Patrick PHARO

Patrick Pharo, sociologue, est directeur de recherche au CNRS,
professeur associé à l'université Paris-V René Descarte
et membre du Centre de recherche Sens Éthique Société (CERSES).

(1992)

“Civility before law.”

LES CLASSIQUES DES SCIENCES SOCIALES
CHICOUTIMI, QUÉBEC
http://classiques.uqac.ca/

http://classiques.uqac.ca/

Les Classiques des sciences sociales est une bibliothèque numérique en libre accès, fondée au Cégep de Chicoutimi en 1993 et développée en partenariat avec l’Université du Québec à Chicoutimi (UQÀC) depuis 2000.

UQAC

http://bibliotheque.uqac.ca/

En 2018, Les Classiques des sciences sociales fêteront leur 25e anniversaire de fondation. Une belle initiative citoyenne.

Politique d'utilisation de la bibliothèque des Classiques

Un document produit en version numérique par Jean-Marie Tremblay, bénévole, professeur associé, Université du Québec à Chicoutimi
Courriel: classiques.sc.soc@gmail.com
Site web pédagogique : http://jmt-sociologue.uqac.ca/
à partir du texte de :

Patrick Pharo

“Civility before law.”

Un texte publié dans la revue ***Human Studies***, no 15, 1992, pp. 335-359.

This paper retrieves the content of my Ph.D. course at Syracuse University, Department of Political Science, in the winter of 1987. I am very indebted to Gwen Terrenoire, from the Centre de Sociologie de l'Éthique in Paris, for having corrected the numerous mistakes of the first English version of this paper.

 Courriel : Patrick Pharo : pharo.pgh@gmail.com

Police de caractères utilisés :

Pour le texte: Times New Roman, 14 points.
Pour les notes de bas de page : Times New Roman, 12 points.

Édition électronique réalisée avec le traitement de textes Microsoft Word 2009 pour Macintosh.

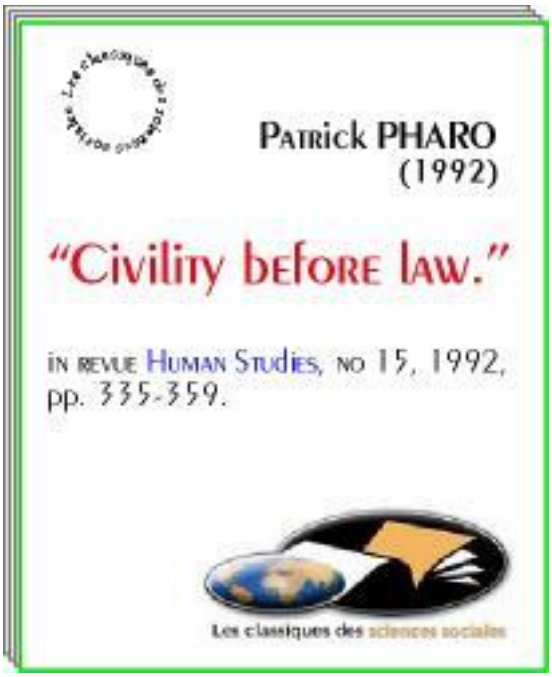
Mise en page sur papier format : LETTRE US, 8.5’’ x 11’’.

Édition numérique réalisée le 10 février 2021 à Chicoutimi, Québec.

Patrick Pharo

Patrick Pharo, sociologue, est directeur de recherche au CNRS,
professeur associé à l'université Paris-V René Descarte
et membre du Centre de recherche Sens Éthique Société (CERSES).

“Civility before law.”



Un texte publié dans la revue ***Human Studies***, n° 15, 1992, p. 335-359.

This paper retrieves the content of my Ph.D. course at Syracuse University, Department of Political Science, in the winter of 1987. I am very indebted to Gwen Terrenoire, from the Centre de Sociologie de l'Éthique in Paris, for having corrected the numerous mistakes of the first English version of this paper.

“Civility before law.”

Table des matières

Patrick Pharo

Patrick Pharo, sociologue, est directeur de recherche au CNRS,
professeur associé à l'université Paris-V René Descarte
et membre du Centre de recherche Sens Éthique Société (CERSES).

“Civility before law.”

Un texte publié dans la revue ***Human Studies***, n° 15, 1992, p. 335-359.

This paper retrieves the content of my Ph.D. course at Syracuse University, Department of Political Science, in the winter of 1987. I am very indebted to Gwen Terrenoire, from the Centre de Sociologie de l'Éthique in Paris, for having corrected the numerous mistakes of the first English version of this paper.

1. Introduction

Retour à la table des matières

The present paper [1] presents a criticism of social contract theories in order to suggest, as a possible alternative, a theory of rights grounded in civility and mutual understanding and not in law - either natural or conventional. The great merit of social contract theories lies is their emphasis on the possibility of rational grounds for modern democracies, and especially in their discovery of the idea of popular consent as the primary basis of legitimacy for any political order. But on the other hand social contract theories do not clearly address the

[1] This paper retrieves the content of my PHD course at Syracuse University, Department of political science, in the winter of 1987. I am very indebted to Gwen Terrenoire, from the *Centre de Sociologie de l'Éthique* in Paris, for having corrected the numerous mistakes of the first English version of this paper.

question of civility, in the sense of logical conditions of mutual understanding and peaceful life in common, and do not take account of semantic features of civil action, that is to say social action whose accomplishment depends on its being understood by someone else [2]. According to social contract theories, the civil state and recognition of rights proceed basically from citizens' prior commitment to abide by rules of law. But, as will be seen, this position seems circular because the only answer to the question of the origin of compliance with rules, is consent and the recognition of rights, in other words civility. Theories of rights usually consider rules as standards for decision making in various, contingent circumstances. Accordingly, rules are used as normative guidelines for civil action. But in this view it is difficult to say how these normative guidelines are chosen. By other rules ? But if we need a rule to follow a rule, then the search for new rules will be endless. This is why we need a way to get out of the circle or infinite regression. This possibility can be found if we observe that agents pick out the rules that are supposed to be followed from a civil point of view and this depends essentially on the semantical constraints of mutual understanding. In this view the basic phenomenon of the civil state is not rules of law but the fact that mutual understanding constrains civil relations by compelling agents to expect truth, consistency and consideration from one another and, consequently, to follow rules. As will be seen in the next sections, this way of approaching the civil state challenges commonplace justifications of Western democracies and questions the rational grounds for these democracies.

[2] The model of the civil action is the speech-act of Austin - such as a request, promise, reproach, and so on - because in principle a speech-act is not accomplished unless it is understood by someone else. But all civil actions are not single speech-acts, as for example giving a present, trading, playing a game, marrying...

2. Rational grounds of Western democracies

Retour à la table des matières

If someone is asked the following question : what are the essential features of Western democracies ? he will probably express a series of beliefs about characteristics of the Western way of life, such as free elections, free circulation, paying taxes, bringing an action to court, acting in accordance with the law, concluding voluntary agreements or contracts with others, the right to peaceful enjoyment of property and protection of privacy, and so on. All of these features of democracy are usually considered self-evident ; they are taken for granted by a large proportion of people living in the Western world. On the other hand, these features are not entirely specific to Western democracies since some of them obviously characterize other cultures and other eras as well. But their distinctiveness comes from their mutual interlocking which defines the way of life in Western societies.

The purpose of this section is not to describe the historic features of Western democracies nor to give a genetic explanation of their originality. Rather it is to inquire about the conceptual premises that rationalize and vindicate a particular political fabric because these rational grounds are probably the main features of Western democracies. Most of the conceptual premises at the root of modern democracies stem from classical traditions of political philosophy, in particular the 17th and 18th centuries' theories of social contract. Today the ideas stemming from these philosophies are so deeply embedded in political discourse and legal institutions that they are no longer noticed. Ideas such as popular sovereignty, human rights, majority rule and equality in the face of the law appear as basic conditions for a just and democratic political order, even though it is not clear whether these ideas represent a political ideal or actually describe reality in Western societies. In any case, the origins of this commonsense ideology can be found at the theoretical core of Enlightenment philosophies, with sophisticated arguments that can be used to justify modern forms of political order.

The strength of these classical theories comes from the clear answer they give to one of the most important questions in political theory : what conditions are necessary for stability and justice in a political

order ? This question can be broken down into two others, because a political order can be stable without being just - even if the converse seems impossible. Now a clear-cut answer to the question of stability and justice is given by Rousseau in his famous sentence : "The stronger man is never strong enough to be master all the time, unless he transforms force into law and obedience into duty" (1762 : 3). Thus the fact of stability is only guaranteed when obedience has become a duty. But what are the conditions of a *just* transformation of obedience into duty ? Theories of social contract provide an elaborate answer to this question through their account of natural rights and conventional law : justice in a political order depends on compliance with law, in so far as law itself proceeds from the primary compact between citizens. By the same token, social contract theories explain the fact that in Western democracies people usually obey the law (because indeed obedience has become a duty) and provide a possible justification of this state of affairs (the commitment of citizens proceeding from the primary compact). As long as citizens and government keep their own commitments, the political order can be said to be stable and just.

A classical line of argumentation against this kind of account is provided by marxian theory. If it is thought that the history of mankind is also the history of class struggles and the succession of modes of production, the commonplace tendency to take classical justifications of current democracies for granted appears as a mere historical state of social consciousness. Democratic beliefs then are solely a pernicious effect of cultural influences and self-deception ; they are doomed to disappear with the development of class struggles and the ultimate abolition of structures of domination.

This explanation of the political order may be adhered to, but it does not address the question of rational grounds. Rather, marxist criticism denies the very possibility of rational grounds for the present political order. Therefore, to accept the marxist point of view amounts to thinking that non-marxists who believe they have good reasons for being attached to their democratic way of life, dwell in a kind of irrational dream. This kind of criticism makes it difficult to have a deliberate and detailed discussion of the most consistent arguments likely to justify ordinary democratic beliefs, because such a discussion is made useless by the basic theoretical assumptions of marxism. Finally it makes it impossible to improve present-day forms of western

democracies, except by way of a radical refusal of their political structures.

But today numerous signs point to the weakening of marxist criticism and the persistence and resistance of old classical theories of social contract, as for example the renewal of thinking on human rights, or the success of John Rawls' book : *A theory of Justice*, (1971), or, in France, the discussions around the bicentenary of the French Revolution. And indeed these theories correspond pretty well with commonplace beliefs concerning democracies. They give a plausible account of its salient features - free elections, abiding by laws, enjoyment of liberties,voluntary agreements between citizens, and so on. This is a good reason for focusing on these theories and particularly on three major notions : natural rights of individuals, prior consent in political order, legal rules as standards of justice.

3. Three basic notions in social contract theories

Retour à la table des matières

These three notions are found in some form in every social contract theory, and namely in Locke, Rousseau and Kant [3]. They deal in a seemingly consistent way with the problems of the foundation and legitimacy of political order. Each of them must be linked to the others in order to provide a foundation for political order. The notion of rule-following is at the core of this trilogy as the principle of linkage between prior consent and rules of law. But modern attempts to clarify the notion of rule-following make it difficult to accept this linkage.

First it is important to stress the unprecedented novelty of these three notions in the Western philosophical tradition, in comparison with previous conceptions of the natural order from Antiquity to the Middle Ages. According to the Ancients, and specially Aristotle, a cosmic order rules and governs everything in the universe, including social life and the political order. This cosmic order is the ground of natural law

[3] In fact, Hobbes is the first author of social contract theory. But his authoritative conception of sovereignty has not been retained by the democratic tradition. That is why this paper is only devoted to his three great successors : Locke, Rousseau and Kant.

and is also a standard for every human action and institution. The 17th century thinkers break deeply with this tradition, transforming the Aristotelean conception of natural law and proposing, for the first time, a theory of individual rights.

a) The first innovation brought about by these 17th century thinkers is the idea that individuals possess certain rights essentially, almost in the same way as they possess their ears, nose or mouth. From this point on, rights are primarily attributes of individuals. Possessing rights is an individual's essential feature. These theories also recognized the individuals as the basic unit of society. The human community is considered an association of individuals locked together, like atoms in material bodies. It is noteworthy that the modern conception of human rights still encompasses this view of the individual's essential properties. Such a view is basic to all the theoretical innovations of social contract but it is also the source of most of its difficulties.

In these theories, the civil state is conceived as a means of managing conflicts between equal and free individuals who originally are not linked to one another. A separation is introduced between the primitive source of rights (the free individuals) and the community as a locus guaranteeing rights. How then is the transmission of rights from individuals to the community possible ? This problem is very difficult to solve as long as the basic links between individual rights and society, by way of mutual understanding, are not scrutinized. Proponents of 17th and 18th century theories use a naturalistic, non-relational notion of individual rights which enables them to break away from the old conception of natural law, but they do not address the question whether someone can having rights in complete isolation from other members of society. Now the very use of the common sense concept of free individuals separated from society presupposes their prior belonging to this society. For the fact of individuals' rights is a fact of meaning which could not exist without they are not recognized by a community of understanding. In other words, the naturality of individual rights is a semantic, not a physical, phenomenon. Without commonsense meanings and concepts, there would be no such thing as natural rights of individuals.

b) In social contract theories, the transmission of rights from individuals to civil states is conceived as the result of unanimous consent to the political order. This notion of consent is the main innovation propounded by social contract theorists because for the first time in history, justice in a political order is seen to originate in the citizens. For these theorists political forms of life are not bestowed on a community by God or a Prince, but result from a basic agreement between citizens in order to build up a just and peaceful society. This is the idea of the "initial compact" (in Locke) or "social contract" (in Rousseau) and becomes the new standard of justice. The idea of *unanimous* consent to the political order as a condition of legitimacy for any political order is also a great innovation, for without such a possibility mutual understanding among an enlarged society would be impossible.

But in social contract theories, unanimous consent does not concern the possibility of always sharing commun sense and moral concepts, i. e. ways of understanding. Rather it is only a very transient *moment* in societal histories or in the rational justification of the political order. Unanimous consent is a condition of legitimacy for the political order, but it needs only to have happened once to vindicate all the succeeding legal order. There is a gap between the primitive initial contract which legitimates the civil state and the manifold civil and political decisions which do not have to rest on mutual consent, but only on the law. According to social contract theories (namely John Locke), civil and positive law can legitimate all political decisions. Because the initial contract is the standard of civil justice, because the law represents this initial contract, each decision which complies with the law is at once legitimate. This view utterly separates the application of the law from the moral conditions of actual consent. In principle, compliance with the law supersedes the sense of justice, for abiding by the law is supposed to suffice to ensure compliance with facts and justice. But it is not evident that present-day consent among people results from conformity to previous and external standards of justice (rules of law) rather than from a common acceptance of conceptual and moral constraints in relation to particular situations.

c) Finally, the conception of positive law as a standard of justice is shared by all thinkers of social contract, though, as will be seen, with important differences among them. It raises two important questions :

first, why do people follow political or juridical rules of law ? and second : what exactly is the following of rules of law ? What precisely does it consist in ? Social contract theorists answer the first question in detail but do not address the second which is considered self-evident.

Why do citizens follow rules of law ? There are at least two reasons. The first is moral. If there has been a commitment to the preexisting social contract, then obviously action must be in accordance with law. For keeping promises is the basic moral condition for social order and the initial contract is the paramount promise for everyone. But there is another reason for abiding by the initial contract and following rules of law. It consists of fear of political enforcement by the social order, by the Leviathan, as Thomas Hobbes says. According to Hobbes, the main reason for following rules of law is this latter one. According to John Locke, it is the former. The opposition between fear of Leviathan and moral will has become classic. But it is still problematic since fear and good will, like instrumental and moral attitudes, belong to individuals who are not isolated from others but who act and live in relevant relations with others and the world.

One can consider, as Descartes puts it, that fear and good will, like desire and respect and all the passions of the soul, are causally produced when material bodies come in contact with one another as well as by human self-reflexion. It is much easier and more frequent to be mastered, influenced, subjugated by other persons or by one's own passions than to abide by the law. The passional understanding of the social world's events are immediate and precede any reflexion or interpretation of the laws. That is why fear and moral will should be taken not only in relation to legal rules but also in relation to the understanding of ordinary social relations. These everyday relations of passions and rights between human beings can be named "rights in use". Such rights play an important role in the practical foundations of various attitudes towards the political state, including fear and good will. In other words, it seems impossible to reduce moral feelings towards the civil state to a concise and univocal attitude (fear or good will) towards legal rules, because moral feelings towards the civil state are primarily local and interpersonal.

In order to substantiate this first criticism, the next three sections scrutinize some logical difficulties in the three versions of social contract theories, in Locke, Rousseau and Kant. Then the two last

sections systematize this first criticism and propound an alternative view.

4. Locke and circularity problems in following rules of law

Retour à la table des matières

The work of John Locke presents the first systematic account of what can be called a conventionalist theory of law, explaining the civil state by the following of rules proceeding from an initial commitment on the part of citizens. But there are at least three difficulties in this account, which are related ito Locke's conceptions of morality, tacit consent and judgement in accordance with a rule.

a) According to Locke, morality (which is a "complex idea of relation") is defined as the accordance of voluntary actions with a law (1690b : II, XXVIII). This conception is quite different from the Kant's (for whom morality is the sense and love of duty). The Lockean account of morality is framed in a political model which leads from good and evil as experienced to moral good and evil as moral categories. Accordingly Good is an increase in pleasure because of the reward following conformity with law and Evil is a decrease in pleasure because of the punishment following violation of the law.

However all moral laws are not political. There are in fact three kinds of moral laws : the law of God which judges sin and duty and determines the invariable character of the Just and the Unjust ; the political (or civil) law established by society ; and lastly the law of opinion or reputation which judges virtue and vice. The power of these three laws is not equivalent. The most powerful one is God's law, which is also called the law of Reason, holding sway over everything in the world. Next comes the civil law (that is to say the law of the state) which has the public forces at its disposal. Finally the law of opinion is only an "ordinary" law because it lacks power. Nonetheless it is powerful in a certain way because many people fear the opinion of others and take account of it in determining their own behavior.

The latter two laws exert their power only if the law of God has not been brought into play. This point is important since it stresses the fact that human laws concern only so-called "indifferent things", and consequently take effect when questions of justice, in the strongest sense, are not clearly and immediately involved. That is why the law of God, and therefore of Reason, can be invoked at any time against decisions stemming from human law. Locke does not draw these consequences explicitly himself, but this is the only account of moral law that can explain the possibility of appealing to Heaven against tyranny (1690a : XIX, 242).

All this means that even within the juridiction of the civil law, the law of God and Reason always has the last word. For example, if we ought to keep our promises, it may be because we are forced to by civil or reputation laws, but basically it is because of the moral or divine law (1690a : XVI, 195). We can agree with this idea of a moral and rational empire over civil affairs, even if we have some reason for doubting the divine guarantee. But the fact of recognizing that rational morality plays a major role in civil affairs is hardly compatible with the conception of the civil state as the establishment, by the law, of a paramount arbitration of human conflicts. For if the capacity of any civil institution to be right is restricted by the rational ability of any individual in society to be right, the argument justifying the political order immediately loses some of its soundness - because political law purports precisely to hold sway over individual wills.

b) According to Locke, the natural state is not a warfare (as in Hobbes' conception), but already a quasi-civil state because the law of God already has power over people. This seems logically consistent with the moral theory expounded above. In the natural state, people conclude contracts and exchange goods, own properties (wealth but also properties such as life and freedom), create societies based on mutual consent : husband and wife, parents and children, masters and servants. Locke considers that the state of nature is a fact that has really existed - and not a mere regulative idea as do Rousseau and Kant. But in this state all men are similarly free and equal, and this is the source of all the problems.

Indeed each person must manage his conflicts with others by himself. There is no umpire, no judge for deciding between differents parties in dispute. So the most just party can be defeated if, by

misfortune, it is also the weakest one. This is why people decide to pass on to the civil state and conclude the initial compact. Hence all the legislative authority in the civil state proceeds from this unanimous decision to leave the natural state. But the initial compact is tacit, not explicit (1690a : VIII, 110, 119). Here lies a second important difficulty in Lockean theory. For if consent is tacit, the proofs of its existence can only appear when citizens actually abide by law. But if this is not the case - for example, if someone commits a theft, we can reasonably assume that he disagrees with the laws. In fact tacit agreement is nothing more than the practical following of laws. And consequently the reasoning which vindicates the following of law by tacit agreement with law or with the initial compact seems circular, since the criteria used for evaluating tacit agreement and the following of law are identical.

A similar problem arises in the sociological theory of norms. How do we know that social norms actually exist and must be obeyed ? Because people usually act in accordance with them - this can be demonstrated by statistics for example. But as soon as someone breaks a norm, we no longer have proof that it is a norm for him too. And if a person states that his behavior is abnormal, his reasoning is circular because the only way to demonstrate the existence of norms is precisely to describe the behavior complying with norms. In the end the description of an alleged abnormal behavior always amounts to the description of its difference with regard to other behavior.

It might conceivably be said that someone can be considered to have broken his initial consent to the laws of the civil state if and only if he has taken an oath concerning these laws. But even in the case of an explicit agreement, it is not easy to demonstrate that any particular behavior breaks or does not break an initial commitment, because every commitment (promise, agreement...) refers to a tacit open-ended list of accomplishment conditions. As this list is tacit and open-ended, it always seems possible to deny that some actual condition really corresponds to the conditions foreseen by the initial commitment. [4] I will return to these points in the last section.

[4] Cf. on that subject the skeptical argument of Wittgenstein in Kripkean account (1982).

c) The same kind of difficulty arises with the argument justifying the idea of a passage from the natural to the civil state. According to Locke, three things are lacking in the natural state : 1- an established law known to all ; 2- a judge who is known and whose impartiality is recognized ; 3- a power to back and support the judgment when it is fair (1690a : IX, 124, 125, 126)[5]. It might be observed that the first statement seems to contradict the idea already mentioned according to which divine law is the paramount law of mankind and exists everywhere, even in the state of nature. On the other hand, we must stress the fact that his analysis of the natural state leaves the question of what a fair judgment is completely open. Locke's answer consists in stating that a judgment or a sentence is fair if it complies with the laws of the civil state and if the laws themselves comply with the principles of the unanimous initial compact and with the public good. Accordingly, the difference between a Prince and a tyrant consists only "in this, that one makes the Laws the Bounds of his Power, and the Good of the Publick, the end of his Government ; the other makes all give way to his own Will and Appetite" (1690a : XVIII, 200). But the public good is not an immediat matter of fact and depends on moral judgments. In such a matter respect for the law is not a sufficient criterion for determining the public good.

Actually the critical question concerns the link between the initial compact and manifold particular judgments (by government, judges or citizens). According to the conventionalist interpretation of Locke, this link is achieved through the rules of law which, so to speak, convey justice from the initial conditions of unanimous consent to the actual conditions of a particular judgment - as a logical reasoning conveys truth values from the premises to the conclusion. In such a view, a promise and its ensuing commitments are the ideal pattern of

---

[5] Locke writes : "The great and *chief end* therefore, of Men uniting into Commonwealth, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting. *First*, there wants an *establish'd*, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them (...) *Secondly*, in the State of Nature there wants *a known and indifferent Judge*, with Authority to determine all differences according to the established Law. (...) *Thirdly*, In the state of Nature there often wants *Power* to back and support the Sentence when right, and to give it due *Execution*..."

legitimacy. But if we can agree that unanimous consent can create conditions of justice at the moment of consent - even if these conditions are insufficient -, it is difficult to grant that conformity with law will always conserve something from the initial unanimous consent and will be a sure criterion of a just sentence or judgment. For how do we know that a particular judgment is in accordance with law ? Only by another judgment which recognizes this. In other words, unanimous consent must be presupposed in order to ensure the conformity with law. There would be no problem if everybody agreed everywhere and always about what a judgment complying with law is. Unfortunately this is not the case and there are, as Dworkin calls them, a lot of hard cases where the right following of rules cannot be grounded on a rule of law but only on a moral judgment.

Locke himself is aware of this difficulty. In the last chapters of his treatise, when he analyses tyranny and the dissolution of government, he states the critical question clearly : who shall be judge whether the prince or legislative act contrary to their trust ? (1690a : XIX, 240) His splendid answer - "The People shall be judge" - fails to answer the most important question in a satisfactory way : how do we know whether the prince or legislative *really* (and not according to some particular opinion) act contrary to their trust ? In other words, the critical question concerns the grounds of moral judgment and whether it is possible to find a criterion of morality and justice in social life. In the conventionalist Lockean theory, this criterion is supposed to be the law. But the idea that, "in a matter where the law is silent, or doubtful, and the thing of great consequence," "the proper Umpire should be the Body of the People", amounts to canceling the link that rules of law set up between the original agreement and particular judgements. Indeed, every important case of applying and interpreting the law runs the risk of turning into a hard case requiring a moral judgment by or in the name of "the body of the People". If there were no stronger principle than the law itself to rule the hard cases, the possibility of returning to the natural state would exist at all times in the civil state.

By allowing for the possibility of appealing to heaven, that is, in other words, to free and fresh moral judgments, Locke weakens all his previous conventionalist argument. His successors, Rousseau and Kant, go alternate ways in order to solve these difficulties : one emphasizes the supremacy of popular sovereignty over rules of law, the other

emphasizes morality and the supremacy of the law over particular challenges of power.

5. Is the general will a solution to Locke's circularity problems ?

Retour à la table des matières

As stated in Locke, social contract theory provides an explanation of the necessary conditions for stability and justice in a political order, insofar as rules of law convey original conditions of justice (unanimous consent) to current situations. Rousseau's contribution consists roughly in restricting the scope of this transfer and defining the permanent conditions of political legitimacy in a stronger way. According to Rousseau, legitimacy depends basically on the direct expression of general will. In order to understand the theoretical function of this notion, we must focus on two important concerns in Rousseau's version of social contract theory : first, the transformation of rights brought about by passing from the natural to the civil state and second, the sharp separation between the public and private spheres.

Whereas in Locke rights belong to individuals in both the natural and civil state and accordingly passing to the civil state adds new rights to individuals without transforming the earlier ones, on the contrary, in Rousseau, individual rights belong to civil association after social contract. Social contract occasions a "total alienation by each associate of himself and all his rights to the whole community" (1762 : I, VI). Although "no rights are left to individuals" (ibid.), "since each man gives himself to all, he gives himself to no one" (ibid.) "each man recovers /in the civil state/the equivalent of of everything he loses"(ibid.) This passing to the civil state not only consists in the transformation of individual rights but also in the transformation of man himself : justice replaces instinct and morality makes its appearance (1762 : I, VIII).

In Rousseau the social compact is not an association between individuals, but between individuals *and* community. That is why the social contract is "as it were a contract of the individual with himself" (1762 : I, VII). Individuals can have two kinds of relations with the

sovereign authority : they can be members of the sovereign body in relation to individuals and they can be members of the state in relation to the sovereign (ibid.) In the former role the citizen can participate in the expression of general will whereas in the latter he can only express his own particular will. Here is the basis of the sharp distinction between the public and private spheres. According to Rousseau the public or general interest and private interest are irreconcilable in the last analysis. The social compact, civil conventions and law of states establish the general conditions for making the relations between individuals moral and reasonable, but leave citizens, as individuals, unable to decide on the general interest. This point explains that the general will can neither be represented (1762 : II, I : "power indeed can be delegated, but not will"), nor concerned with private affairs (because discussion of any private affairs lacks a "common interest to unite and identify the decision of the judge with that of the contending parties", 1762 : II, IV).

Accordingly the general will can only exist at the moment of its expression ; further it only concerns questions of general interest. If the general will establishes the basic conditions of justice, it cannot guarantee the justice of any particular decisions in ordinary situations of civil life. Thus, the Lockean continuity from the initial compact to the manifold decisions of civil life is disrupted by the expression of general will, but this disruption is limited by the moment and the scope (general interest) of the expression. Nonetheless, Rousseauist theory creates a new opportunity for solving conflicts of legitimacy by the expression of general will which can occur at any time. In Locke, the unique moment of the initial compact creates legal conditions of political legitimacy that are valid for ever. In Rousseau, political legitimacy can always be judged and rejudged by new expressions of the general will. Indeed "it would be against the very nature of a political body for the sovereign to set over itself a law which he could not infringe" (1762 : I, VII). And again : "it is absurd that the will should bind itself as regards the future" (1762 : II, I). The great originality of Rousseauist theory is in subordinating the strength of law to the expression of the general will. In other words, the commitments which follow from the initial promise are no longer the only model of legitimacy. This is an interesting way of solving Locke's circularity problems, since political legitimacy no longer depends on some

interpretation of the law nor on the manifold analyses of the public good, but takes place in the act of expression of general will : "there neither is, nor can be, any kind of fundamental law binding the people as a body, not even the social contract itself" (1762 : I, VII). According to Rousseau, legitimacy is not a legal deduction but an unfettered act of popular expression.

But this solution immediately raises the following question : what exactly is the general will and namely the expression of general will ? Rousseau fails to answer this in a satisfactory manner. In fact the general will is an abstraction likely to justify any political power : "if the sovereign, while free to oppose their chiefs' orders, does not do so ..., the universal silence permits the assumption that the people consent" (1762 : II, I). Thus Rousseau returns to Locke's conception of tacit consent, without being able to determine the moral criteria of popular consent. As "the general will derives its generality less from the number of voices than from the common interest which unites them" (II, IV), the general will amounts to a very abstract version of the public good. But nothing prevents someone from claiming that he or his fellows act in agreement with general will. The advantage of Rousseau's solution for Locke's circularity problems (supremacy of popular sovereignty over any rules of law) runs the risks of completely collapsing as long as the notion of general will is not grasped through more precise criteria. This is where Kant can help.

6. Moral limits of legal duties

Retour à la table des matières

Kant's political theory can be considered a synthesis of previous versions of social contract theory. It claims to be both logically and morally founded. Its originality consists in its *a priori* deduction of the ideas of right and justice in order to show that following the rules of law is both a duty and a rational necessity. In short Kant claims to establish a wholly rational ground for civil law and thus explain both the conditions of stability and legitimacy of political order. He does not discuss any particular civil state but rather the idea of civil state in general. In so doing, he does not explicitly deny the possibility of an unjust state but he does not take it into consideration. In order to understand this view we must recall the Kantian theory of morality and then turn to the concept of legality.

a) According to Kant, there are two kinds of philosophy : empirical philosophy grounded on experienced principles (material or substantive) and pure philosophy grounded on *a priori* principles (formal) (1785 : preface). Pure philosophy is split into logic (forms and rules of understanding) and metaphysics. Metaphysics is a pure philosophy which applies only to objects of understanding. Metaphysics is reason reflecting upon itself (ibid.)

There are two metaphysics : the metaphysics of nature which is a critic of pure reason (its empirical counterpart is physics) and the metaphysics of morals (its empirical counterpart is practical anthropology). Each metaphysics studies the conditions of possibility either of knowledge or morality. Thus the basic question for the metaphysics of morals is : what are the *a priori* rational conditions of morality ? This question has two parts : one concerns justice and rights (as external legislation), the other concerns virtue (as internal legislation).

This brief and somewhat tedious summary of the Kantian system makes it easier to understand that Kant's moral and political philosophy claims to be purely rational and cannot be challenged by empirical data. It would be unfair to impugn Kant's formal level of discussion from an empirical or material level. Rather what must be questioned is the

compatibility between the so-called external and internal legislations in this same formal system.

b) According to Kant,the only standard of morality is the sense of duty (which is also practical reason and depends on the concept of freedom). The first stage of his reasoning is that good will is self-evident, even for ordinary understanding, because "good will seems to be the essential condition, for what makes us worthy of happiness" (1785 : sect. 1) Thus the only ground for good will is duty because the idea of duty is implied by the idea of will and the logical form of will is imperative.

From this Kant draws three basic moral statements : 1. act out of duty and not only in compliance with duty (1785 : sect. 2). For example, if salesman sells a product to everybody at the same price - even if the customer is not wordly-wise - we can say that the salesman acts in conformity with duty but not necessarily out of duty : perhaps he only looks for his own interest or merely acts by habit. 2. do not act according to the aim but according to the maxim. The (empirical) object of action does not matter because only the principle of will is important. Now the idea of will implies the idea of the autonomy of will : therefore will is only necessary in relation to itself, and not to empirical objects - like material aims, interests or contingent motives. The condition of possibility of practical knowledge and practical reason lies in the *a priori* (and not empirical and *a posteriori*) determination of will. "The autonomy of will is the property of will enabling it to be its own law" and therefore "will is the causality of living beings" (ibid.) "Will is nothing but practical reason" (ibid.) 3. from this stems the third moral statement : act out of respect, esteem, consideration for the moral law.

c) In our earlier discussion we raised the question of the exact nature of the moral law. According to Kant, there are two kinds of imperatives. The first is hypothetical, a means to accomplish another aim. The second is categorical, it is its own aim. Moral law is only concerned with the latter. The principle of moral action is to act out of duty whatever the consequences.

The conclusion of this reasoning is the following maxim of the categorical imperative : act in such a way that the maxim of your action could be established as a universal law of nature (1785 : sect. 3). In fact, the idea of universalization is also a rational test for making up one's

mind in various practical situations. Two examples of this test are given by Kant himself : if a person must borrow money but knows he will not be able to give it back ; if nonetheless he borrows money, he cannot establish the maxim of his action as a universal law of nature, because rational beings cannot accept such a law. If a desperate man wants to kill himself, the maxim of his action is only vanity, self-love. He thinks he will be less unhappy if he dies than if he goes on living. But according to Kant it is impossible to accept the idea of suicide as a universal law of nature, because nature needs to endure. Consequently suicide is not a moral action (ibid.)

Finally Kant summarizes the practical form of the categorical imperative in this new statement : "you must treat humanity in yourself and in others not as a means but always as an aim", because only practical maxims oriented towards the aims of humanity as a whole can be universalized.

d) Without going further in the discussion of Kantian moral philosophy, we can apprehend its consequences in the political theory elaborated by Kant in his old age, in Metaphysische Anfangsgründe der Rechtslehre (1797). In this book Kant discriminates between Ethics : a legislation in which duty is the motive, (this legislation is said to be *internal* and natural) and Legality : a legislation with another motive (this legislation is said to be *external* and positive).

Remembering the grounds of Kantian morals, we could be tempted to think that only the internal legislation is really morally binding. But oddly enough Kant states that all duties pertain to ethics, even if some do not come from internal legislation. For the doctrine of natural law leads Kant to think that all positive legislation must be grounded in natural law and justice (1797 : intro. § A), because human beings, as rational beings, cannot find other principles of justice than moral, internal, natural ones. In such a view "all ruling power comes from God" (1797 : part 2, sect. 1, §49, A) because the *a priori* Idea of state stands as "the standard for every actual union of men" (ibid. § 45). This extension of moral duty to all positive duties entails a total negation of the right of resistance against the state. The state is the expression of general will - which cannot prescribe unjust action against itself. That is why the will of legislation is "irreproachable", the executive capacity of government is "irresistible" and the sentence of the supreme judge is "inalterable" (ibid. § 48). Even if the ruler of the state commits

violations of the law, his subjects cannot resist then, they can only complain about them (1797 : ibid., § 48, A). Unlike Locke, Kant is fully aware that to allow for right to resist would amount to destroying the entire lawful constitution. According to Kant the alleged right to resist is grounded in self-contradiction (ibid.) because resisting implies assuming a stronger force of law than the actual law, i. e. one that is able to protect subjects and express legal judgments. Now the only one who can act in this way is the sovereign, and therefore the supposition contradicts itself because the sovereign cannot be opposed to himself.

This subtle reasoning eventually gives a rigid solution to Locke's circularity problems. For if we consider that gouvernment decisions are always morally binding on the citizens, the question of the nature of a just application of law disappears. If justice is a basic feature of all gouvernment decisions (because of the idea of state which is an *a priori* idea of reason and the only condition of justice), even when the government is obviously wrong, the problems of conditions of justice and political stability are definitely solved. As a rational principle, the law and its accomplishments are always just.

But, even in Kant, there are two exceptions to this principle : rights of necessity, when a person has to protect himself from violations of law by the ruler (1797 : ibid., § 49, A), and above all, cases of contradiction between internal and external legislation : "you must obey the authority having power over you for everything which does not contredict internal morality" (1797 : app., conclusion). But conceding only one exception to the principle of the moral bond of legal duties makes the whole Kantian political theory collapse. Because once again the question arises as to the practical cases where exceptions are allowed. And this is no longer an *a priori* problem but rather a question of casuistry. The difficulty with Kant's argument seems to come from a confusion between the formal characteristic of moral obligation, called internal legislation, and the supposed moral evidence of abiding by law, which is a totally external legislation and also an idea of reason. As external legislation, law is not formal (*a priori*) but substantive, material, *a posteriori*. But, as it is drawn from an idea of reason, the law seems to be able to be formal and even divine. For in order to harmonize formal moral duties with substantive legal duties, Kant has introduced a formal principle into the legal order itself. His interpretation of social contract theory allows him to discover this

principle in the act of social contract : "it is the Idea of that act that alone enables us to conceive of the legitimacy of the state" (1797 : part. 2, sect. 1, § 47). But this harmonization is very fragile because legal duties do not derive from this very abstract formal principle but from actual, substantive decisions. In the end Kant's theory runs the risk of making moral and internal obligation dependant on external and substantive obligations - and this is unacceptable in his own system. That is why Kant starts by including legal duties within moral duties and ends up accepting possible contradictions between them - which is certainly right, but in the end the political problem of legitimacy remains entirely unresolved.

7. civil rules and rightness

Retour à la table des matières

The starting point of this discussion was a question about the rational grounds of Western democracies which led to a more general question : what conditions are necessary for stability and justice in a political order ? We have shown that social contract theories begin by answering the first question (stability conditions), and, by the same token, answer the second (justice conditions). The explanation of these conditions is found in the idea of individual commitments to the political order conceived as a whole. The story is that citizens left the state of nature to protect their life, freedom and property and establish a common standard by which powerful justice could be exercised. This decision was unanimous, it compelled everyone to act in compliance with it and with rules of law representing the prior commitment of the initial compact in current situations.

This story raises several difficulties which all relate to the circularity problem raised by the Lockean version. 1) First, it is very difficult to prove that citizens feel committed by this prior consent. On the contrary, one can observe, as a matter of fact, that citizens very often can break the law and, at the same time, assert the legitimacy of their acts. 2) This objection leads to a more serious difficulty regarding the impossibility of proving that a new law or a fresh application of the law complies with the just and peaceful principles of the initial, unanimous compact. As coparticipants in the social world, we know that many laws

and their application are often unjust. Therefore it is far from obvious that rules of law are a sufficient means of transfering justice and legitimacy from a prior to a present situation. 3) Finally, we do not have any conclusive reason for thinking that standards of fair and just civil actions and, more generally, standards of rightness, preexist with regard to present situations. Indeed there is no preexistent rule or principle enabling accurate predictions about the rightness of any given action. In the end, the weak point in social contract theories is their theory of civil action, for its whole theoretical fabric rests on unquestioned assumptions about the rule-governed character of civil action and the deductive nature of its rightness. It is these assumptions which raise the circularity problem of social contract theories. How can it be resolved ?

a) what are civil rules used for ?

According to the model of legitimacy in social contract theories civil action must comply with a prior commitment expressed in civil and political rules and conventions. Now this binding of an action by prior commitment and convention is nothing more than what is described as a *promise* [6]. But the promise model seems far too narrow to account for the moral grounds of the civil order and the actual relations of citizens with civil and political rules. It is a temporal model which does not deal with the variety of semantic constraints existing in practical situations.

As a matter of fact, civil action in political, legal or ordinary situations takes account of existing rules - whether civil rules refering to ordinary conventions of social life such as social norms or rules of politness, and political rules such as laws or quasi-laws, like rules of jurisprudence. Every civil agent knows a lot of rules and procedures himself and intentionally or not can want to follow some rules ; he can also have expectations about other people knowledge of rules and their possible understanding of these rules ; and, finally, he can try to extend

6 Admittedly Hume claims that many conventions are not promises and he gives the example of rowers who can row together without any prior commitment. This may be right, but as soon as an action can be justified only by a prior act, we are in the promise model. Now it is plain that social contract theories, and likewise classical sociological theories of norms, rely on prior acts establishing conventions, in order to justify present actions.

the validity of his action in time by formulating rules likely to govern decision making.

However, formulating rules to be obeyed, or understanding and explaining something by existing rules does not imply that action is really governed by these rules. As in social contract theories, we probably have to assume that civil and political rules are conditions of the civil and political order since any political order would be unthinkable without them. But civil and political rules are assuredely not instant means of civil government and enforcement. For example, our agreement that we are now playing poker instead of bridge is not a sufficient reason to force us to play poker if we want to play bridge ; or our agreement that playing the game of free elections is not a sufficient reason to force us to play free elections if we incline towards totalitarianism. More generally the fact that we agree to follow a rule makes this rule mandatory as long and only as long as we judge this rule mandatory. Furthermore, if the only reason for considering that a rule is mandatory is because of a threat of sanction, we can suppose that the rule is no longer mandatory when the threat disappears.

That is why I suggest that prior knowledge of civil and political rules is rather a logical condition of understanding and meaningful action. Citizens know that others will be able to understand their actions and possibly approve them only if they recognize the rules governing their accomplishment. By their action they have to indicate the rule, in other words the concept or the description [7], likely to justify their actions if they want to be understood and possibly approved. But the movement of showing or recognizing the rule of action does not proceed from the formulation of the rule to the action but from the action to the rule that may possibly be followed. A request, a promise, a compliment are not recognized from the formulation of the rule of request, promise or compliment, but from the facts (physical movements, sounds, signs, and so on) of request, promise or compliment which lead us to infer their concepts and their possible descriptions from these facts. This process of infering conceptual rules from empirical facts works in all sorts of civil action - an invitation to dinner or a proposal of political action. Mutual human understanding largely consists in grasping the conceptual rule likely to correspond to the document of an empirical

[7] Concerning the notion of "action under a description", cf. Anscombe (1957).

action, but there is never any absolute guarantee as to the rightness of the concepts and descriptions under which the empirical document is grasped. The application of a rule to a particular fact is right as long as the reasonable criticism of human beings does not prove the contrary.

Thus, a meaningful action is nothing other than an action able to be understood by way of a rule, in other words a concept or a description, i.e. a chain of concepts. Before they become mandatory, civil and political rules are means of knowing, understanding and recognizing commonplace behavior. Consequently it is clear that civil action is necessarily and basically understood by rules - because an action whose rule has not been perceived cannot be understood -, but it is far from evident that civil action is basically rule-governed. The latter idea may only be an optical illusion coming from the former.

Even if the idea of a prior agreement were accepted, (for example to play poker instead of bridge or to play free elections rather than totalitarianism), it would be very difficult to produce any definite proof that in a particular case the rule chosen by someone is in breach of the first agreement or not, because the rule by which an action can be understood is not necessarily in a logical relationship with the rule held to be broken. That is why the promise model is quite inadequate to account for the moral grounds of civil order. For example, I can assure my students that I will be at my office tomorrow morning. And of course for my students this actual commitment is a very strong argument for forcing me to be at my office tomorrow. But if I do not come, I will be able to argue that my commitment was mandatory only if some external event did not occur. And tomorrow I may be able to point to an event (say something unforeseen) justifying my absence. Likewise, when someone says : "I will love you for ever", there is also an implicit clause of possible exception, as for example "if I do not fall in love with someone else". Breaking a promise is an offence if and only if one cannot point to a good reason for doing so.

The previous examples emphasize that validation of civil action depends on local and momentary settings, and that standards of validity are rather internal features of particular actions. This conclusion implies that there is no such thing as a general and atemporal criterion of rightness or justice. But this conclusion is by no means skeptical. For the absence of a definitive standard of justice or an easy principle for selecting fair judgements does not imply the absence of all standards of

justice and fair judgment. These standards exist, but cannot be defined and predicted in advance. And when they are recognized, they are valid only until proof of the contrary is provided. In everyday life it is understandable to assume that criteria of rightness will last. We also know that in general or on the average people abide by civil and political rules. These rules are means of common understanding which, as Wittgenstein has suggested, are open to possible corrrection by others, be they officials of the state or friends, members of the family or other acquaintances. Admittedly this eventuality is tied up with fear of sanction and punishment which, according to Hobbes, stems from the threat of Leviathan's force. Furthermore, as Locke states, the possibility of being sanctioned by one's acquaintances probably exerts just as much influence in ordinary life. Nonetheless, fear is not sufficient to explain obedience to rules. A person can indeed be afraid of being punished if he does something, and still do it. But he cannot accept being sanctioned or blamed at all times because if he did, he would also lose all means of grasping the rightness or the rationality of his own deeds. It seems indeed impossible to live without the slightest approval from one's entourage. Everybody needs to be approved by at least one member of the human community ; therefore, at least part of the time, everybody must choose actions which are compatible with such an agreement.

On the other hand, rules are means of argumentation and make justification possible in civil relations. If a person tries to justify his behavior, he is compelled to refer to rules that can be understood by at least some members of the community. People rely on civil and political rules because they are commonplace means of knowing and anticipating the behavior of other people but also because they are means of justifying, validating their own behavior. The common understanding existing between people consists partly in this activity of justification. Civil action is an outcome of recognition by means of common sense concepts of current and local circumstances and contingent events : it is not rule-governed, even if it is rule-understood and rule-justified. Semantic knowledge is not fundamentally an application of general rules or procedures to particular situations but an implicit and non-reflexive grasp of the concepts by which a situation may possibly be described and understood.

b) what is rightness ?

In the classical view, there is a gap between civil actions and preexisting standards of rightness ; and the validity of a particular action must be appraised by means of these external, preexisting standards. But standards of rightness seem to be adhered to first when people act. For example, a rule of politness has been formulated which compels people to answer a greeting with another greeting. If on a particular occasion A does not answer the greeting of B by another greeting, the classical analysis considers A a deviant because he breaks the formulated rule of politness. But what is the criterion for considering the rule mandatory ? The fact that this rule has applied in other circumstances ? But then, the criterion is simply invalidated by the present circumstances where the rule no longer applies, and there is nothing more to be said. The fact that in these circumstances the rule must apply ? but this cannot be said without referring to another which says that in this case the rule must apply. Therefore following a rule seems to imply using a local rule which is not included in the rule being followed.

In fact, there is a confusion in the classical analysis between the judgment in principle - for example : every murderer must be punished... every baby belongs to its biological mother... - and the judgment in situation which is informed by a series of local, sequentially ordered data (after a series of events and arguments). The former can always be true, if we agree with its content, but the latter is true only if we agree that it applies to the particular situation. Now it is rare that sensible people do not agree with great moral principles of peace, justice and so on. Thus, we can easily agree that murder is prohibited and must be punished, but, in practical situations, we have to decide whether the fact under consideration is actually a murder and not a suicide, an accident, a natural death, an act of selfdefense and so forth (by the way cf H. Garfinkel). The fact of murder is not self-evident. That is why a trial is needed to substantiate the meaning (murder or something else) from singular facts. Even if we want to judge from principles, we judge in fact from the situation. Dogmatic judgments claim to be governed by preexisting rules but cannot avoid being subjected to deliberative judgments which are governed by a process of accomodation between facts and concepts, and mutual

understanding : if only one person sees a murder where everyone else takes it to be an accident, it will be very difficult for that person to maintain his point of view without appearing to be mad.

Rules then are means of rightness which do not operate from the rules to the situations but from the situations to the rules. The major error of social contract theory is probably in considering civil and political rules only in one direction : from the establishment of the law to its application ; they do not deal with the other direction : from the moment of following the rules to their formulation. Advance knowledge of the rule does not enable anyone to decide what will be just later because, at the time of civil action, the agent elicits both his action and its standard. The standards of rightness, no matter the kind of rightness, - moral or technical, appear in the local adequacy between concepts and facts : they are internal - and not external - features of actions. For example, the difference between a murder and an act of legitimate defence or between a just accusation and calumny depends on the adequacy between the facts and the different intentional concepts by which these facts can be described. If the dead man was shot in the back, it was probably not an act of legitimate defence, because the concept of such an act cannot be applied convincingly and in a consistent way to such a fact. On the other hand, if the fact which is reproached is confirmed and morally evil, it may not be a calumny but a just accusation, and so on. Now, even if legal and social rules are extremely precise and detailed, none is able to comprehend such an adequacy between facts and concepts of intentional actions or passions in advance.

A claim to validity, legitimacy, normality, rationality, in short, a claim to rightness arises in all civil actions. The claim to rightness (correctness, justice, normality, rationality...) in the action consists in performing the action and, at the same time, exhibiting a possible standard for its rightness. The standard is displayed in the accomplishment itself - for example a candidacy for a position, a proposal to go on strike or an invitation to play must always demonstrate their possible rightness. Civil discourse and action more generally claim to be right, by calling to an instance of legitimation, a mandatory duty, a principle of general utility and by asserting their relevance with regard to the objective situation. Indeed it would be

meaningless and self-destructive without the prospect that at least one other human being will understand its meaning and grants its rightness.

While agents carry out an action, they rely on possible standards of its rightness, i.e. that a possible world exists in which their action will be described as relevant with regard to the facts and understood as being permitted and justified. Agents choose their own standards of rightness in acting but do not have to make their choice explicit. The appropriateness of standards to a given situation is not a feature of the standards but a feature of the action which is understood under some description. And the supposed gap between real actions and ideal standards is only detectable at the moment of analysis, when the analyst compares the action's claims to validity, under one description, with other possible descriptions of the same action. For example, the policeman's belief, in a certain description of a particular action, that he has the right to kill an fleeing robber can be challenged by another description which makes his act illigitimate with regard to standards of just violence. The same action can be described by several standards of rightness and in the end the gap between actions and standards is actually a gap between different descriptions of the same action.

Understanding the meaning of an action amounts to recognizing that, under a certain description, it complies with possible standards of rightness, even if the standards are not moral standards nor are recognized as the good standards by the describer. That is why there is a normative character in every action understanding. In ordinary life, as in legal, political or technical situations, each particular claim to rightness may impinge upon similar claims by others. The critical question of civil action then consists in arbitrating between these competing claims. Mutual agreement happens when there is consent about respective claims to rightness. Without mutual agreement, all rights, even the most sacred human rights, run the risk of being denied. In this sense laws cannot protect rights without mutual agreement. And mutual agreement itself depends on the constant effort to make rights arbitration just and to reconcile competing claims to rightness fairly.

It is important to remember that in the Aristotelian tradition, justice, whether particular or general, is a feature of practical judgments in local circumstances. In social contract theories, an initial general commitment is required to ensure the stability and justice of the political order ; but conformity with this prior commitment, and namely

the paramount commitment to live peacefully with others, depends on the moral evaluation of practical circumstances. In other words *compliance with prior commitment does not guarantee civility but presupposes it*. Consequently, no prior commitment is necessary to ensure this paramount commitment, because it is presupposed by the ordinary means of mutual understanding between human beings. Instead of admitting a general, basic, prior agreement or structure to explain the stability of the political order and thus give general instructions of justice, we can follow the hypothesis that the stability or instability of a political order proceeds from the logical features of mutual human understanding. The alternative to social contract theories simply consists in admitting the semantic grounds of the civil bond which, in the long run, show that it is unsound to comprehend physical or social facts with inappropriate concepts, and particularly unjust deeds with the concept of justice. There is then no other way to escape the warfare than to place our confidence, constantly and critically, in common sense and ordinary intelligence for judging the rightness and justice of civil actions.

Fin du texte