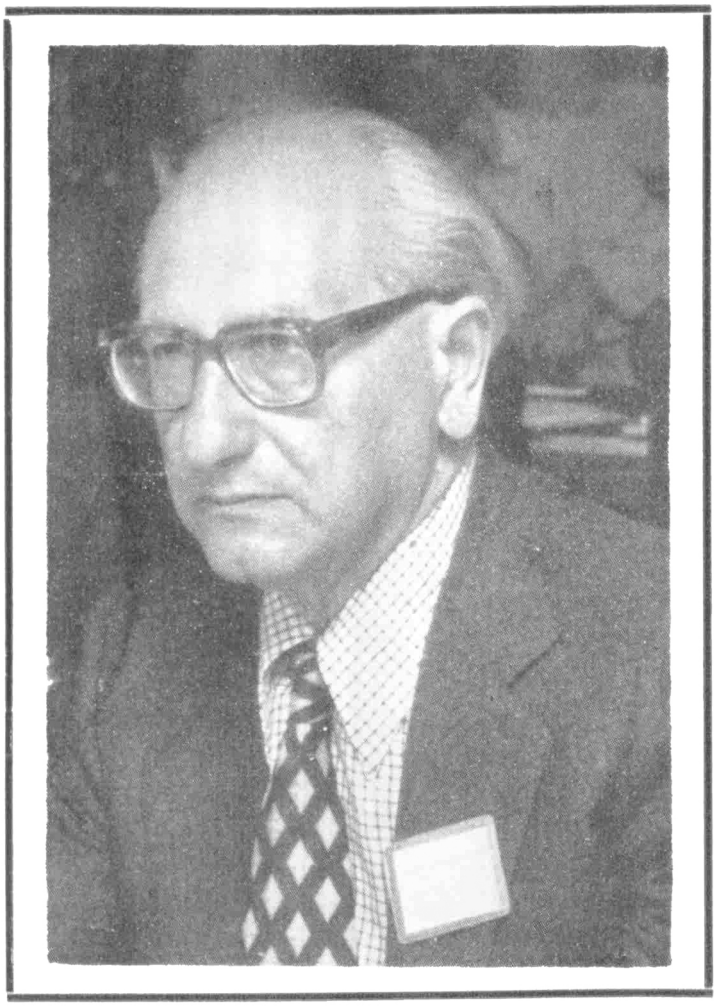

CHAIM PERELMAN

(1912—1984)

https://doi.org/10.1017/S0021223700008190 Published online by Cambridge University Press

Israel Law Review

Vol. 19 Winter 1984 No. 1

CHAIM PERELMAN — *IN MEMORIAM*

Perelman was born in Warsaw in 1912. In 1925 he immigrated to Belgium, where he soon found the opportunity to develop his exceptional talents. By 1938 he had already completed his studies at the University of Brussels in two branches, law and philosophy. His double qualification entitled him to teach Logic, Ethics and Metaphysics at his own *alma mater.*

This activity is interrupted by the war and the German invasion. The young scholar at once switches all his efforts to alleviate the sufferings of the victims of Nazi persecution: together with his remarkable wife, he joins the ranks of the Belgian resistance movement. At the same time he feels deeply distressed by the horrors he witnesses. How can the National-Socialist concept of Legality be reconciled with that of Justice? Perelman soon discovers that no legal system is totally immune from some measure of subjectivity and even of oppression. He sets out to examine this ominous aspect of the Law and his misgivings form the substance of a monography which is completed in August 1944, i.e. a few weeks before the liberation of Belgian territory.

On December 8, 1944, the Brussels University promotes him to the rank of full professor. But personally he is not satisfied; and this is how he explains his position at that stage:

> The idea that all assessments, all value judgments, could be equally arbitrary, seemed to me unacceptable; but I did not know how the preference given to some over others could be justified, unless one was to base such preference on incommunicable intuition. How does one argue about values? Are there any methods or reasoning in this field, a logic of value judgments? The only procedures on which agreement seemed possible concerned derived value judgments, those which ascribe a value to a means of realizing an accepted end or those related to an obstacle with respect to such an end. But as for the

> ends themselves, how were their values to be determined? Not knowing how to answer this question, I decided to act in the same way as Gottlob Frege who had asked an analogous question concerning mathematical reasoning. Are there principles to be extracted from demonstrative reasoning? To answer this question, Frege proposed to analyze the mathematicians' Reasoning. He thus arrived at a modernization of formal logic which had been unaltered since Aristotle. Would it be possible to uncover a logic of value judgments through an analysis of reasoning on practical matters put forward by politicians, jurists, lawyers and philosophers, the reasoning of those who want to justify a preference, a decision, a choice, a rule or a model?[1]

This was the origin of Perelman's theory of *New Rhetoric.* Renewing the link with the tradition of Aristotelian thinking, he spent no less than ten years of his life in examining and criticizing the various methods of argumentation "as opposed to analytical reasoning which consists in the deductive proofs of formal logic".[2] Argumentation, he notes, supposes the existence of an audience, whether a wide body of listeners or readers, or a small number of participants, whom the person who addresses them wishes to rally to his view. The success of his endeavour will then depend to a large extent on his "eloquence". Thus, parallel to formal logic which seeks to convince, but distinct from it, there is ample room for the use of dialectics, aiming simply to persuade, by appealing to the listeners' beliefs and emotions:

> Thus, generalized rhetoric, applicable to all non-analytical reasoning, beyond the limits of a simple calculation or a formal demonstration, would develop essentially as a function of the audience, be it ignorant or competent, composed of philosophers, lawyers or scholars, or even of a single person conscientiously weighing up the pros and the cons. If formal logic is independent of the psychological, social and historical context in which it is evolved, the case is different when we speak not of a proof, but of reasons, the strength or weakness, pertinence or irrelevance of which depend on the method proper to each discipline. Having started from procedures based on common sense, and therefore familiar and acceptable to all, and moved through a certain vagueness and ambiguity, the different disciplines specialize in and elaborate upon more refined techniques and criteria of their own, consequent on their theoretical progress and the errors which it was possible for

[1] Chaim Perelman, "From Logic to Rhetoric; an Intellectual Itinerary", a lecture delivered on the occasion of his receiving an Honorary Doctorate from the Hebrew University of Jerusalem on April 1st, 1970.

[2] *Ibid.*

> them to eliminate. However, they are comprehensible only on the basis of the notions of common sense, which they have had to refine and specify. That is why the history of methodological progress is so interesting from the philosophical viewpoint. But it cannot be understood within a concept of logic limited to formal logic. The latter, which is concerned with the theory of deductive proof, should be complemented by a theory of non-formal argumentation, related not only to the dialectical and rhetorical types of reasoning of Greco-Roman antiquity, but also to the methods of Talmudic reasoning.[3]

Having reached this momentous conclusion, Perelman did not rest on his laurels, but at once proceeded to use his doctrine as a stepping stone for further conquests, reconsidering its numerous aspects and implications in every field of the law. This was the object of an impressive series of books and articles he produced, many of which were translated into other languages, including Hebrew. Moreover, Perelman invited some eminent jurists all over the world to come and discuss a number of specific problems: the Conferences he convened within the framework of the National Center for Logical Research in Brussels served the purpose of confronting his views with those of his colleagues and of submitting his method to their criticism. Having fixed the agenda, he conducted the debates, edited the minutes and, of course, injected his own remarks and conclusions. What an opportunity to put the very art of argumentation to the test and to raise the level of individual research to that of fruitful team-work!

In the meantime Perelman constantly widened his horizon. One of the main subjects to which he gave his attention was the Hebrew University of Jerusalem. At an early date he enlisted among its most active supporters and was instrumental in creating the Belgian Association of Friends. Here again he was seconded by his wife. Thanks to their efforts the Jerusalem campus was enriched by several beautiful buildings, such as the Queen Elizabeth Institute of Archeology and the Collegium Belgium Fabiolanum used as a Faculty Club and more popularly known by the name of House of Belgium. His devotion and clearsightedness as a member of the Board of Governors were also invaluable. In 1970, the Senate of the University resolved, in token of gratitude, to bestow upon him the title of *doctor honoris causa;* and, in addition to his merits as a scholar, the citation emphasized the University's profound appreciation for Perelman's fidelity to the Jewish people, his courageous activity on behalf of the Jews of Belgium and his efforts to promote the cultural ties between that country and Israel. Perelman replied with a lecture expressing his gratification for having "for more than

[3] *Ibid.*

twenty years, . . . been associated with the fortunes of this great centre of learning and culture"; and he added:

> Being a friend and admirer of many of its leaders and teachers and appreciating the intelligence and earnestness of its students, whom I would have liked to have as my own pupils, I consider the degree you are conferring upon me a symbolical cooption to your teaching staff.

Indeed, Perelman repeatedly volunteered to come to Jerusalem as a visiting professor. Having finally reached the age of retirement, it was apprehended that he would take a well-deserved rest for the sake of his failing health. But this was not his style of life; on the contrary, he preferred to devote to his seminars on the Jerusalem campus an ever increasing part of his time.

Perelman has aptly been described as "completely Belgian and completely Jewish, and yet, on top of this, profoundly human". A Jewish adage he often quoted likens the Wise Man to a source that makes the desert bloom. Such a man was he himself: his memory shall never perish.

Shalev Ginossar

A TRIBUTE TO CHAIM PERELMAN *

My purpose this evening is to propose that we see the two main themes of Perelman's thought — his analysis of the idea of justice and his attention to the "New Rhetoric" — as inspired and motivated by his deep and enduring concern with a perennial problem of philosophy, a problem that has captured many minds in the wake of the Second World War: the problem of the status of values and their ultimate justification. I believe that when we see his work in this way, we can achieve an understanding of his contribution to philosophy in general and to the philosophy of law in particular.

Perelman clearly shared the crisis felt by many analytic philosophers after the Second World War: the philosophical climate was against objectivity in ethics. A distinction was drawn between facts and values, and while facts were considered objective, values were considered relative and ultimately man-made. Extremists in philosophy even argued that ethical statements were meaningless, but all respectable philosophers seemed to agree that value judgments could not be "true" the way factual statements could be. The war presented philosophers with a dilemma: on the one hand they wanted to condemn in clear terms the moral atrocities of the war. But if values are relative, if justice can be compatible with racism, what can one say beyond stressing that one disagrees with the values of the Nazis? Surely, it was felt, the condemnation of the Nazis rested on firmer ground. Yet the conceptual framework within which this criticism could be made was missing. The New Rhetoric, the art of practical reasoning which goes beyond deduction from true premises to inevitably true conclusions, meant that there is a role for reason in arguing about values despite the fact that values are not "objective". This reason helps us to identify good arguments and wise, useful, prudent, proper, decisions; it enables us to distinguish these from bad decisions. It does not purport to ascribe "truth" to these decisions, but it permits an appreciation of practical affirmations and commitments, and thus a condemnation which is not merely personal of some moral atrocities. The analysis of justice, on the other hand, reaffirmed the fact that, ultimately, justice is what people believe is just, and that some people's conception of justice may very well be compatible with a lot of injustice according to our judgment. When we assess activities by

* Talk given on the 30th day memorial for Prof. Chaim Perelman, in Jerusalem on Feb. 23, 1984.

invoking the ideal of justice, says Perelman, we must do two things: first we must specify the sense in which we use the term "justice", and secondly we must remember that there are many conceptions of justice which may lead to contradictory practical implications, so that justice cannot be the ultimate or the only virtue.

Let me start with the analysis of justice. To account for the fact that many people invoke this ideal in support of contradictory practical conclusions Perelman draws two important distinctions: a distinction between the concept of justice and conceptions of justice, and a distinction between three contexts in which we can talk of justice: we may ascribe justness to an act, to a rule, or to a man.

The concept of justice is that people who are substantially equal should be treated alike. This is a formal concept, and its practical content depends on what we think are factors relevant to the determination of equality, and how we decide which kind of treatment is appropriate for each group. These determinations go beyond the concept of justice itself. Standard positions as to relevant considerations in this context are desert, need, merits, class or parentage. Controversies about justice are thus controversies about conceptions of justice. The important practical question is, thus, the determination of relevant differences. When race, for example, is used as a relevant factor to justify the killing of people not belonging to a preferred race, we have an atrocious regime which meets, nonetheless, the requirements of formal justice.

The same point is driven home by the second distinction. An act is just, says Perelman, if it is an application of a general rule. The justice of the act is thus independent of the content of the rule. It consists only of the fact that the rule is enforced equally on all those to whom it applies. Perelman was the first to note and to stress that a just act may lead to terribly unjust consequences if the rule applied in it is immoral and unjust. A rule is just if it treats sustantially equal persons alike. But, as we saw above, this formal criterion cannot provide us with a test for the identification of justice in the material sense. Justice will depend on how we define the groups and the way to treat them. Finally, the third context is that of the just man. The just man is not simply the man who seeks always to do the just act and to follow the just rule. Justice, says Perelman, is not the only human virtue, and it is not even the ultimate one. Besides, there are many antinomies of justice, in which the requirements of justice itself seem to pull in a number of directions. The just man is the one who knows when he should do the just act and follow a given rule, or seek to identify the just rule, or when to mitigate both by invoking things such as equity, generosity, or beneficence.

This conceptual scheme of Perelman's has both theoretical and practical implications. It helps us account for the fact that all human societies strive to seek justice, yet there is persistent disagreement as to how this common goal could be promoted. The disagreement stems from both the plurality of conceptions of justice and from the different implications of such conceptions. It may also help us present one of the most central and enduring questions of legal philosophy. We usually expect the judge to do the just act. We see it as his task to apply the pre-existing laws of his system, and in this way to achieve justice between the parties. In most cases we do not expect the judge to do more, and if he does we hold it against him. Under our conception of good government, judges should apply laws, not make them. The judge should not re-evaluate the laws, he should apply the norms made by the legislature. Perelman's analysis shows that this may be a humble sort of virtue, the one the lawyers call the formal rule of law, but that it is an important virtue: it guards against arbitrariness and against discrimination in the application of the rules.

Everyone familiar with the law knows that this dictate telling the judge to apply the law is not always simple to follow. The inevitable ambiguity of language and purpose create situations in which the judge must make some of the law. These are the cases in which the New Rhetoric comes into play: we seek to persuade the judge to make the law by the best practical argument we can make. In such cases the judge tries to articulate a just rule to fill in the gaps left by pre-existing norms. We usually say that in this creation of the law the judge cannot be governed by his own ideas of what the just rule should be. Rather, he has to seek the rule which would seem right in view of the system as a whole. In Perelman's terminology, the judge in such cases should not seek the just rule according to his lights, but should still be bound by a professional ethos that might contradict his own conception of justice and the just rule.

Yet the most difficult cases of all are those in which we can identify the law clearly enough, and we can also know that the legal rules thus identified are unjust. There the judge is in a predicament: should he do the just act and follow the unjust rule, or should he "transcend" his professional duties and articulate a just rule to be followed? Or, in a more general formulation, should the judge seek to be a person doing justice under the law, or should he seek to be a "just man"?

Perelman believed that a good judge should be aware of these difficulties and be flexible. He documented, with many comparative details, how judges in different periods saw their job, and what the awareness of the relativity of values did to the task of the judge. In most cases, judges have to aspire to the justice of acts. This is, in fact, the definition of their role.

At times, however, they should be obedient to the just rule; and at times they must seek to be the just men. It is important to remember that among the virtues of judging we count not merely the judicial and legal competence called for by the first task, nor only the courage to seek the just rule, but also the ability to fulfil the ultimate moral duty of being the just man.

Perelman did not provide the answer to the question when the judge should do the one rather than the other. No one can provide this answer. We lawyers say that the answer lies in the "sixth sense of the jurist". Yet we can deal better with the question and understand its dimensions better when we come equipped with the framework Perelman has provided.

This analysis stresses the important role of political and legal arguments, arguments not about the deduction of conclusions from true or accepted premises, but about the prudence and reasonableness of decisions. The arguments made to the legislature or to the judge are usually arguments of the latter kind. The study of these arguments is the subject of the New Rhetoric.

Here again we see the uniqueness of legal reasoning as a particular case of practical reason. All practical argumentation shares these features of not being about truth but about goodness, usefulness, prudence. Yet in the moral system we do not have any authoritative arbiter, and we do not need one. Sometimes we can persuade another, if we show him that our conclusions do follow from premises that he accepts or is willing to accept. This is the main task of rhetoric. But if we do not have shared starting points, the moral argument cannot be resolved: the issues are not joined, and the controversy is beyond the force of reason. Law is one context in which we cannot afford this situation: social life requires that there will be machinery for solving disputes by authority, so that violence can be prohibited. This machinery requires that all will accept the authority of this system. Within the law we do indeed argue from shared premises, and it is the power of the law that the "rules of the game" are dictated and accepted by definition. Thus the legal system is an area in which the New Rhetoric is at its most potent.

In stressing this point Perelman joins in one of the most important and widely shared insights of all legal philosophers, including Kelsen, Weber and Hart: legal systems, as a whole, must be legitimate, they must be accepted, they must be "by and large efficacious". This legitimacy of the law rests on the fact that the law does work on premises which are by and large accepted by a large part of the population. The legal system thus creates a "community of listeners", who all agree to start from some shared premises.

We should not underrate the importance of this requirement. In philosophy

we tend to belittle consensus, since we know, from both logic and history, that in many cases people agreed on false beliefs and on pernicious values. Agreement, we know, is no guarantee of either truth or goodness. Yet the solution of social and political problems, the decisions on questions of social justice and of political priorities, must be worked out within the consensus. Perelman was right to insist that philosophers should not merely identify the right thing to do. To solve social problems we must also know how to promote our values. The philosopher should not concern himself with promotion through power or violence. But it is within his competence to show us how to persuade others of the utility or commendability of our views.

Perelman's passion was for finding the argument which will persuade the "universal audience" of the advisability of the good. Rhetoric is effective, he showed, only where the audience is already committed to the starting point of the speaker. It is most proper to point out at the end of this short presentation that in his work Perelman has managed to achieve just such an audience, and this is one of his most obvious achievements: in a world divided by cultural and linguistic barriers he managed to create a universal audience indeed for his views. He himself has brought his work to many countries, making it relevant to all these places by learning the details of the systems and applying his framework to these details. His work has been translated into many languages, including Hebrew. Our understanding of law, its strength and its limits, has been greatly deepened and enriched by his work. For all these we thank him.

Ruth Gavison **

** Associate Professor of Law, The Hebrew University of Jerusalem.

https://doi.org/10.1017/S0021223700008190 Published online by Cambridge University Press