

PERELMAN Chaïm (1912-1984)

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CHAÏM Perelman is a major figure of legal and moral philosophy of the second part of the 20th century. The leader of the Brussels School, he is best known as the founder of the « New Rhetoric » for having initiated the contemporary argumentative turn in philosophy, law and social sciences. He emphasized the argumentative nature, the epistemological value and the various techniques of the practical reasoning in general and the judicial reasoning in particular.

Education

Perelman was born in 1912 in Warsaw Poland within a Jewish family of merchants. In 1925, his family moved to Antwerp Belgium. He received a secular education at Antwerp's high school, where he met his lifelong friends and future colleagues Henri Buch and René Dekkers. The three of them studied law at the Université Libre de Bruxelles (ULB). Perelman graduated *Juris Doctor* in 1934. At the same time, he also studied philosophy under the supervision of notably Eugène Dupréel « *the leader of the Brussels School and the most eminent of Belgian thinkers* », according to the *Biographical Dictionary of Twentieth-Century Philosophers* (Routledge, 1996). Perelman's masters noticed the outstanding intelligence and talents of this extraordinary student and determined that he should become one of their own. In 1936, Perelman became a Belgian citizen. He also obtained a grant to study formal logic at the School of Logic of the University of Warsaw. Two years later, he was awarded a PhD at ULB with a dissertation on Gottlob Frege. He was appointed lecturer in philosophy at ULB but not for long. In 1940, he was forbidden, as a Jew, to teach and he resigned his position. The Nazis regarded the ULB faculty as a bunch of free masons, Jews and communists and had decided to transform it as a model of Third Reich University in Europe. However, the board of ULB derailed the project by closing the doors of the University from 1941 to the end of the German occupation. In the meantime, Perelman joined the Résistance and participate to the founding of the Comité de Défense des Juifs (CDJ). His wife Fela, an historian, played an important role in the saving of about 4.000 Jewish children placed in educational facilities and ordinary families.

The logic of justice

In 1945, Perelman was appointed ordinary professor and succeeded Dupréel when he retired in 1947. Perelman as well his colleagues were profoundly shocked by the crimes and atrocities committed by the Nazis. They rejected the positivistic view that any order given by the political authority in accordance with the procedure was legally binding and should be obeyed. As soon as 1945, Perelman published an essay *on Justice*, where he tried to find the logical structure of justice. Starting from the ancient Roman definition of justice as *sum cui tri-*

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buere, Perelman distinguished the multiplicity of criteria promoted by competing communities of values in order to materialize the formula. Does-it mean to attribute the same thing to everybody or should one consider the needs, the merits or the status of the various members of the community? Or, last but not least in a positivistic era, was the formula to be understood as giving to each one whatever portion determined by the applicable rules? However Perelman soon realized that this path was a dead-end. There was no way to decide in principle which criterium was the best. Similarly, it appeared impossible to agree, within a pluralistic community, as a matter of principle, on a certain order of preferences that should apply on each and every case. Nevertheless, Perelman noticed that, when considering in a particular case at hand, what justice would require, the competing values would provide different and contradictory solutions. Some of them would be considered more convincing or more reasonable than others. The way in which the abstract criteria or values were to be applied in the case at hand in order to provide the best answer, i.e. a fairer solution, was not the result of a formal deduction but rather formulated as an argument.

The rehabilitation of rhetoric

From then on, Perelman deserted the arid fields of formal logic that he regarded as almost useless in practical matters such as morals and law. Turning his back to formal logic, he immersed himself in the luxuriant jungle of rhetoric, following the steps of his master Dupréel. After World War I, Dupréel had undertaken the difficult task of rehabilitating the Sophists, who had been most severely condemned and despised by philosophers during more than 2,300 years. Dupréel's primary interest was in pluralistic societies, meaning societies made of competing groups owning their own sets of values and interests such as Western contemporary democracies. He wanted to understand how collective values that could serve as grounds for collective action and democratic deliberations could be constructed in such a context and evolve over time. From the Sophists, he borrowed some useful notions like the value of artificial conventions and the usefulness of fuzzy concepts. With them, he shared a pluralistic view of moral and epistemology, from which he developed a constructive theory of values, that looks quite similar to the one of his American counterpart, the pragmatist philosopher John Dewey.

The Treatise on Argumentation

From 1949, Perelman engaged in the next steps with Lucie Olbrechts-Tyteca, another Dupréel's disciple. They collected a very extensive corpus of political, literary, philosophical works, discourses as well as press articles and scrutinized them meticulously in order to exhume a contemporary topic of arguments that they presented in a systematic classification in their *Treatise of Argumentation*. New

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Rhetoric (1958). The treatise was an immediate success. He was translated in many languages and started Perelman's international career. This book is generally seen as having contributed to launch the argumentative turn in philosophy and in law, along with Viehweg's *Topik und Jurisprudenz* (1953) and Toulmin's *The Uses of Argument* (1958).

The Seminar on Legal Logic

Simultaneously, Perelman founded in 1953, along with his lawyer friends Buch and Dekkers, the legal section of the Belgian National Center for Research in Logic (CNRL), which Perelman chaired during 30 years, until his death. The regular contributors were both Professors at the ULB and justices as well as prosecutors from the two supreme courts coexisting in Belgium at this time: the Cour de Cassation and the Conseil d'Etat. This group was commonly referred to as «The School of Brussels» in the fields of jurisprudence and philosophy of law. They were joined by dozens of foreign law professors and legal philosophers. Together they studied a range of tools mobilized by judges in the motives of their rulings. The caselaw material included both Belgian, foreign, European and international courts decisions. As a result, Perelman published, partially with Paul Foriers, eight books of collective works on *Facts and Law* (1961), *Antinomies* (1965), *Loopholes* (1968), *Legal Rules* (1971), *Presumptions and Fictions* (1974), *Motives of Court Rulings* (1978), *Proof* (1981) and *Fuzzy Concepts* (1984) in law. In addition, Perelman published a monography summarizing his views on the subject : *Legal Logic. The New Rhetoric* (1976).

Facts and Rules

According to Perelman, the figure of syllogism, traditionally used on the continent to formalize the correct reasoning of the judge, where the major premise states the law, the minor states the facts and the conclusion is logically deduced from them both, is unacceptable. It conceals the difficulties that should be explained: 1° how are the premises construed; 2° where and how the facts and the rules are brought together by the legal characterization of facts. Moreover, the Brussels School does not abide by Hume's law and denies the possibility of a complete separation between *Sein und Sollen*. Norms and values on the one hand and facts or reality on the other cannot and should not be severed from one another, no more than theory and practice. Rules as well as facts are constructions made of mixed materials. The rule discovered by the judge is partially derived from the facts, which themselves are characterized by the rules.

From formal logic to argumentation

Antinomies and loopholes are no defects of a legal system, exposing its inconsistency or incompleteness that need to be eradicated by

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abstract metarules. Rather, when judges acknowledge the existence of an antinomy or a loophole, they create for themselves a possibility to add an element to the ongoing collective construction of the law in order to solve the case at hand. The tools and resources they use to build the law and to apply it to a case do not derive from logic. They are arguments, that would be contradicted by other arguments, and provide more or less convincing grounds for a correct and reasonable ruling. The audiences to be persuaded are plural and vary in their scope. The litigants need to convince the judge. The judge himself argues in his motives in order to persuade the parties, especially the one who loses the case, the courts that would potentially review his ruling, and in some cases the scientific community of lawyers who discuss its merits or even the general public in major or sensitive cases and sometimes at last the « universal audience » which is, according to Perelman, the final audience of philosophers.

Rebuttal of the « no right answer » theory

Perelman absolutely rejects the positivist epistemology which separate, on the one hand, issues of facts and reality judgments who are the realm of science from, on the other hand, issues of morals and value judgments, which cannot be dealt with scientifically and are subject to arbitrariness and subjective preferences. Such conception produces terrible consequences by denying any possibility to reason in practical matters, who are most important for the sake of the human kind and the world, such as moral, political, legal as well as social issues, decisions and choices. Perelman refuses the impossible dilemma between logical reason and complete irrationality. Argumentation is the way of reasoning appropriate to discuss and to make decisions in practical matters. « It is the logic of action ».

Discussing Hart's very famous hard case example « *no vehicle in the park* », Perelman rebuts the idea that hard cases are borderline cases to which our conventions provide no answer and that should be left to the discretion of the judge. Giving the example of an ambulance or a cab entering the park in order to collect a person who feels ill, Perelman shows that hard cases are indeed central cases when the real issue is a choice between competing values that contribute to reveal and to complete the meaning of the rules to be applied.

Enforcement of the rule of law

The various kinds of argument used by judges in the justification of their rulings make part of a toolbox that is needed to construct the law and to make it effective. In this task, judges mobilize not only what Perelman calls « rules in uniform » but also « guerilla norms », i.e. unofficial norms, which are not enacted according to primary rules but nevertheless play an important role in the fight for law and justice. Among these, general principles, norms and fundamental rights are

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of capital importance, although they are only effective insofar that they find their way to infiltrate the layers of the legal orders. Rejecting the frontal confrontation between positivism and jusnaturalism (another replication of the misleading separation between reality and ideals, facts and values), the Brussels School invented the oxymoron « natural positivist law » (*droit naturel positif*) to capture the dynamics of these norms progressively integrating (or, at the contrary, being excluded from) the law and leading its further evolution. More practically, professors and judges from the Brussels School committed themselves very hardly to this task, by promoting and sometimes enacting themselves some bold court rulings and judicial reversals, contributing to improve significantly the rule of law in Belgium and sometimes in Europe.

Posterity

The field of argumentation reopened by Perelman and some others has been growing ever since. Legal argumentation has become a specific branch of jurisprudence. Argumentation plays an important role in contemporary linguistics and pragmatics. The analysis of discourses is a method largely practiced and recognized in social sciences. More specifically, Gadamer referred to Perelman's judicial model of reasoning in his major work *Truth and Method*, which mutated the argumentative turn into an interpretative turn. The famous debate between Gadamer and Habermas, stressing the importance of both tradition and critique in deciding practical issues, whose results were integrated by Dworkin and his famous « chain novel » in *Law's Empire* had a significant influence in political and legal philosophy in the end of the 20th century. Finally, at a time when democracy and the rule of law are one more time clearly under attack, Perelman's conception of the law as a battle to fight case after case so that principles of justice and the rule of law would prevail remains a strong inspiration for the current and hopefully future generations.

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