"Toward a Theory of Governance. The Action of Norms"

Lenoble, Jacques ; Maesschalck, Marc ; Paterson, John

ABSTRACT

For more than a century Western democracies have struggled to keep faith with both economic efficiency and social justice. Yet reconciliation of these factors remains as baffling as ever. Among the many voices clamoring today for theory of collective action, we hear most often of the great chasm between "legitimacy" and "efficiency". It is the contention of the authors of this ground-breaking book that these antinomies can be seen as distinct "moments of application" in the operation of normative judgement, and that a reflexive treatment of norms of collective action, by clarifying limitations in rules and in beliefs, allows us to develop mechanisms to correct the limiting effects of such judgements and act accordingly. Drawing on and developing recent trends in social sciences, "The Action of Norms" presents a powerful new theory of governance with far-reaching implications of the future of law, the judiciary and justice itself. Among the contributing modern ideas that are explained an...

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Toward a Theory of Governance

The Action of Norms

By
Jacques Lenoble and Marc Maesschalck

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Introduction

A profound transformation of our Western democracies is evident today under different forms. These transformations express an insufficiency of our traditional forms of social organization. Still in search of themselves, these transformations continue to provoke debates on the orientation that would be appropriate to ensure ‘effective’ respect for democratic requirements. The question of governance, of its efficiency and of the effective respect for the objectives assigned to it in the name of democracy, has progressively become, in recent years, the major issue in our social debates. Whether it is a matter, as will be seen below\(^1\), of the debate launched in the United States in the fifties on the transformation of regulatory states, of the debate on European governance\(^2\), or again of the current debates on the transformation of forms of international cooperation required by the respect for fundamental rights at an international level\(^3\), we find today active consideration of the improvement of governance arrangements\(^*\) at the national, European and international levels.

Faced with this present situation, two observations arise. First, the social sciences have provided two antinomical responses to the need for a new approach to the governance of democratic societies. Second, although the transformations

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\(^1\) See chapter 1, section 1 below.

\(^2\) For example, the debate on the improvement of European institutions by increasing the efficiency of their regulatory interventions as against improving them by confronting their democratic deficit and developing a participatory European democracy (and notably the debate on the Open Method of Coordination); EBERLEIN B. and KERWER D., “Theorizing the New Modes of European Union Governance”, in European Integration online Papers (EIoP), vol.6, n° 5, 2002, http://eiop.or.at/eiop/texte/2002-005a.htm; the special edition TRUBEK D. and SCOTT J. (eds), “Law and New Approaches to Governance in Europe”, in European Law Journal, vol. 8, 2002; JOERGES Ch., MENY Y. and WEILER J. (eds), Symposium: Responses to the European Commission’s White Paper on Governance, European University Institute, R. Schuman Centre for Advances Studies, 2001; TRUBEK D. M. and MOSHER J. S., New Governance, European Union Employment Policies and the European Social Model, NYU School of Law, Jean Monnet Chair working paper 15/01, 2001. See in particular, DEWANDRE N. and LENOBLE J. (eds), L’Europe au soir du siècle, Identité et démocratie, Paris, Esprit/Seuil, 1992; DE SCHUTTER O., LEBESSIS N. and PATerson J. (eds), Governance in the European Union, Luxembourg, EC, 2001.

\(^3\) For example, the debate on ‘international regimes’, mainly in international environmental law, or on the question of humanitarian intervention. (For the literature on international regimes, see chapter 1, section 1, n. 41 and section 2, n. 153 and 165 below).

\(^*\) Translator’s note: ‘arrangements’ is used throughout the text as the translation for ‘dispositif’. While the latter term is often translated as ‘mechanism’, this word in English has connotations of formalism, which the authors are explicitly critical of. Equally, in the French text, the authors use ‘mécanisme’ where they intend this meaning.
in question principally concern the law (the challenge to the traditional separation of powers from the increasing role of the judge, the question of the limits to recourse to the law as an instrument of social transformation in view of effective respect for fundamental rights, and so on), legal theory has for a long time remained strangely silent in response to the challenges which have been posed. For legal theory, it has seemed that the theoretical questions posed by the possible recasting of the theory of governance would not oblige it, except perhaps marginally, to question its own theoretical frameworks. At best, it would be a matter of questions that have no effect on legal thought other than on the level of the theory of adjudication or on that of the sociology of law. The perspective developed in our work is situated in opposition to this theoretical attitude. Indeed, our general basic hypothesis is, on the contrary, that the current ‘revision’ of theories of governance in the social sciences poses major theoretical and epistemological questions, which oblige in return a redefinition of certain fundamental positions in legal theory. First and foremost among these positions are both the most recent approaches of the positivist thesis of the conventionality of law and its attempts to move beyond those approaches. Moreover, such a redefinition is equally necessary due to the fact that it conditions, in turn, the possibility of dealing with the insufficiencies of the antinomical responses currently provided by the social sciences to the required reformulation of the conditions for an effective respect for democracy.

Let us come back to the first aspect of our basic observation, which concerns the state of research in the social sciences in the face of the need for a new approach to the governance of our democratic societies. Two antinomical answers are today offered by philosophy and the social sciences to improve democratic governance: either a response in terms of efficiency or a response in terms of procedural ethics. According to the first, the improvement of democratic governance arrangements requires a better attention to the conditions that must ensure an efficient result for public action (defined in terms of Pareto-optimality). This efficiency would have to be understood on the basis of the theory of rational action and measured with the aid of instruments, which its recent developments have refined (cost-benefit analysis, theory of incentive contracts, etc.). According to the second, the welfare state must be transformed into a more deliberative democracy. Whatever the reforms to be carried out in the name of efficiency, administrative action and the action of the market must remain fundamentally subject to legal constraints which express the limits imposed in the name of ethical principles determined by means of public discussion. It is accordingly on

4 Cf. infra chapter 6 for the beginnings of a recent change that our own hypotheses aim to reinforce.
5 Either by the pragmatism inspired by Putnam or Wittgenstein or by Habermas’ formal pragmatism, cf. infra chapter 6.
6 The fact is that these two current responses both rest, implicitly or explicitly (for Habermas’ post-conventional deliberative theory) on an epistemologically problematical conception of law and of the norm.
another level that democracy manifests a ‘regulatory’ insufficiency. For Habermas, this relates in effect to the arrangements that must allow a genuine discussion within public opinion, that is, a discursive formation of the general will respecting the requirements of a post-conventional procedural ethics. The theory of law and of the separation of powers, as conceived by representative democracy, is not wrong. It must simply be improved by the arrangements of a participatory democracy that would allow us to consider the procedural redefinition of a norm’s criteria of validity (a norm is valid if it is the result of a free and rational discussion among all of those with an interest).

Intuitively, these two responses appear almost immediately to be unsatisfactory when one compares them with each other. The first would miss the moment of ethical constraint that should condition the simple approach of efficiency in a democratic regime. But, in contrast, the economic critique of governance in terms of efficiency contains a truth that the ‘moral’ approach in terms of fundamental rights and of ethical constraints does not manage to integrate. Indeed, one understands the spontaneous scepticism provoked by the incantatory appeal to fundamental rights and to the formal approach of public debate as the means to overcome the ‘regulatory’ insufficiencies of traditional representative democracies. In that sense, economists are surely right to focus attention on the arrangements that condition the efficiency of public action.

This common sense intuition certainly remains insufficiently constructed from a theoretical point of view. But, it nevertheless has value as a symptom. The development of our general hypothesis in the form of a theoretical proposition of a ‘contextual proceduralization of law’ aims to reconstruct and support this intuition. It suggests that both of these current critical approaches to governance share, beyond their apparent opposition, the same presupposition that accordingly explains their parallel insufficiency. This presupposition concerns the conception of the ‘norm’s mode of action’ and therefore refers to a theory of the norm.

Every theory of democracy and of law presupposes such a theory of the norm. Thus, at the base of the traditional and still dominant approach to democracy in terms of fundamental rights, lies a certain conception of action theory. According to this conception, when society adopts an objective (that is, adopts a norm) that is judged legitimate, the question of its application, of its effectuation, is not considered to pose any fundamental problems. The application is in a way considered as a step that follows logically from the determination of the objective to be achieved. The simple adoption of the

7 According to this moral approach, redefined by the deliberative theory of democracy, a norm is legitimate if it takes account of the rights of all citizens.
8 How should we understand this operation by which society aims to regulate itself and to act upon itself by means of norms which it judges legitimate? How should we understand the way in which these norms will be effected? What are the factors that condition the meaning effects resulting from the use to which the norm is put? How, therefore, does the process function by which collective action is effected?
The Action of Norms

objective provides the necessary ‘resources’ for the realization of the goal pursued.

We can usefully cite an example linked to the contemporary themes of the debate on governance. It is concerned with the approach adopted by the experts who have guided the bulk of the policies of international cooperation implemented in recent years with a view to transforming the societies of Central and Eastern Europe. The action carried out in recent years by international experts in these societies is often based on the idea that their transformation into democratic liberal regimes and market economies will be achieved by their adoption of the legal rules and mechanisms which define the formal framework of such regimes. Underpinning such a policy we find the belief that the rule, in all its formal power itself, ensures the transformation of the social context that it aims to govern so as to institute the form of life required by its normative prescription. Everything is supposed to happen as if the logic governing the effectuation of the rule was identical to that governing its justification and its formal adoption. But, as the effective results of this policy appear today to demonstrate, the factors which condition the effectuation of a rule, and thus which govern the way in which the effective transformation of social contexts on the basis of an objective pursued operates, are much more complex than is suggested by the formalist approach.

Our theoretical proposition will consist in showing that such an ‘intentionalist, mentalist and schematizing’ approach to the operation of the application of social norms is too reductionist and ignores the ‘logic’ which governs the effects produced by the use which is made of a norm. Is it not, moreover, this ignorance which explains the observed inefficiency of diverse governance arrangements in realizing the ‘ethical’ objectives which democracies regularly set themselves? Does not this inefficiency oblige us to move beyond the simple emphasis placed by these ‘ethical’ approaches on the quality of ‘legitimacy’ (formal validity or rational acceptability) of norms in order to integrate other conditions more directly related to the processes which condition its application in a determined context?

9 Other equally significant examples could have been taken. Consider the inefficiency of numerous ‘humanitarian interventions’ that, despite the legitimacy of their objectives, often prove to be ineffective in local contexts. But to a greater extent, as we will see, it is the same type of analysis which lies at the heart of questions of governance that arise today, for example, in relation to international environmental protection, to the reform of European institutions, or to the more usual setting of the regulation of public policies.

10 Intentionalist, because the norm’s effects are supposed to be deducible from the simple intention directing its adoption. Mentalist and schematizing, because what enables the determination of the effects of a norm or of a public policy is supposed to be linked to rules (or schemes, to use Kant’s term) located in every mind and therefore a function of mental capacities which do not at all depending on a thinking subject’s exterior context. It is also for this same reason that the operation of application can be considered as a simple formal operation of deduction on the basis of the rule itself.
In this sense, the contemporary Law and Economics critique of traditional command-and-control governance models is suggestive. The emphasis is placed by economists less upon the operation of the justification of the norm than upon its application and respect for procedures capable of ensuring the efficiency of the objectives pursued. It is nevertheless important to note that this critique, even if it contains a large element of truth, is based definitively upon the same theory of the action of norms as that employed by the ‘ethical’ approaches. For neoclassical economics, the determination of the ‘effective possibilities’ remains linked to a mental act of anticipation that the economic expert can effect according to given preferences. As we shall see below\textsuperscript{11}, the contemporary debates relating to the theory of rational choice do not manage to free themselves from this mentalist presupposition. Thus, an equally mentalist and schematizing approach (or to put it in more technical terms, a conception of the operation of the effectuation of the action as a schematizing and subsuming operation) is employed by these contemporary economic theories of efficiency.

It is this representation of the processes of the effectuation of the norm – the way in which a norm is applied, acquires a meaning and is expressed in effective consequences – that we want to question. Our theoretical proposition in terms of contextual proceduralization aims to tackle once again this epistemological presupposition of the different current approaches to governance. The intention is to reconstruct and criticize their basic mentalist preconception and thus contribute towards their synthetic displacement. We seek to establish how we must construct the cognitive operation which every normative judgement involves, and which thus covers not only the operation of determining the objective which is judged to be justified (at the individual or the collective level of a rule of law), but also the operation of application which will govern the ultimate real consequences resulting from the use made of the norm. Only such a reconstruction of the theory of action allows us to cope with the respective impasses and insufficiencies to which the proposed moral or economic approaches to the reform of our governance arrangements appear to lead.

Our theoretical proposition will also allow us more particularly to emphasize the ‘reflexive’ insufficiency of these two approaches and, as a consequence, the reflexive insufficiency of the governance arrangements to which they lead. Reflexivity is an operation specific to every act of judgement which consists in grasping this act itself in its activity, in its semantic productivity with regard to a determined context, that is, as a power of ‘potentiation’. In judgements of action, reflexivity more particularly determines the power to draw support from certain elements in order to produce meaning effects in a determined context. Attention to reflexivity thus determines the conditions of contextual application of a judgement insofar as it enables the capacitation of new ways of life. By emphasizing the necessity of increasing the

\textsuperscript{11} See chapter 1, section 2 below.
understanding of the reflexivity of processes of collective action (and therefore of governance arrangements), which is at the heart of the current debate on democratic governance, we will thus try to advance beyond the current opposition of moral and economic approaches.

A better understanding of the extent of the reflexivity of action – and therefore of the factors which condition the effects of the application of the norms that a society aims to assert – allows a deepening of the gains made by the theoretical debates recently initiated both by Habermasian proceduralism and by research initiated within social theory by the critique of the classical approaches to rational choice theory. By doing this, our own approach will only be pursuing the movement of current research in the social sciences. But it also allows us to indicate what remains to be done in order to realize this epistemological project since the contemporary debates are not generally presented in the form of a reflexive and procedural theory of collective action.

The second aspect of the observation at the basis of our research relates precisely to the deficit of theoretical repositioning in the field of legal theory in the face of the new requirements that a revision of the theory of governance could bring. As has already been indicated, both the practical transformations of our models of governance and the theoretical renewals that accompany them within the social sciences seem only to have had a marginal impact up to now in legal theory.

Certainly, legal scholarship, principally American, has witnessed evolutions directly linked to these debates, as we shall see below. But whatever the importance of the reflections opened by the crisis of the Legal Process school at the end of the fifties – such as *Law and Economics* or Republicanism – they did not provoke a renewed and articulated examination within legal philosophy of the dominant theses of the conceptual analysis of law.

In parallel, the link that would exist between the theory of law and the theory of governance has not been established. It is obviously not because the legal effects of these transformations of our governance models – principally those which are evident at the level of the judicial function – are ignored or

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12 Indeed, a reconstruction of the most recent debates within, principally Anglo-Saxon, economic theory or political science allows one to see the extent to which authors today emphasize the need for a better understanding of the factors which limit individual rationality and oblige a redefinition of the rationality of action less in terms of a calculation of optimization than of a process of collective learning. The dynamic of current research therefore consists in each case of better redefining the reflexive nature of the processes leading to the application of normative judgements and, as a consequence, in reorganizing the governance arrangements so as to avoid the inefficiencies linked to the reflexive insufficiency of previous arrangements.

13 We mean ‘theory of law’ in the sense of an analysis of the concept of law. See especially LEITER B., “Legal Realism and Legal Positivism Reconsidered”, in *Ethics*, vol. 111, 2001, pp. 278-301. The expression ‘philosophy of law’ has the same meaning, if it is not its explicit project to construct the epistemological presuppositions engaged by this conceptual analysis of law.
denied. But, these effects are considered, at best, only to concern the theory of adjudication or the sociology of law. It is therefore not generally established that the shortcoming evinced by these transformations would bring one back to a supposed shortcoming of the current state of philosophical reflection on law. In the same way, the idea that this current state would rest upon a theory of the norm (and therefore a theory of governance) whose epistemological presuppositions would be problematical is absent from this reflection. This is, however, the hypothesis that we will try to put forward. In this perspective, we will try to show that, even if the theory of law does not seem explicitly to express the same current dynamic as can be observed within other social sciences, in the end it manifests it implicitly. Indeed, a careful reconstruction of the best current debates attests to the re-felt need to deepen the definitive results of analytical positivism through a better procedural and reflexive reconstruction of normative judgment. Moreover, this better articulation between ‘legal theory’ and the ‘theory of reflexivity’ – which is now sought both within analytical positivism and within pragmatic approaches to law – calls for a deepening which the development of our own hypothesis will try to define. This epistemological deepening, at the same time as it allows the extension of the definitive results of positivist and pragmatic approaches to the conceptual analysis of law, also opens this latter to the theory of the norm which necessarily underpins it and, in this way, to the theory of governance it calls for.

Note finally that, even if it is not strictly within the theory of law, certain theoretical reflections have already appeared within legal scholarship to address the questions of ‘governance by law’ on the basis of an explicitly procedural and reflexive approach to action. It is mainly in the American literature emerging from the Law and Society movement that such research has been initiated. The reason for this origin is due to the way in which the crisis of governance has been manifest within the American legal field from the fifties onwards. As we will show below, a dynamic started there which expresses a will to transform our governance arrangements by drawing support, explicitly or implicitly, from the idea that the deficits linked to governance models are the effects of an ignorance of the reflexivity inherent in normative reasoning. Although the work of Nonet and Selznick is more descriptive than theoretical, it is nevertheless representative of this movement. But it is obviously in the work of the sociological writers inspired by Luhmann (principally Teubner) that one will more directly discover the traces of an approach to law which is concerned with the reflexivity of action. This approach is moreover akin to the attempts of those

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15 See chapter 1, section 1 below.
who, within economic theory, endeavor to reinterpret rational choice theory by integrating evolutionist perspectives inspired by functionalism.

Whatever its epistemological limits\(^{18}\), this functionalist approach already constitutes a substantial gain, if only through the requirement which it adds. It agrees, at this level, with other contemporary approaches to research in the social sciences (principally in economics or in political science) or in philosophy (principally Habermas and Putnam). It is this same path that we intend to follow and to borrow from. The path followed here will undoubtedly take, in its reconstructive momentum, a more philosophical turn. This epistemological detour should allow, as has already been said, a better appreciation of the procedural and reflexive nature of action and of the conditions which control its effectuation. It should also lead us in parallel to a deepening of the current debates in legal philosophy, so as to move beyond the false antinomy of the approaches to governance, which emphasize respectively either the conditions of legitimacy of collective actions or their conditions of efficiency.

The clarification of the double observation underpinning our general basic hypothesis has already allowed us better to discern the specificity of the approach we will take. We will now provide the plan of its implementation.

The first chapter is subdivided into three sections and constitutes in itself the first stage in our approach. It contains, in effect, a critical approach to the debates on governance and a first attempt at reconstructing the question of reflexivity on the basis of these debates.

In the first section of this chapter, we will briefly present\(^{19}\) the history and the dynamic of the debates on governance that have permeated research in the social sciences for almost forty years. It will also be a question of showing how these positions are all linked to a procedural conception of collective action. A useful way of presenting them is to start from the American legal debate, which began in the fifties. Indeed, that legal debate during the last forty years effectively reflects internally the debates within other disciplines and thus invites an integration of the problematics. Furthermore, it is immediately articulated with the concrete political issues that motivate these debates. Finally, addressing the question of governance in this more concrete way has the didactic advantage of allowing us to demonstrate more clearly the necessity and the utility of constructing this question by reference to its more abstract presuppositions relative to models of rationality. This critical approach will allow us to highlight

\(^{18}\) As we will indicate below (see chapter 1, section 1, 1.2.), the functionalist approach of Luhmann and Teubner reintroduces a mentalist representation of systemic adaptive capacities to the context. Such a mentalist approach to action implies a denial of reflexivity, which their approach nevertheless intends to safeguard.

\(^{19}\) This presentation, as well as a part of the present Introduction and of the third section of chapter 1, corresponds, with sometimes certain modifications, to that already presented in French in the *Revue canadienne droit et société*, vol. 17, 2002, pp. 1-38, under the title “Droit et gouvernance, Pour une procéduralisation contextuelle du droit”. 

the two principal theoretical frameworks within which the social sciences now address the question of the governance of collective action, namely, on one hand, the deontological and deliberative approach to governance and, on the other, the approach emerging from theories of rational choice and the neo-classical economic theory of efficiency with its extensions and corrections in the neo-institutionalist vein. These two perspectives rest, albeit in a different manner, on a theory of the norm that seeks to be procedural and reflexive.

The second section of the first chapter is devoted to a rapid reconstruction of the second theoretical perspective, insofar as its uniting with a theory of the norm is not usually considered in the current dominant debates in the social sciences. It will allow us to make more apparent the theoretical position that best embodies the current result of this dynamic of research in governance theory initiated in the social sciences by the debates relating to neo-classical economic theory. It will also better allow us to highlight how this dynamic rests on a growing will to develop a procedural and reflexive understanding of the normative operation by which a collectivity aims to act on itself.

Finally, in a third section and in introducing the second stage of our reasoning, we will proceed to a first attempt to reconstruct the question of reflexivity on the basis of the positions to which the debate on governance leads today.

In a second stage, it will be a matter of questioning the epistemological presuppositions of the two theories of the norm, which thus underlie the two current approaches to the theory of governance to which scientific reflection today leads. This stage must lead us to highlight the epistemological insufficiencies of these theoretical positions (chapters 2 and 3) and to propose a new theoretical solution (chapter 4).

In chapter 2, we will show the problematical aspects of the ‘weak proceduralism’ of the first position, that is, of the pragmatic and connectionist position (well illustrated, for example, by the approach to governance recently developed by Bruno Latour). In chapter 3, the same critical epistemological reconstruction will be carried out with regard to the ‘strong proceduralism’ of the theory of the norm linked to the deontological and deliberative approach to governance (well illustrated by the theory of Jürgen Habermas).

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20 In fact, the second theoretical perspective can only be understood if one is not content with the reductive formulations it is too often given. Its framework is larger than the well-known positions on efficiency. It also refers to the evolution of neo-institutionalist research in the theory of governance and to the diverse attempts to reformulate it over the past forty or so years. But this evolution can itself only be grasped if one refers it to the more epistemological debates which feed it in the background. That is why our reconstruction will lead us through the work of Simon on bounded rationality and the internal dynamic of neo-institutionalist and evolutionist research and that linked to the theory of learning.

21 As we shall see, we will qualify this position as a ‘pragmatist and connectionist’ position.
In chapter 4, we will try to deal with the epistemological shortcomings of these two current solutions offered by the social sciences on the basis of a more extended conception of the reflexivity of normative operations. This conception will consist in determining the modalities of the application of the judgements allowing a society to produce the conditions for the emergence of new ways of life.

In a third stage, corresponding to chapter 5, it will be a question of returning to the current debates in the social sciences and legal scholarship. In order to do this, we will try to demonstrate the fruitfulness of the deepening that we propose with regard to the current attempts in the social sciences to better account for the reflexivity of the processes constituting collective action. To this end, we will first of all return briefly to some of the most recent neo-institutionalist developments in political science (see chapter 5, section 1). Next, we will demonstrate the clarification our approach allows in one of the most tangible sectors where a legal improvement of institutional governance arrangements is sought today: the theory of risk (see chapter 5, section 2).

Finally, in a fourth and final stage corresponding to chapter 6, we will try to synthesize the possible contributions permitted by our approach in the current debates on legal theory. It will be a question of confronting our hypothesis with the definitive results of recently developed approaches in legal philosophy by analytical positivism and by pragmatism in order to try to resolve the still outstanding questions of an analysis of the concept of law.

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22 We will return in the Conclusion to the methodological nature of these four steps and to their dialectical implications.
although there would be good reason to ‘cross’ it with a second type of mechanism.

Let us begin by recalling the dynamic of this recent reflection on governance and the undeniable achievements it has led to today. This dynamic aims at a better definition of the conditions that must be fulfilled by the organization of the institutional mechanisms that prove to be indispensable to assure the effectuation of a coordination of the actors in a collective action. It has been seen that, from this point of view, both in the theoretical tradition flowing from rational choice theory and in that flowing from the deliberative theory of the public space, it is a matter of reinforcing the conditions that the institutional arrangements must fulfil in order to assure a better reflexivity of the actors in view of the constraints imposed by collective action. The significance of the mechanism is to organize coordination or cooperation. The simple objective of a requirement of coordination is not sufficient. Its effectuation deploys other resources than the simple pursuit of individual strategies. A return to these strategies is essential in order to enable the construction of a common strategy. No doubt the perspectives vary here. But without rejecting the richness of the approaches in terms of simple coordination rules (market rules, incentive contracts) the dynamic of the reflection today emphasizes more and more frequently the need to join to them aggregative mechanisms of a cooperative type, indeed of a deliberative and argumentative type (in Habermas’ communicative perspective). This dynamic therefore clearly expresses a sort of increasingly pronounced ‘critical attention’ to what has been called the ‘reversibility’ between the operation of application and that of justification and therefore the reversibility between the strategies of the actors and the aggregative institutional arrangements necessary to assure the normative objective of the best possible equilibrium.

An immediate remark is, however, necessary. This dynamic rests on a common presupposition. It is supposed in effect that the organizational arrangement thus conceived will realize the objective set for it by the simple means of the conditions internal to its organization. In other words, the organization arrangement is supposed as ‘complete’ in the sense that it would contain within itself its own conditions of effectuation. In such a perspective, it is supposed that the aggregation of the actors gathered will assure by itself, by the simple fact of this gathering, the selection of all the possibilities that it is realistic to consider in view of the situation to be regulated. It is therefore, in the end, supposed that every actor, by himself, disposes, by his mental faculties alone, of the capacities of self-adaptation allowing the selection of all the possibilities called for by his strategic inscription in the aggregative arrangement. The question of a capacity of the ‘actors gathered’ to ‘construct and identify’ their beliefs is not considered relevant, because it has already been resolved at the level of the insertion in an aggregative arrangement which will produce by itself
the adjustment of beliefs. It is here that the limitation of the schematic approach again appears: this question of the conditions of possibility is supposed as regulated by the functioning of ‘mental schemes’. But an approach to the complete reflexivity of judgement leads to the consideration of an ‘asymmetry’, namely that the meaning effects of the aggregative institutional mechanism will only produce a meaning by themselves by the usage that will be made of it at the level of the actors’ ‘beliefs’. And the selection by the actors of the diverse possibilities specific to each strategic actor with a view to their integration by means of the conditions of the aggregative mechanism can only be held as resolved by the aggregative mechanism itself if this selection is supposed as guaranteed by the simple means of the mental competences of every actor.

It can thus be better understood why we can say that the schematic approach results, on this level, in the ‘symmetrization’ of the operations of justification and application: the capacities called for by the proper functioning of the aggregative institutional mechanism are attributed to all of the actors. No doubt in a first stage such approaches to governance have rightly considered the reversibility of these operations and therefore implemented the necessary aggregative mechanism to enable the reflexivity called for by the most rational possible common integration\(^7\). But this reversibility is then conceived in terms of symmetry and not of asymmetry. The consideration of a complete reflexivity of judgement obliges, indeed, a ‘redoubling’ of the aggregative mechanism and thus a decompletion of the ‘possibility’ of this mechanism of providing itself with the conditions of possibility of the effectuation of the objectives set for it.

This is why, in articulation with the ‘institutional mechanism’ aiming to assure the ‘negotiated cooperation’ of the different strategies of the actors concerned, it is also necessary to organize incentive mechanisms specific to the actors’ identification of the possibilities called for by their own perceptive context of problems.

One can thus envisage that a greater reflexivity of the actors with regard to their strategic positioning is only of interest correlative to a greater reflexivity with regard to the organizational beliefs that underlie aggregative and cooperative institutional arrangements. The limitations of the different spheres of normativity are combined in an asymmetrical relation so that the weak point of one can be the strong point of the other or vice versa.

The critical attention to this possible double reflexive gain then poses the question of the evaluation of governance policies in a new light. The point from now on is, in effect, to test their capacity to produce new incentive mechanisms based on the intersected attention, within governance norms, to types of actors and to types of institutions. One will thus speak of reflexive incentives when

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\(^7\) Even though this greatest possible rationality is qualified in terms of maximization, of satisficing (as in Simon) or of rational acceptability (as in Habermas).
governance norms favor, firstly, the cooperation of types of actors whose behaviors reinforce the reflexivity of institutional arrangements (incentive mechanisms organizing the capacity of the actors to ‘identify’ the possibilities of their perceptive context) and, secondly, the development of types of institution whose framing arrangements reinforce the reflexivity of the actors to engage in the negotiated cooperation of common norms.

Beyond these three observations, it remains for us to emphasize again the specificity of this approach from the point of view of recent developments in legal theory. The way in which we have developed this whole research on the basis of the evolutions undergone by the standard representations of normativity in the regulatory arrangements of the welfare state, then by integrating an epistemological critique of these standard representations from the point of view of a general theory of normative judgements attentive to the limitations of rationality and to reflexivity’s potential for inference, and finally by drawing out the consequences of this position by proposing a new approach to the proceduralization of norms – this path also constitutes a re-questioning of the dominant schemas in legal theory. We have devoted the last chapter to clarifying this more disciplinary point of our approach. But beyond the disciplinary issues of this debate, it was a matter especially of fixing finally, in the framework of specifically legal reflection, the implications of a better construction of reflexivity compared to the epistemological types that reverberate in this domain, in particular in the positivist and pragmatic attempts to move beyond the formal self-understanding of legal judgement.

By distinguishing three levels of application of a norm, this last chapter was able not only to dismiss equally positivism and pragmatism in their claims to consider adequately the role of context in the normative operation, but also to provide a final key to the approach undertaken. Our approach to reflexivity is indeed directly articulated with the way of understanding the question of the judgement of application, or more exactly, with the way, complete or incomplete, in which one identifies and connects the ‘moments of application’ that mark out the operation of normative judgement. What legal theory, indeed, highlights very clearly, as we tried to show in chapter 6, is the reduction of the moment of application to that of judicial application. This overvaluation of the moment of the effectuation of the rule as meaning-for-others in its judicial application not only has the effect of obliterating two other moments of the application of judgements – that of the perception of a relevance of the rule for a context of usage and of the attention to a coherence of the rule with this context of usage – it also leads, by the same token, to the ‘dissociation’ of these three moments, which, however, cannot be dissociated in a complete reconstruction of normative judgement. It is important to see clearly the link that exists between these three moments of application constituting the operation of normative judgement and the effect of obliteration or of dissociation implied by an incomplete approach to
the reflexivity of judgement, that is, a non-reflexive treatment of the empirical, transcendental and speculative levels constituting the conditions of effectuation of judgement. Such a non-reflexive treatment, linked to the dissociation of the three moments of application, always leads to supposing that the perception of the problem exhausts all the contextual possibilities, to neutralizing the limitation effects of the beliefs deployed by the rule and, therefore, to a failure to consider the mechanisms allowing a correction of these limitation effects.

As has been seen, the most recent positivist and pragmatic attempts in law (linked to Putnam and Wittgenstein) maintain this obliterating and dissociating effect despite their real wish to take account of the specificity of the moment of application and its reversibility on the operation of justification. The same goes for the procedural theories of the norm – as in Rawls or Habermas⁸ – where these moments were, however, identified and treated under the modalities of presumption and idealization. But, by reducing these moments to the rational operations framing the conditions of argumented justification of an interpretation of norms, it becomes impossible to grasp how the privilege accorded to the construction of the rational acceptability of an interpretive choice at the level of effectuation has the effect of rendering inoperative the two other conditions of the application of norms. Rendering them inoperative simultaneously produces the effect of obliteration and dissociation specific to every incomplete approach to the reflexivity of judgement. Indeed, the two other conditions of the application of norms no longer appear except as necessary references to a usual context of application and to an ideal form of deliberative rationality guaranteeing the recognition of others.

It is necessary both to grasp again the evolutions of the context of application (perception) and to discern the new requirements of a more complete rationality in its relation to uncertainty (attention to contextual limitations) in order better to determine the conditions of a judicial application better informed of its limitations (inference). The role of the judge is a role of critical evaluation. It was in particular the point of the present work to reflect, with regard to forms of governance, on this concept of critical evaluation (cf. the concluding observations 1 and 2 above). By analogy with what one has tried to highlight on this last level, one could therefore say that the judicial application can then seek to reinforce the mechanisms that will correct their reflexive insufficiencies and provoke capacities of a reflexive reconstruction of the problems and solutions to be identified in a cooperative manner (inference). It is here also that the theoretical link between the traditional questions of legal theory and those of a critical evaluation of our forms of governance is apparent.

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But an indirect interest of this last chapter is also to allow a return to our methodological approach in order to show all its implications. The plan of our work corresponds, indeed, to these three moments of the application of a judgement. This formal homology in the construction of the work is itself essential since its point is to formulate a ‘judgement’ on theories of governance and of the norm. Our approach therefore consisted, through the constant questioning of obliterating positions, in proposing a theoretical path capable of linking the operations of perception, of attention and of inference in a complete reflexive model according to the dialectic of the empirical, transcendental and speculative levels of a typic of normative judgement.

This is why the work endeavored first of all to reinstate a perception of the theoretical context\(^9\) with its major strategies of evolution (perception). Next, the work directly attacked the epistemological beliefs that underlie these strategic options (attention to beliefs). Finally, it tried to show the consequences of its own position from the point of view of the programs orienting the conception and the evaluation of normative regimes (inference). On thus finds again the meaning of the three types of reflexivity that we have distinguished above. These also enable three different types of learning dealt with in this work: learning by simple reflexivity (single loop learning) relating to the evolution of theoretical strategies; learning by redoubled reflexivity (double loop learning) relating to epistemological beliefs; and learning by inferential reflexivity relating to the programs of the transformation of normative regimes\(^{10}\).

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\(^{9}\) But it is also the desire to link necessarily perception, attention and inference which justifies the fact that, from chapter 1, the beginnings of the shift (chapter 1, section 3) implied by the critical aim which current theories of governance attempt to construct were integrated within the very perceptive reconstruction we had to evaluate.

\(^{10}\) Our current research attempts to test this reflexive model in different fields of international governance so as to elaborate and propose ‘reflexive incentives’ capable of guaranteeing the transformation of normative regimes in the perspective of reflexive governance (see www.cpdr.ucl.ac.be).


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