HOMO JURIDICUS

On the Anthropological Function of the Law

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parliament or in the courts – than are accounting or ISO standards.[104] But they are treated as such. This new mode of governance presents a major risk for democracy, a threat that is due not simply to the decline in law to the benefit of contract, but to a process of mutation of both contract and law. The nature of this mutation is not so much that it fixes rules as that it creates bonds that predetermine the behaviour of every subject of law: States, trade unions, employees, company directors, et cetera. No subject is absolutely sovereign in such a system, but each necessarily becomes an agent in the regulation of the whole, which is no longer really debated anywhere.[105]

From this point of view, it is useless to deplore on principle the re-emergence of types of legal bond that bring us back to feudalism. What we should do, however, is criticize what underpins this emergent normative order, and which itself is radically new: the 'neutrality of the technical norm', the 'scientific authority of the expert', the 'subject freed from laws' – to cite but a few verses taken from today's bible. For if contractualization invents new ways of harmonizing particular and general interest, it can also pave the way for new forms of oppression. We know at least since Gaius that in setting the institutional scene we must attend not only to persons and things but also to action,[106] that is, the right of persons to challenge the *status quo*. One of the most disquieting aspects of the ideology of governance is that it assigns no place to conflict or to collective human action in the functioning of society.[107] Paradoxically, this leads it to resemble the totalitarian utopias of a world purged of social conflict. A Chinese leader who was asked recently about his political vision for his vast country replied that he should take a leaf out of the West's book and become a 'democratic dictatorship'. It is one of the paradoxes of comparative study that the view is often better from afar.

104. See on this point the remarkable demonstration by R. Salais, 'La politique des indicateurs. Du taux de chômage au taux d'emploi dans la stratégie européenne pour l'emploi', *op. cit.*

105. The most apposite concept might be the one invented by Gierke in the nineteenth century in opposition to the Roman law tradition, and which had a certain success in German doctrine under Nazism: *das personenrechtliches Gemeinschafts-verhältnis* (which could be translated as 'the personal legal relationship of belonging to the community'), which expresses the subjective dimension of the bond to the community.

106. 'Omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones' (Gaius, *Institutes*, I, 8).

107. See A. Supiot, 'Revisiter les droits d'action collective', *Droit social*, 2001, p. 687.

6

BINDING HUMANITY: ON THE PROPER USE OF HUMAN RIGHTS

One should be able to see that things are hopeless and yet be determined to make them otherwise.

F. Scott Fitzgerald[1]

What we call globalization is not a radically new phenomenon but the latest stage in a process that has lasted several centuries, and which can be traced back to the Renaissance and the conquest of the New World. From the extermination of America's indigenous population until today, this process has gone hand in hand with the domination of Western countries over all others. This domination did not stem from any physical or moral superiority of the West, but from the material power it derived from its science and technology. With the extension of Western science and technology – and the market economy which accompanies it – to the whole world, an old question emerges anew: are there beliefs that are shared by all humanity, values that are universally recognized (if not universally observed), which might provide us with common principles on which to found our globalized world? Or are systems of dogma mutually exclusive, with the result that they either turn their backs, or make war, on each other?

Clearly this question concerns first and foremost human rights. For there are those who believe that they are universal and those who do not. The first group believes that human rights provide our globalized world with the universal Tables of the Law it was lacking, while the other group believes that they are nothing but 'White human rights' serving to legitimate the domination of the West over the rest of the world. The flouting of human rights, of which the West has given the world numerous examples in its totalitarian, dictatorial or colonial enterprises, is winning over the minds of many who live in countries

1. 'The Crack-Up', in *The Bodley Head Scott Fitzgerald*, vol. III, London, Bodley Head, 1965, p. 388.

subjected to the West's dominion. As Simone Weil observed in a note on colonization written in London in 1943 for the French government in exile:

> What is most serious is that the poison of scepticism becomes, like alcoholism, tuberculosis, and some other diseases, much more virulent in a hitherto virgin soil. We ourselves, unfortunately, believe little enough, and wherever we go we are creating by contagion men who believe nothing at all. If this process continues we shall get sooner or later a reaction of whose brutal violence Japan [1943] offers merely a faint foretaste.[2]

It is really in terms of belief that the question of human rights should be addressed, and any reflection on the subject should begin by acknowledging their dogmatic nature and that they are articles of faith inspired by the values of Western Christianity. But their dogmatic character should not lead us to disqualify them. A dogma is also a resource and perhaps an utterly indispensable one, since human beings must assign a sense to their lives even though no sense is apparent. They must do so for fear of sinking into meaninglessness and individual or collective madness. We can only act freely when we have secure reference points which give meaning to what we do, which is why, as Tocqueville observes, 'there is no society that can prosper without shared beliefs, or rather there is none that could survive'.[3] The role of human rights in the techno-scientific enterprise is as a dogmatic resource which serves both to legitimate this enterprise and to channel its energies so that it does not become an enterprise of dehumanization. The colourful catalogue of unparalleled atrocities perpetrated in the twentieth century shows just how indispensable this role is, and just where techno-science may lead when dissociated from the dogma of human rights. But if human rights are to continue to fulfil this dogmatic function, they must be reinterpreted and transformed, in step with the historical development of science and technology and their geographical extension. This presupposes that the non-Western world appropriates human rights, enriching their meaning and scope. Only then will they cease to be a creed imposed on humanity and become a common dogmatic resource open to interpretation by all peoples.

2. S. Weil, 'East and West: Thoughts on the Colonial Problem', in her *Selected Essays 1934–1943*, trans. Richard Rees, London, Oxford University Press, 1962, p. 197.

3. See Tocqueville, *Democracy in America*, *op. cit.*, p. 407.

The Creed of Human Rights

It is difficult to deny the dogmatic character of human rights. Many would, of course, like to see them grounded in 'scientific truth', and here and there one can indeed find well-meaning attempts to ground legal equality in the biological similarity of all human beings.[4] Though motivated by the best intentions, such arguments are in fact a reversion to the principles of sociobiology that were a seedbed for Nazism and the Holocaust. For they inevitably imply that biological differences could justify legal inequalities, and if science, which has historically asserted the existence of such differences, were to discover new ones in the future, the principle of equality would have to be abandoned.[5] But if we leave aside the temptations of scientistic fundamentalism, we are forced to admit that human rights are simply postulates: undemonstrable assertions that are the cornerstones of our legal systems. Since God has withdrawn from the organization of the socio-political whole, it is Man who has taken His place, fulfilling the prophecy of Auguste Comte that the secularization of our societies would give rise to a 'Religion of Humanity'.[6] But, as we have seen in the preceding chapters, this Religion, in which we invite all to commune, is deeply rooted in the long history of the belief systems that have dominated and fashioned the West.

This history appears firstly in the figure of the universal and atemporal being to which all our declarations of rights refer.[7] The 'human' of 'human rights' has all the characteristics of the *imago Dei*

4. See the many declarations accompanying the simultaneous publication in *Nature* and *Science* of the human genome sequence (11 February 2001), seeking to assure us that if we were to read this 'Great Book of Life' it would convince us that races do not exist ('Les bouleversantes révélations de l'exploration du génome humain' [Astonishing Revelations from the Exploration of the Human Genome], *Le Monde*, 13 February 2001).

5. Such a reversal occurred when 'gender theorists' who had claimed, in the name of science, that there was no difference between man and woman, were then obliged to take new 'scientific truths' into account which show that the organization of the brain in fact differs between them. See Mark Lansky, 'Gender, Women and all the Rest', *International Labour Review*, vol. 139, no. 4, 2000, pp. 481ff.

6. 'Humanity substitutes itself once and for all for God, without however forgetting His provisional services', wrote Comte in the conclusion to his *Catechism of Positive Religion*, *op. cit.*, p. 294. Renan states similarly, at the end of *The Future of Science*: 'Farewell; although Thou hast deceived me, I love Thee still!' (trans. C.B. Pitman, London, Chapman and Hall, 1891, p. 460).

7. See the Universal Declaration of Human Rights.

which we detected beneath the West's *homo juridicus*.[8] Like *homo juridicus*, the subject of human rights is first and foremost an individual, in both the quantitative (unity) and qualitative (uniqueness) sense of this originally legal term (from Roman law, *indivis*). As an indivisible being, the individual is an elementary particle of human society, stable, countable and endowed with unchanging and uniform legal properties. As a unique being, however, the individual cannot be compared to any other, since each is an end in itself, a complete and self-enclosed entity which transcends the various and fluctuating social groups of which it may form a part.[9] The 'human family'[10] is, from this perspective, one vast group of siblings which create a society where all are equal – except that individual rights inevitably clash with the 'spirit of brotherhood'.[11] In a society reduced in this way to a collection of formally equivalent individuals, the key to a just order cannot lie elsewhere than in competition between them all. This vision is very different from that found in other civilizations, where people may feel themselves to be inhabited by several beings, or see themselves as part of a whole that traverses and exceeds them, has pre-existed and will outlast them.

The 'human' of 'human rights' is, secondly, a sovereign *subject*. Like *homo juridicus*, this subject has an inherent dignity,[12] is born free, endowed with reason and is the subject of rights.[13] It is a subject in both senses of the term: bound to respect the law and protected by it.[14] It is also an 'I', capable of laying down laws for itself and as such responsible for its acts. We find these two levels at which human mastery over laws is asserted in declarations of rights. On the one hand there are scientific laws, whose 'discovery', replacing divine revelation,[15] has enabled human beings to master nature.[16] On the other hand, there is civil legislation which derives its legitimacy from the people to whom it applies.[17] Individual sovereignty, as expressed

8. See Chapter 1.

9. In the Universal Declaration, art. 16, the couple and the family are subjects of individual rights.

10. Universal Declaration, first point of the Preamble.

11. Universal Declaration, art. 1.

12. The recognition of this dignity is the first point in the Preamble to the Universal Declaration. On the monarchical origins of this concept, see Chapter 1.

13. Universal Declaration, art. 1.

14. Universal Declaration, arts 7ff. and 29–2.

15. Universal Declaration, art. 27 (right to share in scientific progress and the benefits deriving therefrom).

16. Universal Declaration, art. 17 (right to property) and 23 (right to work).

17. Universal Declaration, art. 21–3.

in the vote – defined less as a political function than as an individual right[18] – has become the basis of institutions in which each person may play a role independently.[19] Such a vision is of course entirely alien to the great civilizations that, on the contrary, value the effacement of individual will, as for example Japan,[20] or Islamic countries, where God alone is conceived as the authentic Legislator, with humans attaining freedom only by confessing their impotence with respect to the godhead.

Lastly, the 'human' of 'human rights' is a *person*. 'Everyone has the right to recognition everywhere as a person before the law,' as Article 6 of the Universal Declaration of Human Rights states. It was Christianity, as we saw earlier,[21] that endowed every human being with personality, by attributing to each a dual nature, in the image of Christ: both matter and spirit, a mortal body housing an immortal soul. The union of body and soul constitutes the person. When the discourse of human rights keeps driving home the theme of 'the free and full development of [. . .] personality',[22] it is heir to this concept of the person as a unique spirit which will develop throughout its life and survive after death by virtue of its works.[23] Thus conceived, personality is not a mask to be stripped away, as in Indian philosophy, but a being to be discovered; it is the revelation of the spiritual identity of each human being in their physical incarnation. If the 1948 Declaration introduced legal personality into its list of human rights, this was not solely because it was logically necessary for the enjoyment of all other rights. The essential reason lies elsewhere. The West, under the sway of scientism, had come to believe that the only human truth was biological and that the legal personality was therefore a mere technique which could be used and abused at will. But the horrors of Nazism had just shown that this reduction of the human being to a biological essence resulted in society being transformed into a Darwinian struggle where only the law of the strongest holds. That is why the Universal Declaration made legal personality into a universal and inalienable right. The consecration of legal personality was supplemented by the recognition of new human

18. Universal Declaration, art. 21–1.

19. Universal Declaration, art. 21–1 and 21–2.

20. See O. Nishitani, 'La formation du sujet au Japon', *op. cit.*, especially p. 70.

21. See Chapter 1.

22. Universal Declaration, arts 22, 26, 29.

23. Universal Declaration, art. 27–2: 'right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

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rights, called 'second generation' rights, which stem from the physical and intellectual dignity of the human being.[24] These 'rights to' (to employment, to social security, to education and culture) are clearly the result of the particular history of those Western countries that chose the path of the Welfare State rather than that of totalitarianism. They are informed by concepts – such as 'work', implicitly salaried – that do not correspond to those of Southern countries.

The definition of the 'human' of 'human rights' is therefore specifically Western, and so too is the very vocabulary of law and rights, which has nothing immediately universal about it and in fact expresses a specifically Western system of beliefs. The idea that the world is governed by universal and unbending laws is proper to the civilizations of the Book. For a devout Muslim as for Einstein or an atheist neurobiologist, human beings are governed by unchanging laws, and nothing is more important, as Maimonides[25] wrote as early as the twelfth century, than to study and to know them. The only difference is how they are brought to light: some have sought the Law in divine revelation, others have devoted themselves to discovering the laws inscribed in the great Book of Nature. But both believe in a world ordered by laws that human beings can observe and know. Such a conviction is, as we have seen, completely alien to other great civilizations, first and foremost that of China.[26] In Confucian thought, the natural or social order is founded on the internalization by each human being of his or her place within it, and not on the application to all of uniform laws. The fact that non-Western civilizations have had to, or still have to, adopt Western legal ideas creates the illusion that they have been converted to our legal culture. But this is to fail to understand that the idea of law was either simply imposed by colonial powers or else imported as a necessary condition for trade with the West, and in no way expresses the human or social values of the civilization. Japan offers a particularly striking example of this point, since it has adopted a Western legal tradition for external use, while continuing to promote its own vision of human relations internally.[27]

The idea of human law can claim universality even less than can religious or scientific law. With the law of legal systems, the nature of Law changes. It ceases to be a prescription revealed for all time in an

24. Universal Declaration, arts 22 and 25 (right to social security), 23 and 24 (right to work), 26 (right to education), 27 (right to cultural life).

25. Maimonides, *The Book of Knowledge*, ed. and trans. Moses Hyamson, Jerusalem/New York, Feldheim Publishers, 1974, p. 59a.

26. See Chapter 2.

27. See Chapter 3.

unchanging Text, and becomes a technical object, whose meaning derives from the human mind that creates or reforms it.[28] Thus defined, the notion of law is the product of Europe's long history, in the course of which human beings have come to be recognized as masters of the laws that govern them. As Harold Berman and Pierre Legendre have shown, the decisive moment in this history was the Gregorian revolution of the eleventh and twelfth centuries.[29] During this period, the Papacy recycled Roman law for its own purposes and established itself as the living source of the laws that were to be applicable to all Christendom, and thus ultimately to the whole world. 'The papacy', as Élie Faure noted already in 1932, 'was simply the abstract continuation of Roman administration.'[30] Our conceptions of the law and the State date from this period: the law as an autonomous, integrated and evolving system of rules; and the State as immortal personality, source of laws and guarantor of individual rights. These structures took on their modern form with the separation of Church and State. Science replaced religion as the universal measure of truth, becoming, as Saint-Simon had predicted, the only spiritual power to have authority in the public sphere. The nation-state freed itself from the authority of the Church and became a sovereign subject, both at the national and at the international levels (the world conceived as a society of States); and human beings became ends in themselves, without reference to any godhead. They founded their own Religion of Humanity, complete with its Ten Commandments: human rights.

This contemporary construction, the outcome of a disintegration of what was once a single religious point of reference, has from the outset been undermined by a contradiction that emerges into broad daylight with globalization. On the one hand, the State and law have national foundations, and international society is conceived as a society of States. But on the other, the Romano-Canonical ideas of a universal sovereignty and of a *ius commune* extending to all humanity persist.[31]

28. See Chapter 4.

29. See H.J. Berman, *Law and Revolution*, *op. cit.*; P. Legendre, *La Pénétration du droit romain dans le droit canonique classique*, *op. cit.*; also his *Les Enfants du texte*, *op. cit.*, particularly pp. 237ff.

30. Élie Faure, *Découverte de l'archipel*, *op. cit.*, p. 217.

31. For the different versions of this concept, see Alain Wijffels, 'Aux confins de l'histoire et du droit: la finalité dans le débat sur la formation d'un nouveau *ius commune*', *Revue d'éthique et de théologie morale*, Supplement no. 207, December 1998, pp. 33–66; and his 'Qu'est-ce que le *ius commune*?', *op. cit.* On the form which the *ius commune* takes in France today, see Mireille Delmas-Marty, *Pour un droit commun*, Paris, Seuil, 1994, and her *Trois défis pour un droit mondial*, Paris, Seuil, 1998.

Consequently every great nation-state at some time or another has sought to impose its belief in the universal value of its *imperium* by force of arms or propaganda. Such was the case with France's 'civilizing mission', the British Empire, the German Reich and the Soviet bloc; and so it is today with the 'empire of good' which the United States believes it has the mission to establish throughout the world.

This imperialist tendency can only confirm the convictions of the increasing number of people in all parts of the world who see human rights as a form of Western messianism. It can only encourage them to respond with their own particular creeds, turning the weapons and techniques of the West against itself. The risk is then of a 'clash of civilizations'[32] which would escalate into a war of religions on the scale of the planet, and whose outcome no one can predict. It is doubtful whether one can really convert people with bombs. Human rights, one of the finest expressions of Western thought, and as such constitutive of humanity's self-knowledge, at all events deserve better treatment.

The Three Figures of Western Fundamentalism

If a reflection on the 'values common to humanity' is to make any headway, it must begin by avoiding the temptation of fundamentalism. Fundamentalism, a Protestant notion, referred originally to a doctrine that appeared at the end of the nineteenth century in traditionalist American circles – the *Five Fundamentals* adopted in 1895 – which was characterized by the defence of the literal interpretation of the Scriptures, in opposition to theological liberalism and the social gospel movement. This imprisonment of thought within the letter of a Text can be found in what we today call Islamic fundamentalism, which excludes from the sources of the Law the contribution of medieval legal thought and the technique of

32. This expression comes, as is well known, from the programmatic title of the book by Samuel Huntington: *The Clash of Civilizations and the Remaking of World Order*, New York, Simon & Schuster, 1997. Huntington was the first author in the United States to raise an issue Pierre Legendre had addressed a decade earlier in the most limpid terms: 'The extension to the whole planet of the notion of management and the knowledges it draws on cannot make rival religions disappear [. . .]. Peace through managerial values (*la paix gestionnaire*) is war, and war in the strong sense of religious conquest [. . .]. Industrialists do not simply encounter what economists call "international competition", they also encounter non-industrial religions, particularly Islam' (P. Legendre, *L'Empire de la vérité*, *op. cit.*, pp. 41–2).

consensus between doctors, retaining only the letter of the Koran and the Sunna.

The fundamentalist interpretation of human rights can take three forms: messianism, when people seek to impose their literal interpretation on the whole world; particularism, when, on the contrary, human rights are made into a sign of the West's superiority over other civilizations which are deemed incapable, in the name of cultural relativity, of adopting them; and lastly scientism, where human rights are reduced to the dogmas of biology or economics, considered as the true and inviolable laws of human behaviour.

Messianism

The messianic approach to human rights consists of treating these as the new Commandments, a Text revealed by 'developed' societies to 'developing' ones, leaving the latter no choice but to 'catch up' and convert to modernity: human rights and the market economy in one. This approach is fundamentalist because it aims to impose a literal interpretation of human rights on the teleological interpretations already integrated into national systems of rights. Taken literally, the principles of equality and individual liberty that are at the basis of human rights can give rise to sheer madness. When Saint Paul asserted that 'there is neither male nor female',[33] or Simone de Beauvoir that 'one is not born a woman, one rather becomes one',[34] they were not intending to deny sexual difference but to proclaim the total equality of the sexes in the religious (Saint Paul) or temporal (de Beauvoir) sphere. In other words, they were affirming sexual equality in relation to a third term – God, Society – to which each adhered. But the difference between mathematical and legal equality is that, in the latter case, the beings it applies to may not be freely substituted for each other. The fact that the son is equal to the father (in the French Civil Code as in Christian theodicy) does not mean that the son *is* the father, and the fact that I am the equal of the man who aspires to my daughter's hand does not mean that I have the same right as he to marry her. In other words, legal equality always needs to be interpreted within a given referential framework. The fundamentalist interpretation of human rights divorces the principle of equality from any external reference point, and treats human beings as what the

33. Saint Paul, Epistle to the Galatians, 3:28.

34. Simone de Beauvoir, *The Second Sex* [1949], trans. H.M. Parshley, Harmondsworth, Penguin, 1972, p. 295.

French Civil Code calls a 'chose de genre' (a thing determined only as to its kind);[35] that is, as mass-produced items, interchangeable and devoid of any unique qualities; and concomitantly human society as the arithmetical sum of elementary units, contracting particles that are identical – except for how much they have in the bank. In this interpretation, human rights are summoned to treat personal status as a blank page to be filled out by each of us, as from the moment of our birth. Many intellectuals, echoed by politicians of all colours, are today abandoning social issues in order to specialize in these 'last taboos', calling for a society in which differences between the sexes would be abolished, maternity 'de-instituted', filiation replaced by contract, children freed from their 'special status' – likened to an oppressed minority – and where insanity would be recognized as a human being's inalienable right.[36]

We should not forget, of course, the threat of reprisals against the laggards who, in the West as elsewhere, might fail to applaud these glorious vistas. Messianic fundamentalism seeks to extend the radical interpretation of human rights to all countries – first in the West, then to 'developing' countries – and avails itself of the most modern instruments for propagating the faith, starting with the media and the social sciences.[37] One can also find many examples of it in the 'development' or 'structural adjustment' plans that have been applied

35. French Civil Code, arts 1246, 1291. In opposition to 'things certain and determined', 'things determined only as to their kind' are defined solely by their species and thus may be substituted for each other. See J. Carbonnier, *Droit civil*, vol. III: *Les Biens*, Paris, PUF, 12th edn 1988, no. 20, pp. 88ff.; P. Jaubert, 'Deux notions du droit des biens: la consomptibilité et la fongibilité', *Revue trimestrielle de droit civil*, 1945, pp. 75–101.

36. The reader interested in these vagaries is referred to the texts cited in Chapter 1, pp. 37–8. The 'inalienable right to insanity' currently proclaimed by eminent jurists (O. Cayla and Y. Thomas, *Du droit de ne pas naître*, *op. cit.*, pp. 65ff.), and which the above interpretations exemplify, constitutes a passage to the limit of Western legal culture, as Henry Sumner Maine already observed: 'in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention; and indeed several of the few exceptions which remain to this rule are constantly denounced with passionate indignation' (*Ancient Law*, *op. cit.*, p. 304).

37. Note the large percentage of grants, in Western aid programmes for African scholars, for work in Gender Studies, which has taken over the role of sexual normalization which was previously imposed by the missionaries. On the need to rid ourselves of certain paradigms from the social sciences, see Immanuel Wallerstein, *Unthinking Social Sciences: The Limits of Nineteenth-century Paradigms*, Cambridge, Polity Press, 1991, and particularly his critique of the concept of 'development', pp. 51ff.

over the past half-century to combat 'under-development'. And it flourishes also in the decisions of courts specially created to ensure that human rights are respected. In July 2001, for instance, the European Court of Human Rights heard a complaint lodged by a group of Turkish MPs from the Refah (Welfare) Party who had been removed from their seats by the Turkish army. It rejected the complaint on the grounds that they advocated the introduction of Sharia, which 'faithfully reflects the dogmas and divine rules laid down by religion' and is therefore 'stable and invariable'. It deemed that 'principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.'[38] The decision trampled underfoot the rich history of Islamic legal thought, excluding any idea of accommodation between human rights and the values of Islamic law. In so doing, it precisely vindicated the interpretation of human rights given by Islamic fundamentalists. Such human rights fundamentalism can only encourage, in reaction, the rise of anti-Western fundamentalisms, and precipitate human rights into a war of religions. The issue of equality between the sexes provides a good illustration of this: the insane interpretations of the principle of equality that deny differences between the sexes are matched by the equally insane ones that seek to imprison women within an unchanging, predetermined role.

Particularism

At the opposite extreme, there are those who consider human rights to be the Ten Commandments that have been revealed to the West alone, such that liberty, equality and democracy would be senseless for other civilizations. This approach, which starts from the postulate that there can be no communication between bodies of dogma, gives cultural relativism the value of a norm. It is a fundamentalist approach because it treats bodies of dogma as inflexible structures that are unable to evolve and be interpreted afresh. It has resulted,

38. ECHR, Third Section, 31 July 2001, Case of Refah Partisi (the Welfare Party) and Others *vs.* Turkey, point 71. The same point also refers to the declarations of the plaintiffs 'concerning the desire to found a "just order" or the "order of justice" or "God's order", [which], when read in their context, and even though they lend themselves to various interpretations, have as their common denominator the fact that they refer to religious or divine rules in order to define the political regime advocated by the speakers'. We may note that this *ratio decidendi* would warrant the destitution of the democratically elected President of the United States, on the basis of his declarations, mentioned above, concerning the USA's divine foundations.

even within Western countries, in the promotion of particularist politics – especially in relation to immigrant communities that have been driven from their homelands by half a century of 'development' policies – and in the cultivation of the ideal of 'multiculturalism'. Multiculturalism uses the euphemism of 'cultural reference' to establish that membership of a race (in its North American version) or a religious affiliation (in its European one) is the ultimate basis of human identity,[39] thus reducing society to a simple patchwork of ethnic or religious 'communities'. This has had the already visible result of generating a parallel particularism on the part of 'native inhabitants', and feeding the sources of racism and violence. It is a particularist fundamentalism since it treats people's ethnic or religious origins as a fatality. This leads, on the one hand, to the free human beings of human rights, destined to become masters of their own fate, for example, in the United States, the WASPS (White Anglo-Saxon Protestants); and, on the other, to 'anthropoids',[40] those new subjects of anthropological study, no longer to be found in the former colonies but in our 'deprived urban neighbourhoods'. They are supposedly marked from birth by affiliation to a particular community – African-American, Hispanic, Asian-American in the United States, 'French of foreign origin' or members of the Jewish or Muslim community in France[41] – from which they can escape only by denying who they are and becoming renegades. Such particularism works to discredit the nation-state internationally, in order to promote an imperial system along the lines of the Ottoman *millet*, which involved the exploitation of wealth in the empire as a whole, while permitting local ethnic and religious communities to be formed.[42] At a time when

39. P. Anderson, 'Réflexions sur le multiculturalisme', in A. Supiot (ed.), *Tisser le lien social*, *op. cit*, pp. 105 ff.

40. Osamu Nishitani introduced this most suggestive pair, *humanitas/anthropos*, to describe the Western vision of other cultures. See O. Nishitani, 'Deux notions de l'homme en Occident: Anthropos et Humanitas', in A. Supiot (ed.), *Tisser le lien social*, *op. cit.*, pp. 15ff. See also E.W. Said's critique of the construction of the East as image of the Other in *Orientalism*, New York, Vintage, 1978.

41. By proclaiming for all to hear, in 2003, that the first ever 'Muslim Prefect' (*préfet*) had been nominated, the French goverment managed from the very start to stigmatize – if one can call it that – a French citizen who had become a local representative of central authority. The only real novelty in this nomination escaped the notice of the media: the choice of the head of a business school to represent the State.

42. See A. Gokalp, 'Palimpseste ottoman', in A. Supiot (ed.), *Tisser le lien social*, *op. cit.*, pp. 93ff. On the *millet*, see R. Mantran, 'L'Empire ottoman', in M. Duverger (ed.), *Le Concept d'empire*, Centre d'analyse comparative des systèmes politiques, Paris, PUF, 1980, pp. 231ff.

people are again harping on about the global and the local, we would do well to recall the endless wars and massacres into which this imperial model has plunged the Balkans since 1914. Whether intended for internal or international consumption, human-rights relativism is always decked out in the appealing garb of universal tolerance. But it is always built on the belief that, if all cultures are in principle of equal value, the one that guarantees this equal value is necessarily worth more than the others.

Scientism

Lastly, scientism interprets human rights in the light of the 'true laws' of human behaviour that are revealed to us by a fetishized science.[43] The danger of degenerating into scientism does not affect all sciences equally. The most rigorous ones, such as mathematics, are almost totally exempt from this risk, as are the disciplines that do not claim scientific status, such as literature and law (with some alarming exceptions). On the other hand, scientism is endemic in the sciences whose theoretical bases are the least developed, such as the social or life sciences. For the past century, biology and economics in particular have, separately or jointly, been the breeding ground of normative constructions which, when they do not overtly contradict human rights, seek to impose their interpretation of them. The periods of dictatorship or totalitarianism that have marked the history of the West over the past two centuries, or the reduction in fundamental social rights observed over the past thirty years, show how intolerant scientistic 'realism' is of humanistic values. Even in the West, then, human rights are something fragile and unstable, supported by legal dogma alone, while faced with all those beliefs that appeal to science to weigh up the validity of human rights or hinder their implementation.

For instance, the past thirty years have seen the legitimacy of what are called 'second generation' human rights hotly contested in the name of economic science. The most influential economists, such as Friedrich Hayek, extend to all aspects of human life in all countries of the world the principles of free competition which are to be the basis of the 'Great Society'. They attribute the recognition of economic and social rights by the 1948 Declaration to a form of totalitarian thought (which they see at work from Plato to

43. See Chapter 2.

Stalin[44]), and claim that 'the new rights could not be enforced by law without at the same time destroying that liberal order at which the old civil rights aim'.[45] As is well known, this Darwinian vision of society,[46] which is at the root of the denigration of social rights, has acquired the status of a dogma in institutions such as the International Monetary Fund or the World Bank. What is less well known is that this vision is also influential within international organizations responsible for implementing these very economic and social rights, such as the International Labour Organization,[47] on which Hayek nevertheless heaps a contempt as great as that he has for trade unions. Commenting on the 1948 Declaration, he states that

> . . . the whole document is indeed couched in that jargon of organizational thinking which one has learnt to expect in the pronouncement of trade union officials or the International Labour Organization [. . .] which is altogether inconsistent with the principles on which the order of a Great Society rests.[48]

44. This school of thought always prefers Aristotle to Plato, who is accused of being a philosopher of servitude. This is quite a strange assertion if one cares to remember that it is Aristotle and not Plato who sought to found slavery in natural law, maintaining that slaves exist by nature, situated between man and animal, since 'he who participates in rational principle enough to apprehend, but not to have, such a principle, is a slave by nature' (*Politics*, 1254b, 21–4, trans. Benjamin Jowett, Oxford, Clarendon Press, 1921). See P. Garnsey, *Ideas of Slavery from Aristotle to Augustine*, Cambridge, Cambridge University Press, 1996, pp. 107 ff. There is no such discourse in Plato, who considers slavery to be a punishment for, or a consequence of, war (*The Statesman*, *op. cit.*, 307–309, pp. 179–87).

45. See F.A. Hayek, *Law, Legislation and Liberty*, Vol. 2, *The Mirage of Social Justice*, London/Henley, Routledge & Kegan Paul, 1976, p. 103.

46. Hayek is one of the key advocates of evolutionary theory in economics, a theory that maintains that human behaviour is not founded on the rationality of actors but on routines that play the same role as genes in biology. History is seen as a process of selection of the behaviour best adapted to the environment, and law should not hamper but facilitate this natural selection. For a clear and concise presentation of these different theories, see F. Eymard-Duvernay, *Économie politique de l'entreprise*, Paris, La Découverte, 2004.

47. See the ILO's *Declaration on Fundamental Principles and Rights at Work* [1998]. Although the goals of this declaration are considerably less ambitious than those of the Universal Declaration of 1948, its article 5 nevertheless 'stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up'. If this condition were applied to the letter, it would make the whole Declaration meaningless, since outlawing trade unions or using forced labour, for example, might well constitute a comparative advantage which should 'in no way be called into question'.

Two arguments are put forward to exclude social rights from the legal sphere. The first is that social rights aim to redistribute wealth, whereas law is by nature restricted to 'rules of just conduct'; the second is that they have the form of a claim on the community and not of an individual guarantee. In this view, then, only rights that can be exercised independently of any institution designed to realize them are true rights, whereas social and economic rights merely beg the question, since they cannot be exercised without the prior existence of an institution designed to bring them into effect.

These criticisms are simply groundless. Social and economic rights are fully fledged rights, both as regards their content and as regards their structure. As regards their content, the first declarations of rights, for example the Declaration of 1789, defined 'Man' as a purely rational being whose physical existence was taken into account only in provisions on sentencing. But history has since shown that civil and political rights were meaningless and liable to disappear whenever entire human communities were subjected to poverty and fear. It is only when a minimum of physical and economic security is assured, and protection from attack, from hunger, cold or illness, that people can concern themselves with the defence of freedoms or property rights. As Brecht noted during the rise of Nazism, 'those who have contempt for food are those who have already eaten'; similarly today, those who mock the 'risk-phobic' are those who are not exposed to risk. One of the lessons of the 1930s was that poverty and mass unemployment pave the way for dictatorship, and that freedom is impossible where physical or economic insecurity prevail. This was the very reason for the declaration of social rights after the Second World War.

48. F.A. Hayek, *The Mirage of Social Justice*, *op. cit.*, p. 105. Freedom of association is of course one of the principal social rights enshrined by the 1948 Universal Declaration and condemned by Hayek. If we recall how Chile under Pinochet – a model of these economic theories in action – treated trade unionists, or the role that the right to form trade unions played in overthrowing Communism in countries such as Poland, we may acquire a more accurate picture of the value and significance of this economic analysis of human rights. Hayek's consecration (along with many like him) by the Nobel Prize in Economics gives one an idea of the role played by the Nobel institution in dogmatic conflicts internal to the West, in which scientific truth plays a very minor role. (However, to exonerate Alfred Nobel, it should be recalled that the exact title for this prize created in 1969 is 'The Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel'.)

As for the structure of these 'second generation' rights, some of them (such as the freedom of association) have the same form as traditional rights, that is, they guarantee a sphere of individual autonomy. However, the rights that cannot be exercised without the presence of a collective organization (the right to health care, for example), far from constituting a regression into a pre-legal sphere, have on the contrary anticipated a development that currently affects certain 'first generation' rights, for example property rights. Globalization has shifted the focus to 'intellectual', not material, property, that is, to what jurists call 'intangible assets' such as trade marks, patents or copyright. Since there is no concrete difference between an original and a perfect copy of a musical recording, a luxury handbag or a software program, and since copies can be made without depriving anyone of the use of their original recording, their bag or their computer, it is vital for transnational companies to ensure that copies cannot circulate freely, and hence that the manufacture and circulation of these products be limited by respect for the intellectual property rights that the transnational companies have over these products and that generate income for them.[49] Respect for these rights also implies, however, that compulsory contributions should be paid on the manufacture, reproduction or sale of products over which intellectual property rights extend.[50] Intellectual property rights therefore have the same structure as social rights. They can be assimilated not to the tangible possession of something but to a right that is a debt claim, and that cannot be exercised without the concrete intervention of States. Respect for this right can only be guaranteed by ensuring that the product is traceable, which in turn implies the need for a collective body which must be worldwide if it is to be effective.

The fact that intellectual property rights and social rights are structurally identical obviously raises the question of how they are to be reconciled, or which has priority over which. One could, for instance, interpret the Declaration of 1948 as implying that the right

49. See the ruling of the Cour de cassation, Chambre commerciale, 24 September 2003 (*Bulletin des arrêts de la Cour de cassation* IV, no. 147, p. 166): a Court of Appeal was censured for refusing to cancel a sale of counterfeit clothing on the grounds that neither deception nor error had been proven. After referring to art. 1128 and 1598 of the French Civil Code, the Court of Cassation ruled that 'counterfeit goods cannot be the object of a sale'.

50. The provisions of Annex 1C of the Marrakesh Agreement establishing the World Trade Organization (called TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights), obliged States to set up 'enforcement procedures . . . so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement' (TRIPS, art. 41–1).

of pharmaceutical firms to have their patents protected should yield before the right of populations to have access to adequate health care. Politics here rediscovers its capacity to act as arbiter, which the adepts of the law of the free market seek to deny it. The similarity with social rights, in which the beneficiaries of the system contribute to the collective organization of social welfare in proportion to their resources,[51] suggests that the beneficiaries of intellectual property rights should likewise be liable for compulsory contributions, to be collected by the countries that guarantee respect for these rights. It is these sorts of interpretation that fundamentalist economists like Hayek wish to stifle, seeking as they do to subject human rights to market forces, rather than vice versa.

But scientism also encourages 'first generation' human rights to be interpreted according to the so-called 'laws' of economics. Where, for instance, article 5 of the Universal Declaration of Human Rights declares that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,' Richard Posner, one of the founding fathers of the economic analysis of law, maintains that 'If the stakes are high enough, torture is permissible.'[52] This interpretation, which can at the very least be called 'bold', arose in the context of the 'war on terror' and the patriotic mobilization of 'post-9/11'. But it is in perfect harmony with the economic analysis of law as a whole and the principle according to which the calculation of utility is always the basis and the limit of individual rights. The utility for an individual not to be tortured – which founds the corresponding human right – should in this light be weighed up against the utility for other people of torturing him or her. At the end of the day, there is nothing new here compared to the more homespun justifications of torture that General Massu came up with during the Algerian War, except that now it is science that is summoned to justify that human rights be brushed aside.

Economics is not the only science to have been mobilized in this way over the last few years. Sociology, psychology and biology have all been pressed into the service of the intense media campaign in favour of same-sex parenting, to endorse the right of homosexual couples to be legally recognized as parents. The human rights of a childless couple are of course evoked, and notably the principle of equality with heterosexual couples.[53] But what of the child? Can one

51. See below.

52. R.A. Posner, 'The Best Offense', *New Republic*, 2 September 2002.

53. On this interpretation of the principle of equality, see pp. 193–4.

assign a child a purely masculine or a purely feminine lineage (as child of two fathers or two mothers[54] respectively), and consequently deny the child the right to a mother and a father,[55] without infringing the first principle of the Declaration of the Rights of Man and of the Citizen (article 1) and the Universal Declaration of 1948 (article 1), which states that 'all human beings are *born* equal in rights'? This issue is *never* raised by the supporters of same-sex parenting who, when it is a question of the child, suddenly abandon the terrain of human rights to occupy that of science. The child need not then be viewed as a subject of law and can be treated 'objectively' – object of the homosexual couple's desire or object of psychological and sociological knowledge – such that the case is settled with the simple declaration: 'there is no significant scientific argument against same-sex parenting'.[56] And if doubts are raised on this issue, we are told bluntly that we just have to try it and we will see for ourselves.

What characterizes a scientistic approach, whether it concerns torture or experimentations on the personal status of children, is that it interprets human rights in the light of the teachings of science. The issue of norms is reduced to a question of fact, and the law is there simply to hasten the advent of the norms revealed by science. The latter's legitimate use is to destroy the collective beliefs that

54. The Civil Code of Quebec has recently enshrined the right to same-sex parenting for women, and in such cases assigns two mothers to children conceived through 'the contribution of the genetic material of a third party'. Since the notions of father and mother have not yet been removed from other laws, article 539.1 of this Code specifies which of the two will be considered to be the father: 'If both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child.'

55. See article 538.2 of the Civil Code of Quebec which forbids, in the case of a child conceived through 'the contribution of genetic material for the purposes of a third-party parental project', that a bond of filiation with the contributor of the said 'genetic material' be established. The child born of the parenting project of a female couple – which is authorized by the Code – is therefore condemned by law never to have a father.

56. This is the subtitle of an article by J.-C. Kaufmann: 'Le mariage n'est plus ce qu'il était' [Marriage is no longer what it used to be], published in the French daily newspaper *Le Monde*, 28 May 2004 *and* 20 August 2004 (note that this article, which denounces the 'repetitive and tedious' arguments of those who continue to 'believe' in the difference between the sexes, was well and truly published twice in the same newspaper at only a few months' interval). The author, who makes much of his status as sociologist and research director at the CNRS, declares his wish to 'contribute some *scientific* elements to the case', stating that the idea that the division between the sexes plays a role in the psychical development of the child is 'purely ideological, a groundless form of collective belief' based on 'a psychoanalytic doctrine of a bygone age'.

continue to hinder 'the groundswell of individual democratization that encourages each of us to break out of imposed roles in order to reinvent ourselves creatively'.[57] As soon as science shows us the way to the New Human Being, we know from historical experience that law is no longer allowed to have a say.[58] But it is also clear that human rights, even if unanimously considered to be absolutely fundamental, are threatened even in the West with being subordinated to rules considered to be even more fundamental.

These variants of Western fundamentalism are evident in North–South relations, as the foreign policies of Western countries combine now one, now another messianic, particularist or 'realist' (natural selection) position. Such is the case when a war of aggression is launched in the name of human rights – which the authors of the war do not themselves feel bound to respect due to the particular nature of local circumstances – while it is military victory that is to prove the superiority of their value system . . . The Revolutionary, Napoleonic, then colonial episodes of French history can provide a wealth of examples of these sorts of contradiction, which have re-emerged today with the 'war on terror' waged under the banner of the United States.[59] All fundamentalist interpretations of human rights present the Southern countries with the following alternative: either transform yourselves and abandon who you are, or remain who you are and abandon any idea of transformation. This is why, in some of these countries, movements preaching a return to a mythically pure identity have met with such success, accompanied by the inevitable psychical regressions and social segregations.

Opening the Doors of Interpretation

All major bodies of dogma, whether or not they are considered as 'religious', share the characteristic of metabolizing impulses to violence and murder, and are therefore forms of the knowledge that humanity has acquired about itself. To see human rights as a body of dogma, a Religion of Humanity, allows us to approach the question of 'values' in a globalized world from a different perspective. Like the

57. J.-C. Kaufmann, 'Le mariage n'est plus ce qu'il était', *op. cit.*

58. See Chapter 2.

59. As with every fundamentally untrue position, such as that of persecutors who seek to be considered as victims, the only solution is to make enough noise to cover the cries of the real victims. To do so, all you need is to control the major organs of media propaganda.

infinite diversity of languages, each of the major bodies of dogma presents us with a singular worldview, different from the others yet each faithful to reality in its own way.[60] Like Hokusai's thirty-six views of Mount Fuji, they convey different facets of the same object, and, as with languages, none can be considered more truthful than any other, since they cannot be judged by empirical criteria. That is why, like languages, they are irreducible to each other, yet translation is possible between them. If we bear this in mind, we should be able to avoid the insoluble dilemma of absolute versus relative values, and sketch out paths for a hermeneutics of human rights that could be open to every civilization. In order to move in this direction, we must begin by *opening the doors of interpretation* of human rights to all civilizations. I use this notion advisedly, since it has been defended by generations of Muslim intellectuals concerned to help their countries escape the forces of regression by returning to the most brilliant episodes in Islamic civilization.[61] A similar regression threatens Western thought and values, should these yield, in turn, to fundamentalism.

Human Rights: Humanity's Common Resource

Opening the doors of interpretation means treating human rights as a resource for all humanity, and welcoming the contributions of every civilization. There are two reasons for adopting this notion of 'common resource' (the *res communes omnium* of Roman law). Firstly, it is not an arbitrary choice, since it is a notion that registers the objective extension of the model of the State and the recognition of human rights internationally. Although States vary greatly, and change, it is a fact that international society is organized into a system of nation-states. This must be stressed, if the West is not to embark afresh on an imperial enterprise even more dangerous than those already undertaken. Since a large majority of States are signatories to treaties on human rights, the interpretation of human rights should not be restricted to that provided by Western countries. Secondly, the notion of human rights as a 'common resource' aims to break with the semblance of an ecumenical approach, which in reality has always

60. On this diversity as a resource for humanity, see G. Steiner, *After Babel: Aspects of Language and Translation*, Oxford, Oxford University Press, 3rd edn., 1998.

61. For an introduction to this notion, see Louis Gardet, *La Cité musulmane*, Paris, Vrin, 1954, pp. 121ff.; Joseph Schacht, *An Introduction to Islamic Law*, *op. cit.*, pp. 69ff.; Mohamed Charfi, *Islam and Liberty*, London, Zed Books, 2005.

meant that the West shops around beyond its borders, takes what it likes and jettisons the rest. If a resource is held in common, it must logically be able to be appropriated by more than one. Assisting this appropriation is the only way to respect the proper character of each civilization, while not treating it as self-enclosed.[62]

There are many reasons to think that such a development is possible. Recent history provides numerous examples of countries that have successfully appropriated Western modernity without being destroyed by it, such as Japan, India and, more recently, China. These countries could rely on their own dogmatic resources, consigned in a vast and rich corpus of writings that is fully the equal of that of the West and which is open to evolving interpretations.[63] A person raised on the *Mahabharata* is unlikely to lose his or her identity in the culture of Walt Disney. The situation is somewhat different in countries whose dogmatic resources are threatened by fundamentalism, as is the case in the West or certain Islamic countries, or else by the absence of a written corpus, as in much of sub-Saharan Africa. In the first case, the danger would be to equate Islam with fundamentalism, and to believe that modernization requires the eradication of all reference to religion from the public sphere. Ataturk's attempts along these lines – and particularly replacing Arabic with Latin script, which cut off modern Turks from their written heritage – have not been particularly successful. In contrast, the difficulties of interpretation arising from the reconciliation of human rights with Islamic law could be an excellent way for these societies to invent their own paths to modernization – provided, of course, that this reconciliation is not declared *a priori* impossible, as Islamic fundamentalists and the European Court of Human Rights have both claimed.

A much more problematic case is in fact posed by Africa, for while the West has appropriated numerous elements of its rich culture – dance, music, sculpture – its lack of a written corpus threatens its civilization with extinction. Any 'fundamentalist' reading of human rights could only hasten this process, by tearing apart the social structures that are the living fibre of the transmission of African values. Prohibiting child labour, for instance, in societies without schools,

62. On this notion of appropriating modernity, see Jacques Berque, *L'Islam au temps du monde*, Arles, Sindbad-Actes Sud, 2nd edn, 1984, p. 87.

63. A penetrating analysis of the prospects of each of these three great civilizations was made in the 1920s by Liang Shuming, *Les Cultures d'Orient et d'Occident et leurs philosophies*, Paris, PUF, 2000, Preface by L. Vandermeersch.

deprives children of their only opportunity of learning their own culture.[64] In contrast, if this prohibition were opened out to a range of interpretations, including African ones, the West might be forced to reflect on its own ways of bringing up children, which are not necessarily exemplary, and it might discover for example that schoolwork is also a form of work, even if it is ignored by labour legislation. The 'common value' in this case is not hard to find: it is the right of a child to be a child, and to be treated as such, according to his or her needs and abilities. In this light, the notion of 'decent work', which is currently advocated by the ILO,[65] seems a much richer and more promising notion than all the indignant prohibitions that know nothing of the civilizations to which they apply. The same argument could be put forward as regards equality between the sexes, which is certainly not a mathematical equality corresponding to a uniformly and universally applicable formula, but an equality in difference and an always fragile equilibrium dependent on respect for these very differences. It is at any rate understandable that African women do not appreciate Westerners coming and telling them, as the missionaries did before them, what attitudes to adopt in relation to men.

This is not to imply that African countries are naturally resistant to the values expressed by human rights, but rather to suggest that they should be permitted to promote their own interpretations of them. Besides, it is Africa which has so far made the most remarkable attempt, in legal terms, to appropriate human rights, in the form of the African Charter on Human and Peoples' Rights of 27 June 1981.[66] As its name suggests, the charter integrates the individual rights that feature in Western declarations, but does so within a conception of the human being not as an isolated individual subject, but as a being linked to others, whose identity exists as member of a number of communities. That is why the charter features subjects of rights other than the individual and the State, and towards which the individual and the State have obligations (articles 27, 29): there is the family, not solely as object of an individual right, as in article 16 of the Universal Declaration, but

64. A. Cissé-Niang, 'L'interdiction internationale du travail des enfants vue d'Afrique', *Semaine sociale Lamy*, Special Issue, *Regards croisés sur le droit social*, 1095, 2002, pp. 9–13.

65. See the report of the Director-General of the International Labour Office, *Decent Work*, to the International Labour Conference at its 87th Session, Geneva, 1999: http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm

66. English text available at www.achpr.org/english/_info/charter_en.html. A brief presentation can be found in F. Sudre, *Droit international et européen des droits de l'homme*, Paris, PUF, 5th edn, 2001, pp. 76ff.

as 'custodian of morals and traditional values recognized by the community' (article 18), which the State has a duty to assist; and there is the people, which has the right 'to struggle against foreign domination, be it political, economic or cultural' and which is understood within a framework where 'the reality and respect of peoples' rights should necessarily guarantee human rights' (article 20).

Our conception of human rights in the West might gain from opening the doors of interpretation and pondering some of these 'African values', in the light of which we might be able to solve some of our own problems. For instance, not isolating human beings from their relationships with others (article 28); establishing the principle of solidarity (article 29); asserting the right of peoples to the protection of their environment (article 24); or safeguarding the educational role of the family (article 18 and 29). These values do not figure in the Universal Declaration of Human Rights of 1948, but they are no less universal for all that.

The Principle of Solidarity Revisited

A brief examination of the principle of solidarity will convince us of this. This principle is of vital importance today. No country is exempt from major technological, environmental, political or health risks, and the organization of international cooperation in the face of these risks, aided by globalization, has become a primary concern worldwide. In the Universal Declaration of 1948, the principle of solidarity is not formulated as such – except in an allusion, in the Preamble, to the 'human family' – since it is expressed in individual *rights*, such as rights to social security, to an adequate standard of living or to security in the event of unemployment (see articles 22 and 25). In the African Charter, by contrast, solidarity is conceived as a *duty* (article 29–4: 'The individual shall have the duty to preserve and strengthen social and national solidarity'). In the first case, solidarity takes the form of a claim on society, in the second, of a debt. But in reality, these two relations are linked, since the rights declared in Northern countries have always had as their counterpart this duty to ensure social welfare through compulsory contributions (taxes and social security contributions).[67] These compulsory contributions which, as we know, are the cornerstone of the social model in 'old Europe', are the structural equivalent of the duty to solidarity to which every African of some

67. This duty is explicitly formulated in the American Declaration of the Rights and Duties of Man, approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948 (arts 35 and 36, cited below).

means is subject. But whereas this traditional solidarity operates through personal networks, the contributions to Western social welfare regimes are paid to anonymous organizations, whether the State (for public services) or social security insurance schemes.

The transition from personal to institutional solidarity is a recent phenomenon even in the West. The concept of solidarity derives from civil law, where it serves to correct the imbalance created by a single obligation for which there are a multiplicity of creditors (active solidarity), or of debtors (passive solidarity).[68] Social legislation and sociology since Durkheim have appropriated this legal notion of solidarity, because it could allow a collective obligation to be conceived (the body of creditors and debtors) that was not based on individual consent, family ties or community allegiance. But the concept metamorphosed as it moved from civil to social law. Instead of designating a legal bond that unites creditors and debtors directly, the principle of solidarity has been the inspiration for a new type of institution. It unites a credit of social contributions (of a variable amount, depending on the resources of the members) and a debt of services (of which the total is unrelated to the material and financial resources of the members at the time of their affiliation).[69] Solidarity therefore means establishing a common fund to which all must contribute according to their capacities and on which each may draw according to his or her needs.[70]

In contrast to traditional redistribution mechanisms such as the African tontine,[71] the system of solidarity set up in the framework of

68. See arts 1197 *et seq.* of the French Civil Code: 'An obligation is joint and several (*solidaire*) between several creditors, where the instrument of title expressly gives to each of them the right to demand payment of the whole claim, and payment made to one of them discharges the debtor, although the benefit of the obligation is to be partitioned and divided between the various creditors'.

69. See the definition of the principle of solidarity in European Community law: ECJ, 17 February 1993, case nos 159/91 and 160/91, Poucet and Pistre.

70. See on this point the seminal article by J.-J. Dupeyroux, 'Les exigences de la solidarité', *Droit social*, 1990, p. 741.

71. The word 'tontine' is the improper legal translation of a term designating an institution that is widespread in certain African countries. What in Bamileke is called *njangi* (to pool, to contribute together) refers to 'associations of persons who typically have something in common (members of the same family, area or ethnic group), who make regular contributions, in kind or in money, and the total is then redistributed in turn to each member of the association' (see J. Nguebou-Toukam and M. Fabre-Magnan, 'La tontine: une leçon africaine de solidarité', in Y. Le Gall et al., *Du droit du travail aux droits de l'humanité. Études offertes à Philippe-Jean Hesse*, Rennes, Presses universitaires de Rennes, 2003, pp. 299ff. This is one of the rare legal studies on the subject, which is also well documented on economic and anthropological aspects.

Welfare States is stripped of any personal bond between creditors and debtors. This is why it can extend over a whole country, as do national social security schemes (founded on the 'principle of national solidarity'[72]) or public services, which are responsible for ensuring that all citizens have equal access to services deemed essential: health, energy, transport, education, information, et cetera. Solidarity is therefore anonymous, which is both a strength and a weakness. It is a strength because it frees people from their bonds of personal allegiance and enables large quantities of resources to be mobilized while ensuring that risks are spread very widely. But it is a weakness, because this anonymity exacerbates individualism by doing away with any direct links between the persons participating in the solidarity scheme, and replaces these with a relation between an individual and an impersonal organization. Depending on whether one adopts the viewpoint of the providers or the contributors, the system looks like a sort of manna from heaven (pure credit and no debtors) or a sort of racket (all debt and no real beneficiaries).[73] Another weakness is that such systems of solidarity could only develop in the framework of States which act as their guarantors or even their managers.

For all these reasons, the systems of social solidarity developed in the framework of Welfare States are undergoing a major crisis. They have proved a failure when exported to many Southern countries, where bonds of personal solidarity remain the only bonds which can be relied upon;[74] and in Northern countries they are under fire from the market fundamentalists, while encountering increasing financial difficulties linked notably to the opening up of frontiers, which allows capital and companies to avoid taxes and welfare contributions. The solution to these problems is not provided by the myth of a global society composed of self-sufficient individuals freed from any bonds of solidarity, nor by national systems of solidarity turning in on themselves, since they are the

72. For France, see art. L.111–1 of the French Social Security Code. This principle means that any person residing on French territory is obliged to belong to one of the social security schemes or, failing that, to a personal insurance scheme.

73. This would explain the schizophrenic attitude often observed in those categories whose income is provided by compulsory contributions (civil servants, doctors, etc.). They demand on the one hand wage increases, and on the other a reduction in these very contributions.

74. Administrators of State welfare organizations often see these as a common fund that belongs to nobody and that one can therefore dip into for oneself and for those to whom one is indebted.

backbone of their society and are therefore obliged to evolve with it. The destabilization of these systems can only be countered by giving an international dimension to the duty to solidarity inherent in the declaration of 'second generation' rights. Such rights are only one side of the principle of solidarity, and are linked to corresponding duties to contribute financially, enshrined in current charters and declarations.[75] The economic and social rights already gained should provide sufficiently powerful legal weapons to oblige economic operators to carry out their duty and make significant financial contributions in the countries where they are established. Furthermore, the principle of solidarity could be drawn upon in new ways, and economic and social rights could be interpreted afresh in the light of the new legal regime of globalized trade. If the international social divide and the conflict of interests between workers in Northern and Southern countries is to be reduced, this reinterpretation must include the ways in which solidarity is conceived and practised in Southern countries.

Community law shows that the reaffirmation and reinterpretation of the principle of solidarity is already under way in Europe, as a result of the pressure exerted by the enlargement of the European Union to former Communist countries. Twenty years after the African Declaration, the European Charter of Fundamental Rights has in turn endorsed the principle of solidarity, while extending it further.[76] It includes under 'solidarity' not only the social rights subscribed to in the Universal Declaration but also new fundamental rights – workers' right to information, a right to bargaining and collective action, a right of access to public services – as well as certain principles that public authorities and companies are subject to, such as reconciliation of family and professional life, protection of the environment, or protection of consumers. This extended definition of solidarity could help contain the effects of social breakdown brought about by globalization. Firstly, it implies that those whose conditions of life and work are affected by the liberalization of international trade should be granted the right to form trade unions, to take action and to negotiate at an international

75. This link is explicitly established in certain declarations, such as the American Declaration of the Rights and Duties of Man (1948), in the terms of which it is the duty of every person 'to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances' (art. 35), and 'to pay the taxes established by law for the support of public services' (art. 36).

76. See chapter 4, art. 27 *et seq.* of the European Charter of Fundamental Rights adopted in Nice, 2000.

level,[77] solidarity being envisaged here not only as a way of protecting people from risk, but also as a way of giving them the concrete means of exercising certain freedoms.[78] This recalls many non-Western, traditional forms of solidarity, such as the tontine mentioned above, which in this light appears astonishingly modern. Secondly, this definition of the principle of solidarity can serve as a basis for rules that set limits on the commodification of people and things. If we place, as the Charter does, environmental or consumer rights under the sign of the principle of solidarity, we should be able to combat the shirking of responsibility that today's networked economy enables.[79] All those who benefit from an economic transaction should be considered jointly and severally responsible for the damage that may result for the environment and consumers, whatever complex legal strategies may be used by a company to avoid this responsibility.[80]

The primary sense of solidarity thus resurfaces, originating in civil law but obscured for a long time by techniques taken from insurance. This sense is strangely similar to the traditional forms of solidarity that are still operative in non-Western countries, in which those within the solidarity system are also personally responsible for it.[81] In

77. This would give a legal basis to active solidarity across frontiers, which representative associations or trade unions could exploit. It explains the determination of certain governments, headed by the United Kingdom, to prevent the European Community judiciary from interpreting the provisions of the Charter too freely. These same governments successfully opposed the recognition in the Constitutional Treaty of a right for workers to international collective action (see C. Barbier, 'Un traité constitutionnel en quête de ses ultimes auteurs', *op. cit.*).

78. On these 'social drawing rights', see A. Supiot (ed.), *Beyond Employment*, *op. cit.*

79. See Chapter 4.

80. The European directive of 25 July 1985 adopts this solution regarding responsibility for defective products. Defining the defective product as one that 'does not offer the security one may legitimately expect', the directive makes the producer responsible for damages caused by this defect to persons or goods, whether or not the producer is bound by contract with the injured party. This solution was also used very effectively by the United States after the oil spill from the *Exxon Valdez*, since US law provided for charges to be brought against all those who took part in the transport operation, whether directly or indirectly. Indeed, the American Oil Pollution Act of 1990 states that responsibility for pollution caused by a vessel rests with 'any person owning, operating, or demise chartering the vessel'.

81. See the French Civil Code, art. 1200: 'There is joint and several liability (*solidarité*) on the part of debtors where they are bound for a same thing, so that each one may be compelled for the whole, and payment made by one alone discharges the others towards the creditor.' A doctrinal current is emerging in civil law to give new scope to the principle of solidarity on contractual issues: see D. Mazeaud, 'Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?', in *L'Avenir du droit. Mélanges en hommage à François Terré*, Paris, PUF, Dalloz JurisClasseur, 1999, pp. 603ff.; C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in *Le Contrat au début du XXIe siècle*, *op. cit.*, pp. 441 ff.; C. Jamin and D. Mazeaud (eds), *La Nouvelle Crise du contrat*, Paris, Dalloz, 2003.

order that companies operating internationally should assume their corporate social responsibility, this type of solidarity would have to exist between the different parts of an international supply chain or a transnational network. Were this to be the case, it would become possible for entities that are 'able to exercise a significant influence over the activities of others'[82] to be brought before the courts in the countries in which they have their headquarters, and to be obliged to take responsibility for the entities belonging to the same network or supply chain in the 'host country', if they fail to observe the principle of solidarity. Such an obligation would encourage good practice, and discourage bad practice, in subcontracting.[83] Any such lawsuits could themselves be spearheaded by coordinated trade union action in the network or supply chain.

This reinterpretation of the principle of solidarity naturally welcomes the contributions of all the countries affected by its implementation. Such contributions would help restore the essential function of human rights, which is to channel the effects of people's feelings of omnipotence. As science and technology develop, such feelings have come to threaten the very survival of humanity. It is the true function of law to protect us from this threat.[84]

Towards New Modes of Interpretation

How can we imagine opening up the interpretation of human rights to the input of 'all the members of the human family', in the terms of the Universal Declaration of Human Rights? In responding to this question, we must bear in mind the fact that '*dogmatic systems as such do not enter into dialogue* – in the sense given by the overhasty theories of communication – *they can only negotiate*'.[85] An open interpretation of human rights presupposes the existence of *institutions* capable of encouraging such negotiation and endowing

82. The phrase is taken from the *OECD Guidelines for Multinational Enterprises* (1976, revised in 2000).

83. One of the effects of the provisions of the American Oil Pollution Act was to make large petroleum companies more attentive to guarantees of security in the choice of their carriers. Operators therefore began to use their oldest ships elsewhere – in the European Union . . .

84. See Chapter 4. The attack of 11 September 2001 showed the world just what such a divorce between technological mastery and legal culture could imply. Its authors were in no way 'backward', but on the contrary had perfect mastery of Western technology, including the techniques of media bombardment for propaganda purposes.

85. P. Legendre, *Le Désir politique de Dieu, op. cit.*, p. 183.

the resulting agreements with legal force. It is unlikely that a hypothetical International Court of Human Rights would be the suitable place for this negotiation, which is linked to economic globalization and to the opening up of frontiers to the movement of capital and goods. While open to things, these frontiers remain closed to people, and no free circulation of persons exists on an international scale. After giving a hero's welcome to dissidents who had managed to flee Communist countries, Western countries are today hounding illegal immigrants seeking to flee Southern countries, while refusing to address the reasons for their flight, which would oblige them to face up to the devastating effects of the organization of trade that they impose worldwide. The World Trade Organization has made it abundantly clear that, apart from some detailed issues covered by its statutes, the fate of human beings lies beyond its remit. Yet if the human consequences of the extension of the free market to the whole world are not taken seriously, this movement will not be long-lived. A 'division of labour' is already appearing between international organizations responsible for things (goods and capital) and those responsible for persons (labour, health, social protection, culture and education, and so forth).

It is within this context that the question arises of the articulation between the market economy and the values of different civilizations around the world. We will only survive globalization if it is conceived not as a process of homogenizing peoples and cultures, but as a process of unification that thrives on diversity and not on its eradication. The hermeneutics of human rights is a key aspect of the problems raised by the liberalization of trade and financial markets. The disputes that occur as a result of the extension of the free market can and should be an opportunity for these human – and fundamental – rights to be reinterpreted, instead of perpetuating Northern unilateralism, which has led to the failure to integrate a social clause into international trade agreements.[86]

The 'social dimension of globalization'[87] is condemned to remain an empty slogan as long as there are no institutions by means of which

86. For an overview of the debates on this clause, see J.-M. Servais, *Normes internationales du travail*, Paris, LGDJ, 2004, pp. 17–27.

87. This was the title of a World Commission established under the aegis of the ILO. See its report, *A Fair Globalisation. Creating Opportunities for All*, Geneva, International Labour Office, 2004 (http://www.ilo.org/public/english/fairglobalization/report/index.htm)

Southern countries may counter the North with their own interpretation of fundamental rights. When, for instance, the European Union supports the dumping of agricultural produce, on such a scale as to threaten the survival of food-producing agriculture in the Southern countries, the latter must be able to defend the right of their populations to decent work and obtain appropriate redress before an international body. We need to create, at the international level, the same fundamental human labour rights as were developed at national level through labour legislation in industrialized countries over the past two centuries, so that the weak can turn the weapons of the law against those who use the law to exploit them, and so contribute to the progress of law overall. We should recall that from the very outset, a division arose within the labour movement between the revolutionaries – who saw the law as a mere mask for bourgeois exploitation, and sought ultimately to do away with both the State and law – and the reformists who chose to appropriate the resources of the State and of law in order to fight for the law to be transformed. The first path led to the Communist experiment, which pursued the utopia of a world free of class conflict; the second led to the creation of the Welfare State, founded on a social hermeneutics of civil law, which was made possible by the recognition of the right to contest the law, a right that still remains the Welfare State's most innovative and lasting contribution.

Faced with the globalization of the market economy, we likewise need mechanisms that will enable a human and social hermeneutics of economic law to emerge. But unlike the labour movement, this can no longer take place under the aegis of the nation-state. Such a project must therefore be integrated into the procedures regulating international trade. The simplest solution would be to permit parties in a dispute taken to the World Trade Organization to submit a plea of lack of jurisdiction. The case would then be referred to an *ad hoc* body for settling disputes, under the auspices of the relevant international organization – the International Labour Organization for work and social protection, UNESCO for culture, and so forth. This body could have a panel system similar to that of the World Trade Organization, to ensure a balanced representation of the different cultures concerned. The search for such a balance globally – or rather, for less imbalance – would also dictate that rights of action specific to poor countries be recognized in their economic relations with rich countries.

It is, however, one of the lessons of social history that proclaiming equality does not suffice to make it a reality. On the contrary,

declarations of formal equality served in the first instance to strip the weak of what protection they had, and it took more than a century for social and economic rights to emerge and legal equality between employer and worker to become something other than the justification of the exploitation of the latter by the former. Equality between the sexes still remains more formal than real, and the European Union legislation that enshrines it has been used principally to disregard the rules protecting family life from the encroachments of the workplace, rather than to extend its benefits to working men. The proclaimed equality between rich and poor countries still serves to justify the exploitation of the latter by the former. Only when we cease to view individuals and peoples in the abstract and treat them as the human beings they are, can equality really be achieved. If we forget this, and treat strong and weak as formally equal, we run the risk that the weak will join the ranks of the enemies of equality.

As could be seen at Durban in 2001 (the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance), Southern countries are at present involved in a debate on human rights similar to the debate triggered by the industrial revolution, which split the labour movement. While some do not hesitate to dismiss human rights, professing a racist vision of the world, others demand that Northern countries respect human rights and acknowledge that they have violated them with respect to Southern countries. This was what motivated the demand that Europe and the United States recognize their responsibility in the slave trade and the enslavement and deportation of millions of Africans, which was undeniably a crime against humanity, and as such without prescription; likewise, we cannot deny that terrorism, understood as the deliberate extermination of civil populations for political ends, was widely practised and theorized in the West (from the Reign of Terror[88] to Hiroshima, via Guernica and the 'strategic area bombings' of Germany by the Allies). Were we to admit this, we could engage in a hermeneutic process resulting in a legal definition of terrorism acceptable to all, which could preserve us from the troubling effects of a 'war on terror' with no clearly identifiable opponent.

Genuinely opening up the law to its interpretation by all peoples is the path we must follow, since this path alone may enable humanity,

88. On this founding episode for the modern State, see P. Guéniffey, *La Politique de la Terreur. Essai sur la violence révolutionnaire*, Paris, Fayard, 2000.

in its infinite diversity, to agree on the values that unite it. This presupposes that Northern countries stop imposing their own convictions on others, at all times and in all places, and start learning from other cultures, in a common enterprise of exploration of the human beings we are.

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