

I/ La critique de Stanley Cavell (2)

A/ La promesse : un énoncé performatif donc une pratique ?

1) Le "credo" rawlsien (un invariant chez Rawls de 1955 à 1971 au moins) : a) une « pratique » est une institution sociale constituée par des règles (dites elles-mêmes « constitutives », cf. J. Searle, Les actes de langage) et b) toute théorie de la justice (ou de la promesse, ou de la peine) ne doit porter que sur de telles pratiques. Ainsi cette note qui ouvre au moins trois articles de Rawls :

I use the word practice throughout as a sort of technical term meaning any form of activity specified by a system of rules [...].

"Two Concepts of Rules" (1955, *Col. Pap.*, p.20), "Justice as Fairness" (1958, *Col. Pap.*, p.47), "Justice as Reciprocity" (1971, *Col. Pap.*, p.190)

I consider justice as a virtue of social institutions only, or of what I have called practices. [...] I shall focus attention, then, on the usual sense of justice in which it means essentially the elimination of arbitrary distinctions and the establishment within the structure of a practice of a proper share, balance, or equilibrium between competing claims.

"Justice as Reciprocity" (1971), in *Collected Papers*, p.190-191.

2) Selon Rawls le fait que la promesse soit une pratique, au sens précis de la citation précédente, est hors de doute, ce qui fait de cette affirmation l'un des présupposés principaux de son article :

That punishment and promising are practices is beyond question. In the case of promising this is shown by the fact that the form of words "I promise" is a performative utterance which presupposes the stage-setting of the practice and the properties defined by it. Saying the words "I promise" will only be promising given the existence of the practice.

"Two Concepts of Rules", Section 4, *Collected Papers*, *op.cit.*, p.41

3) L'argument de Rawls, selon lequel si la promesse est une pratique c'est parce que dire « Je promets » est un énoncé performatif, est tiré de sa lecture d'un article de John Langshaw Austin datant de 1946, « *Other Minds* » (« Les autres esprits » ou « Autrui » : à propos du problème philosophique classique du solipsisme). Rawls fait explicitement référence à cet article d'Austin dans une note de « *Justice as Fairness* », *Col. Pap.*, p.60 : « The sense of 'performative' here is to be derived from J.L. Austin's paper in the symposium 'Other

Minds' ») Mais cet article d'Austin, s'il considère bien la promesse comme un système de règles, se démarque à l'avance de la démarche Rawls, en ce que pour Austin ce système de règles n'a pas à être justifié par quoi que ce soit d'autre (par exemple, comme chez Rawls, par le principe d'utilité). Austin en un sens désamorce à l'avance la tendance rawlsienne à la justification de nos pratiques :

It seems, rather, that believing in other persons, in authority and testimony, is an essential part of the act of communicating, an act which we all constantly perform. It is as much an irreducible part of our experience, as, say, giving promises or playing competitive games, or even sensing colored patches. We can state certain advantages of such performances and we can elaborate rules of a kind for their "rational" conduct (as the Law Court, and historians and psychologists work out the rules for accepting testimony). But there is no "justification" for our doing them as such.

J.-L. Austin, "Other Minds", *Proceedings of the Aristotelian Society*, vol. XX, 1946, p.186-187

4) L'objection de Cavell est la suivante : le fait que promettre soit un énoncé performatif ne prouve en rien que la promesse soit une « pratique » au sens de Rawls puisqu'il existe de très nombreux cas d'énoncés performatifs qui ne sont de toute évidence pas des pratiques au sens de Rawls.

[According to Rawls promising is a performative utterance]. But so are "I warn, beseech, bet, pick, accuse, forgive you...", "I command him to you, "I withdraw, protest...etc.", performative utterances ("I punish you" is not). Are all of these practices ? It might be said that one must "know how" each of these actions is done, but does one learn that by learning "a form of activity specified by a system of rules which defines offices, roles, moves penalties, defenses and so on...which gives the activity its structure ?"

Stanley Cavell, *The Claim of Reason*, 1979, Oxford University Press, Chapter 11 « Rules and Reasons", p.294.

B/ La conception pratique des règles peut-elle rendre compte de la force obligationnelle des règles morales ?

5) Une hésitation de Rawls dans une note de 1958 : la conception pratique des règles ne vaut que pour les règles juridiques et les règles d'un jeu, et non pour des règles dites morales...à l'exception des règles gouvernant la pratique de la promesse ! Règles qui seraient alors des règles morales d'un type spécial ? Encore faudrait-il l'expliquer, ce que Rawls ne fait pas.

What I did argue [in "Two Concepts of Rules"] was that in the *logically special case* of practices (although actually quite a common case), where the rules have special features,

and are not moral rules at all, but legal rules or rules of games and the like (except, perhaps, in the case of promises), there is a peculiar force in the distinction between justifying particular actions and justifying the system of rules themselves. Even then I claimed only that restricting the utilitarian principle to practices as defined strengthened it. I did not argue for the position that this amendment alone is sufficient for a complete defense of utilitarianism as a general theory of morals.

“Justice as Fairness” (1958), *Collected Papers, op.cit.*, p.51

As I have already stated it is not always easy to say where the conception [i.e. the practice conception of rules] is appropriate. Nor do I care to discuss at this point the general sorts of cases to which it does apply except to say that one should not take it for granted that it applies to many so-called “moral rules”. It is my feeling that relatively few actions of the moral life are defined by practices and that the practice conception is more relevant to understanding legal and legal-like arguments than it is to the more complex sort of moral arguments. Utilitarianism must be fitted to different conceptions of rules depending on the case, and no doubt the failure to this has been one source of difficulty in interpreting it correctly.

“Two Concepts of Rules” (1955), *Collected Papers, op.cit.* p.43.

7) *Cavell, un peu plus loin dans son chapitre consacré à Rawls, enfonce le clou et pointe une objection possible: si les règles (comme pratique) de la promesse nous obligent (are binding upon us) n'est-ce pas parce que nous nous sommes auparavant engagés à respecter les institutions (dont l'institution de la promesse) ? Si c'est le cas alors le caractère obligatoire des règles de la promesse ne dérive pas du fait que la promesse soit une pratique mais de cet engagement préalable.*

Rawls suggests in the final note to his paper that the practice conception is not often usable in the moral life : “*relatively few actions of the moral life are defined by practices.*” I have argued that, in particular, promising is not so defined. If my remarks about that are right, then a suggestion emerges about why philosophers appeal to rules in theorizing about morality, and about how rules are then conceived. The appeal is an attempt to explain why such an action as promising is *binding* upon us. But if you *need* an explanation for that, if there is a sense that something more than personal commitment is necessary, then the appeal to rules comes too late. For rules are themselves binding only subject to our commitment. Why one may think that rules could explain the bindingness of commitment is a question obviously too far for us to reach now. In part it comes from an idea of rules which *might* be expressed by saying that “rules define games”. An idea which picture rules not as defining baseball as opposed, say, to cricket (which they do), but as defining what it is to play a game (which they cannot do).

Stanley Cavell, *The Claim of Reason* (1979), chapter 11, p.307.

II/ La critique de l'« utilitarisme de la règle » (rule-utilitarianism) ou « utilitarisme restreint » (restricted utilitarianism)

8) Le philosophe australien Jack Smart (né en 1920) distingue dans un article de 1956 (« *Extreme and Restricted Utilitarianism* », in *The Philosophical Quarterly*, vol. 6) l'utilitarisme extrême (ou « de l'acte ») de l'utilitarisme restreint (ou « de la règle »). Selon lui l'utilitarisme restreint, défendu, par Rawls un an avant dans « *Two Concepts of Rules* » est intenable d'un point de vue utilitariste : Smart plaide donc en faveur d'un retour, contre les amendements de Rawls, à l'utilitarisme extrême, ou de l'acte. Voici tout d'abord la manière dont il présente la différence entre les deux sortes d'utilitarisme :

Utilitarianism is the doctrine that the rightness of actions is to be judged by their consequences. What do we mean by "actions" here ? Do we mean particular actions [extreme utilitarianism] or do we mean classes of actions [restricted utilitarianism]? According to which way we interpret the word "actions" we get two different theories, both of which merit the appellation "utilitarian". (...) [Restricted utilitarianism] holds, or seems to hold, that moral rules are more than rules of thumb. In general the rightness of an action is not to be tested by evaluating its consequences but only by considering only whether or not it falls under a certain rule. [...] Broadly, then, actions are to be tested by rules and rules by consequences. The only cases in which we must test an individual action directly by its consequences are a) when the action comes under two different rules, one of which enjoins it and one of which forbids it, and b) when there is no rule, whatever, that govern the given case.

"Extreme and Restricted Utilitarianism", (1956), in *Theories of Ethics*, Ph. Foot (ed.), OUP, 1967, p.171-172.

Smart soulève l'objection suivante vis-à-vis de l'utilitarisme de la règle ou utilitarisme restreint : cette forme d'utilitarisme (monstrueuse pour lui) nous conduirait à une sorte de fétichisme de la règle (rule-worship, sorte de pensée magique, primitive) où il faudrait suivre la règle même dans un cas où il vaudrait mieux ne pas la tenir.

Suppose that there is a rule R and that in 99% of cases the best possible results are obtained by acting in accordance with R. Then clearly R is a useful rule of thumb ; if we have not time or are not impartial enough to assess the consequences of an action it is an extremely good bet that the thing to do is to act in accordance with R. But it is not monstrous to suppose that if we have worked out the consequences and if we have perfect faith in the impartiality of our calculations, and if we know that in this instance to break R will have better results than to keep it, we should nevertheless obey the rule ? Is it not erect

R into a sort of idol if we keep it when breaking it will prevent, say, some avoidable misery ? Is not this a form of superstitious rule-worship (easily explicable psychologically) and not the rational thought of a philosopher ?

Ibid, p.176-177.

9) *Un autre philosophe australien contemporain, Michael Smith (né en 1953), reformule la même objection en mettant au jour la contradiction interne propre à l'utilitarisme de la règle, du point de vue de la question de la « motivation morale ».*

I must therefore deny the rule-consequentialist's suggestion that an act is obligatory only if it is permitted by the rules the acceptance of which is value maximizing, never-mind about whether the act itself is value maximizing [...] Rule-consequentialism of the kind just described implausibly breaks the connection between an agent's having an obligation to act in a certain way and his having a normative reason to act in that way. In order to see this is so, remember that, according to the standard view of what it is for an agent to have a normative reason to act in a certain way, his having such a reason amounts to there being something valuable realized by his acting in that way. [...] Bearing this in mind, the problem with the kind of rule consequentialism just described should be clear. For there is no reason at all to suppose that there is any value realized by an agent's action when he acts in accordance with a rule the acceptance of which is itself value-maximizing. True enough, his acceptance of a rule requiring him to act in that way must be value-maximizing. He must therefore be required by reason to desire, or approve, or aim at the outcome of his acceptance of the rule. But his acting in accordance with that rule need not be value-maximizing. The upshot is thus that, [...], an agent may have a normative reason *not to do* what he has an obligation *to do*. To my mind, this is a decisive objection to this kind of rule-consequentialism, as it shows that it entails a contradiction.

“The Value of Making and Keeping Promises”, in *Promises and Agreements*, H. Sheinman (ed), OUP 2011.

10) *La grande philosophe britannique Philippa Foot (1920-2010) résume elle aussi le débat en partant de la question de la motivation morale : si nous avons intérêt à ne pas tenir notre promesse – calcul des conséquences – il semble que la considération de la règle ne suffise pas à motiver notre action, à faire que nous allons tenir effectivement notre promesse malgré ces conséquences ! (« Je suis obligé ? So What ? Et alors ? »). Donc la distinction rawlsienne action/pratique ne nous sort pas du conséquentialisme pour ce qui est de la motivation morale, donc les « amendements » de Rawls manquent leur but.*

[Rawls] believes that we should argue for and against some actions on utilitarian grounds, and for certain very special cases it is rule utilitarianism that should be applied. These special cases are ones in which there is an activity (as e.g. promising or punishing) which depends

for its existence on rules of action which do not permit a man to decide what he will do simply by weighing consequences. Rawls points out that there would be no such thing as promising or punishing in a world in which everyone did what he thought would bring the best consequences on each particular occasion, since a promise imposes other restrictions on what one is to do, and punishment must be according to certain rules about offences and penalties. Thus the institutions of punishing and promising presuppose behavior which is in this sense non-utilitarian. Rawls draws the conclusion that the justification of any action which presupposes such practices (e.g. breaking *a promise*) must be according to the rules of the institution, so that consequences can be considered only in so far as the rules allows for this. It is the practice, not the individual action that has to stand up to the utilitarian test. What is puzzling is why Rawls thinks that this conclusion can be drawn. Smart argues that an individual man who can break the rules without damaging the useful institution is irrational not to do so where the consequences would be good, and against this Rawls seems to have offer no defence. It is one thing to show that the rules governing a certain practice must be non-utilitarian, and another to show that an individual may not secretly appeal to the principle of utility against the rules.

Philippa Foot, *Theories of Ethics*, (1967), *op.cit*, p.14-15.