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Can the Rights of Man Be Founded?*

Professor Ch. Perelman seeks to establish a sufficient grounding for a theory of human rights by linking it to both a concept of the reasonable and the theory of man. He thinks that human rights can be founded upon the reasonable exchange between general moral rules and particular moral experiences.

Any search for a foundation presupposes the need for solid grounding. However, if this need should manifest itself regarding just anything, the problem of grounding would never receive a satisfactory solution because the search would lead to infinite regression. For the search to be a sound undertaking, one must admit the existence of realities or principles that serve as foundation for other things and are, themselves, incontestable or, at least, uncontested. On the other hand, what one proposes to ground would either be contestable by right or contested in fact.

I stress the distinction between the incontestable and the uncontested, the contestable and the contested. The failure to recognize this distinction is the source of confusions that make philosophy oscillate between absolutism and skepticism, two extreme positions that both seem contrary to effective thinking, which normally falls between them.

The search for a foundation (or a proof that guarantees it) presupposes a doubt, a disagreement, or an argument, sometimes as to the existence, the truth, or the necessary character of a reality, proposition, or norm; sometimes as to the nature of that which exists, the meaning of the proposition, or the range of the norm. Everyone admits that doubts, disagreements, and disputes can arise regarding one or another of these points, and that it is then necessary to clear them up or sidestep them. In refuting an objection, justifying a rule, or defining its range, one may eliminate a doubt, reduce a disagreement, or avoid a dispute that has actually presented itself, and this procedure

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may furnish a *sufficient* basis for a given situation. But it is always possible that a dispute, temporarily avoided, may emerge later for some new reasons. A sufficient grounding at a given moment may not have the characteristics of an absolute grounding that can permanently forestall disputes concerning this matter. One can understand that the ambition to avoid all disputes forever has moved most philosophers to seek an incontestable, absolute grounding for their assertions.¹ Opposed to the philosophic dogmatism that claims to furnish such an absolute grounding, knowable through some form of evidence, is the philosophical skepticism that denies such a possibility and takes exception to such evidence. But both approaches overlook a "sufficient" grounding, one that eliminates a current doubt or dispute but does not guarantee, once and for all, the elimination of all uncertainties and all future controversies. The history of thought, in all its domains, teaches us the importance of groundings that are not absolute but might appear sufficient to certain minds, in certain ages, in certain disciplines, and manifest the personal aspect of our knowledge and culture, historically and methodologically situated. The search for groundings that are sufficient but relative to a spirit, a society, or a particular discipline becomes philosophically essential for all those who, while refusing to consider self-evidence an absolute criterion, nevertheless cannot be satisfied with a negative and sterile skepticism.

In classical philosophies, which I have elsewhere called *first philosophies*,² the criterion of self-evidence in an ontology or epistemology, whether it concerns intuitions of the reason or of the senses, must permit the distinction between necessary first realities and principles—which require no grounding on anything else—and the realities, truths, norms and values, that must find their grounding in those first realities and principles. That which exists in itself and is conceived through itself provides a foundation for that which exists in something else and is conceived through something else. Thus, in some cases, the modes will find their grounding in substance, contingent beings in Necessary Being, derived truths in evident principles, norms and values in an incontestable reality.

Corresponding to the classic conception of proof,³ where all that is doubtful must be demonstrated and that which is self-evident has no need of proof, the classic idea of grounding is that of an obvious and absolute foundation. Now, in the empiricist conception of knowledge, only sensation furnishes us this indubitable foundation. Thus, norms and values, which are not given by sensation, would have to be capable of being grounded upon some empirical reality. But as one cannot deduce the "ought" from the "is," norms and values deprived of a valid grounding would be nothing more than the expression of subjective emotions or of commands drawing their weight from the source that imposes and sanctions them.

In a theocratic view of society, when a command is considered to emanate from a perfect source, the norm that it poses cannot be challenged. If the

command emanates from the general will, constituted on the basis of a social contract, the norm it establishes is considered obligatory by virtue of the principle *pacta sunt servanda*. The clearly expressed will of the sovereign gives these norms an unquestionable foundation. One sees how, in transferring to the general will the functions previously filled by the divine will (*vox populi vox Dei*), the juridical positivism has thereby succeeded in grounding all positive juridical rules on the legislative power of the state and on the sanction that guarantees obedience to the law. Refusing all other grounding of the law, juridical positivism has denied the existence of any law that is not the expression of the will of the sovereign.

But this conception of juridical positivism collapses before the abuses of Hitlerism, like any scientific theory irreconcilable with the facts. The universal reaction to the Nazi crimes forced the Allied chiefs of state to institute the Nuremberg trials and to interpret the adage *nullum crimen sine lege* in a non-positivistic sense because the law violated in the case did not derive from a system of positive law but from the conscience of all civilized men. The conviction that it was impossible to leave these horrible crimes unpunished, although they fell outside a system of positive law, has prevailed over the positivistic conception of the grounding of the law.

The renaissance of natural law theories in contemporary legal philosophy is certainly in great part the consequence of the failure of positivism. But, to counter this failure, is it absolutely necessary to fall back on ideological constructions that seemed definitely destroyed by the positivistic critique? More and more, jurists from all corners of the world have recourse to *general principles of law*, which one might liken to the ancient *jus gentium* and which would find their real and sufficient grounding in the consensus of civilized humanity. The fact that these principles are recognized, explicitly or implicitly, by the courts of various countries, even if they have not been proclaimed obligatory by the legislative power, proves the inadequacy of the Kelsenian construction, one which makes the validity of all rules of law depend upon their integration in a hierarchical and dynamic system whose elements would all draw their validity from a presupposed supreme standard. This juridical formalism, whatever its advantages and seductions for a theoretician of systematic mind, does not take into account the aberrant element constituted by the general principles of law. But the lack of a legislative grounding, does not oblige one to seek a foundation for these principles in a permanent natural law which no subsequent reaction of conscience can modify or clarify. Just as the natural sciences have stopped granting their theories and principles the status of final truths sheltered from all refutation by experience, we, too, despite love of system, do not have to shelter our norms and values from challenges our consciences may present. To say that the conscience must limit itself to the domain of morality, without its revolt having any consequences in the juridical domain, is sacrificing more than is

necessary to the love of order and a methodologically satisfying construction. That grants to an ideology, whatever its motives and reasons, an unchangeable and imperfectible character. It grants to institutions designed to protect the individual and promote the common good an infallible character, one that no contradiction not conforming to the modalities foreseen by these institutions could change. This ideological absolutism, to which the search for an absolute and unchangeable grounding must lead even if this grounding is positivistic, seems unacceptable to me. But that does not mean that all search for a nonabsolute foundation lacks sense and significance.

Whenever controversies arise about the existence or significance of certain rights, it is normal to link them to an ideological grounding, that is to say, to ontological, anthropological, or axiological principles that, once admitted, would furnish sufficient reasons in favor of a right or of a limitation or hierarchization of rights. Indeed, a conception of the real or of a vision of man does implicitly contain evaluations, hierarchizations, or structuralizations from which an axiology and a link to moral and juridical norms can be made. In structuring the real, based on an ontology, one places a higher value on certain aspects. Quite naturally, one will admit the primacy of essence over accident, of the act over the possible, or of the spiritual over the material. In conceiving the individual in relation to society, or in making the social reality depend on individual wills, in giving preference to that which is unique or reputable, one at least implicitly puts value on (*valoriser*) one or another aspect of the real in his ontology or anthropology. It is this overall and hierarchizing view of the real which distinguishes the ontological from the purely scientific, purely methodological point of view. In preferring an epistemology that favors scientific methods under all circumstances and neglects all others, positivism under its various manifestations arrives at an ontology that retains only those aspects of the real that the methods of the positive sciences permit it to recognize. Thus its case confirms, paradoxically, that there exists no ontology devoid of all value judgments, at least implicit ones.

It follows that the attempt to ground norms in an ontology does not consist of a deduction of an "ought" from an "is," of a *sollen* from a *sein*, but of the structuralization of these norms based on a vision of the real inseparable from a stress, therefore a valuing (*valorisation*) either of certain "beings" or of certain aspects of "being."

When it is a question of norms, the search for a grounding is too often inspired by a mathematical model, as if one could demonstrate them, like the theorems of a system of geometry, starting from axioms both evident and unambiguous. But, in reality, the search for a foundation in the moral and juridical domain is of an entirely different nature.

In the interesting volume published by UNESCO on the occasion of the Universal Declaration of the Rights of Man,⁴ several authors state that if

agreement upon a list of the rights of man, between representatives of different and even opposed ideologies, has been possible, it is because their sense, their significance, and their hierarchization have not been spelled out.⁵ Regarding the rights of man, we find ourselves confronted with the same situation as that indicated in a previous discussion concerning the ultimate principles of morality.⁶

Indeed, it is easy to obtain agreement on general principles, such as "It is immoral to inflict pain unnecessarily"; "We must act in such a way that the maxim of our will can at the same time become a universal law"; or "that is moral which has the greatest utility for the greatest number." As long as these principles remain sufficiently vague, nobody wants to challenge them. But the arguments start as soon as general rules are applied to specific cases. I wrote concerning this:

In fact, the different principles of morality are not challenged by men who belong to different cultural environments but are interpreted in diverse fashions, these attempts at interpretation never being definitive. In matters of morality, the argument differs completely from formal demonstration because it is a constant relating of particular experiences with concepts which are partially undetermined and in constant interaction. . . . Moral philosophy is not worked out by means of axioms and deductions but thanks to a continual development of rules which can guide us in action.⁷

From this perspective, the search for an absolute grounding must give way to a dialectic in which the principles one works out in order to systematize and hierarchize the rights of man, such as one conceives them, are constantly confronted with the moral experience, the reactions of our conscience. The solution of the problems created by this confrontation will be neither obvious nor arbitrary. It will develop through taking a theoretical position resulting from a personal decision, a position that one presents nevertheless as valid for all reasonable minds. This decision, not conforming simply to the evidence, and not presenting itself as infallible, does not risk furnishing a grounding for an enlightened despotism that escapes all checks and critiques. On the contrary, the contingent and obviously perfectible solutions presented by the philosophers can claim to be reasonable only to the extent that they are submitted for the approval of the universal audience, constituted by the totality of mankind who are normal and competent to judge.⁸ Indeed the *reasonable* does not refer to a reason defined as reflection or illumination of a divine reason, unchangeable and perfect, but to a purely human situation, with agreement presumed from all those whom one considers competent to discuss the questions under consideration. This presumption permits the working out of a rule or norm, but one which does not escape from a check by the facts. The *norm*, the *normative*, is intimately associated with *normal*, with that which "is." But one sees immediately that recourse to the members of the universal audience, in order to actualize the idea of the reasonable,

cannot fail to refer us to an anthropology, a theory of man, just as the *duty of the dialogue*, the fundamental norm in the thought of Guido Calogero,⁹ gives rise immediately to the question: "With reference to whom do we have this obligation to dialogue?" If one tries to respond to such questions, and to all that they imply, one will arrive, by a certain point of view, at justifying certain rights of man.

Let us now take the idea of the reasonable, which I believe conditions the ancient ideal of philosophy.¹⁰ Taken as a criterion of conduct and practical norms, the reasonable is, by that very fact, grounded (*valorisé*). But the reasonable works itself out due to the participation of all human beings capable of integration in the universal audience and necessitates the confrontation of their ideas, the knowledge of their actual reactions. The fruitful development of a philosophy of the reasonable requires an appreciation (*valorisation*) of the men who prepare it, the recognition of all the rights of these men that would permit them to contribute effectively to the progress of thought.

The recourse to the reasonable, as a grounding for the rights of man, that defines and hierarchizes these rights in terms of their contribution to the progress of a concrete rationality, furnishes an illustration of my general thesis. Because it shows that only those who grant some value to the progress of theoretical thought and especially to philosophy, who conceive this progress in the form of historical elaboration of ever more reasonable conceptions, could link to it a theory of the rights of man arising out of a dialectic of the reasonable. But one sees that the grounding thus worked out would be neither an absolute grounding nor the only grounding conceivable, and that the rights that it would permit us to justify would not be defined in a fashion devoid of all ambiguity and indetermination. This example shows in what sense the undertaking is possible and demonstrates that the theory of the rights of man thus grounded would not be the expression of an irrational arbitrariness.

NOTES

1. See my article "jugements de valeur, justification et argumentation," in *Justice et Raison* (Bruxelles: Presses Universitaires de Bruxelles, 1963), pp. 236-38.

2. See "Philosophies premières et philosophie régressive," in Ch. Perelman, *Rhetorique et Philosophie* (Paris: Presses Universitaires de France, 1952), pp. 85-109; "Evidence et Preuve," in *Justice et Raison*, pp. 140-54 (trans. as *The Idea of Justice and the Problem of Argument* [London: Routledge and Kegan Paul, 1963]).

3. See Pascal, "De l'esprit de géométrie et de l'art de persuader," in *L'oeuvre de Pascal* (Paris: Éditions de la Pléiade, 1941), pp. 380-81.

4. *Autour de la Nouvelle Déclaration des Droits de l'Homme*, texts collected by UNESCO (Paris: Sagittaire, 1949).

5. Ibid., J. Maritain, "Introduction"; R. McKeon, "Fondements philosophiques et conditions matérielles des droits de l'homme"; Don Salvador de Madariaga, "Droits de l'Homme ou relations humaines?"; "Conclusions de l'enquête menée par l'UNESCO sur les fondements théoriques des Droits de l'Homme," pp. 210-14.

6. Ch. Perelman, "Scepticisme moral et philosophie morale," in *Morale et Enseignement*, no. 44 (Bruxelles, 1962), pp. 22-26. Reproduced in *Droit, Morale et Philosophie*, pp. 83-86.

7. Ibid., pp. 25-26; *Droit, Morale et Philosophie*, pp. 85-86.

8. For the idea of universal audience, see Ch. Perelman and L. Olbrechts-Tyteca, *Traité de l'argumentation* (Paris: Presses Universitaires de France, 1958), 6-9. English trans., as *The New Rhetoric* (South Bend, Ind.: Notre Dame University Press, 1969).

9. See G. Calogero, *Logo e Dialogo* (Milano, 1950); *Filosofia del dialogo* (Milano, 1962).

10. See "L'idéal de rationalité et la règle de justice," *Bulletin de la Société française de Philosophie*, no. 1 (1961). Also in *Le champ de l'argumentation*, pp. 287-336.

