

Homo Juridicus

On the Anthropological Function of the Law

Alain Supiot

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Translated by Saskia Brown

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PROLOGUE

Glissez, mortels, n'appuyez pas,
la glace est sous vos pas fragile

Pierre-Yves Narvor[1]

Humans are metaphysical animals. As biological beings, they apprehend the world through their sense organs. But they inhabit not only a universe of things but also a universe of signs, extending beyond language and embracing anything that gives material form to an idea and so may evoke what is physically absent. The universe of signs encompasses all things in which meaning is invested, particularly manufactured objects, insofar as they embody the idea that presided over their production and hence may be distinguished from natural things. It is a universe that includes the most commonplace objects, such as a hewn stone or a handkerchief, as well as the most sacred, like the *Mona Lisa* or the Pantheon. This universe also encompasses distinctive signs (clothing codes, makeup, tattoos) and bodily routines (gestures, ritual, dance) that transform the body itself into a sign. The life of the senses is inseparable, for humans, from the sense we confer on life, for which we are even ready to die, giving death itself a sense. It is vital for us to assign meaning to ourselves and to the world, in order to avoid sinking into meaninglessness, that is, in order to become and remain rational beings.

Every human being is born into a world of sense, the sense of a world already there, which gives meaning to his or her existence. In order to have access to this world, every child must learn to speak, and so subject him- or herself to the 'legislator of language'. If, as Plato says, this legislator 'is of all the artisans among men the rarest',[2] it is because

1. [*Glide, mortals, tread not heavily / the ice beneath your feet is thin*].

2. See Plato, *Cratylus*, 388e, trans. H.N. Fowler, Cambridge, MA, Harvard University Press, 1927, p. 25.

she has the appearance of our mother's face: our mother tongue, which is our first source of sense, is also the primary resource of the dogmatic beliefs necessary for the constitution of the subject. If we are to enjoy thinking and expressing ourselves freely in a language, we must first submit to the limits that give words meaning; without this radical heteronomy, we would have no autonomy. But even before the newborn child arrives at an awareness of his or her being through speech, he or she is named, situated in a lineage: a place will have been attributed to him or her within the succession of generations. That is, before we can dispose of ourselves freely and say 'I', we are already a subject of law, bound – *sub-jectum*: thrown under – by words which tie us to others. The bonds of law and the bonds of speech converge, enabling every newborn child to become a member of humanity, in other words, to have their life endowed with recognized meaning.[3] Wherever people are cut off from their fellow creatures, they are condemned to idiocy, in the etymological sense of the term (from the Greek *idios:* 'confined to oneself'), as are people who cannot envisage that universes other than their own exist and who are therefore incapable of arriving at a consensual representation of a world where we would each have a place. The aspiration to justice is thus, for better and for worse, a fundamental anthropological fact and not a hangover from pre-scientific modes of thought. People will kill and die for a cause they consider just (Freedom, Country, God, Honour, and so forth) – which implies that we each bear within us a bomb.

Human beings are not born rational, they become so by gaining access to meaning shared with others. Every human society in its own way undertakes the institution of reason. What we call 'society' is a weave of speech binding people together (which by the same token makes an 'animal society' impossible).[4] 'Law' and 'contract' are two sorts of legal ties by which we are bound and which bind people together: under 'law' we can class texts and words imposed on us independently of our will, and under 'con-

3. *Signum*, in Classical Latin, corresponds to the Greek *sêma*; its general sense is 'distinguishing mark' or 'stamp', and it applies to ensigns or standards, painted or carved images, as well as to the distinctive forename of a person, a signal, slogan, portent or symptom. In French, *signification* ('meaning') from the very first denoted what allows one to affirm that something that is not present exists. Its cognates *signifier* and *signification* had, from very early on, the legal sense of 'to notify', 'to bring a legal deed officially to the attention of those to whom it applies'. See A. Rey (ed.), *Dictionnaire historique de la langue française*, Paris, Robert, 1992, s.v. '*signe*'; also R. Maltby, *A Lexicon of Ancient Latin Etymologies*, Leeds, Cairns, 1991.

4. See P. Legendre, *De la société comme texte. Linéaments d'une anthropologie dogmatique*, Paris, Fayard, 2001.

tract' those stemming from an agreement freely entered into with an other. We are each bound by our civil status as determined by law before being bound by any commitment we may make. Moreover, not everything we say is binding on us, or brings obligations, in the literal and etymological sense of the term (*ob-ligare*: to tie to); for example, I am in no way bound by what I am writing at this moment and I reserve the right to go back on what I say, or contradict myself. Within the words and texts that bind me to others, that create obligations, we must identify those which come from me and those which come from others, since the latter only have authority over me and logically came first in my life, even though I did not pronounce them myself or give my assent to them. Our concepts of law and contract are therefore intimately related. Both stem from the belief in a divine Legislator who vouches for the pledges made by those who believe in Him, who are true to Him and therefore true to their word. That is why such notions do not exist in the same abstract and general form in other civilizations, for example in China and Japan. The ideas of law and contract common to the civilizations of the Book constitute only one way of instituting justice among people, and bringing them under the rule of reason.

It is by transforming each of us into a *homo juridicus* that, in the West, the biological and symbolic dimensions that make up our being have been linked together. The law connects our infinite mental universe with our finite physical existence and in so doing fulfils the anthropological function of instituting us as rational beings. To reject the biological or the symbolic dimension leads to the insanity of treating humans as mere animals or as pure mind, subject to no limits that are not self-imposed. Pascal expressed this connection in its most succinct form: Man is neither angel nor beast. Yet we find it hard to grasp this simple idea because our categories of thought set the body against the mind, 'materialism' against 'spiritualism'. The progress of science and technology has moreover exacerbated this division. We are convinced that human beings may be explained just like any other natural object. The natural sciences, it is argued, will one day be able to reveal and process all there is to know about us, so that, when all mysteries have been elucidated, we will be able to escape all natural constraints: we will choose our sex, remain untouched by age, triumph over illness and – while we are at it – over death itself. To view the human being as pure object or pure mind are two sides of the same lunacy.

One of the lessons that Hannah Arendt draws from the experience of

totalitarianism is that 'The first essential step on the road to total domination is to kill the juridical person.'[5] To deny the anthropological function of the law in the name of a supposed realism grounded in biology, politics or economics is something that all totalitarian projects have in common. This lesson seems to have been forgotten by the jurists who today argue that the legal person is a pure construct bearing no relation to the concrete human being. And, indeed, the legal person is just that, a construct, but in the symbolic universe that is ours, everything is a construct. Legal personality is certainly not a fact of nature, but rather a certain representation of the human being that posits the unity of body and mind at the same time as it formulates a prohibition: that the human being should never be reduced onesidedly to either. In the wake of the horrors of Nazism, it was deemed necessary to extend legal personality and the prohibition it contains to every person wherever they might be.[6] It is this prohibition that is really being challenged when people today seek to disqualify the subject of law and treat the human being as a mere accounting unit, like cattle, or – and it amounts to the same – as a pure abstraction.[7]

This reductive approach to the human being goes hand in hand with the development of arithmetical calculation, on which capitalism and modern science were built. A good example of this development is the way the legal principle of equality has been mapped onto arithmetical equality, so as to abolish all difference: if I say $<a = b>$, then a may be indifferently replaced by b, wherever it occurs, such that $<a+b = a+a = b+b>$. If we apply this to sexual equality, it means that a man is a woman and *vice versa.* But equality between men and women does not mean that men *are* women, even if they may sometimes dream of being so. The principle of equality between the sexes is one of the most valuable and vulnerable achievements of the West, but it is doomed in the long term if it is conceived mathematically, that is, if the human being is treated as a purely quantitative unit. Thinking and living equality *without* negating differences is precisely the difficult task that modern societies confront today. This is relevant not only to relations between men and women but equally to relations between men or women of different nationality, customs, culture, religion or generation. What distin-

5. H. Arendt, *The Origins of Totalitarianism*, London, Allen & Unwin, 1967, p. 447.

6. The Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December, 1948 art. 6.

7. For the different aspects of this legal reification of the human being, see B. Edelman, *La Personne en danger*, Paris, PUF, 1999.

guishes capitalism is not the pursuit of material riches but the subordination of the diversity of people and things to the rule of quantity. It is a rule that engenders ludicrous interpretations of equality when we are encouraged to believe in abstract numbers independently of the qualitative character of what we are counting.[8]

Calculating is not thinking, and the arithmetical rationalization on which capitalism is built degenerates into madness when it leads people to believe that what cannot be calculated for that very reason has no significance. The ability to calculate is without doubt an essential attribute of reason,[9] but it is not reason in its entirety. The logical formalization of such an ability has led to the invention of the computer; and the process whereby the human mind projects itself onto an object has, from the very first carved flint, been the agent of technological progress and mastery over the material world. But the kind of cognitivism which currently replaces yesterday's Science of Mind moves in the opposite direction: it projects onto the human mind the model of the calculating machine, hoping, with the help of a few nanotechnologies, to end up mastering thought itself. Like the prevalent economic ideology, it is based on the belief that rational beings are exclusively calculating beings, such that their behaviour can, in turn, be calculated and programmed. But, in order to calculate, we must first be able to forget the diversity of things and beings, retaining only their most basic characteristic: their number. What enables us to forget this diversity – without which there would be no calculation of interest nor scientific calculation – is that other facet of human reason, which covers everything that numerical abstraction leaves out. For even mathematics cannot do without undemonstrable postulates, its axiomatic basis. We cannot add up caterpillars and clouds because we can only count identifiable objects in which we posit some common trait; and the categories of thought through which we identify and classify natural objects are not themselves mathematical (which does not mean that they are not rational). The labour of thought is to give meaning to calculation by systematically relating the quantities measured to a measure of sense. There inevitably remains a dogmatic element in our definition of this

8. See R. Guénon, *The Reign of Quantity and the Signs of the Times*, trans. Lord Northbourne, London, Luzac & Co., 1953.

9. The French term *raison* comes from the Latin *ratio* (which itself comes from the verb *reor*, to count, to calculate) and which first meant 'amount' before it came to mean 'judgement, doctrine', and, lastly, 'reason' (see R. Maltby, *Lexicon of Ancient Latin Etymologies, op. cit.*,); *ratio* in contemporary French has retained the first sense (numerical ratio).

sense, insofar as our categories of thought are not a gift of nature; they are the means by which we seek to understand it.

Sapere aude! 'Have courage to use your own reason!'[10] Kant's famous precept reminds us of the act of faith on which the Enlightenment rests: faith in the human being as rational being. We believe in the Enlightenment if we believe that the human being is capable of thinking freely. Such an act of faith should not prevent us from examining the conditions under which the human being may become a rational being, but it should prevent us assimilating the human being to an animal or a machine, or professing to explain him or her away through external determinants. Whenever the discipline of the human sciences attempts to imitate the natural sciences, reducing people to objects that can be programmed and explained away, it becomes a mere relic of Western dogma, a pitiful reminder of the decomposition of scientific thought as it busies itself with eliminating the very questions it should be addressing. Besides, the persistent efforts to force society into the mould of mechanics or biology are doomed to failure because whereas biological norms may be discovered by examining biological organisms, this is not the case with human societies. The founding norm, which secures our place within a given society, can only come from outside it. For Georges Canguilhem, this feature remains 'one of the major problems of human existence and one of the fundamental problems that reason attempts to address'.[11] It implies that the meaning of life cannot be found within our organs but only in relation to a point of reference lying outside of us. If we refuse to admit this, and identify reason with scientific explanation, or law with biological regulation, we will give free rein to madness and murder; and if we remain blind to the necessity of instituting reason, society will appear to us simply as a mass of elementary particles driven by the calculation of individual utilities or by a physico-chemical makeup. In such a framework, every human being is taken to be a self-sufficient entity, whereas in reality not a single one of us can do without the others. Without a common reference point to guarantee a meaning and a place for each of us, we become caught in a trap of self-referentiality, with no choice other

10. I. Kant, *Beantwortung der Frage: was ist Aufklärung?* [1783], translated by Lewis White Becker as 'What is Enlightenment?' in *Critique of Practical Reason and Other Writings in Moral Philosophy*, Chicago, University of Chicago Press, 1949, p. 286.

11. G. Canguilhem, 'Le problème des régulations dans l'organisme et dans la société', in his *Cahiers de l'Alliance israélite universelle*, 92, September–October 1955, pp. 64ff., reprinted in his *Écrits sur la médecine*, Paris, Seuil, 2002, p. 108.

than solitude or violence. That is how we arrive at the war of all against all, suffering what Vico called the 'civil malady' of peoples in decay.[12]

If science and technology, as well as the market economy, are historically the products of Western civilization and are still closely linked to it, this is because of the beliefs on which this civilization is founded. Scientific and technological progress stemmed from the belief that the Earth was God's legacy to humankind, that Nature was organized according to His unchanging laws and that knowledge of these laws would give humans mastery over Nature. The material prowess of the West, and the consolidation of its identity, thus owes much to Christianity.[13] We tend to think that all this belongs to the past and that Western societies have freed themselves from religion. The 'disenchantment of the world' and the 'desertion of religion' have become commonplaces in the social sciences, to the extent that many Westerners consider the continued attachment of other peoples to the religious foundations of their societies as an archaic trait destined to disappear. But we should not forget that the meaning of the word 'religion' has changed into its opposite with the secularization of society. There is religion and Religion. Whereas previously Religion constituted the dogmatic foundation of society, nowadays it is a question of individual freedom; a public affair has become a private one, which is why discussing religion today is unfailingly a source of misunderstanding. In medieval Europe, Religion was not a private matter and so had no existence in the sense the word has today.[14] At the time, Religion determined the legal status of both the Prince and his subjects. Even commercial law, the *lex mercatoria* which developed during that period, was the work of good Christians united in a common faith, and the 'trust account', which was later to become a powerful instrument of capitalism, was invented to serve the needs of

12. G. Vico, *Princìpi di Scienza nuova d'intorno alla comune natura delle nationi* [1744], translated by David Marsh as *Principles of the New Science Concerning the Common Nature of Nations*, London, Penguin Books, 2001, p. 488.

13. The reference to the 'West' originates in the great division of the Roman Empire into Eastern and Western realms. It designates the different cultures that inherited their political structures from medieval Christianity. This imperial legacy explains, among other things, why those Westerners who most strongly believe that their vision of the world is absolutely universal are also those who refuse to recognize themselves in this reference to the West, which would put them on an equal footing with other civilizations.

14. See J.-C. Schmitt, 'La croyance au Moyen Âge', *Raison présente*, 115, 1995, p. 15, reprinted in his *Le Corps, les rites, les rêves, le temps. Essais d'anthropologie médiévale*, Paris, Gallimard, 2001, pp. 77ff.

Franciscan monks who did not want to own the goods they had received by donation.[15] The idea of an undying State derives from that of the mystic body, in the theory of the king's two bodies.[16] Modernity brought about the secularization of these notions in the West, with the State becoming the ultimate guardian of the identity of persons and the guarantor of the pledged word. But a distinction has remained between what one could broadly call the realm of faith and the realm of calculation. The realm of faith is the realm of the qualitative and the undemonstrable; it is basically the sphere of law and of public debate. The realm of calculation, of the quantitative, is the sphere of the contract and negotiation.

The fact that Christianity no longer has any constitutional position in certain Western countries in no way implies that the latter are not founded on dogma. States, no less than people, continue to be sustained by undemonstrable certainties, beliefs that are not the result of free choice because they are part and parcel of one's identity. Ask an Englishman if he 'believes in the Queen' (head of state and of the Anglican Church: 'God save the Queen!') or a Frenchman if he 'believes in the Republic' ('indivisible, secular, democratic and social'), and it will sound today as absurd as asking the question 'Do you believe in the Pope?' would have in medieval Europe. Of course the latest credo of Western man is that he no longer believes in anything, a position that is particularly widespread in former Catholic countries, where the separation between State and Church is greatest. But even those who today label themselves as unbelievers will readily admit to believing in the value of the dollars in their wallets, although these are nothing but scraps of paper. It is true that they bear the words 'In God we trust' and that the President of the United States, who is sworn in on the Bible, misses no opportunity to remind us of the special bond between his country and God,[17] a bond echoed in the motto 'God bless America'. But we place our confidence equally in the yen or

15. See L. Parisoli, 'L'involontaire contribution franciscaine aux outils du capitalisme', in A. Supiot (ed.), *Tisser le lien social*, Paris, MSH, 2004, pp. 199ff.

16. E. Kantorowicz, *The King's Two Bodies: a Study in Medieval Political Theory*, Princeton, Princeton University Press, 1957.

17. At the G8 meeting in Canada in June 2002, President Bush declared to the summit (the summit of the eight richest countries in the world) that 'the declaration of God in the Pledge of Allegiance doesn't violate rights. As a matter of fact, it's a confirmation of the fact that we received our rights from God, as proclaimed in our Declaration of Independence' (*United Press International*, 28 June 2002, and *USA Today*, 27 June 2002).

the euro, even though we have taken pains to eradicate any religious reference from them.

'Irrational' beliefs instituted and guaranteed by the law can thus be found at the very heart of the arithmetical rationality which is the hallmark of our times. Even the economy, insofar as it involves exchange, is above all concerned with credit (etymologically *credere*: 'to believe'); and, in its free trade form, is based entirely on legal fictions such as legal personality or the circulation of debt claims, that is, the circulation of beliefs. These dogmatic foundations of the market[18] resurface whenever the confidence of economic operators begins to waver. One has only to cast doubt upon the veracity of a company's accounts – those mysterious icons created by accounting rules – for the good old techniques of the oath and severe punishment of perjury, which American law is extending to the whole world, to come galloping back, in order to restore confidence in the authenticity of these revered figures.[19] When all is said and done, no State, not even those that declare themselves totally secular, can do without a certain number of founding beliefs which cannot be empirically demonstrated and yet which determine its nature and actions. Just as the ability to communicate, and freedom of speech, would be impossible without the dogmatic rules of language, so people cannot live freely and peaceably without the dogmatic nature of the law.

The West's project of dominating the rest of the world is based on its conviction that it possesses the truth and is superior to all other societies. This conviction has remained intact throughout the different forms it has taken historically. It was first conveyed by the dogmas of Christian Rome, in which the idea of the West originated, in opposition to the Christianity of the Eastern empire. It was in the name of these dogmas that the non-Christian world was first conquered and converted. Thereafter, science took over from religion to justify ruling over other populations. Until the Second World War, the idea of a biological inequality between people was widespread, particularly in Protestant countries, and was one of the 'scientific truths' inherited from Darwinian science.[20] In countries with a

18. See A. Supiot 'The Dogmatic Foundations of the Market', *Industrial Law Journal*, vol. 29, 4, December 2000, pp. 321–45.

19. Following the Enron and WorldCom scandals, the Sarbanes–Oxley law of late July 2002 obliges directors of companies trading on the US stock exchange to swear under oath that their accounts are correct. Perjury is punishable by twenty years' imprisonment, and directors cannot evade their responsibility by claiming bankruptcy.

20. See A. Pichot, *La Société pure. De Darwin à Hitler*, Paris, Flammarion, 2000.

Catholic tradition, like France, the colonial enterprise was justified by the idea of the West's historical mission, a 'civilizing mission' which aimed to dispel the night of superstition in which certain peoples were still shrouded. While the idea of racial inequality may well have disappeared after Nazism and the notion of 'civilizing mission' did not survive the collapse of the colonial empires, the history of the West nevertheless continues to unfold according to the same – slightly revised – logic. Humanity is henceforth divided into developed and under-developed countries (more recently termed 'developing'); well-meaning economists have even invented 'human development indicators' to measure how far behind certain peoples are compared to their Western counterparts.[21] As for the prophets of the end of history, they consider that the domination of the West over the rest of the world has an objective cause, namely obedience to the laws of the economy. This credo has been taken up by European Union institutions and international organizations, with a view to extending the supposed benefits of a free market economy to the whole wide world. Whatever happens, Western countries will always be on the right historical track – especially since they are the only ones to believe in such a thing.[22]

Western legal systems, in which the conception of the human being as a rational being is most fully developed, are themselves based on dogma. For example, the Preamble to the French Constitution of 1946 opens thus: 'The French people once again proclaim that every human being, irrespective of race, religion or creed, possesses inalienable and sacred rights.' The Subject – the French people – that proclaims these 'sacred rights' is evidently not exposed to the condition of mortality, otherwise it would be unable to remind the world of what it had already declared in 1789: the sacredness of Man himself. Likewise, the United States Declaration of Independence is based on what are called 'self-evident truths' ('We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .'), that is, on dogma in the etymological sense of the term: that which is true and displayed and honoured as such. It is clearly a religious statement, in what is historically the

21. See the *World Report on Human Development*, published in the framework of the United Nations Development Programme (UNDP), Brussels, de Boeck and Larcier, 2002. The invention of human development indicators is explained in a technical note in the Annex to the Report, pp. 252ff. It turns out that in 2002 the Norwegians were the most developed people on the planet.

22. See K. Löwith, *Meaning in History: Theological Implications of the Philosophy of History*, Chicago, University of Chicago Press, 1949.

primary sense of the term, that is, a statement that cannot be freely evaluated but rather is absolutely and timelessly imposed on all. The cliché that is served up time and again, that law arrives after the fact, overlooks this temporality of legal systems. As is the case for any system based on dogma, the legal system cannot be situated in a continuum of chronological time but takes place in a sequential time frame in which any new law both repeats a founding discourse and generates new cognitive categories.[23]

It is thanks to Pierre Legendre that this concept of dogma has been placed at the heart of our analysis of modernity.[24] 'Dogma' is a pivotal concept in the history of science (particularly in medecine[25]), but is generally taken, in everyday language, to imply the very opposite of reason. And yet human reason – today as in the past, in the West as elsewhere – is founded on dogma, which is 'the site of legal truth, posited and displayed socially as such'.[26] Our entry into language, which defines us as human beings, also opens the gates wide to every form of lunacy. Dogma is there to close those gates. The dogmatic dimension of human reason did not escape the notice of the founding fathers of the human sciences. Tocqueville states that dogmatic beliefs 'can change in form and object, but one cannot make it so that there are no dogmatic beliefs, that is to say opinions which men accept on trust and without debate'.[27] Auguste Comte, father of both scientific positivism and the Religion of Humanity, is even more explicit:

> Dogmatism is the normal state of the human mind, the state to which by nature it tends, continuously and in all sorts, even when the mind seems to be distancing itself from it most. For scepticism

23. This temporality characteristic of legal discourse can be observed in the cultures originating in the religions of the Book. For the case of Islam, see Aziz Al-Azmeh, 'Chronophagous discourse: a study of clerico-legal appropriation of the world in an Islamic tradition', in F.E. Reynolds and D. Tracy (eds), *Religion and Practical Reason*, Albany, State University of New York Press, 1994, pp. 163ff.

24. See particularly P. Legendre, *L'Empire de la vérité. Introduction aux espaces dogmatiques industriels*, Paris, Fayard, 1983; P. Legendre, *Sur la question dogmatique en Occident*, Paris, Fayard, 1999; also his *De la société comme texte*, *op. cit.*

25. See M. Herberger, *Dogmatik. Zur Geschichte der Begriff und Methode in Medizin und Jurisprudenz*, Frankfurt, Klostermann, 1981.

26. P. Legendre, *Sur la question dogmatique en Occident*, *op. cit.*, p. 78.

27. A. de Tocqueville, *De la démocratie en Amérique*, II, I, chap. II; 'De la source principale des croyances chez les peuples démocratiques', translated by Stephen D. Grant as *Democracy in America*, II, I, ch. 2, 'The Principal Source of Beliefs among Democratic People', Indianapolis, IN, Hackett, 2000, p. 175.

> is only a state of crisis, the inevitable result of the intellectual interregnum which necessarily occurs whenever the human mind is called to change doctrines, and at the same time an essential means employed whether by the individual or the species to permit the transition from one dogmatism to the other; that constitutes the only fundamental utility of doubt [. . .]. Modern people have obeyed this imperious law of their nature, even in their revolutionary period, since whenever it was necessary really to act – even if only to destroy – they were led inevitably to give a dogmatic form to ideas which were in essence purely critical.[28]

One should not forget the central role of the religious paradigm in Durkheim's and Weber's sociology, and in the anthropology of Marcel Mauss and Louis Dumont, none of whom lost sight of the beliefs which bind human society together. Yet dogma is considered nowadays to be the obscene underbelly of reason, destined to be eradicated.

Since the legal system is clearly the last refuge of dogma, attempts have been made to subsume it under the laws of science, whether the laws of history or race, as in the past, or those of economics or genetics, as is the case today. Such projects are supported by those legal theorists who see law as nothing but the product of political or economic forces. Materialist critique was the first to treat law as nothing but a technique of power serving the interests of the powerful, such that only laws ratified by science should be binding on people. This idea was brilliantly formulated by Pashukanis at the time of the Russian Revolution,[29] and was further developed by those for whom the idea of justice had no place in a 'scientific' analysis of law (even if they themselves were often aware of the very real injustices produced by existing legal systems[30]). But reducing law to a mere instrument of force has also been the hallmark of all totalitarian

28. A. Comte, 'Considerations on the Spiritual Power', *Early Political Writings*, ed. and trans. H.S. Jones, Cambridge/New York, Cambridge University Press, 1998, pp. 214–15.

29. E.B. Pashukanis, 'The General Theory of Law and Marxism', in P. Beirne and R. Sharlet (eds), *Selected Writings on Marxism and Law*, London/New York, Academic Press, 1980, pp. 32–131.

30. Duncan Kennedy, a brilliant representative of Critical Legal Studies, describes his first days studying law as follows: 'I started law school in 1967 with a sense that "the system" had a lot of injustice in it, meaning that the distribution of wealth and income and power and access to knowledge seemed unfairly skewed along class and race lines,' in 'The Stakes of Law, or Hale and Foucault!', *Legal Studies Forum*, vol. 15, 1991, p. 327.

regimes. When they have not simply done away with legal forms altogether, they have exempted those in positions of power from any legal constraints. The fact that these enterprises have always ended in failure shows how futile the contemporary theories are that seek to explain the law without reference to the idea of justice. They are mostly elaborated by individuals genuinely seeking greater insight (even if they do tend to overlook that their comfortable academic position itself owes much to the legal form).[31] But those who were forced to reflect on these same issues from within the hell of totalitarianism drew quite different conclusions. Simone Weil wrote in 1943:

> Where force is absolutely sovereign, justice is absolutely unreal. Yet justice cannot be that. We know it experimentally. It is real enough in the hearts of men. The structure of a human heart is just as much of a reality as any other in this universe, neither more nor less of a reality than the trajectory of a planet. It doesn't lie within the power of any man absolutely to exclude all justice whatsoever from the ends which he assigns to his actions. The Nazis themselves have not been able to do this. If it were possible for men to do so, the Nazis would no doubt have managed it [. . .] If justice is ineradicable from the heart of Man, it must have a reality in this world. It is science, then, which is mistaken.[32]

Jurists who believe it is realistic to eliminate all considerations of justice from their analysis of the law are profoundly misguided and fundamentally unrealistic: they forget that human beings have two

31. The French 'legal critique' movement was explicitly Marxist in inspiration, which maybe explains why the 'critical positivists' of today hardly refer to it. They are more likely to adhere to the American Critical Legal Studies movement (called 'Crits'). The latter refers abundantly to Foucault and Derrida, which certainly breathes new life into that old undertaking of seeking to make law 'wither away' – a project rebaptized 'deconstruction' – and which conveniently erases the burdensome memory of Communism as it really was. For the French legal critique movement, see M. Bourjol et al., *Pour une critique du droit. Du juridique au politique*, Paris/Grenoble, Maspero and PU de Grenoble, 1978; and for the Crits movement, see R.M. Unger, *The Critical Legal Studies Movement*, Cambridge, MA, Harvard University Press, 1986; also A.C. Hutchinson and P.J. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', *Stanford Law Review*, vol. 36, 1984, p. 199.

32. S. Weil, *L'Enracinement. Prélude à une déclaration des devoirs envers l'être humain* [1943], translated by A. F. Wills as *The Need For Roots. Prelude to a Declaration of Duties Towards Mankind*, London, Routledge and Kegan Paul, 1952, pp. 232–3.

dimensions, and that life in society partakes both of 'being' and of 'ought-to-be'. Law is neither a divine revelation nor a scientific discovery. It is a wholly human creation that includes the contribution of those who claim to study it and who cannot remain blind to the values implied by their interpretations. Every society must develop a vision of justice that is shared by all its members, in order to avoid civil war, and this is what the legal framework provides. Whereas conceptions of justice differ from epoch to epoch and from country to country, the need for a shared representation of justice in a particular country and at a particular time does not. The legal system is where this representation takes shape and, although it may well be contradicted by the facts, it gives shared meaning and a common orientation to people's actions. These are the very simple truths which the horrors of the Second World War fixed firmly in everyone's mind, and which jurists are today forgetting when they claim, in the name of science[33] – and returning to the positivist ideals of the pre-War years[34] – that every 'value choice' falls within the sphere of individual morality and must therefore be excluded from the strictly legal sphere. The study of law requires knowledgeable and scholarly minds capable of understanding the moral, economic and social issues involved in legal technique, and not latterday Scholastics professing to possess the 'true science'.

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33. The claim to the status of 'scientist' defended by certain jurists (some even compare themselves to nuclear physicists!) would be simply comical if it did not remind us chillingly of what Georges Ripert wrote in his preface to a collective volume on Nazi law: 'Men of science have the right to be unconcerned with the practical consequences of their research' (in *Études de droit allemand*, Paris, LGDJ, 1943, pp. VI–VII, cited by C. Singer in *Vichy, l'Université et les juifs*, Paris, Les Belles-Lettres, 1992, p. 179). Ripert was Dean of the Law Faculty of Paris and became Secretary of State for Education under the Vichy government. It is in this role that he presided over the first political and racial purges of the teaching profession. In private he declared that he found the first anti-Semitic laws 'brutal and unjust', while at the same time overseeing their implementation as a 'technical advisor' (C. Singer, *Vichy, l'Université*, *op. cit.*, p. 95; on this subject, see also the courageous summary by D. Lochak, 'La doctrine sous Vichy ou les mésaventures du positivisme', in D. Lochak et al. (eds), *Les Usages sociaux du droit*, Paris, PUF, 1989, pp. 252ff.).

34. See the biting criticism that H. Dupeyroux levelled at legal positivists as early as 1938: 'Our legal positivists may try as they may to banish that uncomfortable notion called justice – be done with it, lock it up somewhere, keep it from getting out – it will necessarily return to its proper place due to the teleological nature of law. It permeates every rule; it reappears in enforcement, or in the refusal of enforcement; all attempts to stifle it are destined in advance to failure. If I may put it in such terms, justice seeps in everywhere' ('Les grands problèmes du Droit', *Archives de philosophie du droit*, 1938, vols 1–2, pp. 20–21).

Other jurists do not deny that the law has something to do with justice, but they immediately identify justice with maximizing individual utility.[35] This is what the 'Law and Economics' doctrine does, relating every rule to a calculation of utility which would be both its source and the measure of its legitimacy.[36] This doctrine has become very popular on French campuses and has found additional support in the Court of Cassation (*Cour de cassation*) which recently became its most zealous advocate.[37] So even jurists have been bitten by this mania for calculation, and seek to reduce human society to the sum of individual utilities.[38] From such a perspective, all rights are individual rights. Every rule is transformed into a subjective right: right to security, to information, to privacy, to dignity, to have a child, to a fair trial, to knowledge of one's origins, and so forth. Rights are doled out like arms – and now it's over to you! Law as a shared heritage disappears in this flood of individual rights, which

35. In this they reflect today's prevailing economism. The famous work of J. Rawls (*A Theory of Justice*, Oxford, Clarendon Press, 1972) owes much of its success to the fact that it posited a contractual basis for the generalization of the calculation of utility. For a more brutal, but also clearer, presentation of this way of conceiving society, see G.S. Becker, *The Economic Approach to Human Behavior*, Chicago, University of Chicago Press, 1976.

36. R.A. Posner, *Economic Analysis of Law* [1972], 5th edn, New York, Aspen Law & Business, 1998; R. Cooter and T. Ulen, *Law and Economics*, Glenview-Illinois, Scott, Foresman & Co. [1988], 2nd edn, 1996; E. Mackaay, 'La règle juridique observée par le prisme de l'économiste, une histoire stylisée du mouvement de l'analyse économique du droit', *Revue internationale de droit économique*, vol. 1, 1986, p. 43, and *id.*, *L'Analyse économique du droit*, vol. 1: *Fondements*, Montreal and Brussels, Thémis & Bruylant, 2000.

37. This highest jurisdiction, which one might have thought was there to judge and not to support and disseminate theories, organized a series of conferences in 2004 in partnership with the Chair of 'Regulation' at Sciences Po Paris (l'Institut des études politiques de Paris). The title of this cycle could not be more explicit: 'The Relevance and Interest of an Economic Analysis for Law, Economics and Justice' – to which should be added the explanation given by the First President of the Cour de cassation to the press: 'Judges at the Cour de cassation should be able to integrate an economic analysis into their legal arguments' (G. Canivet, 'La Cour de cassation doit parvenir à une analyse économique "pertinente" ', *Les Échos*, 1 March 2004). In calling upon economic analysis to lay down the law through its integration into legal reasoning, the normative dimension of such an analysis is being enshrined by the highest judge in France.

38. One is eventually led to reduce the law to the calculation of interests which is operative in the contract. But in so doing, it is the very notion of contract that is destroyed. An example of this is provided by the contemporary theory of the 'efficient breach of contract', according to which there is no difference between honouring one's word and providing reparation for the consequences of not doing so. See Chapter 3.

obscures the fact that law has *two* aspects, subjective and objective, and that they are two sides of the same coin. In order for each of us to be able to enjoy his or her subjective rights (*les droits*), these must be related to law as a legal system (*le Droit*) which is the shared framework recognized by all, and the normative skeleton within which individual rights take on meaning. Law as the body of legal rules stems from the State, the sovereign legislator, whether in the form of the Prince or the Nation. It is this idea of law as *heteronomous rules* that is withering away,[39] as though persons could be bearers of individual rights without any need for the law, which makes these not only enforceable but, firstly, possible. It is as though, on the contrary, the whole sphere of the law were simply the sum total arrived at by adding and subtracting different, and sometimes conflicting, individual rights.

The common law tradition, which is today's dominant legal culture and also the cradle of the economic analysis of law, can go all the more blithely down this path because it precisely lacks a term equivalent to the French *Droit objectif (or Droit* with a capital D). The French concept has equivalents throughout the Continental tradition. It is translated by 'law' in English, but the translation loses both the idea of direction, of common orientation, which the term *Droit* takes from its root *directum*,[40] and the distinction between *a* single law or piece of legislation (*loi*, *legge*, *Gesetz*, *ley*) and the sphere of the law as a legal system (*Droit*, *Diritto*, *Recht*, *Derecho*), a distinction that holds throughout Continental Europe. This distinction originates in Roman law,[41] where *lex* designates the place where a legal system is founded (well conveyed by the German term *Gesetz:* 'that which is placed, posited'), and *ius* the rules governing how this system functions. The modern meaning of this distinction comes to us from Romano-Canonical law which conceives the State on the model of the papacy, as State and Legislator in one, both source of the law (the system of rules, *le Droit*) and of rights (the prerogatives secured for each individual, *les droits*). English retains from the tradition of *ius* only the figure of the

39. See J. Carbonnier, *Flexible Droit. Pour une sociologie du droit sans rigueur*, Paris, LGDJ, 6th edn, 1988, p. 85.

40. Derived from *dirigo*: 'to trace a path', 'to guide' (see R. Maltby, *A Lexicon of Ancient Latin Etymologies*, *op. cit.*).

41. See for example the *Institutes of Gaius*, 1–3, translated by W.M. Gordon and O.F. Robinson, London, Duckworth, 1988. On the origins of the concept of *ius*, see A. Magdelain, 'Le Ius archaïque' [1986], reprinted in *Ius imperium auctoritas. Études de droit romain*, Rome, École française de Rome, 1990, pp. 3–93.

'judge' and of 'justice', in other words the scene of recognition of individual rights in litigation. In the common law tradition, it is the judge and not the Crown (the State) that incarnates the ultimate source of legitimacy – the totemic figure of legislative power – and no word exists for the normative whole through which individual rights gain their meaning and significance.[42]

However, the difference between common law and Continental cultures should not be overemphasized, since the idea of a normative unity is certainly present in the common law tradition, while holding a less prominent position than in its Continental counterparts, since in common law the normative unity (equivalent to French *le Droit*) develops out of individual rights (equivalent to French *les droits*), and not *vice versa*. If we take, for example, the legal mechanisms for controlling globalization, a jurist from the Continental tradition will think firstly of the creation of international institutions capable of formulating common rules, while a common law jurist will think of endowing every inhabitant of the planet with the same individual rights. Common law has typically flourished in Protestant countries, where the idea of the believer's unmediated individual relation to the Text is most fully developed. Without going into the relative influence of the religious and legal traditions here, we can simply note the idea that nothing intervenes between the individual and the law. Our contemporary world sees great potential in this, because it allows one to imagine laws without States. For example, economic analyses of law treat the whole of humanity as an aggregate of individuals armed with the same rights – the right to vote, the right to property, human rights – and competing with each other under the rule of the one and only law, the law of the market, which prescribes the struggle of all against all. This vision of the world allows one to dismiss States and legal systems as expressions of local sovereignty which have no place in the imperial model which is today making a comeback under the name of globalization.

But by making the individual the alpha and omega of legal thought, the sole certainty that studying law can yield is forgotten, namely that there is no identity without limits, and if people do not find limits internally they will seek them beyond themselves. Europeanization and globalization open onto a sinister future if they are

42. The English-language translation of Hegel's *Grundlinien der Philosophie des Rechts* as *Philosophy of Right* is a sign of this difficulty and particularly abstruse for an Anglophone reader (see Hegel, *Philosophy of Right*, trans. T.M. Knox, Oxford, Oxford University Press, 1965, or trans. S.W. Dyde, New York, Prometheus Books, 1996).

conceived as processes of obliteration of differences and homogenization of beliefs. To believe that one's categories of thought are universal and to impose them on the rest of the world is the surest way to disaster. Old Europe knows a thing or two about it, having trodden that path time and again. France in particular has always finally come up against the limits of its universalist pretensions, from the Napoleonic campaigns to the Indochinese War. Similar disappointments await the utopia of a globalized world exchanging market values and human rights in pidgin English. The radical individualism that has taken hold of legal thought has transformed the beliefs underlying Western legal systems into some transcendent Law which is then imposed on the whole wide world. That is how we arrive at a Western fundamentalism which cannot but fuel the fundamentalisms of other systems of belief. If we claim to make the world uniform, we wreck all chances of unifying it, and dissolving our legal heritage into a collection of individual rights secured by a supposedly universal Law is the surest path to a 'clash of civilizations' where belief confronts belief, armed to the teeth.

A better solution would be to return to what has always been the distinctive feature of legal systems: not the beliefs they contain, on which the West has flourished, but the resources of interpretation they harbour. A legal framework, like any other normative system, fulfils the function of an interdiction. It is a word imposed on all, and interposed between each person and his or her representation of the world. Everywhere else, this anthropological role has been assigned to religion, which endows human lives with a common meaning and can thus fend off the danger threatening each of us of succumbing to our own private madness, as from our entry into language. The specificity of the law in this sense, since its emergence in Graeco-Roman Antiquity, is that it has progressively moved away from its religious origins to arrive at what Louis Gernet calls a 'secularization of speech'.[43] It has become a technique of interdiction: a *technique*, because its meaning is not sealed within the letter of a sacred and immutable Text but, like any other technical object, depends on the objectives that people have set for it, and these are human, not divine, ends; and a technique *of inter-diction*, which interposes a realm of shared meaning transcending the individual and carrying obligations with it, between people, and between people and the world, and so

43. See L. Gernet, 'Droit et prédroit en Grèce ancienne', *L'Année sociologique*, 1951, pp. 21ff. reprinted in his *Droit et institutions en Grèce antique*, Paris, Flammarion, 1982, p. 110.

transforms each of us into a link in the human chain.[44] Law has served many varied purposes in the history of political systems as in the history of science and technology, but it has served these by subordinating power and technology to human reason. It is therefore as misguided to reduce law to a 'mere technicality' empty of meaning, which people tend to do today, as it is to subsume it under the supposedly immutable rules of a hypothetical Natural Law, as people did in the past. In either case, law's essential quality is neglected, namely that it can temper the most varied forms of political power or technological prowess with a measure of reason.

It is this quality that should be borne in mind and defended today. While it would be madness to seek to make the law into an instrument for spreading our beliefs abroad, we can reasonably hope that the resources of interpretation provided by our legal technique may save us from an inward-looking attitude by forcing us to see justice also through the eyes of others. Since the dogmatic resources of the law are grounded neither in a declaration of faith, sealed once and for all in the letter of a Text, nor in the certainties of a fetishized science, they can at best found a fragile equilibrium which will always be exposed to the temptation of fundamentalism. This temptation has two sides to it, legal nihilism and religious fanaticism, which today reinforce each other and, in depriving present and future generations of a universe of meaning which precedes them, cannot but unleash violence. Law is not the expression of a truth revealed by God or discovered by science; and it is not simply a tool which could be judged on the basis of its efficiency (efficient for whom?). Like the measuring instruments in Dürer's *Melencholia*, its role is to come as close as possible to an accurate and just representation of the world, in the knowledge that this can never be achieved absolutely.

44. The French term *interdit* (English 'prohibition' or 'interdiction') captures the sense both of something that is *said* (inter*dit*, from the verb *dire*, 'to say'), and of something said *between* (*inter*dit); as such, the term implies both a separation and a link that makes speech and shared meaning possible.

Part One

LEGAL DOGMA: OUR FOUNDING BELIEFS

1

THE HUMAN BEING AS *IMAGO DEI*

It is precisely the characteristic feature of the awakening human spirit that a phenomenon has meaning for it.

Wittgenstein[1]

Let us learn our limits then: we are something, but we are not everything. Such existence as we have hides from us the knowledge of first principles, which arise out of nothing; and the littleness of our being conceals the infinite from our sight.

Pascal[2]

The oldest written narrative to come down to us is the epic of Gilgamesh.[3] It recounts the wanderings of a young king, half man, half god, who, after losing his companion and double, Endiku,[4] scours the universe seeking a reply to the question: 'Why is there death? How can we avoid death?' This question, which is as old as humanity itself, still torments us today. If research projects in genetics and biotechnology attract so much funding and stir such passions, it is because they hold out the promise of answering it one day. What age-old dreams biology is currently vested with: the dream of discovering the hidden building blocks of the human being, of having perfect children, of knowing and mastering the ultimate causes of illness and old age or of living on through a replica of oneself! Science and

1. '*Das ist eben das Charakteristische am erwachenden Geist des Menschen, da ihm eine Erscheinung bedeutend wird*'; in L. Wittgenstein, *Remarks on Frazer's 'Golden Bough'*, trans. A.C. Miles, Retford, Brynmill, 1917, p. 7.

2. '*Connaissons donc notre portée: nous sommes quelque chose, et ne sommes pas tout; ce que nous avons d'être nous dérobe la connaissance des premiers principes, qui viennent du néant; et le peu que nous avons d'être nous cache la vue de l'infini*', in Pascal, *The Pensées*, trans. J.M. Cohen, Harmondsworth, Penguin Books, pp. 53–4.

3. *The Epic of Gilgamesh*, trans. Andrew George, London, Penguin Classics, 2003.

4. *Ibid.*, p. 7.

technology today elicit the same mixture of hope and fear as did the building of cathedrals a few centuries ago. Every large town wants its science park or cyclotron, and opens its purse liberally to attract scientific infrastructures to its area. While we may not be convinced that synchrotrons or biotechnology centres will leave behind them for future generations wonders comparable to Gothic art, we cannot really be surprised that now, as in the past, vast sums are lavished on revealing the mysteries of the universe. But whereas, for a religion, transcending the human condition is reserved for another world, science and technology let us glimpse this possibility in the here and now. Today, as in all other epochs, human beings do not escape their secret desire for immortality, but the singular character of this desire in the West, where the human being is conceived in the image of God, is revealed in a combined fear of and faith in scientific progress. Since our identification with God has outlived the disappearance of its religious roots, we are tempted to throw off any and every limit; but this dream of limitlessness contains within it a destiny of decomposition, since in decay alone are the limits of the human being truly abolished.

The Normative Institution of the Human Being

Nothing is more difficult to grasp than what founds us. We all believe in the first article of the Universal Declaration of Human Rights, which states that human beings are born free and endowed with reason, and so we have difficulty admitting that reason and freedom are precarious constructions which have an institutional basis. The limits of the sovereignty of the human mind are only perceptible when we reflect on ourselves and on the fragility of our rational faculty. Even someone who is a convert to the reassuring certainties of cognitivism and who conceives his mind as a computer with a human face, capable of processing huge quantities of data, may well, if he reflects on what he really knows, respond in the terms of Saint Augustine:

> This faculty of memory is a great one, O my God, exceedingly great, a vast, infinite recess. Who can plumb its depth? This is a faculty of my mind, belonging to my nature, yet I cannot myself comprehend all that I am. Is the mind, then, too narrow to grasp itself, forcing us to ask where that part of it is which it is incapable of grasping? Is it outside the mind, not inside? How can the mind

> not compass it? Enormous wonder wells up within me when I think of this, and I am dumbfounded.[5]

If each of us feels threatened with being dumbfounded, it is because each mind, like Saint Augustine's, is too narrow to encompass itself and has to look beyond itself to find the grounds of its being. Like every living creature, the human being experiences the world firstly through the senses; but, unlike all others, the human being has access, through language, to a universe beyond the here and now of sensory experience. The finite nature of our organic, biological life is supplemented by mental representations, which know no limits. A child who appears to be making sandcastles is in fact building fortresses populated by creatures he has invented and over which he rules; he may be there on the beach but the story he is telling himself spirits him away to the distant times of knights, deep in a forest, or else to another planet in a spacecraft. Through the words he whispers to himself or exchanges with his playmates, he experiences an intoxicating freedom which no animal has ever known, as he invents other possible worlds where he can fly, have a double, become invisible, become an ogre or a giant . . . a world in which he confers sense on the objects he creates or the drawings he makes, and which has thus become the visible imprint of his mind.

Once we have entered this symbolic universe, only clinical death can remove us from it. We thus evolve in the physical universe of our biological being and its natural environment, and also in the symbolic universe of words and objects that the human mind has endowed with meaning. This piece of carved wood is certainly made of wood and as such belongs to the natural world around me, but it is also a stick, a technical object, and which has significance, as any potential opponent will be quick to notice.[6] The word 'No' is indeed a physical object – it can be analysed phonetically or as ink on paper – but it is also a word that, unlike a cry, derives its sense from the place it occupies in the structured totality of signs that constitute the English language.[7] Human beings attain a freedom that is truly vertiginous through the act of crafting objects and through the words that designate them. It is the freedom to reconstruct the world in their

5. Saint Augustine, *Confessions*, X, 8, 15, trans. Maria Boulding, New York, New City Press, 1997, pp. 246–7.

6. See A.-G. Haudricourt, *La Technologie, science humaine. Recherches d'histoire et d'ethnologie des techniques*, Paris, MSH, 1988, p. 37.

7. On the specificity of human language, see T. Deacon, *The Symbolic Species. The Co-evolution of Language and the Human Brain*, London, Penguin, 1997.

image, to wrest themselves from the weight of things by endowing them with meaning.

But one does not just wander into the universe of sense without knocking. If we are to take up a place within it, we must first abandon the wish to fashion the world in our image alone and learn to recognize the limits of our subjectivity. We are metaphysical animals, and always risk being carried away by the giddying powers of our imagination. In using our mental faculties we must therefore learn to discern what is imaginary and what is real in this world of symbols which both links us to and separates us from the physical world. Whoever is imprisoned within the confines of their own vision of the world, oblivious to the sense that others give it – and who is therefore incapable of communicating that vision – is literally self-estranged. We may enter the universe of sense only on renouncing the pretension to dictate the sense of the universe and on recognizing that this sense cannot be embraced by one person alone.

Modern science abandons this pretension to give meaning to the world more radically than any other discipline, since its goal is the world of the senses and not that of sense. A procedure is truly scientific when it no longer asks the question *why?* but the question *how?*: no finality is presupposed, and no 'spirit' is posited within the object of scientific investigation. The latter may be explained only by the interplay of the laws governing matter. This is the position of science even when it examines the ultimate origin of things. The hypothesis of the Big Bang aims to explain how, and not why, the universe came about, and hence it is fundamentally different from the narratives of origins that one finds in every religion and which give meaning to the human condition. But whenever a scientist claims to explain the meaning of human life *in the name of science*, he or she is in fact doing anything but following scientific procedure and is giving way to scientism. A truly scientific method aims to efface the subject in favour of the object and cannot therefore explain what founds the subject.[8] It is obliged to postulate that people are capable of agreeing on a representation of the world that is compatible with the evidence of the senses. This capacity is human reason, which is not an effect of scientific procedure but its very condition.

Human reason is therefore always an accomplishment, the precarious establishment of shared meaning which we can all believe in because it accounts for our sensory experience. It is based on

8. See E. Husserl, *The Crisis of European Sciences and Transcendental Phenomenology*, trans. David Carr, Evanston, IL, Northwestern University Press, 1970.

certainties that cannot be demonstrated, on dogmatic resources that bridge the world of sense and the world of the senses. These certainties may differ from one society to another or from one period to another but our need for them is unchanging.[9] There is no objective sense to be discovered in the world of nature; sense is necessarily posited. In order to become rational subjects, human beings must first enter a symbolic universe which attributes sense to them and to the things that surround them. They are credited with a meaning to their lives before being indebted for the life they have received. Teaching a child to speak is the first way of honouring this debt, but learning a language involves accepting the rules that govern it, and it is on this condition alone that the child will later be able to give free expression to his or her thoughts and bring forth new ones. Saussure noted that:

> When a philosopher or psychologist [. . .] announces a new system, doing away with all previous notions, the thinker's new ideas, however groundbreaking, can only be classified in the terms of the language in use. None may come to be classified under an existing word *by chance* [. . .] Furthermore, there will always be a particular term which ALREADY corresponds better than others to the new distinctions.[10]

We are all subject to the heteronomy of language. It constitutes the condition of any discussion and thus cannot itself be debated. A world where each of us had to, or sought to, reinvent language would be a world of madmen; shared meaning implies calling a spade a spade without wondering why one says 'spade'. Similarly, there is no reason why one should drive on the left rather than on the right but if we each had to make a decision about this at every moment, deaths on the road would rise to millions. Language, customs, religion, law and rites are all founding norms of human life. They ensure an existing order within which people can act, even if their actions call this order into question.

The institution of reason is what allows every human to reconcile the finitude of their physical existence with the infinity of their mental universe. In order to achieve this, we must learn to inscribe within the universe of sense the threefold limits placed on our biological existence:

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9. On the dogmatic basis of the human intellect, see A. Comte, 'Considerations on the Spiritual Power', *op. cit.*, pp. 214–15; Tocqueville, *Democracy in America*, II, I, ch. 2, *op. cit.*, pp. 407ff.

10. F. de Saussure, *Writings in General Linguistics*, trans. Carol Sanders and Matthew Pires, Oxford, Oxford University Press, 2006 (Saussure's emphases).

birth, sex and death. Accepting these limits is already the exercise of reason. When we give meaning to the fact of birth – our birth and that of our children – we have understood that we are inscribed within a chain of generations, that we live indebted for the life we have received,[11] and from this we can come to understand the idea of causality. When we assume our sexual identity, we understand that we embody only half of humanity and that we need the other half, and from this we come to understand the idea of differentiation, and learn to relate the part to the whole. When we learn to accept our death, we conceive that the world will outlive us, that our life is subject to a constraint on which we have no purchase, and thus we come to understand the idea of the norm.[12] In every society, the process of humanizing the anthropoids we are involves giving sense and form to these three limits, thus enabling us to become rational beings. That is the purpose of what can be called the religious sentiment, in its broadest sense, which is a distinctive feature of humanity, and which situates each person's life within a framework which transcends them.[13] The Western world today is no exception to this rule and its 'disenchantment' does not go so far as to reject funeral rites altogether and treat corpses as mere refuse.[14] Or rather, when it treats them in this way – as the world of the Nazi concentration camps has shown us – it has sunk into scientistic madness, reducing man to the status of a thing. Collective irrationality and negation of the meaning of human existence are two sides of the same coin.

The fact of endowing sexual difference, birth and death with meaning does not imply that the human being is incapable of imagining a world where these limits could be dispensed with. For the Vedic gods, the notion of filiation goes in both directions, with fathers being sons of their sons or even their own sons.[15] Angels, in the monotheistic religions, have no sexuality and know

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11. On this idea of the debt contracted by every person by virtue of being born, see C. Malamoud (ed.), *Debts and Debtors*, New Delhi, Vikas, 1983, and his *Liens de vie, noeuds mortels. Les représentations de la dette en Chine, au Japon et dans le monde indien*, Paris, EHESS, 1988; also his contribution in M. Aglietta and A. Orléan (eds), *La Monnaie souveraine*, Paris, O. Jacob, 1998, pp. 65ff.

12. Death is the archetypal limit which founds a systems of norms. The Vedic God of death, Yama, is also the Dharma, god of laws. See C. Malamoud, *Le Jumeau solaire*, Paris, Seuil, 2002, pp. 8ff.

13. See Vercors, *Borderline*, trans. Rita Barisse, London, Macmillan, 1954.

14. On contemporary developments in the legal status of the corpse, see J.-R. Binet, *Droit et progrès scientifique. Science du droit, valeurs et biomédecine*, Paris, PUF, 2002.

15. See C. Malamoud, *Le Jumeau solaire*, *op. cit.*, p. 36.

no death. The theme of the pregnant man is present in the Bible (the account of the birth of Eve from Adam's rib[16]) and in Greek mythology (Dionysus, born of Jupiter's thigh[17]), not to mention one of the many forgotten episodes in the recent history of biology, that of reproduction through parthenogenesis.[18] If the idea of cloning human beings gives rise to such heated debate today, it is because it draws on this collective fantasy of a superhuman universe. Being able to produce replicas of ourselves holds out the promise of eliminating in one go all three of the limits placed on the human condition: it would free us from the succession of generations, from dependence on the opposite sex and from death, by enabling us to continue indefinitely. Dreams of duplication are nothing new. Stories of doubles abound, in all civilizations, mostly concerning twins and the particular dangers attached to them.[19] The theme of the double has also inspired many works of fiction. What all these stories have in common is that they always end badly for the cloned character (for example in the films *Confessions of a Rogue*[20] or *The King and the Mockingbird*[21]) and also for the clone (for example, the clone of Professor Mortimer[22]). Doubles always meet a sorry end because, while they are absolutely sense-less, they also trigger a fantasy that is so powerful that the tale can end only with the death of the original or the copy. Yet people argue that when humankind harboured the dream of flying off into space like an angel, or like Icarus, such a venture was likewise considered doomed, until aviation made it possible. Why should it not be the same for cloning? Is it not the distinctive feature of human beings to use their imagination to transform the world, and push back ever further the limits of their condition? Since science gives us a glimpse of the technical possibility of self-replication, why should

16. See R. Zapperi, *The Pregnant Man*, trans. Brian Williams, Chur and New York, Harwood Academic, 1991.

17. See C. Isler Kerényi, *Dionysos nella Grecia arcaica. Il contributo delle immagini*, Pisa–Rome, Istituti editoriali e poligrafici internazionali, 2001.

18. See A. Pichot, 'Clonage: Frankenstein ou Pieds-Nickelés?', *Le Monde*, 30 November 2001, and A. Pichot, 'Qui se souvient de M.J.?', *Le Monde*, 27 December 2002.

19. For Ancient Greece, see C. Isler Kerényi, *Dionysos nelle Grecia arcaica*, *op. cit.*, pp. 120ff.; for India, see C. Malamoud, *Le Jumeau solaire*, *op. cit.*

20. *Copie conforme*, film by J. Dréville, Paris, 1947.

21. *Le Roi et l'oiseau*, film by P. Grimault, Paris, 1979.

22. E.P. Jacobs, *Les 3 formules du prof. Sato*, Part I, *Mortimer à Tokyo*, Brussels, Éd. du Lombard, 1977.

it be forbidden? Should not everything that is possible and conceivable be realized?[23]

Human cloning is not, however, just another technological project. Its goal is not to extend human mastery over nature but to dissolve the very limits that constitute the human being; it is in the field of eugenics rather than of aviation that a historical precedent should be sought. An aeroplane, just like the first hewn stone, imprints the mark of human will on an external object, whereas eugenics and human cloning aim to imprint the will of some humans on the creation of others. Humanity will then be divided between producers of people and people produced, under the aegis of the 'laws of science'.[24] In producing humans in his own image, Man would realize his wildest dreams of occupying the position of God the Father, the absolute Father who is neither the son nor the husband of anyone and who is therefore freed from all the limits defining the human condition. Human beings would be replaying Genesis on their own terms, no longer simply procreating as links in a chain of generations whose meaning goes beyond them, but becoming Creators, the ultimate Origin of beings programmed by them. The project of human cloning effects a passage to the limit of the Western conception of the human being, treating this being both as omnipotent creator and as pure object of technological manipulation. This project could only emerge in the anthropological context of the West, which conceives Man in the image of God. It is part of a much older and more deeply rooted movement by which scientific rationality is transformed into scientistic madness. In order to understand this movement, we must revisit the properly Western conception of the human being and examine how it differs from all others.

The Legal Foundations of the Person

Like all other societies, our own is founded on a certain conception of the human being that gives meaning to our lives. From a legal point of view, we consider humans to be endowed with reason, and subjects of

23. See the argument put forward by Françoise Héritier, an anthropologist and professor at the Collège de France, in favour of legalizing same-sex parenting: 'When things are possible and begin to be thinkable, they will end up being realized one day or another' ['Quand les choses sont possibles et commencent à être pensables, elles finissent un jour ou l'autre par être réalisables'], *Le Monde*, 3 May 2001, p. 10.

24. J.-L. Baudouin and C. Labrusse-Riou, *Produire l'homme: de quel droit? Étude éthique et juridique des procréations artificielles*, Paris, PUF, 1987.

inalienable and sacred rights. But from a scientific point of view, humans are objects of knowledge whose behaviour can be revealed and explained by biology, economics, the social sciences, and so forth. These two aspects of the human being – subjective and objective – are two sides of the same coin, since it is only in the light of a certain conception of the mind that the body comes to be considered as a thing.[25] The concepts of subject and object, person and thing, mind and matter are defined by mutual opposition, each conceived in relation to the other. Positive science is entirely reliant on these concepts, and its own activity would be impossible without the postulate of a human being capable of rational thought. This postulate is precisely not the result of scientific demonstration, it is a dogmatic affirmation, developed in the history of law and not the history of science. Contemporary scholastic quarrels that set a 'materialist' neurologist against a 'spiritualist' philosopher[26] would be quite simply incomprehensible in a system of thought not based on these dichotomies. The culture of imperial China, for example, which had no notion of the subject,[27] could evidently not qualify certain persons as 'objects', as was the case in imperial Rome, and therefore had no notion of slavery in its precise sense. Before medicine could be conceived as a science, and work as a negotiable commodity, the human being had first to be conceived as a material object. Modern science and economics would not have seen the light of day without the specifically Western legal configuration called the human being.

Our Western conception of the human being as an abstract universal, born free, endowed with reason, and equal among equals,[28] won out only at the end of a long historical process which stretched from the development of Roman law to modern declarations of rights. And it is only in modern times that the relation of subject to object and of spirit to matter has become a general principle of intelligibility and domination of the world.[29] This new way of

25. See Georges Bataille, *Theory of Religion*, trans. Robert Hurley, New York, Zone Books, 1989, pp. 36ff.

26. See Jean-Pierre Changeux and Paul Ricoeur, *What Makes Us Think?*, trans. M.B. DeBevoise, Princeton, NJ, Princeton University Press, 2000.

27. See Jean Escarra, *Chinese Law: Conception and Evolution, Legislative and Judicial Institutions, Science and Teaching*, trans. Gertrude R. Browne, Cambridge, MA, Harvard Law School, 1961; also L. Vandermeersch, *La Formation du légisme. Recherche sur la constitution d'une philosophie politique caractéristique de la Chine ancienne*, Paris, École française d'Extrême-Orient, vol. LVI, 1965, reprinted 1987, pp. 192ff.

28. The Universal Declaration of Human Rights (1948), art. 1.

29. See E. Cassirer, *The Individual and the Cosmos in Renaissance Philosophy* [1927], trans. Mario Domandi, Oxford, Blackwell, 1963.

understanding the world started in the sixteenth and seventeenth centuries, in the wake of the Humanist critique of the knowledge system of the Scholastics and Glossators. It introduced the idea of a science founded on the Cartesian *cogito* and of a *ius commune*, governed no longer by reason of State but by the state of reason ('*non ratione imperio, sed imperio rationis*').[30] The ensuing period, which leads to our own, opens with the Enlightenment. It is characterized by the disappearance of God from the socio-political scene, which is why it is interpreted as a desertion of religion and a 'disenchantment of the world'.[31] However, it could equally be interpreted as a triple re-enchantment: of science (which replaces religion as authorized truth on the scale of the universe); of the State (promoted to the status of omnipotent subject, living and supreme source of laws); and lastly of the human being, whose finality is henceforth found within himself, divorced from any reference to the divine. This process was accompanied by the rewriting of the human being's origins – from Hobbes and Rousseau to Rawls – and the founding of a Religion of Humanity, linked to scientific positivism[32] and endowed with its Ten Commandments: the Universal Declaration of Human Rights.

Contemporary debates on bioethics have much to gain from taking into account the history of our conception of the human being, which is part of the history of the Christian West. The conception we have inherited is that of the *imago Dei*, the human being conceived in the image of God and destined to achieve mastery over nature. Like God, the human being is one and indivisible, like God he or she is a sovereign subject endowed with the power of the Word and, like God

30. See A. Wijffels, 'European Private Law: A New Soft-Package for an Outdated Operating System?', in M. van Hoecke and F. Ost (eds), *The Harmonisation of European Private Law*, Oxford, Hart Publishing, 2000, pp. 103–16; and A. Wijffels', 'Qu'est-ce que le *ius commune*?', in A. Supiot (ed.), *Tisser le lien social*, *op. cit.*, pp. 131ff.

31. See M. Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. Oscar Burge, Princeton, NJ, Princeton University Press, 1997. This concept of *Entzauberung* was elaborated by Max Weber who uses it in a very different sense (rejection of magical means of attaining salvation). See *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons, London, Unwin, 1985, pp. 105–6; see also 'The Social Psychology of World Religions' in *From Max Weber: Essays in Sociology*, ed. and trans. H.H. Werth and C. Wright Mills, London, Routledge, 1991, pp. 281–2. For Weber, this concept dates back to the prophetic moment in Judaism, associated with Greek scientific thought (see on this point the comments of J.-P. Grossein in his presentation of his French translation of Weber's texts, *Sociologie des religions*, Paris, Gallimard, 1996, pp. 108ff.).

32. See A. Comte, *The Catechism of Positive Religion* [1927], trans. Richard Congreve, 3rd edn, Clifton, NJ, A.M. Kelley, 1973.

again, the human being is a person, an incarnate spirit. But, while conceived in the image of God, humans are *not* God. Their particular dignity is not self-created but stems from their Creator, and it is a dignity that is shared with all other humans. This is why the three attributes of the human being – individuality, subjectivity and personality – each have a double value: as an individual, each one of us is unique, but also similar to all others; as a subject, each one of us is sovereign, but also subjected to the law; as a person, each one of us is spirit, but also matter. The secularization of Western institutions did not eradicate this anthropological configuration, and the three attributes emerge again, each with its double value, in declarations of human rights. The reference to God has disappeared from the law of persons, but what has not disappeared is that, logically, all human beings must be referred to an authority that vouches for their identity and symbolizes that they are not to be treated like a thing.

The Individual, Unique and Identical

In order to grasp what is distinctive about our individualism, what better method than to take an outsider's view, for example the illuminating remarks of the African sage Amadou Hampâté Bâ. When asked what he understands by human identity, he replied with the following anecdote: 'Every time my mother wanted to speak with me, she first called for my wife or sister and said: "I desire to speak with my son Amadou, but I would like to know beforehand which of the Amadous which inhabit him is there at present." '[33] This reply, which we feel intuitively to be extremely profound, is at the same time disconcerting, because it undermines what we take to be the hallmark of human identity: its indivisibility. In our legal tradition, a person is one and indivisible, from birth to death, a single whole, and not a space of multiple coexisting characters. We are equally disconcerted when we learn that, in Melanesian countries, people may be defined as empty spaces characterized by all the bonds linking them to others (father, uncle, spouse, clan),[34] rather than, as in the West, as substantial egos that freely forge social links rather than being fashioned by them. While in most other civilizations people consider themselves to be part of a whole which both surrounds and goes beyond them,

33. See A. Hampâté Bâ, 'La notion de personne en Afrique noire' in G. Dieterln (ed.), *La Notion de personne en Afrique noire*, Preface by M. Cartry, CNRS, reprinted Paris, L'Harmattan, 1993, p. 182.

34. See M. Leenhardt, *Do Kamo: Person and Myth in the Melanesian World*, trans. Basia Miller Gulati, Chicago, University of Chicago Press, 1979, pp. 153ff.

which has preceded and will outlive them,[35] our legal tradition leads us, on the contrary, to see the person as an elementary particle of human society, an individual in both the qualitative and the quantitative sense. Qualitatively, the individual is made in the image of the monotheistic God, and so is a unique being, incomparable to any other, and his finality is found within himself. Quantitatively, the individual is an indivisible and stable entity. Both self-identical and identical to all others, the individual is the basic accounting unit *par excellence*. Thus conceived, all human beings are necessarily equal since each is made in the image of God, even if they are a woman, a slave or a heretic; and each is both unique and similar to all others. The principle of equality is still traversed, in its most modern and secularized version, by this tension between the two facets of individual identity: we are all alike and hence all identical; and we are *also* all different, for we are each unique.

Since all individuals are identical, they are like mirrors set at the same distance from the godhead or, to put it in the 'secular' terms of the Preamble to the French Constitution of 1946, they each hold 'sacred and inalienable rights' equally. Our identity is fundamentally the same as that of any other person, and any difference based on sex, race, religion, nationality, age, et cetera, may be disqualified as a prohibited discrimination. In the arresting words of Saint Paul: 'There is neither Jew nor Greek, slave nor free, male nor female.'[36] Hence the seminal role of the principle of equality in our legal and political traditions.[37] We all have the same rights and duties, and we are all identical, which implies that any one person can always be replaced by another. Consequently, a person may occupy all positions within society, while not being absolutely identified with any of them.[38] Such a conception is very

35. See for example L. Dumont, 'Absence de l'individu dans les institutions de l'Inde', in I. Meyerson (ed.), *Problèmes de la personne*, Paris, La Haye, Mouton, 1973, pp. 99ff.; O. Nishitani, 'La formation du sujet au Japon', *Intersignes*, 8/9, 1994, pp. 65–77, especially p. 70; M. Chebel, *Le Sujet en islam*, Paris, Seuil, 2002.

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

37. See of course Tocqueville on this point (*Democracy in America*, *op. cit.* II, II, ch. 1, pp. 479ff.) and Louis Dumont, who was the first to turn an anthropologist's questioning back onto the Western world (see *From Mandeville to Marx. The Genesis and Triumph of Economic Ideology*, Chicago and London, University of Chicago Press, 1977; also Dumont's *Essays on Individualism: Modern Ideology in Anthropological Perspective*, Chicago and London, University of Chicago Press, 1986).

38. The Declaration of the Rights of Man and of the Citizen, 26 August 1789, art. 6: 'All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.'

different from, for example, the caste system, which assigns a particular function to each person in their present life, with social mobility coming into play in the cycle of reincarnations.[39] Insofar as each person is replaceable, each is also quantifiable and can be apprehended as an accounting unit. This quantifying tendency is evident in the history of our political institutions, in which the law of numbers has come to override any qualitative considerations, resulting in a purely arithmetical conception of the majority principle.[40] It is also at work in the increase in economic and social statistics, which has led to the emergence of a new type of norm: legal norms, deemed arbitrary because they are based on a qualitative appreciation of people and things, are increasingly challenged by technical norms, deemed valid because founded on the quantification of these.[41] As an accounting unit, the individual is also a stable entity which remains essentially unchanged from birth to death. In the terms of Hauriou:

> individual legal personality appears to us as continuous and *self-identical*; it emerges at the same time as the individual and is immediately constituted; it remains unchanged throughout its existence and unfailingly subtends unchanging legal situations; it is watchful when Man sleeps, and remains sane when Man loses his reason.[42]

This fiction, which is the cornerstone on which economic theory in its entirety rests, is obviously completely foreign to certain great

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39. See L. Dumont, *Homo hierarchicus: The Caste System and Its Implications*, trans. Mark Sainsbury, Louis Dumont and Basia Gulati, Chicago and London, University of Chicago Press, 1980.

40. On the medieval origins of this conception, see L. Moulin, 'Les origines religieuses des techniques électorales et délibératives modernes', *Revue internationale d'histoire politique et constitutionnelle*, April–June 1953, pp. 143–8; and his '*Sanior et maior pars*. Étude sur l'évolution des techniques électorales et délibératives dans les ordres religieux du VIe au VIIIe siècle', *Revue historique de droit français et étranger*, 3 and 4, 1958, pp. 368–97 and pp. 491–529. On the triumph of this conception after the French Revolution, see P. Rosanvallon, *Le Sacre du citoyen. Histoire du suffrage universel en France*, Paris, Gallimard, 1992.

41. See G. Canguilhem, *The Normal and the Pathological*, trans. Carolyn R. Fawcett in collaboration with Robert S. Cohen, New York, Zone Books, 1989. The new modes of governance and regulation are inspired by the quest for just such an 'objective' norm, in opposition to the 'old-style' rule-bound modes of government (see A. Supiot, 'Un faux dilemme: la loi ou le contrat?', *Droit social*, 2003, pp. 59ff.).

42. M. Hauriou, *Leçons sur le mouvement social*, Librairie de la société du recueil général des lois et arrêts, 1899, pp. 148–9, cited by A. David in *Structure de la personne humaine*, Paris, PUF, 1955, p. 1.

traditions such as Buddhism, which emphasizes on the contrary the impermanence and instability of the physical and psychical states of the human being.[43] Lastly, since we are all made in the image of God the Father, we are all related to some degree, we are all brothers, and therefore obliged to extend help and assistance to each other. This spirit of universal brotherhood is asserted in the first article of the Universal Declaration of Human Rights. From it is derived the principle of solidarity, which inspired the establishment of the Welfare State.

But each individual, made in the image of the one God, is also a unique being, different from all others. The individual's radical singularity is not the result of objective factors present from birth, but is expressed in the individual's exercise of his or her freedom. It is through competition with others that human beings, born free and equal, are revealed to themselves and to others. This conception of election, which is a driving force behind the market economy, came to dominate with Protestantism.[44] According to the Protestant ethic, our works do not give us any particular access to the afterlife, but reveal what we are in this world, with material success being consequently an external sign of salvation.[45] Louis Dumont described this feature in saying that, in the Protestant worldview, there is inside each of us a monk.[46] One could add that it is a 'fighter monk', since free competition between formally equal individuals becomes the sole criterion of justice. When competition is thus elevated into the organizing principle of private life (freedom in marriage and in personal life), of politics (free election of leaders), of civil administration (free access to public service positions) and of economic life (free competition), it becomes the very motor of social existence rather than being confined to its margins as something dangerous and deathly.[47]

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43. See R. de Berval (ed.), *Présence du bouddhisme*, Paris, Gallimard, 1987, pp. 113ff.; A. Bareau, 'La notion de personne dans le bouddhisme indien' in I. Meyerson (ed.), *Problèmes de la personne*, *op. cit.*, pp. 83ff.

44. See M. Weber, *The Protestant Ethic*, *op. cit.*; E. Troeltsch, *Die Bedeutung des Protestantismus für die Entstehung der modernen Welt* [1911], translated by W. Montgomery as *Protestantism and Progress: The Significance of Protestantism for the Rise of the Modern World*, Philadelphia, Fortress Press, 1986.

45. See F.G. Dreyfus, 'Les piétismes protestants et leur influence sur la notion de personne aux XVIIIe et XIXe siècles' in I. Meyerson (ed.), *Problèmes de la personne*, *op. cit.*, pp. 171ff.

46. A comment made by L. Dumont and reproduced in I. Meyerson (ed.), *Problèmes de la personne*, *op. cit.*, p. 185.

47. See P. Thureau-Dangin, *La Concurrence et la mort*, Paris, Syros, 1995.

The invention of legal personality enabled this individualistic notion to invade every human community or society. Legal personality allows every form of association of individuals, whether based on having things or having ideas in common, to constitute itself in turn as an individual.[48] That is how *homo juridicus* comes to treat a plural like a singular, an 'us' like an 'I' capable of interacting with all other individuals on an equal footing. The cornerstone of this human order composed exclusively of individuals is a supreme individual posited, again on the model of the *imago Dei*, as one and indivisible. Such is the French Republic, one of the first forms of the State to be divorced from any sort of religious reference, and to incarnate, one and indivisible, an immortal Being which transcends the individual interests of its members (unlike the guilds which were instruments in the service of their members).

The Subject, Sovereign and Subjected

A subject is one who is the cause of something, first of all through his or her words:[49] he or she speaks and the spoken word is law. In the Christian tradition, this capacity to organize the world through speech is the first attribute of God: 'In the beginning was the Word, and the Word was with God, and the Word was God. The same was in the beginning with God. All things were made by him; and without him was not any thing made that was made.' This famous opening to the Gospel of Saint John, in which metaphysics is identified with language, and language is made into the ultimate key to the sense of the universe, is the most remarkable expression of a conception that exists in other forms in many other civilizations. 'To be naked', says the African luminary Ogotemmêli, 'is to be speechless', and speech was the first garment to be thrown down on the world by the god of

48. Essential references here are: O. von Gierke, *Das deutsche Genossenschaftsrecht*, Berlin, 1868–1913, 4 vols., a selection translated as *Community in Historical Perspective: A Translation of Selections from Das deutsche Genossenschaftsrecht (The German Law of Fellowship)*, selected and edited by Antony Black, trans. Mary Fischer, Cambridge, Cambridge University Press, 1990; R. Saleilles, *De la personnalité juridique. Histoire et théories*, Paris, Rousseau, 1910; L. Michoud, *La Théorie de la personnalité morale. Son application en droit français*, [1924] Paris, LGDJ, 1998, 2 vols.; on the canonical origins of the concept, see P. Gillet, 'La Personnalité juridique en droit canon, spécialement chez les décrétistes et les décrétalistes et dans le Code de droit canonique', thesis, Catholic University of Louvain, Malines, W. Godenne, 1927.

49. In French, the verb *causer* has the double sense of 'being the cause of something' and of 'speaking' (with emphasis, as in the term '*causerie*', on conversation).

water in order to confer order upon it.[50] In the Confucian tradition, a sound order is inseparable from correct use of language because the existence of things in their individuality depends on their correct designation.[51] In the *Cratylus*, Plato evokes the figure of the legislator of language, 'of all the artisans among men the rarest', whom he compares to a weaver capable of reproducing in each name the form appropriate to it.[52] In the Koran, God entrusted Adam with the secret of the 'veil of the name' by which things are concealed, with human beings acting as God's *khalifa*, his lieutenant on earth.[53] Moreover, it is well known that the *regula*, the rule, appeared in Roman law as a synonym for *definitio*.[54] These are just a few examples of the anthropological wisdom of which the New Testament was neither the first nor the sole expression: that the supreme normative power is the power of naming, of establishing categories of thought, and that this heteronomy of language is indispensable to human life.

What characterizes the Christian West alone, by contrast, is the idea that God has posited his laws within Nature. His Word is expressed not only in a sacred Text, a revealed Law, but also in the laws that God has inscribed within the 'Great Book of Nature' (and today in what scientists have called the 'Great Book of the Genome'). In the Christian tradition there may be one Law but there are two Books: the book of divine revelation and that of scientific discovery.[55] We are heirs to this dualism which is unknown, for example, in the Islamic tradition, since for Islam God is only the source of customs in the natural order, which may be overturned by His omnipotence.[56] The Christian God, however, is effectively bound to observe the laws that He Himself has laid down; the omnipotence of His Word is

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50. See M. Griaule, *Conversations with Ogotommêli. An Introduction to Dogon Religious Ideas*, trans. Ralph Butler, rev. Audrey I. Richards and Beatrice Hooke, London, Oxford University Press for the International African Institute, 1976, p. 82.

51. See M. Granet, *La Pensée chinoise* [1934], Paris, Albin Michel, 1988, pp. 363ff.

52. See Plato, *Cratylus*, *op. cit.*, 388e–389c, pp. 25–7; *The Statesman*, 306e, trans. H.N. Fowler, Cambridge, MA, Harvard University Press, 1927, pp. 175ff. (see the Prologue). The image of weaving plays a significant role in illustrating the art of politics in *The Statesman*, 306e, *op. cit.*, pp. 175ff. See also A. Laks, 'Pour une archéologie du lien social', in A. Supiot (ed.), *Tisser le lien social*, *op. cit.*, pp. 61–72.

53. See L. Gardet, *La Cité musulmane. Vie sociale et politique*, Paris, Vrin, 4th edn, 1981, pp. 80ff.

54. See G. Alpa, *I principi generali*, in G. Iudica and P. Zatti (eds), *Trattato di diritto privato*, Milan, Giuffrè, 1993, p. 58.

55. See Chapter 2.

56. See L. Gardet, *La Cité musulmane*, *op. cit.*, p. 117.

binding on Himself also. This conception also informs the sphere of human affairs and notably the figure of the State, which is an offspring of the divine figure of the Legislator: the rule of law implies that the State should be bound by its own laws.

Another characteristic of the Christian world, or at least of Western Christianity, is that it considers that human beings may appropriate the power of the Word, its force of law, and in this way make themselves subjects in the full sense, that is, primary causes of effects, and not effects of a cause. The appropriation by the speaking subject of the normative power of speech is absent from the great civilizations from which Christianity stems. In Ancient Greece, which was one of the first civilizations to develop the idea of civil law,[57] democracy was considered impossible without the prohibition of this sort of appropriation of speech. That is why it was decided to remove the aspirate *h* from the alphabet, when democracy was re-established and the Athenian laws were written down (403 BC), since it symbolized the *pneuma*, the breath of life, the divine inspiration and the spirit that binds men together in the political whole; the heteronomy of the law seemed incompatible, for the inventors of democracy, with the private use, in writing, of this breath which is the spirit of the *polis*.[58] Similarly, the Hebrew alphabet, which has no vowels, made the Law inaccessible to anyone who was not of Jewish descent and who was therefore unable to give life to the Text through restituting its divine breath.[59] The teachings of Islam also stress that it is impossible for the individual to become legislator since humans are nothing in the face of the omnipotence of God; even when they think they are laying down the law, they are nothing but the instrument of ways that remain impenetrable to them.[60] Of the three religions of the Book, only Western Christianity has fully endowed individuals with the quality of subjecthood. In the Islamic tradition,

57. See J. de Romilly, *La Loi dans la pensée grecque* [1971], Paris, Les Belles-Lettres, 2001.

58. See C. Herrenschmidt, 'Writing between Visible and Invisible Worlds in Iran, Israel and Greece', in Jean Bottéro, Clarisse Herrenschmidt and Jean-Pierre Vernant, *Ancestor of the West: Writing, Reasoning and Religion in Mesopotamia, Elam and Greece*, trans. Teresa Lavender Fagan, Chicago and London, University of Chicago Press, 2000, pp. 137ff. Note the etymology of *nomos* (*nemô*, to share), recalled by J. de Romilly (*La Loi dans la pensée grecque*, *op. cit.*, p. 14): since the law is what makes possible a shared world, no single person may appropriate it.

59. See C. Herrenschmidt, 'Writing between Visible and Invisible Worlds', *op. cit.*, pp. 130ff.

60. See L. Gardet, *La Cité musulmane*, *op. cit.*, pp. 36ff.; also M. Chebel, *Le Sujet en islam*, *op. cit.*

God alone enjoys this quality, and in the Jewish tradition it is accessible on earth only to the people of Israel, who are conceived of as 'a holy people of universal significance'.[61]

This capacity to lay down the law, as it appears in the Western tradition, is expressed both in the human being's attitude to things, and in the way human relations are conceived. Human relations are submitted not to religious law but to a human legal framework, whether in the form of ordinary law founded – in democratic regimes – on the sovereignty of the people or in the form of contract law founded – in a free-market context – on the sovereignty of the individual. As sovereign subjects, human beings are capable of being bound by their word and answerable to it; human responsibility originates in free will, before any act, and not in the consequences of acts, as is the case for example in Japanese culture.[62] The relation between human beings and things consists of the ordering of Nature by technology,[63] but no longer, as in other cultures, in the sense of efficient *bricolage*,[64] but as the implementation of the scientific knowledge of the laws of the universe which humankind has discovered. The divine prescription ordering humans to become masters of the universe has here reached its logical conclusion: God has been dismissed and humans have monopolized the attribute of Subject in a world governed by them and filled with objects made in their image.

Yet the subject has not lost its deeply entrenched duality, despite its total secularization. The subject of law is indeed a *sovereign* subject, that is, a being born 'free and endowed with reason', autonomous and capable of subjecting the world of objects to its will; the subject is the cause of effects which it is answerable to and not the effect of a cause

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61. See K. Löwith, *Meaning in History*, *op. cit.*, p. 195. While the Biblical covenant, the *berith*, is a real synallagmatic (that is, reciprocally binding) contract between God and the people of Israel alone (see F. Ost, *Du Sinaï au Champ-de-Mars. L'autre et le même au fondement du droit*, Brussels, Lessius, 1999), its Islamic equivalent, the *mithaq*, involves a commitment that God freely makes to every man, a unilateral contract that allows man to escape enslavement to the senses, so that he may become a bearer of rights and obligations (see L. Gardet, *La Cité musulmane*, *op. cit.*, pp. 53ff.).

62. See M. Pinguet, *Voluntary Death in Japan*, trans. Rosemary Morris, Cambridge, Polity Press, 1993, pp. 45ff.

63. See M. Heidegger, *The Question Concerning Technology and Other Essays*, trans. William Lovitt, New York and London, Harper and Row, 1977, p. 19.

64. As in Ancient Greece, where technology never got further than 'a set of traditional methods and practical skills' (Jean-Pierre Vernant, 'Some Remarks about the Forms and Limits of Technological Thought among the Greeks', *Myth and Thought among the Greeks*, New York, Zone Books, 2006, pp. 299ff. 314).

situated outside itself. But the subject only gains this freedom insofar as it also remains a subject in the etymological and primary sense of the term, that is, a being *subjected* to the observance of laws (*sub-jectum*: 'thrown beneath'), whether the laws of the *polis* or the laws of science. This is how the human being is instituted as subject of law: through a two-sided subjection in which autonomy is achieved through the heteronomy of the law.[65] In the West, as for other cultures, there is no 'I' possible without an authority that guarantees this 'I', or, to put it in legal terms, without an authority that guarantees personal status. No one can make the sovereign gesture of altering their lineage, sex or age. Such issues have long been referred to the religious authorities, and still are in certain countries.[66] In the West, it is the State which is nowadays the ultimate guarantor of personal status; this status is inalienable, that is, it lies beyond the domain of individual sovereignty. The rules determining civil status or the conflicting dogmas concerning the legal personality of the embryo[67] may have replaced religious casuistry regarding the administration of the sacrament of baptism, but the identity of the mortal human being still continues to be governed by an immortal and super-human subject. Even before arriving at the autonomy of the speaking subject through the heteronomy of language, the human being becomes a legal subject through the heteronomy of the law.

The Person, Spirit and Incarnate

The world is divided, as we see it in the West, into two distinct parts: on the one hand things, on the other hand persons. This *summa divisio* goes back a long way and is deeply embedded in our legal culture. It was first systematized in the Justinian Code and reappears in the structure of the French Civil Code. But whereas in Roman law the separation of things and persons was relative, it has since taken on a normative value: it has become unacceptable to treat the person as a thing and irrational to treat the thing as a person. This separation has

65. See P. Legendre, *Les Enfants du texte. Étude sur la fonction parentale des États*, Paris, Fayard, 1992 (see particularly pp. 87ff. on the *vitam instituere* in the Western legal tradition; and *id.*, *Sur la question dogmatique en Occident*, *op. cit.*, pp. 106ff.).

66. For example in Israel, where rabbinical courts alone are deemed competent to rule on nonpatrimonial family law (see C. Klein, *Le Caractère juif de l'État d'Israël*, Paris, Cujas, 1976, pp. 122ff, and Klein's *Le Droit israélien*, Paris, PUF, 1990, pp. 69ff.). A similar situation obtains in certain Muslim countries.

67. See the clear and exhaustive presentation of this debate in C. Labrusse-Riou and F. Bellivier, 'Les droits de l'embryon et du foetus en droit privé', *Revue internationale de droit comparé*, 2, 2002, pp. 579ff.

consequently acquired a dogmatic value, as something self-evident which explains our entire vision of the world. It is a powerful dogma, and informs the pairs of opposites within which our scientific explorations have developed: culture/nature, spirit/matter, psyche/soma, human sciences/natural sciences.

At the root of our notion of human personality are the *personae*, the death masks of the ancestors.[68] In Ancient Rome, personality was assigned to the one entrusted with the *imagines*[69] and the names of the ancestors: the *pater familias*. In Roman law, not all human beings had full personality: some were treated as things,[70] while others simply partook of the personality of the *pater familias*. There was no generic concept of 'person' but rather degrees of personality, from slave to *pater familias* via freedmen, free sons and women, peregrines, and so forth.[71] Only with Christianity was personality attributed to every human being. In the two other religions of the Book, God remains a Being that cannot be circumscribed – *aperigraphtos* – and hence cannot be represented; the godhead cannot be enclosed within the defining elements of the person, the name and the face, which give a *perigraphê* (circumscription), a form and limits. By contrast, through the Christian God's incarnation in his Son, He acquires a face (*prosopon*) and hence personality.[72] Most of the theological debates

68. The Latin persona initially translated the Greek *prosopon*, meaning the actor's mask. But, as Mauss has shown, the term's legal sense comes from the patrician practice of the mortuary mask (*imago*). See M. Mauss, 'A Category of the Human Mind: The Notion of Person; The Notion of Self' [1938], in Michael Carrithers, Steven Collins, Steven Lukes (eds), *The Category of the Person: Anthropology, Philosophy, History*, Cambridge, Cambridge University Press 1985, pp. 14ff.

69. The *imago*, which is the imprint of the face of the dead man, is not an 'image' of the deceased, a figuration or a *fictio*, but the seal, the real physical trace of the person: it functions metonymically and not metaphorically. The *imagines* were shut away in cupboards – *armaria* – and thus were normally hidden from view; they were taken out only during the funeral rites, to welcome a descendant. By contrast, the names (*nomina*) and titles (*honores*) of the dead were exposed in full view, inscribed on labels (*tituli*) which were fixed to the outside of the *armaria* on which were also depicted the genealogical trees. Names and masks could not be separated, and only the names of those whose masks one possessed could be displayed (see F. Dupont, 'L'autre corps de l'empereur-dieu' in C. Malamoud and J.-P. Vernant, *Corps des dieux*, Paris, Gallimard, 1986, pp. 315ff.).

70. See the famous threefold structure of the Institutes (*personae, res, actiones*), in which slaves are classified as persons while elsewhere they are treated as things (*The Institutes of Gaius*, *op. cit.*,).

71. See P.F. Girard, *Manuel élémentaire de droit romain* [1895], Paris, Rousseau, 5th edn, 1911, pp. 91ff.

72. See J. Daniélou, 'La notion de personne chez les Pères grecs', in I. Meyerson (ed.), *Problèmes de la personne*, *op. cit.*, pp. 114ff.

of the early Church concerned the issue of the dual nature of Christ, both divine and human, to which the only solution found was the dogma of the Trinity. These debates are the ground in which the Christian conception of the human being takes root, a being made in the image of God and therefore endowed with a dual nature, spiritual and temporal, and with a mortal body housing an immortal soul. This conception was systematized by jurists in the medieval period. Every human being without exception is a composite of body and soul, a *homo naturalis* destined through baptism to become a person in the Church.[73] And the Church is conceived as the mystical body of Christ, distinct from the believers who comprise it. During the same period, the Church also served as a model for a figure which was to become central to our contemporary political and economic life: the legal person, an artificial being which binds humans together while transcending their mortal condition.[74]

Marcel Mauss states that 'our own notion of the human person is still basically the Christian one'.[75] It is notably the source of the principle of dignity as it is proclaimed in the Universal Declaration of Human Rights (article 1) or in laws on bioethics (article 16 of the French Civil Code). In medieval terms, 'dignity' referred to a corporation that extended not in space but over time, a corporation by succession. 'Dignity' produced the fiction of a unity between predecessors and potential successors, who were all present in and incorporated into the incumbent of the moment; by definition, therefore, 'dignity' never died.[76] The concept was first applied to the royal function and began to be 'democratized' with the Renaissance Humanists and firstly Dante, for whom every human, while a mortal being, incarnated the immortal dignity of *humanitas*.[77] True to its etymology, 'personality' remains a mask, but one that enables

73. See G. Le Bras, 'La personne dans le droit classique de l'Eglise', in I. Meyerson (ed.) *Problèmes de la personne*, *op. cit.*, pp. 189ff.

74. O. von Gierke, *Das deutsche Genossenschaftsrecht*, *op. cit.*; P. Gillet, *La Personnalité juridique en droit canon*, *op. cit.*; E. Kantorowicz, *The King's Two Bodies*, *op. cit.*

75. M. Mauss, 'A Category of the Human Mind', *op. cit.*, p. 19.

76. See E. Kantorowicz, *The King's Two Bodies*, *op. cit.*, pp. 386ff.

77. *Ibid.*, pp. 451ff. This theme was developed by the successors of Dante and notably by Pico de la Mirandola in his *Oratio de hominis dignitate*: 'After having been born in this state so that we may be what we will to be, then, since we are held in honor, we ought to take particular care that no one may say against us that we do not know that we are made similar to brutes and mindless beasts of burden' (Pico della Mirandola, *On the Dignity of Man*, trans. C.G. Wallis, Paul J.W. Miller and Douglas Carmichael, Indianapolis, Hackett, 1998, p. 7).

every human being to partake fully of human dignity and to achieve scientific knowledge of nature through the power of the mind, the *cogito*. As Descartes wrote in the now famous Preamble to his *Cogitationes privatae*, 'As I prepare to make my entrance onto this stage of a world, where until now I have been but a spectator, I proceed masked.'[78]

Personality is therefore the generic concept in which body and soul are held together. It transcends the mortal nature of the individual and enables him or her to partake of the immortality of the human spirit. But whereas in other civilizations this communion presupposes that our personality be progressively effaced before the absolute value of spirit, in the Western world it takes the form of a revelation of spirit in the experience of its mortal incarnation. The legal personality that is attributed in the Universal Declaration of Human Rights to any and every human being wherever they may be found (article 6), is like a blank page on which the individual is to leave the mark of his or her spirit. The horizon of the 'Human' in the Universal Declaration is the 'free and full development of . . . personality', which justifies the attribution of rights without which this development would be compromised (articles 22, 26, 29). Legal personality is therefore simply a means guaranteed by law to enable everyone to realize his or her personality on this earth, in a way that will identify him or her in the eyes of contemporaries and of future generations. Recalling the etymology of the term *persona*, which in Greek first meant the masks of actors, Heinrich Zimmer notes:

> The Western outlook – which originated with the Greeks themselves and was then developed in Christian philosophy – has annulled the distinction, implied in the term, between the mask and the actor whose face it hides. The two have become, as it were, identical. When the play is over the *persona* cannot be taken off; it clings through death and into the life beyond. The Occidental actor, having wholly identified himself with the enacted personality during his moment on the stage of the world, is unable to take it off when the time comes for departure, and so keeps it on indefinitely, for millenniums – even eternities – after the play is over.[79]

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78. '*Sic ego, hoc mundi theatrum conscensurus, in quo hactenus spectator existi, larvatus prodeo*' (Descartes, *Cogitationes privatae* [1619], in *Oeuvres*, Paris, Vrin, vol. X, 1986, p. 213).

79. See H. Zimmer, *Philosophies of India*, ed. Joseph Campbell, Delhi, Motilal Panarsidas Publishers, 1951, pp. 236–7.

In stark contrast, one of the major tasks that Indian thought has undertaken over the centuries has been to establish a clear frontier between actor and role: 'Piercing and dissolving all the layers of the manifest personality, the relentlessly introverted consciousness cuts through the mask and, at last discarding it in all of its stratifications, arrives at the anonymous and strangely unconcerned actor of our life.'[80] This attitude stems from the inevitability of reincarnation and from a will to live tempered by melancholy and weariness in the face of 'the prospect of this endless before and after, as though an actor should become suddenly bored with his career'.[81] In this world, the spirit is ensnared by a vital force which blindly carries creatures away in an endlessly returning cycle. This is why in Indian culture such prestige accrues to renunciation, to the figure of the ascetic, who is like a renegade actor tired of playing role after role in this unending theatre of life, and who decides to withdraw from the play. To the question 'Who is this fool that keeps this dim-witted entertainment on the boards?', Indian philosophy replies that it is the human being, whose brain, tongue and limbs are permanently possessed by the need to do something – and who goes ahead and does it![82] Whereas Indian civilization sees personality as a mask to be torn off, the West sees personality as a mask to be fashioned. This difference is evident in funeral rites: Indian ritual, far from preserving the physical remains of the deceased in order to immortalize the memory of their personality,[83] seeks to destroy them.[84]

One can understand in this light why Indian civilization, which in other respects is so rich, has remained seemingly indifferent to the history of humankind, seen as a ceaseless and laborious return to the beginning, whereas the West has made History the very key to understanding the human being. Just as a person's spirit is revealed in their individual history, so the history of humanity has always been endowed with meaning, in the eyes of the West, whether in the guise of progress towards salvation, the revelation of the human spirit to itself, or scientific and technological progress. For us, history has a prophetic dimension and we intend to learn from it; it is an ideology of progress based on theological suppositions inherited with the

80. *Ibid.*, p. 237.

81. *Ibid.*, p. 238.

82. *Ibid.*, p. 240.

83. See P. Ariès, *The Hour of Our Death*, trans. Helen Weaver, London, Allen Lane, 1981; and his iconographical study, *Images of Man and Death*, trans. Janet Lloyd, Cambridge, MA, and London, Harvard University Press, 1985.

84. See C. Malamoud, *Le Jumeau solaire*, *op. cit.*, pp. 67ff.

Christian conception of the person.[85] This would explain why the first anthropologists tended to cast the societies they were studying into some sort of prehistory of humanity whose deeper meaning basically escaped them. As Wittgenstein notes:

> Frazer is much more savage than most of his savages, for these savages will not be so far from any understanding of spiritual matters as an Englishman of the twentieth century. His explanations of primitive observances are much cruder than the sense of the observances themselves. An historical explanation, an explanation as an hypothesis of development, is only *one* kind of summary of the data – of their synopsis. We can equally well see the data in their relations to one another and make a summary of them in a general picture without putting it in the form of an hypothesis regarding the temporal development.[86]

Our conception of the person as spirit revealed in its incarnation also forms the basis of our understanding of rights in the West. This conception is explicit not only in the legal status of the body but also in the status of things that bear the imprint of the human spirit. The Church considered the human body as a temple for the immortal soul, and we still consider it to be the seat of the personality; it is treated as a sacred object, from before birth to after death. Law also protects intellectual works, that is, those that bear the imprint of the personality of the author. The person assigned 'paternity' of the created work has moral rights over it, even if it is transferred into other hands, and even after his or her death.[87] The works that are the most brilliant illustrations of the dignity of the human spirit are even partially or totally banned from being traded and come under what French law calls 'cultural heritage'.[88] Such works become part of the Nation and as such are legally consecrated, in the original sense of

85. See E. Troeltsch, 'L'édification de l'histoire de la culture européenne', in J.-M. Tétaz (ed.), *Religion et histoire*, Geneva, Labor et Fides, 1990, pp. 141ff.; K. Löwith, *Meaning in History*, *op. cit.*, p. 195. The same idea is treated critically in the work of Simone Weil: 'Christianity was responsible for bringing this notion of progress, previously unknown, into the world; and this notion, become the bane of the modern world, has de-Christianized it. We must abandon the notion' (*Letter to a Priest*, trans. A.F. Wills, London, Routledge and Kegan Paul, 1953, p. 48).

86. L. Wittgenstein, *Remarks on Frazer's 'Golden Bough'*, *op. cit.* p. 8.

87. See B. Edelman, *Le Sacre de l'auteur*, Paris, Seuil, 2004, and *id.*, *La Propriété littéraire et artistique*, Paris, PUF, 3rd edn, 1999.

88. See A.-H. Mesnard, *Droit et politique de la culture*, Paris, PUF, 1990, pp. 419ff.; also F. Choay, *L'Allégorie du patrimoine*, Paris Seuil, 1992.

consecratio: they pass from a profane to a sacred space. Lastly, human labour, which is a point of contact between spirit and thing, is subject to specific measures allowing it to be transformed into exchange value while also precluding that the worker's body be treated like an object to be traded.[89] The notion of *person* is what allows us to think matter and spirit in their unity and not as two radically distinct universes. This unity forces us to take into account the existence of sacred things (the body, intellectual works), at the frontier between people and things. These cannot be treated simply as objects put at the disposal of the human being; they possess a meaning of their own which is not to be altered by any contrary meaning. The prohibition they represent produces the desire to transgress it, in the sadistic desire to view the human body as merely a thing subjected to the omnipotence of someone else's mind or the technological desire to transform the body into a creation of the human spirit. Personality is therefore not a biological given like genetic makeup or blood group, it is a dogmatic construction which would collapse if people could treat it simply as they pleased.[90] The principle of the inalienability of civil status is the expression of the prohibition that surrounds personality, and it also posits the existence of a third party which guarantees this status.

The Third Party as Guarantor of Identity

The individual, the subject, the person: these are the three pillars on which, in the West, the human being rests. What they have in common is their irreducible duality. The individual is both unique and like others; the subject is both sovereign and subjected; the person is both flesh and spirit. These three terms also provide the categories of thought through which the apparently contradictory facts of human experience may be grasped in their logical unity and the universe of the senses may be reconciled with our demand for sense. When we represent the human being as a unique and indivisible individual, both equal to and irreducibly different from all others, we are performing an act of faith which clearly falls outside the realm of

89. See Alain Supiot, *Critique du droit du travail* [1994], Paris, PUF, 'Quadrige', 2nd edn, 2002, pp. 39ff.

90. The theme of the human being who, deprived of his or her identity, is reduced to the state of hunted animal has always been a strong theme in literary works, from Classical myths to Hollywood via the Perrault tale 'Donkey Skin' (*'Peau d'âne'*) (the hero suffers from a genealogical disorder) and the *Tales of Grimm* in which princes are transformed into bears.

experimental science. It is likewise for our notions of subjectivity, encompassing heteronomy and autonomy, and of personality, encompassing body and spirit. This anthropological structure cannot be established on a scientific basis, since science itself results from this structure when it posits the human being as subject of knowledge capable of observing itself as object of knowledge. Our faith in this conception of the human being is not a private affair, as religious faith has become today, but a belief shared by all. It supposes the existence of an ultimate point of reference symbolizing and guaranteeing what the American Declaration of Independence calls 'self-evident truths'; and it invests these with dogmatic value.

In a radically secular legal order like the French Republic, it is the State that occupies this position of ultimate reference.[91] The State has taken over from the Church, but as a 'transformed Church' which is exclusively based on the representation of individuals.[92] The State is the cornerstone of the organization of the socio-political whole and is the immortal representative of the attributes of the human being, divested of their negativity: unique, without equal; sovereign, subjected to nothing other than itself; spirit of the community, undying because its physical body is the people which is constantly regenerated. The State is a transcendent person bearing prerogatives to which the ordinary law does not apply and is also the ultimate guarantor of the legal personality of the real or fictive beings that are referred to it. Without this pinnacle to the system, our anthropological configuration would simply come apart. Yet the exclusive reference to the State as guarantor of identity is the exception rather than the rule. In numerous countries, including Western ones, questions of civil status continue to be wholly or partly the remit of religion. For example, in the United Kingdom, couples have the choice between civil marriage and a limited number of religious marriages, and this is the case in a great many European countries[93] where the State plays only a secondary role as ultimate guarantor of the status of persons. For human identity is, in the last resort, always an issue of faith, in the two senses of confidence and belief – such that when citizens cease to identify with the Republic and its values, the religious underpinnings of society tend to re-emerge in various forms, even in countries like France that are at first sight thoroughly secular.

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91. See P. Legendre, *Les Enfants du texte, op. cit.*

92. See L. Dumont, *Essays on Individualism, op. cit.*, pp. 58–9.

93. For an up-to-date survey, see J. Pousson-Petit (ed.), *L'Identité de la personne humaine. Étude de droit français et de droit comparé*, Brussels, Bruylant, 2002.

Towards Total Emancipation: Humanity Decomposed

Techno-science issues directly from the anthropological structure that characterizes the West, and is also the key to its domination over the rest of the world. But scientific method requires that the beliefs on which it is founded be forgotten, and its own history along with it. Guided by the omnipotence of the *cogito* and plunged into the universe of things, science sets about treating the human being as an object. This is also true of sociology, for example, when it seeks to be recognized as a science and claims to observe individuals as '"particles" that are under the sway of forces of attraction, repulsion, and so on, as in a magnetic field'.[94] It is even more evident in the case of modern biology, which reduces living beings to their physico-chemical makeup and rejects every form of 'vitalism'.[95] Eminent biologists for whom even the notion of 'genetic programme' has finalist intentions nowadays maintain that 'life does not exist as such as a scientific object, since its mechanisms can be reduced to chemical interactions'.[96] That the life sciences should deny that the existence of living beings can be the object of scientific enquiry demonstrates just what asceticism is required by the scientific method! It is of course comprehensible that, from a methodological point of view, a biologist might be led to the conclusion that 'life as such does not exist' (whatever questions this kind of affirmation might raise as to the pertinence of the paradigms of biology, considered as a life science). One could concede even more readily that 'man does not exist as such as object of science',[97] if only this idea were to lead certain economists, sociologists or linguists to make their scientific claims with a little more humility.[98] But doubting the existence of life, man or the universe has invariably led to nothing more than the spontaneous

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94. P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology*, Cambridge, Polity, 1992, p. 106.

95. See A. Pichot, *Histoire de la notion de vie*, Paris, Gallimard, 1993.

96. H. Atlan, *La Ein du 'tout génétique'? Vers de nouveaux paradigmes en biologie*, Paris, INRA, 1999, p. 52.

97. This is what J.-J. Kupiec and P. Sonigo suggest in *Ni Dieu, ni gène. Pour une autre théorie de l'hérédité*, Paris, Seuil, 2000. In response to the question 'Does the human being exist?', these two brilliant biologists reply, 'We are obliged to examine this question calmly' (*ibid.*, pp. 32ff.). Richard Dawkins does not take such precautions and maintains simply that only genes exist (R. Dawkins, *The Selfish Gene* [1976], 2nd edn, Oxford University Press, 1990).

98. From *humare* ('to bury'), from which *humanitas* is also derived, according to the etymology defended by Vico, *Principles of the New Science*, *op. cit.*, p. 8.

rediscovery of the experience of the Cartesian void and the proud solitude of the *cogito*. Whereas if neither life nor man may constitute objects of science as such, this only confirms the suspicion that science is radically unfitted to the task of grounding any type of claim concerning the 'ends' that might give meaning to human life.[99] This incapacity is unimportant as long as science remains subordinated, as a specialized activity, to the dogmatic structures that give meaning to the human being and society. But as soon as these dogmatic structures are themselves subordinated to science, understood as the ultimate foundation of laws, this incapacity is fatal:[100] science exceeds its sphere of validity and degenerates into scientism.

Scientism emerges when science, like a river in spate, bursts its banks. The field of science is abandoned, a field of doubt in which truth is understood to be forever elusive and capable only of a provisional and approximate representation. When scientism takes over, it floods the hermeneutics of human life with fetishized certainties it calls 'scientific'. This aberration is by no means restricted to the natural sciences. While it frequently affects prominent biologists, when they claim to *explain* the human being, it also characterizes many researchers in the social sciences who aspire to become like natural scientists, trying their hardest to consider the human being exclusively as a thing. Scientism may be recognized – whether in the 'hard' or the 'soft' sciences – by the belief that the human being is an object that can be exhaustively explained, and that nothing can be known about humans that the natural sciences will not one day discover and allow us to master. Its motto could be the headline that appeared on the front page of the French daily *Le Monde*, announcing that the human genome had been deciphered: 'Man laid bare' ['L'homme mis à nu'].[101] This viewpoint is to the knowledge of the human being what pornography is to love. As such, why should we not display a similar tolerance towards it, so long as we can steer clear of its tediously repetitive pronouncements? After all – so the

99. The most lucid biologists admit this when they say that in the ethical sphere they are 'obliged to make choices that are increasingly independent of biological data' (P. Sonigo, 'Une vague idée de l'individualité', in M. Fabre-Magnan and P. Moullier (eds), *La Génétique, science humaine*, Paris, Belin, 2004, p. 170).

100. See the acute remarks by Norbert Elias on the way in which, in the wake of Descartes, the increased distance set between the subject and others or the self in the relation of observation becomes ossified, giving the observer the impression of being cut off from all others and existing independently of them. N. Elias, *The Society of Individuals*, trans. E. Jephcott, New York and London, Continuum, 2001, pp. 103ff.

101. *Le Monde*, 27 June 2000.

argument goes – scientism stems from the anthropological structure of the West in its modern form, which conceives the human being as capable of knowing and mastering the totality of the laws governing the universe, while also being a thing subject to these laws. The only problem is that the figure of the Third, the guarantor of identity, and with it the dimension of the *institution* of the human being, have been lost along the way. Why on earth should this bother us?

It should bother us because it is a breeding ground for what Pierre Legendre, referring to studies on filiation, has called a 'butcher's conception' of humanity.[102] Recent history has demonstrated just where the reduction of the human being to a biological essence can lead. Its foremost effect is to replace the founding beliefs of humankind with the dogmas of a fetishized science[103] – the beliefs of others, of course, of Indian, African, Asian, Muslim, *anthropoi*. The West has long since reduced these to the status of objects of anthropological knowledge and classed them within the prehistory of reason.[104] But scientism has also replaced our own founding beliefs, the beliefs that stem from the *imago Dei* and that ground the Western conception of the human being. In a world in which science is the ultimate point of reference, belief in the dignity of man is relegated to the private sphere, along with religion, while the public sphere is concerned with the 'realism' of the struggle for existence. This 'realism', which is in fact a scientism, replaces belief, and is the basis on which people seek to build the social and economic order.

The West's loss of faith in the categories grounding the notion of the human being has been a hallmark of the twentieth century, understandably so, since it was no longer possible to believe in man's humanity after the First World War had exposed the murderous power of technology. When the soldiers described themselves as 'cannon fodder', they better than anyone put their finger on what was radically new in this industrial management of massacre, and the reduction of the human being to the state of an animal to be slaughtered. Hitler, an offspring of this war, learnt one lesson from it: 'It is not by the principles of humanity that man lives or is able to preserve himself above the animal world, but solely by means of the most brutal struggle.'[105] He thus expressed, in Louis Dumont's view,

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102. See P. Legendre, 'L'attaque nazie contre le principe de filiation' in *Filiation*, Paris, Fayard, 1990, pp. 205ff.

103. See J.-C. Guillebaud, *Le Principe d'humanité*, Paris, Seuil, 2001.

104. See O. Nishitani, 'La formation du sujet au Japon', *op. cit.*

105. Speech by Hitler, 5 February 1928, cited by Louis Dumont in *Essays on Individualism, op. cit.*, p. 170.

the only belief on which Nazism was really based, 'the struggle of all against all as the final truth of human existence, and the domination of one man over another as characteristic of the natural order of things'.[106] Far from constituting a pathological return to an immanent community, Nazism was a radical form of Social Darwinism, in which no human reality was admitted other than that of biological individuals ceaselessly involved in a conflict in which, according to the Führer, 'the stronger and cleverer win out against the weaker and less clever'. Since the truth of the human being is exclusively biological, there remains only physical similarity – racial identity – on which the social bond might be founded, with the State being merely an instrument for developing and maintaining a society where all would ideally be identical.[107] 'We shape the life of our people and our legislation according to the verdicts of genetics,' said the Nazis,[108] expressing a conviction which today has become a commonplace: that knowledge of the human being is the business of science, and the law must bow to this.

After the Second World War and the military victory over Nazism, the West was confident that a world organized around universally accepted values had been re-established. It was encouraged in this belief by the implosion of Communism half a century later. The adoption of the Universal Declaration of Human Rights in 1948 was intended as a reaffirmation of the values inherited from Christianity and recast by Enlightenment philosophy. The idea was to refound a religion of humanity capable of bringing together all the peoples of the earth. At the same time, the creation of a system of international organizations based on the recognition of the inviolability of State sovereignty was intended both to protect all States from the risk of new wars of aggression and to encourage the spread of 'social progress', as the West understood it, to the poorer countries, in the fields of education, culture, work and health.[109] People hoped these measures would prevent the return of modern forms of barbarity in which the human being is viewed only as a biological animal subject to the laws of natural selection. However, the refusal to admit

106. L. Dumont, *Essays on Individualism, op. cit.*, p. 173.

107. *Ibid.*, p. 175. Ernst Troeltsch notes as early as 1911 that evolutionary theory, in replacing the harmony of interests with the struggle for survival as motor of history, 'is nothing but a weak remnant of a religious faith in the meaning and purpose of the world' (see *Protestantism and Progress, op. cit.*, p. 91).

108. *Nazi Primer*, cited in Arendt, *The Origins of Totalitarianism, op. cit.*, p. 350.

109. See Chapter 6.

that Nazism was in fact a passage to the limit of the Western conception of the human being,[110] and not just some accident of history come from outer space, precluded any critical reflection on scientistic 'realism', the feature that the totalitarian regimes had in common. As Dumont remarks:

> Hitler only pushed to their utmost consequences some very common representations of our times, be it 'the struggle of all against all', a kind of commonplace for uncultured people, or its more refined equivalent, the reduction of politics to the raw notion of power. Once such premises are admitted, and with Hitler's example at hand, one cannot see how the man who has the means to do it can be prevented from exterminating whom he will, and the horror of the conclusion demonstrates the falsity of the premises. Universal reprobation shows agreement on values, and political power should be subordinated to values. The essence of man's life is not the struggle of all against all, and political theory cannot be a theory of power but should be a theory of legitimate authority.[111]

Today we live in a 'post-Hitlerian' era.[112] The memory of the crimes of Nazism and the even more fragmentary memory of those of Communism[113] have taken the place of whatever might have obliged the democracies to do a bit of soul-searching – regarding economism, for example, which was central to Communist ideology, or the biologism of Nazism. Far from being a Nazi reserve, the paradigm of race was omnipresent in pre-Second World War anthropology and biology in all Western countries.[114] Since Western democracies have

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110. In the logical sense of a passage to the limit, which implies a transition to something qualitatively different (see R. Guénon, *Les Principes du calcul infinitésimal*, Paris, Gallimard, 1946, pp. 77ff). At the dawn of the twentieth century, Ernst Troeltsch had already noted just such a qualitative transformation in the history of capitalism: the 'expansion of modern capitalism, with its calculating coldness and soullessness, its unscrupulous greed and pitilessness, is turning to gain for gain's sake, to fierce and ruthless competition. Its agonising lust for victory, its blatant satisfaction in the tyrannical power of the merchant class, has entirely loosed it from its former ethical foundation; and it has become a power directly opposed to genuine Calvinism and Protestantism' (*Protestantism and Progress, op. cit.*, p. 74)

111. L. Dumont, *Essays on Individualism, op. cit*, pp. 176–7.

112. See P. Legendre, 'L'attaque nazie', *op. cit.*

113. While the horror of the Nazi concentration camps can be evoked through the films and photographs taken at the liberation of the camps, almost no images are available to keep alive the memory of the gulag or of the extermination of the kulaks.

114. See A. Pichot's very detailed research in *La Société pure. De Darwin à Hitler, op. cit.*

refused to analyse what in their own systems might have provided a seedbed for totalitarianism, they continue to believe that, in the last instance, the economy determines social relations and that, also in the last instance, biology is the way to gain knowledge of the human being. Science occupies the structural position of the True formerly occupied by the Church. Over the past half-century, the study of the genetics of populations has given way to biomolecular genetics,[115] with genetic explanations[116] simply replacing racial ones, but within a discourse whose dogmatic structure has remained unaltered: the idea that the struggle of all against all is the motor of history, no longer in the form of a collective struggle of class or race but in the democratic form of individual competition, generalized to all domains of human existence – economic, sexual, religious, and so forth. This generates a vision of society not as a whole but as a heap,[117] as an aggregate of juxtaposed individuals motivated by the pursuit of their own individual interests.

A collection of individuals only forms a whole if each refers to the same organizatory principle, a common law which transcends the existence of any single individual. The anthropological structure of *imago Dei* refers each of us to a supreme Being which guarantees our identity. The sexed being is referred to a single generic category – the human being – which encompasses both sexes and on which the idea of a law of nations, common to all humanity, is based. Likewise biology refers every organ, cell or gene to a totality that transcends it: the human body. A totality is unthinkable if the concepts of reference, hierarchy and common rule are rejected, if one refuses to accept that, in the words of Canguilhem, 'there is a kind of domination of form over matter, a sort of subjection of the parts to the command of the whole'.[118] This is the difficulty biology experiences today in its

115. See A. Pichot, *Histoire de la notion de gène*, Paris, Flammarion, 1999.

116. A recent discovery splashed across the front pages of supposedly quality newspapers is the language gene (see *Le Monde*, 9 May 2003, '*La mutation du gène FOXP2 pourrait avoir engendré la parole*' [Mutation of the gene FOXP2 could be at the origin of speech]). It joins the cohort of 'explanatory genes', alongside those of homosexuality, intelligence, aggression, and so forth. These have simply replaced the 'good head for maths' and other cranial convexities identified by the now defunct phrenology.

117. See L. Dumont, *Essays on Individualism*, *op. cit.*, p. 263.

118. G. Canguilhem, 'Le problème des régulations dans l'organisme et dans la société', *op. cit.*, p. 114. On the perspectives opened up for biology by the return to favour of the idea of 'form', see the concept of morphogenetic field developed by R. Sheldrake, *Une nouvelle science de la vie. L'hypothèse de la causalité formative*, Monaco, Éditions du Rocher, 1985.

definition of the living being. As soon as it reduces the body to its component parts and these to their physico-chemical elements, nothing can be observed that might account for the living being as such. This leads to the conclusion that the latter cannot in fact constitute an object of scientific investigation. The dogmatic moment of the institution of the individual is then transferred onto bits of body – genes, cells – which are supposed to function according to the law of the struggle of all against all. As always, our ideas of the human and the social body are interdependent, such that we also see society as a mass of individuals in competition with each other. The individual – a remnant of the structure of *imago Dei* – is conceived as an elementary particle, a being that refers only to itself and has no need to be instituted in order to become and remain a rational being.

The primary meaning of instituting the human being is setting it on its feet, standing it upright,[119] by inscribing it within a community of sense by which it is linked to other human beings. Instituting the human being means enabling it to occupy its place within humanity. This was the task of the primary school teacher in the French Republican system (the *instituteur*). The *instituteur* instructed young children in the subjects required by this system, in order to enable them to act and learn independently in the future. A very revealing terminological change occurred when these teachers asked for the title of *instituteur* to be abolished – since it had become incomprehensible – a request that was acceded to. They were thereafter assimilated into the body of those who 'publicly display their knowledge' or 'profess' – the *professeurs*. As for the generic notion of the human being which used to encompass the two sexes and to which every human being was referred, it has been superseded by that of human species, which equates the human with the animal. The generic category of humanity, which transcends sexual difference and allows the human (*homo*) to be thought of as a totality encompassing the masculine (*vir*) and the feminine (*mulier*),[120] has become

119. On the notion of *vitam instituere*, see P. Legendre, *Les Enfants du texte, op. cit.*, pp. 87ff.; and his *Sur la question dogmatique en Occident, op. cit.*, pp. 106ff.

120. On the distinction in Roman law between genus and species, see J.-H. Michel, *Les Instruments de la technique juridique*, Cahiers du Centre de recherches en histoire du droit et des institutions, Brussels, Publications of the Saint-Louis University Faculties, 2002, pp. 3ff. In Cicero's definition, 'a genus is that which embraces two or more species, resembling one another in some common property while differing in some peculiarity' (*De oratore*, 1, 42, 189, trans. E.W. Sutton and H. Rackham, Loeb Classical Library, Cambridge, MA, and London, Harvard University Press, 1948, p. 130).

incompatible with the contemporary credo which reduces a person's sex solely to their biology. This has led to a change in the sense of the term 'gender' which, in the orthodoxy of Gender Studies, now designates the arbitrary imposition of a sexed state, masculine or feminine, on individuals who are free to shake it off. This is a world in which, abetted by advances in biology and surgery, each person would ultimately have the right to choose his or her sex and change it at will.[121]

When a pervasive scientism converges with the Western belief in progress it produces an ideology of the *un*limited which makes itself felt in every sphere of human life. In the field of technology it is expressed by an unshakeable faith in future discoveries that will be able to counter the threats to our planet which our technological and economic *hubris* keeps multiplying.[122] In the legal sphere, it encourages the law to be considered not as guarantor of personal status but as a constraint from which we must liberate ourselves.[123] In this secularized version of the end of the Law as heralded by Saint Paul,[124] freedom flows from faith in a human being capable of auto-foundation and advancing towards a radiant future in which each of us is subject only to the limits that we impose freely on ourselves. Consequently, any limit imposed from the outside is rejected. The seductive power of this fantasy is evident both on the Right and on the Left of the

121. This right was confirmed at a full court session of the French Court of Cassation, 11 December 1992, *Bulletin civil*, 1992, no. 13, *Gazette du Palais*, 1993, 1, jurisprudence 180, conclusions Jéol), when it brushed aside considerations of the inalienability of civil status and went further than what the European Court of Human Rights had decreed, on the issue of the transsexual's right to privacy (ECHR, 40, 25 March 1992, Botella v. France, *Recueil Dalloz*, 1993, J, 101, note Margénaud).

122. See J.-P. Dupuy, *Pour un catastrophisme éclairé. Quand l'impossible est certain*, Paris, Seuil, 2002.

123. The bipartite organization of material which jurists are so fond of demonstrates this ideology clearly when, in their treatment of the problems of the identity of persons, jurists distinguish 'identity imposed' (by the law) and 'identity chosen' (by the individual): see J. Pousson-Petit (ed.), *L'Identité de la personne humaine, op. cit.* The law as guarantor of the identity of persons is thus eclipsed, in the mind of jurists, by the individual's quest for a 'sense of identity' (see D. Gutmann, *Le Sentiment d'identité. Étude de droit des personnes et de la famille*, Paris, LGDJ, 1999).

124. 'Before this faith came, we were held prisoners by the law, locked up until faith should be revealed. So the law was put in charge to lead us to Christ. . . . Now that faith has come, we are no longer under the supervision of the law' (Saint Paul, Epistle to the Galatians, 3:23–5).

political spectrum. In its right-wing version, the politics of deregulation is confined to the economic sphere: *homo oeconomicus* must be delivered from the laws by which he is fettered, so that he may enter into the free play of contracts. In its left-wing version, the devastating effects of such deregulation are (rightly) denounced, but exactly the same logic is applied to the private sphere: any law that seeks to limit the free play of our loves or loathings is viewed as negative, and a politics of deregulation of personal status is actively promoted in the name of a struggle against the 'last taboos'. Both versions, at the end of the day, have very similar effects: the return of the law of the fittest and a widening gap between a small number of winners and a large number of losers. However, the problem is not that of choosing between collective discipline and individual liberty, but of redefining how they must necessarily be combined, in both private and working life. A legal system does not fulfil its anthropological function unless it guarantees that every newcomer on this earth finds a world that pre-exists them and guarantees their identity over time, while also providing them the opportunity to transform this world and leave their personal mark on it. There is no free subject that is not subjected to a law that grounds it.

While the anthropological structure of the West, which has lost faith in a third party that guarantees identity, continues to unravel under our very eyes, wild theories flourish on its ruins. When the principles of equality and individual liberty are no longer rooted institutionally, anchored in a common law binding on all and independent of the whim of any, they can be used to justify the abolition of every difference and every limit, that is, they can generate interpretations that are sheer madness. Numerous examples of this lunacy are provided by contemporary demands in Western countries: to abolish the difference between the sexes,[125] to 'de-institute'

125. Sexual difference, it is suggested, is an 'ideology' which is 'incompatible with our egalitarian and universalist principles' (Association 'Mix-Cité Paris', a mixed movement for equality between the sexes, in 'Quels parents pour demain?' [Tomorrow's parents], *Le Monde*, 19 June 2001, p. 15). Jurists attached to the French National Centre for Scientific Research (CNRS) expound their arguments in the media concerning the 'superfluous' character of the legal division between the sexes (see M. Iacub, 'Filiation: le triomphe des mères' [Filiation: our mothers' triumph], *Le Monde des Débats*, March 2000, pp. 16–17). Meanwhile, sociologists from the École normale supérieure argue that the imprisonment of human beings within a sexual identity should give way to their sexual orientation, freely chosen by each (see E. Fassin, 'Les pacsés de l'an I' [Those united in the PACS, one year on], *Le Monde*, 14 October 2000, p. 20).

maternity,[126] to consider the child as 'a woman's worst enemy',[127] to dismantle the 'specific status' of children (assimilated to an oppressed minority),[128] to replace lineage with contract,[129] or even, – and, in fact, most logically – to claim the right to be mad.[130] The *Cité des sciences* in Paris organizes erudite seminars suggesting that procreation and filiation should henceforth be understood in a framework 'characterized by the end of the monopoly on reproduction of the heterosexual parental couple, giving way to a mobile system of people around the child, whose roles, and cultural and biological filiations and sexualities, would no longer be stable nor interrelated'.[131] Today's fascination with reproductive cloning is understandable in this context: applied to human beings, it would allow them to free themselves at last both from sexual difference and from generational differences, in order to create this 'mobile system of people around the child, whose roles, and cultural and biological filiations and sexualities, would no longer be stable nor interrelated'. It would look something like a world of angels. Or else a world of wild beasts, since

126. 'Just as it was necessary to de-institute the maternal from the feminine, in order to establish equality between the sexes, so equality between sexualities, and parental equality, require maternity and the heterosexual couple to be de-instituted from the education of the children' (in 'Quels parents pour demain?', *op. cit.*). For a similar position, see the critique by French jurists at the CNRS of the tardiness of French law, which has not yet 'freed women from their primary and traditional attachment to children', and which 're-endorses and entrenches the institution of two sexed subjects, in conformity with the old ideology of "two complementary halves of humanity" ' (Iacub, 'Filiation', p. 17).

127. M. Iacub, *Le Monde*, 9–10 March 2003.

128. 'The argument of the "weaker sex", which was used to deprive women of their autonomy 'bears a close resemblance to the argument for the vulnerability of children and their "specific status" ' (in 'Quels parents pour demain?', op. cit.). The International Convention on Children's Rights (United Nations, 1989) unfortunately takes the same line, insofar as it treats the child as a miniature adult endowed with every right – freedom of association, of conscience, of thought, of religion, of expression, of peaceful assembly – excepting the right to be simply a child.

129. See F. de Singly, 'Le contrat remplace la lignée', *Le Monde des Débats*, March 2000, p. 19. This same well-known sociologist of the family was heard explaining on French national radio (France Culture, *La Suite dans les idées*, 14 March 2002) that the incest taboo is a historical phenomenon which our modern world will one day be able to leave behind.

130. This right is claimed by certain jurists at the Ecole des hautes études en sciences sociales, who define freedom as 'a sort of inalienable right to madness' (O. Cayla and Y. Thomas, *Du droit de ne pas naître*, Paris, Gallimard, 2002, pp. 65ff.).

131. 'Procréation, sexualité et filiation' ['Procreation, sexuality and filiation'], seminar organized by V. Nahoum-Grappe and P. Jouannet, *Cité des sciences*, Paris, January–March 2003.

all those who do not succeed in imposing themselves as masters on this deregulated market of social positions will be judged to be alone responsible for their misfortune and will be relegated to a sort of subhumanity unfit to reap the benefits of a limitless freedom.[132] Once maternity has been 'de-instituted', we will have to build prisons for children – and we already have to – since whoever does not find limits inscribed within themselves will necessarily encounter them outside.

These are the forms through which the revolutionary inversion of law and science, characteristic of the totalitarian regimes of the twentieth century, has lived on. Law and the State, from this point of view, are nothing but conventions that can be endlessly revised, instruments in themselves empty of meaning and subordinated to the truths of science and the irresistible progress of technology. They are no longer called upon to serve the natural domination of one race or class over another, but the individual in competition with all others for self-affirmation. This new version of scientism, like its previous incarnations, leads to a dead end, and a bloody one at that: it refuses to recognize the place of *interdiction* in the institution of reason.

Canguilhem, noting that the biological organism is a rather exceptional mode of being, since there is no difference between its existence and the rule governing it, states that the situation is quite different in the realm of human affairs, in which the rule is not immanent but necessarily external to the 'social body'.[133] This explains why in medicine it is evil (illness) and not good (health) that is the problem, whereas, for society, it is the definition of what constitutes a just order that cannot be taken for granted. Society's rule cannot be found in itself; it necessarily proceeds from another sphere which lies beyond both scientific research and individual whim – even if the latter masquerades as 'ethical'. Yet this rule is no less necessary, in order to protect humans from their murderous and omnipotent fantasies, especially when these are exacerbated by the power of technology. In every civilization, the logic of interdiction responds to the need to place a third principle between humans and their representations, whether mental (language) or material (tools). This dogmatic[134] function – of interposing and interdiction – gives law an exceptional place: that of a technique that humanizes technology.[135]

132. P. d'Iribarne, *Vous serez tous des maîtres. La grande illusion des temps modernes*, Paris, Seuil, 1996.

133. G. Canguilhem, 'Le problème des régulations dans l'organisme et dans la société', *op. cit.*, pp. 106ff.

134. On this concept, see P. Legendre, *L'Empire de la vérité, op. cit.*, pp. 29ff.

135 See Chapter 4.

Denouncing the dogma of law in the name of science, as many jurists do today, invites dangerous forms of regression, as Norbert Elias suggests when he states that 'it might well be possible that the inadequacy of the modes of thinking based on the classical natural sciences reinforces the tendency of people to seek a welcome refuge in pre-scientific, magical-mythical notions of themselves'.[136] The faith in a 'radiant future' where we would be free of any law except that of science has been the matrix of the negation of humanity for the last two hundred years. Today it can still give birth to unprecedented monstrosities. Horror may not be repeatable, but it is regularly renewed, and the Maginot lines of memory are incapable of preventing its return. The devices of the law must be held firmly in place if human beings and society are not to fall apart.

136. N. Elias, *The Society of Individuals*, *op. cit.*, p. 77.

2

LAW'S DOMINION: *DURA LEX, SED LEX*

Of all the precepts, none is equal in importance to the study of the Law. Nay, study of the Law is equal to them all.

Moses Maimonides, *The Book of Knowledge*

Do not be bewildered by the surfaces; in the depths all becomes law.

Rainer Maria Rilke, *Letters to a Young Poet*

The universe of laws is infinitely larger than the body of legal norms (*le Droit*). This body of norms, or legal system, is how the West organizes the rules that people apply to themselves. It derives from *ius*, a word which in Roman law referred to the formulas in which the judicial process was expressed.[1] It is based on the idea of direction (*directum*) and associates the idea of justice with that of line of conduct, an association already present in the Latin *regula* (ruler) or *norma* (set square). Rulers, set squares, lines and right angles: for such a body of norms, justice is an issue of geometrical patterns rather than of casuistry, of surveying rather than sentencing, even if, in the famous words of the *Digest*, justice is ultimately a question of rendering to each their own (*suum cuique tribuere*). The common law tradition has no exact equivalent for this normative architecture, also called 'law' in English. In the common law tradition, in Britain or the USA, the equivalent of this normative architecture has its source in precedents and not in codes, in cases decided by the judge rather than in paths laid down by the State.

1. The origin of the word is obscure, but in its most general sense *ius* expresses a legal formula, which leads E. Benveniste to suggest that 'it is not *doing* but always *pronouncing* which constitutes "law" ' (*Indo-European Language and Society*, trans. Elizabeth Palmer, London, Faber & Faber, 1973, p. 392). In the same vein, see A. Magdelain, for whom 'in Ancient Rome, law is a language' (*Ius imperium auctoritas*, *op. cit.*, pp. 33ff.).

However, in both the Anglo-Saxon and the Continental traditions, the general idea of law (*loi*, *legge*, *ley*, *Gesetz*) includes the rules over which people have no influence: the Law of Moses or of Islam, the laws of Kepler or Newton, of thermodynamics or of universal gravitation. *Lex*, whose meaning was firstly religious, always expresses an imperative, a power imposed on people, but it can be a physical or a metaphysical power as well as a human power. The idea of the law as a body of norms (*le Droit*), by contrast, is specific to legal thought and allows jurists to inhabit their own system of rules. These different types of normativity structure Western thought. However, thinking in terms of law, in all its forms, is certainly not self-evident and by no means universal. If we can understand this, we may be able to view the West's 'civilizing process'[2] in a different light.

Variations on a Mode of Thought

At the end of his classic work on Chinese thought, Marcel Granet wonders how he can best summarize his understanding of it. His response is as follows: 'Stressing the fact that the Chinese do not readily submit to any constraint, even of a simply dogmatic nature, *I shall restrict myself to characterizing the spirit of Chinese customs by the formula*: neither God nor Law.'[3] This summary, which also corresponds to Granet's aim of '*situating* the most immense and long-lived civilization ever known',[4] invites us to situate, in turn, our own modes of thought.

The citation above does not of course imply that Chinese thought had no notion of law, but that law never had the central position it has in the West. On the purely legal level, the Middle Kingdom had both administrative[5] and penal law, but it never developed the idea of civil law, on which the West's concept of 'civilization' is founded. In the Confucian tradition, a 'civilized' man has no need of law because he has already internalized the whole art of social etiquette ('rituals'). Law is good only for those barbarians who are incapable of adopting such social behaviour, and so its form is brutal and simple: the penal

2. See N. Elias, *The Civilizing Process* [1969], trans. Edmund Jephcott, Oxford, Blackwell, 2000, p. 436.

3. M. Granet, *La Pensée chinoise, op. cit.*, pp. 475–76 (Granet's emphasis).

4. Ibid.

5. See notably É. Balazs, *La Bureaucratie céleste*, Paris, Gallimard, 1968, particularly the first part, 'Société et bureaucratie', pp. 15ff.

code.[6] There was a school of thought during the tumultuous years preceding the founding of the Empire that denounced the hypocrisy of this 'government by men' (which in reality meant that the Mandarins decided on the fate of the powerless), and advocated 'government by law'. This was the Legalist School (*Fa-kia*) which we know about notably thanks to the work of Léon Vandermeersch.[7] But these Legalists, making do with what they had, did nothing but extend the penal code to all aspects of social life. Their rise to power at the beginning of the First Empire saw the brutal repression of Confucians (whose books were burnt in 213 BC). The Legalists' victory was short-lived since their ideas were abandoned with the overthrow of the Qin dynasty (206 BC), and they went down in history for their cruelty and extremism.

The Legalists are said to have engraved the laws on the iron cauldrons in which offenders were boiled alive, thus making the content and sanction of these laws immediately intelligible, and giving them maximum publicity. Kafka's *In The Penal Colony* is based on precisely the opposite principle: the abstruse text of the law that has been infringed is inscribed into the flesh of the tortured man, who by this means alone, and as he draws his final breath,[8] can have its meaning revealed to him. Kafka's texts reflect the very law they describe and elicit an endless labour of interpretation. So I will restrict myself to just three comments here. Firstly, the idea that the law is an enigma is typically Western. It would never have occurred to the Legalists of the *Fa-kia*; according to one of the school's classic texts, the *Shangjunshu*: 'The people are easy to govern, for they are stupid. The law can cater for this. It need only be clear and easy to understand to function unfailingly.'[9] Secondly, the idea that the human body is the privileged site of the inscription of the law was one of the divergences between the Jewish and Christian traditions (around the

6. See J. Escarra, *Chinese Law*, *op. cit.*; for a more nuanced viewpoint, see Xiaoping Li, 'L'esprit du droit chinois: perspectives comparatives', *Revue internationale de droit comparé*, 1, 1997, pp. 7ff.; and for a terminological analysis, see Tchehao Tsien, 'Le concept de "loi" en Chine', *Archives de philosophie du droit*, vol. 25, p. 231. For contemporary developments, see X.-Y. Kotovtchikhine (ed.), *Sources of Law and Legal Reform in China*, Paris, Litec, 2003, bilingual English–French.

7. L. Vandermeersch, *La Formation du légisme*, *op. cit.*; and 'An Inquiry into the Chinese Conception of the Law' in S.R. Schram (ed.), *The Scope of State Power in China*, London, European Science Foundation, St Martin's Press, 1985, pp. 3–26.

8. F. Kafka, 'In der Strafkolonie', in *Ein Landarzt und andere Erzählungen*, translated by J.A. Underwood as 'In The Penal Colony', in *Stories 1904–1924*, London and Sydney, Macdonald, 1981, pp. 149ff.

9. Cited by L. Vandermeersch, *La Formation du légisme*, *op. cit.*, p. 200.

commandment of circumcision[10]). Lastly, the Western mind has always been fascinated by the idea that the incarnation of the law in the tortured body could be a site of Revelation – as illustrated, for example, by Georges Bataille[11] or Michel Foucault.[12]

At no moment in the history of Chinese thought, not even among the Legalists, is there any concept of law guaranteeing individual rights[13] (nor, for that matter, is there the concept of slavery, in the legal sense of the term, but this is doubtless linked to the first point). How are we to explain this fundamental difference between Eastern and Western thought? This is where we should reflect upon the work of André-Georges Haudricourt. In all his works, Haudricourt, an ethnologist, botanist, technologist and Orientalist, shows us that 'the relations between man and nature are infinitely more important for explaining his behaviour and the social history it expresses than the shape of his skull or the colour of his skin'.[14] In an article published in 1962 he put forward a typology of these relations:[15] on the one hand, the gardener, represented in the Book of Genesis by Cain; on the other hand, the shepherd, represented by Abel. A society may combine these two types, and it often does combine them in practice, but it will be characterized by a dominant type of relation to nature. The domestication of animals predominated in the pastoral societies of the Mediterranean basin – and Yahweh preferred the smell of Abel's grilled meats to Cain's vegetarian offerings (Genesis 4:3 *et seq.*) – whereas Asian societies

10. See the Acts of the Apostles, 15:1–34 and Saint Paul's Epistle to the Romans 2:25 *et seq.*: 'If thou be a breaker of the law, thy circumcision is made uncircumcision . . .; neither is that circumcision, which is outward in the flesh.' On this debate and its significance, see J. Taubes, *Die politische Theologie des Paulus*, edited by A. and J. Assmann, Munich, Fink 1993; also Pierre Legendre, *Les Enfants du texte, op. cit.*, particularly pp. 220 and 243.

11. See the pages devoted by Bataille to the form of Chinese torture called 'of the Hundred Pieces' in *The Tears of Eros*, trans. Peter Connor, San Francisco, City Lights Books, 1989, pp. 205ff; also *The Trial of Gilles de Rais*, trans. Richard Robinson, Los Angeles, Amok, 1991, pp. 61ff.

12. See Foucault's *Discipline and Punish*, trans. Alan Sheridan, Harmondsworth, Penguin, 1979, pp. 1ff.

13 This absence of subjective rights obviously leads to an objective and not a subjective notion of responsibility; on this see J. Gernet, *L'Intelligence de la Chine. Le social et le mental*, Paris, Gallimard, 1994, pp. 70ff.; and, on Japan, see M. Pinguet's masterpiece, *Voluntary Death in Japan, op. cit.*, p. 35.

14. A.-G. Haudricourt, *La Technologie, science humaine, op. cit.*, p. 285.

15. A.-G. Haudricourt, 'Domestication des animaux, culture des plantes et traitement d'autrui', *L'Homme*, 1962, pp. 40–50. Reprinted in *La Technologie, science humaine, op. cit.*, pp. 277ff.

depended for their survival on growing rice or yams. Cultivating plants involves acting on them in an indirect, negative way. It is not by tugging at them that they will be made to sprout, but by creating the positive conditions necessary for their growth (light, moisture, the right soil, et cetera); in other words, it involves working *with* rather than *against* nature. Constraint, on the other hand, characterizes animal husbandry; it relies on sticks, pens, dogs and ropes. In each culture, the dominant mode affects the subordinate one. Thus, in the West, the notion of taming nature also informs our attitudes towards plants – witness the formal French garden or, more troublingly, the normative approach to plants taken in industrial agriculture. In China, the idea of being in harmony with nature influences the relationship between man and beast: 'The ox has the same breath and blood as Man, and its feelings must be taken into account.'[16] For Aristotle, however, 'there can be no friendship, nor justice, towards inanimate things; indeed not even towards a horse or an ox, nor yet towards a slave as slave. For master and slave have nothing in common.'[17]

As this quotation from Aristotle suggests, the relation between humans and nature in any given society also has repercussions on the way people conceive the powers that rule them. It took sailors and fishermen to conceive government in terms of a hand on a tiller, and the prevalence of the pastoral image in Western religious and political thought is indisputable: the shepherd,[18] the Lamb, the faithful flock, the crosier, the sceptre. Here, power takes the form of an order, an *imperium*; it is political leaders and commanders of men who are venerated, today as in the past. In the Confucian tradition, on the other hand, the role of political power is to guarantee the harmony necessary for all to develop their own particular qualities, and only the most virtuous deserve to wield it: 'If a ruler is himself upright, his people will do their duty without orders; but if he himself be not upright, although he may order, they will not obey.'[19] One can

16. *Traité de l'agriculture*, cited by A.-G. Haudricourt in *La Technologie, science humaine, op. cit.*, p. 284.

17. Aristotle, *Nicomachean Ethics*, VIII, 11.6, trans. H. Rackham, London, Heinemann, 1926, p. 497 (cited by A.-G. Haudricourt, in *La Technologie, science humaine, op. cit.*, p. 282).

18. See, for example, how Plato brings together the image of the divine and the human shepherd in order to express the origin of the art of politics, in *The Statesman*, 271d–277d, pp. 59ff.

19. Confucius, *The Analects*, trans. William E. Soothill, London, Oxford University Press, 1910, pp. 131–2.

understand in this light how government by law found favour in the West, while Asia preferred government by men. The profound disgust the Chinese and Japanese feel for those who invoke the law and have recourse to a judge to assert their rights was limpidly expressed by the Emperor K'ang Hsi, who ruled over the Middle Kingdom in the seventeenth century:

> lawsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the lawsuits of the other half. I desire therefore that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.[20]

By contrast, the good shepherd is one who makes his flock submit to his law. In Christian Europe the concept of order – social, natural or celestial – has always referred back to the concept of law – human, scientific or divine. Thinking in terms of law has certainly never been exclusive to jurists.

The famous definition that opens Montesquieu's *The Spirit of the Laws* helps us understand this: 'Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of things; and in this sense, all beings have their laws.'[21] Divine beings have their laws, Montesquieu continues, as does the material and animal world, and humans also have their laws. All three types of law share the idea of 'necessary relations'. Law here means the principle of causality, which is the universal governing principle, encompassing transcendence (God), immanence (physical and biological nature) and the human being. Law understood as principle of causality leads Montesquieu to conclude that: 'Law in general is human reason insofar as it governs all the peoples of the earth.'[22]

This conception of law is wholly characteristic of Western thought and still has far-reaching effects today. It situates the realm of the

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20. Cited by S. van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis*, London, Athlone, 1966, p. 77.

21. Montesquieu, *The Spirit of the Laws*, I, 1, trans. Anne M. Cohler, Basia Caroline Miller and Harold Samuel Stone, Cambridge, Cambridge University Press, p. 3.

22. *Ibid.*, I, 3, p. 8.

man-made legal framework of norms within a larger whole unified by the principle of causality, which also encompasses divine and scientific laws. This is certainly not how the couple 'science and law' are generally conceived today;[23] discussions mostly revolve around the legal or moral (ethical?[24]) limits that should be placed on the implementation of certain scientific discoveries, especially in the field of biology. The question becomes 'Should we legislate or not?', thus using the sphere of law – legislation – as a remedy for the malaise of a science without a conscience.[25] However, if we accept that both scientific and human law refer to the notion of causality, we will be able to grasp the problem of their relation at its root: religion.[26]

There is at least one historian of science – and by no means the least prestigious – who posed the problem in these terms, and who brings us back to China, since the historian is Joseph Needham. Needham asked why the Chinese – whose knowledge and skills far surpassed those of Europeans in every respect until the sixteenth century – nevertheless did not take the path of modern science. One of the explanations Needham put forward was that European science was based on a conception of law wholly absent from Chinese thought.[27]

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23. On this subject, see however Christian Atias, *Epistémologie juridique*, Paris, PUF, 1985, esp. pp. 99ff.

24. See among others R. Draï and M. Harichaux (eds), *Bioéthique et droit*, Paris, PUF, 1988; G. Braibant (ed.), *Sciences de la vie. De l'éthique au droit*, a study by the Supreme Administrative Court (Conseil d'État), La Documentation française, 1988; N. Lenoir, *Aux frontières de la vie: une éthique biomédicale à la française*, report for the Prime Minister, La Documentation française, 1991; C. Neirinck, *De la bioéthique au bio-droit*, Paris, LGDJ, 1994. Today we seem to talk more readily of ethics than of morals. This is doubtless because the lexical field of ethics situates it alongside the technical, mathematical, physical or biological (for example, 'bioethics') and therefore in a logical sphere in opposition to the world of the French Moralists which is one of death and destruction, evoking metaphysical depths beyond our grasp. While some people are reassured to see a National Ethics Committee, a National Moralists' Committee would terrify anyone.

25. Within an extensive bibliography on this issue, see particularly J.-L. Baudouin and C. Labrusse-Riou, *Produire l'homme: de quel droit?*, Paris, PUF, 1987; B. Edelman, M.-A. Hermitte, C. Labrusse-Riou and M. Rémond-Gouilloud, *L'Homme, la nature et le droit*, Paris, C. Bourgois, 1988; C. Labrusse-Riou (ed.), *Le Droit saisi par la biologie. Des juristes au laboratoire*, Paris, LGDJ, 1996; B. Feuillet-Le Mintier, *Normativité et biomédecine*, Paris, Economica, 2003; also the special issues 'Biologie, personne et droit' in *Droits*, 13, Paris, PUF, 1991; and 'Droit et science', *Archives de philosophie du droit*, vol. 36, 1991.

26. See M. Fabre-Magnan and P. Moullier (eds), *La Génétique, science humaine, op. cit.*

27. Joseph Needham, 'Human Law and Laws of Nature in China and the West', *Journal of the History of Ideas*, 1951, 1, pp. 3–30 (Part I) and 2, pp. 194–230 (Part II).

The idea that laws of nature are related to human law is a very ancient one. It most probably originated with the Ancient Babylonians, who, at the time of the Code of Hammurabi (around 2000 BC), represented the sun god Marduk as 'lawgiver to the stars': he it is 'who prescribes the laws for the (star-gods) Anu, Enlil (and Ea), and who fixes their bonds'. He it is who 'maintains the stars in their paths' by giving 'commands' and 'decrees'.[28] The image occurs in Hebrew writings also (the fundamental importance of the divine legislator in Judaism is well known), and through these in Christian thought (for example: 'The Lord gave his decree to the sea, that the water should not pass his commandment'[29]). The Roman jurisconsults tried to establish beyond the *ius gentium* a common denominator for the practices of all known peoples, from which the concept of natural law was derived. However, under the influence of the Stoics, this *ius naturale* came to embrace both man and nature. In the formula of Ulpian in the first paragraph of the *Digest*:

> Natural law is that which all animals have been taught by Nature; this law is not peculiar to the human species, it is common to all animals which are produced on land or sea, and to fowls of the air as well. From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children; we find in fact that animals in general, the very wild beasts, are marked by acquaintance with this law.[30]

This idea of the laws of nature can also be found in medieval Europe, forming part of a divine legislation that all must obey. Needham reports that as late as 1474 a cockerel was sentenced to be burnt alive in Basel for the 'heinous and unnatural crime' of laying an egg.[31]

Today the bird would no doubt end up in the hands of a biologist who, rather than punishing such a transgression of the

28. See *ibid.*, Pt 1, p. 18. It is worth stressing that this representation is contemporary with the Code of Hammurabi which, due to its systematic character, can be considered as a precursor of scientific thought. See on this J. Bottéro, *Mésopotamie. L'écriture, la raison et les dieux*, Paris, Gallimard, 1987, pp. 191ff.

29. On the links between the Mesopotamian cosmogony and the Biblical Genesis, see J. Bottéro, *La Naissance de Dieu. La Bible et l'historien*, Paris, Gallimard, 1992.

30. Ulpian, *Digest*, I, 3, quoted in Needham, 'Human Law', *op. cit.*, Pt. I, p. 24.

31. On the medieval practice of lawsuits against animals, see M. Pastoureau, *Une histoire symbolique du Moyen Age occidental*, Paris, Seuil, 2004.

laws of genetics, would endeavour to understand it. Modern science came into being when scholars ceased to set themselves up as guardians of divine laws and set about deciphering them instead. It was the hypothesis that there existed, as Descartes put it, 'laws which God has established in Nature'[32] that made it possible for these laws to be discovered and expressed mathematically. That is when God stopped speaking Latin and began speaking in numbers. Needham writes that:

> In Europe natural law may be said to have helped the growth of natural science because of its *precise formulation*, and because it encouraged the idea that to the earthly lawgiver there corresponded in heaven a celestial one, whose writ ran wherever there were material things. In order to believe in the rational intelligibility of Nature, the Western mind had to presuppose (or found it very convenient to presuppose) the existence of a Supreme Being who, himself rational, had put it there [. . .]. This we do not find in Chinese thought. Even the present-day Chinese translation of Laws of Nature is *tzu-jan fa*, spontaneous law, a phrase which uncompromisingly retains the ancient Taoist denial of a personal God, and yet is almost a contradiction in terms.[33]

This religious origin common to both human and scientific law is even clearer when viewed in historical rather than epistemological terms. The idea of laws of nature took on scientific value only with the emergence of a distinction – and articulation – between Church and State, between spiritual and temporal power. Needham locates the moment of rupture at the point when, in the political sphere, centralized royal authority came to triumph over feudalism. Descartes was writing just forty years after Bodin developed his theory of sovereignty,[34] and it was at the height of absolutism that the idea of

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32. R. Descartes, *Discourse on Method* [1637], part V, trans. Desmond M. Clarke, London, Penguin, 1999, p. 30.

33. J. Needham, 'Human Law', *op. cit.*, Pt. 2, pp. 227–8.

34. The parallel was made by Descartes himself in a letter to Mersenne, in which he states, on the subject of mathematical truths, that 'it is God who has laid down these laws in nature just as a king lays down laws in his kingdom' (15 April 1630, R. Descartes, *Philosophical Letters*, trans. Anthony Kenny, Oxford, Clarendon Press, 1970, p. 11). On the Cartesian idea of laws of nature, see also the trenchant remarks of P. Thuillier, *La Grande Implosion*, Paris, Fayard, 1995, esp. pp. 280ff. On Bodin's idea of sovereignty, see Chapter 5.

laws of nature *qua* scientific laws were elaborated in the work of Spinoza, Boyle or Newton.[35]

But the theory of the monarchic State is indebted above all to the Gregorian revolution of the eleventh and twelfth centuries, which both separated religious from secular powers and established the Church as model of the centralized State.[36] It is thanks to this 'revolution in interpretation',[37] to Gratian[38] and the Bologna school of jurists – birthplace of the university in Europe – that laws were subsumed under the principle of causality, through their inscription in a systematic body of texts. Abelard also contributed to this development in formulating the distinction between natural and miraculous causes, and affirming the powers of reason against the authority of Tradition.[39] Western thought began to tear itself away from the search for concrete, singular causes (*causa proxima*, *remota*, *efficiens*, et cetera[40]) in favour of investigating formalizable causal links, for which algebra would provide the best model.

It was not until the French Revolution and the dawn of the nineteenth century, however, that science and the State fully emancipated themselves from a religious reference, and that Grotius's

35. See Needham, 'Human Law', *op. cit.*, Pt. I, pp. 29–30. Needham refers here to the work of E. Zilsel (notably his 'The Genesis of the Concept of Physical Law', *Philosophical Review*, May 1942). This connection between the history of science and political history is not new. We mentioned above the relation between the idea of the 'lawgiver to the stars' and the political centralization occurring at the time of Hammurabi; nearer to us, the Stoical doctrine of universal law was developed in the wake of Alexander the Great's conquests.

36. See E. Kantorowicz, *The King's Two Bodies, op. cit.*; P. Legendre, *La Pénétration du droit romain dans le droit canonique classique*, Paris, Jouve, 1964, and *Les Enfants du texte, op. cit.*, esp. pp. 237ff.; H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1983, esp. pp. 85ff. Berman also considers the study of laws to be the prototype of experimental science, but criticizes Needham for underestimating the role of the Gregorian revolution in this domain (*op. cit.*, pp. 151ff. and p. 587, n. 78).

37. In Pierre Legendre's terms (*Les Enfants du texte*, *op. cit.*).

38. Long before Montesquieu, Gratian distinguished and established a hierarchy between divine law (which one reaches through revelation); natural law (*ius naturale*) which also expresses divine will but is accessible to human reason; and human laws formulated by the Prince and the Church, which must not be in contradiction with the other two categories (see H.J. Berman, *Law and Revolution op. cit.*, p. 145).

39. On the intellectual contribution of Abelard, see the proceedings of the international colloquium edited by J. Jolivet and P. Habrias, *Pierre Abélard à l'aube des universités*, Nantes, Presses de l'Université de Nantes, 2001.

40. Only in civil law does the theory of causality still have a certain role to play, in contract law and regarding liability (see J. Carbonnier, *Droit civil*, vol. IV, *Les Obligations*, Paris, PUF, 20th edn, 1996, para. 58ff. and 213ff., and bibliography).

'impious hypothesis' of a jurist working without the supposition of God began to be realized.[41] In the field of science, the break was made a little later by Laplace, who said of God 'I can do without that hypothesis.' The laws of nature had become sufficient unto themselves and there was consequently no further need to refer to a divine legislator to lift the veils of our ignorance; scientific discovery could now entirely replace divine revelation.

It thus took seven hundred years – from the twelfth to the nineteenth century – to dispel the confusion caused by having religious, human and natural spheres all subjected to a single Law; and for science and the State, as we understand them today, to consolidate their power. We might ask, however, whether this confusion is not re-emerging today, in new forms.

The Human Mastery over Laws

In order to understand our present situation, we have first to grasp the two-sided nature of this process of secularization – or 'disembeddedness'[42] – of laws, in the course of which, like Renaissance statues, they were wrenched from cathedrals and placed in public squares and gardens. The history of art can precisely help us here, since it develops in parallel to law and science. While the subordination of pictorial space to mathematical principles through the discovery of the laws of perspective was prior even to Kepler's subordination of planetary space to mathematical laws, the ancient civilizations of the East, Classical Greece and medieval Europe largely rejected perspective, 'for it seemed to introduce an individualistic and accidental factor into an extra- or supersubjective world'.[43] This was particularly true for religious art: an individual viewpoint could scarcely subordinate an image of heaven, which was precisely conceived as transcending this viewpoint.[44] With the laws of perspective,

41. See P. Legendre, *Le Désir politique de Dieu. Étude sur les montages de l'État et du Droit*, Paris, Fayard, 1988, p. 21.

42. The term is H.J. Berman's: see his *Law and Revolution, op. cit.*, p. 121.

43. Erwin Panofsky, 'Die Perspektive als symbolische Form', in *Vorträge der Bibliothek Warburg*, Leipzig, 1927, pp. 258–330, translated by Christopher S. Wood as *Perspective as Symbolic Form*, London, Zone Books, 1991, p. 71.

44. Perspectival vision effectively prevents religious art from entering 'the realm of the magical, where the work of art itself works the miracle, or the realm of the dogmatic and symbolic, where the work bears witness to, or foretells, the miraculous' (Panofsky, *Perspective, op. cit.*, p. 72).

the image is rigorously organized around an individual subject's perception. Herein lies the two-sided nature of this discovery, masterfully analysed by Panofsky:

> the history of perspective may be understood with equal justice as a triumph of the distancing and objectifying sense of the real, and as a triumph of the distance-denying human struggle for control; it is as much a consolidation and a systematization of the external world, as an extension of the domain of the self.[45]

Panofsky's remarks on the invention of the laws of perspective are equally applicable to the invention of human and scientific laws, when freed from any metaphysical reference. They effect a 'consolidation and a systematization of the external world', subordinating relations between people, and between people and nature, to objective principles. Human law, in the form of general and abstract rules, applies equally to all, including to the constituted State from which it stems, while scientific law subjects our relation to the world to the causality principle, excluding the possibility of miracles or divine intervention.[46] Such laws are reinforced by being seen as elements of a larger body of logic, in which they are linked to each other. On the other hand, they also extend 'the domain of the self'. For the centre – the head? – of this body of logic is Reason, which ultimately lies in the mind of Man, with the position of the painter corresponding to the Cartesian *cogito* in scientific theory, or to the legislator's sovereign will in theories of the State. While in medieval times the human being occupied a position subordinate to the omnipotence of God, in modern times human beings can consider themselves to be the intellectual centre of the world:[47] founding the order of society

45. *Ibid.*, pp. 67–8.

46. It might even appear, on reading Descartes, that God is subjected to the rule of *tu patere legem quam ipse fecisti* ('abide by the rules which you yourself have made'), before even the State: 'It will be said that if God had established these [mathematical] truths He could change them as a king changes his laws. To this the answer is: "Yes he can, if his will can change." "But I understand them to be eternal and unchangeable." – "I make the same judgement about God" ' (Letter to Mersenne, 15 April 1630, in *Philosophical Letters*, *op. cit.*, p. 11).

47. On the passage from the nominalist critique of William of Ockham to the Cartesian *cogito*, see particularly Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace, Cambridge, MA, MIT Press, 1983, p. 151: 'only after nominalism had executed a sufficiently radical destruction of the humanly relevant and dependable cosmos could the mechanistic philosophy of nature be adopted as the tool of self-assertion'.

through the State[48] and submitting nature to their rule through the discovery of the laws of science. These two ambitions were intimately linked as from the Enlightenment, when the project of grounding law in human nature by drawing on the methods of mathematics and the physical sciences was first conceived.[49] We will need to look at the fate reserved for these two interpretations of law if we are to situate its place in contemporary thought.

While law made a sense of the real prevail, it at the same time became increasingly inaccessible to human reason. It metamorphosed into other notions that have replaced it: paradigms, models, ideal types, structures, markets, fields, systems, conventions, and so forth. In the nineteenth century, natural scientists still met at international congresses to establish what the law was on controversial points.[50] Nowadays, this idea of law – in the sense of Newton's laws, for example – is considered valid only within very strictly defined parameters. With Heisenberg's uncertainty principle, physicists have admitted that the infinitely small cannot be explained in terms of the principle of causality and hence within those of law, which is informed by this principle. In the human sciences, Freud's discovery of the unconscious led to the recognition that there was an obscure region within the human being that defies logical determination, even if it functions like a language. In the political sphere, the State and the law are still indissociable, still propping each other up; but their legs are a little shaky. The State seems to have given up on abstracting general and enduring laws from a world whose complexity eludes it, and has reverted to new forms of feudalism. The law has become a rule with limited validity, or else retreats in the face of markets and various forms of contractual agreement.[51]

In subjecting human beings to the reality principle, the law did indeed keep its promise, but as formulated by Saint Paul and Luther: to convince them of their frailty and to teach them to despair of their

48. '*L'État juriste*': for this notion, see P. Legendre, *Les Enfants du texte*, *op. cit.*, pp. 254ff.

49. This was, of course, the project of thinkers such as Leibniz, Grotius, Hobbes or Pufendorf. See A. Dufour, 'La notion de loi dans l'École du Droit naturel moderne', *Archives de philosophie du droit*, vol. 25, pp. 212ff.

50. I thank Jean Dhombres for pointing this out (paper given at a seminar held at the Maison des Sciences de l'Homme Ange Guépin on nationhood, 1995).

51. See Chapter 5.

powers.[52] As in Kafka's parable, a person could spend his life waiting for the door of the law to open, while counting the fleas jumping from the doorkeeper's beard.[53] And even were he to get through that door and decipher that law, he would find a thousand more behind it, each one a thousand times more difficult to get past. Already at the dawn of the modern age, Dürer's *Melencolia I* expressed this sense of reason's powerlessness to grasp the world's complexity, and the nostalgia for a bygone age when thought could take divine law as its firm foundation.[54]

Cut off from its religious origin, the law also liberated 'the distance-denying human struggle for control'.[55] When the role of divine legislator fell vacant, humans could not but try to fill it and develop a foundational discourse for all law. But such a discourse needed a legitimacy comparable to that of the natural sciences and so the latter's methods were applied to the study of man and society. Auguste Comte formulated this most concisely when he wrote that the supernatural origin of law could alone place it beyond human questioning and, with the disappearance of this origin, only laws revealed by the study of nature could take its place. This led to the foundation of a new science, which he called sociology,[56] and to his discovery of the 'law of the three states' which explains the historical development of human societies and allows one to predict the advent of a society free of law.[57]

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52. See Luther, *Von der Freiheit eines Christenmenschen* [1520], translated by Bertram Lee Woolf as *The Freedom of a Christian*, in *Reformation Writings of Martin Luther*, London, Butterworth Press, 1952, §§. 8–9, pp. 360–61; Saint Paul, Epistle to the Romans, 4:15: 'For where no law is, there is no transgression'; 5:13: 'but sin is not imputed when there is no law'; 7: 'Nay, I had not known sin, but by the law: for I had not known lust, except the law had said, "Thou shalt not covet."'

53. This was the only part of *The Trial* that Kafka authorized to be published during his lifetime. See F. Kafka, *The Trial*, trans. Willa and Edwin Muir, London, Secker & Warburg, 1956, ch. ix, pp. 238–40.

54. On this engraving and its links with another engraving of Dürer's, *Saint Jerome in his Study*, see E. Panofsky, *The Life and Art of Albrecht Dürer*, 4th edn, Princeton, NJ, Princeton University Press, 1955, pp. 156–71.

55. E. Panofsky, *Perspective*, *op. cit.*, p. 67.

56. See Wolfgang Lepenies, *Between Literature and Science: The Rise of Sociology*, trans. R.J. Hollingdale, Cambridge, Cambridge University Press, 1988.

57. See Comte's summary of his ideas in *The Catechism of Positivism, or Summary Exposition of the Universal Religion* [1852], trans. Richard Congreve, London, Kegan Paul, Trench, Trübner & Co., 1891, pp. 119ff. The first formulation of the law of the three states (theological, metaphysical, positive) can be found in the 1822 work *Plan of the Scientific Operations Necessary for Reorganising Society* (in *General Appendix to the System of Positive Polity*, trans. Henry Dix Dutton, London, Longmans, Green & Co., 1877, vol. 4, Pt. 2, pp. 547ff.); this law was later elaborated, principally in Comte's *Cours de philosophie positive* [1832–42]; see vol. II, 'Physique sociale', Paris, Hermann, 1975, especially the 51st lesson, pp. 202ff.

Comte hoped it would then be possible, in the words of his mentor Saint-Simon, to replace the government of men with the administration of things. This certainty that a scientific, technical norm is destined to supplant human law entirely is also found in Marxist legal critique.[58] Confronted with the injustices of their time, Saint-Simon, Comte and Marx dreamed that humanity might be set free: the godhead would be overthrown and then, by means of the laws of science, the power of States would be defeated.

Enlightenment thinkers had replaced the trinity of laws – divine, natural and human – with a duality, natural and human law, united under the sign of Reason. The nascent social sciences sought to reduce this duality by establishing the sovereignty of scientific laws, and in the same gesture to make both theology – whose position they would usurp in the universities[59] – and law redundant. On a purely scientific level this project was doomed to failure since, as mentioned above, searching for ultimate laws requires an awareness of the limits of one's understanding. As the social sciences accumulated an unprecedented stock of knowledge, the sheer complexity of what they discovered demonstrated the vanity of promulgating cast-iron laws – of history, economics, society – that might in the last instance determine human destiny.

However, on the political and ideological levels, this development enjoyed extraordinary success, as it offered human lust for power literally unlimited scope. Which is to say, it opened wide the gates to madness. The totalitarian systems that left their stamp on the twentieth century help us to see precisely in what way this project for the scientific regulation of society was a madness. It was not in the similarity of these systems to religion, although there is more than a structural resemblance between those who see themselves as instruments of a divine law and those who see themselves as instruments of a law of History (survival of the most progressive class) or of Nature (survival of the fittest). Numerical comparisons of those massacred in the name of one or other of these laws give little grounds for distinguishing between them either. The difference lies elsewhere. Divine law (in the religions of the Book), just like human law, always takes the human being as *subject*; it grants

58. The most intelligent and systematic presentation of this critique is doubtless the work of E.B. Pashukanis, 'The General Theory of Law and Marxism', *op. cit.*

59. See P. Legendre, *La 901e Conclusion. Étude sur le théâtre de la Raison*, Paris, Fayard, 1998, p. 95.

humans identity at the same time as it postulates their responsibility and freedom – if only the freedom to break the law and therefore incur its sanctions. The laws of science, on the other hand, view humans as *objects*; they explain human beings by relating what they are and do to objective determinants that are clearly beyond human responsibility. Scientific law knows neither innocence nor guilt, only relations of cause and effect. It was in this sense that, as early as the sixteenth century, the Spanish theologian Suarez wrote that one can speak of law only by metaphor, 'since it concerns things lacking in reason'.[60] The idea of grounding the laws of society in science supposes that people are no longer considered as subjects endowed with reason, but as objects, particles in a magnetic field, animals on a stud farm – just so many things 'lacking in reason'.[61] Hitler could write of himself: 'I am nothing but a magnet moving constantly across the German nation and extracting the steel from this people.'[62] The analogy with the laws of physics merits closer attention: Hitler does not claim to act *in the name of* a distant Law but rather to incarnate it totally as its active embodiment. He writes:

> In a world in which planets and suns follow circular trajectories, moons revolve round planets, and force reigns everywhere and supreme over weakness, which it either compels to serve it docilely or else crushes out of existence, Man cannot be subject to special laws of his own.[63]

60. *Tractatus de legibus*, 1612, cited by Needham, 'Human Law', *op. cit.*, Pt. I, p. 28. On Suarez, see also J.-L. Vullierme, 'La Loi dans le droit, les sciences, la métaphysique', *Archives de philosophie du droit*, vol. XXV, Paris, Sirey, 1980, pp. 47ff., p. 55, and M. Bastit, *Naissance de la loi moderne. La pensée de la Loi de Saint Thomas à Suarez*, Paris, PUF, 1990.

61. This sort of system can consequently no longer work with the categories of the legal and the illegal, the permitted and the prohibited, but instead works with those of the normal and the pathological. The justice meted out in the Soviet Union by the 'men in white suits' – the internment of opponents or protesters in psychiatric hospitals – is a good illustration of how the principle of reason could be stood on its head (see Alain Supiot, *Critique du droit du travail*, *op. cit.*, 3rd part, 'Le légal et le normal', pp. 187).

62. Cited in H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, p. 360.

63. Hitler, *Mein Kampf*, cited in Simone Weil, *The Need for Roots*, *op. cit.*, p. 229. 'These lines express in faultless fashion the only conclusion that can reasonably be drawn from the conception of the world contained in our science. Hitler's entire life is nothing but the putting into practice of that conclusion' (*ibid.*).

The language of the Third Reich created notions such as 'human material', which reduces the human world to that of things.[64] It was this elimination of the subject of law in the name of the subject of science that was the point of insanity on which totalitarian thought was based.[65]

Totalitarian regimes negated the guarantee of identity and of individual rights provided by law because they saw themselves as instruments of a higher law, scientific and superhuman, which was to make the State and positive law superfluous. Both Communism and Nazism conceived of the State as simply a puppet in the service of the Party, as a visible government that could conceal the true location of power. 'The State itself', wrote Hitler, 'is not the substance but the form.'[66] Both doctrines also rid positive law of its substance, leaving only the name. 'We shape the life of our people and our legislation according to the verdicts of genetics,' the Hitler Youth Manual stated.[67] Hitler himself repeated many a time: 'It is not the State that commands us, but we who command the State,'[68] and that 'The State is only the means to an end. The end is: conservation of the race.'[69] What was distinctive about Nazi extermination policies was not solely that the lives of millions of innocent men, women and children were taken, in the name of the racial struggle, but that they were stripped of the different layers that made them subjects of law, so as to destroy their full legal capacity: they were deprived not just of their jobs, but of their occupational status; not just of their property, but of their right to property; not just of their homeland, but of their nationality; and finally of their name, by turning them into numbers, and in so doing destroying their human status before taking their lives. Again, the murderers themselves did not simply act *in the name* of racial law – they *were* that law incarnate, all distance between the two denied. They were encouraged to consider themselves as cogs in a

64. On this expression, see V. Klemperer, *LTI. Notizbuch eines Philologen*, Leipzig, Reclam, 1975, trans. Martin Brady as *The Language of the Third Reich. LTI – Lingua Tertii Empirii. A Philosophical Notebook*, London, Athlone Press, 2000, p. 148ff. Far from disappearing after the Second World War, these structures of thought continue to flourish even today. We no longer talk of 'human material' but we do talk of 'human capital', borrowing – unknowingly – from Stalin.

65. H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, p. 447.

66. Hitler, *Mein Kampf*, trans. James Murphy, London, Hurst and Blackett, 1939, II, 2.

67. *Nazi Primer*, cited in H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, p. 350.

68. *Ibid.*, p. 419.

69. Cited in H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, p. 357.

wheel moved by superior forces, and to suppress any feeling of responsibility or guilt.[70]

When politics refers to supposedly scientific laws – the 'biological law' of survival of the fittest race[71] or the 'historical law' of class conflict as the motor of history – it implicitly destroys the anthropological function of positive law. According to Arendt, positive law serves

> to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born into it. With each new birth, a new beginning is born into the world, a new world has potentially come into being. The stability of the laws corresponds to the constant motion of all human affairs, a motion which can never end as long as men are born and die. The laws hedge in each new beginning and at the same time assure its freedom of movement, the potentiality of something entirely new and unpredictable; the boundaries of positive laws are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world, the reality of some continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them.[72]

This reference to the anthropological function of the law enables one to cut through the interminable debates on 'justice' and to highlight the need for every generation to be guaranteed a 'world already there', what Arendt here calls 'the pre-existence of a common world . . . which transcends the individual life span of each generation'. This need is unique to human beings as symbolic animals which, in contrast to all other animals, perceive and organize the world through the filter of language. Western legal constructions are not the sole means of ensuring this anthropological function: it has been the

70. The case of Eichmann is exemplary here (see H. Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*, London, Penguin Books, 1994). Arendt reminds us that one of the problems confronting the SS was to stifle any sense of conscience regarding their barbaric acts. Himmler accordingly addressed them as follows: 'What we are expecting from you is "superhuman", to be "superhumanly inhuman" ' (*ibid.*, p. 107).

71. The 'scientific' justification of eugenics by biologists was very widespread, especially in Protestant countries, right up to the Second World War (see A. Pichot, *La Société pure*, *op. cit.*).

72. H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, p. 465.

Western way, and there are others, notably the Chinese tradition which is based not on laws but on relations, not on rules but on rites.

It is worth quoting Hannah Arendt at length here in order to stress that the Nazi genocide of the Jews is 'the basic experience and the basic misery of our times', that we must try to build 'a new knowledge of man' on the basis of this experience and that this history cannot provide 'arguments which might be exploited for any specific political purpose whatsoever'.[73] We do not seem to have learnt these lessons. For on the one hand, even among legal scholars, the anthropological function of positive law is still denied. Yet on the other hand, people keep calling for ethics – a product available in many models: bioethics, business ethics, and so forth – whereby they are unknowingly obeying the instructions given by Hitler to the German legal profession in 1933: 'The total state must not know any difference between law and ethics.'[74] This 'mirror effect' leads those who are doubtless sincere enemies of totalitarianism to act in precisely the way they condemn. To think that the Nazis – or their contemporary incarnations – are not people like us is already to think like them; in wishing to burn the books of the proponents of *autos-da-fé*, we join their ranks, and in introducing into criminal law an official truth we deny the force of historical truth. In short, 'the heritage of totalitarianism today informs our social practices'.[75]

The Human Being Explained by Laws

Is the idea of law still prominent in our modes of thought today? If so, in what form? At first sight, one might think that law is on the decline. This is the diagnosis of most of the legal profession, which notes the devaluation of laws, their instability and lack of adequation to an overly complex world, all of which strips law of its majesty and value. The shares that are rocketing on the legal stock market are not 'Law' but 'Contract'. The sciences in general – and the social sciences in particular – seem to have abandoned the attempt to reduce the order of things to fundamental laws, such as Comte's law of the three states. In this light, the Law as conceived by Saint Paul or Luther has

73. H. Arendt, 'The Image of Hell' [1946] in her *Essays in Understanding, 1930–1954*, New York, Harcourt Brace, 1994, p. 200. On the uses and abuses of the memory of the Nazi genocide, see the insightful analyses of T. Todorov, *Les Abus de la mémoire*, Paris, Arléa, 1995.

74. Cited by H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, p. 394.

75. P. Legendre, *La 901e Conclusion*, *op. cit.*, p. 139.

indeed fulfilled its role: that of convincing us of its inaccessibility. We believe we are protected from the mad scientists who imagine they have discovered the Law of the Universe and who intend to apply it to us; Doctor Mabuse's success does not extend beyond the film club, and what haunts our nightmares is rather the fear of a scientific or technological innovation escaping human control. This situation does not prevent killings and massacres being carried out on our very doorstep in the name of a bloody conflict of Laws: divine law against State law, or conflicting divine laws. These events may (and should) shock us, but we tend to think that the separation of Church and State in our world of Romano-Canonical law is a bulwark against such murderous aberrations. It would appear, as regards law, that we have become sceptics.

Such scepticism would be justified if one could still define law as that which links cause and effect in a linear sequence. This would be its primitive definition but, at least as regards the history of law, it was becoming obsolete already in the twelfth century. At that time, the revolution in interpretation consisted not only of conceiving law as a principle of causality but additionally of inscribing laws within a systematic body of texts. The idea of a *Corpus Juris* had been absent from Justinian compilations; it was first introduced in medieval times, and contained the idea that no law is self-sufficient, and that it has sense and value only when related to a larger whole. The notion of the relativity of laws was therefore already present, as well as that of a system of rules, the logical matrix of laws. It is doubtless in this form that laws continue to exercise a hold over Western thought. We no longer try to explain the world through linear relations of causality, but instead we think we can reduce it to a system of rules. We admit that laws are relative, but immediately go on to say they are relative to each other, and it must therefore be possible to devise a theory of the system of which they are a part. Just as, at the dawn of modern times, the search for laws replaced the search for causes, so today the search for an 'order of orders',[76] in Lévi-Strauss's phrase, for a law that may govern particular laws, has superseded the search for laws.

'Present-day research', writes Musil, 'is not only science but sorcery, spells woven from the highest powers of heart and brain, forcing God to open one fold after another of his cloak; a religion whose dogma is permeated and sustained by the hard, courageous,

76. C. Lévi-Strauss, *Structural Anthropology*, trans. Claire Jacobson and Brooke Grundfest Schoepf, London, Allen Lane, 1968, p. 312.

flexible, razor-cold, razor-keen logic of mathematics.'[77] This endeavour recalls that of the masters of Sufism, for whom the primary principle which explains all things 'is a hidden source of fascination beyond the Law, which is only divulged to those who seek it'.[78] Scientific research receives its most powerful psychological motivation not from a liking for solving puzzles[79] but from a mystical drive to reach 'beyond the discursive, beyond the sensory and even beyond oneself, to experience the immediate knowledge of supreme Reality'.[80] All great scholars secretly strive to reach the place where everything becomes clear, which is why scientific research has always been conceived in the West as a vocation, the incarnation in professional life of one's belief. Max Weber describes such belief in the following terms:

> The natural sciences [. . .] presuppose as self-evident that it is worthwhile to know the ultimate laws of cosmic events as far as science can construe them. This is the case not only because with such knowledge one can attain technical results but for its own sake, if the quest for such knowledge is to be a 'vocation'. Yet this presupposition can by no means be proved. And still less can it be proved that the existence of the world which these sciences describe is worthwhile, that it has any 'meaning' or that it makes sense to live in such a world.[81]

Just like the crisis in religious vocations, the 'crisis in scientific vocations' that we deplore today is incomprehensible to anyone who discounts the dogmatic basis of research work. Someone can be said to have a vocation if he or she is not satisfied with the laws already discovered, and intends to pursue the quest for the first principles from which these laws derive. Someone can be said to lose their vocation when they no longer believe that the natural sciences will one day allow us to grasp the ultimate laws of the universe.

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77. R. Musil, *The Man Without Qualities*, trans. Sophie Wilkins, London, Picador, 1997, pp. 35–6.

78. R. Pérez, in his presentation of Ibn Khaldûn's work, *La Voie et la Loi, ou le maître et le juriste*, Paris, Sindbad, 1991, p. 58.

79. See T. Kuhn, *The Structure of Scientific Revolutions*, Chicago, University of Chicago Press, 2nd edn, 1970.

80. R. Pérez, *La Voie et la Loi*, *op. cit.*, p. 14.

81. M. Weber, *Wissenschaft als Beruf* [1919], translated as 'Science as a Vocation', in *From Max Weber: Essays in Sociology*, ed. and trans. Hans. H. Gerth and C. Wright Mills, New York/London, Oxford University Press, 1947, pp. 143–4.

The natural sciences have had a profound influence on this search for the 'ultimate laws' governing human beings and society. The metaphor of the body, which had been dominant in medieval times, was used extensively in the social sciences to represent the 'order of orders', particularly by the founding fathers of sociology, through concepts such as 'organic solidarity'. People today still frequently talk of social 'functions', of 'organs' or of the 'social body'. This metaphor has, however, lost its strength over time and been replaced by others, taken from the 'hard' sciences (physics or genetics) or from the 'soft' sciences that ape the 'hard' ones (economics or linguistics). The present situation is made more complex still by the fact that no one in the social sciences agrees on how to refer to this system of rules, with everyone trying to 'get their concept in', if one can put it like that, and devoting a large part of their work to defending it.[82] As a result, the simple soul who just wants to keep abreast may well identify with Gombrowicz when he declares in an 'auto-interview' entitled 'I was a Structuralist before everyone else':

> But of course I'm informed! Believe me, I've read here, there, a bit of Greimas, Bourdieu, Jakobson, Macherey, Ehrmann, Barbut, Althusser, Bopp, Lévi-Strauss, Saint-Hilaire, Foucault, Genette, Godelier, Bourbaki, Marx, Dombrowski, Schucking, Lacan, Poulet, as well as some Goldmann, Starobinski, Barthes, Maurron and Barrera. I'm up to date, even if I'm not sure which date exactly . . . there are just too many of them.[83]

Nevertheless, it is clear on reading reliable authors that the idea of the law as a system of universally applicable rules (a form familiar to Continental legal scholars) continues to pervade our ways of thinking about the human being and society. This idea of the law is at the heart of two paradigms that have dominated the social sciences since the decline in the Marxist belief in the laws of history: the paradigm of structure and the paradigm of the market.

The concept of structure was elaborated within an analysis of language, and designates an explanatory system of rules. As is widely known,

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82. Only politicians would today think of associating their own name with a law; in France, this is getting to be a dangerous habit – a Waldeck-Rousseau law, four Auroux laws and how many from Aubry? In the field of science, while authorship of laws (as in Kepler, Newton or Laplace) seems to belong to a bygone era, theories or concepts liable to lead to their author's immortality do not. We still seek to leave an individual stamp on works, which began with the Renaissance.

83. In Cahier de l'Herne, *Gombrowicz*, ed. C. Jelenski and D. de Roux, Paris, Éditions de l'Herne, 1971, p. 228.

it comes from general linguistics, particularly the work of Jakobson who adapted it from the field of physics. According to Jakobson:

> the ever increasing number of detected *laws* moves into the foreground the problem of universal *rules* underlying the phonemic patterning of languages of the world. . . . The supposed multiplicity of features proves to be largely illusory. . . . The same *laws of implication underlie* the languages of the world both in their static and dynamic aspects.[84]

Anthropology then appropriated the idea of structure in order to tease out the universal laws underlying the diversity of observable social phenomena. For Lévi-Strauss, the strength of the linguistic model was to bring to light such syntactic and morphological laws, of which we are not conscious.[85] For him, anthropology too must be able to derive from the diverse forms of social life 'systems of behavior that represent the projection, on the level of conscious and socialized thought, of *universal laws* which regulate the unconscious activities of the mind'.[86] The force of structural analysis rests ultimately, then, upon the 'the identity postulated between the laws of the universe and those of the human mind'.[87] What interests the anthropologist here is unconscious laws which determine men's behaviour without their knowledge. 'For conscious models, which are usually known as "norms", are by definition very poor ones, since they are not intended to explain the phenomena but to perpetuate them.' In order to make a deep structure visible, the ethnologist must penetrate beyond the conscious system of norms that are 'standing as a screen' and hiding the deep structure of a given society from collective consciousness.[88] In anthropology as in linguistics, and before that in physics, structural analysis therefore consists of laying bare the system of rules which underlies and determines the objects studied.

The undeniable heuristic value of this model exerted a strong influence on all the human sciences,[89] and reference to the structures

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84. R. Jakobson, quoted in C. Lévi-Strauss, *Structural Anthropology, op. cit.*, p. 83 (emphasis added).

85. C. Lévi-Strauss, *Structural Anthropology, op. cit.*, p. 56.

86. *Ibid.*, p. 59 (emphasis added).

87. *Ibid.*, p. 89.

88. *Ibid.*, pp. 281–2.

89. And even on jurists! See A.-J. Arnaud, *Essais d'analyse structurale du Code civil français. La règle du jeu dans la paix bourgeoise*, Paris, LGDJ, 1973, Preface by M. Villey and Afterword by G. Mounin.

of language can be found in domains other than anthropology, for example, in the works of Lacan on the unconscious. The model was so successful that Lévi-Strauss even envisaged founding an all-encompassing science of communication which would include not only linguistics and anthropology but also economics and even genetics:

> In any society, communication operates on three different levels: communication of women, communication of goods and services, communication of messages. . . . Theoretically at least, it might be said that kinship and marriage rules regulate a fourth type of communication, that of genes between phenotypes. Therefore, it should be kept in mind that culture does not consist exclusively of forms of communication of its own, like language, but also (and perhaps mostly) of *rules* stating how the 'games of communication' should be played both on the natural and on the cultural levels.[90]

The 'communication of goods and services' was, however, already under the sway of another paradigm, which has become so successful that it has almost eclipsed that of structure: the market.

The paradigm of the market flourished, naturally enough, with economists, but its influence extends today to all the social sciences. Whoever sets out to find the hidden laws governing the world will find the 'invisible hand' of the market stretched out to greet him, which, in the history of economic thought, 'expresses the "wisdom of nature", that is, the permanence of laws'.[91] The market, like language, presents itself as a system of unconscious rules that spontaneously govern human relations.[92] Until recently, however, political economy was defined by its object: the production and exchange of material goods. A first attempt to extend this object led to the inclusion of all phenomena relating to the allocation of scarce resources; but this catch-all category made economics so broad that it became a 'total science', at the risk of losing its credibility. A

90. Lévi-Strauss, *Structural Anthropology*, *op. cit.*, p. 296 (emphasis in the original). Note the reference to game theory, which is also founded on the idea of a system of rules.

91. J.-C. Perrot, *Une histoire intellectuelle de l'économie politique (XVIIe – XVIIIe siècle)*, Paris, EHESS, 1992, p. 335.

92. The analogy between the exchange of words and the exchange of goods, both of them specific to human beings, is already present in Adam Smith (see Jean-Claude Perrot, *Une histoire intellectuelle*, *op. cit.*, p. 333, who underscores the longstanding connection between language and money in the work of thinkers such as Locke, Hume, Turgot or Condillac).

decisive step was taken when economists put forward the notion that their science was defined not so much by its object as by its analytical method, which might legitimately be applied to all aspects of human life, alongside the methods of other social sciences. This thesis was systematized above all by Gary Becker,[93] whose work was crowned by the Nobel Prize for Economics in 1992.

According to Becker, economic analysis is based on three axioms from which several theorems of human behaviour can be derived: maximizing behaviour, market equilibrium and stable preferences.[94] Economic analysis, like structural analysis, does not presume that people are conscious of the forces that determine them. Adam Smith had already stressed that man 'is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always worse for the society that it was not part of it.'[95] The laws of the market (axioms and theorems: the law of supply and demand, the principle of maximizing utility, et cetera) operate beyond men's consciousness and independently of the rationality or otherwise of their behaviour.[96] Becker sees heuristic qualities in economic analysis at least equivalent to those attributed to structure in sociology:[97] economic analysis can uncover the deep motivations of behaviour in all fields, and holds out the hope of at last finding a system of rules that may account for human behaviour. As Becker states:

> All human behavior can be viewed as involving participants who maximize their utility, from a stable set of preferences, and

93. G.S. Becker, *The Economic Approach to Human Behavior*, Chicago, University of Chicago Press, 1976.

94. 'The combined assumptions of maximizing behavior, market equilibrium, and stable preferences, used relentlessly and unflinchingly, form the heart of the economic approach [. . .]. They are responsible for the many theorems associated with this approach' (G. S. Becker, *Economic Approach to Human Behavior*, *op. cit.*, p. 5).

95. A. Smith, *The Wealth of Nations*, IV. ii, *Works*, vol. IV, ch. 2, Chicago, University of Chicago Press, 1976, p. 477. For Gary Becker, 'the economic approach does not assume that decision units are necessarily conscious of their efforts to maximize or can verbalize or otherwise describe in any informative way reasons for the systematic patterns in their behavior' (*Economic Approach to Human Behavior*, *op. cit.*, p. 7).

96. On this important point, see G. S. Becker, *Economic Approach to Human Behavior*, *op. cit.*, pp. 153ff.

97. 'Prices and other market instruments allocate the scarce resources within the society and thereby constrain the desires of participants and coordinate their actions. In the economic approach, these market instruments perform most, if not all, of the functions assigned to "structure" in sociological theory' (*ibid.*, p. 5.)

> accumulate an optimal amount of information and other inputs in a variety of markets. If this argument is correct, the economic approach provides a unified framework for understanding behavior that has long been sought by and eluded Bentham, Comte, Marx and others.[98]

Becker views every aspect of human life through the prism of the market: politics, law, marriage, sex, bringing up children, the relation to time, and so forth. For example, he posits the existence of a marriage market on which the candidates (or their parents) are in competition, and he explains the choices made by individuals through the laws of this market.[99] The interest of Becker's work is that it displays the market paradigm in its purest form: as a method for uncovering the system of rules that supposedly governs all human behaviour. The influence of this paradigm has been and remains immense, not only in the media, which spread this economic creed far and wide, or in international or European Community institutions, which lend it legal force, but also in all the social sciences and even within law faculties.[100]

The market paradigm is applied today in a great many explanatory systems outside of economics. Such is the case in France with the sociology of Pierre Bourdieu, whose concept of 'field' is likewise presented as a system of rules for explaining human behaviour. The concept is drawn from physics and Bourdieu himself does not hesitate to say that he considers individuals as '"particles" that are under the sway of forces of attraction, of repulsion, and so on, as in a magnetic field'.[101] But his categories of thought are essentially derived from economics (capital, prices, interest, and so forth).

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98. *Ibid.*, p. 14.

99. *Ibid.*, pp. 205ff. Criminality can likewise be analysed in terms of a costs/advantages model, both from the point of view of the State and from that of the offender, independently of any psycho-sociological considerations (*ibid.*, pp. 39ff.); in the political realm, the electorate can be analysed as a market on which politicians are in competition (*ibid.*, pp. 34ff.); changes in birth rates, which demographers merely observe, may be explained as soon as an economic analysis reveals the utility function motivating the parents (*ibid.*, pp. 171ff.) – and so forth.

100. This doctrine has been systematized in Anglo-Saxon countries by the 'Law and Economics' movement (see particularly R.A. Posner, *Economic Analysis of Law, op. cit.*).

101. P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology, op. cit.*, p. 106.

Within one field,[102] 'it is one and the same thing to determine what the field is, where its limits lie, etc., and to determine what species of capital are active within it, within what limits'.[103] Bourdieu frequently uses the concept of market, and it is not always possible to distinguish it clearly from 'field'. For example, 'the family and the school function as sites in which the competences deemed necessary at a given time are constituted by usage itself, and, simultaneously, as sites in which the *price* of those competences is determined, i.e. as markets'.[104] Bourdieu likewise identifies a marriage market, a market of symbolic goods, a market of high society, et cetera.[105] In these markets or fields, individuals stake three types of capital: economic, cultural and social. As for the power of the State, it is 'a kind of *meta-capital* capable of exercising a power over other species of power, and particularly over their rate of exchange'.[106]

Without really distorting Pierre Bourdieu's thought, one could therefore replace the word 'field' with the word 'market' – in the broad sense that Becker gives it – wherever it appears in his works.[107] Bourdieu, like Becker, gives enormous scope to concepts derived from economic analysis. In his words, a general science of the economy of practices 'does not limit itself to those practices that are socially recognized as economic'; it 'must endeavour to grasp capital, that "energy of social physics", in all of its different forms, and to *uncover the laws* that regulate their conversion from one into

102. A field is defined as 'a network, or a configuration, of objective relations between positions. These positions are objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (*situs*) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.)' (*ibid.*, p. 97).

103. *Ibid.*, pp. 98–9.

104. P. Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, trans. Richard Nice, London, Routledge, 1984, p. 85 (emphasis in the original).

105. These notions are all explored in *Distinction, op. cit.*

106. P. Bourdieu and L. Wacquant, *Invitation to Reflexive Sociology*, *op. cit.*, p. 114.

107. Bourdieu refutes the accusation of economism which was inevitably levelled at him, stating that the only thing he shares with an economic orthodoxy 'is a certain number of words'. This response is hardly convincing, and could be countered with the critique he himself makes of the philosophical use of language 'as a sum of partially intersecting idiolects [that] can only be adequately used by speakers capable of referring each word to the system where it assumes the meaning they intend it to bear' (Pierre Bourdieu, *Language and Symbolic Power*, trans. Gino Raymond and Matthew Adamson, Cambridge, Polity, 1992, p. 273).

another'.[108] Here too, by extending this method to social practices as a whole, it should be possible to reveal the unconscious determinants of human behaviour: 'there are general *laws of fields*: fields as different as the field of politics, the field of philosophy or the field of religion have *invariant laws of functioning*. (That is why the project of a general theory is not unreasonable . . .).'[109] The reference to economics is primarily a consequence of the rejection of structuralism, which is accused of ignoring the relations of power which are also at work in the use of language: 'grammar defines meaning only very partially: it is in relation to a *market* that the complete determination of the signification of discourse occurs'.[110] Bourdieu's critique of structural linguistics leads him to propose in its stead 'a simple model of linguistic production and circulation, as the relation between linguistic habitus and the *markets* on which they offer their *products*'.[111]

Pierre Bourdieu, an exact contemporary of Gary Becker, is of course not a disciple of his, and they do not share the same goals: the former seeks to lay bare collective relations of domination whereas the latter is interested in what determines individual behaviour. And yet the works of both authors, despite their differences, draw some of their force from the extraordinary properties of the market paradigm, which dismisses all the principles in the name of which people claim to act, retaining the only one they are reluctant to admit: self-interest, whether conscious or not.[112]

Linguistic structure and the market thus emerge today as the two points of reference around which the social sciences organize their search for the underlying laws that govern human affairs. Both offer the model of a system of rules that do not have to be recognized in order to be effective, that are capable of self-regulation, that leave space for human initiative, while, lastly, subjecting humans to the implacable decrees of a hidden Legislator, be it the 'legislator of language' (which we find already in Plato's *Cratylus*[113]) or Adam

108. P. Bourdieu and L. Wacquant, *Invitation to Reflexive Sociology*, *op. cit.*, p. 118 (emphasis added).

109. P. Bourdieu, *Sociology in Question*, trans. Richard Nice, London, Sage, 1993, p. 72 (emphasis in the original). So the law here guarantees the principle of reason. . . .

110. P. Bourdieu, *Language and Symbolic Power*, *op. cit.*, p. 38 (emphasis added).

111. *Ibid.*, pp. 37–8 (emphasis added).

112. The universality of the pursuit of individual interest founded the idea of law already in the *Fa-kia* school, which presented itself as a pessimistic version of Western eighteenth-century utilitarianism (see L. Vendermeersch, *La Formation du légisme*, *op. cit.*, pp. 219ff.).

113. Plato, *Cratylus*, *op. cit.*

Smith's 'invisible hand'.[114] Numerous categories of thought currently emerging in the social sciences, such as that of the network,[115] appear as hybrids of market and structure.

Where do positive laws fit into the picture? To the jurist – or the scientist – a particular law only has sense if it is related to the system of rules within which it is situated. However, as in the social science, the nature of this system and the appropriate term for it are the subjects of much scholarly controversy:[116] the Kelsenian idea of law as a logical system of norms has taken on the value of a paradigm and been refined on numerous occasions,[117] particularly through the theory of autopoiesis which dispels the obscurity around the concept of *Grundnorm*, by closing the system of rules on itself.[118] The instrumental conception of law, which developed out of Marxist critique, also considers laws from the point of view of their place in a normative order.[119] The uncertainty principle becomes evident in the pre-eminence accorded to rules of procedure – which open up the field of settlements or individual initiatives – over fundamental rules.[120]

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114. This notion has all the characteristics of a 'hidden God': see J.-C. Perrot, *Une histoire intellectuelle, op. cit.*, pp. 333ff. This idea of a hidden God, a Legislator at work below ground, who is master of the rules underlying humanity, seems to have replaced the celestial Legislator in the mind of many scholars.

115. See M. Castells, *The Rise of the Network Society*, Oxford, Blackwell, 1996; G. Teubner, 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors', in J. McCahery, S. Picciotto and C. Scott (eds), *Corporate Control and Accountability*, Oxford, OUP, 1993, pp. 41ff.; F. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Brussels, Publications of the University Faculties of Saint-Louis, 2002.

116. For a good overview, see S. Goyard-Fabre, *Les Fondements de l'ordre juridique*, Paris, PUF, 1992.

117. See H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961.

118. The concept of autopoiesis, which draws its inspiration from biology and cybernetics, designates a closed system capable of maintaining itself and reproducing its own components. It is a key notion in the work of Niklas Luhmann (see his *Social Systems*, trans. John Bednarz and Dirk Baecker, Stanford, CA, Stanford University Press, 1995), and was transposed into the legal domain particularly by Gunther Teubner (see *Law as an Autopoietic System*, trans. Anne Bankowska and Ruth Adler, Oxford, Blackwell, 1993 and his *Droit et réflexivité. L'autoréférence en droit et dans l'organisation*, Paris, LGDJ, 1994).

119. For France, see A. Jeammaud who defends an 'instrumental conception of legal normativity', which considers law as a statement fulfilling the function of an evaluative model or a means of measuring action, due to its place in a totality that is viewed by society as normative ('La règle de droit comme modèle', *Recueil Dalloz*, 1990, pp. 199ff.).

120. The work of Habermas and Rawls has been particularly influential on jurists; see especially J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des democratischen Rechtsstaats*, Frankfurt, Suhrkamp Verlag, 1992, translated by William Rehg as *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA, MIT Press, 1996; and J. Rawls, *A Theory of Justice*, Cambridge, MA, Harvard, 1971.

Due to this proceduralization, laws simply sketch out possible scenarios which are only actualized by contracts.

However, what all those who currently claim to be working on a 'science of law' have in common is their dismissal of any consideration of the values underlying the norms they study. As Simone Weil writes:

> A value is something that we unconditionally accept. For every instant of our lives is in reality directed by some system of values or other; a system of values, in the instant that it orientates our life, is not accepted subject to conditions, but purely and simply accepted. Since knowledge is subject to conditions, values may not be an object of knowledge. At the same time, we cannot abandon the attempt to understand them, since this would mean ceasing to believe in them, which is impossible because human life cannot exist without orientation. Therein resides a contradiction which is at the very heart of human life.[121]

This contradiction is the driving force behind legal thought. On the one hand, the dogmatic nature of law is undeniable, but on the other hand law is the offspring of a civilization that has placed scientific knowledge at the very heart of its value system. Jurists who place the study of law within the field of the 'true laws' of science refuse to admit this contradiction. As Michel Troper writes:

> In order to describe the legal framework in force, the knowledge of the values subtending it appears entirely superfluous. The positivist is quite content, if one may use the term, with the assertion that 'according to the laws in force, Jews are excluded from the Civil Service'. Such an assertion does not enable the law to be 'explained' nor does it indicate how the norm should be interpreted and applied in concrete cases, but these are issues for the practice and not the science of law [. . .]. To put it brutally, the *ratio legis* (reason of law) is neither the law nor its science; it is not even the science of law; it lies beyond it.[122]

The 'science of law' would therefore be characterized by the fact that it does not allow the issue of the reasons (and unreasons) of law

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121. S. Weil, 'Quelques réflexions autour de la notion de valeur' [1941], in her *Oeuvres*, Paris, Gallimard, 1999, p. 121.

122. M. Troper, 'La doctrine et le positivisme' (on an article by Danièle Lochak), in D. Lochak et al., Les Usages sociaux du droit, Paris, PUF, 1989, p. 291.

to be addressed. Its argument is as convincing as that of the technical expert who claims that the science of technical objects forecloses the issue of their use and purpose. We see here, in a radical form due to the pretension to scientific status,; a stance on the part of jurists that goes back a long way and consists of referring the issue of the reason of laws to others.[123] Accursius, who was at the forefront of the medieval rediscovery of Roman law, was already replying negatively to the question of whether jurists should be well read in theology, because 'everything can be found in the corpus of the law'.[124] Nowadays, the 'science of law' does not of course refer to theology on the question of its founding principles, but to other sciences, namely biology and the social sciences.

From the perspective of the social sciences, positive laws are indeed explained by the underlying systems of rules which scientific research unveils. The structural anthropologist sees positive laws as a screen onto which beliefs are projected, masking society's deeper structure; the economist analyses them as management tools, whose effectiveness depends on their compatibility with the laws of the market; the sociologist of fields sees them as instruments of symbolic domination, to be analysed within the logic of the legal field.[125] As Pierre Legendre has noted, scientific legitimation therefore comes to occupy the structural position of dogmatic point of reference.[126] Several difficulties emerge, however, when one dissolves positive law in this way into a science that supposedly reveals the true laws of humanity. Not only does one leave by the wayside the notion of the subject of law – reduced to an economic or linguistic 'particle' – but one also undermines the concept of justice, to which man's (false) consciousness

123. Slightly earlier in the same article (p. 290), this authority on legal theory affirms that as soon as a jurist begins interpreting texts and hence referring to a *ratio legis*, he or she is 'at the opposite extreme from positive science'. The refusal to interpret would thus characterize the science of law. This premise is correct – interpretation is not a science in the sense of the positive sciences – but the normative conclusion deduced from it, that the jurist must refrain from interpreting, is false. The only conclusion that can really be drawn from this premise is that law, which belongs to the field of interpretation, is not and can never be a positive science.

124. '*Omnia in corpore iuris inveniuntur*' (*Ad.* 1, 10, *De iustitia et iure*, 1). Most law professors would today reply in the same vein as Accursius to the question 'should the jurist have a knowledge of economics, sociology, psychology or anthropology?' Law faculties since the late nineteenth century have expelled anything remotely related to these fields of knowledge.

125. P. Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', trans. Richard Terdiman, *Hastings Law Journal*, 38 (5), July 1987, pp. 805ff.

126. P. Legendre, *Sur la question dogmatique en Occident, op. cit.*, p. 246.

ordinarily refers all laws. In other words, one arrives at a science without a conscience, capable of justifying the most criminal enterprises – the soul's perdition, as we know since Rabelais.

On what, then, are ideas of justice and solidarity to be based when one has thus dissolved the idea of law? Becker who, true to his promise, carries out his demonstrations 'relentlessly and unflinchingly', does not attempt to minimize the difficulty. How may one justify altruism in a world that is driven exclusively by the pursuit of individual interest? He addresses this question in the final chapter of his book, 'Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology'.[127] The answer, he claims, is to be found in the laws of genetics: for many species, altruism towards one's fellow creatures has been a condition of survival, and has therefore been genetically selected; and what is true for animals must be true for humans.[128] Becker – and, in his wake, many contemporary economists – thus ends up looking to genetics to discover the ultimate laws of human behaviour (but in a completely different framework from that of Lévi-Strauss).[129] Many other authors are today

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127. I thank Bob Hancké (WZB/Berlin) for drawing my attention to this chapter of Becker's *The Economic Approach to Human Behavior*, *op. cit.*

128. We may note in passing the anthropocentric paralogism which underlies this argument. In order to explain the animal kingdom, one begins by projecting onto it categories of thought derived from human experience (here: altruism); one deduces from this that man and animal obey the same rules of conduct. The mediation of language, which is specific to human experience, is skilfully spirited away in this conjuring trick which would amuse my cat, for all its egoism – if only it could tell me! This sort of aberration displays a striking ignorance of the division between man and animal that the capacity to manipulate symbols introduces, a division which is highlighted by biologists themselves (see the pioneering work of A. Leroi-Gourhan, *Gesture and Speech*, trans. A.B. Berger, Cambridge, MA, MIT Press, 1993, II, 'Memory and Rhythms', pp. 219ff.; also, more recently, T. Deacon, *The Symbolic Species. The Co-evolution of Language and the Human Brain*, New York, W.W. Norton, 1997).

129. 'The approach of sociobiologists is highly congenial to economists, since they rely on competition, the allocation of limited resources – of, say, food and energy – efficent adaptation to the environment and other concepts also used by the economists' (G.S. Becker, *The Economic Approach to Human Behavior*, *op. cit.*, p. 283). The link between the social sciences and biology had already been made by Auguste Comte when he stated that 'the systematic study of society requires a previous knowledge of the general laws of life'. But since biology, although ultimately destined for man, 'has to study life only in what it presents in common in all the beings which enjoy it', it can only 'sketch in rude outline' the true study of man (*The Catechism of Positive Religion*, *op. cit.*, pp. 130–31). So we should take care not to caricature Comte, who understood full well the dogmatic foundations of man and society, and whose idea of the 'Religion of Humanity' is the only one that, in the West, can still today resist the encroachment of scientism, principally through the dogma of 'human rights' (see Chapter 6).

setting out on this slippery slope: certain biologists, whilst keeping their distance from sociobiology, are currently developing an evolutionary anthropology which would relate adaptive strategies (rather than individual behaviour) to universal genetic 'givens' (not linked to 'race').[130] At the same time, an intellectual current is emerging that aims to refound the political Left on Darwinian grounds, arguing that certain aspects of human nature (for example, the sense of hierarchy) are genetically determined and cannot therefore be modified culturally.[131] This 'Darwinian Left' attempts to counter the economic Darwinism that is used today to justify the law of the strongest – the market selects the fittest, who are the best – with a progressive version in which the idea of social justice would be adapted to genetic givens. The only way to avoid going astray with such ideas is to take seriously the anthropological function of human laws and to recognize the role of law in constructing individual and collective identities.

When economic operations are freed from the positive laws of States, and claim to incarnate the impersonal forces of the market or of biology, they bear within them the seeds of a totalitarian conception of law. Hannah Arendt has admirably demonstrated how it is

> the monstrous, yet seemingly unanswerable claim of totalitarian rule that, far from being 'lawless', it goes to the sources of authority from which positive laws receive their ultimate legitimation, that far from being arbitrary it is more obedient to these suprahuman forces than any government ever was before, and that far from wielding its power in the interest of one man, it is quite prepared to sacrifice everyone's vital interests to the execution of what it assumes to be the law of History or the law of Nature.[132]

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130. See for example R. Dawkins, for whom 'we are survival machines – robot vehicles programmed to preserve the selfish molecules known as genes' (*The Selfish Gene*, *op. cit.*, p. ix). See also Matt Ridley, *The Origin of Virtue: Human Instincts and the Evolution of Cooperation*, New York, Viking Press, 1997; Jerome Barkow, Leda Cosmides and John Tooby (eds.), *The Adapted Mind: Evolutionary Psychology and the Generation of Culture*, Oxford, OUP, 1992. I thank Eva Jablonka, Professor of Biology at the University of Tel Aviv, for the many insights she shared with me on this subject. In France, the theme of the 'man-machine' is best known through *L'Homme neuronal* (Paris, Fayard, 1983) by Jean-Pierre Changeux, former President of the National Ethics Committee; for a critique of this mechanistic ideology, see P. Thuillier, *La Grande Implosion*, *op cit.*, *passim* and particularly pp. 447ff.

131. See P. Singer, 'Evolutionary Workers' Party', *Times Higher Education Supplement*, 15 May 1998, p. 15.

132. See H. Arendt, *The Origins of Totalitarianism*, *op. cit.*, pp. 461–2.

The economic vulgate which predominates today prompts one to see humans at worst as a cost to be reduced, at best as 'human capital' to be managed; that is, as a resource whose exploitation obeys universal laws that are applicable to all.[133] The company managers responsible for reductions in manpower are simply the instruments of these laws and are judged favourably if they can overcome the awful spectacle of the suffering they inflict on others.[134] For these categories, professionalism means unflinchingly implementing programmes of 'downsizing' in the name of 'value creation'. This sort of professionalism could already be observed in those first managers of human resources within a globalized economy: the officers of slave ships. They were capable of contemplating their cargo of human beings as they would look at a cargo of lumber.[135]

Those who seek to dissolve the law into the laws of science inevitably fail, but they nevertheless denounce the devastating effects of what they themselves were advocating. Pierre Bourdieu's sociology, which is otherwise such a remarkable body of work, leads to just such a dead end when it treats the issue of law. How, for example, can one reconcile the following two statements: 'the State, that quasi-metaphysical notion that must be exploded';[136] and 'the critical efforts of intellectuals [. . .] should be applied as a matter of priority against the withering of the State'?[137] If the notion of the State 'makes

133. For an analysis of the economic vulgate of the World Bank and the International Monetary Fund, see M. Michalet in *La Régulation sociale: le rôle des organisations européennes et internationales*, Institut d'études politiques de Paris, 23–24 May 1997, proceedings published by the Fondation nationale des sciences politiques; see also J. Stiglitz, *Globalization and Its Discontents*, New York, W.W. Norton, 2002.

134. This would explain the topicality of the concept of 'banality of evil' which H. Arendt formulated; see C. Dejours, *Souffrance en France. La banalisation de l'injustice sociale*, Paris, Seuil, 1998, pp. 93ff. This theme was addressed in a film by J.-M. Moutout, *Violence des échanges en milieu tempéré* (2003).

135. See the remarks by Robert Harms in his study of the ship's log that Robert Durand, first lieutenant of a slave ship, kept: 'What is especially chilling about Robert Durand's words is their businesslike, matter of fact tone. He was writing about selling people exactly as he would have written about selling barrels of wine or loads of wheat. He gave no indication that he felt any sense of shame or moral ambivalence about his mission; otherwise he would not have dedicated the voyage with such flourish to the "greater glory of God and the Virgin Mary". Nor was Durand a hardened slave trader. He was only 26 years old, and this was his first trip to Africa.' See R. Harms, *The Diligent. A Voyage through the Worlds of the Slave Trade*, New York, Basic Books, 2002, p. 5.

136. P. Bourdieu and L. Wacquant, *Invitation to Reflexive Sociology*, *op.cit.*, p. 111.

137. P. Bourdieu, *Acts of Resistance: Against the New Myths of Our Time*, trans. by Richard Nice, Cambridge, Polity, 1998, p. 46.

sense only as a *stenographic label* – but, for that matter, a very dangerous one – for these spaces of *objective relations* between *positions* of power (assuming different forms) that can take the form of more or less stable networks (of alliance, cooperation, clientelism, mutual service, etc.)',[138] how can one struggle 'against the destruction of a *civilization*, associated with the existence of public service, the civilization of republican equality of rights, rights to education, to health, culture, research, art, and, above all, work'?[139] In order to avoid such aporias, one would do better to draw on what is best in the sociological tradition: thinkers such as Mauss, who did not seek to dispatch the question of law in a few definitive formulas, but who, on the contrary, highlighted the anthropological function of legal dogma.[140] We should share the indignation of Pierre Bourdieu at the manner in which whole swathes of humanity are precipitated into the social abyss in the name of the laws of the market. But this indignation can neither guide nor be guided by intellectual endeavour if one refuses to think positive law as such. It is useless to lament the dislocation of the Welfare State if one deprives oneself of the means of analysing it. 'Welfare' is not a listed building to be defended against the injuries of time; it is a constantly evolving and extremely complex legal mechanism, whose survival depends on how one understands it.[141]

More generally, a legal analysis would enable one to test the hypothesis that notions of positive law and scientific law follow parallel trajectories. The idea of scientific law came to the fore at the same time as the nation-state. A careful study should be undertaken of the way in which that institution's pillars are now cracking, and of the new articulations of law and contractual agreement. These developments are noticeable in the increasing proceduralization of law, which is one of the effects of the market paradigm. Good economists – those who still study the *practices* of the production of material wealth – are the first to recognize this. Robert Salais notes:

> The disproportionate interest displayed in procedures and discourses is the result of models of observation derived from theories

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138. P. Bourdieu and L. Wacquant, *Invitation to Reflexive Sociology*, *op. cit.* p. 112 (emphasis in the original).

139. P. Bourdieu, *Acts of Resistance*, *op. cit.*, p. 24 (emphasis in the original).

140. See particularly M. Mauss, 'A Category of the Human Mind', *op. cit.*, pp. 13ff.

141. Research into the social security system is notoriously neglected in France, especially in law faculties.

> of the market. Where the model of society is that of the generalized market, constituted solely of transactions between individuals or economic agents, what counts is solely the degree of optimization of the procedures that govern the transactions. Since the actors are presumed to be rational beings playing a strategic game, public policy is conceived merely as a form of regulation to prevent opportunistic behaviour. The real content of the operations, like the material products, in the broad sense, that result from this process, are of little significance to the State since, by definition, they belong to the private sphere and are the responsibility of the actors involved. Consequently, they cease to be considered pertinent for observation.[142]

European Community law provides an ideal object for the study of the process by which laws are relativized within a legal system based on the idea of the 'Single Market': for all the laws and States within the Community appear enthralled to this idea. Besides, what concept does the unidentified legal object called the European Union (or Community) correspond to? How are we to classify Commission and Council directives and regulations, these 'non-laws'? From the legal point of view, the EU is neither a State nor an empire, simply a system of texts[143] – but one that lays down the law for member states and now mints its own money. The source of the legal system may no longer be imputed to the State, but laws survive this retreat, their value becoming simply relative and local. The idea of law endures in the form of national legislation inserted into an encompassing system of EU regulation that is binding on it, such that diverse national (directives), local or occupational realities may be accommodated.[144] One cannot help but draw a parallel with the evolution of contemporary physics, which has likewise abandoned any single and ultimate cause in favour of laws that have only relative and local value. These developments confirm the unity of Western thought, in which law and science advance hand in hand, informed by the same conception of law. They also confirm the heuristic value of Montesquieu's theory of the relativity of positive laws:

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142. R. Salais, 'La politique des indicateurs. Du taux de chômage au taux d'emploi dans la stratégie européenne pour l'emploi', in B. Zimmermann and P. Wagner (eds), *Action publique et sciences sociales*, Paris, Maison des sciences de l'homme, 2004.

143. See P. Legendre, *De la société comme texte*, *op. cit.*

144. See the soaring number of opt-out clauses in labour law (J. Pelissier, A. Supiot and A. Jeammaud (eds), *Droit du travail*, Paris, Dalloz, 22nd edn, 2004, no. 847 *et seq*).

> They should be related to the *physical* aspect of the country; to the climate, be it freezing, torrid, or temperate; to the properties of the terrain, its location and extent; to the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established. They must be considered from all these points of view.[145]

What more need be said concerning the immense task that awaits the jurist?

145. Montesquieu, *The Spirit of the Laws*, *op. cit.*, I, I, 3, p. 9 (emphasis in the original). Montesquieu is implicitly responding to Pascal ('It is a strange justice that is bounded by a stream! Truth on this side of the Pyrenees is error on the other', *The Pensées*, *op. cit.*, p. 92) who, like certain scholars today, was incapable of conceiving law as an absolute.

3

THE BINDING FORCE OF THE WORD: *PACTA SUNT SERVANDA*

Cattle are tied by their horns, men by their words.[1]
Antoine Loysel

'The binding force of the contract constitutes the very basis of life in society. From time immemorial, people have considered that honouring one's word was a fundamental axiom which, from its origin in natural law, has passed into all systems of legislation.'[2] This claim by the great French civil law specialist Josserand stems from a long tradition in which the saying *Pacta sunt servanda* ('agreements must be respected') constitutes a dogma valid for every organized society. This dogma is not restricted to the Continental tradition and can also be found in common law theorists such as Addison, who writes:

> The law of contracts may justly indeed be said to be an universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal.[3]

However, as early as the nineteenth century, authors more attentive to the history of law were already aware that the

1. 'On lie les boeufs par les cornes et les hommes par les paroles', *Institutes coutumie`res*, Geneva, Slatkine Reprints, 1971, bkII.

2. L. Josserand, 'Le contrat dirigé', *Recueil hebdomadaire Dalloz*, 1933, no. 32.

3. C.G. Addison, *A Treatise on the Law of Contracts, and Rights and Liabilities ex Contractu*, 1847, cited in P.S. Atiyah, *Essays on Contract*, Oxford, Clarendon Press, 1986, p. 17. The same absolute certainty can be found at the same period in the work of Continental jurists: 'The obligation resulting from a contract pre-exists civil law. The legislator came upon it already constituted and had merely to settle the details of its performance and mode of prosecution' (L. Larombière, *Théorie et pratique des obligations*, 7 vols, 1st edn, Paris, A. Durand, 1857, vol. I, p. 379).

contract, far from being a timeless category, corresponded to a moment in the history of civilization. In a famous work, Sir Henry Sumner Maine even interpreted the whole history of law in the West as a transition from status to contract, understood as a generalizable form of the legal bond.[4] Léon Bourgeois characterized modernity in a similar way when he stated that contract had become 'the ultimate basis of human law'.[5] These theorists did not see contract as an abstraction forever suspended in a Platonic realm of Ideas, but as the end point and culmination of a historical progress, in which people were plucked from their subjection to status, and placed on the path to freedom. They considered that the history of law has a sense and guides humankind to a world of freedom in which people bear no chains other than those with which they freely fetter themselves.[6]

The 'Civilizing Mission' of the Contract

In the wake of the Enlightenment, it became accepted that the emancipatory process created by the contract was destined to become universal and would one day be extended to all those peoples still in their infancy. Immediately following decolonization, these nations were indeed invited to join the international institutions that guarantee the freedom to contract across frontiers. Adopting the culture of the contract became the condition of admission into the modern age and into the family of nations. This was the case with Japan during the Meiji era when, in order to escape the yoke of 'unequal treaties', it had to adopt a law of contract whose philosophy was profoundly alien to its traditions. It is also true today of certain ex-Communist countries, whose failures in the market economy can be explained largely by the fact that the notion of contract is not rooted in their culture.

The belief in the civilizing mission of the contract is one of the most powerful forces in contemporary law. But it is also narrowly Western, as comparative law shows whenever it is not reduced to the

4. H. Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* [1861], 14th edn, London, John Murray, 1891, pp. 304ff.

5. L. Bourgeois, *Solidarité*, Paris, A. Colin, 1896, 3rd edn, 1902, p. 132.

6. Only someone like Tocqueville, with his exceptional clear-sightedness, could resist the temptation of such optimism, and also perceive the dark side of this ideology.

comparative study of common law and Continental law,[7] but takes into account, on this subject also, the Eastern traditions, which have always had the beneficial effect of disorientating the West and unsettling its received ideas.[8] The case of Japan is particularly revealing, in that the contract was imported there over a century ago without eliminating the neo-Confucian culture to which the contract is not only unfamiliar but positively hostile: it is not the individual – and certainly not the individual's will – that lies at the heart of this culture, but cosmic and social harmony. The idea that a contract entered into at a given moment in time should be binding in the future, whatever the future circumstances and whatever the harm done by performing it, is foreign to this culture and deeply loathsome to it. More generally, the difference in attitude can be related to the status of speech, which varies between cultures. The West is of course not the only civilization to place a very high value on the spoken word. Black Africa also sees the word as a principle which confers order on the world,[9] and Chinese culture likewise attaches the greatest importance to language, since a sound order can only exist through the correct designation of each being within it.[10] But only in the West did people conceive that the legislative power of the Word vested in God could be appropriated by anyone for their own ends, and that the future could be frozen through words.[11]

This difference between East and West is well illustrated by comparing their linguistic structures and, above all, their writing. In Chinese – a monosyllabic language using ideographic writing – the word functions as a vocal or graphic emblem.[12] The language is uninflected, with few phonemes but a very rich vocabulary. It tends to evoke the concrete diversity of people, things and feelings, rather than abstractions. The linguistic sign incarnates things rather than

7. On this otherwise very instructive topic, see D. Tallon and D. Harris (eds), *Le Contrat aujourd'hui: comparaisons franco-anglaises*, Paris, LGDJ, 1987; G. Alpa, 'L'avenir du contrat: aperçu d'une recherche bibliographique', *Revue internationale de droit comparé*, 1–1985, pp. 7–26; D. Tallon, 'L'évolution des idées en matière de contrat: survol comparatif', *Droits*, 1990, pp. 81–91.

8. This is a very old story: see René Etiemble, *L'Europe chinoise*, Paris, Gallimard, vol. I, 1988, vol. II, 1989.

9. See M. Griaule, *Conversations with Ogotommêli*, *op. cit.*

10. This explains the principle of the 'rectification of names', found throughout Chinese political philosophy: see M. Granet, *La Pensée chinoise*, *op. cit.*, pp. 47ff.; J. Escarra, *Chinese Law*, *op. cit.*; X. Li, 'L'Esprit du droit chinois: perspectives comparatives', *op. cit.*, pp. 7ff., pp. 33–5.

11. See Chapter 1.

12. See M. Granet, *La Pensée chinoise*, *op. cit.*, pp. 33ff.

arranging them in a formal structure. In the West, by contrast, alphabetic writing and inflected forms result in many fewer signs, and produce an infinitely more abstract representation of the world. The capacity to abstract has even become a sign of cultural excellence, with each major European country claiming that its language is best suited to this function. All are united in their worship of mathematical formalization and quantification, whereas in Chinese, the closer the word (or the sign representing it) is to the act or thing it designates, the more powerful it is. Chinese writing has left its mark on all the cultures of the Far East; and if Japanese writing has preserved the use of *kanji*, Chinese ideographs, to this very day, it is due to their value as emblems, their concrete evocative power. There is an instinctive mistrust, within these cultures, of whoever claims to subsume the diversity and instability of beings under abstract categories.

While the West places its faith wholly in the explicit word, Japan trusts only the act itself. Maurice Pinguet, one of the subtlest analysts of Japanese culture, explains this profound mistrust of the pledged word in the following terms:

> Truth cannot be captured by mere words; it slips between them, beneath their apparent meaning, through the gaps between them. Freud thought this; his intuition might almost have been prepared for him by the long Japanese experience of the implicit. No culture had greater respect for codes, which rules every aspect of life; but no culture was ever so suspicious of codes, never mistaking them for anything but artefacts, which is what they are.[13]

In such a culture, undertakings are expressed not in words but in deeds; the strength and duration of the bonds between people do not depend on verbal pledges. They depend rather on maintaining the harmony that prevailed when these bonds were first formed, hence on the ability of each person to preserve the bonds linking them to others and on their capacity to adjust their claims in the light of the changing nature of people and circumstances. Claiming something from someone that they are no longer willing to do or that it would be prejudicial for them to do is contrary to the elementary rules of

13. M. Pinguet, *Voluntary Death in Japan*, *op. cit.*, p. 159. See also Y. Noda, 'La conception du contrat des Japonais', in T. Awaji et al., *Études de droit japonais, Société de législation comparée*, Paris, 1989, Preface by J. Robert and X. Blanc-Jouvan, pp. 391ff.

social etiquette, the rules of *giri*,[14] which vary according to one's age and station. *Giri* – which may be translated by 'obligation, duty, moral debt'[15] – is not founded on a universal law or a contract which is dissolved once it has been executed. *Giri* depends on the persons who are bound by it, and it is the basis for links that are

> long-lasting and unbreakable, involving the individual's idea of himself and the esteem in which he is held: it rests on his discretion and sensitivity. One good turn deserves another, or rather must not be forgotten, and it can be repaid – without cancelling the relationship, rather the reverse – in any one of a thousand freely chosen and often symbolic ways.[16]

Giri thus weaves a powerful web of obligations which are flexible but mutually endorsing, and which preserve the harmony of the community.

However, since the Meiji era, Japan has joined the ranks of Western legal culture – French, then German and lastly American – and now boasts a law of contract in the best globalized style.[17] If the contract was really what the West considers it to be, that is, an ultimate, universal and fully developed form of the legal bond, one might have expected that *giri*, an 'archaic' form of exchange, would gradually be eliminated by the progress of modernity. But nothing of the sort has occurred. The culture of the contract, which came from the barbarians of the West, is used by the Japanese to trade with – the barbarians of the West. But it is hardly used internally. A simple statistic suffices to convey the vitality of *giri*, the art of compromise and the avoidance of the paths of law: where the United States counts one lawyer per 300 inhabitants, Japan counts one per 10,000.[18] The economic successes of Japan (and perhaps soon of China) can in large part be explained by this welding of two cultures: that of law and

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14. See the explanatory presentation of this major concept in R. Benedict, *The Chrysanthemum and the Sword*, London, Routledge & Kegan Paul, 1967, pp. 94ff.; also I. Kitamura, 'Une esquisse psychanalytique de l'homme juridique au Japon', in T. Awaji *et al.*, *Études de droit japonais*, *op. cit.*, pp. 25ff.

15. Ruth Benedict mentions a definition of *giri* she found in a Japanese dictionary: 'Something one does unwillingly to forestall apology to the world' (*Chrysanthemum and the Sword*, *op. cit.*, p. 94).

16. M. Pinguet, *Voluntary Death in Japan*, *op. cit.*, p. 318.

17. See E. Hoshino, 'L'évolution du droit des contrats au Japon', in T. Awaji *et al.*, *Études de droit japonais*, *op. cit.*, pp. 403ff.

18. See R. Abel, P. and S.C. Lewis (eds) *Lawyers in Society*, Berkeley, University of California Press, 1988.

contract imported from the West, and that of the imperative of harmony and the social bond, inherited from Confucianism.

We must evidently avoid giving too rigid an account of the cultural relativity of the contract. While initially accepted for the needs of international trade, the contract is very gradually gaining ground within Japanese society, while being transformed by contact with the home culture.[19] But this movement is not one-sided. Thanks to international trade, the Japanese value system has also permeated Western ways, particularly in the sphere of management, where Western firms have adopted Japanese-style methods for arriving at collective agreement. The Japanese model has also influenced the legal sphere, with the theory of relational contracts which has attracted much attention, especially in the United States.[20] This theory explains the importance in business practice of framework agreements, which set up long-term relations of cooperation within which a series of contracts is drawn up; the relational contract establishes a flexible bond over time, which is reinforced – and not dissolved – by the reciprocal exchange of services. This latest triumph of Western legal engineering is arguably an incarnation of Eastern methods of arriving at agreement, a transposition of the culture of *giri*.

So the contract has not always been a universal category but is clearly in the process of becoming one, proving along the way that the Western conception of the human being and society is destined to be extended to the whole world. At least this is what globalization professes, as it applauds in one and the same movement the virtues of the free market and those of the contract – flexible, egalitarian and emancipatory – in opposition to the heavy machinery of States and the imperfections of the law – rigid, unilateral and enslaving. On this issue it is fair to talk of contractualism – not to be confused with contractualization – that is, an ideology, the idea that the contractual bond is the ultimate form of social bond and is destined to replace the unilateral imperatives of the law everywhere. Contractualism is just

19. See T. Awaji, 'Les Japonais et le droit', in T. Awaji *et al.*, *Études de droit japonais*, *op. cit.*, p. 9.

20. See I.R. MacNeil, *The New Social Contract. An Inquiry into Modern Contractual Relations*, New Haven, CT, Yale University Press, 1980. The notion of 'relational contracts' has given rise to much doctrinal discussion: see particularly M.A. Eisenberg, 'Relational Contracts' in J. Beatson and D. Friedmann (eds.), *Good Faith and Faith in Contract Law*, Oxford, Oxford University Press, 1997, pp. 291–304; H. Muir-Watt, 'Du contrat "relationnel" ', in Association H. Capitant, *La Relativité du contrat*, Paris, LGDJ, 2000, p. 169.

one element in an economic ideology[21] that conceives of society as a sum of individuals motivated solely by self-interested calculation. Contractualization, however, simply designates the objective extension of contractual techniques, a process that often throws up effects very different from those that contractualism promised.

The influence of contractualism spreads with the progress of economic ideology, of which it is only one aspect. Already in 1861, Sumner Maine observed that

> the bias indeed of most persons trained in political economy is to consider the general truth on which their science reposes as entitled to become universal, and, when they apply it as an art, their efforts are ordinarily directed to enlarging the province of Contract and to curtailing that of Imperative Law, except so far as law is necessary to enforce the performance of Contracts.[22]

This remark gives a very accurate account of the current relations between standard economic analysis and law. The 'Law and Economics' movement, which seems to exert a fascination even over French law faculties, seeks to include all human behaviour within what may be called a primitive anthropology of contract law, through the figure of the person who knows what he or she wants and what is best for them.[23] This anthropological moment can be found at the basis – 'first stage' – of the economic analysis of law, as expounded by its best representatives, Cooter and Ulen:

> Let us outline the steps in a complete economic analysis of a legal problem. The first step is to assume that the individuals or institutions who make decisions are maximizing well-known and clearly specified economic objectives, for example, that businesses are maximizing profits and that consumers are maximizing wealth and leisure. The second step is to show that the interaction among all the relevant decision makers settles down into what economists call an equilibrium, a condition that does not sponta-

21. The term 'ideology' is by no means pejorative here. No society can survive without a system of ideas which produces a hierarchy of values, that is, without ideology (see L. Dumont, *From Mandeville to Marx*, *op. cit.*, pp. 17ff.).

22. H. Sumner Maine, *Ancient Law*, *op. cit.*, p. 305.

23. See particularly R.A. Posner, *Economic Analysis of Law*, *op. cit.*; R. Cooter and T. Ulen, *Law and Economics*, *op. cit.*; B. Coriat and O. Weinstein, *Les Nouvelles théories de l'entreprise*, Paris, Le Livre de poche, 1995.

neously change. The third step is to judge the equilibrium by the criterion of economic efficiency.[24]

In this light, the law of contract neither precedes nor conditions the market economy. It is the instrument of market operations – Marxists would say it is superstructural – but not their source. The founding fathers of the economic analysis of law insist on this: it is not the legal principle of freedom to contract that founds the free market, since the free market is a fact of economic life which the law of contract merely accompanies and facilitates.[25] Here the old nineteenth-century convictions return, with the sole difference that economics has replaced natural law as the basis of contract law, and the yardstick has become not justice but efficiency. Where Marx failed, the 'Law and Economics' movement might well be succeeding, winning jurists over to accepting the importance of setting law back on its 'real' feet, that is, on its economic base. This explains the flood of literature whose primary aim is to relate each rule of contract law back to an economic law: incapacities are referred to the stable preferences of the rational actor, defects of consent such as duress to the freedom of choice of the rational actor, mistake and duties of disclosure to the transparency of market operations, and so forth.[26] This method cannot fail to bring to mind Marxist legal critique, which also aimed to relate each legal rule back to its economic determinants.[27] The only difference is that, whereas Marxist analyses set out to criticize the 'legal form' by exposing how it maps onto economic laws, the correspondence between the two seems to send our jur-economists into ecstasies of admiration. But in both cases the legal form is related back to a natural order that explains and encompasses it. Today, the binding force of the contract comes to be based on economic laws, which are then attributed universal value, as suggested by the following comment by L. Summer, Chief Economist at the World Bank: 'One of the things I have learned during my short time at the bank is that whenever anybody says "But things work differently here", they are about to say something

24. R. Cooter and T. Ulen, *Law and Economics*, *op. cit.*, p. 7.

25. See A.T. Kronman and R.A. Posner, *The Economics of Contract Law*, Boston/Toronto, Little, Brown, 1979, pp. 2–3.

26. See, for example, R. Cooter and T. Ulen, *Law and Economics*, *op. cit.*, pp. 234ff., and table 6.1, p. 241.

27. See, for example, M. Miaille, *Une introduction critique au droit*, Paris, Maspero, 1976.

dumb.'[28] Contractualism no longer rests on a political theory of the social contract but on the scientifically certified conviction that the market lays down the law on the scale of the planet. The garb of natural law has been abandoned in favour of the new clothes of economic analysis, and jurists can thus continue to rest assured that there is a world order that transcends national legislation, an order which the latter is there to serve. In the grand symphony of globalization, economic science has thus won pride of place as founding discourse for the universal order, leaving law the role of second fiddle: human rights.

As a result, any law that is not derived from a contractual agreement is considered suspect, and we busy ourselves grounding every obligation in the assent of those bound by it. Correlatively, the agreement of the person obligated tends to become a sufficient justification for the obligation, with the result that our inalienable rights get fewer and fewer. This leads to a generalization of contractual vocabulary, which reaches into the farthest corners of human life, including the public sphere. In order to grasp the meaning of this movement, we must begin by tracing it back to its origin, and the question of why, and since when, people may be bound by their word.

The Origins of the Contract

Pacta sunt servanda: without this principle which grounds respect for the pledged word, the contract would never have become the abstract universal that is the pride of modern jurists. The autonomy of the will would have acquired no legal force without this decidedly heteronomous rule. But where does this rule come from? Since when and why are we bound by our word? Retracing how this rule arose will allow us to grasp the central position occupied by the State today in the structure of the contractual bond.

The assertion that 'agreement between two parties is sufficient to form a contract' implies that the notion of contract must already be current. Yet the concept of the contract implies a radical separation between the world of things and that of persons. It also implies the idea that the future may be controlled by words. In the concepts of

28. Quoted by C.A. Michalet, 'Le nouveau rôle des institutions de Bretton Woods dans la régulation et la mondialisation', in M. Berthod-Wurmser, A. Gauron and Y. Moreau (eds), *La Régulation sociale: le rôle des organisations européennes et internationales*, Paris, IEP, 1997, p. 66.

alliance and exchange, which form part of the prehistory of the contract, things and persons are not yet clearly distinguished, and roundabout ways are used to ensure the control of time.

In the concept of the *alliance*, things are grasped only through persons: the alliance was conceived first of all as a particular kinship bond. It could be the result either of marriage or of 'artificial kinship',[29] established by means of a ritual involving blood: the blood covenant. Rituals of this kind are frequently described in the work of ethnologists,[30] since they exist in most 'archaic' societies and always have a religious dimension. This type of rite also appears in the Scriptures and survives to this day in the religions of the Book, which use the symbolism of spilt blood to seal the covenant[31] in and with God (the eucharist, circumcision). In the blood covenant as in marriage, it is by changing status that one is bound to another person. Kinship bonds are thus the detour by which a long-term relationship of obligation may be created.[32] But the things and services to which this relation of obligation applies remain necessarily undefined at the moment at which the alliance is sealed; the content of the obligation will depend on the chance events of the lives of those bound by the alliance and their respective needs. We still retain this type of arrangement in our legal heritage, in which a relation of obligation is derived from an artificial bond assimilated to a kinship bond. The idea of the body of employers (*le patronat*[33]) shows the enduring influence of the model of paternal authority on the employment relationship, a model that has persisted from Roman law (where it designated the bond between the freedman and his former owner – Latin *patronus* – who brought him into the world of civil life[34] and

29. See G. Davy, *La Foi jurée. Étude sociologique du problème du contrat. La formation du lien contractuel*, Paris, Alcan, 1922. The notion of 'artificial kinship' used here by Davy does not lead him to espouse, at the other extreme, a biological definition of kinship bonds. On the contrary, he states that 'kinship is not originally a physiological notion' (p. 53).

30. Beginning with the first ethnologist, Herodotus. See his description of an exchange of oaths between Scythians: 'they fill a large bowl with wine and drop into it a little of the blood of the two parties to the oath' (*The Histories*, IV, 70, trans. Aubrey de Sélincourt, Harmondsworth, Penguin, 1954, p. 264). Nearer to us, see the examples cited by G. Davy, and his bibliography, in *La Foi jurée*, *op. cit.*, pp. 43ff.

31. See A. Chouraqui, 'L'alliance dans les Écritures', *Revue de sciences morales et politiques*, 1995, p. 5.

32. See G. Davy, *La Foi jurée*, *op. cit.*, pp. 72ff.

33. The designation *Conseil national du patronat français* was replaced by *Mouvement des entreprises françaises* (French Business Confederation) only in 1998.

34. 'The patron gave legal personality to the freedman, somewhat like the father to his child' (P.F. Girard, *Manuel élémentaire de droit romain*, *op. cit.*, p. 123).

whose name he bore[35]) right up to modern labour law on salaried employment.[36] Our modern employment contract also involves a change in occupational status – access to employment with all this implies in terms of subordination and security – which incurs an obligation whose precise content will only become clear in the course of the contract's performance.

With the concept of *exchange*, on the other hand, persons are grasped through things. As is well known, the first form of exchange results from the chain of obligations to give, to receive and to give back. As Mauss has shown in his rightly famous essay on the gift, giving back becomes an obligation because of 'the spirit of the thing given' (the *hau*):[37]

> The thing received is not inactive. Even when it has been abandoned by the giver, it still possesses something of him. Through it the giver has a hold over the beneficiary just as, being its owner, through it he has a hold over the thief [. . .]. The *hau* follows after anyone possessing the thing.[38]

Our languages retain something of this idea, since the same word – *Gift* – designates poison in German and a present in English. When one gives a gift, the recipient is tied to the giver in the future, until he or she in turn gives something back, at which point this tie is dissolved. This sequence, from which is derived the obligation to pay one's debts, implies that a third term – here, the spirit of the thing – ensures restitution. Such an arrangement has not disappeared from our legal system either. Our contributory pension schemes create a bond which, in France, has been improperly called a 'contract

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35. Instead of the name of his father, the freedman bore the name of his former owner, in the genitive, preceded by 'l.' (*libertus*). See G. Sicard, 'L'identité historique', in J. Pousson-Petit (ed.), *L'Identité de la personne humaine*, *op. cit.*, p. 119.

36. Social security schemes have freed employers from this artificial paternity with respect to their employees, and transferred it onto welfare institutions. The concept of solidarity, which is a hybrid concept taken from the law of obligations and family law, in turn provides the basis for artificial kinship bonds between those belonging to the scheme (see Alain Supiot, 'Les mésaventures de la solidarité civile' in *Droit social*, 1999, p. 64). However, for social security, exchange is the prior concept and the bond between persons is simply its result (see below, the case of retirement pensions).

37. M. Mauss, *The Gift. The Form and Reason for Exchange in Archaic Societies*, trans. W.D. Halls, London, Routledge, 1990, p. 10.

38. *Ibid.*, pp. 11–12.

between the generations' ['un contrat entre les générations'],[39] but which is actually much closer to the 'archaic' sequence of obligations implied in giving, receiving and giving back. The chain of debts and credits constituting relations between the generations (we receive life from the previous generation, give it to the following one and, by giving it, restitute it to the preceding generation) is matched, in these pension schemes, by a chain going in the opposite direction: we give for the previous generation, receive from the following one, which in this way gives back what it has itself received. It is through this balance of debts and credits that a pension scheme may create bonds of solidarity between people.[40]

Roman law is at the basis of our notion of contract, and likewise of our sharp distinction between things and persons. Even so, this distinction took a long time to become established. In the *nexum*[41] (a loan for which the pledge is the person of the debtor himself), the relation of obligation again resulted from a change in status, the horizon of the debtor's enslavement; and perhaps also from a (poisoned) gift, the brass ingot, which was put into the debtor's possession until the debt had been paid off.[42] Moreover, even if Roman law did clearly distinguish between

39. See *Un contrat entre les générations* (Paris, Gallimard, 1991), the French Government White Paper on retirement pensions prefaced by the former French Prime Minister Michel Rocard. The idea of a contract between the generations reveals our inability to think of the bonds between people other than in contractual terms. Likewise for the bonds between human beings and Nature: according to an eminent philosopher of science, Nature cannot be conserved except by entering into a 'contract' with her (M. Serres, *Le Contrat naturel*, Paris, F. Bourin, 1990). Both social and environmental legislation are thus placed within the sphere of contractualism, but at the cost of subverting the distinction between things and persons.

40. The question of the legal basis of the right to a retirement pension is a headache for jurists equipped only with the concepts of contemporary law, since it defies our distinctions between tortious and contractual liability, and between the individual and the collective. It becomes clearer, however, if understood as the reappropriation in social legislation of forms of legal bond that *predate* these distinctions. Such a bond cannot be called contractual any more than potlatch can; however, like potlatch, it grounds solidarity between groups on the basis of a reciprocity of patrimonial obligations.

41. On the problematic interpretation of *nexum*, see P.F. Girard, *Manuel élémentaire de droit romain, op. cit.*, pp. 478ff.; P. Noailles, *Fas et Jus. Études de droit romain*, Paris, Les Belles-Lettres, 1948, pp. 91ff.; A. Magdelain, *Ius imperium auctoritas, op. cit.*, pp. 25ff. and 713ff.; P. Ourliac and J. de Malafosse, *Histoire du droit privé*, Paris, PUF, vol. I, *Les Obligations*, 2nd edn, 1969, no. 15 and the bibliography cited on pp. 36–7.

42. Mauss, *The Gift, op. cit.*, pp. 47ff.

persons and things,[43] not all people were persons and the concrete diversity of things was maintained. Roman law therefore has the notion of contracts, in the plural, which obey different regimes according to their objects (their *negocium*), but it is not concerned to define the 'contract itself' as a generic category.[44] There was never any question, for example, of identifying the contract simply with consent exchanged between two parties (called a pact or an agreement). Certain formal procedures were needed to move from agreement to contract (promise, *stipulatio* or oath) or else certain material actions (for example, handing over the object), which varied according to the contract. The binding force of real contracts derived from the transfer of the object to the debtor, while the binding force of stipulation and oath had religious roots.[45] The spirit of things or of the gods thus continued to preside over the creation of bonds between humans.

So if one single principle emerges from Roman law, it is rather that the pledged word has no legal force whatsoever: *ex nudo pacto, actio non nascitur*.[46] This rule, although constantly readjusted, was never abrogated, not even under Justinian, despite the increasingly numerous modifications it underwent.[47] The bare agreement is in

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43. See the organization of Justinian's *Institutes*, which inspired the French Civil Code and which adopts the tripartite division of Gaius's *Institutes*: every right supposes a *person* who is its subject, who exercises this right; a *thing* which is its object, which it applies to; and an *action* which endorses it and allows it to be put into effect (see P.F. Girard, *Manuel élémentaire de droit romain, op. cit.*, pp. 7ff.).

44. See M. Villey, 'Préface historique à l'étude des notions de contrat', in 'Sur les notions du contrat', *Archives de la philosophie du droit*, vol. XIII, Paris, Sirey, 1968, pp. 1ff., p. 7. *Contractus*, the past participle of the verb *contrahere*, is rarely used as a substantive in Roman law. *Contrahere* named the act of entering into a legal bond, but the result of this act was designated either generically by *obligatio* or by the proper name of the contract in question (*emptio*, *locatio*, *societas*, *mandatum*, et cetera). See also W. Wolodkiewicz, '*Contrahere–contractum–contractus* dans le droit romain classique', in H. Kupiszewski and W. Wolodkiewicz, (eds), *Le Droit romain et sa réception en Europe, Proceedings of a Colloquium*, Warsaw, 1978, p. 295.

45. Historians agree on this religious origin, and appeal to the etymology of the verb *spondere* (*spondai*: 'to make libations'), which is the term used to designate an exchange of promises (see P.F. Girard, *Manuel élémentaire de droit romain, op. cit.*, p. 486; P. Ourliac and J. de Malafosse, *Histoire du droit privé, op. cit.*, no. 18, p. 31; and, more generally, P. Noailles, *Du droit sacré au droit civil*, Paris, Sirey, 1949). A more controversial thesis derives stipulation from the ritual use of the rod (*stips*): see P.F. Girard, *Manuel élémentaire de droit romain*, op. cit., pp. 485ff.; and M. Mauss, *The Gift, op. cit.*, p. 48.

46. 'No legal action may accrue out of a bare agreement', Ulpian (I, 7, para. 4, D., 2, 14, *de pactis*); Paul (*Sentences* 2, 14, I).

47. See P.F. Girard, *Manuel élémentaire de droit romain, op. cit.*, p. 432.

principle assimilated to the voluntary surrender of oneself to another. It is simple trust, said to reside in the right hand, and incarnated in the figure of Fides, the white-haired goddess who is older even than Jupiter himself, since without her presence no human order would be possible in the world. Originally, whoever puts their trust in the word of another places themselves beyond legal protection.[48] Fides became secularized, as it were, under the influence of the *ius gentium* which saw the emergence of the first consensual contracts between Romans and foreigners. International trade was already based on trust – or rather on the fear of retaliation – and therefore did not bother with a formal framework. Those whose trust had been betrayed would have the Peregrine Praetor initiate a *bona fides* action to ensure respect for everyday transactions: sale, hire, partnership and, later, mandate. Good faith (*bona fides*) in this context meant trust that is objectively founded, that could have been placed by any person in the same situation. As for innominate contracts, respect for them could be ensured only by an *actio in factum*, which the Praetor agreed to on a case-by-case basis, and only when the service promised by one of the parties had already been carried out. In other words, Roman law assigned a certain importance to the pledged word in concluding contracts, but never took it to be the general principle from which the contract's validity could be derived.

The medieval Glossators reinterpreted for their own ends the precept 'Ex nudo pacto, actio non nascitur', on which they based their theory of *vestimenta pactorum*. Since, in the words of Accursius, the bare agreement is like a sterile woman, one must set about dressing her so that she gives birth to rights. Some agreements 'are naturally ample and warm and need almost nothing to appear well dressed', for example sale or hire, in which Roman law already saw consensual contracts. For the rest, heavier garments than simple consensus are required: *res*, *verba*, *cahaerentia*, *rei interventus*, and so forth.[49] In the sixteenth century, Loysel derides this theory of *vestimenta* when, having formulated what was to become the most famous image of consensualism – 'cattle are bound by their horns, men by their words' – he adds: 'and a simple promise or agreement is

48. See J. Imbert, 'De la sociologie au droit: la "Fides" romaine', in *Droits de l'Antiquité et sociologie juridique, Mélanges Henry Lévy-Bruhl*, Paris, Sirey, 1959, pp. 409ff. Along the same lines, for Ancient Greece, see L. Gernet, 'Droit et prédroit en Grèce ancienne', *op. cit.*, pp. 138ff.

49. See P. Ourliac and J. de Malafosse, *Histoire du droit privé*, *op. cit.*, no. 69, pp. 84ff. and the bibliography, pp. 104ff.

worth as much as all the stipulations of Roman law'.[50] This is because in the intervening period, between the medieval Glossators and Loysel, the principle enshrined in Roman law had been reversed. Henceforth, the saying would be: *ex nudo pacto, actio oritur* ('a bare agreement may give rise to legal action').

It is the medieval canonists who are responsible for turning the original principle on its head and for inventing the rule 'Pacta sunt servanda'.[51] The Church denounced the use of oaths in transactions, since it considered that a simple promise before God should suffice. A Christian's every action must always have Truth as its touchstone, and whoever promises and does not keep their word is acting in a way contrary to the Truth, deceiving their neighbour and committing a mortal sin. So, honouring one's word was elaborated first of all as a moral rule, grounded in the Scriptures and in the doctrine of the Fathers of the Church. Its initial formulation – *Pax servetur, pacta custodiantur* ('Peace should be preserved, agreements should be respected') – can be found in the canon *Antigonus*, in which the first Church Council of Carthage (348 AD) gave its verdict on an agreement between two bishops concerning the limits of their respective congregations:[52] a Christian who does not keep his word will incur the ecclesiastical punishments for lying. In the thirteenth century this moral rule was transformed into a legal obligation. In 1212, the *Glossa Ordinaria* of the Decree of Gratian endowed the obligation to respect simple agreements with legal force and a form of action.[53] This rule was taken up again in the *Decretals* of Gregory IX in 1230, in opposition to the principle inherited from Roman law and

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50. *Institutes coutumières*, L. III, vol. I. Loysel here distorts a maxim that the gloss *iuris vinculum* on Justinian's *Institutes* had applied precisely to the pronouncing of the sacramental words of stipulation: 'ut enim boves funibus visualiter ligantur, sic homines verbis ligantur intellectualiter . . . voce ligatur homo' (see F. Spies, *De l'observation des simples conventions en droit canonique*, Paris, Sirey, 1928, p. 228).

51. See F. Spies, *De l'observation des simples conventions, op. cit.*; also, for a similar approach, H.J. Berman, *Law and Revolution, op. cit.*, pp. 246ff.; P. Legendre, *Les Enfants du texte, op. cit.*, p. 269; compare J. Bärmann, '*Pacta sunt servanda.* Considérations sur l'histoire du contrat consensuel', *Revue internationale de droit comparé*, 1961, pp. 18ff.

52. See F. Spies, *De l'observation des simples conventions, op. cit.*, pp. 24ff. In this canon, violation of the pledged word is characterized as a punishable offence. Two bishops – Antigonus and Optantius – had agreed on the limits of their congregations. When Antigonus complained to the Council that Optantius was not respecting the agreement and was encroaching on his territory, the President of the Council replied: 'He shall respect the agreement or else be liable for Church discipline'; the Council added 'Pax servetur, pacta custodiantur.'

53. Cited by F. Spies, *De l'observation des simples conventions, op. cit.*, pp. 40ff.

the contractual formalism of the medieval period. It finally won out and was definitively adopted by the Roman law post-Glossators,[54] and in France in the first half of the sixteenth century.[55] It receives a famous formulation in Article 1134 of the French Civil Code: 'Agreements lawfully entered into have the force of law for those who made them.'[56]

It is therefore due to belief in the existence of the one God, who sees all things and before whom no one must speak falsely, that the simple agreement (the 'pactum nudum') ended up being identified with the contract. In other words, the modern notion of contract could never have emerged without faith in a universal guarantor of the pledged word. This word only carries weight if it obeys the law of this guarantor, originally the divine law which required that the agreement must have a just cause,[57] today the law of the State, which gives legal force only to agreements that are 'lawfully entered into'. The binary and horizontal dimension of exchange or alliance could not have become the homogeneous and abstract plane on which the market economy can flourish without the ternary, vertical dimension of the third party, which presides over the drawing up of contracts.

In order to understand this dimension, we need only set foot on the market square of any medieval town, for example Brussels, which offers a particularly fine representation of the laws of exchange. The magnificently orchestrated space is bordered by buildings devoted on the one hand to organized labour (the seats of the guilds) and on the other hand to the authorities that guarantee fair exchange (the Town Hall). This architectural composition makes it immediately clear that there is no system of trade without a third party to guarantee it, and without a collective organization of the workers who produce the goods to be traded. If we leave this organized space, we also leave the space of the market and its laws, and indeed, on the hillside overlooking this market square, at the Law Courts or the Royal Palace, we are governed by laws that are not the laws of exchange. If it were not

54. See H.J. Berman, *Law and Revolution*, *op. cit.*, p. 246.

55. See F. Spies, *De l'observation des simples conventions*, *op. cit.*, pp. 139ff.

56. On the origins of this formulation, see F. Spies, *De l'observation des simples conventions*, *op. cit.*, p. 258; A.-J. Arnaud, *Les Origines doctrinales du Code civil français*, Paris, LGDJ, 1969, pp. 199ff.

57. The theory of just price is derived from precisely this condition. See H.J. Berman, *Law and Revolution*, *loc. cit.*; A. Söllner, 'Die causa im Kondiktionen – und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)*, 77 (1960), pp. 182–269; K.S. Cahn, 'The Roman and Frankish Roots of the Just Price of Medieval Canon', *Studies in Medieval and Renaissance History*, 6 (1969), p. 1.

for this separation, legal or political decisions could be bought and sold, as in corrupt political systems where the very notion of the market loses all sense as it degenerates into criminal dealings. In other words, the market does not spontaneously produce universal rules but is a singular institution whose stability depends on its legal basis and on the larger political whole within which it operates.

While the context within which the market functions has evidently changed since the Middle Ages, it still rests on dogmatic foundations. If we need to be reminded of this today, it is because the dominant economic *doxa* has fallen into the trap of the legal fictions on which it is based. In order for the system of free trade to be introduced two centuries ago, people had to behave *as though* work, land and money were products that could be exchanged – commodities.[58] Clearly, work, land and money are ***not*** products but rather the very condition of economic activity; treating them as products is the result of a series of fictions. These fictions are legal artefacts, since it is the law which for example authorizes one to treat work *as though* it were a commodity separable from the person of the worker, by setting up a salaried status and also setting limits on this commodification and forbidding that the worker be treated like a thing. If we forget that these are fictions informed by the dogmas founding the legal order, and if we go on to treat men and nature as pure commodities, we are not only morally reprehensible but we will also inevitably court major ecological and humanitarian disaster. The market, if it is to function well, must be limited by rules and institutions that ensure the security of human, natural and monetary resources.

The State as Guarantor of Agreements

Since the turning point of the Enlightenment, it is the State that has occupied the position of guarantor of exchange, at least in Western secular countries. We have moved from a religious culture, in which the believer's word was placed under the aegis of divine law, to a secular culture, in which the rational individual enters into agreements under the aegis of the State. This 'secularization' by no means implies that contracts can henceforth do without faith, without belief in a guardian of the pledged word. Returning from his trip to the United States, Max Weber reported the following suggestive state-

58. See K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, [1944] Boston, Beacon Press, pp. 68ff.

ment by a businessman: 'What someone believes is wholly indifferent to me, but if I know that a client does not go to church, then for me he is not worth 50 cents; *why would he pay me if he does not believe in anything?*'[59] Belief – whose object alone changes – lies at the heart of the rational calculation implied by the contract. Tocqueville had already stated: 'I doubt whether man can support at the same time complete religious independence and entire public freedom,' adding that 'if faith be wanting in him, he must serve, and if he be free, he must believe'.[60] This remark is entirely applicable to the freedom to contract, which is not conceivable without shared faith in a third party that guarantees agreements. That is why the figure of the third party is present everywhere in the structure of the contract.

It is present firstly in the reference to the law in article 1134 of the French Civil Code, a reference that occurs no less than three times in this article alone.[61] The law is part of the structure of the contract, beyond persons, things, space and time. And the law is always the word of the guarantor, whether of the Republic in the French tradition or the judge in common law systems. International law has endorsed this structural requirement: by always allowing one or more laws to be designated as applicable to an international contract, it ratifies the principle that 'contract is governed by law'.[62] There is no contract and there can be no contract without a law which, at the very least, founds the personality of the contracting parties and lends force to their word.[63]

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59. Max Weber, '"Churches" and "Sects" in North America: An Ecclesiastical Socio-Political Sketch', trans. Colin Loader, *Sociological Theory*, 3 (1), Spring 1985, p. 7.

60. Tocqueville, *Democracy in America*, II, 29, cited in L. Dumont, *Homo hierarchicus, op. cit.* p. 49.

61. French Civil Code, art. 1134: 'Agreements lawfully entered into have the force of law for those who made them. They may be revoked only by mutual consent or upon grounds authorized by law. They must be performed in good faith.'

62. See the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, article 3, paragraph 1.

63. This fact should prevent us getting involved in the debates generated in international private law by the fantasy of a contract without law. A useful summary of these debates for the interested reader can be found in P. Mayer and V. Heuzé, *Droit international privé*, Montchrestien, 7th edn, 2001, no. 700. The only scenario in which the idea of a contract without law has some sort of grounding is that of a 'contract' entered into with a State. However, States are precisely not ordinary contracting parties and the agreements they make are always at odds with the law of contract (see below). On the very complex relations between law and contract today, see P. Gérard, F. Ost and M. van de Kerchove (eds), *Droit négocié, droit imposé?*, Brussels, Publications of the University Faculties of Saint-Louis, vol. 72, 1996.

Secondly, the presence of a third party as guarantor is expressed in the reference to money in the wording of contractual obligations. Money can in fact never be absorbed into a standard economic analysis.[64] This is because, in order to fulfil its function of financial asset or means of payment, it must necessarily establish a community of contracting parties who believe in its value. One need only look at what is written on a dollar bill to see that its symbolism still involves religious faith; and what binds this community of believers is independent of the individual will of any of its members. Notwithstanding contemporary fantasies about a money that would be self-referential, there is no money, and there can be no money, without a third party that guarantees its value.[65] Until recently in European countries and still today in most others, this third party has been the State. Through its central bank, the State is the ultimate guardian of the qualitative dimension of monetary relations.

Modern nations have managed to preserve the essential features of the medieval scheme by monopolizing the promulgation of laws and the minting of money, with the result that the historical impetus introduced by the medieval idea of universal guarantor continues to have effects today. In uniting the main attributes of this guarantor, the State has also enabled the abstraction of the contractual bond to be extended and perfected, without which the social bond could not be placed under the aegis of the rational calculation of interests. The *Primus* and *Secundus* of Roman law have been replaced by the mathematical symbols of economic equations, which require persons to be grasped simply as contracting units, considered independently of physical contingencies, abstractly (the concept of person) and as formally equivalent (the principle of equality), indeed as pure fictions (legal persons) to whom we attribute the same legal existence as human beings. Goods and services, which are all different through the uses they are put to, must be treated as commodities, all comparable by virtue of their monetary value and equally free for trade; this is why names, works, and so forth are increasingly treated as assets, a

64. 'Money is not an economic entity, not even in our societies, since it is what makes the economy conceivable, and that is possible only from some non-economic space' in M. Aglietta and A. Orléan (eds.), *La Monnaie souveraine, op. cit.*, p. 20. See also G. Simmel, *The Philosophy of Money*, trans. T. Bottomore and D. Frisby, 2nd edn, London/New York, Routledge, 1990; R. Libchaber, *La Monnaie en droit privé*, Paris, LGDJ, 1992, and the bibliography cited.

65. See A. Orléan, 'La monnaie autoréférentielle: réflexions sur les évolutions monétaires contemporaines', in M. Aglietta and A. Orléan (eds), *La Monnaie souveraine, op. cit.*, pp. 359ff.

process that strips things of the 'spirit of things'. Time, except when effaced by technological progress, must be a homogeneous and quantifiable given,[66] a clockwork time adapted to measuring obligations. Lastly, space must be continuous, cleared of any obstacle to the free circulation of goods, workers and capital.[67] If these conditions are fulfilled, the contract can be thought of as an abstract relation which is independent of the diversity of persons and things, and which gives legal force to the calculation of interests. But a further condition is that its validity should be guaranteed by a State which is responsible for the qualitative definition of persons (personal and occupational status), of things (whose trade it can limit or forbid), of time (which it regulates) and of space (which it divides into administrative areas).

However, this model of contractual relations guaranteed in the last instance by the State invariably encounters three sorts of obstacles. Firstly, certain things resist being transformed into commodities. They may, for example, preserve the mark of the person who created them. Certain works are informed by the spirit of their creator, and intellectual property law has revived the idea that something of the creator remains attached to the things he or she has created[68] (as Mauss had already noted).[69] Other things, on the contrary, cannot be attached to a specific person and are therefore difficult to appropriate and exchange. For example, certain natural or cultural treasures must be wholly or partly excluded from circulation, to protect them from being destroyed by trade (protection of the environment, of the gene pool, of certain cultural objects, et cetera).[70]

Secondly, the trade in 'human resources', inherent in the idea of employment contract and in the institution of the labour market,

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66. See Benjamin Franklin's famous saying: 'Time is money', and the no less famous commentary on it by Max Weber in *The Protestant Ethic and the Spirit of Capitalism, op. cit.*, p. 48.

67. On these different aspects, see the Association H. Capitant, *La Relativité du contrat, op. cit.*

68. The computer viruses which manufacturers put into their software in order to protect it from illegal use are a hightech version of the evil spirit of things which assails the unauthorized user (and even the authorized one).

69. M. Mauss, *The Gift, op. cit.*, p. 67.

70. To avoid their appropriation by the private sector, one often says that they belong to the 'shared heritage of humanity'. This formulation avails itself of the ambiguity inherent in the notion of heritage or patrimony, which situates us both on the horizontal plane of exchange and the vertical axis of filiation (see A. Sériaux, 'Brèves notations civilistes sur le verbe avoir', *Revue trimestrielle de droit civil*, 1994, pp. 801–13; F. Ost, *La Nature hors la loi. L'écologie à l'épreuve du droit*, Paris, La Découverte, 1995, pp. 306ff.).

contradicts the separation of persons and things on which the market system rests. This explains the invention of concepts – such as 'employment' or 'solidarity' – that are a hybrid of contract and status, and that give a new lease of life to precontractual forms of the social bond where the distinction between contract and status was unknown. German law, always one for conceptual rigour, has adopted a tripartite legal system in which a place is assigned to social legislation, which mixes contractual and regulatory techniques, alongside private and public law. French jurists, however, in their reverence for bipartite structures, have always had difficulty acknowledging the importance of these hybrid forms or incorporating them alongside their basic legal concepts.

Thirdly, the secularization of the function of guarantor has hindered the universalization of the contract. As God receded, so the unity of the normative space in which contracts are made began to fragment. The universal guarantor gave way to only local guarantees. States, however vigorous their claims to universality – particularly the case in France[71] – can guarantee agreements only within the restricted space of their national territory. It is due to this fragmented normative space that international private law, with its techniques for resolving conflicts of law and jurisdiction, has flourished. Efforts have, of course, been made to strengthen international contracts with universal substantive rules; but this has been successful only in particular cases. Moreover, it has led to a return to the old technique of nominate contracts – starting with that of sale, as in the Roman period – which implies forfeiting the conceptual unity of the contract on an international scale, a unity so laboriously achieved by medieval jurists. There is a further problem resulting from the secularization of the third party guarantor: not many contracts were entered into with God,[72] whereas States are both guarantors and contracting parties to which the ordinary and the principle of equality do not apply. They inevitably throw the law of contract into a confusion that increases as methods of government rely more and more heavily on contracts. In

71. The soldiers at Valmy, in their cry of 'Long live the Nation', were not referring to the French nation, but to the Nation as universal organizatory principle of society on the basis of shared interests. See E. Hobsbawm, *Nations and Nationalism since 1780. Programme, Myth, Reality*, 2nd edn, Cambridge, Cambridge University Press, 1990, p. 20. Yet still today, when the French State declares that the social security it is introducing is 'universal' – as in the 'Universal Health Cover' introduced in the year 2000 – this universality is in fact restricted to nationals or residents.

72. At most, one would make a covenant with Him, precontractual in nature, and which it might be rash to assimilate to an agreement (see above).

this area, hybrid categories that are legally ill-defined also abound. While appearing to be contracts, they remain refractory to the universality of the principles of contract law.

The inadequacy of conceiving exchange as universal and abstract has also been highlighted by certain non-orthodox currents in economic theory. Standard economic arguments – with the 'Law and Economics' movement in tow – have, as it were, got no further than the abstractions of the general theory of contract, since such arguments are based on the pure abstraction of rational actors calculating how to maximize their utility. But the validity of this type of analysis is contested today: the economics of conventions[73] has rediscovered the importance of belief, culture, work and concrete objects for understanding people's material life. It has given centre stage, in its economic analyses, to the way people in practice agree to act.[74] Meanwhile, the economics of regulation has demonstrated the role and significance of institutions in the comprehension of economic phenomena.[75] Although these currents turn their back on the question of the third party as guarantor,[76] they provide rich and illuminating material for legal analysis, while also revealing clearly how contemporary ideas on exchange are developing: concrete practices are being taken into account, which fundamentally alter the parameters of the contract.

As a result, special domains of law have developed (labour law, social security law, law concerning environmental protection, consumer rights or public utilities), in order to accommodate the

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73. See A. Orléan (ed.), *Analyse économique des conventions*, Paris, PUF, 1994; see also the contributions to the Special Issue of the *Revue économique*, 40 (2), March 1989, 'L'économie des conventions'.

74. The individual of a standard economic analysis does not *act*, he or she *behaves*. But in reality 'actual men do not *behave*; they *act* with an idea in their heads, perhaps that of conforming to custom' (L. Dumont, *Homo hierarchicus, op. cit.*, p. 6). The reintroduction of the notion of action implies above all that the finality of actions may be constructed progressively, which puts an end to the abstraction of the individual who always knows in advance what he or she wants.

75. See R. Boyer and Y. Saillard (eds), *La Théorie de la régulation: état des savoirs*, Paris, La Découverte, 1995.

76. Recently, the economics of conventions has raised the issue of institutions, but only to reduce it to a product of conventions (see R. Salais, E. Chatel and D. Rivaud-Danset, *Institutions et conventions. La réflexivité de l'action économique*, Paris, EHESS, 1998). The economics of regulation has been no more successful in extricating itself from an instrumental conception of law, understood as one form of regulation among others. The question of the institution of the subject is absent from both fields. But one can hardly reproach economists with avoiding institutional issues when even standard legal analyses neglect them.

elements that fall outside the sphere of the calculation of individual interest. Whole areas of contract law have consequently been subordinated to mandatory rules applicable to particular categories of goods or persons. These special domains of law prop up an ordinary law of contract that is less and less capable of mastering the complexity of the phenomenon of contractualization. The effectiveness of such props is, moreover, constantly diminished by the progress of free trade and the opening up of national frontiers to the circulation of capital, goods and services, which obliges States to reduce these props or adapt them accordingly.

Feudalism's Revival in the Contractual Bond

While until recently the State was sole guarantor of the circulation of goods and capital, it is viewed nowadays, on the international stage, as an obstacle to exchange. New institutions contend with it for the role of laying down the law on trade issues or maintaining currency stability. International institutions, vested with a role and a mission by the prevailing economic credo – the World Trade Organization, the Organization for Economic Cooperation and Development, the World Bank, the European Bank, the International Monetary Fund and the European Commission – have taken over most of the State's material power (budget allocation) and spiritual power (spreading the good word on the virtues of free trade). They ensure that the freedom to contract beyond frontiers overrides respect for national legislation. States are then invited to dismantle any legislation that might protect 'local' solidarities – public services, profession-based mutual-benefit insurance schemes, public subsidies – which are considered to be obstacles to the free circulation of capital, goods and services. Meanwhile, the organizations responsible for a 'social' dimension – the International Labour Organization, UNESCO, the World Health Organization, et cetera – have neither money nor certainties to distribute, and they are setting themselves less and less ambitious targets. Until recently, they aimed to help all people enjoy a Western level of lifestyle, but now their goals have slipped back to those of the first nineteenth-century social philanthropists: to prevent the spread of epidemics, prohibit forced labour and limit child labour.[77]

77. See the International Labour Organization's *Declaration on Fundamental Principles and Rights at Work* (1998).

The attempt to reduce everything that might, in the definition of persons, things or time, hinder the free negotiation of contracts is a clear sign of the contract's tendency to exceed the frameworks within which the State sought to confine it. The legal constructions that brought together the 'economic' and 'social' dimensions of work under the aegis of the State are under pressure. The deregulation of labour law, on the one hand, and the generalization of statutory social protection, on the other, can be understood in this light as two sides of the same coin: labour can be freely bought and sold, stripped of its relation to the person, who only appears when there is a 'need' so great that society as a whole can no longer ignore it. The policies of international financial institutions (the World Bank or the IMF) reveal this process even more clearly: on the one hand, in the name of free competition they encourage the demolition of systems of solidarity, while on the other hand they finance programmes to fight poverty, in the name of 'human development'.

The range of things that can become the object of a contract is, moreover, constantly expanding. The moral right of authors has been eroded in the latest international conventions on intellectual property, while patent law now extends to living organisms, and the human body is handed over, piece by piece, to the law of contract.[78] As privatization progresses, the law of contract extends its dominion to publicly owned goods and services, in the name of the citizen – but a citizenship defined by reference no longer to the State but to the consumer's rights in the marketplace.[79] Lastly, with the revolution in information technology, time itself becomes a mere accounting unit, just one of the parameters of the computerized calculations programmed to effect the most profitable financial transactions in the light of market movements. Parties can now contract in 'real time', at any moment and wherever they may be, in that 'instant of reason' that legal theory had imagined before technological progress came along to make it possible.[80] The deregulation of the time of exchange implied by contemporary challenges to the principle of weekly rest or to the prohibition on night work, aims to efface any qualitative dimension of time, to make way for a homogeneous, continuous time

78. See B. Edelman, *La Personne en danger*, *op. cit.*, pp. 277ff, and *id.*, 'L'Homme dépossédé. Entre la science et le profit', in M. Fabre-Magnan and P. Moullier, *La Génétique, science humaine*, *op. cit.*, pp. 215ff.; J.-R. Binet, *Droit et progrès scientifique. Science du droit, valeurs et biomédecine*, Paris, PUF, 2002.

79. M. Freedland and S. Sciarra (eds), *Public Services and Citizenship in European Law*, Oxford, Clarendon Press, 1998.

80. See F. Ost, *Le Temps du droit*, Paris, O. Jacob, 1999.

that places no obstacle in the path of contractual activity and enables us, at any and every moment, to be a producer or a consumer.

As States lose their power, so, indissociably, does the figure of the third party as guardian of agreements. This is why independent authorities have proliferated, whose role is to supervise contractual activity within a particular area (the European Commission) or a particular sphere of activity (energy, the stock markets, transport, telecommunications, audiovisual industries, biotechnology, information technology, food security, hospitals, medicines, et cetera).[81] This plethora of concrete, particular authorities is a far cry from that dream or nightmare of globalization, a planetary legal order united in its respect for, inseparably, human rights and the market. Under the cloak of contractualization, we can detect what Pierre Legendre has called, in a different context, the 'refeudalization of the social bond'.[82] The forces of economic rationality attack and weaken the State, due to its concrete, local and fundamentally heterogeneous character, but since law and contract are fundamentally indissociable, the resulting emancipation of the contract from State control profoundly transforms the contract's nature. For it is only when law embraces the incalculable aspects of human life that contract may be conceived of as an instrument of rational calculation and an abstract relation existing independently of the contracting parties and of the object of the contract. In an increasingly complex and internationalized world, the distribution of roles between the two is constantly changing.

On the one hand, our demands that law and the State protect us from all that lies outside the pure logic of calculation are constantly increasing. For example, we turn to the public authorities when confronted with the incalculable risks resulting from economic and technological 'development', risks that exceed the statistical calculations of insurance companies. This is the essential reason for the emergence of the precautionary principle.[83] But the public authorities can only respond to this demand by themselves calling on expert opinion to legitimize the law, often in the institutional form of independent authorities, whether national or international.

On the other hand, questions that were previously the remit of the

81. See Chapter 5.

82. P. Legendre, 'Remarques sur la reféodalisation de la France', in *Études offertes à Georges Dupuis*, Paris, LGDJ, 1997, pp. 201ff.

83. See P. Kourilsky and G. Viney, *Le Principe de précaution*, Report to the Prime Minister, Paris, O. Jacob/La Documentation française, 2000; K. Foucher, *Principe de précaution et risque sanitaire*, Paris, L'Harmattan, 2002; J.-P. Dupuy, *Pour un catastrophisme éclairé*, *op. cit.*

State are now referred to the contract and negotiation. Laws are emptied of substantive rules and replaced by rules on negotiation. This trend – proceduralization[84] – transfers the concrete and qualitative questions that were previously settled by the State into the sphere of the contract. It leads to a diversification of the legal regimes of contracts according to their objects, and hence to a plethora of 'special contracts' which take us back to the technique of the 'nominate contract' in Roman law. Such a process increases the chances of conflicts of interest and hence the need for a code of ethics for contracts, based on the realities of concrete persons.[85] This in turn makes it necessary to reintroduce a qualitative appreciation of time, giving precedence to the individual bond in its substance and duration over against the mechanical interaction of abstract obligations.

The consequences of the weakening of the State can be felt not only at a higher level – the homogenization of normative space on the scale of the planet – but also in the phenomenon of (re-)territorialization. While the commercial contract develops internationally, we find at the opposite end of the spectrum the contract for the person receiving minimum welfare benefits, which aims – successfully or not – to restore a person's links to a certain territorial space; or the whole panoply of contracts that have accompanied decentralization, regional planning, agricultural policy and employment policy. As a result, however, the contract can no longer be considered as an abstract relation, independent of the identity of the contracting parties and of the singular nature of the goods, services and even persons which are its object.

In its canonical form, the contract binds persons who are equal and who have freely taken on obligations which are generally reciprocal. In its modern guise, one or other of these features tends to be lacking, with the result that contracts today have in common only the fact that they are agreements that generate obligations. The principle of privity of contract (that contracts are binding only on the parties to the contract and not on third parties) is jeopardized by the development of agreements that, as in the exemplary case of collective labour agreements, are binding not only on the contracting parties but also on the bodies they represent. The contract consequently blurs over

84. Cf. M. Mekki, *L'Intérêt général et le contrat. Contribution à une étude de la hiérarchie des intérêts en droit privé*, Paris, LGDJ, 2004, Preface by J. Ghestin.

85. See C. Labrusse-Riou, 'De quelques apports du droit des contrats au droit des personnes', in *Le Contrat au début du XXIe siècle. Études offertes à J. Ghestin*, Paris, LGDJ, 2001, pp. 499ff.

into regulation and extends its effects to groups of an indeterminate and variable number of persons. The principle of equality is also eroded, particularly in the context of decentralization policies of (public or private) organizations, in cases where the contract aims to establish a hierarchy between the different interests of the parties or of those they represent, to provide the basis for one to supervise the other or to implement principles of collective interest that are in theory not negotiable. These figures of the contract abound, from contracts for people receiving minimum welfare benefits to contracts relating to long-term planning, from social security to subcontracting agreements, and they may be governed by public law, social legislation, international law or business law. Lastly, the freedom to contract is also compromised every time contractual activity is imposed by law. The proliferation of obligations to take out insurance gives some idea of the powerful force behind the legal obligation to contract, magnified by the deregulation and privatization of public services. The user is transformed into a party obliged to contract, who thus assumes new responsibilities, starting with the choice of the co-contracting party.

Taken as a whole, these transformations suggest that contracts of a new kind are emerging. Their primary aim is not to exchange particular goods nor to cement an alliance between equals but to legitimate the exercise of power. The impetus provided by the principle of equality, which has subtended Western thought for the past two centuries, has led to the replacement of the unilateral exercise of power by the contract and more generally of the unilateral by the bilateral and heteronomy by autonomy. However, the law of contract has been contaminated by the heteronomy it effaces, and has ended up as an instrument of subjection. It now occupies the places where power is exercised, borne along by the principle of equality, but it can do so, as Louis Dumont has so well illustrated, only by encompassing its opposite, by establishing a hierarchy of persons and interests. At the outer margins of exchange and alliance, the law of contract has now added the notion of *allegiance*, by which one party is placed within the sphere of power of another. Two sorts of contract, often combined in practice, embody this figure of allegiance: contracts of dependence and controlled contracts.

What characterizes contracts of dependence is the subordination of the activity of one person to the interests of another.[86] The employment contract still serves as model here, but the traditional formula –

86. G. Virassamy, *Les Contrats de dépendance*, Paris, LGDJ, 1986.

subordination freely consented to – is losing ground, because subordination is no longer sufficient to satisfy the needs of entities that reject the pyramidal model in favour of the structure of the network.[87] The network is not interested in obedience to orders; it is feudal in character, and its bonds remind us strongly of the bond of vassalage. It needs to subject people without depriving them of their capacity to take initiative and assume responsibility, which is the better part of their value. New hybrid forms flourish here – already well represented in the economic sphere, for example in distribution, subcontracting, agricultural integration, et cetera – to achieve the subordination of some to the interests of others. These forms are dominant in management culture, whether public or private. In combining freedom and servitude, equality and hierarchy, they take labour law[88] and law on liability[89] off their guard, opening wide the gates to hitherto unknown forms of power over people.[90]

What characterizes controlled contracts is that they do not seek solely to satisfy the interests of the contracting parties but additionally to realize a collective interest. Already in the 1930s, Josserand was alarmed by the emergence of the controlled contract which he identified with the growing influence of mandatory rules on certain types of contract (hire and transport, for example).[91] But this was only the first generation of mutants. These types of contract were still positioned within the pyramidal structure of the centrally planned economy which was meant to ensure that they would contribute to the public interest, as defined by the State.[92] However, in the latest versions of this contractual technique,

87. For a legal analysis of networks, see the seminal article of G. Teubner, 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors', *op. cit.*; F. Ost and M. van de Kerchove, *De la pyramide au réseau?, op. cit.* In France, analysis of networks still seems to be restricted to the distribution sector (see L. Amiel-Cosme, *Les Réseaux de distribution*, Paris, LGDJ, 1995).

88. See A. Supiot (ed.), *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*, Report for the European Commission, Oxford, OUP, 2001, esp. pp. 10ff.

89. C. Del Cont, *Propriété économique, dépendance et responsabilité*, Paris, L'Harmattan, 1997.

90. See Chapter 5.

91. L. Josserand, 'Le contrat dirigé', *Recueil hebdomadaire Dalloz*, 1933, no. 32, p. 89.

92. See A. Rouast, 'Le contrat dirigé', in *Mélanges juridiques dédiés au Professeur Sugiyama*, Tokyo, Maison franco-japonaise, Association française des juristes de langue française, 1940, pp. 317–27; R. Morel, 'Le contrat imposé', in *Le Droit français au milieu du XXe siècle, études offertes à Georges Ripert*, Paris, LGDJ, 1960, vol. II, p. 116.

controlled contracts are given the task not only of implementing but also of participating in the definition of the principles of collective interest. Moreover, the technique of controlled contracts is no longer the monopoly of the State; it extends into the private sector in the form of framework agreements which define the rules of collective interest that must be respected by the contracts made within their field of application. Examples of this new type of contractual interventionism can be found in contracts concerning the planned economy or the medical profession, and in the agreements having force of law introduced into European social legislation; through these, a large number of persons, both public and private, become involved in the exercise of power. The contractualization of State initiatives[93] is only the most glaring example of this leasing out of power, which seems to have been invented and tested firstly in private companies.

What all these versions of the contract have in common is that they place a person – whether real or legal, private or public – within the sphere of power of another person, but without thereby infringing, at least in formal terms, the principles of freedom and equality. The proliferation of these bonds of allegiance is accompanied by the blurring of the distinction between public and private, and by a fragmentation of the figure of guarantor of agreements through, notably, the multiplication of independent authorities.

We should therefore have no more illusions about the idea 'for everything a contract'. The 'contractualization of society' we are witnessing, far from signalling the victory of contract over law, is rather the symptom of the hybridization of contract with law, which resurrects feudal ways of forging the social bond. In its hybrid form, the contract revives what was its major strength in the legal history of the West: its capacity to bind all powers. Marc Bloch remarks that our conception of the contract is strongly indebted to the notion of the homage paid by the vassal (which distinguishes Western feudalism

93. See the French Supreme Administrative Court's public report *L'Intérêt général*, in *Études et documents du Conseil d'État*, no. 50, Paris, La Documentation française, 1999, pp. 323ff. See also J. Caillosse, 'Sur la progression en cours des techniques contractuelles d'administration', in L. Cadiet (ed.), *Le Droit contemporain des contrats*, Paris, Economica, 1987, pp. 89ff.; A. Garbar, 'Les conventions d'objectifs et de gestion, nouvel avatar du "contractualisme" ', *Droit social*, 1997, p. 816; Y. Fortin (ed.), *La Contractualisation dans le secteur public des pays industrialisés depuis 1980*, Paris, L'Harmattan, 1999; Association H. Capitant, *La Relativité du contrat*, *op. cit.*

from its Japanese counterpart). He concludes his masterly work on feudal society as follows:

> The originality of [Western feudalism] consisted in the emphasis it placed on the idea of an agreement capable of binding the rulers; and in this way, oppressive as it may have been to the poor, it has in truth bequeathed to our Western civilization something with which we still desire to live.[94]

We would do well to take this process of refeudalization seriously and strive to control it rather than succumbing to the illusory idea 'for everything a contract'.

The inseparability of the three forms of reference that are the State, the law and money will thus have corresponded simply to a particular historical moment. Each of these figures has proved capable of freeing itself from the others. One need only look at a dollar bill to see that certain States continue to see in God the guarantor of the value of their money. Other States may, on the contrary, give up their monetary sovereignty,[95] relying either on a more powerful state, *de facto* or *de jure* – pegging their currency to the dollar or, for example, to the CFA Franc – or may create a 'common currency' like the euro. New institutions also appear, which vie with nation-states for this role of guarantor, seeking to lay down the law on trade or currency issues. European Community law on competition and the European Central Bank respectively are the most immediately visible expressions of this rivalry. The structural function of guardian of agreements is therefore not indissociably linked to the State; it is a function that preceded the State and might outlive it. But this function cannot simply remain vacant without compromising the very idea of a legal order, since without a guardian of the pledged word, only force counts. Richard Wagner, who is known to have exerted a certain fascination on the Nazis, expressed this idea in music in *The Twilight of the Gods*: 'Runes [*Runen*] of treaties [*Verträge*] deeply pondered graved Wotan in the shaft of the spear: he holds it to sway the world. A hero bold in fight has broken the spear; in splinters shivered the

94. M. Bloch, *Feudal Society*, trans. L.A. Manyon, London, Routledge & Kegan Paul, 1961, p. 452.

95. Medieval history shows that the opposite movement is also possible, with the regal right of minting money being conceded to feudal lords (see M. Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich, New York, Bedminster Press, 1968, p. 1099).

treaties hallowed haft.'[96] Those who think we can found a new world order today solely on the calculation of individual utility are the legitimate heirs to this superhuman fantasy and are gently leading us towards a new Wagnerian twilight.

If we relate every rule to a calculation of utility, which would be both its source and the measure of its legitimacy, we must consider that someone who makes a commitment is entitled to breach it if, at the end of the day, this is more advantageous for him or her. Such a theory of the 'efficient breach of contract' means, according to the American judge Holmes's formula – much over-interpreted – that 'the duty to honour a contract means that you must be prepared to pay damages if you do not honour it, and nothing more'.[97] This position is justified by the idea of optimal allocation of resources on the market. For example, it would be more efficient from an economic point of view for me not to deliver goods (for example, some medicines) to someone to whom I have promised them (a poor person) if it proves more advantageous for me to supply these medicines to a third party (a rich person) who offers me a price higher than the sum of the initial price and the damages I would owe to the first buyer who has been let down. This theory is taken up by French jurists who claim that there is no difference between honouring one's commitments and paying damages for not honouring them.[98] Trust, whose value is incalculable, is disqualified here. When we realize that this conception of law is being extended to the whole world and that it is being presented to Southern countries as an exemplary model, there is really something to worry about. A world in which people feel bound by their commitments only insofar as it is convenient for them is a world in which the pledged word has lost all value. A society founded on postulates such as these cannot but become increasingly violent and increasingly policed. Since it is also a world where the weakest pay the highest price, politicians will no longer be listened to, and laws will have not the slightest value. Deploring the erosion of social

96. Wagner, *The Twilight of the Gods*, Prologue, trans. Frederick Jameson, New York, G. Schirmer Inc., 1972.

97. O.W. Holmes, 'The Path of the Law', 10 *Harvard Law Review*, 457, 1897. Citing Holmes, M. Fabre-Magnan gives a clear and well-documented presentation of this theory in *Les Obligations*, Paris, PUF, 2004. See also D. Friedmann's scathing critique, 'The Efficient Breach Fallacy', 18 *Journal of Legal Studies*, 1 (1989).

98. See P. Remy, 'La "responsabilité contractuelle": histoire d'un faux concept', *Revue trimestrielle de droit civil*, 1997, pp. 323ff.; P. Le Tourneau and L. Cadiet, *Droit de la responsabilité et des contrats*, Paris, Dalloz, 2002, no. 222.

cohesion is nothing but a pathetic farce when at the same time the instituting function of the law is being destroyed, such as to deprive people of the shared points of reference vital for making their actions meaningful for all.

Part Two

LEGAL TECHNIQUE: THE RESOURCES OF INTERPRETATION

4

MASTERING TECHNOLOGY: THE TECHNIQUE OF INTERDICTION

While one may study the same object from different points of view, it is certain that there is one point of view which is more essential than the others, from which the laws governing the object's appearance and transformation can emerge. It is clear that for a manufactured object, the human point of view regarding its manufacture and use is what is essential. If technology is a science, it is a human science.

A.-G. Haudricourt, *La Technologie, science humaine* (1988)

One need only compare the French technology of the 'Minitel' with a computer to sense how profoundly, at a given moment in time, technical objects and a legal culture may be linked. The 'Minitel' incarnates the very spirit of French law concerning the public services: the system is centralized and pyramidal, branching out like a tree; access is guaranteed equally to everyone without exception and at the lowest cost; and the relation to texts is mediated by a public body. The computer with Internet access, by contrast, incarnates the spirit of common law: the organization is multi-polar, with indefinable contours; access is unequal, and depends on the financial, technical and cultural resources at the person's disposal; and all texts are accessible directly, without the mediation of a central authority. Comparing these two objects makes one aware that there is no unilateral and deterministic relation between law and technology.[1] Advances in technology naturally bring transformations in law, and computers had of course to be invented before people could think of legislating on data protection. But technological development itself depends on the legal culture that holds sway at a particular time. It is because

1. See A. Leroi-Gourhan, *Gesture and Speech*, *op. cit.*, pp. 187ff.; A.-G. Haudricourt, *La Technologie, science humaine*, *op. cit.*, pp. 44ff.

Western institutions were based on the idea of law that it was assumed that nature itself obeyed laws; and it was for the same reason that the scientific discovery of these laws became the basis of technology.[2]

If we can understand that law and technology partake of the same culture and develop hand in hand, we will avoid boxing ourselves into the argument that regularly dominates any reflection on the links between them. Broadly speaking, this argument opposes two conceptions of law: on the one hand, a transcendent or natural law conception which considers law to be the expression of universal and timeless principles and, on the other hand, a positivist and instrumental conception which considers law as a pure technique, in itself neutral and devoid of meaning. For some, the problem is making technology submit to the major principles revealed by law, while for others law is a kind of cart which can tout around any normative content, such that everything that is technically feasible should end up being enshrined in law.

The pointlessness of this confrontation becomes evident if one cares to remember what 'the technical' really means. The technical object is different from the natural object in that its sense derives from the person who fashions and uses it. When asked one day why he painted stones, Magritte replied that the stone is a being that is important to him because it does not think, whereas man-made objects, such as a piece of furniture or a house, always have a bit of thought in them.[3] Haudricourt notes that a chair or a table can of course be studied as though they were natural objects, from the point of view of mathematics (surfaces and volume), physics (weight, density, resistance to pressure), chemistry (tendency to ignite or dissolve) or biology (age and species of the tree from which the wood comes); but it is only the point of view of their manufacture and their use by human beings that allows us to understand what a table or a chair really is.[4] In other words, the distinctive stamp of the technical object can be found in the fact that 'The tool has no value in itself – like the subject, or the world, or the elements that are of the same nature as the subject or the world – but only in relation to an anticipated result.'[5] The technical object, which derives its sense from

2. See Chapter 2.

3. R. Magritte, *Écrits complets*, Paris, Flammarion, 2001, p. 627.

4. A.-G. Haudricourt, *La Technologie, science humaine*, *op. cit.*, pp. 37–8.

5. G. Bataille, *Theory of Religion*, *op. cit.*, p. 28. Compare Heidegger's conception of the imposition of reason on nature by technology in Heidegger, *The Question Concerning Technology and Other Essays*, *op. cit.*, pp. 19ff.

the human being who conceives it, is not necessarily a material object: there exist techniques of the body[6] and also immaterial techniques such as, most recently, computer software.

In the light of this definition, law most certainly belongs to the sphere of 'the technical', and is even one of the first immaterial techniques that the Christian West made its own, in appropriating the heritage of Roman law from the eleventh century.[7] Already in the Ancient World, the religious roots[8] of Roman law were tenuous, with the result that it could be redeployed over the centuries, providing a major impetus for the development of techno-science in Western Europe.[9] Unlike Jewish or Islamic law, the law that developed in the West does not express a transcendent truth that is imposed on the human being; this is why a gulf separates the interpretative methods of Western law from those of the Torah[10] or of Sharia.[11] But the meaning of Western law does not reside entirely in itself either, in its statements, because it is the result of goals – human not divine – which people have assigned to it from the outside. Its interpretation is therefore not enclosed within the letter of its texts but open to the spirit that informs it. It can serve different ends at different times in the history of political systems as well as in the history of science and technology. It plays a role therefore, as one technique among others, in the progress of technology.

However, just as it is insufficient, in order to understand what a spade is, to say that it is a tool, so it is insufficient to say that law is a technique if we are to understand its place and role within techniques as a whole. Every technical object is characterized by the particular end it has been conceived to serve. Spades, planes or computers are defined by the mental representations that govern their manufacture,

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6. See M. Mauss, 'Body Techniques' (1934), in his *Sociology and Psychology*, trans. Ben Brewster, London, Routledge, 1979, pp. 95–123.

7. See P. Legendre, *La Pénétration du droit romain dans le droit canonique classique*, *op. cit.*; H.J. Berman, *Law and Revolution*, *op. cit.*, pp. 85ff.

8. See P. Noailles, *Du droit sacré au droit civil*, *op. cit.*; A. Magdelain, 'Le Ius archaïque', *op. cit.* Élie Faure notes that the Roman world compensated for its almost total absence of real religious spirit with its administration and law (in *Découverte de l'archipel* [1932], Paris, Seuil, 1995, p. 210).

9. Pierre Legendre, *La 901e Conclusion*, *op. cit.*, pp. 214ff.

10. See G. Abitbol, *Logique du droit talmudique*, Paris, Éditions des sciences hébraïques, 1993.

11. See J. Berque, *Essai sur la méthode juridique maghrébine*, Rabat, M. Leforestier, 1944; L. Milliot and F.-P. Blanc, *Introduction à l'étude du droit musulman*, Paris, Sirey, 2nd edn, 1987; J. Schacht, *An Introduction to Islamic Law*, Oxford, Clarendon Press, 1964.

by the thought that each reflects:[12] digging the earth, flying through the air, processing information. I can, of course, kill a rat with my spade, use a plane as a missile or my computer as a work of modern art. But I can only do so by subverting these objects, by transforming them into another object (sharp-edged, explosive, decorative). What, then, is the specific end served by law in the universe of techniques?

The changes in labour law that accompanied the industrial revolution have given us some idea of the answer. It is really in the history of labour law that the question of the relation between law and technology was first clearly posed, long before civil law turned its attention to biotechnology. In France, there were three periods to this history. In the first period, the French Revolution laid the legal foundations of the market economy and the industrial revolution. By imposing a conception of property rights that no longer owed anything to feudal relations and by extricating the contract of hire of services from its subordination to the guilds, the Revolution paved the way for relations of production based on mechanization. Thereafter, as is perfectly analysed by Marx, the machine age gave rise to working conditions that were dangerous and inhuman.[13] Machines, which reduce the need for muscular force, enabled the labour of women and children to be exploited; machines powered by steam, or other energies that are not subject to fatigue or to the cycle of the sun, enabled an indefinite extension of the working day. The factory became like the headquarters of an industrial army, and was organized accordingly, with its officers, its troops and its barracks-style discipline. In the last period, labour law developed throughout the industrialized countries to set limits on the enslavement of humans to their new tools. In introducing the physical protection of workers, limits on the length of the working day, liability for damage caused by things and the first collective freedoms, labour law reduced the deathly and enslaving effects of industrial mechanization, and contributed to making it an instrument of 'well-being'.

This history shows that while it is true that law is a technique among others, it is not like any others. It has made industrial mechanization humanly bearable and has allowed new technologies

12. On this theme of the machine created in the image of the human being, see the myth of the Golem (a mechanical slave which turns against its creator) and Norbert Wiener's interpretation in *God & Golem, Inc: A Comment on Certain Points Where Cybernetics Impinges on Religion*, London, Chapman & Hall, 1965.

13. See the chapter 'Machinery and Modern Industry' in Marx, *Capital*, Book I, Ch. XV, trans. Samuel Moore and Edward Aveling, London, Lawrence & Wishart, 1954, vol. I, pp. 351ff.

to be used, without people being destroyed by them. Intervening between the human and the machine, law has served to protect people from the fantasies of omnipotence produced by the machine's power. Law is a tool placed between humans and their representations – whether mental (speech) or material (tools) – and thus fulfils the function of dogma: law interposes and interdicts.[14] Law therefore occupies a singular position among techniques: it is a technique of humanization of technology.

The problems raised today by the 'new information and communication technologies' prove that the anthropological function of the law does not simply disappear when one moves from one type of technology to another. A closer look at these problems will enable us to understand the relation that has always existed between the technical and the legal. It is not reducible to a simple adaptation, always belated, of law to technological progress, or, on the contrary, to the subordination of this progress to unchanging legal principles. Law as a technique was involved from the very beginning with the emergence of the information and communication technologies, and its content evolves daily under our very eyes, subordinating the use of these technologies to values that are genuinely human. This is why labour law remains a privileged position from which to observe the relations between law and technology. The results of these observations can be used to throw light on vital issues currently emerging in other branches of law, as they too are faced with the phenomenon of major technological risk, particularly, as we shall see, the issues raised around filiation in the light of developments in biotechnology.

Law is Part of Technological Progress

The immense importance the computer has come to acquire, in the course of only a few years, for our ways of living and working has accustomed us to conceive of society as a system of communication. Yet this conception developed out of a more general process of renewal within scientific paradigms, which affected physics, biology and anthropology. The same people who invented the atomic bomb also invented the computer; the idea of a society open to

14. Like the French term *interdire*, the English 'interdiction' should be understood in its double sense of 'prohibiting' and 'speaking between'. On this point, see the last note of the Prologue.

communication and exchange was a response to the horrors of the scientistic deviations that had led to discrimination between people on the basis of their supposed racial, class or genetic identity.[15] At the heart of the development of information and communication technologies lies the idea that people must henceforth be defined not through their inner qualities but through the totality of the external links they forge with their environment. This idea gave rise firstly to the invention of the computer, which was the result not of increasing mastery over materials – hardware – but of the extension to the machine of the logical, and therefore universal, organizatory principles of the human brain, believed to work generally in binary mode.[16] Secondly, cybernetics was born, as a general science of communication encompassing not only humans but machines and animals also.[17]

From this point of view, creating a society can no longer be understood as instituting the human being,[18] attributing to each person a stable and well-defined place that enables him or her to act and to establish links with others. Assigning to each a determined place in a social whole presupposes the existence of a *deus ex machina* (God, the Heavens, the State, the Republic, the Working Class) as shared point of reference. But in a purely physical vision of the world there is no place for a transcendent figure of this sort, which exceeds the here and now of individual experience. That is why institutions are asked to make way for flexible systems of communication that allow people to react and adjust their behaviour in relation to each other within a self-regulating network. The problem is then not instituting but

15. See P. Breton, *L'Utopie de la communication*, Paris, La Découverte, 1992; and on these aberrations, see Chapter 2.

16. See P. Breton, *Une histoire de l'informatique*, Paris, Seuil, 1990, p. 90. The reduction of human reasoning to a binary logic is a philosophical *a priori* characteristic of modern science, which transforms logic into both a technology and a universal doctrine of norms (see E. Husserl, *The Crisis of European Sciences and Transcendental Phenomenology*, trans. David Carr, Evanston, IL, Northwestern University Press, 1970, pp. 60ff.).

17. See N. Wiener, *The Human Use of Human Beings. Cybernetics and Society*, 2nd edn, London, Sphere Books, 1968. For a critique of this ideology, see P. Breton, *L'Utopie de la communication*, *op. cit.*, pp. 124ff.; L. Sfez, *Critique de la communication*, Paris, Seuil, 1988; P. Thuillier, *La Grande Implosion*, *op. cit.*, pp. 363ff.; C. Lafontaine, *L'Empire cybernétique. Des machines à penser à la pensée machine*, Paris, Seuil, 2004.

18. On the genealogy of this *vitam instituere* in legal thought see P. Legendre, *Sur la question dogmatique en Occident*, *op. cit.*, pp. 106ff.

linking, not prescribing but communicating, not ruling but regulating. These processes hold out the hope of constructing a world in which human beings and society would at last be perfectly transparent to themselves and freed from any last metaphysical defect.

Such ideas were implemented in the legal domain long before computers became commonplace in the business world. Labour law developed alongside the new information and communication technologies, preparing the way for and accompanying their dissemination. Legal technique helped acclimatize our modes of thought and action to ideas of network and regulation.

From the Institution to the Network

Labour law in the industrial era developed around three major institutional figures corresponding to three of labour law's core notions: the figure of the Legislator and the notion of the Welfare State; the figure of the employer and the notion of the company; the figure of the salaried employee and the notion of employment. These frameworks of legal thought have been sapped by the logic of the 'information and communication society' which draws on the new technologies. In law, as elsewhere, the buzzword is networks,[19] which means multi-polar structures in which each element is both autonomous and linked to all others. This trend can be illustrated by examining the development of the three basic relations mentioned above, alongside the relations implied by the following acronyms, familiar to any 'well-connected' reader: *html*, *www* and *PC*.

The acronym *html* (hypertext mark-up language) clearly illustrates how the information technologies introduce a rift into our relation to texts. 'Mark-up language' designates a universal format. Information technologies impose *uniformity* on different categories of text and consequently erase not only the variety of their different media but also the hierarchy which has always organized written forms, from the earliest days of printing: the book, the review, the newspaper, the satirical pamphlet, the poster, the letter, and so forth. 'Hypertext' designates a virtual link between texts: using information technology, texts of imprecise and mobile contours may be linked to each other, in unlimited number. Hypertext links give

19. For a legal analysis of networks, see G. Teubner, *Droit et réflexivité*, *op. cit.*; F. Ost and M. van de Kerchove, *De la pyramide au réseau?*, *op. cit.*

access to a third dimension and with it to an ocean of texts, ceaselessly changing and unstructured, on which one can navigate – or drown.[20]

Law is also a question of texts, and the logic of the hypertext was palpable in the legal field even before its development in the field of computing at the end of the 1970s. Differences and hierarchies between texts had already been destabilized with the introduction of that 'hypertext' called the European directive. Directives are 'formats' that are common to all member states and can be implemented into any number of national legislations, as new countries join the EU. They are not intended to be applied, but to be transposed into texts – laws or agreements – whose content is given by the European Community, but whose legal force is given by a State or by management and labour (the social partners).[21] The hypertextuality of directives increased after the Maastricht Agreement on social policy which gave rise to directives that drew their legal force from the European Community but their content from preliminary agreements between social partners.[22] The classification of texts was overturned as a result. Considered internally, the force of a text of law (a law, ruling or collective agreement) had been indissociable from the authority from which it emanated (the parliament, government, or social partners) and from its place in the hierarchy of sources of law. But, considered from a European Community perspective, national legislation is no longer the sovereign and indisputable legal act that it is internally: a judge at national level can be made to give precedence to the provisions of a European directive, at the expense of those of the national legislation, if the latter does not transpose the directive

20. On these transformations, see R. Chartier, *Le Livre en révolution. Entretiens avec Jean Lebrun*, Paris, Textuel, 1997; J.-Y. Mollier (ed.), *Où va le livre?*, Paris, La Dispute, 2000; J.D. Bolter, *Writing Space: The Computer, Hypertext, and the History of Writing*, Hillsdale, NJ, Lawrence Erlbaum Associates, 1991; Ilana Snyder, *Hypertext: The Electronic Labyrinth*, Melbourne/New York, Melbourne University Press, 1996.

21. 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods' (EC Treaty art. 249 (ex-189)). Article 137 (ex-118) authorizes States to entrust the implementation of directives with a social content to the social partners, if both parties request it.

22. EC Treaty, art. 138 and 139 (ex-118 A and B). See P. Rodière, *Droit social de l'Union européenne*, Paris, LGDJ, 1998, nos. 75ff., pp. 72ff.; B. Bercusson, *European Labour Law*, London, Butterworth, 1996.

or does so badly.[23] Similarly, a decision by the European Council, giving binding force to a European collective agreement, can be contested on the basis of the agreement's content or the bargaining procedures it provides for.[24]

The same phenomenon can be observed in national legislation wherever a clear distinction between different categories of text – laws, collective agreements and individual work contracts – becomes blurred, as a result of the increase in negotiated laws and negotiations having force of law, or else because of the measures invented to make up for the absence of structures of collective bargaining in small businesses. The reforms introduced in France in the first years of the twenty-first century concerning unemployment insurance[25] or the reduction in the length of the working week to 35 hours[26] exemplified this new 'order', where texts from any number of categories – law, agreement, regulation, contract – are combined, without it being possible to establish a hierarchy between them on the formal basis of the legal nature of each, or even on the basis of the search for what might be most beneficial for the employee.[27] More generally, the contractualization of State initiatives leads to an intertwining and hybridization of the different types of legal text involved (law, regulation, agreement, and collective or individual contracts), for

23. ECJ, 20 September 1988, Case 190/87. This rule restricts itself to recognizing a directive's vertical direct effect. But the judge at national level, supported by elements of doctrine, is encouraged to give it horizontal direct effect also. See, for example, the refusal of a French judge to apply the French law concerning women's night work, on the grounds that the relevant directive (76/207 EC on equal access to employment) had not been transposed into national legislation in a way that harmonized with the interpretation given by the European Court of Justice. See H. Masse-Dessen and M.-A. Moreau, 'À propos du travail de nuit des femmes: nouvelle contribution sur l'application des directives communautaires', *Droit social*, 1999, p. 391.

24. For example, on the basis of the fact that its signatories are not representative: see the Court of First Instance of the ECJ, case T-135/96, judgement of 17 June 1998, UEAPME v. Council of the European Union, ECR II–2335.

25. On this reform, see Chapter 5.

26. See particularly the ruling of the French Constitutional Council (Conseil constitutionnel), 13 January 2000 (decision 99-423 DC), which states that the provisions of the law concerning the reduction in the length of the working week are unconstitutional, since they challenge the content of previous collective labour agreements without providing a sufficiently strong motive of general interest (see X. Prétot, 'Le Conseil constitutionnel et les trente-cinq heures', *Droit social*, 2000, p. 257).

27. See F. Bocquillon, 'Que reste-t-il du "principe de faveur"?', *Droit social*, 2001, p. 255; compare A. Jeammaud, 'Le principe de faveur. Enquête sur une règle émergente', *Droit social*, 1999, p. 119.

which it is increasingly difficult to establish a classification and a hierarchy.[28]

As for the abbreviation 'www' (World Wide Web), it symbolizes a break in the history of information technology. Until the end of the 1970s, the world of computers remained dominated by large machines (IBM) linked up to users by terminals. The worker was connected to a single machine and could use a part of its resources in accordance with certain procedures and within certain limits which were fixed centrally by whoever controlled that particular machine. At best the terminal would allow the user to communicate with other terminals linked up to the same machine, through an internal network (Intranet). This structure corresponded to the model of the company in which labour law was grounded: a closed, pyramidal structure whose base (the staff) was made up of a stable group of employees of similar status, represented by different bodies at the top, which was occupied by the employer who was also the only person accountable for running the company – to the staff, to shareholders or to third parties.

In computing, it is only in the course of the 1980s that this pyramidal and compartmentalized structure began to be challenged by computer networks *between* universities, a result of interconnected research centres (Internet). And it was not until the middle of the 1990s that a new model came to dominate, that of a web of connections by which computers of all different sizes may be linked together on a global scale. In this new model, market competition centred not so much on the material production of computers as on intellectual property; the key to market domination was not the mastery of machines but that of norms of communication.[29] It is what has made millions for Microsoft and its operating system (aptly named in French the 'système d'exploitation').

In French labour law, a similar change of course is perceptible already in the 1970s, with the weakening of the employer's position in consequence of legislation on temporary work, on the 'economic and social unity' of companies (the 'unité économique et sociale' – in order to prevent the fraudulent establishment of separate companies that are in reality a single company), on company groups and also as a result of the increasing difficulty in identifying the individual employer.[30] But what at the time were just cracks in the system have become

28. See Chapter 3.

29. See M. Borrus and J. Zysman, 'Globalization with Borders: The Rise of Wintelism as the Future of Global Competition', *Industry and Innovation*, vol. 4, 2, December 1997.

30. See the thesis of I. Vacarie, *L'Employeur*, Paris, Sirey, 1979.

central problems for labour law, as the model of the networked company has become increasingly widespread, and with it the substantial legal problems it raises: the representation of employees in company groups,[31] relocation[32] and outsourcing[33] of work, subcontracting[34] and the problem of a company's limits,[35] and so forth. Some leaders publicly entertain the fantasy of an industrial enterprise without factories, trading in the intellectual property of signs (brands, standards, patents, et cetera), which would be relieved of the bother of having to manufacture things and employ people. The two movements are interdependent: constant improvements in computing allow businesses to operate in networks,[36] a phenomenon that encourages further innovation in information and communication technologies.

Lastly, the acronym 'PC' by which personal computers are designated symbolizes a profound transformation of the relation to the work tool. A tool endows a material object with a capacity already present biologically in the human being, and magnifies it.[37] From the first hewn stone, which spared humans the use of their nails and teeth, to windmills and steam, which spared them the use of their muscles, humans have always externalized and increased their physical capacities. The invention of writing, followed by the codex and printing, disburdened people's memory and enabled their thoughts to be recorded in texts. The novelty of the computer in the history of technology is that it externalizes the human capacity to process information. But the first, large, computers were still collective tools,

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31. See particularly the European directive 94/45 of 22 September 1994; see also P. Rodière, *Droit social de l'Union européenne*, *op. cit.*, nos. 252ff., pp. 262ff.; B. Teyssié, *Droit européen du travail*, Paris, Litec, 2001, nos. 730ff., pp. 264ff.

32. See the Court of Cassation, *Chambre sociale*, 5 April 1995, *Droit social*, 1995, p. 487, observations by P. Waquet; G. Lyon-Caen, 'Sur le transfert d'emploi dans les groupes multinationaux', *Droit social*, 1995, p. 489; M.-A. Moreau, 'La délocalisation des entreprises à l'étranger', in *Droits fondamentaux des salariés face aux intérêts de l'entreprise*, Aix-Marseille, PU Aix-Marseille, 1994, 1.

33. See G. Couturier, 'L'article L. 122–12 du Code du travail et les pratiques d'externalisation' (on the Perrier Vittel France rulings of 18 July 2000), *Droit social*, 2000, p. 845.

34. M.-L. Morin, 'Sous-traitance et relations salariales. Aspects de droit du travail', *Travail et Emploi*, 60, 1994, pp. 23ff.

35. See F. Gaudu, M.-L. Morin, A. Coeuret, J. Savatier and P. Rémy, 'Les frontières de l'entreprise', *Droit social*, Special Issue, May 2001, pp. 471–513.

36. See, with a focus on work, S. Darmaisin, 'L'ordinateur, l'employeur et le salarié', *Droit social*, 2000, p. 580; and, more generally, J.-M. Chevalier, I. Ekeland, M.-A. Frison-Roche and M. Kalika, *Internet et nos fondamentaux*, Paris, PUF, 2000.

37. See A. Leroi-Gourhan, *Gesture and Speech*, *op. cit.*, pp. 237ff.

created to serve the needs of an organization, similar in this respect to blast furnaces or railway engines. The computing tool became a personal object with the invention of the PC, more personal than any other tool because its content and organization bear the stamp of the mind of its user.[38] What was initially a collective tool has become an individual one and the worker's initially subordinate position has become a position of autonomy. However, we should not see in the acronym 'PC' simply a rosy future, since if it does indeed liberate its users by enabling them to externalize and increase the power of their mental faculties, it also subjects them to the faceless power of the creators of software and exposes them to new risks such as crashing, spying, memory loss, hacking, viruses, et cetera.

Well before personal computers became widespread, a similar development was already taking place in the occupational status of the worker (salaried or freelance, computer users and others). Already in the 1960s, the agricultural sector began to experiment with integrating independent work into networks controlled by agribusiness companies.[39] From the mid-1970s, labour law saw an increasing individualization of employment status. The decline in the typical employment relation, which matched dependence with security in salaried employment, has had the effect of diversifying salaried employment through individually negotiated contracts. The boundaries between salaried and freelance work, and private and professional life, have become blurred; new forms of subordination have emerged, while economic power is diffused across a labyrinth of company networks; and any reduction in working hours goes together with an increase in work intensity.[40] Here again, law and technology go hand in hand. Autonomy within subordination could not progress within salaried work without the personal computer or

38. The everyday object that the personal computer resembles most closely is without doubt the *shoe*: when new, it fits any foot of that size but once it has been worn, it will be right for one foot only. Besides, does not physical anthropology tell us that Man owes his brain to the prior development of his foot? See A. Leroi-Gourhan, *Gesture and Speech*, *op. cit.*, pp. 61ff. The difference is that the loss of a shoe is not irreparable, whereas the loss of a computer, if one has not made backups, permanently deprives its owner of a part of his or her memory.

39. See the thesis by J. Danet, 'Droit et disciplines de production et de commercialisation en agriculture', University of Paris I, 1982; L. Lorvellec, 'L'agriculteur sous contrat', in A. Supiot (ed.), *Le Travail en perspectives*, Paris, LGDJ, 1998, pp. 179ff, reprinted in *Écrits de droit rural et agroalimentaire*, Paris, Dalloz, 2002, pp. 331ff.

40. This consequence was already observed by Marx after the implementation of the first laws limiting the length of the working day. See Marx, *Capital*, *op. cit.*, vol. I, pp. 380ff.

the cellular phone, by means of which people can work and be monitored anywhere and at any time.[41] Conversely, these new forms of organization of work have provided a powerful impetus to developments in computing, with companies blindly allocating colossal budgets for the purchase of computing material that their suppliers immediately set about making obsolete.[42]

For a sociologist, an economist or a computer scientist, networks appear to be something very modern.[43] For a jurist, however, they strongly evoke feudal structures, and particularly the bond of vassalage which places a free man in the service of one or several lords. That is exactly what companies are looking for in these new forms of organization of work. Subordination is not enough, and workers who simply obey are no longer desirable. The combined demands of product quality and cost reduction have led to expectations that workers will behave as though they were independent and wholly accountable. Yet dependence is gaining ground in relations *between* companies. As each company focuses on its core production, careful monitoring is needed of the quality and punctuality of the services provided by its suppliers or subcontractors, on which the quality of its own products depends.

From Rules to Regulation

The idea underlying theories of information and communication is that no tangible reality exists outside of what all of us can perceive, such that humans may be apprehended only in the ways in which they communicate with their environment and react to the signals received from it.[44] According to communication theorists such as Bateson in anthropology, Goffman in sociology or Watzlawic in psychology, people do not act, they react; and they react not to an action but to a reaction, and it is this chain of reactions that constitutes the social bond (which explains the importance attributed to the concept of 'feedback'. There is nothing to be said – or, for that matter, to know –

41. See J.-E. Ray, 'Nouvelles technologies et nouvelles formes de subordination', *Droit social*, 1992, p. 525.

42. This may provide us with an explanation of Solow's famous paradox, namely that computers are visible everywhere except in company productivity curves (see T.K. Landauer, *The Trouble with Computers. Usefulness, Usability, and Productivity*, Cambridge, MA, MIT Press, 1995).

43. See M. Castells, *The Rise of the Network Society*, *op. cit.*

44. See G. Bateson *et al.*, *La Nouvelle Communication*, Paris, Seuil, 1981 (texts selected and presented by Y. Winkin, with a substantial bibliography).

about people's inner processes, except that the richness of human existence resides in the richness of the communication carried out.[45] In this behaviourist light, 'the physical functioning of the living individual and the operation of some of the newer communication machines are precisely parallel in their analogous attempts to control entropy through feedback'.[46] This is the starting point for a 'theory of regulation' applied to humans, animals and machines, which is intended to perfect both machines and law.[47] It is therefore hardly surprising to note that contemporary law has not only adapted to developments in communication technologies but has actively participated in bringing about the 'information and communication society'. The contribution of law is evident in the expansion of three fields: information, procedure and collective bargaining.

The increased value placed on information is a general legal phenomenon which has taken two forms. The first is the multiplication of obligations to provide information and to foster transparent practices. This now affects all contracts and transforms the traditional conception of many relations (doctor/patient, supplier/client, public authorities/citizen, worker/consumer, shareholder/company).[48] The second is the tendency for information to be treated as an appropriable intangible asset.[49] The legal definition of information has made it possible for software companies to develop monopolies on technical norms through 'proprietary formats' – the non-transparent tagging of electronic text – which, for better or (often) for worse, predominate today. While the transformation of information into assets has been

45. See P. Breton, *L'Utopie de la communication*, *op. cit.*, pp. 54ff.

46. N. Wiener, *The Human Use of Human Beings*, *op. cit.*, p. 26. Entropy, a notion drawn from thermodynamics (Greek *entropé*, 'cause of development'), refers to the spontaneous tendency of all ordered systems to disintegrate. A system has maximum entropy when it has totally disintegrated. One can see here how an old biblical revelation has re-emerged as a scientific discovery: 'All go unto one place; all are of the dust, and all turn to dust again' (*Ecclesiastes* 3:20).

47. See N. Wiener, 'Law and Communication', *The Human Use of Human Beings*, *op. cit.*, p. 93.

48. See Y. Loussouarn and P. Lagarde (eds), *L'Information en droit privé*, Paris, LGDJ, 1978; CURAPP, *Information et transparence administratives*, Paris, PUF, 1988; M. Fabre-Magnan, *De l'obligation d'information dans les contrats*, Paris, LGDJ, 1992,

49. See P. Catala, 'Ébauche d'une théorie juridique de l'information', *Recueil Dalloz* 1984, p. 975; P. Catala, 'La "propriété" de l'information', in *Mélanges Pierre Raynaud*, Paris, Dalloz-Sirey, 1985, pp. 97–112; reprinted in P. Catala, *Le Droit à l'épreuve du numérique*, Paris, PUF, 1998, pp. 224ff.; M.-A. Frison-Roche, 'Le droit d'accès à l'information, ou le nouvel équilibre de la propriéte', in *Le Droit privé à la fin du XXe siècle. Études offertes à Pierre Catala*, Paris, Litec, 2001, pp. 759ff.

actively defended by most jurists, it is at odds with the views of the first theorists of the information and communication society who strongly defended the principle of the free circulation of information, and underlined the disastrous effects of its private appropriation.[50] Labour law, which over the last half-century has likewise seen an increase in rights to information, has developed in a way that is more in harmony with the founding principles of communication theory. Far from advocating the private appropriation of information it has, on the contrary, stipulated that it should be shared. Employers are now obliged to make public all information concerning the running of the company,[51] or to circulate it to employees or their representatives, and especially information that might affect employment. These measures additionally enable one to detect here, more clearly than in civil law, some of the naïve postulates at the basis of the information and communication society.[52] In the universe of the information and communication technologies, the notion of information tends not to be distinguished from that of knowledge. Labour law shows, however, that it needs more than communication for people to understand each other, and that being informed is not the same thing as knowing. As the links between information, training and expertise inevitably became apparent,[53] so the increase in rights and duties to provide information were accompanied by a similar increase in the rights and duties of employees regarding training, advice and recourse to experts.[54] The necessary link that emerged between information and training in turn highlighted people's *inner* processes and their professional identity, proving that people cannot be reduced, as behaviourists would have it, to communicating particles.

Secondly, the proceduralization of the law is a fact acknowledged by all jurists, whatever their interpretation or evaluation of this phenomenon. The notion of procedure played a determinant role in the invention of the computer. The basic idea of its inventor, John von Neumann, was

50. See N. Wiener, *The Human Use of Human Beings*, *op. cit.*, pp. 100ff; P. Breton, *L'Utopie de la communication*, *op. cit.*, pp. 126ff.

51. See particularly, on the contribution of the French Auroux laws, the thesis of R. Vatinet, *Les Attributions économiques du comité d'entreprise*, Paris, Sirey, 1983. The first part of this work is devoted to a discussion of the obligation to inform.

52. See A. Supiot, 'Le progrès des Lumières dans l'entreprise', in *Les Transformations du, droit du travail. Études offertes à Gérard Lyon-Caen*, Paris, Dalloz, 1989, pp. 463–84.

53. See G. Couturier, *Traité de droit du travail*, vol. II, *Les Relations collectives de travail*, Paris, PUF, 2001, nos. 78ff., pp. 172ff.

54. See P.-Y. Verkindt, 'NTIC et nouvelles pratiques d'expertise', *Droit social*, 2002, p. 54.

to extend to machines the possibility of organizing calculations through algorithms, which meant reducing any calculation to an interplay of explicit instructions stored in the machine. Computing language consequently developed in line with the metaphor of the 'program' – which also spread into management and genetics – as a system of procedural norms capable of processing any content whatsoever.[55] The issue of proceduralization in law appeared around the same time, and has been gaining ground ever since. Jürgen Habermas produced one of its most famous theoretical formulations in his attempt to ground law in a theory of communication. He hoped, through the development of discursive procedures, to come up with a response to the bankruptcy of the Hegelian idea of the State[56] in Germany and to reconcile democracy with techno-scientific rationality.[57] Such aspirations are absent from the work of his contemporary and compatriot Niklas Luhmann. Luhmann applied systems theory[58] to law and viewed its proceduralization as proof of the nullity of all discourses that attempt to ground law in values beyond the legal sphere, and as confirmation of law's autoreferential and autopoietic character.[59]

These conflicting approaches, which have fuelled debates in legal theory for the last twenty years in Europe, at the very least highlight the phenomenon of proceduralization which affects every branch of law. Labour law is no exception. Proceduralization could be observed here long before computer programs became widespread within companies, and was most spectacular, in France, in the field of redundancy after 1973. Given that the economic decision of the employer cannot be submitted to a substantive norm of judgement – which would make the judge responsible for the sound running of the company – parliament has multiplied the procedures involved around redundancy. As with Microsoft programs, layer after layer of procedure has been added, with the result that program perfor-

55. See A. Pichot, 'Sur la notion de programme génétique', *Philosopha scientiae*, 6 (1), 2002, pp. 163ff.; also P. Breton, *Une histoire de l'informatique*, *op. cit.*, p. 93.

56. See J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt, Suhrkamp Verlag, 1981, translated by Thomas McCarthy as *The Theory of Communicative Action*, London, Heinemann, 1984–87; also *id.*, *Between Facts and Norms*, *op. cit.*

57. See J. Habermas, *Technik und Wissenschaft als Ideologie*, Frankfurt, Suhrkamp Verlag, 1968, partially translated in *Knowledge and Human Interests*, trans. Jeremy J. Shapiro, London, Heinemann, 1978.

58. Systems theory, as a total scientific model, is another theory that originated in cybernetics.

59. See N. Luhmann, *Legitimation durch Verfahren*, Frankfurt, Suhrkamp, 1968.

mance is reduced, more and more memory space is required, and the risks of blocking the system are multiplied. But what may be reprehensible in computing is perhaps admissible in the legal field: the real significance of the proceduralization of legislation on dismissal is doubtless that it slows down and prolongs the process, allowing employees threatened with redundancy to make the transition to other employment.[60]

Another sign of the contemporary ideal of a self-regulating society is the sharp rise in collective bargaining, and more generally in the contractualization of social policy. The great novelty of computers compared to calculating machines was their capacity to adjust automatically to the objectives they were set. Computer technology has given rise to a new generation of machines that are capable not only of obeying commands but also of adjusting their behaviour to their environment in real time. A car conceived according to this principle would be given a destination and would itself adjust its speed and itinerary in order to transport its passengers there as quickly as possible. The example here of automatic control, which is already extensively used in air and sea travel, enables us to understand the difference between rules and regulations. Rules are dictated from the outside, whereas regulation involves ensuring that a system is able to function homeostatically.[61] According to cybernetic theory, only appropriate regulation and not rigid rules can protect society from entropic disorder, that is, 'nature's tendency to degrade the organized and destroy the meaningful'.[62]

The criticism of the rigidity of rules and the call for regulation, to allow organizations to adapt on their own to changes in their environment, is not restricted to cybernetics and the new information

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60. Rabelais expresses in the words of the judge Bridoison an age-old legal wisdom: 'I stay, delay, and put off the judgment, so that the suit, well ventilated, scrutinized, and batted around, may be borne more easily by the losing parties' (*Third Book*, in *Complete Works*, trans. Donald M. Frame, Berkeley, University of California Press, 1991, p. 379).

61: The inventors of the new information and communication technologies transposed the notion of *homeostasis*, which in biology refers to the capacity of a living being to preserve a certain number of constants internally even if there are variations in the external environment, from the living organism to the machine and society (see N. Wiener, *God & Golem, Inc.*, *op. cit.*, p. 86). For the notion of regulation, the transposition went in the opposite direction, from mechanics and the machine to molecular biology and the living organism.

62. See N. Wiener, *The Human Use of Human Beings*, *op. cit.*, p. 19 and his God & Golem, Inc., *op. cit.*, pp. 87ff.

and communication technologies alone. For the past thirty years, this idea has found expression in labour law in the steady increase in practices of collective bargaining[63] and the radical transformation of its objects, subjects and functions.[64] As heteronomy recedes in favour of professional self-regulation, so the roles of the law and of collective bargaining have changed, the former laying down the principles and objectives to be attained, the latter contributing to defining these and adapting their implementation to the particular circumstances of the sector, company or group concerned. This method seems to be gaining general acceptance today, but at the cost of blurring the distinction between public and private law. It has been widely used, whether for reducing the length of the working week, setting up collective representation in transnational business groups, or creating commercial companies under European law.[65] These new forms of regulation in no way imply a simple withdrawal of the State, with the social dialogue being relegated wholly to the sphere of civil society. On the contrary, in line with the policy of 'management by objectives', the public authorities are involved alongside the employers and trade unions, and their relations determine the effectiveness of the regulation.

When taken to its limit, the idea of regulation – whether in technology or law – evokes the utopia of a world entirely free of conflict and able to do without the figure of the third party. In law, this utopia has taken the form of contractualism, the ideology that states that human beings should be subjected to no other limits than those they fix freely for themselves.[66] Clearly, no human society could function on this basis, and it is important to recall that there is no regulation without a regulator, whether in working or private life. This applies equally to computers: we should not forget that the relation between user and computer is never dual, since it always

63. For France, see the law of 13 July 1971 which introduced the right to collective bargaining and promoted collective labour agreements within companies (see M.-A. Rothschild-Souriac, 'Les accords collectifs au niveau de l'entreprise', thesis, University of Paris-I, 1986; M. Despax, *Négociations, conventions et accords collectifs*, Paris, Dalloz, 2nd edn, 1989, pp. 59ff.). The reform was part of a project for a 'new society' which would be governed by a 'contractual politics'.

64. See A. Supiot (ed.), *Beyond Employment*, *op. cit.*, pp. 111ff.; M.-A. Souriac and G. Borenfreund, 'La négociation collective entre désillusion et illusions', in *Droit syndical et droits de l'homme à l'aube du XXIe siècle. Mélanges en l'honneur de Jean-Maurice Verdier*, Paris, Dalloz, 2001, pp. 181–224.

65. See M.-A. Moreau, 'L'implication des travailleurs dans la société européenne', *Droit social*, 2001, p. 967.

66. See Chapter 2.

takes place under the aegis of a third party, the entity that conceived the machine for its own purposes. Employees and employers alike would do well to put pressure on this third party so that the needs of users are taken seriously. A negotiated definition of how the computing tool may best be adapted to these needs becomes necessary when competition is no longer operative, with one company alone having a *de facto* monopoly in the marketplace.

In conclusion, the development of law over the past forty years has been sustained by the same ideas and ideals as the new information and communication technologies. But if law really is part of the history of technology, it fulfils a singular function: that of a tool for humanizing technology.

Law Humanizes Technology

A widening gap separates the biological condition of humans, whose bodies and instincts have not changed since the distant times of hunting mammoths, from their technological know-how, which has become vertiginously powerful over the past two centuries.[67] It is a power that becomes truly dangerous when it serves the human being's still highly predatory instincts, threatening humanity with enslavement or extermination, and the planet with barrenness and destruction:

> If we project the technical and economic terms of today into the future, we see the process [the complete possession of the natural world] ending in total victory, with the last small oil deposit being emptied for the purpose of cooking the last handful of grass to accompany the last rat.[68]

Every society has institutions that metabolize these characteristically human sources of violence, channelling them so that they do not lead to the downfall of humanity itself.[69] If, in the West, law has played a

67. See A. Leroi-Gourhan, *Gesture and Speech*, *op. cit.*, p. 407.

68. *Ibid.*, p. 185.

69. This idea is developed from different perspectives in A. Leroi-Gourhan, *Gesture and Speech*, *op. cit.*, pp. 232–3; G. Bataille, *Theory of Religion*, *op. cit.*, pp. 43 ff.; E. Kantorowicz, *Mourir pour la patrie*, Paris, PUF, 1984, pp. 105ff.; P. Legendre, *La 901e Conclusion*, *op. cit.*, pp. 367ff. In the contemporary free market model, market competition is the privileged site for the expression of predatory and murderous impulses (see P. Thureau-Dangin, *La Concurrence et la Mort*, *op. cit.*).

role in the rapid expansion of technology, it is also because law has made technology humanly viable. It has been interposed between human beings and their tools, limiting their use through specific prohibitions which vary with the risks involved. European Community law summed up this function perfectly when it declared the 'general principle of adapting work to the worker'.[70] The implications of this very suggestive formulation should be taken seriously on both social and environmental issues.

The crucial task for jurists today in relation to the new information and communication technologies is therefore to identify the particular risks they bring with them for the human being. These risks are twofold. Firstly, by destroying the worker's framework of space and time, and transporting him or her into a virtual world of 'real time' (the time of the instant), these technologies make him or her vulnerable to the fantasy of ubiquitous availability. Secondly, by having the worker's slightest move registered by computer, these technologies make him or her vulnerable to the fantasy of transparent surveillance.

Ubiquity and its Limits

Since human beings first became sedentary and cultivated the land, they have situated their work within increasingly precise and meaningful spatio-temporal frameworks. Leroi-Gourhan emphasizes how the biological and symbolic perceptions of time and space coexist in the human being:

> The image of time and space was new when the human first realized that he could relive them both by saying 'he was by the river', 'he is at my house', 'he will be in the forest tomorrow'. For the rest of the living world, time and space have no initial reference other than that given by the visceral, the labyrinthine [aural] and the muscular forms of sensibility. All of this is absolutely true of us, but with the addition of our enormously complex symbol-making machinery, which underlies the whole of the Cartesian perspective.[71]

References to the time and space of work are present in all areas of labour law today: in definitions of the obligations of contracting

70. Directive 93/104 of 23 November 1993, art. 13. It is interesting to note that the French version is broader, speaking of the 'general principle of adapting work to the human being' (*le principe général d'adaptation du travail à l'homme*).

71. See A. Leroi-Gourhan, *Gesture and Speech*, *op. cit.*, p. 289.

parties, in the settlement of conflicts around laws and jurisdictions, in the legal qualification of illness or accident, and so forth. It is of course a commonplace to say that the new information and communication technologies destroy spatio-temporal frameworks, abolish time and break down frontiers, transporting humans into a virtual world where there is neither day nor night nor distance. More precisely, it is the human's mental faculties that are transported in this way, while their bodies remain fixed where they are, behind a screen or glued to their mobile phone, cut off from communication with the immediate environment.

The fragmentation of space and time is part of a process that began with the industrial revolution. The use of fossil fuels, and advances in communications, had produced a first discrepancy between the space–time of machines and that of human beings. Labour law intervened at the time to reconstitute a humanly viable space–time. Since gas, then electric, lighting had freed industrial work from the rhythms of nature (day/night, summer/winter), exposing workers to disproportionately long working hours, law stepped in to limit the length of the working day, then the working year, and lastly working life. Law replaced 'what is not possible' with 'what is not permitted'.[72] This is how the new rhythms that produce the spatial organization of our modern life were created; henceforth it would be the daily routine of 'travel, work, sleep' ['métro, boulot, dodo'] – and paid holidays. This spatio-temporal framework, which labour law developed gradually over the twentieth century, is weakened today by the new information and communication technologies. They bring with them the fantasy that people are available at all times and in all places, to work or to consume. New limits are now needed, in order to re-establish units of time and space that are compatible with the real life of the worker. When the new machines say 'anywhere' and 'anytime', law objects with 'not just anywhere' and 'not just any time'.

Machine-driven industry led to profound upheavals in the organization of space. Since machines have neither hand nor brain, they have to be maintained and guided by a human being. The factory in the industrial era was characterized both by the concentration of a large number of workers within it, and by its separation from residential zones and the life of the town. From this ensued a host

72. On the increasing pertinence of this issue for developments in biotechnology, see the Foreword to M. Fabre-Magnan and P. Moullier (eds), *La Génétique, science humaine*, *op. cit.*

of problems which law had to deal with: issues of hygiene and security, of liability for machines, of discipline and collective freedoms in the workplace, of organized public transport and health services, and so forth. In this particular historical context, a typology of rights tended to correspond to a typology of spaces: crossing the threshold of the factory meant passing from one legal universe to another. With the new information and communication technologies, however, and with work increasingly focused on signs which are accessible anywhere, rather than on material things stored somewhere, this spatial organization of law breaks down. The concentration of workers has now given way to their dispersion. Even when physically gathered in the same place, workers on computers still do not form a community united by a common activity; even when face to face with a client, they are above all involved in their binary relation with the computer. The *lack* of separation between spaces today, when the same work can be carried out anywhere (at the office, at home,[73] in the train, et cetera), has tended to become more significant than any separation between the factory, the street and the home.

The issue that arises in this context is that of setting limits on this dispersion and lack of separation, in order to preserve spaces for work that are both physically healthy and socially tolerable. Setting limits on the interchangeability of spaces means restoring their legal classification. This classification can come from a technical definition of spaces, as in European directive 90/270 of 29 May 1990, whose field of application is 'any workstation with display screen equipment'. The latter comprises the following elements (article 2): a screen, a keyboard, software providing for a human/machine interface, a telephone, a modem, a printer, a table and a chair. Classification can also come from contractual provisions, for example that 'a worker is not obliged to agree to work from home or to keep work files or work tools at home';[74] at the other extreme an employer cannot oblige an employee to return to work in the office if the employment contract provides that he or she should work from home.[75] Setting limits on the dispersion of workers means moving towards the reconstitution of a working community. This reconstitution can be physical, with

73. On teleworking from home, see J.-E. Ray, 'Nouvelles technologies et nouvelles formes de subordination', *op. cit.*, pp. 47ff.

74. Chambre sociale de la Cour de cassation, 2 October 2001 (Abram), *Droit social*, 2001, 920.

75. Chambre sociale de la Cour de cassation, 12 December 2000 (Baranez), *Bulletin civil de la Cour de cassation*, p. 417.

the 'relocated' worker-from-home exercising a right to work again within the company.[76] Or else it can be virtual, using new technologies to enable information to be communicated to the employer by employees and their representatives: this is exactly what is at issue in debates around workers' rights to collective organization using computer networks.[77]

However, the first and most far-reaching legal transformations caused by the 'information and communication society' occurred in the domain of working time. In France, changes began to appear at the end of the 1970s, as the regulatory structures inherited from the legislation of 1936 began to be challenged. By the beginning of the 1990s it was possible to see along what lines working time should be reorganized.[78]

The organization of time in the industrial era had two main characteristics. It was collective time, linked to the physical concentration of workers around their machines; and it was structured in a binary opposition of working time and free time, which corresponded to the strict separation of spaces of work from spaces for private and public life. The organization of time in the information and communication society marks a break with both of these characteristics. Individual time takes over from collective time when work is no longer based on the mobilization of an industrial army but on interaction between individuals in 'real time'; and a confusion of times takes over from the clear distinction between working time and free time, linked to the permeability of spaces created by the new communications media and the new forms of organization of labour they enable.

In this context, labour law serves to limit the individualization and confusion of times in order to preserve times that are acceptable both for the individual and for society. Its central focus has moved from the collective organization of work to the personal life of the worker. In labour law, a principle of harmonization of different times has

76. In endorsement of this principle, see the guidelines for teleworking in Europe proposed on 11 January 2001 by the European consultative body the 'Telecommunications' Sectoral Dialogue Committee, extracts of which are commented on by J.-E. Ray in 'Nouvelles technologies et nouvelles formes de subordination', *op. cit.*, pp. 52–4.

77. See on this point J.-E. Ray, 'NTIC et droit syndical', *Droit social*, 2002, pp. 65ff. In France, use of a company's computer network for trade union activity is conditional upon a prior collective agreement (French Labour Code, art. L. 412–8, al. 7, Law of 4 May 2004).

78. See A. Supiot 'Temps de travail: pour une concordance des temps', *Droit social*, 1995, pp. 947–54.

emerged, which is the application of the more general principle of 'adapting work to the worker'. At an individual level, this principle implies that everyone should be enabled to harmonize the different times that constitute their life; it might curb those employers who, in their hubris, envisage total flexibility of 'human capital', round-the-clock services on the basis of a seven-day week and just-in-time methods. The focus on time explains the host of new problems that jurists are currently addressing as a result of the introduction of the 35-hour week in France, which superficially looks simply like an extension of 1930s legislation.[79] For example, what is a rest period?[80] What are chosen working hours?[81] What is being on call?[82] How should time used for training be defined?[83] How should the working time of managers be limited?[84] How should the natural rhythm of the day be taken into account while also introducing schemes for flexible working hours?[85] How is it possible to measure workload and not simply work duration?[86] The list goes on. At the collective level, the principle of harmonizing different times implies preserving the right to a normal family and social life, in accordance with the prescriptions of the European Convention on Human Rights.[87]

79. See P.-H. Antonmattei, 'Le temps dans la négociation des 35 heures', *Droit social*, 2000, p. 305.

80. See F. Favennec-Héry, 'Le temps de repos: une nouvelle approche de la durée du travail', *Revue de jurisprudence sociale*, 12/99, p. 819; P. Waquet, 'Le temps de repos', *Droit social*, 2000, p. 288; J. Barthélémy, 'Le temps de travail et de repos: l'apport du droit communautaire', *Droit social*, 2001, p. 522.

81. French Labour Code, art. L.212-4-1 *et seq.*; see F. Favennec-Héry, 'Le temps vraiment choisi', *Droit social*, 2000, p. 295.

82. French Labour Code., art. L.212-4 *bis*; ruling of the Chambre sociale de la Cour de cassation, 24 April 2001, *Droit social*, 2001, 727, J.-P. Lhernoud; see B. Acar and G. Bélier, '"Astreintes" et temps de travail', *Droit social*, 1990, p. 502; J. Savatier, 'Durée du travail effectif et périodes d'inactivité au travail', *Droit social*, 1998, p. 15; J.-E. Ray, 'Les astreintes, un temps du troisième type', *Droit social*, 1999, p. 250.

83. See N. Maggi-Germain, 'À propos de l'individualisation de la formation professionnelle continue', *Droit social*, 1999, p. 692; J.-M. Luttringer, 'Vers de nouveaux équilibres entre temps de travail et temps de formation?', *Droit social*, 2000, p. 277.

84. French Labour Code, art. L.212–15–1 *et seq.*; see P.-H. Antonmattei, 'Les cadres et les 35 heures', *Droit social*, 1999, p. 159; J.-E. Ray, 'Temps de travail des cadres: acte IV, scène 2', *Droit social*, 2001, p. 244.

85. See D. Lecat, 'Le temps de travail des personnels navigants aériens', *Droit social*, 2000, p. 420.

86. See M.-A. Moreau, 'Temps de travail et charge de travail', *Droit social*, 2000, p. 263. See also Y. Lasfargue, 'L'ergostressie, syndrome de la société de l'information', *La Revue de la CFDT*, November 2000, 35, pp. 17ff.

87. Art. 8–1. See A. Supiot 'Temps de travail: pour une concordance des temps', *op. cit.*, p. 954.

This idea is gaining ground today, both in legislation[88] and in case law.[89]

Transparency and its Limits

According to the theorists of the information and communication society, only a society that has extended and intensified its communications and exchanges to the point of total transparency can protect its members from the return of totalitarianism. Totalitarianism, they claim, cannot do without secrets, which it uses to spread its lies and perpetrate its crimes. This is why, in their view, information should be public property, freely accessible to all. Yet, while recent history shows a tremendous increase in the circulation of information, it also shows an increase in the private appropriation of information and of the major communication media – contrary to the utopias forecast by cybernetics. When transparency becomes one-sided in this way, it turns into its exact opposite, producing a world where the majority becomes transparent to the few who remain in the shadows and control all the information and communication channels, whether directly, by appropriating the media and the technical norms of communication, or indirectly, through advertising and propaganda.[90] The risk of this inversion is particularly high within companies, which have always pursued, since the dawn of the industrial era, the ideal of panoptic surveillance of their employees by a management which alone has access to all the secrets. On this point, the new information and communication technologies in no way challenge the old industrial model, but on the contrary provide it with the means of carrying out its tasks surreptitiously, replacing the eye of the foreman with traceable digitized data. But these two versions of transparency – the one democratic, the other dictatorial – are both predicated on the idea of a human being without interiority, who could be reduced without loss to the totality of his or her acts of commu-

88. French Labour Code, art. L.212–4–7 (right to reduction in working hours due to the needs of family life); art. L.225–15s. and L.226-1 (right to paid leave for family events and for end-of-life caregiving).

89. Chambre sociale de la Cour de cassation, 12 January 1999, *Bulletin des arrêts de la Cour de cassation, Chambres civiles*, 7 (freedom to choose place of abode).

90. See a former Soviet dissident's not at all perplexed impression of the Western media: A. Zinoviev, *L'Occidentisme. Essai sur le triomphe d'une idéologie*, Paris, Plon, 1995, pp. 231ff.

nication.[91] In other words, they postulate an inhuman vision of the human being as indistinguishable from the machine. This is where law intervenes, to reduce the risk of technological folly and to bring people back to their senses, reminding them that, as rational subjects of law, they are necessarily opaque (endowed with interiority) and responsible (accountable for their actions).

In the industrial era, it was the physical well-being of workers and hence the human resources of the nation that were at risk. Consequently, the law intervened between the machine and bodies at work, protecting them through the introduction of standards of hygiene and security, and protecting firstly the people who incarnate society's future: women and children. With the new information and communication technologies, the danger has shifted from physical to intellectual well-being. But the legal issues remain fundamentally the same: how are people to live with these new machines? How may people use them without being enslaved by them? Since the threat they pose is intellectual in character, it affects not only workers but also companies. Companies require a minimum amount of opacity, not only for their business operations but also for the technical security of their equipment, products or services.[92] In order to ensure this, they have developed a set of technical and legal measures aimed at monitoring the circulation of information concerning them. But this legitimate need simply increases the tendency towards the cybersurveillance of employees,[93] who also need to have their privacy protected from intrusion by others. Since 1978, a law has restricted the use of personal data in companies in France (Law 78–17 concerning 'Data Processing, Data Files and Individual Liberties', called 'Loi

91. See P. Breton, *L'Utopie de la communication, op. cit.*, p. 54. N. Wiener, who regarded individuality as a form (that is, a particular organization of information) rather than as a substance, entertained the idea that technological progress would allow us one day to transmit a whole human being telegraphically, after deciphering and re-encoding all the digital codes composing their being (*The Human Use of Human Beings, op. cit.*, p. 91). This fantasy – which is basically a fantasy of immortality – has now migrated over to the biologists, where it fuels debates on human cloning (see H. Atlan, M. Augé, M. Delmas-Marty, R.-P. Droit and N. Fresco, *Le Clonage humain*, Paris, Seuil, 1999).

92. See Chambre sociale de la Cour de cassation, 18 July 2000, *Semaine sociale Lamy*, 996, 25/09/2000; on the tension between transparency and secrecy, see M.-A. Frison-Roche (ed.), *Secrets professionnels*, Paris, Autrement, 1999; and on guilty secrets, see P. Lascoumes, *Les Affaires ou l'art de l'ombre*, Paris, Le Centurion, 1986.

93. This is already an issue with video surveillance: see M. Grévy, 'Vidéosurveillance dans l'entreprise: un mode normal de contrôle des salariés?', *Droit social*, 1995, pp. 329–32.

Informatique et Libertés').[94] Reports from the French data protection authority (the Commission nationale Informatique et Libertés, or CNIL) express increasing alarm, as the number of cases of misuse in this domain rises yearly. The reports criticize the unilateral approach of the 'charters' issued by businesses concerning the use of new technologies, 'charters' that are as restrictive for employees as they are permissive for management.[95] Noting these aberrations, which go 'well beyond what is acceptable', the CNIL commissioned a report on the 'Cybersurveillance of Employees in Companies', which was published in March 2001.[96]

The recommendations of this 'Bouchet Report' are threefold. The report recommends, first, that people should be informed if they are to be placed under surveillance: employees are to be informed individually and their representatives collectively. This procedure wisely privileges an authoritarian model of control (that of the Sublime Porte, where ministers knew that the Sultan might at any moment be listening behind a grille inserted into a wall of the council chamber), over the totalitarian model (that of the two-way mirror of the 'diabolical Dr Mabuse'[97]). Second, it recommends that surveillance should be functional and not individual. It would be better practice, for example, to record connection times by workstation rather than the sites consulted or, inversely, the sites consulted while not identifying the workstation.[98] Last, as regards the personal use of communication tools by employees, the report advises 'a healthy tolerance which shall not exclude sanctions in case of overuse'. This last recommendation was supported by the judges of the European Court of Human Rights, who accepted a certain extension of private life into the sphere of work.[99] All these commonsensical recommendations are in perfect harmony with statutes and case law in France, which impose three conditions on the electronic

94. See the chapter devoted every year to labour issues in the Activity Report of the CNIL. French legal provisions must be aligned with EU Directive 95/46 of 24 October 1995 (OJEC of 23 November). See O. de Tissot, 'Internet et contrat de travail', *Droit social*, 2000, pp. 150–58.

95. CNIL, *Vingtième rapport d'activité, 1999*, Paris, La Documentation française, 2000, pp. 180ff.

96. A synthesis of this report is available in English in pdf format at http://www.cnil.fr/index.php?1518

97. Fritz Lang, *Die tausend Augen des Doctor Mabuse*, film dating from 1960.

98. The simplified norm of the CNIL adopted in 1994 relating to automatic telephone switchboards follows similar lines. It is published in CNIL, *Vingt délibérations commentées*, Paris, La Documentation française, 1998.

99. ECHR, 23 November 1992 (Niemietz v. Germany) and 25 June 1997 (Halford v. United Kingdom).

surveillance of employees: that employees be informed beforehand,[100] that the works council[101] be consulted, and that the principle of proportionality be respected.[102] After publication of this report, the French Court of Cassation implemented the recommendations of the CNIL when it ruled that in the use of his or her computer, an employee may preserve a 'private' sphere which the employer has no right to investigate.[103]

It is paradoxical that nowadays the protection of the citizen's privacy seems to be ensured much more effectively in the world of work than outside it. Our banker can know almost everything about our lives, without any obligation to inform us of how our credit card statements are being used, and is subjected to none of the constraints that the employer keen to monitor the phone bill is subjected to. Until recently, the history of labour law had been that of the transfer into the world of work of freedoms guaranteed in civil society; we will perhaps soon be moving in the opposite direction, transferring over to civil society the freedoms guaranteed in the workplace.

Mechanization had created new problems of civil liability: who was responsible for these dangerous and unpredictable new machines? The solution came from labour law, with the 1898 law in France on industrial injury, which introduced the notion of liability for risk and not only for intention or negligence. This legislation became the epicentre of a legal shockwave that changed the face of law on liability and gave birth to a society revolving around insurance, which is still ours today.[104] Today the new information and communication technologies are beginning to pose similarly far-reaching questions of liability: who is responsible for the information stored in a computer or transmitted by it? Responsibility supposes the existence of a cause to which effects may be imputed and which is not itself the effect of a cause;[105] in other words, it supposes a subject of law defined as the origin of words or deeds for which this

100. French Labour Code, art. L.121–8; Chambre sociale de la Cour de cassation, 20 Nov. 1991, *Droit social*, 1992, p. 28, report by Waquet, *Recueil de jurisprudence Dalloz*, 1992, p. 73, conclusions by Chauvy.

101. French Labour Code, art. L.432–2–1.

102. French Labour Code, art. L.120–2 and L.121–7.

103. Chambre sociale de la Cour de cassation, 2 October 2001, Nikon, *Droit social*, 2001, J.-E. Ray.

104. See F. Ewald, *L'État providence*, Paris, Grasset, 1986.

105. On this difference between imputation, which is particular to legal thought, and scientific causality, see H. Kelsen, *Pure Theory of Law*, trans. Max Knight, Gloucester, MA, Peter Smith, 1989, pp. 89ff.; also *id.*, *Allgemeine Theorie der Normen* [1969], translated by Michael Hartney as *General Theory of Norms*, Oxford, Clarendon Press, 1991, pp. 24ff.

subject can and should be held responsible. In a society where an action can always be analysed as a reaction to signals received, there is a risk that this subject becomes dispersed across a communications network within which nobody is any longer responsible for anything.[106] For how may a subject's responsibility be circumscribed in a web of connections with no centre? (To which should be added that if the network does indeed resemble a web, it is certainly not a spider's web). Some legal instruments already exist in labour law for getting behind corporate facades and chains of subcontractors, in order to trace back economic decisions to their source as they circulate in company networks.[107] Criminal law is familiar with this issue, due to the specific difficulties encountered in combating mafia organizations. Imputation of responsibility is also at the forefront of concerns about the environment or product safety, because of the dilution of reponsibility that accompanies chains of contracts.[108]

Particularly illuminating in this respect are the debates concerning the responsibility of software manufacturers. One can understand that the latter would like to have their cake, that is, property rights in intangible objects, and eat it, that is, be liable neither for hidden defects in the contractual sphere,[109] nor for the damage caused by what they sell, whether this is liability in tort or due to defective products.[110] But in the long term this position is untenable, as European Community legislation

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106. In cybernetics, this risk is considered to be something of an opportunity: the opportunity to transfer the human being's decision-making power to 'intelligent machines' (see P. Breton, *L'Utopie de la communication, op. cit.*, pp. 106ff.).

107. See M.-L. Morin, 'Les frontières de l'entreprise et la responsabilité de l'emploi', *Droit social*, 2001, Special Issue, p. 478ff.

108. The French Court of Cassation allows liability to be transferred in cases of contracts appurtenant to a thing (for example, in chains of contracts in which property is transferred) (Assemblée plénière, 7 February 1986, *Bulletin 2, Recueil de jurisprudence Dalloz,* 1986, p. 293, note A. Benabent). However, the attempt by the first Civil Chamber to extend this liability 'which is necessarily contractual in nature' to subcontracting (Cour de cassation Chambre civile, première Chambre, 8 March 1988, *Bulletin des arrêts des chambres civiles de la Cour de cassation*, I, no. 69), and even to all groups of contracts (Cour de cassation Chambre civile, première Chambre, 21 June 1988, *Bulletin des arrêts des chambres civiles de la Cour de cassation*, I, no. 202), was quashed by the full Court (Assemblée Plénière, 12 July 1991, Besse, *Bulletin* no. 5, p. 7; *Recueil de jurisprudence Dalloz*, 1991, p. 549, note J. Ghestin; *Jurisclasseur périodique*, 1991, ed. G, II, 21743, G. Viney).

109. See the critique by J. Huet of the legal qualification of the 'right to use' licence: 'De la "vente" de logiciel', in *Études offertes à Pierre Catala, op. cit.*, p. 799.

110. See A. Lucas, who rejects any idea of liability for things in one's charge or for defective products: 'La responsabilité des choses immatérielles', in *Études offertes à Pierre Catala, op. cit.*, pp. 817ff.

shows when it states that in a society whose organizatory principle is circulation and exchange, liability will necessarily be imputed to whoever first put things into circulation.[111] This principle explains the growing influence of the notion of traceability. It enables the original cause of damage to be identified by moving back up a chain of contracts to its source.[112] Another sign of the same tendency can be found in the recent provisions concerning electronic proof. These limit the confusion, which the new technologies bring with them, between different classes of text, and link texts to a subject of law accountable for their content.[113]

Procreation and the Reproductive Technologies

The issue that arose in labour law of a legal framework through which to temper technology today goes beyond relations of production. The risk of treating the human being as a thing subjected to the power of technology has emerged not only within industry, but also at the very heart of civil law, in the way personal status can be affected by developments in biotechnology. Just as legal technique played an active role in the domain of labour, so in the domain of biotechnology law has not restricted itself simply to reflecting and formalizing developments. Already in 1972, long before techniques of identification using genetic fingerprinting were devised, France introduced the idea of biological 'truth' into legislation on filiation, which had been dominated until then by the idea of legitimacy.[114] From that time onwards, the distinction between legitimate and illegitimate children began to appear discriminatory (to the extent that the very principle has since been condemned by the European Court of Human Rights),[115] while at the

111. Directive no. 85/374 EC of 25 July 1985 relating to liability for defective products, transposed into French national law, art. 1386–1ff. of the Civil Code.

112. See P. Pédrot (ed.), *Traçabilité et responsabilité*, Paris, Economica, 2003.

113. French Civil Code, art. 1316ff., (Law no. 2000–230 of 13 March 2000). See J. Huet, 'Vers une consécration de la preuve et de la signature électronique', *Recueil de jurisprudence Dalloz*, 2000, 95; J. Devèze, 'Vive l'article 1322! Commentaire critique de l'article 1316-4 du Code civil', in *Études offertes à Pierre Catala, op. cit.*, pp. 529ff.

114. French Civil Code, art. 318 (Law of 3 January 1972): 'Even where there is no disavowal, the mother may contest the paternity of the husband, but only for the purpose of legitimation, if she remarries with the *true* father of the child after dissolution of the first marriage.' Judges interpreted this provision broadly, which applies even when the child has always been considered and treated as the child of the husband (Cour de cassation Chambre civile, première Chambre, 16 February 1977, *Bulletin civil de la Cour de cassation*, 1, no. 92).

115. ECHR, 1 February 2000, Mazurek v. France, no. 34406/97 (Sect. 3), ECHR 2000-II.

same time the principle of 'true' biological children became the cornerstone of all conflicts around filiation.[116] This movement was of course reinforced and extended by the technological advances that enabled the biological genitor of a child to be identified with almost total certainty.[117] Judges were therefore inclined to settle conflicts over filiation by abandoning their role as judges in favour of the evidence of the test tube.[118] Biotechnology, just like the information technologies, tends to reduce the human being to materially observable fact. Since, in this version, our genes make us as easy to read as any other animal, we no longer need to distinguish procreation from reproduction or fathers from genitors. After legislation had begun by clearing the way for this essentially biological conception of lineage, technological progress later helped it win out over the presumptions of paternity of yesteryear, and made the principle of the inalienability of personal status yield to this search for the 'truth' of one's lineage.

Just as the industrial revolution enabled earlier legislation that had sought to dismantle corporation-based status to achieve its full effect, so the 'genetic revolution' today enables the complete dismantling of the status of legitimate offspring, a project first undertaken in the name of the principle of equality. However, concerning filiation, we have not yet – as labour law has – entered the third stage, in which new types of status emerge in order to limit the inhuman effects of a system in which technology lays down the law. A 'butcher's notion'[119] of lineage is gaining ground, whose destructive effects are not as immediately visible as were the ravages caused by industrialization on the physical state of the working class. No particular social class is affected in this case, because it is not the physical well-being of

116. Judges widened the breach opened by legislation and multiplied the ways open to the mother of contesting the father's putative paternity (*Cour de cassation Chambre civile, première Chambre*, 9 June 1976, *Bulletin des arrêts des chambres civiles de la Cour de cassation*, I, no. 211: interpretation *a contrario* of art. 334–9 of the French Civil Code; *Cour de cassation Chambre civile, première Chambre*, 27 February 1985, *Bulletin des arrêts des chambres civiles de la Cour de cassation*, I, no. 76: interpretation *a contrario* of art. 322 al. 2 of the French Civil Code).

117. On this 'biologization' of civil law, see C. Labrusse-Riou, 'Sciences de la vie et légitimité', in *Mélanges à la mémoire de D. Huet-Weiller*, Paris, LGDJ, 1994, pp. 283ff, reprinted in *Écrits de bioéthique*, ed. M. Fabre-Magnan, Paris, PUF, 2007, pp. 252ff.

118. In the year 2000, the French Court of Cassation ruled that 'expert biological opinion prevails in matters of filiation, unless a legitimate motive exists for not having recourse to it' (Cour de cassation Chambre civile, première Chambre, 28 March 2000, *Bulletin des arrêts des chambres civiles de la Cour de cassation*, I, no. 103). See also F. Bellivier, L. Brunet and C. Labrusse-Riou, 'La filiation, la génétique et le juge: où est passée la loi?', *Revue trimestrielle de droit civil*, 1999, no. 3, pp. 529ff.

119. See P. Legendre, *Filiation*, *op. cit.*, pp. 198ff.

workers but the psychical equilibrium of individuals that is endangered by the reduction of human identity to a supposed 'biological truth'.[120] The values of scientific truth, of individual freedom and of equality between lineages combine to make the idea of the third party, the guarantor of filiation, appear irrelevant. Many jurists thus accept unquestioningly that whenever the parties involved agree to let expert biological opinion decide on a change in a child's identity, forbidding it would be an intolerable injustice.

Yet the idea that issues of lineage are not reducible to their biological dimension has not disappeared from French law. 'Apparent status' (French Civil Code, art. 311–1), although weakened, continues to play a certain role in establishing descent. Incestuous descent is still prohibited, whatever its biological truth (French Civil Code, art. 334–10). Above all, the obligation not to confuse the procreator with the father is evident in the modes of filiation most extensively colonized by the technical sphere – whether by legal technique (adoption: French Civil Code, art. 352) or by biomedical technology (artificial insemination with anonymous donor: French Civil Code, art. 311–19). In these cases, one is forbidden by law to take into account the biological 'truth', since filiation proceeds from the 'demand' of the parents[121] and not from their physical union. It is hardly surprising that where filiation is most dependent on technology, the need for prohibition is felt most strongly. But the radical separation the law establishes here between the legal and the biological bond can in turn pave the way for the technological madness of making the 'parental project' into the exclusive basis of a child's identity. The biological existence of the child is then viewed simply as the material means by which the parents' wishes may be realized.

Judging by some demands which attract much media attention today, these wishes should be given unlimited scope, including the transfer of the project of parenthood from one 'human material' to another, until someone is found who is capable of executing it; or else imposing on the child a personal status divorced from patrilineal or matrilineal descent, in order to fulfil the desires of same-sex parents

120. On the anthropological issues involved in legislation on filiation, see P. Legendre, *L'Inestimable Objet de la transmission. Étude sur le principe généalogique en Occident*, Paris, Fayard, 1985; and for a clinical approach, A. Papageorgiou-Legendre, *Fondement généalogique de la filiation*, Paris, Fayard, 1990.

121. On adoption, see the French Civil Code, art. 343 and 343–1; and on medically assisted procreation, see the French Code of Public Health, art. L.2141–2 ('Medically assisted procreation is intended to meet the demand of a couple to become parents').

or in the case of reproductive cloning.[122] Instead of being used to treat the human being as just another animal, technology is here used to treat humans as angels, complete with an immaterial body and freed from the need for the other sex. But whether one settles for a version of the procreator simply as genitor (material cause of the child) or on the contrary simply as author (intellectual cause of the child), in both cases one sacrifices what is distinctive about human procreation, which makes it different from both animal reproduction and divine creation: the need for the human being to be born twice, once to the life of the senses and once to the life of sense. As is the case in other domains, the legal fictions subtending issues of lineage are never simply literary fictions[123] that some omnipotent author of a 'parental project' may manipulate at will. These technical resources situate human beings both in their biological dimension and in the dimension of representation, in order to enable them to become rational beings. It is the particular property of legal technique to perform just such an anthropological function, that of instituting the human being. Legal technique, like the developments in biotechnology that it accompanies, can be a source of great freedom,[124] but only if it is not used in a manner contrary to its true function.[125] Perverting its use is as destructive as making a plane into a flying bomb or transforming genetic research into a production plant for chimeras.

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122. One need only open a newspaper now and again to realize that these grandiose prospects are everywhere, and for some politicians masquerade as a social programme in itself. See, for example, the numerous publications and countless interviews by Marcela Iacub, a jurist at the CNRS and director of studies at the École des hautes études en sciences sociales, who defends these ideas with a logical rigour that cannot be faulted: since 'the body is nothing but an institutional medium to which human material is assigned or from which it is withdrawn', Marcela Jacub situates her work 'within the horizon opened up by the biotechnology of the total transplant'. She argues in favour of the 'substitutability of embryos' for executing the parental project, of 'women's right to procreate without involving their bodies', as well as the right to reproductive cloning, the latter being considered simply as an assisted reproduction technique (see particularly *Le Crime était presque sexuel*, Paris, EPEL, 2002, and *Penser les droits de la naissance*, Paris, PUF, 2004).

123. See the work of Bernard Edelman on this point.

124. See M. Corbier (ed.), *Adoption et fosterage*, Paris, De Boccard, 1999.

125. However open Roman law may have been to the idea of adoption, it never allowed adoption to be used to invert the father–son relationship: see M. Corbier, 'Famille et parenté: caractères originaux de la société romaine (IIe siècle av. J.-C.–IIIe siècle apr. J.-C.)', in A. Supiot (ed.), *Tisser le lien social, op. cit.*, pp. 73ff.

5

CALLING POWER TO REASON: FROM GOVERNMENT TO GOVERNANCE

The essence of man's life is not the struggle of all against all, and political theory cannot be a theory of power but should be a theory of legitimate authority.

Louis Dumont[1]

For power to be sustainable it needs to be acknowledged, otherwise it rapidly collapses into violence and murder. This observation has given rise to a question that has preoccupied every great jurist, from Bodin[2] to Kelsen,[3] and that seems to have lost nothing of its topicality: what distinguishes a government from a band of robbers? However varied the responses to this question, they all bring us back to the idea of a point of reference. We will only acknowledge a power if it refers to something we adhere to. We do not obey the orders of just anybody who stops us in the street, but in principle we do obey someone in uniform or wearing a police badge. Likewise, I do not feel obliged to respond to a letter asking me for money, unless that letter comes from the Inland Revenue. Force alone is not enough to make power legitimate, and it must additionally display the credentials that justify it. Giving power a reason and hence erecting the scene of power on a legitimate basis is precisely one of the resources of legal technique. English and German have only one word – right, *das Recht* – by which to designate both 'reason' and 'law' (whereas French has two terms – *la raison* and *le Droit* – but a French person should be capable of understanding that having a right is another way of having reason on one's side). Reason is both a faculty of judgement and that which authorizes us to act in a certain way; a power which has only

1. L. Dumont, *Essays on Individualism*, *op. cit.*, p. 177.

2. See J. Bodin, *Six Books of the Commonwealth*, trans. M.J. Tooley, Oxford, Blackwell, 1967, p. 1.

3. See H. Kelsen, *Pure Theory of Law*, *op. cit.*, pp. 44ff.

force on its side is lacking reason, whereas legitimate power presents us with a reason in which we believe.

The State, that great invention of the West, rests on the ineradicable belief in an immortal and omnipotent Being, a belief that began to take on secular form at the dawn of modern times. Temporal power was placed under the sign of the King who never dies,[4] then of the People which is ceaselessly regenerated, and this timeless sovereign has ended up supplanting God's omnipotence in the running of human affairs. In the terms of Jean Bodin, the first great theorist of the modern State, the sovereign prince has been taken as 'the image of God'.[5] More precisely, he has been taken as the image of the God of the Old Testament, whose Law is binding upon those who believe in Him.[6] Sovereignty, 'that absolute and perpetual power vested in a commonwealth',[7] therefore stems from the belief in a unique source, a supreme power that is self-positing, is its own cause and before which all other powers must yield. This is why the great jurist Carl Schmitt could characterize sovereignty in the following famous phrase: 'Sovereign is he who decides on the exception.'[8] Like Bodin, whom he refers to, Schmitt considers that the sovereign is not bound by any law and that 'the legal order rests on a decision and not on a norm'.[9] Coming from a future Nazi this phrase is worth pondering, expressing as it does the totalitarian drive behind the idea of sovereignty, which is identified with limitless, and therefore superhuman, power. It certainly sheds light on Schmitt's inability to understand the most original features of the Welfare State which was emerging in the 1920s, while other German jurists, driven out by the regime, had grasped its significance.[10] Schmitt refuses to envisage that those ruled

4. See E. Kantorowicz, *The King's Two Bodies*, *op. cit.*

5. J. Bodin, *Six Books of the Commonwealth*, *op. cit.*, Book I, Ch. X, p. 42.

6. As G. Mairet notes, the revealed God of the Gospels is noticeably absent from Bodin's theory of sovereignty, which refers exclusively to the Law of Moses and to Old Testament sources (see his Foreword to *Les Six Livres de la République*, 1583 edition with a Foreword by G. Mairet, Paris, LGF, 1993, pp. 12ff.). The modern State is well and truly a Judaeo-Christian invention and not solely a Romano-Canonical one.

7. J. Bodin, *Six Books of the Commonwealth*, op. cit., I, VIII, p. 32.

8. 'Souverän ist, wer über den Ausnahmezustand entscheidet', in Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* [1922], translated by George Schwab as *Political Theology*, Chicago, University of Chicago Press, 2005, p. 5.

9. C. Schmitt, *Political Theology, op. cit*, p. 10. See also J. Bodin, 'an absolute sovereign is one who, under God, holds by the sword alone' (*Six Books of the Commonwealth, op. cit.*, I, IX, p. 36).

10. They included the labour law scholars Otto Kahn-Freund or Hugo Sinzheimer, both of whom were forced into exile under Nazism. See C. Herrera (ed.), *Les Juristes de gauche sous la République de Weimar*, Paris, Kimé, 2002.

within a legal order may be conceded the right to defend their own representation of justice before the rulers.[11] But this refusal also prevented him from understanding that Bodin's conception of sovereignty could no longer account for the contemporary transformations of the State.

The law came into being well before the State, and there are reasons to believe that it will outlive it. Its long history shows us other ways of addressing the question of power, as for example in Cicero's characterization of the Roman Republic: 'unless there is in the State an even balance of rights, duties, and functions, so that the magistrates have enough power, the counsels of the eminent citizens enough liberty, this kind of government cannot be safe from revolution'.[12] The Roman system did not have recourse to the figure of the State to think the *res publica*.[13] Its conception of the Republic as built on three pillars – power, authority and freedom – may well be more relevant to our contemporary world, characterized as it is by a decline in the notion of sovereignty. The Roman way of instituting power continued to inspire medieval thinkers,[14] until the figure of the monarch or of the sovereign people came to the fore, and the distinction between power and authority disappeared.

This distinction is making a comeback, with the establishment of independent authorities that are assigned the last word on techno-scientific matters. Power's rationale can be found no longer in a

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11. 'As soon as freedom of assembly leads to coalitions (i.e. trade unions), that is, to groups in conflict who confront each other using specific means of bringing pressure to bear, such as strikes or lockouts, then the threshold of the political has been reached, and so it is no longer an issue of a fundamental right to individual freedom' (Carl Schmitt, *Verfassungslehre*, Munich/Leipzig, Duncker & Humblot, 1928).

12. Cicero, *De Re Publica*, trans. Clinton Walker Keyes, London, Heinemann, 1966, p. 169. See also the description by Polybius of the three powers that characterize the Roman Constitution, in *The Histories*, trans. W.R. Patton, vol. III, Book VI, ch. 11, London, Heinemann, 1923, pp. 295ff.

13. See the insightful remarks of Y. Thomas, who notes that the different organs of Roman government are not arranged hierarchically, nor integrated or unified under a single sovereign authority (in 'L'institution civile de la cité', *Le Débat*, 74, March–April 1993, pp. 23ff.); for a similar argument, see A. d'Ors, *Une introduction à l'étude du droit*, trans. and presented by A. Sériaux, Aix–Marseille, PU Aix–Marseille, 1991, no. 82, pp. 113ff.

14. Including the so-called 'prehumanists', as suggested by the Ciceronian influence on Ambrogio Lorenzetti's representation of Good Government in his famous fresco in the Palazzo Pubblico in Sienna (1340). See Q. Skinner, *Visions of Politics*, vol. 2: *Renaissance Virtues*, Cambridge/New York, Cambridge University Press, 2002, ch. 3, pp. 39–92.

sovereign figure which transcends society, but instead in its immanent rules of functioning. The issue of power is consequently no longer one of sovereign *government* but of effective *governance*. This shift took place in the context of the perspectives opened up in the period after the Second World War by cybernetics, which unites governance ('cybernetics' comes from the Greek *kubernetes*, the pilot who holds the tiller) and regulation (proper to any homeostatic system) in an overall theory of mechanical, biological and human systems that is supposed to protect us from the forces of entropy.[15] From the standpoint of law, this shift can be seen as an attempt to synthesize the two Western figures of the norm which have opposed each other since the rise of modern science. These are, on the one hand, the legal norm which draws its force from shared faith in the projected realm that the norm aims to realize; and on the other hand, the technical norm which draws its force from scientific knowledge of an object it intends to put to use.[16] Since from the dawn of the modern age the West has aspired to replace the government of people with the administration of things, it has sought to bring these two figures of the norm closer together. It has done so by reducing law to a technique devoid of meaning and values, which should be assessed by its efficiency, like a technical norm; and by placing the techno-scientific standardization of the 'human resource' at the heart of its system of values.

New ways of putting together people and texts have flourished on this basis, new legal techniques which oblige each of us not only to participate actively in the definition and implementation of rules to ensure the common good, but also to contribute to revising them constantly in the light of the lessons drawn from this implementation. Such developments are the sign of a profound transformation in our relation to power. We must always presume that there is reason for power, but it can no longer be derived from the figure of the sovereign, and the question of power, as Foucault sensed,[17] goes beyond the frameworks of public law. For the decline in State sovereignty has not given rise to increased freedom but on the

15. See Chapter 4.

16. See the elaboration of this point in A. Supiot, *Critique du droit du travail, op. cit.*

17. See particularly M. Foucault, *The Will to Know*, trans. Robert Hurley, Harmondsworth, Penguin, 1998, pp. 136ff.; on the different conceptions of law in Foucault's work, see M. Alves de Fonseca, *Michel Foucault e o direito*, São Paulo, Max Limonad, 2002, and his 'Michel Foucault et le droit', in A. Supiot (ed.), *Tisser le lien social, op. cit.*, pp. 163ff.

contrary to enslavement to the pursuit of goals that are all the more constraining for not being the result of anyone's decision.

The Decline of Sovereignty

The idea of sovereign power began to be radically called into question at the end of the 'thirty years' war' which stretched from 1914 to 1945.[18] This war had shown just how far the murderous unleashing of powers blind to reason could go. It also revealed to the peoples of Continental Europe something unthinkable: that States can die. Since they could not be refounded as though nothing had happened, in the future any State seeking international recognition was going to have to produce credentials for its legitimacy other than a simple affirmation of sovereignty. The challenge to power did not affect the State alone. Figures of sovereign power began to be contested in the company, the family and the public realm, leading not to the disappearance but to the profound transformation of relations of power.

In the legal sphere, this transformation took two forms. Firstly, discretionary power declined to the benefit of functional power. This decline was expressed in the increased monitoring of those holding discretionary power, who were obliged to provide justification for their actions in advance of their execution; and also in the growing importance of judges and experts, who monitored their actions after the fact. No longer was the 'one on top' alone entitled to judge the well-being of all beneath him. Reforms in family law abolished what civil law had called *patria potestas*, replacing it with a parental authority responsible for the interests of the child. Public authorities were monitored increasingly closely on administrative, criminal, constitutional or European Community issues, and obliged to justify their activities in more and more fields ('transparency'). Similarly, at company level, the employer could no longer claim to be the sole judge and became subject to economic monitoring by those to whom he or she was accountable – companies with majority stock, shareholders – as well as to scrutiny by employee representatives and judges.

Secondly, these transformations of power were accompanied by a decline in centralized power and its wider distribution. Here, the old principle of equality and the new principle of subsidiarity joined

18. On the unity of the two world wars, see G. Steiner, *In Bluebeard's Castle. Some Notes towards the Redefinition of Culture*, London, Faber & Faber, 1971, pp. 31ff.

forces in challenging any pyramidal organization of power. In family law, the momentum gained by the principle of equality between men and women led to parental authority being shared, while the lowering of the age of civil majority, together with the emergence of 'children's rights', tended to limit the sphere of jurisdiction of this authority. In public law, the idea of the horizontal separation of powers (the executive, the legislature and the judiciary) lost ground to their vertical organization, with integration into European Community or regional units. In companies, the integrated and hierarchical organization that was the key to the success of the Taylorist and Fordist models was superseded by the model of the network which came to thrive both within companies and in their relations with their economic partners.

In order to get a precise idea of the changes that have really taken place, however, we should also examine the other side of the coin. For not a single one of the developments outlined above is without its downside, or rather its other side: while the age of civil majority has been reduced, the age of economic majority has increased for young people, due to unemployment or a longer time spent in education, hence a longer period of material dependence on their parents (which explains student demands for a specific social status to ensure that civil majority is accompanied by effective emancipation). The power of States has decreased, but often to the benefit of the power of money, judges, experts or the media. The Fordist model has withered away but 'participatory management' has blossomed in its stead, alienating the mind and not only the body. The forces of free competition have vested authority in a set of economic 'tribunals' (the European Commission, the Financial Markets Authority, the European Bank and other regulatory authorities) rather than in the State or monopolistic companies, and they have also conferred unprecedented power on the financial markets. The generalization of the model of the network in the organization of companies[19] has produced both a redistribution of the sites of power and a profound transformation in the ways it is exercised.

Legal deregulation has been accompanied by the growing importance of technical norms claiming universal applicability. Technical standardization, and in particular recourse to quality standards and procedures of certification elaborated by private agencies,[20] has

19. M. Castells, *The Rise of the Network Society, op. cit.*

20. See F. Meyer (ed.), *Certifier la qualité?*, Strasbourg, Presses universitaires de Strasbourg, 1998.

replaced the legal framework previously used to monitor production. Far from implying a return to the liberal legal ideology of the nineteenth century, these developments have given rise to new legal techniques which aim to go beyond the opposition of heteronomy and autonomy. Instead of subjecting relations between people to rules imposed from the outside or else to the unchecked interaction of the relations of force between contracting parties, the idea is to bring these two together in the definition and implementation of an order which would, by that very token, be legitimate, accountable and efficient. Law, true to its technical dimension, once again displays its capacity to help invent new forms of power and to serve new ideals. The loss of faith in the sovereign State has brought back to life certain notions long buried in the sediment of the history of law, such as those of empire, *ius commune* or authority, while others, such as law, contract or democracy, are losing their distinctive features. The current transformations of the State are bringing back the old distinction between power and authority, and diminishing the Legislator's sovereignty.

The Metamorphoses of the State

The State is not an atemporal and universal institutional form; it is a Western invention dating from medieval times. The idea of an immortal State originates in that of the mystic body and in the theory of the king's two bodies whose history Ernst Kantorowicz has explored. From the Reformation onwards, a purely temporal sovereign was reigning in France; owing nothing to the authority of the Pope, sovereignty was already beginning to free itself from any Christian reference. This process of emancipation continued during the Enlightenment and the Revolution of 1789, resulting in the total divorce of the State from religion. This process in fact reinforced the power of the State which, since all its rivals on the political scene had been eliminated, became the only being that was immortal and omnipotent, and capable of transcending individual interests (a quality called *Herrschaft* by German, *puissance publique* by French jurists).

The legitimacy of this sovereign authority was challenged in the nineteenth century as a result of the industrial revolution and the political and trade union struggles to which it gave rise. The market economy from the very outset undermined traditional forms of local solidarity around which pre-industrial societies had been organized. The breakdown of these structures started in Europe and then affected, to varying degrees, all other countries under Western

influence. At the dawn of the nineteenth century it seemed as though the very condition of modernity lay in loosening the social ties formed by familial, geographical or occupational proximity. The legitimacy of the State was also affected by this. Its role, and even its existence, were already then called into question.

One type of reaction to this crisis took the form of totalitarian ideologies, which envisaged the State as a mere tool in the hands of a single party acting in the name of supposedly scientific laws governing life in society (laws of race, laws of history, et cetera[21]). The legitimacy withdrawn from the State was transferred onto other symbols supposed to represent how the social whole functions: race, class, and so forth. The resulting suicide of the State led to the gulag and the Holocaust, which taught us a simple and tragic lesson, too often forgotten by jurists today: when power loses its rational basis, it sinks into madness and murder, where nothing distinguishes a government from a band of robbers and assassins. We are on a similarly slippery slope today when we are tempted to turn States into the docile instruments of economic laws. When economic laws claim to incarnate impersonal market forces and to subordinate positive law, they bear within them the seeds of a totalitarian conception of the whole, in which law is a mere tool for implementing super-human laws which are declared to be universally applicable.[22]

Another type of reaction, and quite the opposite of the first one, involved restoring the legitimacy of the State by entrusting it with new responsibilities and assigning a role to collective action in the ongoing pursuit of social justice. Instead of being simply in charge of governing people and embodying a power that dominates them, the State would ensure their well-being. The *Sozialstaat* or *État providence* or 'Welfare State' gave people new rights and freedoms which added the idea of social citizenship to that of political citizenship. The organization of public services produced social rights which made a number of fundamental benefits accessible to all (health, education, et cetera). The status of the salaried employee gained greater protection through labour and social security legislation introduced by the State or under its auspices.[23] But the hallmark of the Welfare State

21. See Chapter 2.

22. See H. Arendt, *The Origins of Totalitarianism, op. cit.*, pp. 461ff.

23. On the historical development of this status, see R. Castel, *From Manual Workers to Wage Laborers: Transformations of the Social Question*, trans. Richard Boyd, New Brunswick and London, Transaction Publishers, 2003. For the case of Britain, see S. Deakin and F. Wilkinson, *The Law of the Labour Market. Industrialisation, Employment and Legal Evolution*, Oxford, OUP, 2005.

was above all its recognition of collective freedoms, whereby the State's legitimacy was restored. The Welfare State's great strength was that it did not impose on people a previously determined vision of their happiness but harnessed the energy of their collective action and conflicts to produce new rules. Its superiority over totalitarian States in fact resided not in the social protection it provided – typically less extensive and less stable than that of Fascist or Communist States – but rather in these rights to collective action, by which those ruled were authorized to confront the rulers with their own conception of a just order. Trade unions, strikes and collective bargaining became the component parts of a political machine that transformed relations of force into relations of law. It was these rights to collective action that enabled a social hermeneutics of common law to be developed, which took different forms in different countries, but without which neither labour law nor social security would have come into being. The invention of the Welfare State enabled the dual trend towards individualization and interdependence characteristic of industrial society to be controlled.[24] Yet while controlling this movement, it also accelerated it. Men and women were brought into large networks of solidarity such as the social security system or state education, which freed them from their local solidarity networks, while making them increasingly interdependent at national level. This was how the State managed to regain its legitimacy, adopting the appearance of a kindly Sovereign who tolerates contestation and is equipped to fulfil all expectations and provide remedies for all ills.

The opening up of frontiers, which is a response to a whole series of well-known economic, political and technological factors, is at present overturning these national frameworks on which life in society had been built. Solidarity at national level is now under threat, due to globalization on the one hand, relocalization or reterritorialization on the other. 'Globalization' and 'territorialization' are two inseparable sides of worldwide economic strategies based on exploiting local competitive advantages. The State is assailed from two sides. On the international level, globalization produces a legal system in which international competition law, which is supposed to represent the common interest of all nations, is forced upon States. The latter are considered to express local solidarity networks, which are tolerated only insofar as they do not

24. On this tension characteristic of industrial societies, see E. Durkheim, *The Division of Social Labor in Society*, Preface to the Second Edition, trans. George Simpson, New York, Free Press, 1933, p. 15.

hinder the free circulation of goods and capital. This is how the old dichotomy of the global and the local makes a comeback, a dichotomy dear to imperial thought, ever eager to put an end to the nation-state. From this neo-liberal viewpoint, competition law occupies the position of constitutional law on a global scale; and international trade organizations vie with the State for the role of the third party that guarantees trade. The problem is that competition law is incapable of founding a legal order since it understands only the circulation of products and knows nothing of humans or of nature, which alone make production possible. As a result, the international economic order engenders serious social and environmental problems which are devolved onto States, while at the same time their capacity to act is increasingly restricted. Internally, States are faced with demands for security, social protection and the decentralization of power, which become more insistent as the destabilizing effects of globalization make themselves felt. Their response has often been consultation or negotiation with representatives of particular occupational categories. This practice, which has been labelled neo-corporatist, takes the definition of the general interest out of the hands of the State and makes it the result of relations of force between particular interests. As such, the State ceases to be a third party and becomes a partner in the 'social dialogue'.[25]

Neo-liberalism and neo-corporatism have combined in practice to transform the State into a mere instrument in the hands of forces superior to it – the financial markets at the international level and socio-professional interests internally. While remaining the key legal actor on the international scene, the State is losing some of its substance, and even most of its substance in the case of the weakest and poorest States, squeezed between structural adjustment programmes imposed by international financial institutions[26] and the black economy by which many of their nationals survive. Confronted with such economic and social realities, the State is reduced at best to a walk-on part, at worst to a predator.

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25. See P. Schmitter and G. Lehmbuch (eds), *Trends toward Corporatist Intermediation*, London, Sage, 1979; J. Goetschy, 'Néocorporatisme et relations professionnelles dans divers pays européens', *Revue française des affaires sociales*, February 1983, pp. 65–79; G. Vardaro (ed.), *Diritto del lavoro e corporativismi in Europa: ieri e oggi*, Milan, Franco Angeli, 1988.

26. See the instructive report by J. Stiglitz, former Chief Economist of the World Bank and winner of the Nobel Prize in Economics, *Globalization and Its Discontents*, *op. cit.*

The instrumentalization or withdrawal of the State cannot but have a drastic effect on how society functions. The 'laws of the economy' suppose that a world exists where each has a stable identity. This Western myth of a society reduced to a cloud of rational individuals each maximizing their private interests fails to recognize some basic facts of anthropology: human reason is never an unmediated fact of individual consciousness. Human reason is the product of the institutions that allow every person to give meaning to their existence, that grant them a place in society and enable them to express their particular talent within it. Once this process is no longer guaranteed by the State, people attempt to ground their identity in other things: in a religious, ethnic, regional, tribal, sectarian, et cetera point of reference.[27] New particularist claims result from this, making States ever more unstable, and paving the way for murderous conflicts between References, of which contemporary events provide abundant examples both nationally and internationally. The retreat to particularist positions, and the violence this creates, undermines confidence, encourages protectionism and as a result imperils the very economic globalization that gave rise to it.

The Separation of Power from Authority

The distinction between power and authority has a long history in the West. In Roman law, '*potestas* is the capacity to act and *auctoritas* the capacity to ground the action of another person'.[28] With the advent of Christianity, this distinction fuelled debate on the respective prerogatives of the Pope and the Emperor.[29] This debate could be said to have been brought to a close by the secularization of the State, in

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27. For the United States, see M. Piore, *Beyond Individualism*, Cambridge, MA, Harvard University Press, 1995.

28. P. Noailles, *Du droit sacré au droit civil*, *op. cit.*, p. 250, and P. Noailles, *Fas et Jus*, *op. cit.*, pp. 223ff., especially p. 274. See also A. Magdelain (*Ius imperium auctoritas*, *op. cit.*, especially pp. 385ff.), for whom the different uses of *auctoritas* have in common the sense of conferring legal value on an operation which is not self-sufficient. On the origin of the concept, see É. Benveniste, *Indo-European Language and Society*, trans. Elizabeth Palmer, London, Faber & Faber, 1973, pp. 420–23. Benveniste shows that *auctoritas*, deriving from *augeo* ('to increase, expand'), contains the idea of a talent that only certain people have, that of making something emerge, or bringing it into existence.

29. See on this point the famous letter written in 494 by the Pope Gelasius to the Eastern emperor, distinguishing *auctoritas sacralis pontificum* from *regalis potestas*. (The complete text has been translated into French by G. Dagron in his *Empereur et prêtre*, Paris, Gallimard, 1996, pp. 310ff.)

which power and authority are united, at the cost, however, of separating the legislature, the executive and the judiciary within it. Thereafter, the distinction between power and authority gave way to other oppositions in terms of which the organization of institutional spheres was discussed: the State and the nation, the State and civil society, the State and the market. The issue resurfaces today, however, in the context of regulation, where a distinction is made between 'operators' (who have the power to act) and 'regulators' (who have authority over this power). This distinction rests on a simple idea, namely that the Welfare State has inherited the role of grand market regulator. However, the State is also itself an economic operator and can therefore infringe with impunity the laws of the market or turn them to its advantage (as it may do with other freedoms, for example freedom of information). The argument goes that wherever the risk of this kind of confusion exists, it would be better to strip the State of one or other of these functions (or even of both, in the most radical versions of this idea). The role of regulation would then be entrusted to a specially created authority.

The opening up of markets has consequently been accompanied by the creation of a host of regulatory authorities that are not subject to the power of States.[30] On a national level, these authorities have flourished with the privatization (or opening up to competition) of companies and public services, and with the liberalization of the movement of capital. Most of these authorities are specialized in a particular product or service (electricity, telecommunications, television, the stock exchange, medicines, et cetera).[31] Some have been created to help regulate certain public services (health or hospitals), to protect certain freedoms (concerning electronic data or information), or to help political decision-

30. An extensive bibliography is available on this. For a comparative study, see N. Lomgobardi, 'Autorités administratives indépendantes et position institutionnelle de l'administration publique', *Revue française de droit administratif*, 1995, pp. 171 and 383. For France, see the public report in 2001 by the Supreme Administrative Court, *Les Autorités administratives indépendantes*, Paris, La Documentation française, 2001, pp. 253–452; C.-A. Colliard and G. Timsit, *Les Autorités administratives indépendantes*, Paris, PUF, 1988; J.-L. Autin, 'Du juge administratif aux autorités administratives indépendantes: un autre mode de régulation', *Revue de droit public*, 1988, pp. 1213ff.; M. Jodeau-Grymberg, C. Bonnat and B. Pêcheur, 'Les autorités administratives indépendantes', *Cahiers de la fonction publique et de l'administration*, 190, May 2000, pp. 3–14.

31. See M.-A. Frison-Roche (ed.), *Les Régulations économiques: légitimité et efficacité*, Paris, Presses de Sciences Po/Dalloz, 2004.

making on contemporary social issues (ethics committees).[32] Internationally, a certain number of specialized authorities exist, regulating particular services (for example, air transport), but what is most surprising is that independent authorities were also created at this level to regulate markets. The oldest and also the most complex example here is doubtless the European Commission. A similar inspiration gave rise to the World Trade Organization, on a larger scale but with a narrower scope.

The roles of regulatory authorities are as diverse as their objects, but they all share two characteristics: their legitimacy has both a technocratic basis (founded on expertise and not on collective representation) and a religious basis (as in the case of ethics committees). Their findings are supposed to inform legislation and they are presumed to be independent of States or private operators. This independence is often contested. The State is always behind their activities (notably through nomination procedures) and private lobbies are never far away. Moreover, the remit of these authorities invariably goes beyond simply providing technical expertise, such that they are obliged to make value judgements and decide on contentious issues as though they were a public authority pronouncing on matters scientific, technical or economic. For these two reasons, regulatory authorities have tended to be obliged to follow the broad lines of procedure set out in the European Convention on Human Rights and Fundamental Freedoms.[33] In other words, they are obliged to come back to what is at the heart of legal technique.

The revival of 'authorities' reminds one of the major issue that gave rise to the very concept of social legislation in France at the end of the

32. The French Council for Economic Analysis (Conseil d'analyse économique) or the National Ethics Committee (Comité national d'éthique) – and there would be many other examples – occupy the same position with respect to the public authorities as did ecclesiastical advisors with respect to their Prince: for example, in England, the position of the Chancellor in charge of equity. These advisors helped the King harmonize civil law with divine law in order fully to legitimate the former.

33. Cour de cassation (Chambre commerciale), 18 June 1996 (Conso), *Bulletin civil de la Cour de cassation*, no. 179; *Assemblée plénière*, 5 February 1999 (Oury), *Bulletin civil de la Cour de cassation*, no. 1; the Supreme Administrative Court does not go nearly so far: Conseil d'État, Assemblée, 3 December 1999 (Didier); see J. Ribs et R. Schwartz, 'L'actualité des sanctions administratives infligées par les autorités administratives indépendantes', *Gazette du Palais*, 28 July 2000, pp. 3–11; J.-F. Brisson, 'Les pouvoirs de sanction des autorités de régulation et l'article 6, § 1 de la Convention européenne des droits de l'Homme', *L'Actualité juridique du droit administratif*, 1999, pp. 847–59.

1930s. The Continental jurists who conceived this legislation realized that a social conflict cannot be treated by normal judicial methods, which involve referring a dispute to a rule that is already defined (whether or not the rule is contained in a law or in a precedent). This is because social conflict generally pursues the goal of having a new rule adopted. Jurists therefore placed all their hopes in the creation of an organization drawn from civil society, endowed with significant socio-economic powers and capable of creating, through the arbitration of these conflicts, a body of social legislation that would be genuinely responsive to changes in the world of work rather than to economic or political forces.[34] Paradoxically, it is not in the social but in the economic realm that these ideas are flourishing today. The resulting asymmetry between an economic sphere, which has regulatory authorities, and a social sphere, which has none, gives rise to all sorts of harmful effects in the opposition between the two. The market regulatory authorities do not consider that they have to take into account the social dimension of the issues they address, not because such a dimension is absent but because *no organization exists* that is entitled to authorize States to appeal to social considerations in order to limit the effects of competition law. Hence decisions can be taken that are liable to destroy, with one stroke of the pen, the material conditions of existence of whole societies, especially the poorest ones.[35]

The Dismantling of Legislative Power

As the French Declaration of the Rights of Man and of the Citizen (1789) puts it, 'Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation.'[36] In the democratic institutions born of Enlightenment political philosophy, the people as sovereign has the power to develop its own legislation. This power, with the exception of its direct use – the case of the referendum –

34. See P. Laroque, 'Contentieux social et juridiction sociale', *Droit social*, 1954, pp. 271–80.

35. The definition of chocolate adopted by the European Community (directive 2000/36 EC of 23 June 2000, authorizing manufacturers to replace cocoa with vegetable fats) is a good example of this kind of decision, which is motivated more by unlimited greed than by the wisdom of some authoritative body: it lines the pockets of Northern manufacturers at the expense of Northern consumers and of cocoa-producing Southern farmers.

36. Declaration of the Rights of Man and of the Citizen (1789), article 6.

must be exercised through elected representatives.[37] It is because laws were conceived as the expression of the people's will that in modern democracies election was favoured over drawing lots, which was the norm in Athenian democracy.[38] The quantitative approach to the idea of majority, which was beginning to emerge in medieval deliberative technique,[39] triumphed with the French Revolution and eclipsed any idea of a qualitative representation of differences (between provinces, professions or personal status).[40] In Tocqueville's formula, 'the notion of government became simpler; numbers alone made the legal system and the laws. The political realm can be reduced to a question of arithmetic.'[41] The normal site of legislative power in our democracies consequently became a parliament elected by universal suffrage. Since national representatives incarnate the general will, they should not represent individual professions or private interests. No 'section of the people' and no intermediary group should be allowed to impose their law on the whole,[42] since 'The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority that does not proceed directly from the nation.'[43]

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37. See art. 21, para. 3 of the Universal Declaration of Human Rights of 1948: 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

38. See B. Manin, *The Principles of Representative Government*, Cambridge, Cambridge University Press, pp. 8ff.

39. On the medieval origins of elective representation, see L. Moulin, 'Les origines religieuses des techniques électorales et délibératives modernes', *op. cit.*; also L. Moulin, '*Sanior et maior pars*. Étude sur l'évolution des techniques électorales et délibératives dans les ordres religieux du VIe au VIIIe siècle', *op. cit.*; G. de Lagarde, *La Naissance de l'esprit laïc à la fin du Moyen Âge*, Louvain, Nauwelaerts, 1956; M. Clark, *Medieval Representation and Consent*, New York, Longmans, Green, 1964; A. Monahan, *Consent, Coercion and Limit. The Medieval Origins of Parliamentary Democracy*, Kingston, Canada, McGill-Queen's University Press, 1987; Y. Congar, *Droit ancien et structures ecclésiales*, Variorum Reprints London, 1982, pp. 210–59; G. Post, *Studies in Medieval Legal Thought*, Princeton, NJ, Princeton University Press, 1964, pp. 123–238.

40. See P. Rosanvallon, *Le Sacre du citoyen, op. cit.*

41. A. de Tocqueville, *Considérations sur la Révolution*, I, 5, in *Œuvres*, Paris, Gallimard, vol. 3, 2004, p. 492.

42. See article 3 of the French Constitution of 1958: 'National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof.'

43. The Declaration of the Rights of Man and of the Citizen (1789), art. 3.

In the case of France, one might venture to say that 1958, and the Constitution of the Fifth Republic, marks the date at which a decline in the legislative power of the elected representatives of the sovereign people set in. When the government was given control over the agenda of the parliament,[44] the latter saw its prerogative to propose legislation almost completely eliminated. And its omnipotence was finally undone with the creation of a separate sphere for regulations made by government,[45] which was placed under the aegis of a new body – the Constitutional Council – which would later serve as a model for the first regulatory authorities. So it was in 1958 that the power of the French legislature was reduced in favour of the executive, in practice the highest echelons of the French administration which were shortly to unite the most important political, economic and administrative functions in the land. It was basically at this period that the power of intermediary bodies – soon to be designated as 'State Nobility'[46] – reappeared within the institutions of power. Only ten years later, in the upheavals of post-1968 and amid debates on 'self-management', 'profit-sharing' and the 'new society', another kind of intermediary body – trade union and employer organizations – began to appear on the legislative scene, in the framework of a 'contractual politics' which sought to involve these groups closely in the decision-making process. This trend was evident not only in social affairs[47] but, more discreetly if no less effectively, in domains as diverse as the education system, health or agriculture, where political power was in reality wielded under the supervision of professional associations. But it was in the realm of labour relations that this trend was most visible, because the Constitution had provided it with substantial legal impetus through its consecration of the 'principle of participation'. In the words of article 8 of the Preamble to the 1946 Constitution (retained in 1958), 'All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management

44. The French Constitution of 1958, art. 48: 'Precedence shall be given on the agendas of the assemblies, and in the order determined by the Government, to the discussion of government bills and of Members' bills accepted by the Government.'

45. *Ibid.*, art. 37: 'Matters other than those that fall within the ambit of statute shall be matters for regulation.'

46. See P. Bourdieu, *The State Nobility. Elite Schools in the Field of Power*, trans. Lauretta C. Clough, Oxford, Polity, 1995.

47. See J. Commaille, *L'Esprit sociologique des lois. Essai de sociologie politique des lois*, Paris, PUF, 1994.

of the workplace.'[48] While in law it was workers alone who had this right, employers also became involved, because the principle of participation was used above all to justify the extension of collective bargaining.

Collective bargaining may play a role, firstly, in the elaboration of legislation. This leads to 'negotiated law', as it is called, which has become increasingly important over the last thirty years.[49] Since the law in this case results from the agreements arrived at in the course of its elaboration, the distinction between negotiation – implying transactions between particular interests – and deliberation – implying the goal of the general interest – becomes blurred. Negotiated law has two variants. The first allows management and labour to define the content of the law. Collective bargaining occurs in this case before parliamentary deliberation. The resulting agreement is then incorporated wholly or partly into the law.[50] In this first variant, management and labour are in fact invested with a power to propose laws that is by right reserved by the French Constitution (article 39) for the prime minister and members of parliament. Their agreement is tantamount to the formulation of a bill, which has at times led management and labour to lay claim to a power that the Constitution of the Fifth Republic reserves for the government:[51] that of limiting the parliament's right to amend a bill and forcing on the latter a 'single vote' (*vote bloqué*) on the transformation of their agreement into law.[52] A second variant involves introducing a period of negotiation into the period of legislation. Parliament begins by establishing a general objective in a first law and by inviting management and

48. On the development of constitutional doctrine concerning the principle of participation, see X. Prétot, 'Les sources du droit du travail au regard du droit public', in B. Teyssié (ed.), *Les Sources du droit du travail*, Paris, PUF, 1998, nos. 209ff. See also V. Ogier-Bernaud, *Les Droits constitutionnels des travailleurs*, Aix-Marseille/Paris, PU Aix-Marseille and Economica, 2003.

49. See the ground-breaking article by J.-M. Verdier and P. Langlois, 'Aux confins de la théorie des sources du droit: une relation nouvelle entre la loi et l'accord collectif', *Recueil Dalloz*, 1972, p. 253.

50. This method has been used time and again to reform vast swathes of labour law: on professional training, working hours, conditions of employment, payment of salary on a monthly basis, temporary contracts, etc.

51. French Constitution, art. 44, al. 3: 'If the Government so requests, the assembly having the bill before it shall decide by a single vote on all or part of the text under discussion, on the sole basis of the amendments proposed or accepted by the Government.'

52. This was achieved by introducing clauses providing for the 'self-destruction' of the agreement if its provisions were modified by parliamentary deliberation (see G. Couturier, *Droit du travail*, vol. I, Paris, PUF, 3rd edn, 1996, no. 27, p. 53).

labour to negotiate the means to attain this objective. It then adopts a second law which is informed by the results of the negotiations that have been held. This frequently used method[53] conforms to the position of the French Constitutional Council, which concedes that parliament may devolve on management and labour the task of establishing rules concerning the fundamental principles of labour law, 'insofar as the latitude given to the actors of the collective bargaining may permit new rules to be adopted subsequently by parliament, after a short period of experimentation and evaluation of the practices that have resulted from it'.[54]

Collective bargaining may, secondly, play a role in the implementation of the law. This occurs when parliament intends the application of the law to be dependent on the provisions of a collective agreement. The sense of the law emerges only in its application, and it is the difference between the enactment and the application of the law that becomes blurred. This process also has several variants that are widespread today. The first results from the introduction into French labour law of a type of non-mandatory law, the *loi supplétive*, which enshrines the possibility of company- or industry-wide exemptions. The law in this case no longer sets a minimum which negotiation can only modify in a direction more favourable to workers, but becomes simply a subsidiary norm which may be applied only where no collective agreement already exists. Parliament thereby authorizes management and labour to replace national law with a 'law' corresponding to the occupation or company in question, such that the negotiators come to be vested with a portion of legislative power. However, this power must be expressly conferred by statute,[55] with the result that the negotiators share

53. In 1982, for example, to establish workers' rights to direct expression (French Law no. 82–689 of 4 August 1982, and Law no. 86–1 of 3 January 1986; see the French Labour Code, art. L.461–1ff.); and in 1987, to abolish prior administrative authorization of economic redundancies (Law of 3 July 1986, multi-industry agreement of 20 October 1986, and Law of 30 December 1986; see M. Despax, 'De l'accord à la loi', *Droit social*, 1987, pp. 184ff.).

54. Decision of the Constitutional Council no. 96–383 DC of 6 November 1996. On this decision, see B. Mathieu, 'Précisions relatives au droit constitutionnel de la négociation collective', *Recueil Dalloz*, 1997, p. 152; and on legislative experimentation, see C.-A. Morand (ed.), *Évaluation législative et lois expérimentales*, Aix-Marseille, PU Aix-Marseille, 1993.

55. The Conseil d'Etat, 27 July 2001, trade union Force ouvrière, National Transport Federation, *Revue de jurisprudence sociale*, 1/02, no. 107 (invalidity of the provisions of a decree which, without an express granting of legislative power, would have allowed collective agreements to be made entailing exemptions that would be less favourable to employees).

legislative sovereignty only if parliament wills it. In short, the law becomes a subsidiary norm which allows a legal imperative to be formulated while accommodating a diversity of contexts at the level of the imperative's implementation. This is why it has been so favourably received in European Community law, where it has been deployed in the most striking ways.[56]

A second way in which management and labour are involved in the implementation of the law in France is through the adoption of another type of non-mandatory law, the *loi dispositive*, which gives a right that can only be actualized by collective agreement. This type of law differs from the *loi supplétive* in that it does not fix any subsidiary rule to be applied in the absence of a collective agreement. It functions as an incentive to collective bargaining, which is why it has figured prominently in employment policies, since it allows the State to influence the labour market while respecting the freedom of the parties involved.[57] It has also been extended to other aspects of labour legislation, for example fighting discrimination,[58] profit-sharing and save-as-you-earn schemes,[59] incentives to reduce working time,[60] and so forth. Management and labour are involved in yet another way when parliament delegates to them the task of determining the concrete modalities of the norms it enacts. This amounts to entrusting management and labour with a portion of the regulatory power that is normally

56. For example, the directive no. 94/45 EC of 22 September 1994 states that 'special negotiating bodies' shall be formed within multinational companies to ensure the implementation of the obligation to inform and consult employees. These bodies shall be responsible for defining the concrete content of this obligation, with the directive anticipating a system of consultation only secondarily, in case negotiation fails.

57. Most of the laws concerning the release of funds from the French National Employment Fund (Fonds national pour l'emploi) could be placed in this category. Access to these resources is subject to the drawing up of a series of interdependent contracts: agreements between the State and the company ('FNE Agreements'), collective agreements between employers and trade unions, and individual contracts between the employers and employees concerned (see J. Pelissier, A. Supiot and A. Jeammaud, *Droit du travail, op. cit.*, nos. 232 ff.).

58. See the French Labour Code, art. L.123–4–1 and D.123–1 to 123–5; Law of 13 July 1983, art. 18 (modified by Law no. 2001–397 of 9 May 2001) and art. D.123–6 ff., providing for 'contracts for equal access to employment' to be drawn up between the State and the employer or an occupational or multi-industry organization.

59. See the incentives introduced by what is called the 'Fabius Law', Law no. 2001–152 of 19 February 2001 (*Journal Officiel*, 20 February). See Y. Saint-Jours, *Recueil de jurisprudence Dalloz*, 2001, p. 1179; G. Iacono, *Recueil de jurisprudence Dalloz*, 2001, p. 1259; F. Favennec-Héry, *Revue de jurisprudence sociale*, 1/02, p. 2.

60. See the financial provisions of the laws concerning moving to a 35-hour week in J. Pelissier, A. Supiot, and A. Jeammaud, *Droit du travail, op. cit.*, no. 920.

the prerogative of the government. It is a method that has received the approval of the French Constitutional Council, in the name of the principle of worker participation,[61] and a particularly spectacular consecration by European Community law, with the possibility opened up by the Treaty Establishing the European Community of implementing directives at national level by means of collective labour agreements (art. 137, para. 3 and art. 139, para. 2).

After all, it is perfectly logical that the most visible infringements of the traditional interpretation of democracy should have appeared in European Community law, namely the democratic principle that national sovereignty is indivisible and can only be exercised by the elected representatives of the people. From the very beginning, the Treaty of Rome reflected a rather blurred vision of this principle, given that the work of legislation was divided up between a market regulatory authority with executive powers (the European Commission), a body representing the different countries (the European Council), an assembly of representatives elected by universal suffrage (the European Parliament) and a judiciary authorized to deliver binding rulings (the Court of Justice of the European Communities, which 'hereby rules . . .'). Of course, since the European Council is composed of representatives of democratically elected governments, the principle that election constitutes the basis of legislative power in a democratic regime could still be upheld. But clearly this institutional organization already gave off more than a faint whiff of the *ancien régime*: in the European Commission, we have a new clergy of technocrats, doctors in the prevailing law of the single market; the European Council plays the role of the Estates General, responsible for ensuring a representation of the peoples of Europe that is more qualitative (weighting between countries) than quantitative (universal suffrage);[62] the figure of the judge who lays down the law, which

61. 'The Legislator may, subsequent to setting out the rights and obligations defining working conditions and employment relationships, permit employers and employees, or their representative organizations, to determine the concrete modalities of the implementation of the norms it lays down, after suitable consultation' (Constitutional Council, decision 89–257 of 25 July 1989, *Droit social*, 1989, p. 81, note X. Prétot; *L'actualité juridique du droit administratif*, 1989, p. 796, note F. Benoit-Rhomer).

62. By way of instructive anecdote, it turns out that the Draft Preamble to the European Constitutional Treaty contained a quotation from Thucydides defining democracy as the power of the greatest number. This principle was considered at odds with the principle of equality between countries and was therefore removed from the text adopted at the Intergovernmental Conference of June 2004 (see C. Barbier, 'Un traité constitutionnel en quête de ses ultimes auteurs', *Demain l'Europe*, 23 July 2004, p. 2).

everyone thought had been abolished in 1789, has been miraculously resuscitated in the form of the judges of the European Court; and lastly, we have an assembly of representatives elected by universal suffrage in their respective countries but reduced to playing supporting roles without any real power. A further limit has been overstepped in the Eurozone countries, with the establishment of a supranational authority that mints money (the European Central Bank) but which is monitored by no political power – a construction unknown since medieval times.

The Maastricht Treaty allowed management and labour to take the place of a parliament in developing directives on social issues.[63] These 'legislative agreements' are without a doubt a major legal innovation. They lead to legislative power being shared out between a multiplicity of bodies: the European Commission proposes legislation, management and labour negotiate the new text, the European Council gives this text the legal force of a directive and, lastly, member states are responsible for the implementation of the directive within each national legal system. Practically the only body *not* involved in this process of elaboration and implementation of European law is the European Parliament! The European Community judiciary itself has noted that a new version of the democratic principle is being instituted, according to which 'sufficient collective representativity' of interest groups replaces the representativity of elected members of the European Parliament.[64] This new version recalls feudal institutions, with the balanced representation of different social groups supplanting the law of numbers as the mode of expression of the general will of the peoples of Europe.

However, it would be wrong to see European Community law as a kind of Trojan Horse, foreign to French legal culture. The legislative agreements enshrined by the Maastricht Treaty are in fact typically

63. These provisions are now consolidated in art. 138–139 of the EC Treaty. When the European Commission plans to develop a directive in the social sphere, management and labour can take over the issue and negotiate an agreement, to which the European Council will give force of law.

64. 'However, the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour . . .' (Court of First Instance of the ECJ, Case T–135–96, Judgement of 17 June 1998, UEAPME vs. Council of the European Union, ECR II–2335). The European Constitutional Treaty takes a step further in this direction when it provides for a third type of democracy (participatory: art. I–47) alongside representative democracy (art. I–46) and 'autonomous' social dialogue (art. I–48).

French, and no other major European country was able to provide a model for national cross-sector negotiation linked to the legislative process.

In some sense, it is therefore a French image which is reflected back to us from Community law, even if this image is of a feudal heritage, representing an aspect of French legal culture whose vitality we are loath to admit. The medieval period, like Freud's primary scene, is passed over in silence by many contemporary authors when they retrace the genesis of our core Continental legal categories. If they do not simply decide that the world began in 1789 – or even 1804, when the French Civil Code came into force – they leap directly from Antiquity to the Renaissance, from Roman law to national legal systems. The force of this repression is strongest in France, where the feudal system existed in its most developed form.[65] We have difficulty accepting that the decline in nation-state sovereignty has not been accompanied by a symmetrical gain in individual freedoms, but rather has breathed new life into feudal structures, with the resurgence of the feudal dimension of our contractual culture: the contract is used today as was the bond of vassalage in the past, to enmesh free persons within a network of obligations which both encloses and goes beyond them.

The Enfeoffment of Freedoms

We may consider that a decline in State sovereignty leads automatically to an increase in individual freedom only if we forget that such freedom can only be realized substantially if the law takes charge of everything that cannot be reduced to an exchange of goods and services, in other words, everything that goes beyond the realm of the negotiation of measurable values.[66] If, however, the law delegates to the contract the task of circumscribing its content, the contracting parties find themselves subordinated to goals that exceed their patrimonial interests. The contract ceases to be used to exchange quantifiable objects, and participates in the definition of the common good, thus taking on a 'political' dimension. This affects the contracting parties, since their wills remain free, but only on condition that they pursue goals that go beyond their particular interests, with

65. See M. Bloch, *Feudal Society, op. cit.* On the medieval origins of the modern contract, see Chapter 3.

66. See Chapter 3.

the result that their freedom is effectively curtailed and subordinated to the attainment of these goals. This phenomenon appears most clearly in the socio-economic field, both on an individual level, in the standardization of behaviour, and on a collective level through the instrumentalization of the sources of law.

The Standardization of Behaviour

The fact that a contract may be an instrument for subjugating the will of another person should come as no surprise to us; after all, we see this characteristic in the employment contract, which is essentially a bond of subordination. However, this subjugation comes in new forms today. With the weakening of the criterion of subordination, many employees today enjoy a certain freedom; but it is a directed freedom, subject to goals agreed upon with the company head. In a parallel movement, the legal independence of entrepreneurs is being reduced as they become involved in contractual relations or membership networks that restrict their economic activity. In these cases power is expressed through 'objective' criteria which are independent of the arbitrary power of a boss. This is how we pass from governing to governance. Governance is to government what regulation is to rules and ethics to morals: a technique for standardizing behaviour that aims to close the gap between the law and the subject of law. The idea is to make human beings behave in a way that spontaneously conforms to the needs of the established order.

It is an irony of history that our modern Western world, which is so hostile to ritual, should rediscover in this phenomenon the principles of ritualism current in the Chinese Empire, and in the name of which it rejected 'government by laws'.[67] As Léon Vandermeersch has shown, the ritual system involves modelling social relations on forms that are at once the cause of things and the key to the harmonious functioning of the world:

> Once the rights have been respected, and harmony has thereby been introduced into society, each individual spontaneously behaves as it is most fitting for all and for himself. Ritualism, which dispenses completely with any idea of rights or of liberty, accords, by contrast, the greatest importance to the idea of spontaneity (*ziran*).[68]

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67. See Chapter 2.

68. L. Vandermeersch, 'An Inquiry into the Chinese Conception of the Law', in S.R. Schram (ed.), *The Scope of State Power in China*, *op. cit.*, p. 13.

This idea, that norms should be not imposed but persuasively absorbed from the outside, is frequently expressed by Chinese authors through the physiological metaphor of sweating: 'The hearts of men must be bathed in the sovereign edicts, just as a man's members are bathed in the sweat of his body; and then men will subject themselves with confidence [. . .]. Then the scattering abroad [of beings] in the universe may be brought into harmony.'[69] This ideal finds its contemporary expression in the West in ideas of governance, regulation and ethics, which serve to challenge law and constraint in the name of the spontaneous adherence to a certain order.

This new way of disciplining people was first conceived and tested in large transnational companies. What is novel about how these companies are run is not the place that international trade has within them but their independence with respect to the political framework of States. They are modelled nowadays on the idea of a world system in which particular functions (research, development, design, engineering, production and marketing) are organized according to a transnational plan. Since they are no longer supervised by the State, but have also lost their captive markets, these companies are exposed to new risks in a world of globalized trade.[70] They are obliged to supervise not only their employees but indeed all those whose performance affects the profits they make: investors, consumers, suppliers, subcontractors, political figures in the host country, and so forth. These companies have become the testing ground for new techniques of power which subsequently spread into the public sphere, in which information and communication naturally play a major role. Privatization and the extension of the free market have allowed these companies to get their hands on all the major media – radio, television, newspapers, publishing, cinematic production and distribution – and thus to control the world of ideas and images, either directly (through financial control) or indirectly (through the

69. Cheng Yi, quoted by Vandermeersch, 'An Inquiry into the Chinese Conception of the Law', *loc. cit.*

70. In a book its publisher presents as the 'First Encyclical' of the 'Pope of Management', Peter Drucker writes: 'In the traditional multinational, economic reality and political reality were congruent. The country was the "business unit", to use today's term. In today's transnational – but increasingly, also, in the old multinationals as they are being forced to transform themselves, – the country is only a "cost center." It is a complication rather than the unit for organization and the unit of business, of strategy, of production and so on' (Peter Drucker, *Management's Challenges for the 21st Century*, Oxford, Butterworth-Heinemann, 1999, p. 36). For a similar argument, see the seminal work of R. Reich, *The Work of Nations: Preparing Ourselves for Twenty-first Century Capitalism*, New York, Knopf, 1991.

financing of advertising). They can therefore have a much more secure hold over minds than ever the Church could. They have also managed to win over politicians and intellectuals, converting them *en masse* to business values (when they do not simply buy them, as is evident from the countless corruption scandals which poison politics all over the globe).[71] New legal techniques are mobilized to ensure that subcontractors are properly monitored (technical certification and quality guarantees), and that consumer loyalty is bought (through relational contracts that are binding on a provider beyond the one-off supply of goods or services).

But it is above all in the novel ways in which the 'human resource' is used that the legal dimension of these new techniques of governance emerges most clearly. While not excluding ritual – all the rage in management today – governance recycles the ingredients of Western legal culture, and notably the contract. The latter, in fine feudal form,[72] is used to weave bonds of allegiance of a new type, by subjecting people to 'objective' criteria of evaluation through which their performance may be dictated without anyone having to give them orders. These bonds encompass not only those who work in or for companies but also those who are excluded (the unemployed) and even those who are in charge (the employers).

Workers greet the new forms of 'human resource' management to which they are subjected with the following refrain: 'We have been objectified!'[73] The objectified worker is one who, faced with the anonymous power of goals to be attained, has lost his or her one last subjective relation, which was the personal relation to a manager. The Taylorist system had privileged the standardization of the worker's acts, which anticipated the legal concept of subordination. Every job was broken down into a sequence of actions which were as simple and measurable as possible. The worker assigned to the job had to carry out the actions in the prescribed order and at the prescribed speed, under the supervision of another employee who was his or her superior. This system was suited to mass production of moderate quality only. By contrast, the new ways of organizing work today are adapted to the production of a diversified range of high-quality products and services. In order to achieve this, the worker must win back some freedom in the execution of his or her tasks – reviving

71. See Y. Mény, *La Corruption de la République*, Paris, Fayard, 1992.

72. See Chapter 3.

73. See E. Orban, *Services publics! Individu, marché et intérêt public*, Paris, Syllepse, 2004, p. 47.

the tradition of the 'mechanical arts' which Taylorism had precisely sought to do away with – and the hierarchy must not weigh too heavily on the worker. However, supervision does not so much disappear as shift to another object: what is scrutinized is not so much the way in which a particular task is performed as the result of that task. So, instead of obeying the orders of a manager in the execution of their work, employees subscribe to objectives which are in principle transparent, verifiable and known to all, and the pursuit of these objectives gives rise to a follow-up process. This process serves both to evaluate the capacities and performance of the employee and the appropriateness of the objectives assigned, allowing them to be altered in the light of experience.

That is why companies have introduced standards for evaluating the particular contribution of each worker. The standardization of actions which characterized the Taylorist system has given way to the standardization of persons. The aim is always to reduce the element of chance inherent in the employment contract, since the employer is never sure of the quality of the labour hired; henceforth the element of chance is to be reduced through the worker's interiorization of company norms and values, and not through the codification of the ways in which the work should be carried out. In this context, the power of the worker's superior is derived not from the fact that he or she can do the job better than the subordinate – indeed, the subordinate often knows more about the work at hand – but from the fact that the superior is entitled to apply these abstract standards of evaluation to the subordinate's performance.[74] These standards, which are often developed by experts outside the company, are used to justify the employer's decisions, particularly as concerns salaries.[75] Policy on financial remuneration – salaries and profit-sharing schemes – is certainly a key component, alongside individual evaluation interviews and agreement on objectives, of this system of participatory management. It often takes the form of an individualization of salaries, on the basis of these supposedly objective standards of evaluation of job contents and performance. For it is now out of the question for employees simply to devote a determinate length of time to the job and obey orders mechanically, in return for a wage.

74. Some of these standards have met with great success in the business world, such as the Hays method of job evaluation, which includes, among other criteria of evaluation, the (quantifiable!) degree of 'creative initiative' needed from the worker. See C.-H. Besseyre des Horts, *Gérer les ressources humaines dans l'entreprise*, Paris, Les Éditions d'Organisation, 1990, pp. 52 ff.

75. See B. Raynaud, *Le Salaire, la règle et le marché*, Paris, C. Bourgois, 1992.

They must, rather, 'give the best of themselves', in order to maximize their income, which means behaving *as though* they were working freelance. This is how the fiction of a 'freelance employee' is established. At the same time, the employer's power as omniscient and omnipotent, endowed by 'divine right', is replaced by a functional power which applies management norms founded on the authority of experts who conceive or apply them in the framework of audit procedures.[76]

In this system the question soon arose of the legal force of the objectives assigned to employees. Case law shows that failure to attain these objectives is not in itself a cause for dismissal since, in order to be opposable to the employee, the objectives must fulfil three conditions:[77] they must be realistic, they must be appropriate to the professional capacity of the worker (both in terms of training and in terms of scope of action) and, lastly, an employee who fails to attain them must have committed an act of misconduct. This doctrine is in perfect harmony with the very principle of management by objectives, since the latter's aim is to make power itself into something stripped of any arbitrary or subjective element. Moreover, beyond any particular solution it provides, this doctrine expresses a rule of much broader significance: that no 'objective' criterion exists, from the legal point of view, that may prevent the case of both parties being heard. Another example of how the enlightened assent of the employee has become a condition of the legitimacy of the employer's actions is in the judicial decisions that have made the application of a disciplinary sanction that would alter the employment contract conditional upon the employee's agreement.[78] This solution, which is hotly contested amongst scholars, has had indisputably negative side-effects, since it encourages employers always to prefer dismissal to less serious sanctions. But it constitutes a particularly clear illustration of what the objectivization of disciplining techniques implies: discipline ceases to be the expression of a unilateral power and becomes a form of punishment to which the person concerned gives their consent. In

76. See M. Power, *The Audit Society. Rituals of Verification*, Oxford, Oxford University Press, 1997.

77. See P. Waquet, 'Les objectifs', *Droit social*, 2001, p. 120.

78. *Bulletin des arrets de la Cour de cassation*, 16 June 1998 (Concerning the company Hôtel Le Berry); *Droit social*, 1998, p. 803, report by P. Waquet. See C. Radé, 'À propos de la contractualisation du pouvoir disciplinaire de l'employeur: critique d'une jurisprudence hérétique', *Droit social*, 1999, p. 3; M. Morand, 'Le contractuel pourchasse le disciplinaire', *La Semaine Juridique: JurisClasseur Périodique*, ed. E, 1998, p. 2058.

other words, the generalization of contractual relations plays a role in the interiorization of disciplining techniques, as is also evident in the latest developments in criminal law.[79]

It should come as no surprise, then, that this phenomenon extends beyond the contract of employment and also affects freelance workers. In the industrial model of the company, which was centralized and hierarchical, and encompassed the whole of the production process, a clear distinction was possible between work that was under an employment contract and work that was freelance. This opposition has become blurred in the networked model of the company that predominates today.[80] In labour law, the idea of a legal relation of subordination, of strict obedience to the orders of a superior, has given way to a gentler version, that of integration into an organization within which workers are free to carry out in the manner they wish objectives agreed upon with their superiors, objectives that are in fact impersonal norms of evaluation that apply equally to their superiors. In civil and commercial law it is, by contrast, legal independence that is emptied of its substance, as entrepreneurs are subjected to the collective discipline of integrated production or distribution networks. The farming and trade sectors see large numbers of these 'dependent entrepreneurs', who shoulder the responsibilities of a company without having the power to manage it freely.[81] In both cases, what we are witnessing are new forms of subordination.[82] Work no longer takes place within stable, hierarchically structured collective organizations, but is increasingly part of coordinated procedures within networks whose limits are unclear.

The idea of fixing objectives by contract, as a way of making the individual's behaviour conform to norms, quickly spread beyond the workplace. It was adopted particularly by the French State which, for the last twenty years, has sought to use contracts to patch up the

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79. See the increasing number of sentences involving community work or electronic tagging, which can only be passed with the consent of the offender (P. Poncela, *Droit de la peine*, Paris, PUF, 2nd edn, 2001, pp. 126ff.).

80. M. Freedland, *The Personal Employment Contract*, Oxford, OUP, 2003 (paperback 2005). For a European-wide comparative analysis, see A. Supiot (ed.), *Beyond Employment*, *op. cit*, pp. 10ff.

81. See L. Lorvellec, 'L'agriculteur sous contrat', *op. cit.*; L. Amiel-Cosme, *Les Réseaux de distribution, op. cit.*; J. Beauchard, *Droit de la distribution et de la consommation*, Paris, PUF, 1996; M. Behar-Touchais and G. Virassamy, *Les Contrats de la distribution*, Paris, LGDJ, 1999.

82. See A. Supiot 'Les nouveaux visages de la subordination', *Droit social*, 2000, p. 1313.

social bond. The creation in 1988 of a 'minimum income for occupational and social integration' – the *revenu minimum d'insertion* or RMI – was a test case: a person is eligible for this allowance only if he or she signs an 'integration contract' consisting of reciprocal obligations between the beneficiary, who is bound by an 'integration plan', and the public authorities, who undertake to help this plan be carried out.[83] A similar technique was used some years later as the basis for the reform of the French unemployment insurance scheme, inspired by the British example of the Job Seeker's Agreement.[84] In France, the principal innovation introduced when this insurance scheme was relaunched in the year 2000 was the contractualization of the relations between the unemployed person and the insurance scheme (the Association pour l'emploi dans l'industrie et le commerce or ASSEDIC), as well as between the unemployed person and the public services (the Agence nationale pour l'emploi or ANPE). All job seekers must now sign a contractual Return to Work Assistance Plan (the Plan d'aide au retour à l'emploi or PARE) with the ASSEDIC, which mentions their rights and obligations, as well as those of the ASSEDIC and the ANPE. The payment of the benefit – the 'return to work' allowance – is 'consequent upon' signature of the contract.[85] The PARE defines the obligations of the job seeker and especially the obligation to undertake an in-depth interview with the ANPE within the month following signature. At the end of this interview, the ANPE and the job seeker agree on a personal action plan (*projet d'action personnalisé* or PAP). This plan – which can be revised if the job seeker does not find employment within the six months following the contractual undertaking – defines the types of employment corresponding to the qualifications and professional capacities of the job seeker, or the employment for which he or she wishes to retrain, and the assistance or training that will be needed to carry out this plan.[86] The PAP is therefore a real 'contract of agreed objectives', containing all the ingredients characteristic of

83. On these procedures, see the contributions to the special issues of *Droit social* (July–August 1989) and of the *Revue de droit sanitaire et social* (no. 4, 1989).

84. See J. Carby-Hall, 'La fonction et l'effet du droit social britannique dans le contexte du débat emploi/chômage', *Revue internationale de droit comparé*, 1, 1997, p. 75.

85. See the Annex to the French Labour Agreement of 1 January 2001, art. 1 ('Convention du 1er janvier 2001 relative à l'aide au retour à l'emploi et à l'indemnisation du chômage').

86. For a general overview, see J. Pélissier, A. Supiot and A. Jeammaud, *Droit du travail, op. cit.*, nos 158ff. And for a detailed analysis of the reform, see the special issue of *Droit social*, 'La nouvelle assurance-chômage', April 2001.

participatory management: contractual definition of objectives, evaluation outcomes that may modify initial objectives, and so forth. It is a particularly good example of a much more general trend, in which a process of monitoring the application of a law is replaced by assistance in carrying out a plan drawn up by both parties.[87] The idea of sanctions consequently tends to be dissolved into contractual mechanisms ensuring that the rights and obligations of the parties are regularly revised.

The question immediately arose of whether an unemployed person could refuse to sign the PARE contract without forfeiting his or her right to benefits. Those who gave an affirmative response to this question argued that signing the PARE contract constituted a new condition of access to unemployment benefits, which the social partners had no right to add to the conditions already restrictively provided for under the law. The French Supreme Administrative Court, by contrast, took the view that the PARE did not create any new obligations for the job seeker.[88] The obligation to sign the PARE was considered to be contained within the legal obligation to seek work. What is new here is not the relation between benefits and job-seeking – the latter has always been a condition for receiving the former – but the contractualization of this relation.[89] The process of contractualization aims on the one hand to define concretely the content of the legal obligation to seek employment, and on the other hand to impose a legal obligation on the benefits scheme to help with this search. When judges acknowledged subsequently that the PARE was indeed a contract – and that it was in the interests of the unemployed person that the unemployment insurance scheme should have to fulfil certain obligations[90] – the position adopted by the Supreme Administrative Court came to imply that an obligation to contract may be contained implicitly within a legal obligation; as such, if an obligation to seek work is imposed by law, making this

87. See, for example, in the French prison service, the remit of the Vocational Counselling and Probation Department, which is responsible for following up on the offender's plan for reintegration (French Code of Criminal Procedure, art. D. 460ff.; see P. Poncela, *Droit de la peine*, *op. cit.*, pp. 298ff.).

88. Conseil d'État, 11 July 2001, *Revue de jurisprudence sociale*, 10/01, nos. 1157 and 1168.

89. C. Willmann, 'Le chômeur cocontractant', *Droit social*, 2001, p. 384; A. Supiot, 'Un faux dilemme: la loi ou le contrat?', *Droit social*, no. 1, January 2003, pp. 59–71, p. 68.

90. Marseille, Court of First Instance (Tribunal de grande instance), 15 April 2004. See A. Supiot, 'La valeur de la parole donnée (à propos des chômeurs "recalculés")', *Droit social*, 2004, p. 541.

obligation the object of a contract would be adding nothing new. Now this clearly gives vast scope to feudal-style techniques of subordination. But it also shows that the contract does not emerge unscathed from this contractualization of a legal obligation. If a legal obligation brings with it an obligation to contract, then this at the very least overturns the principle of the freedom to contract.

One might be inclined to think that people in positions of power – directors of private companies or heads of government departments – are not subjected to these new techniques of power. But this is not at all the case, and they are likewise caught in the snares of 'governance'. The difference between the State and the private company in this respect is a difference less of structure than of point of reference. The State has qualitative, supra-patrimonial values as its reference point; it operates within the long-term horizon of the life and destiny of people. Private enterprise has quantitative, patrimonial values as its reference point; it is responsible for creating products or services and it operates within the short-term horizon of market exchange. This is what makes today's widely held belief that one must manage the State as one manages a company so frightening – and likewise the belief that there is no essential difference between economic power, political power and administrative power. Yet the same organizational questions may well arise for States as for large companies, and historically their structures have sometimes developed along similar lines. Like States, big companies today find it impossible to take all decisions at the top, and have to invent new ways of governing people. Like States, they are going through a crisis of legitimacy which takes the form of the increased influence of shareholders over against the technocratic power of managers. Their leaders, like those of States, have had to redefine their role and adopt the setting of objectives, while leaving the details of meeting these up to individual and collective bargaining. Even the figure of the independent authority can be found in companies, in the field of finance (market authorities, auditors) as well as in that of products (standard-setting bodies and certification agencies).

In principle, company directors are the sole arbiters of their management choices and the only persons ultimately responsible for any mistakes committed within the company. But this sovereignty is affected by the penetration of 'objective' disciplinary practices into the contractual sphere. Like their employees or subcontractors – or like the unemployed – company directors are themselves obliged to meet objectives to which they are supposed to have adhered. The figure of the 'dependent employer' is increasingly common as a result

of company networks, and is the clearest sign of the hold that management by objectives has over even the employer's power.[91] While within a group of companies the director of a subsidiary is legally bound by the orders of the parent company, via the governing bodies, within a network the activity of every company is bound by standards of quality and efficiency that none of them have elaborated but to which each has adhered by contract. These 'objective' standards (ratified by the International Organization for Standardization (ISO)) have in fact been elaborated by experts working in private-sector agencies which are presumed to be independent, and the observance of these standards is monitored by independent certification agencies.[92] The standards derive their binding force from the mesh of contracts which constitutes the legal fabric of the network. In arrangements such as these, which strongly remind us of pre-industrial forms of economic organization,[93] the contract becomes a means of imposing common disciplinary practices – standardization in the most technical sense of the term – on how directors run their companies.

Such techniques of standardization have also been used to oblige company directors to defend the interests of shareholders. The principles of corporate governance as they came to be developed in England and the USA,[94] and later in Continental Europe, enshrined this goal. Companies were obliged to obey the objectives of 'value creation' for shareholders (that is, the objective of enabling shareholders to get richer). This obligation does not take the form of orders given to company directors (who remain free to decide on the ways and means of value creation) but, again, of 'objective' standards – accounting standards – which both affect and express management choices. As is well known, accounting technique distinguishes

91. See A. Supiot 'Les nouveaux visages de la subordination', *op. cit.*

92. See F. Meyer (ed.), *Certifier la qualité?, op.cit.*

93. See P. Minard, 'Contrôle économique et normes de production dans la France des Lumières', in Istituto Datini, *Poteri economici e poteri politici (secc. XIII–XVIII)*, Florence, Le Monnio, 1999, pp. 641ff.

94. A report from the American Law Institute was published at the end of the 1980s, entitled *Principles of Corporate Governance*, followed a few years later in the UK by a *Code of Best Practice* stemming from the work of the Cadbury Commission. See a presentation of these texts by A. Tunc, 'Le gouvernement des sociétés anonymes. Le mouvement de réforme aux États-Unis et au Royaume-Uni', *Revue internationale de droit comparé*, 1, 1994, pp. 59–72; see also N. Decoopman, 'Du gouvernement des entreprises à la gouvernance', in CURAPP, *La Gouvernabilité*, collective volume, Paris, PUF, 1996, pp. 105ff.; B. Brunhes, 'Réflexions sur la gouvernance', *Droit social*, 2001, p. 115.

between management or cost accounting and financial accounting (used to inform a third party). In the case of groups of companies, the rules for financial accounting (consolidated accounts) are developed under private law by international authorities, which are composed of experts who are in principle independent.[95] The standards developed by these authorities have been reworked in the past twenty years to reflect more faithfully a company's performance in value creation, by means of indicators such as 'economic value added'. This was the main reason why the old (and prudent) principle of the 'historical cost' of an asset was abandoned, whereby only the purchase value of an asset would be entered. It is indeed prudent to take into account the loss in value of an asset (by calculating depreciation or constituting reserves), but it is not prudent to speculate on its possible gain in value. The principle of 'fair value' has, however, replaced the principle of 'historical cost', which means that the value of an asset must now be calculated taking into account today the income it is supposed to generate in the future, that is, in practice, entering its market value on the day the accounts are closed (also called the 'instantaneous market value').

The company director's task – on which hangs his or her job – is consequently to increase this value. In such an accounting image of the company, salaries are counted as expenditure, and any radical reduction in them – for example by cutting staff numbers – will automatically create 'value'. How the company is managed – hiring, firing, purchases, sales, loans, et cetera – becomes entirely determined by its accounting image (which explains firings on the basis of stock market performance). The principle of 'fair value' is blithely being welcomed into the European Union today,[96] just as it is beginning to demonstrate some worrying shortcomings in the United States. It is obviously illusory to believe that accounting standards might be

95. There is the Financial Accounting Standards Board (FASB) whose standards (called US GAAP) are observed by US companies; and the International Accounting Standards Committee (IASC) whose International Accounting Standards Board (IASB) develops standards which are called International Accounting Standards (IAS), and which aim to be international in application. The IASC is a foundation under private law based in London and was until recently chaired by the former chairman of the US Federal Reserve Board. See Y. Lemarchand, 'Le miroir du marchand. Une histoire de la norme comptable', in A. Supiot (ed.), *Tisser le lien social*, *op. cit.*, p. 213.

96. On 12 March 2002 the European Parliament was nearly unanimous in adopting a draft ruling of the European Commission obliging companies quoted on European stock exchanges to use IAS standards as from 2005. These common rules were to be called International Financial Reporting Standards (IFRS).

'purely technical' rules, free from any political bias. Moreover, estimating future revenue flows is a chancy business, more akin to setting a price on divine grace than to experimental science. And one could equally hold the view that the value creation to be taken into account should be a company's net contribution, not to shareholders but to the countries in which it operates; or one could enter pension investment funds as an expenditure and not as an asset; or else decide that stock options should be treated as expenditure. For in reality there is no 'purely technical' standard, and accounting techniques are informed, like any other normative system, by a certain representation of a just order, by beliefs therefore, and not by experimental science. If a national parliament were to seek to reduce the number of redundancies 'caused' by stock market performance, it would do well to examine the content of these standards rather than desperately trying to complicate the legal framework around redundancy. It would then be acting on what determines the employer's decision in advance, rather than exhausting itself attempting to limit the effects of such decisions once taken. Within a system of norms where human beings are always counted as expenditure and never as a real value in themselves, legislation on redundancy can only limit what is otherwise programmed social demolition.

The new techniques of standardization, which have been tried and tested in the private sphere, are currently spreading over into the public realm, where they are liable to have profound effects on the very notion of civil service. A particularly striking example of this can be found in France, in the recent Constitutional Bylaw on Budget Acts (the Loi organique relative aux lois de finances or LOLF[97]). This new 'financial constitution' for the country applies the methods of management by objectives to public expenditure. Budgets will be allocated to progammes 'for implementing an action or a consistent set of actions coming under the same ministry and involving both specific objectives, defined in the public interest, and expected results subject to review' (article 7). The budgets (excluding staff) allocated to a particular programme are fungible, such that no prior definition of

97. Law no. 2001–692 of 1 August 2001, which came into force in January 2006. See the special dossier on this law in the *Revue française de finances publiques*, 76, November 2001, and 82, June 2003; see also M. Bouvier, 'La loi organique du 1er août 2001 relative aux lois de finances', *L'Actualité juridique du droit administratif*, 2001, p. 876; L. Tallineau, *Revue française de droit administratif*, 6, 2001, p. 1205; L. Philip, *Revue française de droit constitutionnel*, 49, 2002, p. 199; S. Damarey, 'L'administration confrontée à la mise en oeuvre de la LOLF', *L'Actualité juridique du droit administratif*, 2003, p. 1964.

types of expenditure may be imposed on how the programme is run. Whenever a Finance Bill is put before parliament, each programme must be accompanied by an 'annual performance report' including '[t]he presentation of its actions, associated costs and goals, and results obtained and expected for coming years measured by a justified choice of accurate indicators' (article 51). An 'annual performance plan' will make known the results obtained for each programme. Alongside this reform, the LOLF is introducing a general public accounting system, also called accrual basis accounting, whose rules are no different from those applied to private companies except in view of 'the specific nature of government action' (article 30). The accounts of the State, like those of private companies, shall be 'lawful, faithful and give a true and fair view of its net assets and financial situation' (article 27), and they shall be audited (by the Court of Auditors).[98] The aim of this reform is to spread the culture of 'governance' within the civil service. Instead of having to ensure that expenditure obeys rules fixed in advance, budget holders have much more freedom in how they run their projects, which aim to meet objectives that they themselves have helped to define. However, they are obliged to account for their project's efficiency, which is evaluated on the basis of 'objective' and quantifiable criteria. The reform constituted by the LOLF effectively supplies the financial instruments that the process of subjecting government action to contractual procedures was lacking.

The Instrumentalization of the Sources of the Law

The rapid spread of contractual techniques has also affected the sources of law, but without increasing the freedom of contracting parties any more than it has in other areas. When integrated into the sources of law, contractual agreements are encumbered by norms that lie outside the remit of those who negotiate or implement such agreements; the latter are instrumentalized by the law and their negotiation is pre-programmed. Inversely, laws and regulations may themselves be instrumentalized by contractual agreements that are made in advance of any political decision, and that predetermine it.

This instrumentalization is evident above all in the development of legislation on collective bargaining. Over the past thirty years, the

98. See L. Levoyer, 'Fondements et enjeux de la réforme de la comptabilité de l'État', *La Revue du Trésor*, 1, January 2003, p. 3.

collective labour agreement has gradually ceased to be simply an agreement concerning the interests of the employers and the employees, as represented at the negotiation, and has become a means of achieving objectives that go beyond these interests. This development affects both the identity of the contracting parties and the objects of negotiation.

The conditions that have to be met in order to arrive at a collective agreement have become increasingly stringent over the years. Initially, any grouping of workers or employers could sign a collective agreement. Thereafter, layer after layer of restrictive conditions concerning the 'capacity to enter into agreement' were added. This capacity was first restricted, as concerns the representation of employees, to professional associations, then to associations that could prove they were representative. With the exemptions instituted by agreement in 1981, then with the reform on the 35-hour week, the prerequisite of majority representation emerged in France, subsequently to be applied to all collective agreements at the demand of management and labour.[99] This development has a counterpart in European Community law, where 'sufficient collective representativity' of signatories to agreements that will have a legislative character – instituted by the Maastricht Treaty – became obligatory.[100]

These restrictive conditions concerning the 'capacity to enter into agreement' are the result of the altered function of the collective labour agreement. As soon as a collective agreement decides on issues of general interest, it must be elaborated by legal entities recognized by the authorities (the government or the judge) and must be able to justify its role in quantitative terms (majority representation, referendum). The form of non-parliamentary democracy that is emerging out of this development of the collective agreement leads to the introduction of techniques for accrediting legitimate contracting parties who are then entitled to contribute to the contractual elaboration of the law.

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99. On the issue of representation, the 'Common position on the ways and means of further developing the practice of collective bargaining', adopted by management and labour in July 2001 (*Liaisons sociales*, 1 August 2001, C1, no. 174), was taken up by the French parliament in its reform of the right to collective bargaining in 2004. See M.-L. Morin, 'Principe majoritaire et négociation collective: un regard de droit comparé', *Droit social*, 2000, pp. 1083ff.; also G. Borenfreund, 'L'idée majoritaire dans la négociation collective', *Mélanges M. Despax*, Toulouse, Presses universitaires de Toulouse, 2002, pp. 429–44.

100. See the Court of First Instance of the ECJ, case T-135/96, judgement of 17 June 1998, UEAPME vs. Council of the European Union, ECR II–2335.

With the extension of obligations to negotiate, the *objects* of the negotiation also come to be binding on the contracting parties. Yet where there is contractual freedom no one should be legally bound to enter into negotiation and even less into contract. French labour law began to depart from this principle already in 1971, when it recognized employees' right to collective bargaining, and even more clearly after 1981, with the introduction of the first obligations to collective bargaining. This legal innovation was presented by parliament itself as the consecration of a new right for workers, confirmed by case law and the majority of scholars. Such an analysis is not wrong, but it is extremely reductive. The law does not confine itself to imposing collective bargaining, but additionally establishes its contents, and the list of subjects on which one is obliged to negotiate is getting longer every year. In 1981, the Auroux reforms prescribed only the annual negotiation of salaries and working hours with, every five years, the negotiation of issues concerning professional development; in other words, these reforms affected only the essential ingredients of the employment relationship. But since that date, the most varied aspects of labour law have, one after the other, been subjected to the obligation to negotiate: professional training, save-as-you-earn schemes, equality between men and women, et cetera. The same tendency can be observed in European Community law: whether on the issue of establishing 'European Works Councils' in transnational firms, creating European limited liability companies, or organizing mechanisms for the representation and consultation of workers, European directives create obligations to negotiate, which may be specific (special negotiation groups) or general.[101] However, the obligation to negotiate is not an obligation to contract, and one would be wrong to see in this development solely a decline in the unilateral power of the employer. The essential issue perhaps lies elsewhere: in the fact that the parties to the negotiation are no longer 'freely contracting', but have become the means by which public policies – on professional training, on equality between men and women, on employment, et cetera – are implemented. The parties have become instruments for attaining certain objectives which they have not been involved in defining but which they are obliged to adopt.

101. See art. 4, cited above, of the directive 2002/14 EC of 11 March 2002, which provides that consultation must be conducted 'with a view to reaching an agreement' when it concerns 'decisions likely to lead to substantial changes in work organization or in contractual relations'. It is hard to imagine an important decision that would *not* be covered by such a broad definition.

The instrumentalization of the sources of the law also affects legislative or regulatory power, when exercised to fulfil objectives laid down in conventions to which States have adhered. Just as managers of large companies are forced to pursue the objectives of value creation, so the governments of most countries – with the exception of the United States – are today called upon to implement programmes which they are supposed to endorse of their own free will and which involve introducing 'technical' norms elaborated by international authorities. For example, numerous Southern countries are exhorted to submit themselves voluntarily to the discipline of 'structural adjustment plans' which establish indicators of healthy management as defined by experts in international economic and financial institutions. A wholly comparable process occurs when the European Union develops new modes of governance, involving the agreement of member states on common indicators devised by the European Commission, which are subsequently meant to 'guide' – through guidelines – the policies pursued at national level. Far from being restricted to social issues (notably employment policy, for which guidelines are established annually),[102] this Open Method of Coordination[103] has become the general mode of European 'governance' ever since the criteria of economic convergence and the financial discipline accompanying the single currency were adopted. The *dura lex* of Roman law makes way for the 'gentleness' of treaty rules ('soft law') which determine in advance how much freedom member states will have in the formulation of their own laws. States may pursue the objectives they have set themselves as they see fit, but the fulfilment of these objectives is regularly evaluated by European Community authorities (the European Commission, the European Bank) on the basis of 'technical' criteria or 'benchmarking'. Here again we find the logic of management by objectives, with its familiar arsenal of norms: 'neutral' performance indicators, the pre-programmed freedoms of subjects of law, and expert authorities that are responsible for ensuring that agreed objectives are met.

Of course, public policy indicators developed at European Union level are no more purely 'technical' standards – which by their very nature would consequently be exempt from being debated in

102. See P. Rodière, *Droit social de l'Union européenne*, *op. cit.*, no. 18.

103. This is the generic name by which American jurists interested in Europe currently designate these new forms of 'soft law', even though the expression is used more restrictively in the European Community Treaty (art 30 and 40). See C. Sabel, 'L'Europe sociale vue des États-Unis', in *Le Droit social vu d'ailleurs*, *Semaine sociale Lamy*, Special Issue, 2002.

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.

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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.

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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'.

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

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'.

> Labour Organization [. . .] which is altogether inconsistent with the principles on which the order of a Great Society rests.[48]

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.

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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 *Mababharata* 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 school-work 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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