

JUSTICE AND JUSTIFICATION

by

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JUSTICE AND JUSTIFICATION

Ch. Perelman*

TWENTY YEARS ago I published a study on the notion of justice, in which I tried to delimit the rational aspects of this notion.¹ I found then that an act may be qualified as just insofar as it is an application of a rule, in conformity with the rule of justice;² and that a rule is just insofar as it is not arbitrary, i.e., insofar as it can be justified by means of general principles. Thus, a criminal law will be just if the punishments it prescribes are proportional to the seriousness of the crimes; a regulation fixing the salaries of public officials will be just if it makes the salaries proportional to rank and to the services rendered to society. But where are the criteria which will permit us to evaluate the seriousness of a crime or the utility of a service rendered? The point I was trying to make in that study was this: that no matter how hard one might try to deduce such criteria from rational norms, in the end one would always come up against a vision of the world based on nonrational values and aspirations.³

It seemed to me that the various ideals we might have of a perfect society were all arbitrary, since they could be founded neither on experience nor on logic. In effect, neither rigorous deduction nor any induction based on experience can guarantee the passage from what is objectively given and true, to the ideal we seek to realize and to the values and rules which that ideal demands. I therefore concluded that, in our effort to justify rules by eliminating what is arbitrary in them, we had to stop at unjustified and not self-evident principles, at positions we ourselves chose, at values which could be controverted. It seemed hopelessly idealistic to expect all men to agree on the same ideal of a just society. To different human aspirations, arranged in different hierarchies, there would correspond different conceptions of the ideal community. If someone found a rule unjust, because it divided people into different categories from those he would have chosen — and this because his personal vision of the world made him judge differently of what was or was not

* Translated by SUSAN RUBIN.

¹ *De la Justice* (1945). English trans. in *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 1-60 (London, Routledge and Kegan Paul; New York, The Humanities Press, 1963).

² *THE RULE OF JUSTICE*, in *THE IDEA OF JUSTICE* 79-87.

³ *THE IDEA OF JUSTICE* 52-63.



important or relevant — then no rational argument seemed to me capable of convincing him to change his mind. Given the plurality of often incompatible and always arbitrary values, it seemed to me that reason was incapable of reconciling any two antagonists. A rigorous analysis had to limit itself to pointing out the different values which underlie different social systems. This is the kind of work done by Enrico di Robilant in his *Sui Principi di Giustizia*, where by comparing the Prussian (*Landrecht*) Code of 1794 and the present Italian Constitution, he shows convincingly the different values which inspired them. But was it possible to find objective criteria which would allow one to demonstrate the undeniable superiority of one of these value systems over the other? This seemed to me absolutely impossible. My analysis twenty years ago led to the following skeptical conclusion:

Let us take the example of a normative system which has the peculiarity of attaching the highest merit to the stature of individuals. From this system will flow rules imposing the obligation to treat men in a fashion more or less proportional to their height. From this system one can try to eliminate every arbitrary rule, all unequal treatment, all favouritism, all injustice. From the inside of the system, so long as the fundamental principle that serves as its basis is not called in question, justice will have a well-defined meaning — that of avoiding anything arbitrary in the rules, any irregularity in action.

We are thus led to distinguish three elements in justice — the value that is its foundation, the rule that sets it out, the act that gives it effect.

Only the two latter elements — the less important, incidentally — can be subjected to the requirements of reasoning. We can require of the act that it should be in accordance with the rules, that it should give the same treatment to persons who belong to the same essential category. We can require that the rule should be justified, that it should flow logically from the normative system adopted. As for the value that is the foundation of the normative system, we cannot subject it to any rational criterion: it is utterly arbitrary and logically indeterminate.⁴

I

BY QUALIFYING any value which founds a normative system as arbitrary and logically indeterminate, I was expressing my conviction that such a value could be neither the result of experience nor the logical consequence of uncontested principles. I continue to believe this today. Yet is this a reason for drawing the much more general conclusion that all the fundamental

⁴ *Id.* at 56.

values and norms which guide our actions are devoid of rationality? that they can be neither criticized nor justified? and that all discussion on them is but the expression of our interests and passions? This conclusion is enough to reduce a rationalist to despair. Yet it must be adopted by all those who say that proof must be founded on either logic or experience, since deduction and induction are the only forms of orderly reasoning. If we adopt this point of view, we must indeed subscribe to a conclusion that jars ordinary common sense, namely that all values are equally arbitrary since none can be demonstrated rationally. Is it really necessary to subscribe to the view of reason and of reasoning which has been imposed on us by modern logic? Is it really true that deduction and induction are the only acceptable bases for proof, and that therefore it is impossible to reason about values?

In 1927 the French logician Edmond Goblot published a book on the logic of value judgments. In this interesting work Goblot analyzed only instrumental values, values which constitute either means or obstacles to desired ends. The ends themselves were treated as given, i.e., founded on intuitions which escaped rational control. Numerous works have also been published over the last thirty years on the logic of norms or deontological logic. These have been concerned only with general rules of transformation for propositions containing expressions like "it is obligatory," "it is forbidden," "it is necessary," "it is allowed," etc. They have made no attempt to guide us in the choice of particular rules or values.

Must we then conclude that the determination of noninstrumental values — as well as that of norms which prescribe our rights and obligations — escapes all logic and all rationality? Must we abandon all philosophical use of practical reason and limit ourselves to the technical use of reason in the domain of action? Must we use our reason only to adjust our means to totally irrational ends? Affirmative answers to these questions form the position of all positivistic philosophers, from Hume to Ayer. Must we then resign ourselves, and consider the whole classical tradition of Western philosophy as nothing more than the expression of a millenarian dream? Are the search for a rational foundation for our individual and collective actions, and the desire to elaborate an ethic, a philosophy of law, and a political philosophy nourished only on illusion and illogic?⁵

It long seemed to me that before accepting the theses of positivism concerning values, someone should make a renewed effort to elaborate a logic of value judgments based not on the reasoning techniques of modern logic but rather on a detailed examination of how men actually reason on values.

⁵ Cf. my *L'idéal de rationalité et la règle de justice*, BULLETIN DE LA SOCIÉTÉ FRANÇAISE DE PHILOSOPHIE, 55th year, No. 1, January 1961.

I undertook to do this work with the collaboration of Madame L. Olbrechts-Tyteca. Ten years after the beginning of our project, we had not found the logic of value judgments that we were looking for. We did, however, rediscover a long-neglected logic which had been completely forgotten by contemporary logicians, although it had been treated at length in the ancient treatises on rhetoric and in the *Topics* of Aristotle. This was the study of what Aristotle called dialectical proofs in contrast to the analytical proofs which interest modern logicians exclusively. In an extended empirical and analytical study called *Traité de l'argumentation*⁶ Mme. Olbrechts-Tyteca and I were able to put forward this nonformal logic as a theory of argumentation, complementary to the theory of demonstration which is the object of formal logic.

Our research convinced us that there exists no specific logic concerning values; rather, the same techniques of reasoning which we use to criticize and to justify opinions, choices, claims, and decisions, are also used when it comes to criticizing and justifying statements that are usually qualified as value judgments. That is why the practical use of reason cannot be understood without first integrating it into a general theory of argumentation. By forgetting the technique of argumentation indispensable for practical judgment, and by overlooking discursive means of convincing not founded on formal logic or experience, modern thinkers were inevitably led to the conclusion that values were logically arbitrary and therefore devoid of rational justification. In the absence of a theory of argumentation one could not even know what was specific to the process of justification, much less specify its relationship to the idea of justice.

The object itself of a justification is very different from the object of a demonstration. The latter is developed from statements or propositions of which we can ask whether they are true or false, whereas the former is of an entirely practical nature: we usually justify an action, a kind of behavior, a disposition to act, a claim, a choice, a decision.⁷ We can speak only indirectly of the justification of a person acting or of a proposition. The justification of an ~~actor~~ ^{agent} consists in the fact of justifying his conduct, or sometimes in dissociating him either wholly or in part from an act or a decision which is imputed to him. But in the latter instance it is more a question of excusing than of justifying: one simply wants to avoid having the judgment of an act transferred to the person performing it.

⁶ *TRAITÉ DE L'ARGUMENTATION* (Paris, Presses Universitaires de France, 1958). To be published in English by the University of California Press.

⁷ Cf. my *Jugements de valeur, justification et argumentation*, *REVUE INTERNATIONALE DE PHILOSOPHIE*, No. 58, 1961. Reprinted in *JUSTICE ET RAISON* 234-43 (Presses Universitaires de Bruxelles, 1963).

The justification of a proposition or of a rule, on the other hand, consists in justifying one's adhesion to it or one's statements in favor of it. It is, then, a justification of behavior. Since we consider it reasonable to adhere to a true statement, the proof of the truth of a statement will certainly constitute the greatest part of our justification. But no demonstration or verification will allow one to justify his adhesion to an axiom or a norm; it is precisely here that the particularities of justificatory reasoning come into play. This kind of reasoning constitutes what Professor Feigl calls *vindicatio actionis*, the justification of an action, rather than *validatio cognitionis* or proof of the validity of knowledge.⁸ But even in this last instance we are dealing with the justification of a belief, of a kind of behavior.

For centuries logicians have been able to neglect the problem of the justification of one's choice of axioms, by considering the latter either as self-evident or as arbitrary. In the first case, since we must bow to the evidence, we have no choice and therefore no need to justify our acceptance. In the second case, since all choices are considered equally arbitrary, it is impossible to justify any one by showing it to be preferable to any other. When we reject both of these extremes, so reminiscent of realism and nominalism, when we admit that a choice of axioms is possible and that it is not entirely arbitrary, then the justification of choice ceases being a negligible problem.

If we transpose the same reasoning to the first principles of philosophy, which are considered to be neither self-evident nor arbitrary, the very center of philosophical thinking becomes transferred from the realm of theory to that of practice; we are heading toward the justification of our philosophical choices and decisions. But a philosophical justification must not refer to the interests and passions of a particular group: if it is not presented as being universally valid, it does not constitute an admissible philosophical justification. A philosophical justification must be rational, or at least reasoned.

To admit the possibility of a rational or reasoned justification is at the same time to recognize the practical use of reason. It means that we are no longer limiting reason to a purely theoretical usage (i.e., the discovery of truth or error), as Hume wished.⁹ To reason is not merely to verify and to demonstrate, but also to deliberate, to criticize, and to justify; to give reasons for and against; in a word, to argue.

⁸ H. Feigl, *De Principiis non Disputandum*, in *PHILOSOPHICAL ANALYSIS* (ed. by M. Black, New York, 1950).

⁹ DAVID HUME, *A TREATISE ON HUMAN NATURE* bk. III, pt. I, sec. 1.

It would never occur to us to want to justify every one of our actions or beliefs. Methodical doubt as practiced by Descartes is conceivable only if a self-evident, indubitable intuition allows us to eliminate it. The problem of justification arises only in the practical realm, when we have to justify a decision, an action, or a choice which has no incontrovertible evidence to guarantee its validity. In this perspective, a desire to justify everything appears completely senseless, for it is unrealizable and would only lead to infinite regression. The enterprise of justification has meaning only if the acts one is seeking to justify are open to criticism; that is, if they possess some fault that makes them inferior to other acts which are uncriticized and which therefore need no justification.

One often has the impression that justification is not the refutation of a criticism but rather the statement of positive reasons in favor of a choice or a decision. These reasons are meant to show that the choice or decision in question is above criticism, and especially above any criticism one might advance ~~from~~ possible alternatives. To allow for such various modalities, we may say that justification consists either in the refutation of specific criticism or in the indication that a proposition is entirely above criticism, or at least that it is less open to criticism than other alternatives.

The criticism of a proposed or already enacted measure, decision, or action is usually directed against its morality, its legality, its regularity (understood in its widest sense), its usefulness, or its opportuneness. In order to criticize, therefore, one must already have certain values ~~for~~ ends in mind, in whose name the criticism is advanced. Whenever a form of conduct or a project conforms indisputably to the accepted norms, or fully realizes some recognized end, it will thereby escape criticism and thus be in no need of justification. The same is true of acts which do not have to conform to any norms and do not claim to pursue any determined end. The conduct of a God, for example, defined as an absolutely perfect will, is not subordinated to any norm; the same is true of a sovereign power considered to be *legibus solutus*, or superior to any law. Justification, therefore, can deal only with debatable things, and usually only with things that have been criticized for specific reasons.

An absolute value cannot be criticized, and it needs no justification: it is enough merely to show that by criticizing and justifying an absolute, one would transform it into a relative and subordinate value. But what is true of absolutes is also true of autonomous entities. Just as a sovereign power refuses to bend to laws imposed on it from the outside, so any discipline which claims to be autonomous, especially if its autonomy is claimed with regard

to philosophy, refuses to submit its theses and presuppositions to philosophical criticism. Specialists in mathematics, history, or law would be stepping outside their disciplines if they had to concern themselves with philosophical principles and argue over such matters as the existence of mathematical entities, the reality of the past, or the necessity of punishment. Their interest lies in modalities: how to construct mathematical entities, how to know the past, how to elaborate a penal code.

This conception of philosophical problems as having nothing to do with a specific discipline — a conception well-nigh taken for granted in scientific and technological circles — seems incomprehensible to anyone adopting the traditionally accepted point of view of Western philosophy. According to this point of view, whatever is not certain must be questioned; but since certainty is the same for all reasonable beings, everyone should arrive at the same certainties, that is to say, at the same principles. It would be inadmissible for science and philosophy to start from different starting points; they should both accept the same criteria and the same norms of criticism and of justification. This consequence is a necessary one if all human beings endowed with reason are interchangeable, and if facts and verities announce themselves to all attentive listeners. It matters little what qualifications or special capacities a critic possesses if his objections are admitted by everyone, if the criteria and norms of their validity are universally admitted. But if the criteria and norms in whose name a criticism is made are not unanimously accepted and if their interpretation as well as their application to specific cases can give rise to divergent opinions, then the qualifications and the specialized capacities of the commentators become an essential element, and sometimes even a prerequisite for debate.

It is true that the search for universally valid principles which would provide a common context for all criticisms and all justifications has been a millennial aspiration of all philosophy, and especially of all rationalist philosophy. But, in fact, criticism and justification are always found in a historically determined context. For all societies and for all intellects, there exist certain acts, certain persons acting, certain values and beliefs which at a given moment are approved without reservations and accepted without argument; hence, there is no need to justify them. These acts, these persons, these values, and these beliefs furnish precedents, models, convictions, and norms which in turn permit the elaboration of criteria by which to criticize and to justify prevailing attitudes, dispositions, and propositions. But one need not adopt an absolutist point of view in order to recognize this fact. Absolutism consists in the assertion that these acts, agents, convictions, and

values will serve eternally and universally as models. The classical idea of justification is based on an absolutist vision, since it looks for an absolute, irrefutable, and universally valid foundation.

If we reject the absolutist point of view, we may admit that the precedents and models, the convictions and values which give rise to criticism and to justification are relative to a specific discipline and a specific environment, and that they can vary in time and in space. Criticism and justification need no longer appear nontemporal or universally valid. The problem of knowing who is qualified or competent to criticize and to judge, and the problem of determining the modalities of criticism and of justification, then become the essential problems. In this perspective, the juridical model takes on its full importance.¹⁰

The jurists whose role it is to maintain and to regulate a stable social order by reducing the number of conflicts and by searching for peaceful means of settling them, have devised a number of institutions and rules of procedure; according to these, certain people have the power to legislate, others the power to govern, and still others the competence to judge and to elucidate the law. As H. L. A. Hart has convincingly shown, it is the existence of such rules that allows us to distinguish law from ethics.¹¹ Similarly, it is the presuppositions and the recognized methods of each discipline which allow us to distinguish it from philosophy.

Who has the authority to legislate? Who has the competence to judge? If we admit that every man is the reflection of a divine reason and that the same standards of good and evil are inscribed in the heart and conscience of all men, then the rules granting authority and competence turn out to be of no importance, for everyone will apply the same rules in the same way. This is the kind of optimism that justifies the anarchist doctrines advocating a society without government, legislators, or judges. Those, on the other hand, who insist that only an elite or even only a single individual can know the right rules and the art of applying them, will grant authority and competence in legislation and judgment only to an assembly of sages or priests, or else to a philosopher-king. But those who believe that anarchy leads to disorder, and that the utopia of a philosopher-king or of a government of wise men, priests, mandarins, or technocrats leads to the despotism of one man or of a supposedly enlightened clique, will have to look elsewhere for the foundation of the authority of legislators and the competence of judges.

¹⁰ Cf. my *Ce qu'une réflexion sur le droit peut apporter au philosophe*, in *JUSTICE ET RAISON*.

¹¹ H. L. A. HART, *THE CONCEPT OF LAW* ch. V (1961).

When objective and universally admitted criteria are missing, we must fall back on personal criteria and grant to some people the authority to legislate and govern, and the competence to judge. These powers, whether they be possessed or conferred, must in turn be justified by the confidence those who exercise the powers inspire and by the authority which is, in fact, recognized in them. This confidence manifests itself in various ways. It may become explicit at election time, when the people not only choose their representatives but also have a chance to control the manner in which they fulfill their duties. It may be implicit and taken for granted, as long as the people do not revolt against their rulers. Whenever it seems preferable to make certain posts permanent and certain judges irremovable, it is also necessary to allow for mechanisms of control and procedures for appeal.

The legislators, executives, and judges who are elected or appointed by those who possess the confidence of the people must exercise their mandates in conformity with the aspirations of the community which they represent. The role of the legislator and of the judge — insofar as the latter does not merely apply the law mechanically, but rather interprets and supplements it — does not consist in personal decisions as to what is just without taking into account the aspirations of the public which is the source of their power. These aspirations may be varied and often contradictory, ill-expressed, or even incoherent. That is precisely why the role of the legislator is a creative one.¹² Even while taking into account the wishes of the public, the legislator must try to formulate rules and specify criteria which will synthesize those wishes. He will thus have to elaborate a juridical order that will be spontaneously accepted as just by the body of the people. Carl Friedrich rightly insists on this: "The most just act is the one which is compatible with the greatest number — and the greatest intensity — of values and beliefs."¹³ It goes without saying that the values and beliefs in question are those of the community in whose name political power is being exercised.

The laws, customs, and regulations of a community are assumed to be just by the mere fact of their existence, and there will be no need to justify them so long as no criticisms arise concerning them. If criticism does arise, the critics will have to show that a given law is unjust, either because it is ineffective, or because it does not provide a good means for realizing its purported end, or again because it is incompatible with one of the accepted

¹² Cf. Clarence Morris, *Law, Justice and the Public's Aspirations*, in NOMOS VI 170-190 (1963).

¹³ C. J. Friedrich, *Justice: the Political Act*, in NOMOS VI 31ff; also, Ch. 17 ("Political Representation and Responsibility") in FRIEDRICH, *MAN AND HIS GOVERNMENT* (New York, 1963).

values of the community. Any criticism intended to reform a law must be submitted to the evaluation of the legitimate holders of legislative power, to those who possess the authority to vote and to modify the laws. In most cases their legitimacy is a result of legality, power having been conferred on them in accordance with prevailing legal procedures. It is in their role as the holders of legitimate power that they have the authority to settle controversial problems. But in the long run the prestige of authority can be maintained only if it is exercised in such a way as not to deviate too much from what the people expect. If the authorities ignore too blatantly the aspirations of the people, they run the risk of increasing opposition which will finally cause the overthrow of the government by elections, coup d'état, or revolution.

This analysis leads to the relativization of the notion of political justice. Politically just laws and regulations are those which are not arbitrary, because they correspond to the beliefs and the aspirations and the values of the political community. If the restraints imposed by a legitimate power are in accordance with the wishes of the community, the decisions of that power are politically just, because it is the community's convictions and aspirations which furnish the criteria of political action. But if this reasoning is satisfactory from the point of view of democratic ideology, is it equally satisfactory from the philosophic point of view?

If we had to equate what is politically just with what is philosophically just, we would join Rousseau in a deification of the general will and of the absolutism which results from it. The adoption of the slogan *vox populi vox Dei* transforms the general will into an absolute norm which no criticism may oppose. At the same time, by bending to the beliefs, aspirations, and values of the political community we abandon our search for a rational criterion of criticism for those beliefs, aspirations, and values. Such a renunciation would have serious consequences. It would mean not only that we considered some obviously imperfect and variable human decisions as perfect and infallible, but also that we allowed force and force alone to settle conflicts between political communities whose aspirations and values turned out to be incompatible. By giving up the search for criteria and norms which transcend those of politically organized communities, we would give up the traditional role of ethics, jurisprudence, and political philosophy. Incapable of fortifying justice, the practical philosopher would by his skepticism limit himself to justifying force. Force would become the criterion and ultimate judge of values and of norms.

Our analysis leaves us floundering between Scylla and Charybdis. Wishing to avoid the use of force in imposing values claimed as absolutes, we see

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that only force seems capable of settling conflicts between relative values. Our philosophical attempt to substitute reason for violence in practical affairs seems to lead inevitably to failure.

But must we be cornered between these two equally disastrous solutions? If we reject an absolutism which claims to be founded on self-evident intuitions, and reject also the anarchic disorder and despotic violence which result from such claims, must we then cynically admit the arbitrariness of all values and all norms? Must we inevitably admit that might is right, and that force is the ultimate foundation of all systems of justice?

History has repeatedly taught us that it is dangerous to try to impose on others by means of violence and inquisition the convictions and values cherished by a philosopher or a prophet as absolutely true and just. Only a step separates the philosopher-king and the armed prophet from the tyrant, and a clear conscience makes a tyrant only more tyrannical. But if the philosopher must renounce the use of force in imposing his ideas, is it not his duty to convince people, and show them that by becoming more reasonable they will become more just?

But in what sense can we affirm the reasonableness of values, criteria, and norms? Is it possible in the practical realm to transcend the aspirations of a political community? Do we possess philosophical criteria which will allow us to criticize and justify them?

II

The legislators and judges who employ sanctions and constraints to assure respect for law and the execution of sentences, owe it to themselves to exercise their functions in the spirit in which those functions have been conferred on them. The legislators must elaborate laws which will be just because in harmony with the aspirations of the community they represent; the judges must apply the laws in a spirit of equity, in accordance with the traditions of the community whose judges they are. But the philosopher's role, unlike the judge's, does not consist in cultivating respect for the established order; nor does the philosopher, like the politician, have to conform to the wishes of an electorate in order to win votes. If such a thing as a philosopher's mission exists, it is that he be the advocate of reason and the defender of universal values valid for all men. In the words of Husserl, "We philosophers are the ~~administrators~~ ^{public servants} of humanity."¹⁴

¹⁴ E. Husserl, *La crise des sciences européennes et la phénoménologie transcendantale*, LES ETUDES PHILOSOPHIQUES 142 (Paris, 1949).

In an absolutist perspective, be it that of a realist, an idealist, or a voluntarist, the notions of *reason* and of *universal value* present no difficulty. If there exists an absolute reality, an absolute mind or an absolute will which enlightens our reason and commands our heart and conscience with a necessity and certainty which excludes both doubt and ambiguity, then the philosopher will have but to incorporate the inventory of these truths which impose themselves on all into a treatise of natural or rational law which no normal human being would think of contesting.

But, in reality, things are not so simple. True, we can all invoke certain universal values like truth, justice, and beauty; we all agree that they exist, and none of us would think of rejecting them. But our agreement lasts only as long as we remain on the level of generalizations. As soon as we try to pass from this agreement *in abstracto* to some concrete applications, controversy begins. The fact that all admire and respect truth, justice, and beauty does not mean that all agree on what is true, just, and beautiful.

Similarly, agreement might be reached on a number of general norms presented as universally valid absolutes, such as "One should do good and avoid evil," "No one should be made to suffer unnecessarily," "We should always aim for the greatest good of the greatest number," and "The principle of our conduct must always be valid as a rule of universal legislation." Each one of these norms expresses, in its own way, a universally valid norm. But is it not obvious that innumerable and ever-renewable discussions will arise each time we try to apply these rules to concrete situations? Does everyone always agree on what is good and what is evil, on the necessities which justify suffering, on what constitutes the greatest good of the greatest number, or on the valid rules of universal legislation? Practical reason, which is supposed to guide us in our actions, unfortunately does not lead all its spokesmen to the same decisions. Must we, then, in confronting these facts, draw the disenchanting conclusion that a general accord on so-called universal values and norms is an illusion, and that we are dealing with vacant forms, rules which no one rejects because everyone is free to interpret them in his own fashion?

Lawmaking does not seem to seek universal norms. Yet to the extent that legal activity pretends to a certain rationality, it might be useful to examine the role of judges in applying the law, and that of legislators in formulating it. Such an examination might enlighten us concerning the role of reason in action.

How should one conceive the ideal of a just judge? What is his role in the administration of justice? A just judge is not an objective and disinterested

spectator whose judgments are just because in describing faithfully what he sees they conform to some exterior reality. The judge cannot stop at letting the facts speak for themselves: he must take a position with respect to them. The just judge is impartial; having no tie with any of the litigants before him, he applies to all of them the juridical rules prescribed by the legal system. Yet the judge is not a simple spectator, for he has a mission, which is to state the law. Through his decisions he must make the norms of the community respected.

The judge's mission may be clarified by considering the task of the arbiter. When the litigants are not before a judge but before an arbiter freely chosen by them, they wish to be judged not according to norms imposed by law but according to norms shared by them and the arbiter. Who the arbiter will be is an essential consideration when litigants agree to submit to arbitration. It is not enough that the arbiter be impartial with regard to two parties unknown to him — if that were the case, any stranger could do the job. His decision must not be arbitrary, as if he were merely tossing a coin. The ideal arbiter will be he whose sense of equity is guided by the same values, the same principles, and the same procedures as the litigants before him. If that is the case, then the desired impartiality is not just an absence of prejudice; it is an active commitment to common norms and values. Consequently, every time that the values, principles, and procedures of the litigants are different, they will have to have recourse to different arbiters.

To settle a conflict between management and labor, for example, someone will be called in who, while favoring neither of the parties, is nevertheless familiar with the principles according to which they wish him to act. Furthermore, he will have to aim also at contributing to the realization of an end which is common to both parties, such as the prosperity of the economy. If two people in the same branch of industry are in litigation, they will choose as their arbiter a respected member of their profession. The latter will have the confidence of both parties because he is familiar with the usages and customs of the profession and has regard for the honor of all its members. An arbiter chosen for a labor or commercial dispute would not necessarily be qualified to arbitrate a conflict between the United States and Cuba. In this instance a neutral would have to be found who, familiar with the principles of international law and devoted to the cause of peace and the maintenance of international order, would be guided by those ends in working out a just solution. In the same fashion, a just legislator looks for rules which, not favoring a particular side, seek to realize the values and the ends corresponding to the aspirations of the whole community.

Taking the judge, arbiter, and legislator as models, how should we define the role of the philosopher, who has to formulate just laws and judge in an impartial fashion, not for a given society or a limited social or professional group, but for the whole of humanity? What distinguishes him as such is that he must look for criteria and principles and formulate values and norms capable of winning the adherence of all reasonable men.

If the philosopher succeeds in finding certain criteria and principles, certain values and norms which to his knowledge are not rejected by any reasonable being, he will gladly make these the basis for a universal law. Such principles and values possess the advantage of not having to be justified — not because they are self-evident, but simply because they are not contested. Privileged principles of this sort will be most often ambiguous or equivocal and hence liable to different interpretations. Then the philosopher's role will be to clarify and specify them, by discarding those formulations and interpretations which in his view could not be defended before a universal audience. He will act according to the same considerations in working out the techniques of proof and interpretation which are indispensable for the establishment of facts and the application of laws. In his effort to formulate just rules, he will seek, like the common law judge, precedents to guide his judgment, while accepting only those motivating principles of decision (*rationes decidendi*) which are capable of becoming the laws of a universal legislation.

The conclusion recalls Kant's categorical imperative. Let us examine Kant's ideas more closely. This will give a more exact idea of how my theses are similar to his, and how they differ from them.

At the beginning of the first book of the *Critique of Practical Reason*, Kant states the following definitions:

Practical principles are propositions which contain a general determination of the will, having under it several practical rules. They are subjective, or *maxims*, when the condition is regarded by the subject as valid only for his own will, but are objective, or practical *laws*, when the condition is recognized as objective, that is valid, for the will of every rational being.¹⁵

The categorical imperative, which is the fundamental law of pure practical reason, is formulated as follows: "Act so that the maxim of your will can always at the same time hold good as a principle of universal legislation."¹⁶

¹⁵ IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 105 (6th ed., tr. by Thomas K. Abbott, 1909).

¹⁶ *Id.* at 119.

We may translate Kant's categorical imperative into judicial language as follows: "You must conduct yourself as if you were a judge whose *ratio decidendi* had to furnish a principle valid for all men." Apart from my emphasis on precedents, to which the *ratio decidendi* must be related, my formulation seems at first glance to differ very little from Kant's categorical imperative. Yet its actual meaning is different because of the clear distinction which Kant establishes between the subjective and the objective.

In opposing maxims to laws, Kant tells us that the maxim is subjective because the subject considers the condition which determines his will to be valid only for his will. The law, in contrast, is objective if the condition is recognized to be valid for the will of all reasonable men. This dichotomy, with its opposition between the individual and the universal, seems to me to be contradictory to the facts and chimerical. As soon as we formulate principles of action, whatever they may be, we eliminate something of the arbitrary from our conduct. Our behavior, being ruled, is no longer entirely dependent on our subjective whims; our rule might even become the principle of action of a community, if its members were inclined to accept it. On the other hand, none of us is the judge in the last instance of principles considered to be objectively valid; that is, valid for the will of any reasonable man. No one of us can declare, *a priori*, as a result of his own conviction, that any man who does not consider such principles to be objectively valid is not a reasonable man.

Experience of the relations between rules and the will shows us that there rarely is a purely subjective rule and that we can never be sure of dealing with an objective and universally valid rule. What we actually do find is a progressive universalization of our moral principles, which allows us gradually to elaborate reasonable principles of action for all mankind. The essential function of the philosopher is, perhaps, to formulate such practical principles, while the scholar exercises a similar function in the realms of science or theoretical reason. The specific role of philosophy is, in effect, to propose to humanity objective principles of action which will be valid for the will of all reasonable men. This objectivity will not consist either in conformity to some exterior object or in submission to the commands of any particular authority. It envisages an ideal of universality and constitutes an attempt to formulate norms and values which could be proposed to every reasonable being. But to propose does not mean to impose. This distinction must be maintained at all cost. Otherwise we run the risk of a philosophizing who would use the political authority and power of the State to insure the supremacy of his convictions, his values, and his norms.

For Kant, a pure practical law, established a priori, can only be formal—that is, its form alone makes it appropriate for universal legislation. My views go beyond that, for I do not believe that a philosopher should limit himself to the formulation of a purely formal law comparable to the rule of justice. It goes without saying, however, that the propositions the philosopher might present to all men cannot prevail with a necessity and an evidence which would put them beyond the test of any challenge.

We know that philosophers who invoke universal values like truth, goodness, justice, and reality as opposed to appearance are rarely in agreement as to the criteria and the content of those values. Does this mean that their efforts, and the conceptual constructs which result from them, are nothing but illusions, or that individual myths have merely replaced traditional and collective ones? This is what we would have to say about metaphysical assertions, if we had to assimilate them to empirically verifiable scientific theories. But assertions which represent the systematic formulation of an ideal cannot be judged the way we judge factual judgments. Their role is not to conform to experience, but to furnish criteria for evaluating and judging experience and, if necessary, for disqualifying certain aspects of it. This is exactly what a philosopher does who opposes reality to appearance through the establishment of a hierarchy of values among the diverse manifestations of reality.

Philosophers who refuse to recognize this primacy of practical reason have often exposed themselves to the criticism of the positivist by presenting ontologies and theories of being as if they were on the same level as scientific theories of reality. But reality as conceived by philosophers is always normative, for it aims at the devaluation of those manifestations of reality which are qualified as appearance or illusion. This is true even of the positivists, for their conception of reality validates that of the natural sciences and dismisses all other approaches to reality as mythical or illusory. The same normative approach can be seen in the philosophical use of the notion of "nature," whether it is a question of following nature or of opposing it. The term "natural" will be applied to certain characteristics, and it will vary with those who use it. Nature for the Stoics coincides with reason, but for the romantics it coincides with passion and opposes social conventions which are considered to be artificial.

The activity of the philosopher, master of wisdom and guide for actions, consists in taking a stand correlative to his vision of the world; it is based on selection, on choice. The danger of choice is partiality, a neglect of opposing points of view and a closing of the mind to the ideas of others. The difficulty of the philosopher's task is that, like a just judge, he must

arrive at decisions while remaining impartial. That is why the philosopher's rationality will be founded on a rule common to all tribunals worthy of that name: *audiatur et altera pars*. In philosophy, opposing points of view must be heard, whatever their nature or their source. This is a fundamental principle for all philosophers who do not pretend to found their conceptions on necessity and self-evidence; for it is only by this principle that they can justify their claim to universality.

Just as a judge, after he has heard the parties, must choose between them, so a philosopher cannot grant the same validity to all opinions. Many of the theses and values submitted to his scrutiny represent interests and aspirations of limited scope and conflict with views of universal scope. In the measure that the philosopher bases his decisions on rules which must be valid for all mankind, he cannot subscribe to principles and values which cannot be universalized, and which could therefore not be accepted by the universal audience to which he addresses himself.

In questions of justification and of argumentation generally, where one is dealing with reasons for or against a given thesis, both the critics and the defenders of the thesis assume the existence of criteria, values, and norms recognized in advance by those who will have to judge the pertinence of the criticism or the soundness of the defense. A speaker who is trying to convince his audience, that is, the totality of those he is addressing, must, ^{not to be} ~~even at~~ *the risk of *petitio principii*, base his argumentation only on principles that his audience admits at the start. *guilty**

The notions of *discourse*, *speaker*, and *audience* are technical notions found in classical rhetoric. If we want to give them philosophical significance, we must generalize them. By discourse we mean any form of argumentation designed to win the support of others, regardless of length or manner of presentation. A speaker is the one who presents this argumentation. An audience is the totality of those whose adherence he wants to win. It is important to note that a speaker must adapt his discourse to his audience, whatever that audience may be — a crowd gathered in a marketplace, a learned society, a judge hearing a case, an individual deliberating, or finally the universal audience that incarnates what we traditionally call reason.

The appeal to reason has always been characteristic of philosophical discourse. Ever since Plato and Aristotle, but especially since Descartes, reason in philosophy has been defined as that faculty in every normal human being, whether or not it is a reflection of divine reason, which allows him to apprehend evidence or that which imposing itself on the reason of a single person, by that very fact imposes itself on all beings endowed with

reason. This faculty, characteristic of every man and common to all men, was supposed to grasp universally valid truths by means of intuition and is therefore supposed to be the same in every man, independently of personality and environment, education and past history. Against this supra-individual and antihistorical conception of reason the romantics and existentialists rebelled.

Admitting the valid aspects of their criticism, I maintain nonetheless that all philosophy is an appeal to reason. But my conception of reason differs from the classical conception. I do not see it as a faculty in contrast to other faculties in man. I conceive of it as a privileged audience, the universal audience. The appeal to reason is but an attempt to convince the members of this audience — whom common sense would define as well-informed and reasonable men — by addressing them. It is to these men, or at least to the universal audience as he imagines it, that the philosopher speaks. It is this audience, with its convictions and its aspirations, that the philosopher wants to convince, starting from postulates and using arguments which he thinks will be acceptable to every one of its members. To achieve his end, the philosopher must use a rational argumentation conforming to Kant's categorical imperative: his postulates and his reasoning must be valid for the whole of the human community.¹⁷

In elaborating his argumentation, the philosopher is perforce obliged to imagine the audience he wants to convince — with the consequent danger that his imagination will not coincide with reality. That is why his theses must be tested by submitting them to the actual approval of the members of that audience. They may challenge the convictions and aspirations which the philosopher attributes to them, or resist the manner in which he selects, formulates, and specifies those convictions to fit the needs of his discourse, or object to the argumentation on which he bases his conclusions. Without this possibility of being always open to dialogue, without a readiness to listen to criticism and to take account of it if he cannot refute it, the philosopher cannot claim to transcend the beliefs, interests, and aspirations of the particular groups which make up the audiences addressed, for example, by theologians or politicians.

The characteristic of rational argumentation is the aim for universality — an aim whose realization is never assured. It is useless to try to define rational argumentation the way we define a demonstrative technique, i.e., by its conformity to certain prescribed rules. Unlike demonstrative reasoning, arguments are never correct or incorrect; they are either strong or weak,

¹⁷ Cf. my *Raison éternelle, raison historique*, in *JUSTICE ET RAISON* 103.

relevant or irrelevant. The strength or weakness is judged according to the rule of justice, which requires that essentially similar situations be treated in the same manner. Relevance and irrelevance are to be examined according to the rules and criteria recognized by the various disciplines and their methodologies.

Unfortunately, there exists no methodology common to philosophy which would allow one to decide the value of a philosophical argument. Philosophers usually borrow their postulates and their techniques of reasoning either from the history of philosophy by situating themselves in a system, or else from one of the several disciplines from which they draw inspiration. Until he has constructed his own philosophy, a philosopher will possess no satisfying criteria for judging a philosophical argument in coherent fashion. His own philosophy is never complete, but as it moves toward completion it furnishes him with increasingly reliable criteria for judging the strength and relevance of his own arguments, as well as the arguments of those who oppose him. Because of the value he places on the coherence of his thought, he will find it more difficult to refute *ad hominem* arguments, those based on internal criticism founded on theses whose value he himself explicitly recognizes.¹⁸

However great the talents and the efforts of the philosopher, he will rarely succeed in convincing all his interlocutors. Often he will try to make up for it by disqualifying the man who doesn't agree with him. Are there men who do not believe in God? "That is a great question," says La Bruyère; and he continues: "If there existed anyone like that, that would only prove the world is not devoid of monsters."¹⁹ La Bruyère here is using a technique of St. Anselm's, who treats the unbeliever as insane.²⁰ This procedure of disqualification, which allows one simply to dismiss his adversaries, occurs more frequently than one might think. It is, however, not always possible, for sometimes the adversaries make up a considerable part of the universal audience. In that case, one might try to prove that the knowledge of true reality and true values is accessible only to an elite, only to those who have a grace and dispose of special means of understanding not available to everyone. But to make such a claim consistent with philosophical thinking, the arguments on which it is based must be addressed to the universal audience, including those who will be subsequently disqualified by them.

Philosophical reasoning being what it is, we must resign ourselves to the fact that philosophical controversies are part of the very nature of phi-

¹⁸ Cf. H. W. JOHNSTONE, JR., *PHILOSOPHY AND ARGUMENT* (Pennsylvania State University Press, 1959).

¹⁹ LA BRUYÈRE, *LES CARACTÈRES, DES ESPRITS FORTS* 15, in *OEUVRÉS COMPLETES* 473 (Ed. de la Pléiade, Paris, 1952).

²⁰ ST. ANSELM, *PROSLGION* ch. II.

losophy. In effect, argumentation — even rational argumentation — is not by nature coercive. There exist no nonformal criteria transcending all philosophy to which rational argumentation must conform. That is why, ultimately, philosophical reasoning implies the philosopher's freedom of judgment as well as his responsibility. The philosopher who judges commits himself; in judging a philosophy, we are also judging the man who is identified with it.

If this is true, the criteria, the values, and the norms of a philosophy do not constitute absolute and impersonal values and truths. They express the convictions and aspirations of a free but reasonable man, engaged in a creative, personal, and historically situated effort: that of proposing to the universal audience as he sees it, a number of acceptable theses. He will try to justify those theses, or else show that they do not require justification, taking into account any objections or criticisms which seem to him pertinent. Aware of his limitations, the philosopher knows that his efforts will not produce a definitive and complete work. Even if he has succeeded in surmounting difficulties and problems of which he is conscious, he foresees that the future reserves other difficulties and problems for mankind; and he is aware that the advancement of knowledge will modify and shake the convictions which today appear to him acceptable to the universal public. It will be for others, who will come after him, to continue his efforts for more rationality and justice, and less violence, in the relations of men.

