*Beyond the Judge: From Hermeneutic and Pragmatist Approaches to a Genetic Approach to the Concept of Law**

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I. Introduction

Philosophical inquiry, J. Coleman[1] recently rightly said, is an exercise that develops austerely and modestly, like a variation on a familiar theme rather than like the chimerical construction, often too prized today, of a new system for its own sake. But this does not prevent advances and shifts. To pursue the musical metaphor, the quality of the variations become evident when, on the basis of a familiar theme, they open up to stimulating and even sometimes destabilising interpretations[2] and thereby reveal an unknown face of the seemingly over-familiar.

Of course, this observation also applies to philosophical reflection on law. In fact, it may even take on broader significance here. A brief look at the history of philosophy of law during the last century seems indeed to attest that those "variations" that are generally considered to have been truly "inspired" are the work of authors who have been especially aware of the necessity to learn, not only from the history of their own discipline, but also from a discussion conducted in the background: the meta-theoretical discussion of epistemological reflection.[3]

[1] "Real philosophers not only learn the history of their discipline; they internalise 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*, Oxford, Oxford University Press, 2001, 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 mention just two of the last century's most influential advances in legal positivism, recall the significance of the links forged by Kelsen with logical positivism and with the late nineteenth century neo-Kantian revival, and those forged thirty years later by Hart with the philosophy of ordinary language.

There are many indications that a favourable moment is approaching for the emergence of such a new variation. It would be linked mainly to the debate prompted by the revisiting of traditional issues in legal theory in the light of the recent pragmatist[4] revival in epistemology.[5]

One of its most representative and fully developed expressions is Coleman's project of "pragmatic conceptualism"[6] and his proposal for what might be called a pragmatist turn in the philosophy of law. We will therefore take it as the starting point for our own reflections. Of course, this proposal for a pragmatist turn is not without predecessors. The interpretivist or hermeneutic turn that governs numerous recent studies in philosophy of law itself reflects the will to respect a form of epistemological internalism which anticipates the project for a pragmatist approach to legal theory. Similarly, beyond the sphere of philosophy of law, the anti-foundationalist trend which has characterised a significant part of American legal scholarship since the sixties anticipates the pragmatist turn, although in a still more implicit and less developed way. Certain features specific to the pragmatist turn, however, augur the fruitfulness of this approach.

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[4] The term "pragmatist" is often the object of less than rigorous usage in the legal literature, especially that of the USA. It is often used to refer to the "sceptical" or instrumental analysis of law, as in Dworkin and several contemporary writers who make allusions in passing and in an exegetically problematic way to Rorty's pragmatism. This is not how "pragmatist" is used in the present text. Coleman, one of the main initiators of the 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**, *The Practice of Principle*, *o.c.*, p. 6, note 6. In the "holistic" (*i.e.*, internalist or, to use an expression more directly related to Putnam, pragmatist) perspective opened up 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 a fuller development of this point, see *infra* III B 1 a.

[5] Perhaps one of the earliest 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* [*Legal Theory* 1995, pp. 5-80]; see also *infra* III B 1 b for an analysis of Putnam's position in this debate. Besides Leiter's and Coleman's work, that of such authors as S. Perry, S. Shapiro, and B. Zipursky can be placed within this movement, although explicit references to epistemological discussions or the pragmatist approach are not always found there, and despite the existence of certain differences in their methodology and hypotheses. See *infra* for references to some of this work.

[6] This is the excellent expression proposed by **B. ZIPURSKY** ["Pragmatic Conceptualism", *Legal Theory*, 2000, pp. 457-485], which seems to be explicitly endorsed by Coleman [*The Practice of Principle, o.c.*, p. 10, note 12]; recall however that this methodological approach is not shared by all the authors who, to different degrees, participate in the movement identified here. For instance, on the differences between this form of conceptualism as proposed by Coleman and Zipursky and that proposed by Leiter, see: **J. LENOBLE and M. MAESSCHALCK**, *Toward a Theory of Governance: The Action of Norms*, London, Kluwer*, 2003, pp. 296-ff.

First, the project for a pragmatist turn (and more broadly the movement of which it is a privileged expression) has introduced a salutary clarification to current debate in legal theory. Thanks to a patient rereading of current findings in positivist research on law (and of certain elements of the background to these findings that help in gauging their import),[7] it has been possible to reinterpret the theoretical significance of the theses in question and thus assess what is at issue in several current debates. As we shall see, it allows in particular for an understanding of why the interpretivist or hermeneutic turn in philosophy of law, and more generally the central place assigned to the judge in current reflection on law, do not yield the critical denunciation of legal positivism that their supporters still too often continue to credit them with.

However, this first feature reflects a second, deeper one. Of course, simply listening attentively to the lessons of the past helps place the purported advances of much current reflection on law in perspective. It does not suffice, however. The advance made by the pragmatist turn consists mainly of its reformulation of the lessons of the past (and the questions underlying them) in the light of a meta-theoretical, that is, epistemological, reflection. As the term indicates, the *pragmatist* project, by deploying the theoretical clarity of recent epistemological discussion in analytic philosophy, leads to the restoration[8] of an essential link between legal theory and a *theory of judgement*. Elucidating the concept of law comes down to understanding the practice by which a social group produces shared normative meaning. Such understanding necessarily presupposes a degree of understanding of the process by which meaning is produced in (social) reality. This is the issue at the heart of any theory of judgement: it aims to reflect on the conditions for possibility of the operation (*i.e.*, the action, the practice) by which judgement produces meaning effects.[9] In reconstructing the conditions for the process of effecting (that is, the process of applying) a judgement,

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[7] Besides J. Coleman's, B. Leiter's, and S. Shapiro's works on Hart's theory, the importance of Leiter's work on legal realism (which has led to a reinterpretation of its epistemological significance; see **B. LEITER**, "Legal Indeterminacy", *Legal Theory*, 1995, pp. 481-ff.; "Legal realism and Legal Positivism Reconsidered", *Ethics*, 2001, pp. 278-301) and of S. Perry's works on Holmes (see *infra* note 96) must not be overlooked.

[8] "Reconstitution" 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 for possibility of governance by law with an analysis of the conditions for possibility of the operation of judgement.

[9] Thus epistemological reflection refers here to a theory of judgement rather than having the more methodological, reductive meaning of "reflection on the method to follow in order to produce scientific knowledge", which it is sometimes assigned in the philosophy science.

epistemological reflection provides a necessary and privileged means of revealing the conditions for the possibility of the practice by which a social group produces and *recognises* a normative authority, that is, a means of revealing the conditions for the possibility of governance by law. The pragmatist turn, advanced mainly by Coleman in philosophy of law, leads to the elaboration of the discussion surrounding these presuppositions and to its analysis in the light of critiques of mentalism (associated in particular with the work of Quine and Putnam) that embody the main trends in current epistemological thought.[10]

It is the *explicit* insistence on this epistemological requirement that accounts for the fruitfulness of the pragmatist turn proposed by Coleman. Certainly, as already indicated, for some time now many authors had been revisiting the traditional questions of reflection on law in the light of the instruments developed by the philosophy of language, Quine's and Wittgenstein's[11] holistic approaches included. The internalist approach Dworkin has attempted to develop on the basis of his hermeneutic perspective is one revealing example. But, as will be seen below with regard to Dworkin, the advance inherent in the pragmatist turn as proposed by Coleman is due to the effects associated with the *explicit* invocation of epistemological arguments. This explicit invocation not only makes it possible to reformulate the fundamental question of theory of law as the question of the conditions of emergence of a given social practice (be it interpretive or other) of adherence to a shared normative meaning. It also reveals the twofold inadequacies of current theories of law. First, the inadequacy of hermeneutic theories,[12] which, though they seek to expose the inconsistencies of positivist theories with regard to a holistic approach to meaning, are themselves incapable of making explicit the requirements of such an approach and respecting them. Second, the parallel inadequacy of current representations of legal positivism,[13] which, in spite of their accurate insight into the need for a conventionalist approach to law, remain incapable of adequately inferring all the conditions of emergence of such an approach.

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[10] On J. Coleman's presentation of these main trends, see *infra* note 69.

[11] For some representative references to this work, see *infra* note 26.

[12] And (to go beyond the strict boundaries of philosophy of law) the inadequacies of the anti-foundationalist approach of American legal scholarship.

[13] Note that, in reframing the true implications of recent versions of legal positivism in epistemological terms, authors associated with the pragmatist turn are also clarifying the exact nature of the arguments that must be addressed by anyone who (rightly) wishes to denounce the inadequacies of positivist legal theories, at least as they stand at present

This is where the central issue in our own reflection emerges. While highlighting the significant gains made by the process that the pragmatist turn has launched in theory of law, we nevertheless wish to extend it in the name of the epistemological requirement that this turn is working to enact. In relying on the especially highly developed version of the pragmatist turn that J. Coleman has provided us with today, we shall seek to apply to it the movement that H. Putnam, in the figurative terms he uses to explain his analysis of the limitations of cognitivist theories, has described as "the trick attributed to adepts in jiu-jitsu of turning an opponent's strength against himself".[14] In other words, we wish to show how Coleman's explicitly epistemological project contains within itself requirements that make it necessary to deepen and indeed modify his proposed pragmatist reformulation of current theses in legal positivism. These modifications relate to the way that the conditions for possibility of the conventional social practice by which a group produces and recognises normative authority must be understood. We will show how a non-mentalist approach to the operation of judgement entails extending the requirement of what Hart has called "the internal point of view" specific to this practice of recognition beyond the officials responsible for applying the rules (*i.e.*, mainly the judges). Our hypothesis is that an exact understanding of these requirements of the epistemological holism called for by the pragmatist turn entails revisiting a presupposition shared by the positivist and hermeneutical approaches, namely the conception of the operation of the production of normative authority mainly through the operation of judges' production of law. We will specify below the exact content of these modifications and its twofold consequences: first, an epistemological consequence that reveals the normative meaning of the concept of technical law; and second, a consequence related to the need for the theory of law to reconnect with political philosophy and open up to the current debate in the social sciences about the question of governance.[15] The latter

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[14] **H. PUTNAM**, *Representation and Reality*, Cambridge (Mass.), MIT Press, 1988, p. xii.

[15] This discussion is linked to the search for mechanisms for regulating collective action better suited to "maximising", to the extent possible, the satisfaction of the normative expectations of participants in the action. (For an overview of this debate and a philosophical analysis of it, see **J. LENOBLE and M. MAESSCHALCK**, *Toward a Theory of Governance*, *o.c.*; *Beyond Neo-Institutionalist and Pragmatist Approaches to Governance, synthesis report for the REFGOV research project*, REFGOV Working papers series : REFGOV- SGI/TNU-1, 2006, http://refgov.cpdr.ucl.ac.be/?go=publications). The renewal of this research approach during the sixties, which took place essentially in the USA, is reflected in particular in the use of the notion of "governance" to refer to what was traditionally called (in economics and political science) "regulation" or (in law or in political philosophy) "government". As R. Mayntz has said, "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 **A. HERITIER**, *Common Goods. Reinventing European and International Governance*, Oxford, Rowman & Littlefield, 2002, pp. 15-27, at p. 21. This new orientation in the approach to questions of "regulation" has so far relied on recognition of the inadequacy of both traditional forms of hierarchical control (command-and-control regulation) and that kind of self-regulation that is based

consequence is also implicitly introduced by the pragmatist turn, although inadequately. This is the case not so much because Coleman and Zipursky have used as their point of departure for their reflection a confrontation with the 'law and economics' approach; nor is it because Shapiro and Coleman borrow explicitly from theories of action whose significance in current reflection in social science is well known. Rather it is the case because from the very heart of the pragmatist reformulation of Hart's rule of recognition there emerges the notion that an adequate understanding of the conditions for possibility of the form of cooperative activity by which law is produced results in an inclusion of the need for specific institutional mechanisms. The opening up of the concept of law to the neo-institutionalist reflection at the heart of current debate in the social sciences is however only sketched out. It does result in a revisiting of the usual postulate in current approaches in philosophy of law, consisting of "inoculating" analysis of the concept of law against other analyses pursued by theory of

exclusively on recourse to market mechanisms (coordination of collective action exclusively by aggregating for individual preferences in a competitive manner). It was mainly developed in economic science, albeit in a close relationship with research in social psychology on *bounded rationality.* However, it was not without an impact in the field of reflection on law. In effect, reflection on the necessary transformation of the mechanisms of governance found ion our social democracies began developing in the fifties in the USA in relationship with the inadequacy of the institutional mechanisms set up by the New Deal for ensuring effective fulfilment of fundamental rights. To correct this inadequacy, it was initially proposed that recourse be had to judges in order to ensure better effective respect of fundamental rights. Under this approach, the judge takes on the role of therapist to the regulatory process and creates the conditions necessary for the effective fulfilment of the respect due to those rights. In order to dispose of the necessary means for this new style of judicial activism (inaugurated by the celebrated Supreme Court judgement in *Brown v. Board of Education* in 1954), judges equipped themselves with methods of intervention that resulted in a significant transformation of both the judging function (creating "public law litigation"; on this, see **A. CHAYES**, "The role of the judge in public law litigation", *Harvard Law Review*, 1976, pp. 1281-13156; **O. FISS**, "The Forms of Justice", *Harvard Law Review*, 1979, pp. 1-30; **R. MARCUS**, "Public Law Litigation and Legal Scholarship", *Journal of Law Reform*, 1988, pp. 647-657) and the administrative function. The idea is that the rationality of public policies developed by the administration must depend on the possibility given to all concerned interest groups to enlighten the authorities and take part in the development of regulatory compromises. This would lead the judge to subordinate the legality of administrative intervention to respect for all the procedural conditions that guarantee such participation; **R. STEWART**, "The Reformation of American Administrative Law", *Harvard Law Review*, 1975, pp. 1667-1813. This initial response to the perceived need to improve and transform our mechanisms for coordinating collective action has thus been of concern to jurists, because it put the exercise of the judging function in question. This accounts for the fact that in American theory of law, it came to be reflected in an intense critical reflection on legal process theory and the synthesis that the latter sought to put forward to resolve the inadequacies of both of Langdell's formalism and the realism of the thirties in dealing with the operation of the judge; **H.M. HART and A.M. SACKS**, *The Legal Process: Basic Problems in the Making and Application of Law*, Westbury, Foundation Press, 1994; and some forms of a recent effort at critical synthesis: **E. RUBIN**, "The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions", *Harvard Law Review*, 1996, pp. 1393-1438. Parallel to this there also developed numerous trends in a sociological and indeed economic and political-scientific perspective seeking to interpret the transformations of law produced not just by this initial response to the crisis in our social democracies but also by subsequent responses prompted in social science research by critiques of the initial reform. In the latter case, legal reflection reflected a closer tie with the discussions then current in the social sciences on the theory of governance. Many legal studies sought to import into legal thinking theoretical models developed by the social sciences. These included the thinking of neo-institutionalist economists in the tradition of Coase, that of sociological theory on self-regulation, that of the communicative theory of Habermas, and

governance (or political philosophy). Our hypothesis, in contrast, is that an inoculation of this kind must be critiqued for epistemological reasons. In prompting us to better formulate the epistemological requirements of an analysis of the practice by which a social group produces normative authority, the pragmatist turn provides a definitive opening up onto the path of its own deepening and renewed understanding of the conditions for possibility of governance by law. In so doing, it succeeds, as we will show, in justifying the opening up of the analysis of the concept of law to current debate in the social sciences; *i.e.*, to the normative question of the desirable reorganisation of our modes of production of norms.

We will proceed with our argument in two stages. Firstly, we will demonstrate how, in the synthetic version provided by J. Coleman, the pragmatist turn appears to pinpoint the inadequacy of both interpretivist critiques of positivism and the presuppositions of the theory of collective action that distort the usual way of formulating the rule of recognition as found in Hart (II). Secondly, we will demonstrate the way this pragmatist reformulation of the conventionalist definition of law demands that it be deepened in the direction of a genetic approach to the practice by which a social group produces normative authority.[16] We will also demonstrate the consequences of this deepening as regards the necessary opening up of the theory of law to the question of the desirability of transforming our modes of production of norms (III).

II. From a hermeneutic critique to a pragmatist redefinition of the rule of recognition

The main criticism of positivist theses since they rose to prominence within theory of law has usually been based on their inadequate understanding of the operation of the application of normative judgement. Positivist approaches were seen as reflecting an inadequacy associated with an epistemologically defective construal of the operations of judgement necessarily presupposed by any theory of norms. True, often enough these critiques were not formulated with explicit reference to this philosophical background. But we

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"experimentalist" approaches in deliberative democracy as currently expounded by J. Cohen, M. Dorf, and C. Sabel. On this, see *infra* III B, in particular notes 99, 101 and 105.

[16] As will be shown below (III and note 54), the point of calling our approach genetic is to emphasise the significance of the consequences associated with specific attention to the conditions for possibility of the conventional practice by which a social group produces norms, as well as attention to the epistemological rootedness of those conditions for possibility.

consider their having been presented this way to have two benefits. First, this approach pinpoints the true philosophical impact of the critical insight that has fuelled the regular recurrence of the critique of positivist approaches since the end of the nineteenth century. Second, it offers the benefit of framing the question in terms that make it possible to measure the limitations of the critique while opening up an approach to reformulating the valid insight this critique seeks to express.

That is our hypothesis. While this critique has often correctly perceived the inadequacy of positivist theories in relation to the operations of the application of normative judgement, it has remained riveted to a restrictive interpretation of those operations. This critique therefore missed its target and was open to a valid rebuttal by positivists. In contrast, *a shift in emphasis* in the way of construing the question of the application (or effectuation) of a judgement and a *broader conception* of the levels at which this question is posed within the theory of norms would allow for a clearer view of the direction in which the positive approach to law needs to be extended. This hypothesis strikes us as being all the more fruitful for being imbricated with the dynamics of the discussion internal to present-day legal positivism.

The most recent reformulations of the positivist analysis of the concept of law -more specifically, the pragmatist reformulation of Hart's rule of recognition- implicitly reflect growing recognition of the need for greater respect within theory of law for recent advances in the theory of action. While this pragmatist reformulation has itself remained tied to an incomplete construal of the conditions for possibility of action, the advance it has facilitated in current philosophy of law must not be underestimated. Besides making it possible to deepen the internal dynamics of positivist research, it has initiated its own extension by shedding light on the usefulness of a deepening examination of the conditions for possibility of the social practice by which normativity is constituted. This is the project that defines our own hypothesis, as will be seen below (III). However, before analysing this "pragmatist" reformulation of Hart's rule of recognition and the extension it calls for, we must conduct a rapid review of those critiques of legal positivism that bear on its inadequate understanding of the operation for application internal to any normative judgement.

As indicated above, this critical current, which has lasted until the present time, conceives of the question of the operation of the application of a norm in somewhat restricted

terms. That is, the critique often levelled at positivists is associated with the way the latter conceive of the operation of judgement. The operation of application internal to any normative judgement is conceived on the model of judicial operation.[17] This critique has taken two successive forms, the first of which we call the realist critique (A) and the second the hermeneutic critique (B). While most readers will be familiar with them, it will be useful to summarise them briefly. This will help in understanding the reasons for a "pragmatist" corrective to Hart's concept of law (C).

A. The realist critique

The realist critique essentially stemmed from work in the sociological and realist theory of law and sought to expose the lack of scientific precision in the positivist definition of law. As formulated by N. Bobbio, this definition is based on the following assessment of the facts: "it is true that law as presently in force consists of a set of rules for conduct which, whether directly or indirectly, are formulated and validated by the state".[18] The realist and sociological critics point out that this assessment is inaccurate as a *question of fact*, because it underestimates the 'creative' power of the judge in applying these rules. Critiques of this kind have been very legitimately rebutted. As L. Green reminds us, 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] Besides this, however, these critiques are fallacious in logical terms. It is worth reviewing two relevant arguments at this point.

One counter-argument is succinctly stated by N. Bobbio. As he points out, and as we have just seen in citing L. Green, "the creation of law by the judge […] is a reality […] that

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[17] On this, see *infra* III B 1 c.

[18] **N. BOBBIO**, "Sur le Positivisme", in *Mélanges Paul Roubier*, Paris, Dalloz, 1961, Vol. I, pp. 53-73, at pp. 61-62.

[19] **L. GREEN**, "Legal positivism", *Stanford Encyclopedia of Philosophy*, 2003, http://plato.stanford.edu/entries/legal-positivism, p. 2. In the same vein, L. Green notes elsewhere that although the earliest positivists, *i.e.*, Bentham and Austin, had, in their approach to the nature of law, emphasised the idea that law is "the command of a sovereign backed by force, by the mid-twentieth century […] this account had lost its influence among working legal philosophers; its emphasis on legislative institutions was replaced by a focus

ethical arguments come up against like arrows shot against a wall. Even the most faithful and orthodox partisans of legal positivism have been unable to do other than come to terms with this reality: the 'mechanistic' theory of interpretation has been abandoned by nearly everyone. Kelsen himself set the example".[20] However, N. Bobbio then observes that this fact does not in itself negate the positive theory of the sources of law according to which law is reduced to rules. We must choose one of two possibilities. Either, as many authors propose, we restrict the label 'sources of law' to the facts that the legal system recognises as productive of generally constraining norms. And, if so, even if through judges' decisions "the law in force in a given country is changed, is supplemented, is adapted to new situations, this does not authorise us to include decisions among the sources of law (where, of course, the institution of precedent does not exist)". The judge's decision in effect constrains only the parties involved. If it takes the form of a general maxim that tends towards becoming obligatory through the practice of the courts, "then the source of law in this instance is custom and not the judge". Or else, as advanced for instance by Kelsen, we extend the compass of sources of law to include individual norms. In that case, judicial decisions clearly do constitute a source of law. But "this elevation [of the judge's decision] is not dependent on a discovery of the creative power of the judge, because a sentence is an individual norm, both when it is the product of the judge's power and when it consists purely of an application of a general norm".[21]

H.L.A. Hart presented another counter-argument in *The Concept of Law* in 1961. It is well known that Hart shed light on the fact that the creative power of the judge results from the impossibility for any rule to lay out the cases for its own application. This argument definitively negates any theory of law that, under the pretext of extreme conceptualism or formalism, would deny or minimise this source of indeterminacy in order to restore a mechanistic concept of interpretation. However, Hart observes, we must also reject the position at the other extreme which, in the form of sceptical theory, would have it 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 just that a perspective of this kind must itself acknowledge at

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on law-applying institutions such as courts, and its insistence on the role of coercive force gave way to theories emphasising the systematic and normative character of law"; *Ibid.*, p. 1.
[20] *Ibid.*, pp. 67-68; N. Bobbio also embraces a position expressed by Carnelutti in 1951, according to which it is necessary to recognise, as do sociological theories, that "the decisive moment in the life of law is the judgement" (p. 68).
[21] *Ibid.*
[22] **H.L.A. HART**, *The Concept of Law,* Oxford, Clarendon, 2nd ed., 1994, p. 136.

the very least the existence of organic secondary rules of the court and other legislative authorities. As well, and most important, this perspective does not take account of a second dimension that the theory of language has been effective in revealing, which rests on the distinction between "mention and usage".[23] The fact is that what is specific to the behaviour of those who make use of the "norms" of law, whether as their ultimate addressees or as public authorities in charge of applying norms, relates to the fact that these norms "are *used* as rules not as descriptions of habits or predictions".[24] In reducing norms to predictions, we fail to take account of what emerges through our way of using them when we apply them. True, this does not negate the fact that judges often reason purely intuitively. But the sceptical perspective fails to differentiate between 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" on one hand; and on the other hand, "psychological questions as to the processes of thought through which the person went before or in acting".[25]

B. The hermeneutic critique

A second kind of discussion succeeded the first critique based on the judge's creative power. As we have just seen, no theoretical argument opposed to an understanding of law in terms of 'rules' can be inferred from the so-called sociological and realist approaches to law or the new light they shed on the functioning of the operations of judgement. But, according to some present-day theorists, the insight that produced these approaches remains valid, providing it is reformulated and displaced.

The question is in fact not that of the creative power of the judge – which in any case no one seriously doubts. The fact that this power exists does not *in itself* invalidate recourse to the notion of the rule as a way of accounting for the concept of law. According to these theorists, the question is rather that a more powerful analysis of *the way* judges exercise this

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[23] On this, and on the way this distinction, which emerged from the philosophy of ordinary language, made it possible to deepen the distinctions that Kelsen sought to establish (in particular between the point of view of causal explanation and the constructivist point of view that the science of law must embrace), see **H.L.A. HART**, "Kelsen Visited", in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon, 1983, pp. 286-ff.

[24] **H.L.A. HART**, *The Concept of Law*, *o.c.*, at p. 138.

[25] *Ibid.*, pp. 139-140. H. Hart is judicious in pointing out that the fact that our behaviour is often intuitive (and is therefore not the result of an explicit calculation performed in light of the rules) does not prevent it from constituting a true application of a rule. The proof of this is that when our behaviour is challenged, we seek to justify it by referring to the rule.

discretionary power entails an invalidation of the way that current positivist theory of law defines the concept of law.

The best-known representative of this recent critique is R. Dworkin, although the fullest developments of the justifications and philosophical extensions that it entails has not always been R. Dworkin himself.[26] His argument is very simple. As he emphasises, judicial practice shows that alongside rules in the strictest sense, judges often use 'principles' (which may or may not be expressed as written norms). Of course, use of these 'principles' constitutes on way of applying "rules" in the broad sense. But the importance of these principles (that is, the power to neutralise rules, in the strict sense, that their use makes possible) and their mode of operation lead, as R. Dworkin points out, to the putting into question of our usual understanding of what law consists of; *i.e.*, the conditions for its identity or existence. Thus clearer understanding of the way judges exercise their power of interpretation (that is, how they identify the 'meaning' of law) reflects back on our understanding of the question of the validity of law; *i.e.*, the conditions for its definition.

As R. Dworkin argues, the dominant theory of law is tainted with '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] However, as R. Dworkin points out, not all our disagreements can be reduced to this model. For example, there are certain words we use to confer what are often controversial interpretations on a social practice in which we participate. According to this hypothesis, our agreements and disagreements can be explained not by our obeying shared rules but by our shared or divergent interpretations of the same material. As Dworkin points out, the example of 'rules' of courtesy within a given society is particularly illuminating. The way members of a social group determine what is

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[26] Among the most interesting approaches within this recent effort at a critical destabilisation of the analytical positivist approaches deriving from H. Hart are certain Wittgensteinian analyses. See **D. PATTERSON**, *Law and Truth*, Oxford, Oxford University Press, 1996; "Law's Pragmatism: Law as Practice and Narrative", *Virginia Law Review*, 1990, pp. 937-965; "Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine", *University of Pennsylvania Law Review*, 1988, pp. 335-429. See also for a less critical perspective: **B. BIX**, *Law, Language and Legal Determinacy*, Oxford, Clarendon, 1993; **PH. COPPENS**, *Normes et Fonction de Juger*, Bruxelles, Bruylant, 1998; **T. ENDICOTT**, *Vagueness in Law*, Oxford, Oxford University Press, 2000.
[27] **R. DWORKIN**, *Law's Empire*, Oxford, Oxford University Press, 1986, p. 45.

required by courtesy is a function of an 'interpretive attitude',[28] which subjects these requirements to ongoing reinterpretation in light of the values that they must serve. "Law is an interpretive concept as courtesy in my imagined example".[29] In effect, "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 law is thus an 'interpretive concept', it follows, as Dworkin argues, that not only the positivist approaches of Austin (reduction of law to an imperative) and Kelsen (the normativist perspective), but also their more recent and subtle reformulation advanced by H.L.A. Hart in his work on the rule of recognition, would prove to be unacceptable. For Hart, as is well known, law can be explained in terms of social facts. These are of a particular kind: law is effectively made possible by a kind of convention or social practice that consists of agreement by the officials in charge of applying the law as to the criterion for the identity or existence of law. This practice can itself be formulated in the terms of a rule that Hart calls the 'rule of recognition'. It is this conventionalist approach to the criterion for legality, as framed in terms of the rule of recognition, that R. Dworkin wishes to critique and prove invalid. Such a conventionalist approach, he argues, would lack two defining features of legal practice.

First, the practice by which the law of a social group is identified is of an interpretive nature. It follows, argues Dworkin, that not all the criteria for identification can be formally defined in terms of 'rules'.

Then, this interpretive practice reflects the necessary link between law and morality, and consequently invalidates the positivist conception of a science of law that would be descriptive rather than normative. Law, Dworkin says, can be identified, whether by judges or scholars, only by means of the interpretation of the requirements of the political morality of

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[28] *Ibid.*, p. 47.
[29] *Ibid.,* p. 87.

the 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] According to Dworkin, then, the interpretive practice regarding what law consists of itself refers us back to the normative requirements of an institutional morality that is simultaneously immanent in the community[32] and the subject of ongoing reinterpretation.

Thus, as L. Green quite accurately points out, Dworkin rejects 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 organisation, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects".[33]

This hermeneutic critique of conventionalist approaches to law in terms of the 'rule of recognition' is itself nowadays the subject of definitive critiques which have made possible a productive deepening of legal positivism.

C. Law and social recognition: A pragmatist reformulation of the rule of recognition

From among the many objections levelled at this hermeneutic critique of legal positivism and more precisely at the version developed by Dworkin, we will address here only the one formulated by J. Coleman, which to us appears definitive. Clearly, Coleman has no intention of challenging the descriptive contribution made by hermeneutic approaches to the

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[30] *Ibid.*, p. 90.
[31] *Ibid.*, pp. 255-256.
[32] Of course, this new form of the doctrine of natural law in no way reinstates belief in an *a priori* definable moral content or any sort of moral intuitionism, which in our day has little epistemological acceptability. On the other hand, it is also clear that any judgements about this political morality must have a claim to objectivity. If this condition is not satisfied, Dworkin's theory cannot maintain coherence.
[33] **L. GREEN**, "Legal positivism", *o.c.*, p. 6. As R. Dworkin writes, "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"; **R. DWORKIN**, *Law's Empire*, *o.c.*, p. 96.

operation of judging. On the contrary, it could be said that Coleman achieves the same shift with respect to the hermeneutic approaches to the function of judging as these approaches themselves had effected with respect to the sociological and realist critiques of legal positivism. Recall that these critiques had erroneously purported to expose the reduction of law to a set of rules by pointing to the 'creative power of the judge'. It soon became apparent that a critique of this nature, whatever the evidence on which it relied, resulted in an impasse. Nevertheless, the hermeneutic approach had shifted and reformulated the perception of an inadequacy in formalist approaches, namely the reduction of the concept of law to the idea of the 'rule'. Clearly, Dworkin does not deny that the law consists of norms (rules and principles) which impose reasons for action. Rather, he proposes that a better understanding of the operation of judgement entails abandoning a positivist thesis that defines the criteria for the 'validity' (*i.e.*, for the existence) of norms in the terms of a 'rule of recognition'. Thus, his critique bears on the definition of the concept of law in terms of 'rules'.

Coleman's undertaking is to expose the inconsistency of Dworkin's critique (a). At the same time, however, he reformulates the notion of the "rule of recognition" in such a way as to definitively deny this critique any relevance (b). Let us take a closer look at each of these features of his argument.

(a) The objection levelled at Dworkin is as follows. Not only does Dworkin wrongly believes that defining law in terms of a rule of recognition presupposes a 'semantic' approach to the criteria for validity of norms, he also falls victim, in his approach to the operations of application in law, to an excessively formalist approach to law.

As was just recalled, according to Dworkin, the interpretive dimension of the law invalidates the positivist project of reducing the conditions for the validity (or for the identification) of law to a rule of recognition, that is, to the way that judges determine the necessary and sufficient conditions for a norm's membership in a given judicial system. According to him, a reduction of this kind effectively presupposes a semantic conception of law, that is, the idea that the criteria for membership (the condition for the identification of law) can be framed in a propositional form that corresponds to the content of the convergent behaviours of the officials in charge of applying of law. An approach of this kind is tainted with the semantic sting because it assumes that formal criteria exist for applying the term

'law'; *i.e.*, for identifying norms likely to be considered legal. Consequently, argues R. Dworkin, such an approach is incompatible with the idea of law as consisting of moral principles that are by their very nature subject to controversial interpretations.

J. Coleman rightly points out that Dworkin's error is to overlook the fact that the 'rule of recognition' need not necessarily be interpreted in semantic terms. It is in fact open to being conceived of in a pragmatist manner. In other words, Dworkin is right to reject any semantic interpretations of the concept of law (*i.e.*, the idea that the meaning of the term 'law' could be formally defined in a propositional statement).[34] Indeed, as Coleman points out, this rejection was already well framed by Wittgenstein in his discussion of rule-following.[35] But R. Dworkin gives the rule of recognition a restrictive interpretation. He supposes that for Hart, the rule of recognition consists of judges' convergent practice that, in and of itself, defines a given group's criteria for legality. Moreover, according to such an interpretation, the rule of recognition must be understood as a 'source thesis': that is, on this view the rule of recognition defines the 'social and conventional sources' that make it possible to identify the content of law. A thesis of this kind does not need to be linked to a conventionalist positivist approach. True, numerous positivists, including J. Raz, maintain this 'semantic' interpretation of the rule of recognition and of the definition of the criteria for legality. But it is possible to defend the idea that law is *in fine* defined by judges' social practices (the conventionalist and positivist approach) without subscribing to this semantic interpretation framed in the terms of a 'source thesis'. A social system can consider that its positive law depends not just on identifiable formal sources but also on its content's compliance with moral requirements. If legality is thus defined not just in terms of its formal and conventional source, but also in terms of its content, it is clear that its identification is a function of interpretations that are

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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 amounts to one more way of acknowledging the impossibility of reducing meaning to propositional content and the interpretive nature of judicial norms and of law in general. From this perspective, 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**, *The Practice of Principle, o.c.*, 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 it 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.

subject to controversy. Indeed, this is the view that Hart worked to defend and that Coleman has in turn adopted.[36]

But if the criteria for the identity of legality can no longer be reduced to propositional content that defines the formal criteria (the formal and conventional sources) for identifying the content of a specific judicial order, what does the rule of recognition mean? In such a case, the rule of recognition can only be defined in a 'pragmatist' manner; *i.e.*, by referring to the use that is made of it. On this view, the rule would be identified with a 'practice' of a more complex kind than one whose meaning could be reduced to propositional content. H.L.A. Hart and still more J. Coleman distinguish this practice by virtue of two features. First, this practice is associated not with all the addressees of all the judicial norms in a social group but rather only the officials in charge of its application.[37] Next, this practice must be of such a kind that it respects two conditions: it reflects the 'recognition of the obligatory nature' of these criteria for legality with respect to the officials in charge of applying law; and it incorporates the potentially conflictual aspect of interpretations of the contents of the normative requirements.

(b) It is with respect to this last point that Coleman deems Hart's hypotheses must be reformulated. This is where he deepens the analysis of the concept of law, using the gains made by the pragmatic theory of collective action. The interpretive dimension of the concept of law necessitates avoiding any excessively 'mechanical' understanding of the way convergent practice by judges, in relation to what is considered law within a given society, is constructed. If, within a pragmatist perspective, it is accepted that the meaning of the normative requirements (*i.e.*, the conditions of existence of law) emerge from the use made of

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[36] In this regard, Hart writes of 'soft positivism', Waluchow of 'inclusive positivism', and Coleman of 'incorporationism', in opposition to positivist approaches that defend an *exclusivist* interpretation of the rule of recognition and that thus view positivism's *social thesis* as a *social source thesis*.

[37] This is a feature that Hart takes over from Kelsen. If law exists only on the condition that it is practised comprehensively, the 'validity' of a rule is not a function of whether it is in effect practised and recognised by its ultimate addressee. It is only a function with respect to the practice of the officials in charge of its application. As Coleman writes, "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 practised, 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"; **J. COLEMAN**, *The Practice of Principle, o.c.,* 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 behaviour 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.

them within practices that attest to their recognition by those in charge of applying them, it remains to identify the nature of this practice, that is, to define its conditions for possibility.

Hart has already successfully revealed the nature of this social practice by pointing out that it is not to be understood as a simple 'factual regularity': it is defined by an "internal point of view" which expresses the fact that the performers of this "convergent" practice recognise that they "have an obligation" to comply with these conditions of legality.

But this internal point of view, observes Coleman, is not sufficient on its own to account for 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] An understanding of the conditions for possibility of legal regulation thus necessitates as well "explaining 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 behaviour as a norm, and focus instead on the normative structure of the pattern of behaviour 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]

Undoubtedly, Hart's insight into this requirement is valid. However, he has failed to carry his analysis of its precise nature to a sufficient depth. What is the reason for this inadequacy? Hart, observes Coleman, assumes that this convergent practice (the rule of recognition) results from a spontaneous effort at coordination among judges, as though potential conflicting interpretations in law inevitably and automatically eventuate in the choice of a common conventional solution representing a Nash equilibrium (that is, in the choice of the best possible solution or, if we believe, as Nash does, that there are several possible best solutions, one of the best possible solutions).[40] A conception of the rule of

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[38] "If I can create a reason by adopting a pattern of behaviour 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"; *Ibid.,* p. 97. Recall that we have directed a largely analogous critique against positivist theses, including those of J. Coleman; **J. LENOBLE and M. MAESSCHALCK**, *Toward a Theory of Governance, o.c.*, p. 283. The reason is that at the time when we were framing this critique we based our analysis on Coleman's

recognition as a 'coordination convention' derives from an analysis of the concept of law based on the conventionalist model of David Lewis.[41] As S. Shapiro has justly noted,[42] "Lewis's model of conventions[43] provides the positivist with a powerful argument in favour of the claim that in every legal system, legal officials follow conventions when determining which authority structure to heed".[44] As Coleman and Shapiro point out, problems of coordination among (legal) authorities relating to the determination of the criteria for legality are more complex. It would be non-reasonable to reduce them solely to the category of game that game theory labels 'coordination games',[45] which are solved by adopting 'coordination conventions' of the kind analysed by Lewis. A telling sign, Coleman points out, of this irreducibility of the rule of recognition to the convention model 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

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works prior to *The Practice of Principle.* Until that publication, Coleman had continued to defend an interpretation of the rule of recognition framed in the terms of "coordination convention". He nevertheless had already conceded with respect to his construal 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 **J. COLEMAN**, *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Oxford, Oxford University Press, 2001, pp. 99-147, at p. 120. It is in pursuing his analysis, in light especially of the work of S. Shapiro and M. Bratman, that Coleman reformulated his argument in *The Practice of Principle* (on this, see *The Practice of Principle, o.c.*, p. 94, note 29). Thus even if the terms of the critique of Coleman that we ourselves framed are no longer usable, it will be shown below (III) that its content and epistemological tenor continue to be valid and can be used in opposition to the reformulation for Hart's rule of recognition as proposed by J. Coleman in his latest work (as well as by S. Shapiro).

[41] **D. LEWIS**, *Convention*, Cambridge (Mass.), Harvard University Press, 1969.

[42] **S. SHAPIRO**, "Law, Plans and Practical Reason", *Legal Theory*, 2002, pp. 387-441, at p. 391.

[43] S. Shapiro recalls Lewis's definition of a convention: "A regularity R in the behaviour 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"
See **D. LEWIS**, *Convention, o.c.*, p.58.

[44] The relevant reasoning is easy to follow. "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 behaviour will continue"; **S. SHAPIRO**, "Law, Plans and Practical Reason", *o.c.*, at pp. 391-392.

[45] These games have a specific structure that is usually described using the model called "Battle of the Sexes" or "partial conflict game". An essential feature of this kind of game (as exemplified by a scenario in which a woman and her husband agree to attend an event together but must choose simultaneously and without collaborating, and where the man would prefer to go to a boxing match and the woman to the opera) is that the players have prior preferences such that "the players, although they have divergent interests, have more gain by agreeing than by disagreeing"; **B. GUERRIEN**, *La Théorie des Jeux*, Paris, Economica, 2002, 3rd ed., p. 54. And that agreement must translate into the adoption of an arbitrary convention as defined by Lewis. As Coleman states, "it would place an arbitrary and baseless constraint on our concept of law to stipulate that the social

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] This means that the conventional practice by means of which the rule of recognition is constructed is of a more complex kind than the one Hart had in mind. Accordingly, in illuminating the distinctly hermeneutic dimension of this practice, Dworkin, while mistakenly denouncing the conventionalism of Hart's positivism, is accurate in his perception of its inadequacy. This hermeneutic dimension entails not, obviously, the abandonment of the conventionalist thesis, but the deepening of the true nature of the operation of construction of this convention. The conditions for possibility of the emergence of this convergent practice cannot be reduced to rational choice of an arbitrary convention, allowing for a quasi-mechanical resolution of the usual problems of coordination, like those that can be resolved by adopting a rule of the road requiring drivers to keep to the right rather than to the left.

What, then, are these conditions for possibility? How are we to understand the structure of this collective action? Coleman says that it is both necessary and useful to take a detour via discussions in social theory and the philosophy of action. He believes it is appropriate to invoke here the model developed by M. Bratman in philosophy of action and called 'shared cooperative activity' (SCA). Naturally, this model of action is not unique to law. But this form of shared cooperative activity "might help us understand the nature of the practice of legal officials".[47]

The practice of recognition by means of which judges define the criteria for legal normativity within a social group cannot be thought as a form of shared cooperative activity, or SCA. Shared cooperative activity implies a 'shared intention'. But, as Bratman rightly

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practice among officials necessary for the existence of a rule of recognition must always be representable as a game of partial conflict"; **J. COLEMAN**, *The Practice of Principle, o.c.,* p. 94.

[46] *Ibid.*, p. 95. As stated by S. Shapiro (whom Coleman cites), "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"; **S. SHAPIRO**, "Law, Plans and Practical Reason", *o.c.*, p. 393.

points out, such an intention is not an intention found in minds: it is an attitude[48] reflected in a certain mode of organising cooperative practice. This is where the conditions for possibility of this specific type of action are revealed. M. Bratman points out that for the cooperative dimension that this shared intention calls for, various institutional mechanisms must be put in place. The organisation of such cooperative activity requires the implementation of an organisational framework in order to "coordinate our intentional actions", "coordinate our planning", and "structure relevant bargaining". These organisational conditions are designed to make possible the threefold 'commitment' that this 'shared intention' reflects: mutual responsiveness,[49] commitment to the joint activity,[50] and commitment to mutual support.[51] J. Coleman concludes: "the practice of officials of being committed to a set of criteria of legality exhibits these features; judges coordinate their behaviour with one another through, for example, practices of precedent, which are ways in which they are responsive to the intentions of one another".[52]

III. From a positivist to a genetic approach to the conventionality of law: A necessary deepening of the pragmatist theory of law

In the second part of this paper, we wish to show how the arguments presented by J. Coleman as a justification for reformulating the positivist approach to the concept of law impose a shift that is more significant that he himself realises and open up new perspectives in philosophy of law.

First, note that by reformulating Hart's thesis, J. Coleman incorporates in the positivist approach a certain normativity. For the function of law as a guide to be realised, the institutional conditions needed for the success of the cooperative action among the officials

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[47] **J. COLEMAN**, *The Practice of Principle, o.c.,* 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*, Oct. 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*, 1992, pp. 327-341, at 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.*).

responsible for applying the rule of recognition must be respected. The reason is that all forms of cooperative activity entail an intentional element and satisfaction of this intentionality cannot be assumed to be guaranteed by 'rules stored in the minds' of participants in this collective action. True, this normativity does not resemble the 'eternal moral normativity' to which theorists of natural law customarily refer. The present argument is much deeper philosophically: it relates to normativity at the level of the conditions for possibility[53] internal to the social activity by means of which law is produced.

At the same time, however, J. Coleman appears to be proposing that these conditions have been fulfilled since the birth of the modern state. The "normative" conditions for the existence of law would, on this view, thus have always been satisfied. At the moment when J. Coleman appears to recognise that the classical positive approach regarding the conventional nature of law should yield to what we call a 'genetic' approach to the 'conventionality thesis',[54] he also wipes out its effects. In our view, the reason is his inadequate understanding of the conditions for possibility of the concept of law and his reduction of these exclusively to the level of the classical conditions for organisation of the judicial apparatus in the modern state. This inadequacy is clearly the result of a theoretical inadequacy. In our view, J. Coleman's reasoning labours under a twofold limitation which results in two consequences whose recognition makes it possible to gauge the scope of the shift that must be effected in relation to the current debate on the concept of law. The present section of this paper will

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[52] **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 97.

[53] This is why we could also call this kind of normativity "transcendental", in the technical sense that Kant and Fichte gave the term. In this perspective, however, it is important to point out that these transcendental conditions are not to be understood as "ideal conditions for the producibility of norms" (which is the perspective adopted by Kant, who thereby restored a mentalist perspective; on this, see below) but rather what one might henceforward call "empirico-transcendental" conditions. Note too that such an approach, based on "empirico-transcendental conditions", addresses B. Zipursky's concern to adopt an epistemological position that "restores a place for conceptualism in law while avoiding the conservative and transcendental tendencies of discredited formalist theories"; **B. ZIPURSKY**, "Pragmatic Conceptualism", *Legal Theory*, 2000, pp. 457-485, at p. 459.

[54] By 'genetic' understanding, we mean an understanding that takes into account the conditions "for production" of the convention by which law is defined, *i.e.*, the conditions for possibility of this convention. Note that this obviously does not imply abandoning the conventionality thesis as such. According to this thesis, "legal authority is made possible by an interdependent convergence of behaviour 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)"; **J. COLEMAN**, *The Practice of Principle, o.c.*, pp. 70-71. Conventionality implies that the existence of the rule of recognition not depend "on substantive (moral) argument"; **J. COLEMAN**, "Incorporationism", in **J.COLEMAN**, *Hart's Postscript, o.c.*, p. 116. This conception of the authority of the rule of recognition also provides the explanation for 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 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.

develop the two points in question. First, however, an outline of their key features must be presented.

The twofold limitation that effects the pragmatist reformulation of the positivist thesis is revealed as a function of the theoretical instrument that J. Coleman himself deploys to underpin his own reformulation of the positivist thesis, namely the critique of mentalism in the theory of action.

First, as will be shown below, an in-depth understanding of this critique of mentalism would entail a radical extension of J. Coleman's understanding -and Bratman's, for that matter- of the conditions necessary to satisfying the intentionality inherent in any cooperative activity. This first limitation, though essential for gauging the nature of the improvements that it would be appropriate to make to our system of governance,[55] is nevertheless not essential to an understanding of the main reason for the inadequacy that compromises current approaches to the concept of law, whether positivist or hermeneutic (for instance, Dworkin's). Suffice it to point out this first limitation here without going into it further.

Identification of the second limitation, on the other hand, plays a major role in revealing the inadequacy that affects both classical approaches to legal positivism and pragmatist reformulations of it (*i.e.*, hermeneutic 'alternatives'). We will show how the argument J. Coleman opposes to Hart's can be turned against J. Coleman himself. A deeper analysis of the 'fact' of citizens' recognition of the authority of the officials in charge of applying the law reveals that this 'fact' is the product of numerous operations of judgement. Moreover, as will be shown below, a close examination of these operations of judgement reveals two essential facts. First, they reflect a search for "a maximisation of normative expectations" (intentionality) by the leaders of social groups. Next, this intentional purpose depends for its fulfilment on the conditions specific to the success of any cooperative activity. In other words, in contrast to what is understood under traditional approaches to the concept of law (whether positivist or hermeneutic), the conditions for production of the rule of recognition cannot be reflected upon exclusively by judicial authorities. The existence of law is also a function of the conditions set up to ensure recognition of the norm by the citizens for

whom the norm is intended. In other words, the possibility of law (that is, the possibility for a social group to be regulated by law) is also a function of the way that citizens 'recognise' their relationship with the 'officials', that is, of the way *citizens organise their form of the 'representation of authority' in order to satisfy their normative expectations*.

This twofold limitation, and more prominently the misunderstanding of the need to extend the internal point of view -to use Hart's terminology- of the rule of recognition to the citizen level, has important consequences. We here present two of these.

First, the recognition of this limitation makes it possible (and this is the first consequence we will examine below) to grasp the extent to which positivist theory, even in its pragmatist version, has been infected by what Dworkin calls the 'semantic sting'. But this semantic sting has a greater significance than Dworkin assigns to it. The fact is that, in avoiding recognising its true philosophical implications, Dworkin not only appears unable to respond to the searing critiques of positivists, but also himself yields to this semantic error. Of course, Dworkin -and, beyond him, the whole 'hermeneutic or interpretivist' trend in philosophy of law- is clearly aware of the need to conceive the concept of law as being 'shot through' with an internal normativity that leads it always to 'exceed' the formal representations of it. Thus the concept of law invokes 'normative expectations' that no formal calculus can foresee: law is thus impossible to 'effect' unless it so organises itself as to respect the necessary 'ongoing transformation' in the offing of a continuously renewed exigency. At the same time, however, at a deeper level, Dworkin assumes the "capability" of the "formal system of social representation" to satisfy this exigency, that is to ensure, "to the extent possible" the fulfilment of the normative expectations and guarantee that they will be continuously adjusted. This is the role he assigns to legal officials, who are thus invested with a presumed capability to address the exigencies internal to the normativity of the concept of law. As regards the organisation of the 'capability' of the social group to "maximise to the extent possible" the group's normative expectations, the system of formal representation of the modern state is thus assumed, as it is by positivists, to ensure entirely on its own the success of the operation of the social production of law. The pragmatist reformulation of the rule of recognition emerges, by other paths, in the assumption that our formal systems of

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[55] In particular, to demonstrate the limitations of deliberative and communicative approaches in the theory of governance. On this, see **J. LENOBLE and M. MAESSCHALCK**, *Toward a Theory of Governance, o.c.*; *Beyond*

institutional representation have the same capability of ensuring the fulfilment of the concept of law. Put in more theoretical terms, the pragmatist redefinition of the rule of recognition proves incapable, as in Hart, of construing the *pragmatic limitation* of the operation of the application of law, and in consequence, of the necessary extension of the operation of recognition that governs the possibility for such an operation. Now *that* one can call a semantic sting: the assumption of the possible formalisation of the conditions for fulfilment of the concept of law.

It is easy to infer the second consequence from the first. Yielding to this semantic error and not taking into account this *pragmatic limitation* of the operation of effectuation that is internal to any normative operation, legal thinking, whether positivist or hermeneutic, arrives at an effect of blockage and idealisation. On one hand, it does not allow for the incorporation into its agenda of the needed reflection on the institutional means that must be set up to ensure cooperative activity that allows for the best possible fulfilment of the normative expectations of those for whom a norm is intended when hard cases emerge. On the other hand, by reducing these conditions solely to the installation of the legal authorities specific to the modern state and consequently by assuming that they are always already in existence, the theory of law obliterates the normative conditions that must be respected to ensure law's guiding function, which defines the concept of law. The second consequence is all the more astonishing to note, in that it results in the theory of law remaining hermetically sealed *vis-à-vis* two phenomena that ought to be able to engage with it: first, the recent turn in the social sciences, which have become aware of the need to put the question of governance back on the table (whereas traditionally it was addressed only by political science); second, the recurring efforts, mainly emerging in American law, to transform the traditional modes of organisation of the function of judging. Of course, these efforts continue to focus on the figure of the judges. But, despite their theoretical and practical inadequacies, they highlight, through trial and error in the sphere of public law litigation, the need for the production and application of law to be open to modes of negotiated participation which include the private addressees of the norm.

A. Pragmatist positivism's advances and limitations, or the requirements of the pragmatic turn in philosophy of law

1. Advances made by pragmatist positivism

The pragmatist redefinition of the rule of recognition proposed by Coleman offers a twofold advantage over Dworkin's hermeneutic position.

Its first advantage is that it clearly reveals the error of the critique, addressed to conventionalist approaches according to which overlook the 'interpretive' nature of the concept of law. As Coleman quite rightly observes, an incorporationist conventionalist approach does not overlook this interpretive dimension. By assuming that every conventionalist approach to law necessarily entails a semantic theory of language, Dworkin fails to perceive the possible pragmatist understanding of the conventionalist approach. The result, as we have seen, is that his critique of positivist conventionalism misses the mark.

There is more, however. Dworkin's inability to formulate correctly the nature of the 'semantic sting' in epistemological terms and therefore the conditions that a non-semantic approach to the operations of judgement would have to respect, also become clear. This explains not just, as H. Putnam correctly inferred and as will be demonstrated below, why Dworkin himself falls back into the error that he imputes to positivist approaches to law, which he thought he could avoid through his hermeneutic approach. It also accounts for why he fails to substantiate his accurate insight into the inadequacy of legal positivism.

This is where we see the second advantage the pragmatist redefinition of the rule of recognition offers over Dworkin's approach. While remaining linked to a positivist approach to the *conventionality thesis*, the pragmatist redefinition put forward by Coleman itself embarks on the process of its own epistemological radicalisation. What then is the contribution made by this redefinition? By reinterpreting the rule of recognition on the basis of M. Bratman's model of 'shared cooperative activity', Shapiro and Coleman make the existence of law subject to that of institutional mechanisms that enable the implementation of cooperative practice among those in charge of applying law. Not only is law determined exclusively by recognition of it on the part of those responsible for applying it, but, as well, any possible conflicts in meaning entailed by the plural nature of possible interpretations on the part of the officials in charge of applying law cannot be resolved by means of a simple

calculus of rational forethought, as in 'coordination' games. Establishment of a balanced solution requires a more complex form of collective action: it requires a cooperative activity, in order to define, in common, objectives deemed acceptable. Moreover, this cooperative construction necessitates institutional mechanisms in order to ensure the effectiveness of this 'shared intentionality' for constructing a common vision. As Bratman says, 'shared intention' cannot be understood in a mentalist fashion: it does not consist of an 'attitude in the minds'. It requires institutional mechanisms designed to ensure its effective fulfilment. Note that this need for institutional mechanisms suitable for enabling the cooperative nature of collective practice in itself reveals the link between the theory of norms and the theory of governance.

2. The limitations and reformulation of pragmatist positivism

Right from the outset, there were indications to justify our asking whether this redefinition of the rule of recognition advanced by Shapiro and Coleman is possibly itself also inadequate and overlooks the epistemological requirement that it implicitly entails. After all, is it not significant that Coleman himself states his theoretical project does not entail particular attention to the institutional conditions for possibility of any cooperative activity?[56] In fact, attention to these conditions, and above all to their epistemological justifications, would have enabled Coleman to perceive the inadequacy of his own construal of the link between law and the practice of recognition. We thus arrive at the question of whether the reproach of epistemological inconsistency that Coleman levels at Dworkin[57] could also be levelled at him. Does not the pragmatist reformulation of the rule of recognition advanced by Coleman itself rest on the formalist and mentalist presuppositions that his pragmatist project claims to expose? We believe that this reformulation does indeed need to be extended, in two directions.

To start with, if the rule of recognition consists of a cooperative practice, the

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[56] "The particular form of interrelated responsiveness constitutive of shared intentions is not important for my purposes"; **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 97.
[57] Coleman's argument consists of refuting the false opposition that Dworkin sets up between interpretivism and conventionalism. As we have seen, however, Dworkin's difficulty in recognising that interpretivism is not incompatible with, and indeed implies, conventionalism reflects a deeper logical inconsistency that is of an epistemological nature. This inconsistency Coleman unfortunately does not explicate. Thus his argument consists of pointing out that Dworkin is himself, because of his epistemological mentalism, the victim of the semantic error that he believes he is exposing in positivist writings. We will return below (section 2 a) to this epistemological inadequacy of Dworkin's hermeneutic approach.

institutional conditions required for this cooperation's realisation cannot be reduced to those defined by Bratman and repeated by Coleman. In other words, the understanding (as M. Bratman, S. Shapiro, and J. Coleman present it) of the conditions for possibility of shared cooperative activity needs, in our view, to be deepened and reformulated. Next, this "shared cooperative activity" that the existence of law depends on does not only concern the officials in charge of applying law (*i.e.*, in essence, judges); it also concerns citizens who are concerned by norms. The reason for the need for this twofold extension is epistemological: it results from the accurate understanding of the operations of normative judgement, that is, of the way that practical reason operates. Further, the elucidation of this necessity will enable us to understand that at the epistemological level Dworkin's hermeneutic approach and Coleman's pragmatist approach partake of a shared mentalism and thus present the same difficulty.

Coleman's proposed reformulation of Hart's way of formulating the rule of recognition thus appears to us to demand a twofold extension. First, if the rule of recognition consists of cooperative practice, the necessary institutional conditions for realisation of this Cupertino cannot be reduced to those defined by Bratman and repeated by Coleman (a). Next, this "shared cooperative activity" on which law depends for its meaning does not only concern the officials in charge of applying law (*i.e.*, essentially judges); it also concerns the citizens who are concerned by the norms (b).

a. A deepening of the approach to the conditions for cooperative activity

Why would the approach to cooperative activity advanced by Coleman reflect an inadequate grasp of the conditions for possibility of such activity? What is at issue here is not the point of departure for this approach. On the contrary, we can only agree fully with the proposal that Coleman (along with Shapiro), following Bratman, presents as the foundation for his analysis of cooperative activity. Let us once again quote Bratman's formulation: "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".**[58]** However, if we grasp the full implications of this position, we are led to see consequences that entail not just an extension of the institutional conditions necessary for the accomplishment of such action, but also and above all a modification of the customary conventionalist approach that positivists take to the concept of law.

If we grant that shared intention is not 'in the minds' of the players but rather must be embodied in institutional mechanisms that enable its possibility, we can reformulate this position as follows: the resources provided by the capabilities internal to the players' reason are not sufficient to ensure the realisation of the intentionality aimed at by cooperative activity. This comes down to saying that in its realisation, this intentionality is a function of an internal limitation, since it cannot find it within itself, *i.e.*, within the internal capabilities alone of representation of the intentional agent, the sufficient conditions for its effectuation. In other words: In social reality, any effectuation of such an intentional aim is a function of X *external to itself*.

This reformulation, however, reveals a deeper consequence of the proposal that shared intention does not exist in minds. It is not sufficient to stop with this latest reformulation in terms of conditions for possibility of effectuation of any shared intentional aim that are *external* to reason. If we make an effort to fully grasp what is entailed by this reformulation, we see immediately that the idea of externality necessarily entails another proposition: No form, no representation of this intentional aim, "exhausts" all possible representations, all possible forms of this shared intention. *Every form (or representation) given to a cooperative activity is merely one possible form among others and none "satisfies" the requirements for the optimal realisation of the normative requirement of cooperation.* Or, to put it in other words: the form that is spontaneously given to cooperative activity, even when it respects the requirements of *responsiveness* to participants' "interests, intentions, preferences and actions"**[59]** and the "commitment to the joint activity and to mutual support" identified by Bratman, still remains a function of the background representation that the various parties have of their own preferences. To assume that the representations *immediately* deployed by the parties reflect an "optimal" representation of the preferences of participants in the shared activity would come down to assuming once again that the conditions for realisation of

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[58] M. BRATMAN, "Shared Intention", *o.c.,* p. 107.
[59] J. COLEMAN, *The Practice of Principle, o.c.*, p. 96.

intentionality are internal to that intentionality and, in so doing, to overlooking the principle of externality mentioned above. This principle of externality entails that the resources internal to the intentionality cannot suffice on their own to ensure the intentionality's effectuation in social reality.

Thus, any representation of these preferences and in consequence any form that cooperative activity might take constitutes no more than one form among others of the realisation of the requirements entailed by the shared purpose of a common goal.

But what is to say that such an observation should imply significant consequences? After all, it could be retorted that it matters little whether such a representation is specific, since to want to define the conditions for a supposed ideal representation of the parties' preferences and thus of an optimal form of cooperative activity is an illusory goal.

True, it will never be possible to define such an optimal representation, since to do so assumes, as mentioned above, the possibility of a form of intentionality that would contain its capability for self-realisation within itself; that is, it supposes the possibility of the absence of judgement's self-limitation. But the true implication lies elsewhere. In truth, does the only alternative to such an impossibility consist of supposing that the 'naturally' limited capabilities (that is, natural in the sense that participants have them immediately at their disposal for defining their preferences and interests) are to be assumed to be the only capabilities available? It is an assumption of this kind that underlies the position adopted by Coleman (as well as Shapiro and Bratman) in assuming as *given* the specific representation that the parties have of their interests and preferences. But how could the fact be overlooked that to assume such a representation is a given entails neglecting the epistemological principle by which we are forbidden to assume the intentionality would have within itself the capabilities for its effectuation within social reality?

Even if we accept the possible absence of an ideal representation of preferences and accordingly of an optimal form of cooperative activity, there is a third position, which is the only one that respects this epistemological principle. This position consists of taking into account the fact that the representation of their intentions, interests, and preferences that the agents formulate *immediately* (*i.e.*, in the absence of mechanisms specially arranged to help

them reconstruct their interpretive frameworks) is only one specific selection among other possible ones and that "attention" to this operation of choice could eventually allow for the construction of other possible selections. This would result in an extension of the possibilities and thus in an 'optimisation' of the representations deployed by participants in the cooperative activity, and consequently in 'optimisation' (which does not mean attainment of the optimum) of the forms of the cooperative activity. This extension of possibilities would be associated with the implementation not just of those mechanisms already clearly pointed out by Bratman, but also of specific mechanisms intended to prompt the players to revisit their initial perceptions of their preferences and to consider these preferences' possible redefinition through the broadening of the interpretive frameworks *immediately* deployed. There would thus occur the identification of their 'specific' representation of the requirements of the common intentional purpose; but this one would have as an 'advantage' an advance in 'extension' over the specific forms that did not take account the self-limitation affecting the representation of the intentionality.

It could thus be said that, besides the conditions of *responsiveness* and *mutual support* identified by Bratman, incentives aiming to ensure the parties' *reflexive learning* would be necessary in order to allow them to carry out a reflexive revisiting of the background representations that *immediately* orient their judgements.

The proposition according to which a shared intention does not exist "in the minds" of the parties to a cooperative activity thus has an epistemological implication which entails supplementing the way Bratman, Shapiro, and Coleman conceive of the nature of the conditions for possibility for ensuring such an action's realisation. After all, it is revealing that the various examples Bratman uses to construct his philosophical understanding of the nature of a cooperative activity are all examples in which the meaning of the shared intention is always already given and takes a comparatively simple form (singing together, painting a house together, and so on). True, Bratman's analyses show clearly that the application of this meaning necessitates mechanisms for building in common. But in allowing himself a formulation of shared intentionality that is assumed to be given, Bratman is faced with the difficulty in identifying the radical epistemological meaning of his fundamental principle, as well as in identifying its implications for a theory of intentionality.

The deepening of the analysis of the normative requirements internal to shared intention is not without consequences for an analysis of the concept of law. We will return to this. Nevertheless, at this point we can raise several questions about the use Coleman makes of the concept of shared cooperative activity, or SCA, in his theory of the rule of recognition. Coleman appears to assume that the forms of judicial organisation developed by all modern states would satisfy the requirements for the realisation of an SCA. Granted, Coleman would acknowledge that these forms may have varied in time and space. Nevertheless, they are all assumed to reflect, at a level beyond their diversity, the way of taking into account the conditions for possibility specific to an SCA. Where would this spontaneous capability of collective systems for satisfying the requirement of cooperative organisation on the part of the officials in charge of interpreting the criteria for the validity of law originate? If we take into account the dimension of reflexive learning that was mentioned above, it is undoubtedly necessary to be more circumspect about this assumed capability on the part of our systems of judicial organisation to satisfy the conditions for an SCA. Note that this caution is strongly in accord with the current social theory that Coleman appears (quite rightly) to invoke in support of his own reformulation of the theory of the rule of recognition put forward by Hart. Whatever the limitations of current social theory,[60] it is symptomatic that the whole of its evolution reflects a shared concern increasingly to extend the nature of the incentives and mechanisms that must be put in place in order to realise cooperative equilibrium. Moreover, numerous authors, including Argyris and Schön, explicitly subordinate these equilibria to forms of reflexive learning, even though their theory of reflexivity fails adequately to construe the epistemological framework that it requires. As well (although this observation is less theoretical than sociological), similar prudence regarding the question of whether all forms of judicial organisation "exhaust" all the conditions for possibility for "optimised" (but not optimal) satisfaction of the requirements for realising cooperation in how to interpret the rule of recognition, would perhaps allow theory to better take into account the dynamic that characterises these forms of judicial organisation. In this perspective, various trajectories are revealing of the need sometimes felt by judicial players themselves for a desirable adjustment in their modes of organisation. To take just one example, the significant changes linked to the introduction, in American law, of the civil rights injunction following the *Brown v. Board of*

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[60] On this, see the works cited at note 55.

Education judgment[61] could be said to have reflected the need to reorganise certain kinds of trial in order to ensure a better construal of the judge's "perceptions" in litigation related to certain public policies.

But the extension of the SCA approach called for by a more epistemologically based understanding of the conditions for possibility of shared intention entails more significant theoretical shifts than this revisiting -decidedly secondary from a philosophical point of view- of the sufficiently or insufficiently cooperative nature of our forms of legal organisation. In order to present this, we must first show that a second extension of Coleman's proposed approach to the rule of recognition must be carried out.

b. A reinterpretation of the relationship between the rule of recognition and citizens' practice in terms of cooperative activity

Why is consideration solely of cooperative activity by the officials in charge of applying law too reductive to ensure a full understanding of the conditions necessary for the realisation of the form of collective action by which a group regulates itself legally? That is, what is the reason why limiting oneself to that consideration alone results in overlooking a conceptual requirement specific to the *guiding function of law*?

Once again, the reason for the lack of validity of this reduction is epistemological. Moreover, it is analogous to the justification for the first extension of Coleman's approach. As we shall show, a reduction of this kind also rests on an assumed given capability, by the social group, to act in common, but without reflecting upon the conditions for possibility of such a capability. To show how this presupposition operates in Hart's and Coleman's approaches, we will recapitulate their reasoning step by step.

As we have seen, Hart, and Coleman after him, postulate that the existence of a legal system within a social group does not require that the "internal point of view" needed by officials in charge of applying law be manifested among the citizens. All that is necessary is that citizens' behaviour reflects a simple, accustomed, and generalised practise of obedience

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[61] **O. FISS**, *The Civil Rights Injunction*, Bloomington, Indiana University Press, 1978; "The Bureaucratisation of the Judiciary", *Yale Law Journal*, 1983, pp. 1442-1468.

to law.[62] As Coleman points out, "the majority of persons need not as a conceptual matter adopt the internal point of view toward the behaviour by which officials validate law, nor towards the subordinate rules that are validated under the legal system".[63] In other words, regardless of whether the majority of the population "feels obliged" or is considers itself to 'have the obligation' to respect the rules of law.[64] Requiring citizens to adopt an internal point of view would, according to Hart, come down to requiring "that both [the bulk of the population] and the officials of the system 'accepted', in the same explicit, conscious way, a rule of recognition".[65] A requirement of this sort, notes Hart, is unrealistic because in all 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". [66] Once again, Hart expresses himself highly explicitly. In a scenario where "only officials might accept and use the system's criteria of legal validity", society "might be deplorably sheep-like; 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". [67]

Of course, it is neither a question of denying that such a system is a legal system, nor of criticising the elementary observation that the majority of citizens have no comprehensive knowledge of the structure of law or its criteria of validity. Similarly, Coleman is right to say that the generalised practice of obedience to law must not be the result of a conscious process of judgement regarding the legitimacy of such criteria. In this sense, Hart and Coleman (as well as most first-rank positivists, including Kelsen) are right to emphasise that the existence of a legal system is not dependent on the nature of the individual motivations that justify its generalised and customary application by citizens. But once again, as with the cooperative

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[62] "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. HART**, *The Concept of Law*, *o.c.*, p. 114.
[63] "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*, *o.c.*, p. 76.
[64] On this distinction, see **H. HART**, *The Concept of Law*, *o.c.*, p. 88.
[65] *Ibid.,* p. 114.
[66] *Ibid.*

activity approach, does an alternative of this kind allow for an adequate construal of the problem and for an identification of the conditions that make such a generalised practice of obedience possible? Let us look again at the scenario Hart advances as being especially probative of his own reasoning, namely that of a social group in which member citizens identified with a flock of sheep and even went so far as to allow themselves to be led to the slaughterhouse from pure obedience to a sanctioned order. What must be assumed for such a social group and such a generalised practice of obedience to exist?

Undoubtedly, if we lived on a planet where members of the group were 'lobotomised', we would be able to understand identical behaviour consisting of obedience to the orders of authority as simple behavioural responses to an external stimulus. However, absent such a hypothesis of lobotomised individuals, we must deploy other propositions to account for a generalised practice of this kind. In effect, we must assume that members of the group conduct at least three operations of judgement preliminary to their own individual decision to obey and behave 'like sheep'. First, a group member must anticipate the behaviour of other group members and have sufficient reason to believe that the latter will also behave like sheep, that is, in such a manner that this individual is justified, in "cost-benefit" terms, in submitting to the police or the dictatorship's officials and adopting purely passive behaviour, even at the risk of being led to the slaughterhouse. Further, the individual must anticipate the anticipations of others, that is, assume that other group members will go through a process of anticipation identical to the individual's own regarding the 'passive behaviour' of the other members of the group.[68] Last, the individual group member must carry out a third form of anticipation: the assumption that the authorities the individual has decided to submit to will in the future themselves decide to continue behaving in conformity with their present role. Absent these anticipations, there could be no 'generalised' or 'customary' practice of obedience. The implementation of such a practice necessarily implies a dimension of duration and a collective dimension that could not take shape if these three anticipations were not

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[67] *Ibid.*, p. 117.
[68] 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 favour 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", *o.c.,* p. 104. It may also be mentioned here that, as of 796, Fichte had constructed his philosophy of law (*Rechtslehre*) on the basis of such a construal of the compounded reflexivities that underlie any social interaction. On this, see **M. MAESSCHALCK**, *Droit et Création Sociale chez Fichte*, Louvain-la-Neuve, Institut Supérieur de philosophie, 1996.

already minimally present. However, if this is the case, we must unavoidably conclude that even in the most extreme form of group members' 'sheep-like' behaviour, any generalised and customary practice of obedience presupposes some form of intention; *i.e.*, the adoption and shared acceptance of a *form of common life*.

Thus at this point in our reasoning, we observe a kinship between the form of action characteristic of "the officials in charge of applying the law" and the form of action necessarily deployed by any generalised and customary practice of obedience by citizens. To repeat: this kinship or formal analogical structure clearly does not imply that what 'motivates' the generalised practice of obedience by citizens is a common reflection on the technical matters entailed by an interpretation of the legal criteria of validity. But the link must be brought to light that exists between this practice of majority respect and the possibility for causing the emergence, within a group, of a common culture of 'trust' and of adherence to a way of life instituted by the group's institutional structure. Thus, it is a question of understanding the link that exists between this respect and the construction of a sufficiently common 'belief' that makes possible the majority's practical acceptance of the instituted way of life. How are we to understand the operations by which is built up this minimal trust that the members of a social group grant to the officials in charge of determining normative requirements? As was just seen, it is not possible to understand this operation without reference to a condition of belief, that is, a form of practical acceptance of a way of life. Thus the possibility of giving 'meaning' to a normative requirement (and thereby to law) in social reality, *i.e.*, of 'applying' it, of causing it to produce effects in reality, depends on a 'will', a 'common motivation', on the part of the addressees of this norm, and thus on a common culture among the players, which is likely to ensure effective realisation of the normative requirements. The possibility for 'governance by law' depends on its 'practical acceptance' by those in charge of respecting it and thus of ensuring its realisation within social reality.

Both Hart on one hand and Coleman and Kelsen on the other prevent themselves from opening the black box that is constituted by the operation which makes possible the emergence of such a culture for law. Moreover, they do not perceive the necessity for this conditionality and the form of *cooperative activity* that it entails. Failing to construe these conditions for possibility of any generalised and customary practice of obedience by the majority of citizens, Hart and Coleman end up assuming as given a form of spontaneous

capability on the part of any social group to erect a form of common life, that is, the capability to form a community. Is it not the case that in so doing Coleman falls into the very error he wished to expose in Hart, which consisted of analysing the rule of recognition in terms of a 'coordination convention'? From the moment when we identify the dimension of shared intention that must necessarily structure any generalised practice of obedience, the question arises of its possible realisation, that is, of the question arises of its conditions for possibility. And thus we come back to the question of the conditions for the realisation of any form of shared intentionality, which was analysed above in the specific framework of the practice of recognition by the officials in charge of applying law.

As we have seen, by not questioning further the conditions for possibility of this general practice of obedience and recognition of the authority of officials, Coleman presupposes this recognition to be given. By *assuming* it, he does not perceive that it is itself the result of an operation of judgement that is internal to the collective practice of construction of a way of living together. This recognition is itself dependent on the way in which the 'common' belief which gives rise to this recognition is constructed. In this sense, the practice of *recognition* by the *officials* itself depends on *an externality* that enables it.

B. The dual consequences of the limitations of pragmatist positivism

1. The epistemological consequence and the normative impact of the concept of law

The analyses above, and especially those concerned with extending the approach to cooperative activity proposed by Coleman and Shapiro, now enable us to work through a further stage of reasoning. That is, they help us grasp the extension of the epistemological framework that the "pragmatist turn" effected by Coleman within theory of law calls for. As we will see, this extension results in a broader understanding of the reflexivity of all operations of judgement (a). Consequently, the epistemological extension of the pragmatist approach allows us to look afresh at two key questions in present-day discussion in the theory of law: the question of an assessment of the Dworkinian critique of legal positivism (b); and that of the judgement of application in law, which, as we have seen, has been, for over a century, at the heart of repeated efforts to expose the inadequacies of the positivist analysis of the concept of law (c). The second question will also enable us to reinterpret the question of the normative meaning of the concept of law.

a. The need to go beyond pragmatist epistemology

It is one of Coleman's merits (and indeed a merit of American philosophers close to Coleman; *e.g.*, B. Leiter) that he constructs his theory of law on explicit and well considered epistemological bases. This is how we should view his "pragmatist approach" and the four main features that distinguish it epistemologically.[69] It is surely respect for the epistemological requirement specific to the pragmatist approach that accounts for the advances made by Coleman's theory over those of Hart and Dworkin. Deeper attention by Dworkin and Hart to the precise implications of the principles of semantic holism and the revisability of beliefs would surely have made them aware of the inadequacies of some of their theses and the need to put forward better-constructed versions of them. Dworkin would

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[69] 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"; **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 6. We are not considering here Coleman's fifth characteristic (however apt it may be), namely *explanation by embodiment*, which does not seem to us to be as relevant to our purposes as the others.

soon have seen that conventionalism in theory of law is, contrary to what he claims, not at all incompatible with an interpretivist approach to the rule of recognition. Similarly, Hart would have been obliged to confront explicitly the question of the form and the conditions for possibility of a collective action (a coordination convention or cooperative activity) likely to produce, among the officials, an identical normative meaning for all. Moreover, it is Coleman's pragmatism, and the rejection (associated with it) of all epistemological mentalism[70] that, with the help of Shapiro and Bratman, enables him to open up the theory of law to the constraints of a non-mentalist understanding of the conditions for cooperative activity. It is here that we see the implications of what has been presented above. The extension we proposed for Coleman's (and Bratman's) analysis of cooperative activity points to the need for a similar extension of his 'pragmatic method'.[71]

Perhaps our undertaking will elicit surprise. Is it not at first sight curious that reflection on cooperative activity should be deemed transferable to a theory of intentionality and meaning? True, just as it is easy to see that a non-mentalist approach to intentionality can be used to better understand the conditions for constructing shared meaning as part of cooperative activity (and this is certainly the process followed by Bratman to analyse shared cooperative activity), it could appear puzzling to do the opposite and transfer the lessons from reflection on cooperative activity to epistemological reflection on the conditions for a judgement's semantic productivity. But this is not so. If we properly grasp the impact of the pragmatist approach as Coleman presents it, we see that the question of a judgement's semantic productivity is quite appropriately analysed in terms of cooperative activity. Semantic holism and the rejection of mentalism consist precisely of considering meanings (that is, the intentional purposes of the operation of judgement), far from constituting physical or computational entities that rest in the mind, always depend on the meaning of other factors[72] whose meaning itself cannot be assumed to be fixed and susceptible of determination through the application of formal rules. That is, as was made clear by L. Wittgenstein and H. Putnam, meaning is ultimately a function and usage necessarily takes the form of shared

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[70] O the link between semantic holism and the rejection of mentalism (that is, of a position which consists of thinking "of concepts as scientifically describable -psychologically real- entities in the mind or brain"; **H. PUTNAM**, *Representation and Reality*, *o. c.*, p.7), see **H. PUTNAM**, Chapter 1, 'Meaning and Mentalism', pp. 1-18; **M. MAESSCHALCK**, *Normes et Contextes*, Hildesheim, Olms, 2001, pp. 242-ff.

[71] **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 6.

[72] As J. Coleman suggests, we will leave the question "open whether the whole semantic system enters into the meaning of every concept, proposition, and belief"; **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 7, note.

social practice. Thus the fixing of meaning -or, to put it in other words, the determination of the effects of meaning produced by the operations of judgement- is a function of a form of cooperative activity within social groups intended to produce common beliefs. At the same time, this turning back of meaning towards usage and the social practices which reflect it also makes possible an understanding of the principle of the revisability of beliefs that Coleman has quite rightly placed at the heart of the pragmatist approach. The fact is: practices of cooperative activity by which our common representations (or beliefs) are constructed ensure their own 'revisability'; *i.e.*, their adjustment in light of the 'interests' -the intentionality- that 'motivated' us to make use of our judgements.[73]

It is precisely on this score, however, that it proves to be necessary to transfer to Coleman's pragmatist approach the reflections we conducted regarding his conception of cooperative activity. It is certainly the case that the rejection of mentalism that results from semantic holism requires a further examination of the 'black box' that Coleman leaves unexamined and that relates to the conditions for the 'revisability of beliefs'. It would appear that, not just with Coleman but also with the contemporary pragmatist theorists Coleman relies on, such as H. Putnam, everything takes place as if this 'collective self-revision' resulted from the immediate play of the competencies inscribed in the minds of players in any social group. But as was seen above, assuming such 'innate or immediate capabilities' for ensuring such revision comes down to making two highly problematical suppositions. On one hand, it means restoring a mentalist approach that conflicts with the holism of beliefs Putnam rightly recognised as being logically linked to semantic holism. On the other hand, and as a result of this mentalism, there is an assumption that any operation of judgement has within itself the capabilities needed to ensure, to the extent possible, the realisation of the intentionality that motivates its usage. Certainly, no social group can achieve an ideal 'revision' of its beliefs. The capabilities of human reason are obviously limited. But if we do not examine the conditions for operation of the revision of beliefs, we will be led to assume that, within these limitations, the best possible revision of the beliefs of a social group is achieved solely by the immediate play of the competencies internal to the operation of judgement. As was seen above, this assumption contradicts the very principle that underlies the rejection of mentalism that is foundational to pragmatist epistemology.

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[73] We will 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; **J.**

Thus the rejection of mentalism entails revealing what we might call the *reflexive* dimension of any operation of judgement. This reflexive dimension does not consist, as is generally thought, of declaring the 'retrospective' competency of reason to reflect back on its previous representations (that is, "to turn back on itself"). Rather, it aims to state that any 'application' of reason rests on ("reflects on") a background representation that the operations of reason do not on their own allow for a reconstruction of. It is this reflexive dimension that justifies the view, expressed above, that the representation that parties to a cooperative activity *immediately* form of their intentions, interests, and preferences (that is, absent mechanisms specially organised to lead them to reconstruct their interpretive frameworks) is no more than a specific choice among other possible choices, and that *attention* to this operation of choice will thus potentially allow for constructing other possible selections. In other words, attention to the *contextual self-limitation* that results from the reflexivity that affects any operation of reason would allow for an extension of possibilities and thus an 'optimisation' of the representations deployed by participants in the cooperative activity and, thereby, 'optimisation' (which does not mean achieving an optimum) of the forms of cooperative activity. This extension of possibilities would be associated with the setting up of mechanisms other than those already identified by Bratman. These would be specific mechanisms intended to incite the players to revisit their initial perceptions of their preferences and examine the possible redefinition of their preferences by broadening the interpretive frameworks *immediately* deployed. Thus, another 'specific' representation of the requirements of the common intentional aim would emerge, but this one would have the 'advantage' of having attained greater 'extension' than those specific forms that did not take into account the self-limitation that affects the representation of the intentionality form. Thus, one could say that, besides the conditions of *responsiveness* and of *mutual support* emphasised by Bratman, incentives designed to ensure *reflexive learning* by agents would be needed in order to enable agents to conduct a reflexive review of the background representations that *immediately* orient their judgements. It is only when we have thus deduced the ultimate 'epistemological' consequences of the pragmatist rejection of mentalism, and on that basis identified the conditions for possibility of revisability, that we can state the principle of such revision, *i.e.*, that we can assume the normative requirements inherent in the intentionality that guides this requirement for the 'self-revision' of beliefs on the part of a social group to have been

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COLEMAN, *The Practice of Principle,o.c.*, p. 9, note 11.

satisfied. Absent this, the principle of revisability remains a 'black box' and entails, in an occult manner, the restoration of the form of epistemological mentalism that pragmatism aimed to expose. Before analysing some of the consequences that this 'extension' of Coleman's pragmatist approach leads to, we will make a brief detour to consider both the advantages and the limitations of Putnam's approach, as a way of understanding his point better still.

Putnam is without doubt the present-day pragmatist who has most effectively sought to identify the epistemological implications of semantic holism and the rejection of mentalism that it entails. As observed above, he has brought to light the 'logical' link between holism of meaning and the holism of belief that guides the social practices by means of which meanings have their usage. Moreover, Putnam has never ceased to draw attention to the fact that this *holism of belief* prohibits formally fixing the procedures for defining the beliefs that govern the usage by which any judgement produces meaning effects. It is precisely in order to avoid exceeding the pragmatic limitations of reason that he postulates that the fixing of shared beliefs can only result in a procedure for common construction through public exchange. Thus, Putnam explicitly and illuminatingly perceived the constitutive link that exists between the semantic productivity of operations of judgement and cooperative activity. However, this line of reasoning needs to be taken further.[74] Because, if it is accurate, the reflexivity entailed by this holism[75] prohibits the assumption that the belief governing the meaning effect of what it leads to defining as rational requirements is constructed solely by the play of the formal constraints of discursivity. The implementation of the cooperative culture that governs the adaptation of existing beliefs to those that are entailed by reason thus requires specific conditions for possibility.[76] To assume that the mere play of the formal constraints of the ethics of discussion (*i.e.* the mere formal play of public discussion) will itself ensure the realisation of the cooperative culture that it requires, is to neutralise and disregard Putnam's

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[74] In this sense, therefore, Putnam ultimately restores a schematic approach to normative judgement; see, on this, **M. MAESSCHALCK**, *Normes et Contextes*, *o.c.*, p. 312; **J. LENOBLE and M. MAESSCHALCK**, *Towards a Theory of Governance, o.c.*, p. 304.

[75] 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.

[76] Thus, as we have seen, M. Bratman's insight about the play of this conditionality is valid. However, since he does not underpin it with the epistemological foundation of the reflexivity of the operation of judgement, he overlooks some of the conditions entailed by the realisation of a Cooperative activity, including, for instance, the condition that makes possible the "reflexive" return of each player on her or his own perception of the context. These conditions must be reflected upon both as regards the institutional setting, which must guarantee that the

argument concerning the impossibility of formalising the procedures by which beliefs are fixed. To assume that the mere internal play of the formal constraints of debate ensures the adjustment of beliefs disregards the fact that the possibility for debate is itself only made possible by a shared belief that motivates participants to use it.

The necessity for such a "belief" -which the formal operations of reason on their own are not sufficient to cause to emerge- reflects the *inferentially reflexive*[77] relationship upon which the possibility for reason to make meaning, that is, the possibility for reason to be realised in the world, is dependent.[78] Any rational purpose for meaning can be realised only by submitting to a specific dependency that the formal play of reason on its own is not sufficient to guarantee. To *schematise* this capability for realisation means assuming that a rule (one that must be inscribed in the minds of the players) will guarantee its use. This means that mentalism is restored. The fixing of belief is itself a reflexive operation whose realisation can never be assumed to have been "settled" by an assumed capability of the subject. On the contrary, unless mechanisms are put in place aimed to organise the reflexivity of this operation of the common construction of an adjustment of beliefs to the critical requirements entailed by 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 does theory of law gain through this 'reflexive' deepening of a pragmatist approach to judgement? We will not return here to the renewed approach it makes possible to the conditions for possibility of the social practice by which the "rule of recognition", which is constitutive of the criteria for defining law in a social group, is defined and interpretively

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mechanism for deliberative negotiation provides for effective integration of various perceptions, and as regards the capability of each intentionality of ensuring the adjustment of the perception it deploys.

[77] The term 'inferential' indicates this reflexivity is not "retrospective" and is not enabled by means of a rule 'stored' in the minds of the parties. The reflexive operation is not deductive; rather, it operates in 'inferential' mode, that is, as a condition for the possibility of meaning.

[78] Determining, by means of one's reason, on an action to be accomplished means wishing to 'transform' the world in order to solve a problem, that is, wishing to 'rationalise' the world. But, as is immediately intuitively clear, *wishing* to rationalise the world implies an existing 'culture', that is, an existing belief or adherence to a *way of life*: a life guided by reason. The transformation of the world that the action to be accomplished implies is only possible because one has accepted that the world can and should be rationalised. As Fichte says, any operation of reason causes an experience of shock (*Anstoss*) that derives from the impossibility of its producing effects in reality other than by relying on something that is not it. It is not reason itself that justifies belief in its own capability of transforming reality. Rather the reverse: the application of reason in the world depends on belief in its potential fulfilment. The effectuation of reason relies, in the last analysis, on belief, on insight into the power of reason to transform reason to transform reality. The power of reason thus refers back reflexively to an exterior that is not itself.

revised. We will only mention that this deepening, which took the form of a twofold extension of the redefinition of Hart's thesis proposed by Coleman, rested directly on a better consideration of the conditions for possibility of the principle of revisability of beliefs and of a better consideration of the cooperative activity that ensures its implementation. That is why we called this analysis a genetic approach to the concept of law: that is, an approach which, in contrast to classical positivism, takes into account all the conditions of 'engenderment' of the convention by which law is defined, in other words, the conditions for possibility[79] of this convention. We wish to show here the advance that is made possible by this 'reflexive' deepening of the pragmatist theory of judgement in comparison with the usual critiques of positivism. The fact is that, though Coleman quite rightly exposes their inadequacies, at the same time he risks overlooking the reformulation these critiques require, reformulations that would allow for a validation of the insight the critiques harbour. Two matters, then, merit a brief review: first, Dworkin's hermeneutic critique; and second, as shown at the start of this article, how to assess the insight that has driven reflection on law since the end of the nineteenth century, namely the idea that the inadequacy of legal positivism is linked to an inadequate understanding of the operation of application in law. As we will see, the latter question will allow us at the same time to reassess the false opposition between descriptive and normative approaches to law and introduce the 'epistemologically' necessary link between the conceptual analysis of law and the theory of governance.

b. A reassessment of the Dworkinian critique of positivism

When showing the advantages Coleman's work offers over both Dworkin and Hart, we already identified the twofold inadequacy of Dworkin's critique of conventionalist positivism. First, this critique is theoretically inconsistent: contrary to what Dworkin believes, an incorporationist conventionalist approach, far from overlooking the interpretive dimension of the rule of recognition, entails such a dimension. It is now clear this entailment is directly associated with the pragmatist principle of the revisability of beliefs. Second, Dworkin's difficulty in correctly grasping the pragmatist impact of the redefinition of the positivist thesis

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[79] That is why, as we have already indicated (see above note 53), we could also call an approach of this kind to law "transcendental", in the technical sense that Kant and Fichte gave this term. Note also the extent to which this shift in relation to the positivist approach constitutes a shift analogous to the one that Putnam identifies as being reflected epistemologically in the "holism of meaning" 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, o.c.*, p. 8.

reflects his own inability to formulate in adequately epistemological terms the nature of the 'semantic trap' that he attacks in the positivists. This second inadequacy accounts for the way Dworkin himself falls back into the very error that he ascribes to positivist approaches to law and that he thought he could avoid by means of his hermeneutic approach. But it also accounts for the fact that he fails to construe his correct insight into the inadequacy of legal positivism. As was been pointed out above, that is why we argue that a certain semantic inadequacy is common to both Dworkin's perspective and Hart's and Coleman's positivist conventionalism.

Let us return first of all to the question of the 'semantic' pitfall that Dworkin himself falls into even though he thought he had avoided through recourse to the hermeneutic model. At this stage of our examination, we are in a better position to grasp how this semantic error manifests itself. To explain our position, we can do no better than to begin with H. Putnam's critical analysis of Dworkin's theses. This critical analysis, which Putnam performed at the request of Coleman and indeed Leiter, is highly stimulating because it seeks to formulate its critique in a directly epistemological fashion. But, while it quite rightly exposes, in other than 'deconstructionist or Derridean' terms, the formalist pitfall Dworkin falls into, this critique remains fragile and incomplete. Let us go over Putnam's reasoning. Doing so will make it possible to show how the reflexive extension of Putnam's pragmatism that we investigated above helps deepen and reformulate this critique.

The critique developed by Putnam relates to the epistemological presuppositions underlying Dworkin's theory of 'one right answer'. Clearly, the theory of one right answer in no way implies a reassessment of the eminently 'controversial' nature of the meaning of law. Putnam willingly grants that, at any rate since *Law's Empire*,[80] "Dworkin now holds that in some cases there may not be a unique 'right answer' (reasons of both sides may be equally strong)". Thus it is quite true that Dworkin has abandoned the principle of bivalence, that is, "the logical principle that a statement is either true or false – tertium non datur". However, Putnam quite rightly points out, "*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 then is 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;[81] 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 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[82] if *this* sort of thing were a counterexample". But, as Putnam quite rightly points out, "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)".[83] What Putnam is exposing is thus the presupposition of the existence of a rule that would allow us, at some level, to formalise interpretive practice, that is, the operation constitutive of meaning.

Is Putnam's critique accurate? Putnam quite rightly perceives that Dworkin, at a certain level in his reasoning, overlooks not the holism of meaning but the holism of belief; *i.e.*, the concept that there is no formal procedure for fixing belief. But this epistemological inadequacy in Dworkin cannot be formulated in the terms used by Putnam. Dworkin definitely recognises what Putnam calls the "second order of vagueness". He would be the first to acknowledge that the 'controversial' nature of law implies that we cannot determine what the easy and the hard cases are by means of a formal rule. He acknowledges that such a

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[80] It is true that Dworkin's position was less clear in *Taking Rights Seriously* [London, Duckworth, 1977]. On the evolution in Dworkin's theory of one right answer, see: **J. COLEMAN**, "Truth and Objectivity in Law", *Legal Theory*, 1995, pp. 48-54.

[81] Note that this description by Putnam of Dworkin's position is corroborated by something Dworkin himself says explicitly in *Law's Empire* [*o. c.*, p. 412]. Having said that he had obviously never "devised an algorithm for the courtroom", Dworkin continues as follows: "I have not said that there is never one right way, only different ways, to decide a hard case".

[82] That is, the kind of bivalence associated with 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", *Legal Theory*, 1995, pp. 69-81, at p. 76.

[83] **H. PUTNAM**, "Are Moral and Legal Values Made or Discovered", *o.c.*, pp. 76-77. This questioning by Putnam of the principle of bivalence obviously does not imply his acceptance of a sceptical position. On this score, Putnam, while critiquing Dworkin philosophically, shares his opposition to Rorty, or to what Dworkin somewhat inappropriately calls "legal pragmatism"; *Law's Empire, o.c.*, p. 151. This shared opposition to a "nihilist" scepticism also explains why Putnam makes the following statement about 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", *i.e.*, issues relating to the theory of truth.

distinction is itself the result of an interpretive practice and consequently not subject to formalisation. Thus, it is not at the second level of this "second order of vagueness" that the "reformalisation of the normative operation" that Dworkin falls victim to is manifested. But, this third level is inaccessible to Putnam because, as indicated above, his understanding of the consequences associated with a 'non-mentalist' approach to the operation of judgement is inadequate. That is, such an approach makes it impermissible for reason to find within itself the resources necessary for its own semantic productivity (that is, necessary for its ability to take effect in social reality). Since Putnam himself has restored a mentalist presupposition (in relation to the capability of the social group to 'automatically' ensure the revisability of its beliefs) and thus underestimates the extent of the reflexivity of all judgement, he does not see that it is at this pragmatic level that Dworkin re-formalises the operation of normative judgement.

Dworkin's hermeneutic approach does try to respect the link being formed between meaning and usage and take the holism of usage into account. However, by not construing its epistemological conditions sufficiently, he does not see the reformalisation of the operation of reason that his 'mentalism' entails. Where does this mentalism manifest itself? As an alternative to the hypothesis of the rule of recognition, Dworkin defines the conditions for legality by reference to a substantial morality assumed to be shared by the social group and to an idealised judge who would be able to ensure its ongoing reinterpretation in light of the requirements for adjustment to transformations in the social context. The judge is supposed to be capable of deducing the meaning of the law from the requirements internal to the 'institutional morality' of the group to which she or he belongs. Dworkin's hermeneutic approach assumes the givenness of *rules in the mind of the judge* that enable the judge to subsume various specific situations under general categories of institutional morality (principles). That is, Dworkin *mentalises* the normative judgement approach by having those rules inscribed in the judge's mental capabilities that make it possible to deduce the normative meanings of law from the requirements of institutional morality and reflect in those meanings (to paraphrase Paul Ricoeur) the injunctions of historical reality.[84]

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[84] This re-formalisation exists in fact in other forms, which Coleman has clearly perceived. As we know, Coleman accepts that law has an interpretive dimension. He explicitly acknowledges the descriptive light shed by hermeneutic approaches. Coleman points out that Dworkin undoubtedly provides an adequate theory of the revision of the meanings of law by judges. But even in connection with the description of the function of judgement, Coleman wishes to radicalise the hermeneutic approach. Dworkin, Coleman says, ascribes to hermeneutics unwarranted powers for determining a single meaning. With his theory of the one right answer, he

In still assuming a homogenous substantive morality as given within the social group, along with a judge who is capable of providing for its ongoing reinterpretation in light of the requirements for adjustment to transformations in the social context, Dworkin assumes a rule of reason capable of guaranteeing realisation of the 'right way' by which the meaning of the normative requirements within the social group will be optimised. It is just such a presupposition that Putnam hopes to expose as philosophically incorrect. As M. Maesschalck has shown in connection with Putnam's internalist realism,[85] this project in effect implies not only the immanence of interpretive practice within belief, but also the impossibility for interpretive practice to define standard procedures for fixing beliefs. This is just what Dworkin overlooks.[86] It is also what accounts for the fact that he *formalises* the operation of judgement and, consequently, falls back into the 'semantic' error that he believed he was exposing in positivist thinking.

It is on this score as well that the advance made by Coleman's pragmatist redefinition of the rule of recognition appears. As we saw, this redefinition subordinates the ability of judges to define the rule to the existence of institutional mechanisms that make possible their own cooperative production of a uniform interpretation. Thus, it could be said that Coleman tempers Dworkin's epistemological internalism by subordinating the assumed capability of the social players -in this instance, judges- to the externality of the incentive of the institutional mechanisms that guarantee the possibility of shared intentionality. However, as has been seen, this way of understanding the 'limitations' of epistemological internalism -and its institutional expression- continues to be insufficiently extended and therefore reflects the

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underestimates the significance of indeterminacy in law. Instead of assuming a holistic rationality in law, as Dworkin does, it would be preferable to ascribe to law a simply local or partial rationality. As Coleman says: "Understanding what the law is or means is not the same kind of project as understanding an individual's behaviour – 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"; **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 168. Dworkin's description of legal hermeneutic poses still other difficulties, including that of accounting for the role of "authoritative statements", which in Dworkin are merely "raw materials for the theory of legal content"; *Ibid.,* p. 166.

[85] **M. MAESSCHALCK**, *Normes et Contextes, o.c.*, p. 179.
[86] Another way of identifying this epistemological inadequacy in Dworkin is to point to the links between his thinking and Quine's theory (to which, in fact, he makes explicit reference at least twice in *Law's Empire*). As Putnam rightly notes, Quine's position ends by ignoring the link between "meaning holism" and "the holistic character of belief fixation"; **H. PUTNAM**, *Realism with a Human Face*, Cambridge (Mass.), Harvard University Press, 1990, p. 283.

re-emergence of a semantic error. The fact is that Coleman's analysis, like Dworkin's, also ultimately rests on the 'mentalist' assumption of the group's presumed given capability to ensure the conditions for satisfying the requirements of governance by law. A brief examination of this question will enable us to see how our epistemological observations will help better construe the recurring insight within legal reflection that positivist analysis has an inadequate analysis of the operation of the application of normative judgement.

c. Positivism and the question of the judgement of application: The normative significance of the concept of law

Contrary to what is claimed by critiques of positivism in various forms, whether sociological or, as more recently, hermeneutic, the conventionalist approach in no way implies a denial of the interpretivist dimension of judicial work. And yet, subject to reformulation, a valid insight underlies this recurring critique.

The extension of the approach to pragmatism developed by Coleman allows for the exposure of a deeper inadequacy in the understanding of the operation of the application of judgement than that related to his approach to the operation of judgement. It is symptomatic that in theory of law the discussion of the operation of the application of judgement appears not to notice that the question of the application is not limited to the application of an assumed existing norm. The meaning given to the operation of the application of a rule is reduced to the classical concept of application corresponding to that customarily used in ordinary language when it is said a judge 'applies a rule' or there exists a technical problem of 'applying' a certain normative guideline deemed to be desirable. The operation of application is assumed to be restricted to the scenario in which the rule, or the normative orientation, is given. But in limiting the question to this formulation, we make it impossible to formulate the problem in more epistemological terms. There is a more fundamental operation of application on which development of the norm (or determination of the normative orientation) itself depends. The choice of norm is in itself already the result of an operation of application. The 'form' (representation) taken by the norm results from the 'application' of the rational requirement inherent in the activity of judgement that members of a social group have decided to deploy in order to solve a problem of collective coordination. The question raised by this operation of application thus concerns the conditions for possibility of the operation by which reason (the activity of judgement) produces meaning effects in reality, that is, 'is applied' or 'is effected' in social reality.

Must we assume that this application is wholly determined, in the last analysis, by the formal rules of rational activity (which would necessarily be stored in the mind)? On this view, the operations of application and of the justification of judgement are governed by *the same resources* and thus exist in a *symmetrical* relationship. It is clear, then, that this

perspective is that of mentalism. It should be noted that this position does not prevent the recognition of a degree of autonomy inherent in the interpretive activity specific to the operation of application.[87] Such a recognition of the 'reversibility' of the operation of application and the operation of justification does not necessarily entail abandoning a symmetrical approach to the operation of judgement, that is, the mentalist point of view. The hermeneutic theory laid out by Dworkin is a good example of this.

Must we then assume, in contrast, as would be entailed by a *non-mentalist* understanding of the semantic productivity of judgement, that the conditions necessary to such productivity (and thus to the application of reason in the world) cannot be reduced to the formal rules of rational activity? If so, it would be understood that reason does not have within itself the conditions for its application within the world, that is, the capability for producing meaning effects. From this second perspective, which is the one opened up by any holistic or pragmatist approach to the activity of judgement, we bring to light the *asymmetrical reversibility*[88] of the operation of reason. While the two operations reference each other, the resources needed for the operation of application are not symmetrical to the formal rules on which the operation of rational justification depends. This *asymmetric reversibility merely* reflects what was called above the 'reflexivity' of any operation of reason, which is the sole protector against the pitfalls of mentalist epistemology. That is, the activity of reason 'reflects' a 'perception' that reason itself cannot justify through its own formal rules, but that nevertheless depends on reason for its implementation, in other words, for the 'choice' of following a way of life governed by 'reason'. Could we then say that reason reflects on 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 understood to be 'rationalisable', 'transformable' according to the requirement dictated by the formal rules of reason. This reflexivity, laid out above in a speculative manner, is even easier to understand if we translate it into the 'concrete' terms of the theory of norms. As will be seen, we come back here to certain views already formulated above regarding Bratman's theory of cooperative activity.

A non-mentalist reflexive approach to judgement can only be achieved if we open up

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[87] As we have seen, acknowledging an autonomous dimension to the interpretive activity of the authorities in charge of applying the rules of law (including the rule of recognition) has become a truism to which everyone in the field of theory of law makes obeisance.

the 'black box' that has been left unexplored by current theories of norms because of their restrictive approach to the operation of the application of normative judgement. This black box relates to the conditions for realisation of the purpose underlying any activity of norm development. This purpose consists, from the outset, of perceiving a problem to be solved, of defining the 'rationalising' of the world required in order to solve the problem according to the conception of the norm held by its authors. Granted, it has become common sense to point to the limitations of the cognitive capabilities of human reason. But the 'contextual' limitation we wish to draw attention to here, which derives from the reversible and asymmetrical nature of the operation of application, is of another kind.[89] This asymmetry in fact implies that the application of a norm within social reality necessitates the deployment of resources that are not supplied by the formal operations of reason on their own.

Underlying any rational decision or voluntary action are two (not just one, as is usually assumed) operations of selection or choice. There is obviously the choice of the transformation that would appear to be called for rationally (that is, the solution deemed to be most rational in solving the problem). But this choice is itself possible only because it rests on a prior operation of selection related to the way of 'perceiving' the 'context' in relation to which the problem to be solved will be defined, and the *use* made of the solutions envisaged by the players called upon to apply them, will be determined. Here, the asymmetry is evident in the emergence of the background that any operation of justification relies on. This second operation of selection -on which the first depends- is not solved by the first. It thus calls for a specific "*attention*" if it is hoped to fulfil the objective sought, which consists of accomplishing the best rational action possible to deal with the problems that need to be solved. The fact is, no "transformation" – and thus no *effective realisation of the intentional purpose specific to every norm* – is possible unless the second conditionality is taken into account and a specific procedure for the adjustment and construction of a common perception of the context is organised. What is at issue is the procedural organisation of the adjustment of existing perceptions by the players involved in order to name the meaning and the nature of

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[88] This turn of phrase was coined by **M. MAESSCHALCK**, *Normes et Contextes, o.c.*, pp. 180 and 244. On this, see **J. LENOBLE and M. MAESSCHALCK**, *Toward a Theory of Governance, o.c.*

[89] Certainly, numerous authors have already incorporated a limit to rationality at that level of formality (for example, Gödel's theorem; procedural rationality in Habermas's sense, allowing for an ever possible renewal of the argument; and procedural rationality in H. Simon's sense). But the limitations of the formalism of reason also exist on a second level and take on a meaning different than that of "limitations in cognitive capabilities". To limit oneself solely to the formal process of the justification for my rule for action is not sufficient to take into account this rule's conditions for semantic productivity.

the inadequacies to be settled and the problems to be solved.

Thus, two processes that cannot be dissociated from each other must be articulated. First, it is necessary to guarantee the necessary consideration of the formal rules on which depends the rational acceptability of the solutions to be implemented in order to deal with the inadequacies of existing life situations. But determining the meaning effects that the solutions to be constructed will produce depends on what will be selected at the outset as the context in which the inadequacies to be solved and the solutions to be constructed must be perceived. To assume this context is given, or that the players involved will immediately and naturally identify their own interests and the meaning of the new constraints that motivate the search for new solutions, is to overlook precisely the structure specific to every judgement, namely the fact that the adjustment of perceptions does not depend solely on the formal rules of judgement. As well, it cannot be assumed that the "perception of context" is identical among the various authors and addressees of the norm. Nor can it be assumed that their common adherence to the solution deemed to be the most rationally acceptable automatically entails a convergent transformation of their perceptions of the context and, consequently, the harmonisation of the motivations for the use they will make of the norm to which they adhere. A specific activity must be organised in order to organise a common perception of the context. This will in turn make it possible to increase the number of 'possibilities' on the basis of which the solutions deemed the most rational for dealing with the inadequacies of the 'context' will be selected.

This second order of the conditionality of action is usually wiped out it is presented as obvious or assumed to be determinable *a priori*. If we assume as given this capability for players in the collective action to adjust their common perceptions to the 'requirements of context', problems of governance clearly become less complicated. Such an assumption implies from the outset the assumption that the players have the capabilities to translate their normative expectations into the effectiveness of action through their interactions. The assumption of a *mental capacity* (a *mentalism*) for translating into reality the goals pursued guarantees this equilibrium solution. It is understood that the "content assumed to be given" of the intended goals of the players in an action will be capable of being translated into the effective content of the action. But to assume such a capability as given consists precisely of overlooking the reflexivity of the operation of normative judgement. In contrast, a better

construal of the *theory of norms* entails invalidating this assumption and consequently postulating the need for incentives likely to cause the emergence of this 'capability' of identifying normative objectives to be pursued in common.

It is in order to respect this epistemological requirement (which exists within both theory of judgement and theory of norms) that we have suggested extending Coleman's pragmatist approach to the concept of law and replacing the positivist approach with a *genetic* approach to the conventionality of law. This would allow for a different way of illuminating both the question of the descriptive or normative status of the theory of law and the analysis by Coleman (and more broadly the positivists) of the conditions for the existence of law within a social group. Granted, we cannot consider subordinating the definition of law to some external 'normativity', as is suggested by classical natural law theory. No one could seriously contest the impossibility for theoreticians to define 'the' rationally desirable way of life. That is not what is at issue here.[90] Moreover, even in its internalist version, Dworkin's critique of positivist 'descriptivism' is hard to accept because in itself it fails to take into account the "reconstructive and descriptive" status of its own analysis of the concept of law. From this perspective, Coleman is right to point out, in Dworkin, "the confusion between the content of the concept of law and the content of the law of a particular community".[91] On the other hand, however, because of his positivist, non-genetic, approach to the conventionality of law, Coleman fails to perceive the normative dimension internal to the content of the concept of law and the irreducibility of this normative dimension to a prescriptive dimension. By "prescriptive" dimension is meant the "distinctive feature of law's governance", which "is that it purports to govern by *creating reasons for action*".[92] By "normative dimension" is meant the requirement for procedural conditions allowing for an "optimised[93] and common" reconstruction of the representations deployed by the creation of these "reasons for action". These conditions, as we pointed out in analysing the conditions for cooperative activity, are associated with the conditions for realising the common intentionality aimed at by the social

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[90] By referring to evidence, this critical challenge does not intend to contest the conventional nature of the social practice by which the 'trust' and the 'effective respect' accorded to the official authorities in a social group are constructed. It seems to us clear that, for the purposes of the conceptual analysis of law, it is not a question of subjecting law to dependency on some outmoded form of belief in natural law which would seek to define the conditions of legitimacy of the social contract. The issue here is of an entirely different nature.

[91] **J. COLEMAN**, *The Practice of Principle, o.c.*, p. 180.

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

[93] As was seen above, the optimisation, that is, the extension of representations, does not mean the search for an illusory "optimal representation".

practice of recognition that is constitutive of the conventionality of law. Moreover, as we have just seen, an adequately epistemological grasp of the theory of norms entails a proper construal of the nature of the intentional purpose borne by every norm. After all, is it no symptomatic that Coleman, adopting Bratman's analysis relative to the internal conditions for the satisfaction of the shared intentionality that defines cooperative activity, appears not to adopt Bratman's distinction between 'prepackaged cooperation' and 'shared cooperative activity'?[94] True, Bratman does not entirely reconstitute the normative requirement entailed by his own rejection of any mentalist approach to shared intention. But he does preserve the idea of a possibility of realisation "in variable and progressive extension" of the requirement entailed by such a form of action. This same idea of 'degrees of progressive extension' is just what we wish to radicalise here in order to show that it is entailed epistemologically and in order to draw from it consequences relative to a normative dimension internal to the content of the concept of law. As may be observed, a normativity of this kind is neither substantive nor procedural in the sense given to these terms by Habermas and Rawls. The procedural entailment that is inherent in it remains internal to a conventionalist approach to law and results from a 'descriptive or speculative' grasp of the conditions for possibility of the operation of judgement by which the rule of recognition specific to any social group is defined and interpreted.

Finally, the revelation of this normative dimension specific to the 'content of the concept of law' (and not of the 'content of law of a specific social community') allows for one last extension of Coleman's reasoning. That is, it requires an extension of the conditions that Hart and Coleman define as 'conditions' that must be satisfied in order to satisfy the requirements of social regulation by law. At the same time, this makes possible both the revelation and the transcendence of the somewhat idealised image that the positivist approach results in, which consists of assuming that, right from the moment of setting up of the formal structures of the modern state, there were brought together the conditions required for the regulation of our societies. This supposition is clearly linked to the fact that Coleman, in line with dominant positivist approaches, considers the existence of law, beyond the "practice of recognition of law" by the authorities in charge of applying it, is a function exclusively of the *effectiveness* of respect for the decisions of these officials by the majority of the population. We will not here repeat our discussion of the inadequacy of the analysis of the "practice of

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[94] **M. BRATMAN**, "Shared Cooperative Activity", *o.c.*, p. 339.

respect for and of adherence to the organisation of a way of life" in terms of simple *empirical effectiveness*.[95] But it is interesting at this juncture highlight to what extent it also contributes to an *idealised* representation of the form of collective action by which a group aims to regulate its behaviours. *Idealised*[96] because the form of empirical effectiveness that Hart and Coleman (and Kelsen) invoke is defined in such a manner that it is assumed to be realised within the very large majority of modern societies. Outside the extreme and transitory case of revolution, the effectiveness of a political power over a territory is understood by them to reflect the coming together at one time of all the conditions that guarantee the accomplishment of the regulatory function of law. With the exception of crisis situations and times of temporary destabilisation, the conditions for satisfying governance by law are assumed to have been brought together from the moment that the institutional structures of the modern state are set up. This is understood to be independent, of course, of the forms of government or legitimacy -*e.g.*, whether dictatorial or democratic- that they serve. If this is put in somewhat more technical language, it could be said, 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".[97] This

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[95] As was seen above, no majority practice of respect for an institutional structure can be analysed outside the intention and the perception of a form of common life deemed to be rationally acceptable. We are also in a position to see that Dworkin correctly perceives this inadequacy in positivist thinking among the positivists, even though, because of his own epistemological inadequacy, he fails to construe it adequately. It is just this inadequacy of the positivists that Dworkin seeks to reveal when he says that every legal system is a form of institutional morality. In so saying, his aim is quite rightly to point out that ultimately the existence of law does not depend on a factual practice independent of an intended acceptable way of life, a mode of collective action respecting good reasons to act. But in just the same way that it is astonishing for Coleman to fail to apply his own model of "shared Cooperative activity" to the practice of "effective respect for law by the majority of the population", it is equally astonishing for Dworkin to fail to apply his 'interpretivist' model to the determination of this institutional morality. Dworkin takes as given the institutional morality that it would fall to judges to adjust interpretively in light of the constraints of reality. It is this that accounts for Dworkin's somewhat naïve ascription of omnipotence to the judge in the judge's mission of "saying" what the best possible representation of institutional morality in a constantly changing context would require.

[96] Note that the idealisation characteristic of the positivist approach recalls, for all their differences, the kind of "mentalist" belief that the idealised and illusory omnipotence Dworkin assigns to the judge approximates. Moreover, even though our respective arguments follow different paths and end in distinct approaches to the 'normative' dimension of the concept of law, the observations made here seem to us to have a certain affinity with Stephen Perry's insights in revealing a kinship between the 'normative' presuppositions of the approaches to the concept of law developed by Hart and Dworkin; ST. PERRY, "Interpretation and Methodology in Legal Theory", in A. MARMOR, *Law and Interpretation: Essays in Legal Philosophy*, Oxford, Clarendon, pp. 97-135; ST. PERRY., "Holmes v. Hart: The Bad Man in Legal Theory", in ST. BURTON, *"'The Path of the Law' and Its Influence*", Cambridge, Cambridge University Press, 2000, pp. 158-196.

[97] J. COLEMAN, *The Practice of Principle, o.c.*, p. 145. It is not very significant for our purposes here that Coleman, without specifying other conditions necessary to the exercise of the conduct guidance function that defines law, postulates that these conditions do not prevent the rule of recognition from taking an "inclusive" form which would include "political morality" as a condition of legality [pp. 146-147].

formal organisation of the state is thus supposed to embody exclusively the institutional conditions for the emergence of the culture of law that the fulfilment of the function of 'guiding conduct' depends on within the social group that defines the law.

Given that the condition for respect for the decisions of officials by the majority of the population are externalised in the form of an empirical effectiveness, they are not analysed as the meaning effect of a collective action with the purpose of a common perception of the 'reasons for action'. The possible "constraints" that would result from an analysis of the conditions for possibility of the operation of judgement deployed by this form of collective action are thus not analysed for their own sake. *The result is that the function of regulation ascribed to law is assumed to be effected independently of any specific institutional mechanism that would translate the development of the norm in order to link it to its final addressees, that is, citizens.* This question of institutional mechanisms is reflected upon exclusively in connection with the officials in charge of the operations of developing and applying the rules. The question of the necessary adjustment of our current mechanisms of government in order to improve the conditions for citizen participation in these operations cannot be posed or understood as resulting from a correct theoretical construal of their conditions for possibility.

Undoubtedly, as has been seen, a "genetic approach" to the conventionality of law and the 'normative' dimension of the concept of law that it allows for revealing in themselves entail questioning such an idealised image of the conditions for fulfilment of governance of our modern societies by law. But it is not the case that our 'epistemological' reasoning us supported 'sociologically' through the mere observation of the concrete dynamics of our societies? And does an observation of this kind not oblige us to perform a more nuanced analysis of the conditions required for law to be 'capable of guiding conduct'?[98] We are witnessing in many spheres today an effort to reflect on the rearrangement of the procedures for constructing normative solutions to make up for the inadequacies that our accustomed procedures result in. Where would these inefficiencies come from if not the fact that the *use* made by the addressees of norms results in these unintended consequences? Let us put it in other words. The meaning given to norms when they are applied in social reality (that is, when they produce meaning effects) tend to make those norms inoperative or ineffective with

respect to the normative objective that the authorities wished to achieve. The whole discussion that has taken place in "theory of governance" over the past four decades (whether in economics, with the purpose of strengthening the mechanisms for market coordination and contractual cooperation; or in political science, with the purpose of strengthening participatory and deliberative mechanisms) has without question emerged from this same necessity to adjust our modes of constructing norms in order to better take into account the representations of these norms by their addressees, and thus the "motivations" on which the use that will be made of them depends. In particular, what this current reflection reveals is that wherever divergences are greatest among perceptions of the problem legal norms seek to resolve, accustomed procedures for constructing and applying norms prove "ineffective" for guaranteeing an adequate solution to the problem. The 'capability' of the public authorities to construct the solution and identify the 'expected' meaning of the norm is thus itself dependent on a 'recognition' of this meaning by the ultimate addressees of the norm. In such conditions of marked dissension, one can understand the emphasis increasingly placed by current theory of governance on the necessity to reflect on the mechanisms best suited to incorporating this 'condition of recognition' and make possible the cooperative construction of common meaning. All this makes it clear that the question of 'trust' or "recognition by addressees deprived of the rule of law" cannot be reduced simply to the classic question of the assumed allegiance by these citizens to the officials in charge of a given legal order (in other words, the condition of 'comprehensive' effectiveness identified by Kelsen, Hart, and Coleman). This way of understanding 'recognition' by citizens proves reductive and inadequate to take into account the condition of 'trust', 'motivation', or 'perception' on which the operation of a norm's semantic productivity within social reality depends.

2. The second consequence: The opening up of theory of law to theory of governance

One of the questions asked in this article is whether it is justifiable epistemologically for the conceptual analysis of law to remain watertight in relation to the "normative" issue of the necessary rearrangement of our mechanisms of governance. Is it justified or not for the philosophy of law to remain autonomous from the normative research on the theory of collective action that sits at the heart of present-day research in the social sciences?

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[98] *Ibid.*

It is easy to see that these questions cry out for a response in the negative. However significant the advances brought about by recent hermeneutic approaches to the function of judgement and the pragmatist redefinition of the rule of recognition, a 'more reflexive' extension of the operation of collective regulation that defines law is clearly necessary. True, legal positivism has sought progressively to adapt its definition of law so that it better takes account of the function of the application of rules. As we saw, in the words of L. 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 emphasising the systematic and normative character of law". Thus, it could be said that the theory of law, by taking into account the reversibility of the operation of application, has sought progressively to take on board the reflexivity of normative judgement by which a social group seeks to act upon itself in order to regulate its behaviours. In internalising the Kelsenian *Grundnorm* and emphasising the reflexive dimension of the rule of recognition, Hart brought about decisive advances. Similarly, the pragmatist redefinition of the rule of recognition advanced by Coleman and its explicit recourse to the philosophy of action are part of the same trend. Moreover, this 'pragmatist' turn reflects the will to incorporate into the definition of law, in a rigorous manner, the "holism of use" that Dworkin perceives but, as Putnam observed, fails to analyse epistemologically.

However, because it retains a symmetrical approach to reversibility, the theory of reflexivity deployed by these various approaches to law always ends, at some point or another, by ascribing to the social body a 'capability' of satisfying the rational expectations implied by its regulatory purpose. The traces of this 'mentalist' presupposition, which, in the last analysis, is associated with a schematic approach to normative judgement, accounts for the exclusive focus on the function of the application of rules by the judge (or by officials). In his somewhat naive idealisation of the judge as an organ that guarantees the self-adjustment of the requirements of the social group's internal moral code, Dworkin provides an obvious example of this. But Coleman's difficulty penetrating the persisting black box of the conditionality of the 'recognition' of the rules by the members of the social group reproduces an analogous epistemological error.

From this perspective, both the approaches to economic analysis of law based on

Coase and Williams on one hand and the sociological approaches to self-regulation (which are indeed sometimes referred to as 'reflexive') and those based on Habermas's formal pragmatism, on the other, offer an advance in comparison with positivist and hermeneutic approaches to law. This is true even though these last approaches, especially those associated with the discussion raised by analytical positivism, have the advantage of performing a more rigorous construal of the technical issues entailed by an analysis of the concept of law. As well, undoubtedly these various critical approaches of an economic, sociological or (as with Habermas) a philosophical kind, remain hampered by an inadequate epistemological construal of the theory of reflexivity that they seek to deploy. This is very clear when it comes to the economic analyses of law associated with theories of rational choice and the sociological approaches inspired by N. Luhmann's theories of self-regulation.[99] And indeed, Habermas too can be charged with reflexive inadequacy, although of a more subtle and complex kind.[100]

But at least these various 'critical' approaches reflect, whether implicitly or explicitly, the same insight, namely that a better understanding of the concept of law requires going beyond the reflexive inadequacy of the positivist and hermeneutic approaches currently available and proposing that the regulatory function of law requires for its fulfilment an extension of the reflexivity of our institutional mechanisms of governance.[101] Recall the

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[99] In these "reflexive" approaches to self-regulation, it would appear that everything takes place as if the "capacitation" of players in a "sub-system" is assumed to exist on its own, and thus assumed to be inscribed within the sub-system, a little like the way Teubner, following Luhmann, assumes "codes" to be "given". To assume that merely convening existing players suffices to create the conditions for developing a solution suited to the setting implies that the determination of the solution to the question of "balance" between the sub-system and the context would result in simply applying rules deployed mentally by players in the subsystem. Such a mentalist approach to action entails a denial of the reflexivity that Luhmann's functionalist approach was intended to preserve. For some neo-institutionalist economic approaches, see also: **J. LENOBLE and M. MAESSCHALCK**, *Toward a Theory of Governance, o.c.*, Chapter 1; **M. MAESSCHALCK**, *Beyond Neo-Institutionalist and Pragmatist Approaches to Governance, o.c.* , Section 2, § 2.2.

[100] *Ibid.*, Chapter 3.

[101] In the same vein, they also have the merit of taking into account not just the parallel evolution of the discussion in the social sciences, but also the evolution of positive law. Present-day reflection in the social sciences on the necessary revisiting of traditional forms of coordination by rules has been reflected in significant legal transformations in our way of constructing rules in numerous important sectors where the difficulty of constructing collective choices is more palpably felt. These transformations are directly associated with the search for legal mechanisms that would provide for better cooperation among decentralised players. This accounts for recent reflections, mainly in the scholarly literature in English, on the phenomenon of the contract, especially the line of thought opened up by relational contract theory initiated by **I.R. MACNEIL** ["Contracting Worlds and Essential Contract Theory", *Social and Legal Studies*, 2000, pp. 431-438]. An exemplary application of this approach may be found in the current restructuring of the regulation of the public sector. On this, see **J. FREEMAN**, "Collaborative Governance in the Administrative State", *UCLA Law Review*, 1997, pp. 1-99; **J. FREEMAN**, "The Contracting State', *Florida State University Law Review*, 2000, pp. 155-214; **J. FREEMAN** "The Private Role in Public Governance", *N.Y.U. Law Review*, 2000, pp. 543-675; **P. VINCENT-JONES**, "The Regulation of Contractualisation in Quasi-markets for Public Services", *Public Law*, 1999, pp. 304-327; **P.**

critiques addressed to jurists by economists during the seventies.[102] They consisted of exposing the 'reflexive' inadequacy of the technique of governance by 'rule' (the so-called 'command-and-control' technique of governance) and its inability to take into account the reversibility of the operation of application, that is, the dependency of the effects of a rule on the use that will be made of it by its addressees. This was also the reason why economists recommended more 'decentralised' forms of our mechanisms of governance.[103]

Similarly, Habermas perceives the inadequacy of reducing the conditions of validity of law exclusively to the 'cooperative' organisation of judges' practice. Habermas perceives that the constraints entailed by the fulfilment of the 'function of governance' of modern law require arrangements in our mechanisms of governance that go beyond the mere 'cooperative' organisation that is specific to the judicial apparatus of the modern state, or the putting into place of the somewhat naive 'heroisation' (in Habermas's appropriate coinage) of the judge that Dworkin's hermeneutic approach results in.[104] According to Habermas, the procedures for developing rules must be adjusted to allow for a better respect for the conditions for possibility of the normative judgement that communicative theory of law and politics reveal.[105]

VINCENT-JONES, "Contractual Governance: Institutional and Organisational Analysis", *Oxford Journal of Legal Studies*, 2000, pp. 317-351; see also: **C. SCOTT**, *Regulation*, Dartmouth, Ashgate, 2002.

[102] As was observed above, many American jurists thought that they had found in the renewal of legal activism a way of compensating for the welfare state's weaknesses in ensuring the "effectuation" of the fundamental rights inscribed in the Constitution.

[103] This proposal for decentralisation does not necessarily result in the valuing of the mechanism of the market on its own. Economists themselves have increasingly become aware that that mechanism must often be accompanied by other institutional mechanisms in order to better guarantee effective cooperation by the various actors involved in the collective action needing to be regulated.

[104] Or for that matter, in a more communitarian tradition, the heroisation inspired by Gadamer and advanced by **M. J. PERRY** [*Politics and Law*, Oxford, Oxford University Press, 1988, pp. 152-ff.], who, as Habermas points out, ascribes to "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 demokratischen Rechtstaats*; transl. by **W. REHG.**, *Between Facts and Norms: Contributions to a Discourse, Theory of Law and Democracy,* Cambridge (Mass.), MIT Press, 1996, p. 258.

[105] That is, an approach to democratic will-formation that "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"; *Ibid.*, pp. 278-279. This perspective is even clearer in the "experimentalist and multi-centred" approaches to forms of production of norms developed, on the basis of collective learning theories, by M. Dorf, J. Cohen, and C. Sabel, who very clearly perceive the shortcomings of traditional approaches to our modes of governance and of production of norms; see **M. DORF and CH. SABEL**, "A Constitution of Democratic Experimentalism", *Columbia Law Review*, 1998, pp. 267-473; **J. COHEN and CH. SABEL**, "Directly-Deliberative Polyarchy", in **CH. JOERGES and O. GERSTENBERG**, *Private Governance, Democratic Constitutionalism and Supranationalism*, pp. 1-30, Proceedings of the COST A7 seminar, European Commission, 1998.

While we are not prepared to endorse all of Habermas's analyses, this last mentioned approach is one we believe should be pursued. A better understanding of the conditions for realisation of the normative requirement inherent in the concept of law (that is, of the conditions for realisation of law's guiding function) requires a critical assessment of the reflexive inadequacy of our current mechanisms of governance, that is, of our normative modes of production. This does not mean that we reject the *descriptivist* project of positivism's undertaking or the positivist exposure of the normative impact of the customary forms of adherence to natural law. Possibly what is indicated is the need to rethink the inevitable link between fact and value and take into account what Putnam calls "the collapse between fact and value".[106]

After all, is it not revealing to note the extent to which the analyses of both Hart and Coleman's conceptual analyses of law are pervaded by an invocation of the ideal? True, it is no longer a question as with Dworkin of ideal governance. However, what is now in play is the functionalist ideal of guidance. As was indicated above, Coleman tells us explicitly that, as the result of a kind of process of natural selection or collective learning, our modern legal systems are the result of a 'maturing process' that has reached completion. According to him, the setting up of our modern legal systems reflects the implementation of the conditions necessary to 'satisfying' the guiding function of law. Thus, the idea is that the conditions for satisfaction of the ideal of guidance are already given, even though this state of affairs will now be viewed as the result of social gains or of a lesson learned specifically with the emergence of modern societies. As with Dworkin, although in a different way, the conditions for satisfaction of the realisation of the ideal are assumed to be guaranteed by a play of a formal rule (in this instance, the rule for a process of natural selection or a social learning operation that has been decisively completed). Our own position is exactly the reverse. In our view, what is at issue, for the sake of a better *descriptive* understanding of the conditions for semantic productivity of normative judgements, is to demonstrate that the conditions for fulfilment of the 'ideal' implied by any rule require a *normative and critical* approach to our current mechanisms of governance, that is, our normative modes of production. Thus, what is at issue is not to oppose the conventionalism that Coleman rightly adopts in opposition to

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[106] **H. PUTNAM**, *The Collapse of the Fact/Value Dichotomy and Other Essays*, Cambridge (Mass.), Harvard University Press, 2002.

Dworkin. Rather, in the name of a radical understanding of the holism of usage that underlies this conventionalist approach, the issue is better to understand the reflexive nature of the conditions for realisation of the form of collective action by which a group proposes to act upon itself within the horizon of what it deems to be rationally acceptable.