashgate, 2002).

[103] As we have indicated above, many American jurists believed they could find, in a renewal of judicial activism, the means of compensating for the weaknesses of the Social State in assuring an 'effectuation' of the fundamental rights inscribed in the Constitution.

[104] This proposition of decentralisation does not necessarily lead to the validation of the market mechanism alone. The economist himself will become increasingly aware that this mechanism must often be accompanied by other institutional mechanisms with a view to guaranteeing the effective cooperation of the various actors concerned by the collective action to be regulated.

[105] Or again, in a more communitarian register, that inspired by Gadamer and proposed by M. J. Perry (*Politics and Law*, Oxford, Oxford UP, 1988, 152ff.) which sees, as Habermas emphasises, "the constitutional judge in the role of a prophetic teacher, whose interpretation of the divine word of the Founding Fathers secures the continuity of a tradition that is constitutive of the community's life" (J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratishen Rechtstaats*, English trad by W. Rehg*., Between Facts and Norms. Contributions to a Discourse, Theory of Law and Democracy,* MIT Press, Cambridge (MA), 1996, p. 258).

[106] That is, an approach to the democratic will-formation which "does not draw its legitimating force from the prior convergence of settled ethical convictions", but from "on the one hand, the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation and, on the other, procedures that secure fair bargaining conditions" (J. Habermas, *Ibid.*, pp.278-279). This perspective is still more evident in the 'experimentalist and poly-centered' approaches to forms of production of norms developed, on the basis of collective learning theories, by M. Dorf, J. Cohen and C. Sabel who perceive very well the shortcomings of traditional approaches to our modes of governance and of production of norms (see especially M. Dorf and C. Sabel, A Constitution of Democratic Experimentalism, 98 *Columbia L.Rev.* (1998), 267ff; J. Cohen and C. Sabel, Directly-Deliberative Polyarchy, in *Private Governance, Democratic Constitutionalism and Supranationalism*, (C. Joerges and O. Gerstenberg, eds.), pp.1-30, Proceedings of the COST A7 seminar, European Commission, 1998).

between fact and value".[107]

Is it not moreover interesting to note the extent to which both in Hart and in Coleman a relation to the ideal also permeates their conceptual analysis of law? It is certainly no longer a matter, as in Dworkin, of an ideal governance. But it is henceforth a matter of the functionalist ideal of guidance. As has been indicated above, Coleman explicitly tells us that, following a sort of process of natural selection or of collective learning, our modern legal systems are the result of a form of 'maturation' that has reached its end. The establishment of our modern legal systems expresses, in his view, the implementation of the conditions necessary for the 'satisfaction' of this guidance function of law. The idea is therefore that the ideal of guidance has its conditions of satisfaction always already given even if this state of fact is henceforth conceived as the result of a social acceptance or learning specific to the emergence of modern societies. As in Dworkin, albeit differently, the conditions of satisfaction of the realisation of the ideal are supposed to be guaranteed by means of a formal rule (taking the form of a process of natural selection or of a definitively accomplished operation of social learning). Our position is exactly the opposite. It is a matter, in effect, in the name of a better *descriptive* understanding of the conditions of semantic productivity of normative judgments of showing that the conditions of realisation of the 'ideal' borne by every rule require a *normative and critical* approach to our current governance arrangements, that is, to our forms of production of norms. It is not a matter, in this same sense, of denouncing the conventionalism that Coleman rightly opposes to Dworkin. It is a matter, on the contrary, in the name of a radical understanding of the holism of usage which underpins this conventionalist approach, of understanding better the reflexive nature of the conditions of realisation of this form of collective action by which a group aims to act on itself in the horizon of what it judges rationally acceptable.

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[107] H. Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, Cambridge (MA), Harvard UP., 2002.

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