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**COMMON HUMANITIES AND HUMAN COMMUNITY -  
TOWARDS A DIANTHROPOLOGICAL PRAXIS  
OF HUMAN RIGHTS**

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*Formulating the rules for a meeting of cultures  
is an urgent need of our times.  
No particular culture has the right to set the pattern,  
and no pattern can be set without  
a certain preunderstanding of the other culture.  
A pattern can be established only if  
some people succeed  
in undergoing a genuine internal experience  
of both cultures.  
Extrapolation will not do here.  
Only living "rosettas" will help  
the mutual decipherment.*

(PANIKKAR 1979 : 362-363)

### ***Die zwei Parallelen***

*Es gingen zwei Parallelen  
ins Endlose hinaus,  
zwei kerzengerade Seelen  
und aus solidem Haus.*

*Sie wollten sich nicht schneiden  
bis an ihr seliges Grab :  
Das war nun einmal der beiden  
geheimer Stolz und Stab.*

*Doch als sie zehn Lichtjahre  
gewandert neben sich hin,  
da wards dem einsamen Paare  
nicht irdisch mehr zu Sinn.*

*War'n sie noch Parallelen ?  
Sie wußtens selber nicht, -  
sie flossen nur wie zwei Seelen  
zusammen durch ewiges Licht.*

*Das ewige Licht durchdrang sie,  
da wurden sie eins in ihm;  
die Ewigkeit verschlang sie  
als wie zwei Seraphim.*

(MORGENSTERN 1973 : 298-299)

*La paix est toujours présente.  
Vous n'avez qu'à écarter les obstacles  
qui la troublent.  
Cette paix, c'est le Soi.*

(MAHARSHI 1993 : 416)

(There is an English translation of MORGENSTERN and of MAHARSHI in the Annexes.)

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*“Are human rights universal, a cultural invariant, that is to say, part of a global culture ? (...) Because the question of universality is the answer to an aspiration of completeness, and because each culture ‘situates’ such an aspiration around ultimate values and universal validity, different aspirations to different ultimate values in different cultures will lead to isomorphic concerns which, given the adequate hermeneutical procedures, may become mutually intelligible and mutually translatable. At best it is even possible to achieve a mixture and interpenetration of concerns and concepts. The more equal power relations among cultures are, the more probable it is that such mestizaje might occur. A balanced cross-cultural mestizaje of concerns and concepts is the multicultural correspondent of single-culture universality. (...) alongside the dominant discourse and practice of human rights conceived as a globalized Western localism, a counterhegemonic discourse and practice of human rights conceived as a cosmopolitan politics has been developing. The central task of emancipatory politics of our time, in this domain, consists in transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project.” (de SOUSA SANTOS 1995 : 337-339)*

In this thesis we will try to take up the challenge de SOUSA SANTOS is presenting to us. We will try to make a contribution to the emergence of an intercultural *mestizaje* of Human Rights.

What is at stake ? In my opinion, it is to enable the emergence of a universally accepted and efficient Human Rights’ system. Or it is rather, as I will develop in this thesis, the building of a working Human Rights’ Community.

We seem to be invited to rethink the contemporary paradigm of Human Rights’ thought and practice as it seems less and less able to respond to the challenges facing us. First, Human Rights are de facto not universal. They are not universally guaranteed to every human being. They are violated, and often grossly, all over the world. Second, even their abstract universality is more and more challenged. This is especially the case through their increasing questioning by non-western cultural traditions. The Vienna World Conference on Human Rights of 1993 provided a good illustration of this trend. There the western character of the universal declaration of Human Rights of 1948 has been criticised by a group of Asian, African and Middle East countries. It has for example been advanced that collective rights should get their place next to individual rights, economical rights next to political rights, and that rights should be counterbalanced by corresponding duties. It has been argued that these demands express specific civilisational values (LE ROY 1997a : 1-2).

Thus posing our western theory and practice of Human Rights as universal without further questioning, becomes a less and less tenable and intellectually satisfying position. Nevertheless it is as untenable to deny that by its development of Human Rights through its culture and history, the western tradition has touched upon something universal. The respect for human life, the ideal of human fraternity (see articles 1 and 3 of the declaration of 1948) cannot be reduced to a western invention. They bear something more, plunging its roots in the most profound depths of human experience.

Engaging into an intercultural dialogue on Human Rights, trying to achieve a *mestizaje* of Human Rights should thus not be interpreted as the taking of a completely relativistic standpoint, or as the negating of any universality of Human Rights. Engaging in intercultural dialogue on Human Rights should in my mind rather be seen as a constructive, rather than as a destructive endeavour. The point is not to deconstruct the western approach by refuting its universality. The point is rather to enrich this approach through different cultural perspectives in order to progressively achieve an intercultural tradition of Human Rights, a *mestizaje* of Human Rights. PANIKKAR (1984a : 30) can help us to illustrate this point of view :

*“Human Rights are one window through which one particular culture envisages a just human order for its individuals. But those who live in that culture do not see the window. For this they need the help of another culture which sees through another window. Now I assume that the human landscape as seen through the one window is both similar to and different from the vision of the other. If this is the case, should we smash the windows and make of the many portals a single gaping aperture - with the consequent danger of structural collapse - , or should we enlarge the viewpoints as much as possible and, most of all, make people aware that there are - and have to be - a plurality of windows? This latter option would be the one in favor of a healthy pluralism.”*

Engaging in healthy pluralism is what lies at the core of our whole present endeavour. We will strongly refuse to take the look through the western window for the only and all encompassing view. And we will also strongly refuse to engage into absolute cultural relativism. Healthy pluralism demands us to recognize plurality. But it also demands us to keep in mind its underlying unity. It respects and takes seriously all cultural universalisms, which is to say the specific cultural ways to access to the universal, but at the same time it emphasises that an intercultural universality, a *mestizaje* of Human Rights can only emerge and can only be entertained by the intercultural dialogue of these different universalisms. Our standpoint is thus neither universalistic nor relativistic. It is pluralistic.

The problem with the universalistic position is that it is highly ethnocentric, as it turns in an undue manner values and conceptions of the society of belonging into universal ones (TODOROV 1992b : 21-22). Dialogue thus becomes impossible. Indeed dialogue is first of all “duo-logue” (PANIKKAR 1979 : 346). It demands respect for the other and for the other’s perspective. Therefore what necessarily arises out of the universalistic position is a monologue, which is potentially oppressive to those who do not share our values and conceptions. In the “Human Rights’ context” the universalistic position leads to a “globalized Western localism” which is doubly counterproductive in our search for universality, or for an interculturally shared outlook on Human Rights. First it does not permit the mutual enrichment of our and the other cultures. By negating the voice of the other we cannot learn from him or her, nor can we fecundate him or her. Sharing, which is giving and taking, is only possible through the recognition of the other. Without recognition, no sharing. And without sharing, no reaching of a consensus, no building of a common future. Therefore, second, the universalistic position takes us from a logic of complementarity and of exchange to a logic of exclusion and of power. This favours particularistic withdrawals which can partly be seen as defensive reactions

against the “western steam-roller” (LATOUCHE 1991 : 8, ABOU 1992 : 16). It makes the building of a Human Rights’ Community impossible. Thus the universalistic position instead of strengthening the universality of Human Rights rather turns out to weaken it by cutting off through exclusion its most fundamental basements : the different peoples of the world.

The problem with the relativistic position is that it absolutizes differences and completely forgets about our common human nature and condition. It is so deeply stuck in “our differences” that it only sees the “differences” and forgets completely about the “our”. The relativistic position emphasizes so much the different perspectives that it forgets about the common horizon. Reaching any kind of universality becomes in that view impossible. Each culture has its own values, conceptions and world view which cannot be challenged, and not even understood or even questioned by other cultures. The picture is the one of a fundamental “Other” with whom no dialogue is conceivable, with whom no mutual enrichment is possible. The best to be expected is mere more or less harmonious coexistence. But no real living together, no mutual understanding, no sharing, no building of a common future seems possible. Such a relativistic outlook can either lead to an imposition of one’s own values on the others (which comes very close to the universalism described above) or in the case of an acknowledgement of an absolute right to difference can lead, in the words of ABOU (1992 : 34-35), to a “right to confinement” (“droit à l’enfermement”), or even to a “right to oppression” (“droit à l’oppression”) or to a “right to death” (“droit à la mort”).

The way we therefore choose, is the way of “healthy” pluralism. This way entails a fundamental paradigmatic change in Human Rights’ thought. As de SOUSA SANTOS notes it is not enough in a period of paradigmatic transition to criticize the old paradigms, new paradigms must be built :

*“The truth is that, after centuries of modernity, the absence of a future cannot be filled out by either the past or the present. The lack of future is but an empty future.*

*We must, therefore, reinvent the future by opening up a new horizon of possibilities mapped out by new radical alternatives. Merely to criticize the dominant paradigm, though crucial is not enough. We must also define the emergent paradigm, this being the really important and difficult task. (...)*

*The only route, it seems to me, is utopia. By utopia I mean the exploration by imagination of new modes of human possibility and styles of will, and the confrontation by imagination of the necessity of whatever exists-just because it exists- on behalf of something radically better that is worth fighting for, and to which humanity is fully entitled.” (de SOUSA SANTOS 1995 : 479)*

Let us thus engage in “utopia”, or rather in “heterotopia” which “*Rather than the invention of a place elsewhere or nowhere*” is “*a radical displacement within the same place : ours.*” (de SOUSA SANTOS 1995 : 481)<sup>1</sup> . We may not use the term “heterotopia” exactly in de SOUSA SANTOS’ sense. But what is important to me is the idea of the “radical displacement within the same place : ours”. By walking on the path of healthy pluralism we do not intend to “leave” this world. We will rather try to see it in a different perspective enabling us to stand up to the contemporary challenges facing us. This new perspective is not a perspective out of the blue, separated from our past and radically different from it. Rather the displacement will result from the putting into dialogue of our perspective with other perspectives. It will be the result of a building on our past through its enrichment by our present, which becomes more and more intercultural and thus also demands us to build on the other cultures’ pasts and presents. Healthy pluralism is thus based on mutual dialogue permitting us respectively to discover the others and ourselves, to discover their and our past and present, and to build together a common future.

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<sup>1</sup> For a more detailed presentation see Chapter III, 57 ff



In this thesis the path of and to healthy pluralism will lead us through three stations, an examination of Common Humanities, Human Community and Dianthropological Praxis of Human Rights. In my eyes each of these concepts constitutes a specific pluralistic paradigm for intercultural Human Rights' Thought. The first, Common Humanities, is related to the plural basement in which our intercultural Human Rights' approach could be rooted. The second, Human Community deals with the plural place (intellectual and practical) where this intercultural Human Rights' approach could unfold. The third, Dianthropological Praxis, deals with the maybe emerging myth which could underlie and sustain our intercultural Human Rights' thought and praxis, and which could provide it with a horizon, and thus with meaning.

Although Common Humanities, Human Community and Dianthropological Praxis of Human Rights are three distinct paradigms, they can only really be understood in their interrelation and interconnectedness. They are the three paradigms making up the broader paradigm of a healthy pluralism in intercultural Human Rights' thought. And they should not be seen as making up this broader paradigm in their mechanical juxtaposition. Rather those three paradigms are organically interrelated. They are the organic parts of the organic whole we call healthy pluralism. The whole, and thus the mutual interrelation of its parts, define the parts as much as the parts define the whole. This should be kept in mind in order to avoid miscomprehensions. It does nevertheless of course not exclude that each paradigm can be individually enlightened, criticised and enriched, as much as the broader paradigm they constitute.

This is not the place to go into a detailed account of these paradigms. They will be extensively developed in the three parts of this thesis. At this point I will only make some brief reflections on them to familiarize the reader with these concepts and to prevent possible misconceptions.

If I have chosen to speak of "Common Humanities" as the basis for an intercultural approach to Human Rights, it is to draw attention to the paradox of our human condition, characterized both by human unity and by human diversity, and to emphasize the equal importance of both for the building of an intercultural *mestizaje* of Human Rights. We are alike and though we are different. We could even say that to some extent we are alike precisely in that we are different. All cultures share a common human condition, which is partially characterized by their need to provide, or to find, meaning to their existences. This need is fulfilled through the construction of particular world views and by the invention of related social organizations. We can thus say that we share our world in our "Common Humanities", in our particular ways to be human. There is a common horizon, the "Common" in "Common Humanities" and also the "Human" of "Humanities", and at the same time there are the different perspectives recalled by the plural form of "Humanities". In Part I we will thus try to give an overview of our different "humanities". We will also try to see how they can engage in intercultural dialogue. And we will show how this intercultural dialogue can allow for the discovery of our Common "Humanities", by shedding light on what we share as well as on what differentiates us. Part I will enable us to get a broader perspective on our human condition and on "Human Rights" than if we had contented ourselves with only looking through our own cultural "window". And it will permit us to move from an exclusionary to a complementary logic.

In Part II, on Human Community, we will try to think of how the insights we may have gained in Part I could be put into practice. To do so we will have to acknowledge pluralism in the legal field. This in turn will demand to abandon a solely "theoretical" point of view on law. Law is not only what the books say - it is also what people do. LE ROY (1994a : 29) even said :

“To think of law, is first of all not to trust what specialists say about it. CLAUZEWITH, the founding father of modern strategy, said that war was too important to be left to soldiers alone. Some of us anthropologists say : ‘law is too important to be left to lawyers alone’.

Law, is not what the lawyers say about it, it is what the actors make out of it. It is what the citizens make out of it. It is the practices of the citizens which permit us to measure the efficacy of law. Law is not in the texts, it is in the practices.”

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We will thus have to take into account the actors’ perspective and emphasize legal *praxis*. We speak of Human Rights’ *praxis* in order to emphasize an approach favouring a Human Rights’ legal context that makes sense to the concerned actors in their theory and practice. This emphasis on *praxis* is a reaction against the predominant *poietic*, instrumental, view of Human Rights. This view sees Human Rights rather as the technical tools of a Human Rights’ system<sup>3</sup>. Talking of Human Community or Human Rights’ Community is thus intended to invite us to leave a systemic approach to Human Rights, characterized by a single point of view and a rather instrumental outlook on law, in favour of a Communitarian approach characterized by the existence of a multiplicity of view points and of their dialogue, and by the emphasis on *praxis*.

Although COTTERRELL develops a somewhat different kind of approach to Law’s Community as we do here by presenting the Human Community, our approach has nonetheless a lot in common with his and the following quotation gives a fair impression of the stakes of our own endeavour:

*“(…) as many writers have suggested, we need to rethink the concept of law itself in pluralistic terms. That can only be done theoretically with any rigour by developing some such notion as that of community. The long established ‘modern’ view has been that law is in essence the law of the nation state. But transnational law (...) is assuming increased importance (...) So also is the idea of autonomous or semi-autonomous regulation of regions, localities, groups and enterprises. (...) Equally, there are now aspirations for more diverse and, in some sense ‘local’ processes of creating, interpreting and applying regulation. The aim is to make this regulation more morally meaningful, closer to the lived experience of citizens, than much state law.”*  
(COTTERRELL 1996c : 1)

To avoid misunderstandings from the start as to my paradigm of Community, it may be important to stress that it does not directly refer to “communitarian” thought, although the acceptance of this paradigm entails to dig deeper into communitarian theories. In order to differentiate my concept of Community from others I will write it with a capital “C” in this thesis. The Human Community paradigm I propose is not a sociological concept but intends to provide a theoretical framework permitting to rethink Human Rights in a plural though united and *praxis* oriented way on the global level. Nevertheless, taking this paradigm seriously will entail to do further research on communities in a sociological sense. Indeed it tends towards delegating the management and regulation of their own lives to the communities most directly concerned, and towards the articulation of these regulations at the global level<sup>4</sup>.

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<sup>2</sup> All the quotations which are not in italic and which are followed by a little number are my translations of quotations which can be found in the Annexes, at the end of this thesis, in their original version.

<sup>3</sup> For a definition of *praxis* and *poiesis* see OST 1996 : 7, OST 1997a : 45

<sup>4</sup> On the relationships between Human Community and especially Common Humanities see Chapter III, 46 ff

Part III, “Towards a Dianthropological Praxis of Human Rights”, will lead us to reflect upon an appropriate myth in which to embed Common Humanities and Human Community, in order to provide them with a horizon which can endow them with meaning. As we will see, the Dianthropological Praxis of Human Rights (in upper case) results of the articulation of two dianthropological praxis (in lower case): the “Social Sciences’ dianthropological praxis of Human Rights” and the “spiritual dianthropological praxis of Human Rights”.

Before explaining “dianthropological” and exposing the two sorts of dianthropological praxis, a few more words on “praxis”. As PANIKKAR notes, after posing the question whether the notion of Human Rights is a western concept (1984a : 28) :

*“It is not a merely ‘academic’ issue. Human rights are trampled upon in the East as in the West, in the North as in the South of our planet. Granting the part of human greed and sheer evil in this universal transgression, could it not also be that Human Rights are not observed because in their present form they do not represent a universal symbol powerful enough to elicit understanding and agreeing?”*

The challenge will thus be to emphasis *praxis* (meaningful practice) of Human Rights, more than their *theoria* (their abstract grounding) or their *poiesis* (technique). As already noted what is at stake is not the implementation of a “Human Rights system” as such, or the efficacy of an a priori determined Human Rights System. What is at the core of the debate is to rethink a “Human Rights Community” permitting a “rule of law” on the local and global levels. For the possibility of such a Rule of Law it is not enough to build on the different cultural theories of Human Rights to permit the emergence of a “universal” one. If we want a working “Human Rights Community” we must also build on the practices, and not only on the representations of those who are concerned (and who are not only the states). Healthy pluralism in the domain of Human Rights thus necessitates *praxis* of Human Rights. And on the global level this *praxis* must be dianthropological.

In using the term “Dianthropological”, I wish to emphasize the three etymological roots on which it is built : *dia* : through, *anthropos* : man, and *logos*: discourse or logic. In its first sense “dianthropological” praxis wants to designate a praxis stemming from a journey through the different anthropologies, through the different logics and discourses of men. It is thus closely related to dialogue (*dia-logos*) as we will develop it in Chapter I. The emphasis on “anthropologos” and not merely on “logos” is due to my intent to bring also the practices of men in the picture next to the logics and the discourses. The term “dianthropological”, through the presence of “anthropos” in its middle already evokes an association of the logics, with incarnated human life and thus practice and praxis. Further as LE ROY (1993b : 235) says, the fundamental requirement of legal anthropology is always to refer the legal discourses and practices to the underlying system of thought and to the logic which generate them”<sup>5</sup>. In its second sense “dianthropological praxis” intents to point to a praxis originating beyond the domain of the logos of man. It points to a praxis originating in the most profound spiritual experience in which man has already gone through the domain of logos, and in which he directly experiences reality.

We have now outlined the programme of this thesis and have clarified the basic concepts. Before starting to develop them I would only like to make two further remarks. The

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<sup>5</sup> “l’exigence fondamentale qui caractérise cette recherche (la démarche anthropologique du Laboratoire d’Anthropologie Juridique de Paris) est de toujours rapporter le discours et les pratiques juridiques au système de pensée et à la logique qui, l’une et l’autre, les génèrent.”

first is about the positioning of this research in the broader context of globalisation, aspect which I will not develop further in this thesis but which seems primordial to me. The second is about my personal positioning in this research.

We can find in the discussions on globalisation formulations running parallel to the ones of Human Rights' universalism or relativism. Indeed globalization is sometimes thought of as a process of uniformization, or westernization (some speak of "McDonaldization" or "Cocacolonization" - see : LIE 1997 : 2). And sometimes it is thought of as a process vivifying the cultural particularisms and thus rather contributing to a dismantling of a global unity than to its building. If it is trendy nowadays to speak of a "global village", ROULAND (1993a : 214) wonders if this "global village" is not an illusion, which under a thin unified surface of quicker person and information exchange, made possible by modern technology, hides a conflictual reality where cultures are far from vibrating in harmony. To him the contemporary situation evokes rather, with the rise of particularisms, a "planetary archipelago" than a "global village". Thus globalization is confronted with the same problematics of universalism and relativism as are Human Rights. But it seems also that their treatment goes in the same direction as the one advocated by de SOUSA SANTOS concerning Human Rights. According to LIE (1997 : 3) :

*"The discussion in the field of international and intercultural communication has shifted and broadened. It has shifted in the sense that it is now focusing on issues related to 'global culture', 'local culture', (post)modernity and 'multiculturalism' instead of its previous concern with modernization, synchronization and cultural imperialism. With this 'new' discussion, the debate has also shifted from an emphasis on homogeneity toward an emphasis of differences. (...) With this shift toward differences and localities there is also an increased interest in the link between the global and the local and in how the global is perceived in the local."*

We are thus here also invited to reflect upon ways to articulate the "global" and the "local", to pay tribute to our common human condition while acknowledging our differences. To sum up, we are here also invited to think a healthy pluralism. Furthermore, the Human Rights debate seems to me not only to run parallel to the globalization debate, but seems to offer a privileged site (or *topos*) to reflect upon the "shaping of our global condition". Indeed for ROBERTSON (1996 : 20-21) :

*"(...) the concept of globalization per se should be applied to a particular series of developments concerning 'the concrete structuration of the world as a whole. The term 'structuration' has been calculatedly chosen. (...) It has to contribute to the understanding of how the global system has been and continues to be 'made'. It has to be focused upon the production and reproduction of 'the world' as the most salient plausibility structure of our time. (...) It is upon this heavily contested problem of the concrete patterning of the world - including resistance to globality - that I seek to center the concept and the discourse of globalization."*

It is my firm belief that Human Rights research in so far as it tries to work out a paradigm for a global life in peace and dignity for individuals and their groups of belonging has much to contribute to the "structuration of our global condition". Is it not the role of law to structure life in society ? For HAURIU, law is a normative set, if possible codified, which acknowledges social truces (see KUYU 1995 : 91, LE ROY 1997c : 135). For BOURDIEU (1986 : 41) codifying is putting in form (shaping) and putting forms<sup>6</sup>. Law in this light appears clearly as consecrating a social order as well as the choices of a society. ALLIOT (1983b : 207) expands this view a little by affirming that law is "at the same time struggling and

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<sup>6</sup> "Codifier, c'est à la fois *mettre en forme* et *mettre des formes* ."

consensus on the outcomes of the struggling in the domains a society considers as being vital”<sup>7</sup>. Law appears here not only as the putting in form of the consensus, but also as the reaching of the consensus through conflict. Furthermore ALLIOT’s definition stresses that law is related to that what a society considers as vital. LEGENDRE’s definition of law (in LE ROY 1996a : 8) which characterizes it as “the dogmatic art of knotting together the social, the biological and the subconscious to assure the reproduction of humanity”<sup>8</sup> brings it even closer to ROBERTSON’s “production and reproduction of the world”.

In our Human Rights perspective I would say that the ideal “Human Rights” try to represent, Peace, Human Dignity, mutual Respect, are what should be considered as vital in our global culture. A reflection on “Human Rights Law” should permit to realize this ideal by structuring our global condition, by permitting to produce and reproduce it, in a way that this ideal can be realized. In this perspective the close link between Human Rights’ research and globalization research appears very clearly. Human Rights research cannot dwell on a purely legal point of view. It must try to contribute to work out paradigms permitting to rethink and actively shape the globalization process in such a way that an embodiment of the “Human Rights’ Ideal”, in our perspective of the Human Community, in reality, is made possible.

Our particular point of view (*topos* of research) is that of a continental European legal theorist with special commitment to legal anthropology who tries to make a contribution to the establishing of a Human Community, of a platform for intercultural dialogue, sharing and exchange. Our perspective on Human Rights is a very broad one. It keeps in sight the globalisation process. It is also a global perspective on Human Rights. It does not see them merely in terms of their efficacy but more broadly as a stake on the national levels to permit a “rule of law”, and on the global level to permit a “concrete structuration of the world as a whole” in a just and meaningful way. The “just”, for me, is linked to the acknowledgement of cultural diversity. The “meaningful” is linked to the acknowledgement of a “*praxis* (meaningful practice) of human rights” rather than to a confinement on their *poiesis* (technique) or *theoria* (abstract grounding of human rights).

The frame is set. Let us now fill it.

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<sup>7</sup> “Le Droit est à la fois lutte et consensus sur les résultats de la lutte dans les domaines qu’une société tient pour vitaux.”

<sup>8</sup> “l’art dogmatique de nouer le social, le biologique et l’inconscient pour assurer la reproduction de l’humanité”, Pierre LEGENDRE, 1981-1982 lecture at the Vth section of the Ecole pratique des hautes études

**Part I :**

**Our Common Humanities -**

**the Grounding for a Dialogical and Intercultural**

**Human Rights Ideal**

Let us start by telling a little narrative which will illustrate and outline the stakes of this first part :

“There were people playing on all the tables, and often for lots. The night had been long and the smoke which had invaded the gambling joint precluded to see from one table to the other. One would have had to move, and would then have been filled with wonder by the variety. Every table was playing a different game (...) All of a sudden the belote players left their table to observe the bridge table. One of them returned quite quickly having noticed that the bridge players did not know the rules of the game (he was thinking of the rules of belote) and committed many mistakes : optimistic and benevolent, he thought that they would end up learning them and know how to play. Having observed them for a little longer, one of his friends understood that they were not playing belote but some other game : he noted the way in which they ordered the cards and plaid them and rejoined the first one to announce him his discovery. It is then that the third belote player, having guessed that you need to know the rules of bridge in

order to understand the game asked the players about them : they handed him a manual, and added that it will not be enough to read it carefully and that he will need a long practice before he could pretend to know bridge.

Thus go human societies. Each one is playing a particular game which the others struggle to decipher.” (ALLIOT 1984 : 269) -2-

Every culture plays its own legal game - to realise this is already a difficult achievement, but it is even more difficult to try to understand these different games and even more difficult to try to articulate them in order to create a new plural game safeguarding their mutual originality. It will be our attempt in this part to help the mutual decipherment of cultures' legal games in relation to the Human Rights problematic in order to gain useful insights permitting us to construct models which can provide a framework, or a forum, for genuine intercultural dialogue on an intercultural universality of Human Rights, permitting us thus to play a “global Human Rights game”. An intercultural approach to human rights can only be based on a dialogical approach, as it presupposes several partners, several points of view. Indeed, the acknowledgement of pluralism, contained in the intercultural ideal makes it very important to clearly work out the different places (*topoi*) from which the different cultural partners are speaking. This acknowledgement of the existence of different cultural *topoi* entails that the mutual decipherment of the different cultures which constitute the frame of a dialogue around an “intercultural universality” of Human Rights itself demands an epistemological break in favour of intercultural dialogue. This dialogical approach does thus not only become relevant in the dialogue about human rights itself but even has to play a crucial part before, in the setting of this dialogue. Genuine intercultural dialogue on the global level, as well in its “knowledge-seeking” as in its “consensus-seeking” aspect, needs as a basis an understanding of the other, of the different localisms, provided for by intercultural “dialogical dialogue” (as opposed to a dialectical one). We will thus start by working out the demands of genuine “intercultural dialogical dialogue” (Chapter I). After this (Chapter II) we will try to use the dialogical approach in order to capture the originality of other cultures' local approaches to “Human Rights” and will try to propose a model which can be used as a forum for intercultural dialogue on a global intercultural approach to “Human Rights” rooted in our Common Humanities.

## **Chapter I : The Requirements for Genuine Intercultural Dialogue**

*“Nobody can decide a priori what it means to humanize Man, nor can this totally depend on a single anthropology. It requires not a methodology but a methodic of its own, which makes its way in and through the mutual interaction and possible cross-fertilization of different religions and cultures. A dialogical dialogue is necessary here. This dialogical dialogue, which differs from a dialectical one, stands on the assumption that nobody has access to the universal horizon of human experience, and that only by not postulating the rules of the encounter from a single side can Man proceed towards a deeper and more universal understanding of himself and thus come closer to his own realization.”* (PANIKKAR 1978 : 90-91)

In this chapter we will reflect upon the requirements of genuine, “dialogical”, intercultural dialogue, the first step towards a Dianthropological Praxis of Human Rights. For that purpose we will heavily draw on PANIKKAR's work in which he has developed some useful tools in his research on a possible dialogue between religions. We will also draw on some insights of anthropology which is perhaps the science *par excellence* dealing with the relationship of “Us” and “Them” (“*Eux*” et “*Nous*”, KILANI 1994b : 17 ff), and especially

on DUMONT's concept of "encompassing of the contrary" (*englobement du contraire*) and its consequences. We will start by explicating the "rhetoric" of the dialogue (I). We will then unveil the perhaps most tricky trap on our way of entering in contact with the "other", the "encompassing of the contrary" (II). To try to break out of this trap we will try to propose the tool of "dialogical dialogue" (III), which in its turn will lead us to the choice of "diatopical hermeneutics" as the basis of our intercultural Human Rights' dialogue (IV).

### *I. The Rhetoric of the Dialogue*<sup>9</sup>

"Dialogue", as I use it in this paper, is not a mere conversation between people. It is rather a process in which a journey through different logics, or discourses, occurs in order to go through and beyond them (*dia*:: through *logos* : discourse) to reach the frame underlying them, their *mythos* and to make it explicit, permitting thus true mutual enrichment and exchange (EBERHARD 1996 : 3-4 and 34 ff).

This "journey" needs a space where it can take place and I think that this space could adequately be conceptualized as the "in-between" (*entre-deux*) which van de KERCHOVE and OST develop in their dialectical approach to Law and which follows from their *interdisciplinary* epistemological positioning (van de KERCHOVE, OST 1992 : 51) which parallels our *intercultural* epistemological positioning. Let us nevertheless note, as we will develop further, that our "in-between" is a dialogical and not a merely dialectical one. Van de KERCHOVE and OST (1992: 52) explain :

"From the moment one refuses the security of disciplinary particularism and of the totalisation of discourse, one renounces to the certainties of established knowledge (patchy or total, whichever), to organize the production of knowledge in an unceasing work of distancing between existing discourses. It is in this in-between that the shape of our episteme unveils itself, as it is in the exchange of dialogue that the sense of our praxis is articulated." -3-

But the creation of an "in-between" alone is not sufficient . Furthermore, this "in-between" must be potentially fruitful. If the "in-between" constitutes the space where the dialogue can take place, then the rhetoric can be seen as that which shapes this space and can turn it into either a fruitful, or sterile or even destructive frame for the dialogue. We will therefore have a closer look now at the rhetoric of the dialogue.

A, rather obvious, consequence of the search for a fruitful rhetoric is to try to achieve a cooperative dialogue (*dialogue coopératif*) which means that the partners genuinely seek mutual understanding and enrichment and a possible consensus. The "cooperative dialogue" thus excludes cheating or imposing one's own point of view on the other by taking advantage of own's dominating position, making thus up alone the questions and the answers (van de KERCHOVE, OST 1992: 63-64). But if theoretically it appears easy to judge the "cooperative" character of a dialogue, in practice this is far less obvious, as a dialogue can turn out to be "uncooperative" not because of a lack of conscious good faith but rather because unconsciously the partners to the dialogue position themselves in a way which does not really permit them to engage in a true "cooperative dialogue". TODOROV (1992b : 71) illustrates very well the danger of the unconscious obstacles to "cooperative dialogue" which stem from an unconscious positioning of oneself in the dialogue with his example of the "unconscious universalist" :

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<sup>9</sup> This title is the title of PANIKKAR's introduction to PANIKKAR 1978.



“The relativist does not judge others. The conscious universalist can condemn them ; but he does so in the light of an openly assumed morality, which thus can be challenged. The unconscious universalist is unassailable, as he pretends to be a relativist; but this does not hinder him to judge others and to impose his ideal upon them. He has the aggressiveness of the second and the clear conscience of the first : he is an assimilator in complete innocence, because he is not aware of the differences of the others.” -4-

Thus the unconscious framing of the dialogue by assuming different unconscious attitudes may constitute important obstacles to the emergence of a really “cooperative” dialogue. PANIKKAR has worked out three attitudes which can frame the rhetoric of the dialogue and which we should keep in mind if we want to transcend them in order to be really able to dialogue. We will briefly present these attitudes by connecting them to our problematic of the building of an intercultural Human Rights’ Dialogue. The three attitudes are *exclusivism*, *inclusivism* and *parallelism*. Two of them are already quite familiar to us, and are in a dialectical relationship : *exclusivism* which is closely linked to the “universalism” discussed above and *parallelism* which is closely related to the problem of cultural “relativism”

*Exclusivism* is the attitude where one is convinced that one’s own truth is the only truth and that therefore there can exist no other truths. The most obvious danger with this attitude is a lack of tolerance towards different points of views which can lead to the violent attempt to impose one’s own views. A less obvious one is to make a distinction between “objective” and “subjective” truth, considering of course one’s own as the objective one, and accepting the other’s as only some “subjective” truths (PANIKKAR 1978 : xiv, xv). This universalistic attitude can thus lead to a justification of relativism, foreclosing any dialogue : we have discovered the objective truth of human equality and thus accept that all cultures should live according to their respective subjective truths (see TODOROV above). We thus can find ourselves through exclusivism in an attitude of *parallelism*.

In the latter attitude we consider that no world view, no culture is perfect and that we should therefore not try to convert or even interfere with others. We should only try to deepen the understanding of our own culture which may permit us to find points of contact with other cultures (PANIKKAR 1978 : xviii-xix). The problem with this attitude is that it denies the need of mutual learning and furthermore does not give an adequate solution to our present global condition in which we cannot dwell solely on our own tradition but have to participate in our global condition. *Exclusivism* and *parallelism* are the two attitudes we should avoid in order not to fall in the pitfalls of neither dogmatic universalism nor overvalorisation of particularisms (LE ROY 1994b : 60).

The third attitude, *inclusivism*, does not exclude different truths nor does it consider them as “parallel truths” with which one should not mingle :

*“The inclusivistic attitude will tend to reinterpret things in such a way as to make them not only palatable but also assimilable. Whenever facing a plain contradiction, for instance, it will make the necessary distinctions between different planes so as to be able to overcome that contradiction. It will tend to become a universalism of an existential or formal nature rather than of essential content.”* (PANIKKAR 1978 : xvi)

Paradoxically such an attitude makes “cooperative dialogue” impossible. Indeed it is too “conciliatory”, as it sees no conflicts. Furthermore it absorbs what are perceived by others as “conflicts”, in its own system, thus finally appearing as the “true system” as it encompasses all the others. We will have to keep this attitude especially in mind when we will come to propose our intercultural “Human Rights’ Community” in Part II of this paper, where my

attempt will be to show that an intercultural “Human Rights’ System” cannot any more be a real system, in the sense of being closed and comprehensive, than a true intercultural dialogue can be the “dialogue” of one culture, or an “intercultural monologue” (a globalized, uniform discourse on Human Rights). Thus it has to be conceptualized as a “Community”.

Having outlined the broad rhetoric of the dialogue, let us now deal more specifically with one major bias of present intercultural dialogue, the “encompassing of the contrary”, before developing alternatives to break out of it.

## *II. The Paradigm of the “Encompassing of the Contrary”*

In his *Essais sur l’individualisme*, DUMONT (1991) raises a fundamental question as to modern ideology : how does it reconcile its diacritical principle of equality, which stems from our Christian heritage and has completely crystallized with the Enlightenment, with the hierarchical principle on which all social organization is based? And what are the consequences of this construction for our perception of the “Others” ?

As to the first question DUMONT’s answer is that we perform an “encompassing of the contrary” (“englobement du contraire”). In what does this consist ? DUMONT gives the following example, taken from the Bible :

“God first created Adam, the non differentiated Man, prototype of the human species. After that, he extracts in a way a being of a different sex out of this non differentiated being. Here are Adam and Eve face to face, this time as male and female of the human species. In this curious operation, Adam has somehow undergone a change of identity, whereas at the same time appears a being which is both, member of the human species and nevertheless different from the major representative of that species. Adam, or in our language Man, is simultaneously two things : the representative of the human species and the male prototype of this species. On a first level man and woman are equal, on a second level woman is the opposite or the contrary of man. These two relationships taken together characterize the hierarchical relationship, which cannot be better symbolised as by the material encompassing of the future Eve in the body of the first Adam. This hierarchical relationship is very generally the relationship between a whole (or a set) and an element of this whole (or set) : the element is part of the set, is cosubstantial or identical to it, and at the same time distinguishes itself from it or is opposed to it. There is no other way to express this in logical terms than to juxtapose at two different levels those two propositions which taken together contradict each other. That is what I refer to as ‘encompassing of the contrary’.” (Dumont 1991 : 140-141, in a slightly different version : Dumont 1979 : 39) -5-

Thus the “encompassing of the contrary” consists in the fact of explicitly encompassing two contradictory principles in the same category, thus constructing them as equal, while implicitly taking one of those principles as the reference in opposition to which the other is constructed, thus reintroducing a hidden hierarchy. This permits us to be “unconscious universalists” (*universalistes inconscients*) to use again the words of TODOROV quoted above. The consequence as to our perception of the “Other” is threefold. First, as the approach is monotypical (from one point of observation - ours) as opposed to a diatopical approach (through different points of observation - including the internal perspective of the “Other”) it leads to a dichotomical construction of the “Other”. There are no different “Others” - there is only “We” and “They”. This, second, leads to an ethnocentrist perception,

as every culture is furthermore only perceived in reference to the dominant culture, our culture. Changes in our dominant culture will heavily influence our construction of the “Other” who is perceived more as our inverted image, permitting us to delimit our identity, than as an identity of its own. Thus KILANI (1994b : 19), for example, notes that during the Middle-ages and the Enlightenment the line between “Us” and “Them” was conceived as a line between “culture and nature”, “man and monster”, “Christian and idolaters”. Later, in the XIXth and XXth century, “They” became integrated in our genealogy, in the universal history, “only to be projected in a historical and social distance, and to be assimilated to our own past”<sup>10</sup> (KILANI 1994b : 20). LE ROY also notes that all colonialist African studies, like studies on customary land law (*droit foncier coutumier*), “animist” religion etc..., have been marked by the paradigm of the “encompassing of the contrary” thus not being able to account for the originality of the African institutions but only giving a caricatural and ethnocentric picture of them (LE ROY 1996a : 3). Last but not least the ideal of equality being closely intertwined in our modern ideology with that of rationality, uniformity and abstraction, the explanatory system provided by the “encompassing of the contrary” will appear as very objective, rational and scientific and thus universal and unchallengeable. Let us note here, before moving on, that for LE ROY (1996a : 3-4) the unitarian way of thinking about legal pluralism (which is thought in reference to a “legal order” and where non-state law is thought as inferior) is another application of the “principle of the encompassing of the contrary”.

To sum up, we can say that the following challenge is facing us : we are invited to break out of a necessarily reductionist rationalistic construction of the other marked by the “principle of the encompassing of the contrary”. Indeed this construction is characterized by the expansion of one group of reference and by its transformation into an abstract general category encompassing all other groups. Although the latter are explicitly claimed to be equal to the former, they are nevertheless implicitly inferiorized as they are constructed in reference to the reference group and not according to their own originality. Thus giving a fair account of the “Other” turns out to be impossible. The originality of the other is negated and he is reduced, in our dichotomical world view, to the inverted image of ourselves. Genuine intercultural dialogue should permit us to break out of this reductionist view of the other and should permit us to discover him in his originality. This should enable genuine mutual exchange and enrichment in order to shed light on our Common Humanities, or our “Universalities”. So let us try to work out the methodology of genuine intercultural dialogue by presenting dialogical dialogue and by contrasting it to dialectical dialogue before exposing the diatopical hermeneutics which sustain it.

### ***III. The Dialogical Approach : Dialogical versus Dialectical Dialogue<sup>11</sup>***

It may be appropriate, before going into further developments, to set out the frame of the following pages by giving a short definition of dialogical and dialectical dialogue and by briefly exposing their relationship.

*“The dialectical dialogue is a dialogue about objects which, interestingly enough, the English language calls ‘subject-matters’. The dialogical dialogue, on the other hand, is a dialogue among subjects aiming at being a*

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<sup>10</sup> “‘Eux’ n’ont été incorporés dans l’histoire universelle que pour être projetés dans la distance historique et sociale, et être assimilés à notre propre passé.”

<sup>11</sup> For a detailed presentation of the “dialogical dialogue” see PANIKKAR 1984c

*dialogue about subjects. They want to dialogue not about something, but about themselves : they dialogue themselves. (...) The dialogical dialogue is not so much about opinions (...) as about those who have such opinions and eventually not about you, but about me to you. To dialogue about opinions, doctrines, views, the dialectical dialogue is indispensable. In the dialogical dialogue the partner is not an object or a subject merely putting forth some objective thoughts to be discussed, but a you, a real you and not an it. I must deal with you, and not merely with your thought. And of course, vice-versa, You yourself are a source of understanding.” (PANIKKAR 1984c : 209)*

Thus, what is at stake in rethinking our way of conceiving intercultural dialogue and our “construction of the Other”, or our “mutual construction”, is our concept of universality itself. Breaking out of the paradigm of the “encompassing of the contrary” and complementing dialectical dialogue by dialogical dialogue could be a first step on the way to an intercultural, and not solely a monocultural universality, of Human Rights. This is so as, with dialogical dialogue, we do not limit ourselves anymore to speaking of the object of Human Rights - an object which we take for granted but which may be problematic for other cultures - but as we use this object to mutually talk of ourselves, permitting a mutual enrichment and the building of a common understanding. Reflecting upon “dialogical dialogue” is thus for us a way to reflect upon our universalism, upon our way to reach universality.

To engage in intercultural universalism we thus seem invited to leave behind strictly dialectical dialogue which develops in the pure fields of logic and of Reason, and which can be evaluated by its logic coherence, to make a step towards dialogical dialogue which does not confine itself to discourse (*logos*) but goes as far as to reach the underlying myths (*mythoi*) of the discourse. Of course, the dialogical dialogue itself inhabits a discourse itself underlaid by a myth. But in the case of dialogical dialogue this is a pluralistic myth, acknowledging the importance of what the others have to say from their standpoint. It is thus not a monopolistic discourse excluding different discourses. On the contrary, it is a discourse explicitly opened to different discourses as it aims at knowing oneself and the other through the mutual unveiling through dialogue including our underlying myths. In order to engage into dialogical dialogue we have to leave behind a “monotopical” approach of the “Other” in favour of a “diatopical” one. Intercultural dialogue cannot limit itself to be a journey through our discourse. It must, if it wants to give a fair picture of all different cultural discourses, be a journey through all those different cultural discourses. Intercultural dialogue is thus closely related to the concept of “testimony”. The partners to the dialogue are not only partners in a shared discourse but are also the witnesses of their own cultural discourses. Universality cannot be reached by pure rational postulation but must be apprehended through concrete live experiences, of which testimony can be given. It is through the crossing, the contrasting, the dialogue of these testimonies that an intercultural universality, a *mestizaje* of Human Rights may be reached. It seems that already ROUSSEAU had this intuition on how to reach universality, as TODOROV (1992b : 34) points out :

“The “good” universalism is thus above all the one which does not deduce human identity from whatever principle, but which starts from a profound knowledge of the particular, and advances by trial and error (...). Furthermore it is the one which rests on at least two particulars (...) and thus on the establishment of a dialogue between them; Rousseau destroys here the false evidence held by the ethnocentrist, the deduction of the universal from the particular. The universal is the horizon of encounter between *two* particulars; one may never reach it, but we nevertheless need to postulate it to render intelligible the existing particulars.” -6-

Before developing with more depth the “diatopical hermeneutics” which intercultural universalism marked by “dialogical dialogue” requires we will start by reflecting upon the

relationship between “testimony” and “dialogue” which will permit us to clarify the need in the intercultural context to leave dialectical in favour of dialogical dialogue and will permit us to grasp the whole relevance of “diatopical hermeneutics”.

PANIKKAR works out the notion of “dialogical dialogue” in relation with the notions of “testimony” and “witness” in Chapter VII : “Witness and Dialogue” of his *Myth, Faith and Hermeneutics - Cross-Cultural Studies* (1979 : 231 ss). While PANIKKAR (1979 : 232) sees dialogue (“the exchange of views, the encounter of beliefs on equal grounds with mutual confidence, complete frankness and without ulterior motives”) as a needed basis for the contemporary world he wonders if and how it can coexist with testimony. Does not the witness refuse dialogue at a certain point (PANIKKAR 1979 : 233) ? The question arises as :

*“(…) witness (testimony) is the act or result of witnessing, of attesting, giving evidence of a conviction one holds, about which one cares, which one recalls and for which one is concerned. The witness knows, understands, recalls, is anxious for, concerned about; he thinks, considers, is preoccupied with what he will manifest to another in his testimony.”*  
(PANIKKAR 1979 : 238)

The witness thus does not appear as very ready to abandon his point of view, to change the recollection of what he has witnessed because of possible arguments developed in the dialogue. The problem is that testimony and dialogue are on two different levels : testimony pertains to the realm of lived experience, which is often that of the unspeakable and is thus of the order of *mythos* whereas dialogue places itself on the level of discourse, of rationality, of *logos*. The paradox of the intercultural dialogue is that it has to be at the same time witness (in PANIKKAR’s sense) and dialogue to the extent that the different cultures do not share a common myth which would provide them with a common frame for discourse. This lack of a shared frame of dialogue in its turn may make the dialogue itself impossible. It seems thus that our conception of dialogue has to be revisited in the intercultural context. Our present conception of dialogue could be defined as “dialectical dialogue”. According to the “Petit Robert”<sup>12</sup> dialectics is the set of tools used in discussion in order to demonstrate, refute, raise approval. It is in a more philosophical understanding the art of discussing by way of questions and answers. It thus appears that dialectical dialogue bears no place for witness, for *mythos*, but remains confined to *logos*. It only provides one of the necessary tools for intercultural dialogue : the tool permitting reflexive and critical knowledge on what is discussed. But it does not provide the equally important tool which would allow integration in its structure of the testimony of the other cultures, which seems primordial in genuine intercultural dialogue. On the contrary the irreconcilable aspect of dialectical dialogue and witness seems to preclude any intercultural dialogue. Witness seems in the end always bound to close the dialogue as it appeals to a sphere out of the realm of dialogue (for the above : PANIKKAR 1979 : 240-242). We thus seem condemned to either convert others to our frame of dialogue, a rational dialogue with no place for value conceptions or world views, or to resign ourselves to relativism. But there may be another way proposed by PANIKKAR (1979 : 242-244) : dialogical dialogue :

*“Now the dialectical dialogue is not the only, nor even the most important, form of dialogue. Discovering the capital importance of dialogical dialogue represents an important cultural mutation in our times. (...) Dialogical dialogue is not the external reinforcement of a monologue in the belief that ‘two heads are better than one’. (...) Dialogue is, fundamentally, opening myself to another so that he might speak and reveal my myth that I cannot know by myself because it is transparent to me, self-evident. (...) Dialogue*

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<sup>12</sup> “Petit Robert”: *Dictionnaire alphabétique et analogique de la langue française par Paul Robert* , France, Société du nouveau Littré, 1973, 1969 p

*seeks truth by trusting the other, just as dialectics pursues truth by trusting the order of things, the value of reason and weighty arguments. (...) Dialogue does not seek to be primarily duo-logue, a duet of two logoi, which could still be dialectical; but a dia-logos, a piercing of the logos to attain a truth that transcends it. We call this dialogical dialogue and we add that the relational nature of all witnessing belongs to this dialogue. (...) If dialogue is more than a dialectical technique, it cannot dispense with a certain testimony, i.e., with the nonapodictic testimony of the other that communicates his experience and does not merely criticize my views. (...) His testimony says to me (...) that there are other points of view, other possibilities, that what is self-evident to me may not be to another. This new sort of dialogue can proceed only by mutually integrating our testimonies within a larger horizon, a new myth. What the other bears is not a critique of my ideas but witness to his own experience, which then enters our dialogue, flows with it and awaits a new fecundation."*

The dialogical dialogue is thus characterized by its integration of testimony and therefore by its opening up to praxis. It is also a process in which the partners to the dialogue undergo a change. By having mutually made a place in themselves for the other, none of the partners to the dialogue will be able to leave it the way he entered it. As van de KERCHOVE and OST (1992 : 64) remark :

*"(...) what one must understand, is that the dialogical "we" is not constructed in the unrefined summation of two monolithical entities : a "I" and a "you" constituted as such in themselves... This "I" and this "you" between which speech circulates are, from the very beginning, divided, split by the fracture in which the other makes himself heard. There is only a possibility of dialogue because a place has already been dug in the "I" which the voice of the interlocutor can fill." -7-*

The dialogical dialogue as a method to seek knowledge, by integrating the acknowledgement of different *topoi* of discourse in the discourse, thus also challenges classical ways of seeking knowledge, as knowledge is no more merely produced *within* a frame but *in-between* different frames of knowledge. It thus characterizes all "inter"-research, may it be intercultural or interdisciplinary. As COTTERRELL (1996a : 47-48) writes, even though without explicitly speaking in terms of dialogue :

*"(...) it may be that the only way in which knowledge in the human sciences generally (including the study of law) can escape being limited by the particular configurations of power in the human activities that make possible each of these specific disciplines (...) is by confrontation between disciplines, or - to put it another way - the effective challenging of the mechanisms sustaining the discipline-effect of these fields. Intellectual confrontations of disciplinary knowledge fields may be possible to advance knowledge beyond that encompassed by each of them. It should follow, however, that any such effective confrontation will not merely add to knowledge but ultimately transform the terms in which knowledge is sought and conveyed by disrupting the taken-for-granted foundations of the disciplines involved."*

But in order to be able to play its emancipatory role in knowledge seeking, dialogical dialogue has to be sustained by an adequate methodology. Indeed the classical methodology will not do anymore as there is no more abstract all encompassing frame of reference for the search of dialogical knowledge which emerges "in-between" frames and not "within" a frame. Thus another factor becomes vital to genuine dialogical dialogue. Witnesses are not disincarnated selves witnessing some disincarnated truth but they are real people looking at the

world through their specific standpoint. Dialogical dialogue thus needs to acknowledge those different standpoints, those different *topoi*. It renders thus a *diatopical* approach necessary.

#### ***IV. The Diatopical Approach - Diatopical Hermeneutics***

The main issue we have to deal with here, the core question of diatopical hermeneutics, is how to understand from the *topos* of one culture the constructs of another (PANIKKAR 1984a : 29). This has always been a core question in anthropology to which the latter has provided the following answer : the anthropologist, in order to be able to understand another culture, must immerse himself in it, though keeping some critical distance towards it. He is thus asked to juggle with the “external” and the “internal points of view” on the cultures, to use a vocabulary familiar to legal theorists (HART 1994 : 88-91, see also : OST, van de KERCHOVE 1987 : 69 ff). It is this decentering, crystallized in his fieldwork, which permits the anthropologist to gain insights in another culture. These insights in turn may lead him towards a deeper understanding of his own culture and hopefully to a deeper understanding of the Human condition in general in all its diversity which is his ultimate goal (KILANI 1994a : 47 ff). The anthropologist must thus become the witness of the culture he is studying - and as a witness he must also be the translator of this culture to his culture of belonging (KILANI 1994b : 14 ff). To put it in CASTORIADIS’ (1992 : 228) terms :

“The ethnologist who has assimilated the world view of the Bororos to the point that he can only see it in their way, is no more an ethnologist, he is a Bororo - and Bororos are not ethnologists. His justification is not to get assimilated to the Bororo, but to explain to the Parisians, the Londoners, the New Yorkers of 1965 this other humanity that the Bororo represent. And he can only achieve this through *language*, in its most profound sense, in the categorial system of the Parisians, the Londoners etc . Yet, those languages are not “equivalent codes” - precisely because in their structuration, imaginary significations play a crucial role.” -8-

What is therefore needed in order to engage in intercultural dialogical dialogue is a diatopical approach sustained by diatopical hermeneutics. The diatopical approach invites us to make our journey through the different cultural discourses (*dia-logoi*) through the different cultural sites from where they emerge (*dia-topoi*). The different cultural discourses thus have to be replaced in their respective underlying myths in order to become mutually intelligible. It is not enough for a fertile intercultural dialogue on Law to become aware of the originality of the socio-legal processes and logics of different cultures. An acknowledgement of their respective legal visions, horizons or universes, their underlying myths is primordial (VACHON 1990 : 167). And on the level of these myths we are not on the level of dialectics, of reason, but on the level of practice, of lived experience. For VACHON (1990 : 169) legal cultures:

“(…) are not only of the order of logos but of the order of mythos, which means of the order of ultimate differences. And ultimate differences are not dialectical (which does not mean that they are non-dialectical or anti-dialectical).” -9-

We are thus again invited to think in a fundamentally plural way, acknowledging that there may be fundamentally different choices that Men have made to think about their lives and to organize them. Our goal can, in this perspective, no longer be to try to work out an all-comprehensive universal explanatory model, reducing this diversity to an artificial unity. It must rather be to find ways to make our different myths mutually intelligible thus permitting their

interfecundation, their articulation, their *mestizaje*. We thus seem invited to engage in diatopical hermeneutics which means according to PANIKKAR (1984a : 29) that :

*“We must dig down to where a homogeneous soil or a similar problematic appears : we must search out the homeomorphic equivalent - to the concept of Human Rights in this case. ‘Homeomorphism is not the same as analogy; it represents a peculiar functional equivalence discovered through a topological transformation’. It is ‘a kind of existential functional analogy.’”*

Before engaging now, as the requirements and the stakes are clarified, in diatopical hermeneutics and an intercultural dialogical dialogue on Human Rights, let us recall a last primordial requirement of both diatopical hermeneutics and dialogical dialogue : this whole approach can only make sense if we never forget our own topos of speech. Our utterances cannot encompass the whole of a problematic and cannot represent all points of views. They can only be an invitation to further dialogue, to further knowledge seeking “in-between”. Also, the relevance and coherence of our utterances can, as there is no more general universal frame of research, only be evaluated by taking into account their topos of origin. The acknowledgement of our topos of research must thus be at the core of any pluralist research in “in-betweens”. As BAUER (1996: 199-200) writes :

*“Standpoints and perspectives necessarily become the focus of attention, as soon as the concept of the universal observer is dismissed or limited. With the understanding of the relevance of the choice of the point of reference or of observation, appears also the hollow character of relativity clamour in the plurality discussion. As Mandelbrot (...) shows, the measure depends on the standpoint of observation even in the physical mesofield, which is the embodiment of objectivity and stability (...) The choice of the measuring unit (of the standpoint) turns into a question of adequacy in relation to the pursued goals and interests. Nevertheless, once the point of observation is chosen and defined, the measurement (...) becomes a question of accuracy of measurement, as it has always been. The same is true in the transition between incommensurable paradigms. They can only be argued in their concrete context. Therefore the appropriateness of the chosen standpoint (of the meta-discourse) as well as the accuracy - from the chosen perspective - of the observations that have been carried out must be proven.” -10-*



## Chapter II : Crystallizing and Modelling our Common Humanities

We have become aware in Chapter I that our outlook on the world and on Law is not self evident. It is underpinned by a myth which can only be rendered explicit through dialogue with the other cultures and the acknowledgement of their underlying myths. Law “as such” is thus not a universal fact, as SINHA (1995a : 31 ff) demonstrates in his “thesis of non-universality of law”. For SINHA, “Law” cannot be equated to social organization but is only one particular form of it, developed by western civilization and largely ignored by other civilizations like China, India, Japan or Africa (SINHA 1995a : 32). Though agreeing with him on the principle, we will nevertheless use in this Chapter the term “Law” while speaking of other “legal” cultures. But we will use it in the sense of a broader working definition than it is usually used in western legal science. We will not call Law state law or a set or system of rules or norms, but more generally the “legal phenomenon” (*phénomène juridique*) as ALLIOT (1983b : 209-210) defines it, and which, he argues, can be found in every society :

“Its generality stems from the fact that it is in the nature of man and of society. Being, is struggling, individually or collectively. But no one can fight on one front of his domain as long as he is not assured of peace on all its other borders. And the fighting of its members is not without danger for the group. In the domains a society considers as vital - and thereupon every society has its own conception- its existence is only possible insofar as its members control, to the extent they can, these struggles or at least the practices that result from them. Living in society, is therefore not only struggling, it is also agreeing on the legitimacy or the illegitimacy of these practices and on the consequences that shall be given to them. Social life calls for consensus. The phenomenon is general because it is linked to the nature of the individual (struggle) and to the requirements of life in society (consensus) . (...)

The law of a society is thus ordered around the limits of the spheres of action of all the domains it considers as vital : it is at the same time consensus on these limits and practices, aimed at, or succeeding in, confirming or displacing them.

Thus defined, law is not linked by its nature to the existence of a state, nor to the formulation of rules, nor to the recognition of its rationality.” -11-

ALLIOT’s definition places itself on the ground of homeomorphic equivalences and thus permits us to engage in dialogical intercultural dialogue as outlined in Chapter I. As he points out himself :

“Whoever wants to understand the form and the meaning of the legal institutions of a society has great interest not to relate them to the institutions of his own society - the connection would be superficial - but to the universe of the society in which he observes them.” (ALLIOT 1983b : 215) -12-

We will therefore start by presenting ALLIOT's theory on legal archetypes, logics and their relationship which can in his opinion permit the elaboration of models necessary to the constitution of a science of Law (*I*). We will then try to crystallize our different legal humanities by giving an overlook on a few major traditions (*II*). Finally we will try to propose models of these different humanities in order to propose a common meeting place which could constitute a platform for a dialogical intercultural dialogue on Human Rights (*III*).<sup>13</sup>

### ***I. "Thinking God - Thinking Law" - Legal archetypes and logics***<sup>14</sup>

It will not be necessary to dwell very extensively here on ALLIOT's theory of legal archetypes and logics as we have already a good preunderstanding of it through our previous dealing with the requirements of intercultural dialogue and as we will see it working in practice while presenting our world's major legal traditions. We will therefore at this place only try to outline his theory and to shed some light on it, in a way to avoid any possible misconceptions that could arise from a relativistic and frozen perception of Law that one might get of ALLIOT's theory and model at first sight.

In short, ALLIOT's theory can be summed up, as he himself used to do in front of his students in the following phrase : "Thinking God is thinking Law"<sup>15</sup>. In this phrase, "God" must be understood as a metaphor for the ultimate causality principle which we see as organizing the world we live in. Thus, in order to be able to understand other cultures' law, we must locate it in the world, the universe from which it originates - and cannot content ourselves to compare it to our own institutions. Therefore we have to understand the other cultures' universes. These "universes" are not only the visible universes in which men live, made up by different material, geographical, economical etc... conditions but are primarily their invisible universes in which men make sense out of their daily experience. It is the latter which give coherence and meaning to the former : the visible can only be understood in reference to the

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<sup>13</sup> It may be interesting to extend ALLIOT's concept of law. In discussing it, Prof. COTTERRELL raised the question if we necessarily have to associate the individual with struggle and societies with consensus. He asks if we could not also see individuals co-operating and groups in conflict. ALLIOT, in his definition, starts from struggle. He writes : "Being, is struggling, individually or collectively." Building on COTTERRELL's remark I wonder if we could not integrate in the very definition of Law the idea of co-operation. Law may have at its core both at the individual and at the collective level aspects of struggle and aspects of co-operation. It does not seem necessary to take exclusively a Hobbesian world view in which man is a wolf to man. On the contrary, in the paradigm of Community we try to develop, and which is above all about co-operation and sharing, and is marked by the ideal of the complementarity of differences, taking into account the co-operative capacity of man seems to me primordial. We have to learn to see man *with* the world instead of only focusing on man *against* the world. We could thus maybe complement ALLIOT's definition by adding "and co-operation" wherever he only speaks of "struggle". Indeed even if there are no struggles, co-operation needs forms which must be known and accepted. It is only through forms, through ways of doing and saying that human interaction and exchange becomes possible. Law partly plays this role of providing known and legitimate forms. Part of our Communitarian challenge, which we will develop further, is maybe precisely to provide people willing to co-operate but who have no adequate frame for their co-operation, with such frames, with Communitarian forms.

<sup>14</sup> Title inspired by the title of ROULAND's presentation of ALLIOT's theory in : ROULAND 1988 : 401 ff.

<sup>15</sup> "Penser Dieu, c'est penser le Droit."

invisible, not only as a whole but also in its particular manifestations (ALLIOT 1983b : 215). As we have noted above, different cultures can be understood as different human universes. They have different basic assumptions, which do not bear a mutual dialectical relation as VACHON noted (see above : p 21), but are fundamentally different as they share in different myths. They thus invite us to a journey to their core - and thus to a diatopical approach permitting us to understand them from inside, to reveal their underlying myth, their way of thinking of “God” and of Law.

It may be worthy to note that, if ways of conceiving the universe, God (as defined above) and Law show undeniable parallels in our world’s societies, this does not mean that one conception has priority over the others and entirely determines them. It is neither our way of organizing our society which will give emergence to a certain religion or philosophy, nor our religion or philosophy which will induce a certain kind of Law. It is rather the underlying archetype of conceiving the universe as a whole that will be manifested in a coherent manner in the different realms and activities of life including religion, philosophy or Law (ROULAND 1988 : 401, 1995a : 12). Furthermore, it should not be forgotten that these different archetypes are not a “reality out there”, a rigid structure imposing itself on the different societies as we would conceive of a legal system which would impose itself within a state. They are just models of ways people live their lives and conceive it. We should recall here what RÉGNIER (1971 : 18-19) says on models in order to know what to expect of ALLIOT’s model. Thus we will be able to understand clearly its link to the dialogical and intercultural perspective we have chosen on Law to enable us to reflect upon an intercultural universality of Human Rights :

“The model constitutes a representation of a phenomenon which is both simplified and global. Indeed one does not make a model in order to represent all the properties of a phenomenon, all the relations that beings have among themselves, all the aspects of the concrete fact. On the contrary, one envisages the phenomenon from a certain point of view (...) One makes an abstraction of certain aspects of the concrete, which simplifies. Further the selected aspects are not arbitrary; they are chosen from a certain point of view, but all that are relevant to this point of view must be chosen, which renders global the representation provided by the model.” -13-

ALLIOT’s model is thus a global, but simplified, model of Law. He proposes it as a contribution to the elaboration of a non-ethnocentric science of Law (ALLIOT 1983b : 208). It is relevant for us to the extent that it permits genuine intercultural reflection and dialogue on Human Rights, as we have outlined above. This does not exclude that for other purposes other models may be more appropriate.

ALLIOT (see ROULAND 1988 : 401-405, 1995a : 7-12) distinguishes three main different legal myths which he calls “archetypes” and to which correspond different logics. We will develop these archetypes and logics on the following pages. Here I will only give a short overlook which will be clarified by the subsequent developments and which is only intended to provide us with a general orientation as to where we are going.

The first one is the archetype of “identification”, exemplified by ancient China; it is complemented by a logic of self-improvement through the respect of rites and of complementarity of opposites. The second is the archetype of “differentiation” exemplified by ancient Egypt and animist Africa; it is complemented by an “autocentered logic” which renders those societies responsible for themselves and which also reasons in terms of complementarity of opposites. The third is the archetype of submission exemplified by Islamic and Western civilization; it is complemented by a logic of deresponsibilization of society itself in favour of an exterior entity and which thinks in terms of opposites excluding each other.

Concerning the logics and their relationship to the archetypes, ALLIOT makes three important remarks. First of all he reminds that, if one often speaks of different rationalities for

people belonging to different cultures (the rationality of the Buddhist or of the Christian etc ...), there is only one “reason” (*raison*) which all human beings share. Nevertheless there are different societal logics stemming from different necessities, choices and postulates which ALLIOT mainly divides according to the criteria of the exercise, or the delegation by the society of the exercise, of the responsibility for its future. Secondly he observes that similar logics are at work in societies having opposite archetypes. Finally he notes that different logics co-exist in one society, corresponding to different situations and contributing thus to the constitution of the legal model of that society (ALLIOT 1983b: 227).

Having now all the tools to understand the following models, let us try to crystallize the different legal archetypes and logics of our Common Humanities.

## *II. Crystallizing our Common Humanities*

We will present one after the other the archetypes of “identification”, where social order is sought to be conformed to the cosmic order, “differentiation”, where order is seen as the harmonious interplay of differentiated forces, and “submission”, where order is seen as the submission of society to a superior order. After this, we will add the Indian archetype which is a mixture of the three precedent ones.

### **1. Identification**<sup>16</sup>

The archetype of identification and its logic are best exemplified by the Chinese and especially by the Confucian thought which though very ancient still influences, often in an indirect manner, the daily life of the Chinese and their conception of society (LE ROY 1992b : 149). Confucian thought is underlaid by an archetype founded on the principle of duality and complementarity, and by the idea of dynamic harmony (LE ROY 1995a : 15). This archetype is best symbolised by the famous symbol of the *Tao*, the *T'ai-chi T'u*, or “Diagram of the Supreme Ultimate” which shows the dynamic intertwinement and harmony of the *yin* and the *yang*, the two fundamental principles standing for the male and the female, the day and the night, the weak and the strong ... (CAPRA 1992 : 119). This representation of the ultimate, of the *Tao*, immediately strikes us by its eminently dynamic nature, which becomes very evident in its English translation as the “Way”. As CAPRA says (1992 : 116-117) :

*“The Chinese, like the Indians, believed that there is an ultimate reality which underlies and unifies the multiple things and events we observe (...) They called this reality the Tao, which originally meant ‘the Way’. It is the way, or process, of the universe, the order of nature. (...)” It is characterized “by its intrinsically dynamic quality which, in the Chinese view, is the essence of the universe. The Tao is the cosmic process in which all things are involved; the world is seen as a continuous flow and change.”*

For the Chinese there is thus no infinite God who has created and who governs a finite world. The world is infinite in number and time. There are a plurality of worlds which appear and disappear endlessly during huge cosmic periods which cannot be apprehended by the human mind. Infinite and finite are as closely intertwined as are the *yin* and the *yang* of which

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<sup>16</sup> A short overlook on the archetype of identification in ROULAND 1988 : 401-402

they are an expression. Therefore, in its dynamism, the world is not limited by any law imposed on it from the exterior. It just regulates itself spontaneously by following its way. The individual has to do the same, in order to conform the human to the cosmic order (ALLIOT 1983b : 216, LE ROY 1992b : 150). Man must spontaneously follow his way which then coincides with the Way, the *Tao*. He thus becomes part of the cosmic harmony. This world view is well illustrated in one of LAO-TZEU's (1979 : 69) verses:

“A something was, not defined but fulfilled  
Born before Heaven-and-Earth  
Without speech as without boundary  
Independent immutable  
Playing itself everywhere without tiredness  
In sum the Mother of the world  
Not knowing her name I call her Way  
(...)  
(...) Man is one of the four Great of the world  
Man follows the ways of the Earth  
The Earth follows the ways of Heaven  
Heaven follows the ways of the Way  
And the Way follows its own ways.” -14-

Confucius' philosophy is based on this idea of the Way, of the *Tao*. It is a reaction against the loss of the *Tao*, of the divine mandate by the governments of his time (he lived from 551 B.C. to 479 B.C.). In Confucian thought the term *Tao* takes on a slightly different meaning from the original Taoist one. It is not merely used to refer to the ultimate reality but it is also used as the *Tao* of man, or the *Tao* of Human Society. In this use *Tao* is understood as the right way of life in a moral sense, which depends on its conformity to the cosmic order (CAPRA 1992 : 117, CONFUCIUS 1981 : 17). Thus it is not a set of rules, or law as we conceive it, which has to play a central part in social organization. The Confucian ideal is an ideal of self-improvement possible through education and of self-discipline which should be guided by the observance of the rites (*li*). It is through education and personal improvement that one becomes a “full” human being :

*“(...) one must earn rights by achieving some minimal level of personhood, of humanity. That is, entitlement to the privileges and benefits offered by society requires demonstration of credentials as a participating member of society. As David Hall and Roger Ames remark : A person is not entitled to political participation because he is born into an exclusive jen (human being) class. Rather, he becomes jen as a consequence of that personal cultivation and socialization that renders him particular. Being a person is something one does, not something one is; it is an achievement rather than a given.”*  
(PEERENBOOM 1993 : 305)

This focus on personal improvement is also reflected in the requirement for the sovereign to have become a *jun-zi*, a man tending to the realisation of the sovereign good, *ren* (CONFUCIUS 1981 : 19-20). He should be a model to his subjects and is seen as the great educator. Instead of governing by force he should govern by virtue mediated by rites (CONFUCIUS 1981 : 22 ff). CONFUCIUS (1981 : 33) says :

“Govern through the force of laws, maintain order through the use of punishments, the people will just obey, without feeling the slightest shame. Rule through Virtue, harmonize through rites, the people not only will know shame, but on its own will tend towards the Good.” -15-

*Li* (the set of rites) is the keystone of social organization. It provides, as LE ROY points out, the mould in which human action is shaped and becomes meaningful. It determines the models of behaviour and conduct of individuals and groups, the groups (families, ethnic groups, professional corporations) enjoying an auto regulation parallel to the personal auto discipline (LE ROY 1995a : 16, 1997a : 6). Concerning *Li* PEERENBOOM (1993 : 309) writes :

*“Of central importance to the historically rich Confucian world view and its non-rights based method of conflict resolution are the li. The li - conventionally translated as rites - may be understood more broadly to include the full range of social customs, ethical norms, and political principles embodied in the complex relations, organizations, and institutions of society. (...) the li are important not merely as the amassed wisdom of the ages, but also because they are the communally-owned repository of shared meaning and value on which people can draw in times of conflict. (...) By tapping the areas of commonality, one may be able to find the ground upon which to build consensus, to forge new harmony.”*

*Fa* (law), or the administrative intervention of the mandarin state thus only had a limited role to play in the organization of the Chinese society and was only reserved to those who either did not respect the rites, the impious, or did not know them, the strangers (LE ROY 1995a : 16). Let us note that through *li* Confucian thought thus doubly recognizes legal pluralism by recognizing *fa* next to *li*, and by respecting the different *li* of the different social groupings.

*Li* constituted the basis for government action until 1912, the use of *fa* remaining exceptional, and it does not seem that the first modernization of the Kuomintang, nor the socialist period have fundamentally changed those conceptions. The duties of the individuals remain still as important as their rights, the interest of the collectivity still prevails over the interest of the individual - and the concepts of “Rule of Law” (or “Etat de Droit”) remain problematic in a society where social regulation is much more centered around the notions of rites and self-regulation than around the concept of law (LE ROY 1995a : 16) and where substantive justice tends to take precedence over formal justice (PEERENBOOM 1993 : 310). It seems thus that even today in order to go towards a working “Human Rights” system within the Chinese sphere one will not be able to elude the question as to a Chinese theory of Rights, as PEERENBOOM (1993 : 314 ff) argues, which will have to have its roots in the Confucian heritage. This acknowledgement of the Confucian world view will also be important for the possibility of dialogue on Human Rights between cultures aimed at talking to, rather than past, each other.

Before finishing with the archetype of identification we should note that although we have illustrated it with the example of China, it also has widespread influence in the rest of Asia which shares the Confucian defiance towards “law”. In Japan for example *giri-ninjō*, the set of rules of behaviour established by tradition for the various types of human relationships, play a role analogous to that of *li* in China. The notion of duty is also very strong : one owes respect to the elders, to the authorities and to order in general. Disputes are mainly settled according to the will of the parties. Compromise is emphasized over the recourse to one’s rights - and in general recourse to law is perceived as a failure. As Takeyoshi KAWASHIMA writes : “Law in Japan is like an heirloom samurai sword : it is to be treasured but not used” (quoted in : HALEY 1982 : 299).

Let us now move on to the archetype of differentiation.

## 2. Differentiation<sup>17</sup>

ALLIOT illustrates this archetype with the help of ancient Egypt and the African animist traditions (1983b : 219-222). We will leave aside ancient Egypt and focus more especially on the African animist traditions which share their archetype with other animist societies spread over the whole globe (LE ROY : 1995a : 18). As we will see, this archetype shares the valorisation of auto regulation and complementarity of the opposites that we have met in the Confucian archetype. It is also characterized by a dynamic outlook on reality. Nevertheless, it differentiates itself from the Confucian archetype by its fundamentally plural and not only dual character. Life in society is in those animist societies often only seen as possible through its ternary structuration through which a complementary collaboration of the different social, moral or political energetic forces becomes possible, thus allowing their dynamic harmony (LE ROY 1995a : 19).

The world view of the animist societies is founded on the idea that the universe is built on the basis of a circulation of energies and that its vital principle, the *anima*, itself is regulated by this movement of energies. This movement is headed towards the harmony and the equilibrium of the whole by an unceasing search for interdependence and complementarity. This leads to the conception of an invisible and visible universe conceived on the basis of multiple, specialized and interdependent instances (LE ROY 1995a : 19). We will start by illustrating the plural and complementary aspect of animist thought before presenting the originality of its correlated dynamic approach to life which privileges function over being. We will then finish the presentation by exposing “custom” (*coutume*) which is the main instrument of social regulation in animist communitarian social life.

In the cosmologies of African animist societies there is no God Creator. The world emerges progressively from chaos, which already contained in an indistinct way all the potential future. First emerges a primordial god, followed by other gods and powers which often manifest as complementary couples and finally Man. It is thus, unlike as in our myth of creation, the multiple, the unstable and the unorganized which “constitute the foundation”<sup>18</sup> of the world. The world creates itself at each instant and Man plays an important part in this process by contributing to the preservation of the universe’s harmony. The unity of society is thus not perceived as the result of the obedience to a uniform, superior order but as the affirmation of distinct groups, who mutually need each other and are therefore seen as complementary and united. Differences being conceived as the basis of unity, western uniformizing legislation, because it erases them, is often perceived as a threat to it. Furthermore as general immutable external rules are rejected Men are seen as themselves responsible for their future - which they create every day anew through custom (*coutume*) valorising conciliation and a unanimist spirit (ALLIOT 1983b : 219-222, 1984 : 283 ff, 1980b : 469 ff).

Before having a closer look at “custom” and in order to permit us to grasp its profound originality and not to reduce it to some non-written, “imperfect” law, we shall say a few words, after those on differences and their complementarity, on the primacy of “function” in animist thought.

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<sup>17</sup> A short overlook on the archetype of differentiation in ROULAND 1988 : 402-404

<sup>18</sup> I have put the quotation marks as the terms “constitute” and “foundation” tend to evoke a solid world view like our own, rather than the dynamic animist one.

As we have already noted, at the core of animist thought we find the dynamic structure of the universe. Movement is not the result of an exterior constraint, but flows from the internal dynamism of the universe. This view is reflected in animist law which privileges becoming over being, a functional over an institutional<sup>19</sup> approach. ALLIOT (1984 : 274) notes that the original African Laws do not know beings destined to accomplish functions : it is function which determines beings<sup>20</sup>. And he adds that in this point of view the African logic goes much further than Durkheimian or Malinowskian functionalism, which presuppose beings preexisting to functions, as they see the organs of the society deemed to satisfy the needs of the beings constituting it. In our Western view, rather than the beings themselves, functions determine social spaces or fields (ex : the political or legal field) in which beings evolve (the beings can be individuals, or companies, or the state etc...). In the African view, on the contrary persons, lineages, the state or even goods are themselves defined by their functions. It is not possible to identify them as a determined type of being - identities are thus multiple and changing (ALLIOT 1984 : 276). ALLIOT (1984 : 274-275) gives the following example as to individuals :

“At the image of God, absolute function beyond being, the universe is not a set of beings but a set of functions which determine beings.

This is the case with family or social functions which determine the status of individuals. In Europe the individual is a person from birth to death, with a right to invariable rights for each and identical for all. The notion of legal personality does not belong to the original African Laws. There one finds the notion of status and of status determined by the functions one accomplishes : the individual status is all the more important as one gets older, as one gets married (and for a man having several wives), as one gets children, as one gets at the head of a lineage, etc . (...)

Being is so unstable that one easily passes from one form to another.” -16-

The view of man reflects this general attitude. For the *Wolof* (a community living in Senegal), the human being is constituted by three elements : the *yaram* (or physical envelope), the *rab* (the ancestral spirit inhabiting the body of the new born child) and the *fit*, the vital energy which can increase and decrease according to social behaviour and ritual practices. The human being can only access legal life (*vie juridique*) through his inscription in a community and by exerting his responsibility in the community or, later, in order to represent it - children are, for example, at their birth inscribed in three communities which they will never leave : their family of procreation, their lineage, and their age group - but it is only little by little, and only after their initiation that they become complete members of the legal “community” (LE ROY 1995a : 19-20). This view reminds us of the Confucian view exposed above and is in complete contradiction with our Western conception of an abstract individual.

Custom (*la coutume*) crystallizes this original outlook on life in the legal field. It would be a big mistake, as we can feel through what we already know of animist thought, to conceive of it as a set of non written eternal rules which would furthermore be autonomous from the other social spaces, as we conceive them, like religion or morals. As ALLIOT (1984 : 277) writes :

“Custom (*la coutume*) is not a being, like a set of laws would be : it is the way to be, to speak, to act, permitting everyone to contribute at his best to the preservation of the cohesion of the group (...) Furthermore, this same function

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<sup>19</sup> We will give a broader development of the institutional approach in the next part on the archetype of submission.

<sup>20</sup> “Les Droits originellement africains ne connaissent pas des êtres appelés à remplir des fonctions : c’est la fonction qui détermine les êtres.”



of cohesion often entails avoidance of the invocation of custom : the ideal is not to let conflicts lead to an open confrontation. And if the latter cannot be avoided, a solution is sought, not so much by relying on previously fixed rules, but in conformity, to what is perceived case by case, as being in the interest of the group. The solution which crystallizes “in the womb of the village” is preferred to the application of law.” -17-

To sum up one could say that “custom”, as the “way of saying the ways of doing of the ancestors”<sup>21</sup> (LE ROY 1995a : 19) is rather a form than a normative content. This form is malleable and lays emphasis on the “models of conduct and behaviour” (*modèles de conduite et de comportement*) which constitute the reference for the evaluation of social behaviour. It furthermore permits to attain the ideal of solving conflicts inside the group in which they arose (*cii bir u keur*, in the womb of the family, as the Wolof from Senegal say), thus emphasising the responsibility of the group for its own future (LE ROY 1995a: 19).

This communitarian approach is thus in opposition to our archetype of submission which emphasises deresponsibilisation in favour of an exterior authority :

“We are at the antipodes of the system in which, at the image of a God of whom everything depends in a continuous creation of every instant, the rights of the ones and the others are only maintained through the grace of the one who is the parent of all those rights, the State. The law of the communities does not need a power who deems it worthy to maintain them. It is the necessary consequence of their structure.” (ALLIOT 1980a : 158)

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Let us now move to the archetype of submission.

### 3. Submission<sup>22</sup>

This archetype is shared by the cultures of the religions of the Book. We will illustrate it through the Western world view and the world view of Islam. It immediately strikes us by its difference to the two archetypes presented above : first, the world is created by a power exterior to it. Being prevails over becoming; differences are not seen as complementary in their mutual interplay, but are seen as excluding each other; and the world does not get its coherence through the mutual attraction of its elements but by laws which are imposed on it from the outside. Second, the responsibility of the society for its life and thus for its future gets decentered. It does not lie in the womb of society. Society does not continuously recreate its life at each instant but its management is transferred to an exterior authority. In the case of the modern state, it is the latter which becomes the responsible authority - other communities are pushed to the background insofar as they constitute an obstacle to the control by the state of its citizens, seen as autonomous and equal individuals (ROULAND 1988 : 404-405). ALLIOT characterizes the archetype of submission and its correlated logic of deresponsibilization as follows :

“(…) for the Christian West God is the One who is, before being the One who creates : he Is since all eternity, he could have not created, or created

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<sup>21</sup> “la manière de dire les manières de faire des ancêtres”

<sup>22</sup> A short overlook on the archetype of submission in ROULAND 1988 : 404-405

differently. In him Being takes precedence over action. At his image, the West affirms precedence of being over function. (...) Also, it is not indifferent that for the Christian West the unique God is radically exterior to its creation, that he is recreating it at each moment and that he governs it in a sovereign way through the uniform constraint of his laws and decrees.” (ALLIOT 1984 : 271) -19-

We should note that modern legal thought, especially the continental European one, giving a central place to the state and to state law is only a rationalized<sup>23</sup> version of this archetype. ALLIOT makes a comparison of this vision with the conception of Law and State of French jurisprudence, which may be one of the most striking examples for the archetype of submission. In this conception society can only be conceived as a set of persons enjoying the same plenitude of legal being, whatever their functions or responsibilities. The State, secularized avatar of God, can only be conceived as unique and all-mighty, centralised and exterior to its citizens. It is the State which permits them to live by granting them their legal being and the rights through which they can act. Furthermore it controls them through uniform laws and decrees. There is no Law outside the state and its uniform laws (ALLIOT 1984 : 271). In addition to the reduction of diversity to homogeneity, this archetype bears a logic of deresponsibilisation :

“Society is then decentered : it projects its center out of itself; above itself. The relationships between its members change completely. They are not anymore centered on the research at each moment of the just attitude between them. The just attitude is to conform to the system of rules established by the power, or if they are not satisfactory, to demand a new law, a new regulation.” (ALLIOT 1983b : 234) -20-

Through rationalization this conception has become universal in our Western minds. State and state law are seen as rational and thus as universal and as the best ways of organizing life in society. Through colonialism we have exported our “universal” model and have proposed (and imposed) it as “The” model for societal organisation. If I speak of “The” model, although there are different forms of State, I do so because this model has a few characteristics that all the diverse manifestations of the modern state share : it is constructed with a direct reference to Reason which gives it a pretension to universality. It involves autonomy of the political space and creation of a public sphere distinct from civil society (BADIE 1995a : 70 ff). Further it is characterized by the principle of territoriality which takes precedence over communitarian allegiances (BADIE 1995a : 82 ff) and by its unification through law (BADIE 1995a : 99 ff). By now this model of State has been adopted all over the world - not without creating lots of troubles to the cultures who adopted it without sharing our archetype and the conditions in which our modern state law emerged (BADIE 1995a : 69 ff). It is only recently that the universality of our model has started to be challenged in the continental European legal culture, that the generality, the rationality, the stateboundness of our law have started to be questioned in order to move towards a “postmodern” conception of law recognizing relativism, pluralism and pragmatism (ARNAUD 1990 : 81). It is also fairly recent that more and more voices from other cultures raise to claim the originality of their own archetypes and logics. And this thesis touches right upon the core of this problematic of the western societal archetype which has claimed its universality and is now being challenged, obliging us to rethink the scope of our possible contribution to “World Law”, and to rethink the notions of universality.

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<sup>23</sup> For a more detailed account on the relations of modernity, the role of Reason, the walk to uniformization and the emergence of the modern state see : LE ROY 1995a : 13-15 or EBERHARD 1996 : 12-15.

As I am writing this thesis from the point of view of a legal theorist who has been predominantly trained in the continental European tradition, it may be useful to stress the different treatment of the relationship between State and Law in British and Anglosaxon common law theory. The latter may to some extent be closer to Islamic legal thought, which we will expose below, than to the continental European one as present, for example, in France or in Germany.

First the Anglo-Saxon tradition seems to see law more as a matter of principles than as a matter of rules. COTTERRELL (1989 : 22-23) asks and remarks :

*“But how far is this common law an affair of rules ? Here, as in many other inquiries about classical common law thought it is important to avoid imposing on the common law tradition modern interpretations reflecting views about law derived from wholly different theoretical premises (...). To write of common law as a system of rules (...) is to impose just such an alien conception on it. (...) The idea of common law as principles of law seems more appropriate for capturing (its) shifting, dynamic character, if only because principles suggest flexible guidelines for legal decision-making rather than rules which control.”*

Second, in common law theory law seems to find its source rather in the community than in the state. *“It is the product of the community grounded in its history”*, as interpreted and applied by the judges (COTTERRELL 1989 : 25). Further COTTERRELL (1989 : 32-33) writes :

*“The idea of judicial authority rooted in community remains perhaps the strongest, most vibrant, contribution of common law thought. Its explanations of political law-making through legislation remain perhaps its weakest, flimsiest elements.”*

These few words on common law thought provide us with a bridge to enter Islamic legal thought. I strongly believe, although I cannot go into an extensive argument here, that it would be very beneficial for continental lawyers to learn more about common law thought in a perspective of intercultural legal research. Despite the intrinsic interest of the endeavour this may permit continental lawyers to broaden their perspective on law while still remaining in the frame of “Western” culture. This may then also permit us to approach Law of other cultures more openly. It may permit us to see it not as something “very far away”, as something completely irreconcilable with our own thought. It may permit us to build up a healthier relationship to acknowledging differences. Indeed, we will already have made the experience that great differences even exist in what we consider as belonging to our own Western culture. Therefore it will appear that differences cannot be reduced to a “necessity of cultural distance”, and of a “cultural distance” furthermore often constructed as being unbridgeable. This broadening of perspective will rather permit us to approach law in a more subtle way, rendering more of its complexity. But let us now move to Islam.

Islam although sharing the archetype of submission, gives it a different interpretation than the one we have already exposed above for the Christian, “Western” tradition. The most obvious difference to the Western interpretation is its sacred character. In Islam no secularisation of Law occurred like in Western culture. There is thus a radical opposition between Western and Muslim law. In the continental European view law has its source in the State. It thus originates in a secular power. In common law it has its source in community, and thus also in a secular and not a divine reality. In Islam, on the contrary, the ultimate source of law is God. There can be no man made law. Koranic law, *sharia*, imposes itself on the worldly powers - it legitimizes or condemns them. The role of the Muslim state should be to assure the respect of divine law, thus permitting its citizens to acquire the dignity which is based on precisely this respect. In Islam, Law transcends Man. It cannot be apprehended in its totality -

it is not possible to conceive of a complete, even though modifiable, edifice of law as we do for instance in continental European legal thought. It always has to be rediscovered through a constant effort which inevitably leads to divergences. These divergences are accepted, and Islamic law can be characterized by its sense of morality, interdependence and solidarity (ALLIOT 1983b : 223-224). In this sense, the archetype of submission as interpreted by Islam is closer to the two first archetypes described above than to its Western counterpart. For LE ROY (1995a : 17) Islam locates itself between the unitarianism of modern Western cultures and the dual structure of Confucian thought. Though affirming the principle of unity, it admits a second referent which, however, is not in a complementary but in a hierarchical relation to the first. Thus if there is only one God, Mahomet is his prophet. If there is only one community of believers, the *umma*, its plurality, in the forms of different rites or schools or brotherhoods (*confréries*) which interpret the Koranic message in their way, is accepted. Parallel to the *Qoran* and the *Sharia*, reasoning of the lawyers and local customs are seen as sources of law<sup>24</sup>. The *Fiqh*, or science of Law, itself is not uniform but encompasses a science of proofs (*usul al-fiqh*) and theology (*usul ad-din*). The complex interplay between those two poles permits various interpretations of law which can either lean rather towards reason, or towards religious faith, through *ijtihad*.

*“The distinction between law and its sources is carefully maintained in Islamic jurisprudence. This distinction assumes that Holy Law, as the aggregate of divinely-ordained rules, is not entirely self-evident from the sacred texts. If it were, the sacred texts would not be the sources of law, but rather the Law itself (...) In fact, the sacred texts do not, as a rule, “state” the Law in a strictly legal sense, in the sense that a code or similar instrument states law. They do, however, contain the Law. Because the Law is buried, as it were, within the (legally) imprecise and sometimes ambiguous language of the sacred texts, it is said to be extracted from the texts; and it is for this reason that the texts are to be considered sources of the Law rather than the Law itself.*

*The process of extracting or deriving (...) legal rules from the sources of Law is termed, with reference to its character as a human activity, ijtihad. Ijtihad literally means “endeavour” or “self-exertion”.*” (WEISS 1978 : 273-274)

HALLAQ (1984 : 287) defines *ijtihad* as “*the maximum effort expended by the jurist to master and apply the principles and rules of usul al-fiqh (legal theory) for the purpose of discovering God’s law*”.

It would thus seem that through *ijtihad*, in its interplay between the rights of God (*huquq al-illah*) and the rights of Man (Adam) (*huquq Adam*), a counterpart to the Western concept of Human Rights, could emerge backed by *ijma*, or consensus, of the community, and *qiyas*, reasoning per analogy, whereas Western Human Rights could never be transposed as such to Islam which only recognizes the Law of God. However, it would therefore also seem unavoidable to open up again the gate of *ijtihad* (of effort) which has been closed in the tenth century. This closing has consisted in freezing Islamic legal theory at that time by declaring that a point had been reached at which all essential questions of law had been thoroughly discussed, rendering thus any further deliberation unnecessary, if not disruptive and thus condemning Islamic law to immobilism and conservatism (LE ROY 1995a : 17, WEISS 1978 : 282, HALLAQ 1984 : 287).

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<sup>24</sup> For the interesting relationship between “official” Sharia Law and “unofficial” customary law see : COULSON 1959 : 263 ff

#### 4. The Indian Archetype

In the following pages we will call “Indian archetype” the archetype shared by traditional Hindu, Jain and Buddhist conceptions of reality. This archetype can best be apprehended through the concept of *dharmā*. But before having a closer look at *dharmā*, let us shortly present the cosmology in which it is embedded.

In the Hindu cosmology there is a creation of the world. But it is not a creation by an exterior God out of the void, but a projection, *srishti*, of the non-manifested (*Brahman*) into the manifested. *Srishti* is the passage from the one to the multiple. It is most currently explained through the differentiation of two fundamental principles, *prāna*, energy in its primordial essence, and *ākāsha*, substance in its primordial essence. It is the interplay of these two principles which allow the existence of all things and beings. The end of the world is a dissolution, *pralaya*, constituted by the return of the manifested to the non-manifested. Nevertheless, this cycle is not unique but repeats itself endlessly according to a regular cyclic rhythm which cannot be apprehended by the human mind (HERBERT 1988 : 76-79, VIVEKANANDA 1970 : 373 ff). Although all existence is based on the dynamic interplay of *prāna* and *ākāsha*, which reminds us of the Chinese structuration of the world by *yin* and *yang*, the Indian is not a dualist world view. Its cosmology rests on a ternary structure of reality which is seen as made up by three worlds (*triloka*).

Further even though there is God and creation, both are not uniform. There are numerous universes and God himself manifests himself through multiple forms. As God as such is too remote to be apprehended by the human mind, he can be rendered intelligible to us by its personalization. This personalized God is called *Ishvara* by the Hindus and can be approached under the aspect of any of its possible functions, powers or manifestations. He can thus be represented in multiple ways and called by multiple names. The Hindu monotheism thus accepts, and even considers as necessary, a parallel polytheism - whose pantheon can seem very puzzling at the first encounter with its multiple gods and their avatars. Furthermore above polytheism and monotheism, Hinduism keeps a place for monism (*Advaita*), a doctrine considering that there is only one reality, that God is not separated from his creation but is his creation. The Indian world is thus fundamentally plural. If it is hierarchically organized, this hierarchy is not a linear and rigid one, but a flexible and complex one (HERBERT 1979 : 60 ff and 95 ff, 1988 : 286 ff, VIVEKANANDA 1972 : 99 ff). We thus find in the Hindu world view, which is also at the basis of Buddhism and Jainism, a blending of abrahamic, Confucian and animist views. There is a God creator and a created world organised through a hierarchical principle. Nevertheless the universe is infinite in number and in time, going through endless cycles animated by the interplay of two opposite and complementary forces. At the same time, the Indian world view pictures an eminently plural world and does not reduce it to a dual structure. It is thus a very interesting *mestizaje* as it can give us hints as to the way of conceiving a platform for mutual encounter which could permit the articulation of our different cultural archetypes.

*Dharma*<sup>25</sup> is a central concept in this world view. It is “The” structuring principle of life and the cosmos :

“*Dharma is that which maintains, gives cohesion and thus strength to any given thing, to reality, and ultimately to the three worlds (triloka).*”  
(PANIKKAR 1984a : 39)

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<sup>25</sup> A development of the concept of Dharma and other stimulating definitions in HERBERT 1988 : 116 ff.

*“On a cosmic level, dharma is the way in which one maintains everything, the way in which the cosmos or the balance in the cosmos, is maintained. At the micro level, dharma is the way in which every constituent element of the cosmos contributes its share to maintaining the overall balance. Each element has its own dharma, its svadharma. As long as each element of the cosmos performs its specific svadharma, the overall balance does not suffer. As soon as an element, however, deviates from its own dharma, that is, commits adharma, the balance is disturbed.” (ROCHER 1978 : 5)*

It should also be emphasized that *dharma* is an eminently plurivocal term :

*“The religious man will see in dharma God’s law; the moral man will see it as the interior principle which provides the criterion for good and evil; the lawyer will see it as law (...), the psychologist will emphasize tradition, custom, social spirit; the philosopher will see in it the conscience of the species or the conscience of unity, which by its will push man to manifest goodness or the sense of unity; the idealist will see in it the ideal; the realist, the law which underpins the apparent manifestations of life; the practical mystic will see in it the force (...) which brings harmony in unity. But actually, dharma is the principle which is at the basis of all these manifestations, contained in all of them, and underlying all these conceptions.” (MEES quoted in : Herbert, 1988: 117-118) -21-*

Thus *dharma* not only inscribes the human beings in society but in the whole universe for which they become partly responsible and thus, as PANIKKAR (1984a : 39) notes:

*“(...) a world in which the notion of Dharma is central and nearly all-pervasive is not concerned with finding the ‘right’ of one individual against another or of the individual vis-à-vis society, but rather with assaying the dharmic (right, true, consistent ...) or adharmic character of a thing or an action within the entire theanthropocosmic complex of reality.”*

In this conception the individual cannot be conceived as an abstract independent entity, as he is *“only the knot in and of the net of relationships which form the fabric of the Real.”* (PANIKKAR 1984a : 40). We will come back and elaborate this insight in our last part on a dianthropological praxis of Human Rights. For the moment let us content ourselves with noting that in this view personality has, like in animist thought, rather a functional than a substantive character. It is the different statuses of men which will determine their mutual rights and duties. Furthermore as already noticed, *dharma* brings in the idea of a cosmic relation and responsibility extending beyond the purely human realm. *“Humankind has the ‘right’ to survive only insofar as it performs the duty of maintaining the world (lokasamgraha).”* (PANIKKAR 1984a : 41). Last but not least, by insisting on the universal interdependence of things and beings and by stressing the need for their harmonious cooperation, the Indian world view also invites us to take a global perspective on Human Rights and not to merely see them as the mere assembly of a set of separate and independent rights.

### ***III. Modelling our Common Humanities as a Platform for Intercultural Dialogue***

Before starting our modelling exercise we should maybe reiterate a warning. Our paradigm of Common Humanities intends to shed light on the plural character of Humanity. It intends to emphasize the mutual interdependence of unity and diversity in the constitution of the

Human. It intends to make us aware of the fact that we express our Humanity, our Common Humanity, through multiple means, in multiple ways, in our Common Humanities. And all of us do. It is not only different individuals or different cultures which express themselves differently. Even the same individual or culture manifests itself plurally. Nevertheless, all individuals or cultures have some features which especially characterize them. That is what makes up their original personality. But next to the dominant trait(s), the individual or the culture also shares the other characteristics of the Human. One could say that they are a bundle of characteristics : they display some of them in major - the others in minor, like in a musical composition. Thus, looking at the others and looking at their differences permits us to discover in ourselves traits we may have overseen.

Crystallizing our Common Humanities is therefore just as much learning about the different choices we have made concerning the traits we play in major, as learning about the whole bundle of traits we all possess as Humans. In the following developments it should thus be kept in mind that I do not intent to give a rigid, essentialising view of cultures and their law. All societies very probably contain all elements presented below and only differentiate themselves in the way they coordinate them and play them in major or minor. The rigid presentation in the forms of models is only necessary to provide us with tools to think our Common Humanities and thus to be able to engage in authentic intercultural dialogue. Thus, when I speak of crystallizing this should not evoke the idea of freezing a reality but rather of rendering conscious the essence of a reality that was unconscious before.

In the precedent pages we have crystallized our Common Humanities by unveiling the different archetypes underlying them. This operation has permitted to render conscious what usually remains unconscious. It has helped to unveil the implicit assumptions members of different cultures may have when dialoguing about Human Rights. This may contribute to shed some light on non Western critiques of Human Rights and may help to see them as constructive critiques rather than as attacks by “barbarians” of a “civilized” ideal. It may help to break out of a logic of opposition which seemed to dominate at the World Conference on Human Rights in Vienna in 1993. It may also permit to break out of “monological” dialogue in favour of dialogical dialogue sustained by diatopical hermeneutics. It may thus permit to orient future meetings towards a more cooperative dialogue, acknowledging that unity must not be reduced to uniformity but can exist in diversity. Keeping in mind our new insights, it becomes easier to understand the originality of non-Western declarations of Human Rights : like the African Charta of Human Rights of 1981 which insists parallel to the individual rights on collective rights, on duties correlative to the rights, and on the right to development, or like the different Islamic declarations of Human Rights (the Universal Declaration of Human Rights in Islam of 1981, the Declaration of Koweit of 1980, the Declaration of Taif of 1981, the Declaration of Ryad of 1988) which are essentially marked by their stressing of the divine character of Human Rights, or finally the Asian declarations (Declaration of the Fundamental Duties of the Asian Peoples and States of 1983, the Declaration of Bangkok of 1993, the Manifest of Human Rights in China of 1979) which insist on the necessity of taking into account regional or national specificities, the importance of collective rights and the right to development (for the above and for more detail : ROULAND 1995b : 202-204, 1994 : 21-28).

The aim of this part is to draw on the lessons provided by the precedent pages in order to propose a synthetic model which can constitute a frame for thinking about Human Rights in an intercultural perspective. In other words we will try to propose a “platform for intercultural dialogue” in which our Common Humanities could meet in mutual exchange. In order to do so I will present three models which Etienne LE ROY has given during his lectures on “Anthropologie économique et sociale” for the “Diplôme d’Etudes Approfondies Études africaines Option anthropologie juridique et politique” of the University of Paris I - Panthéon-Sorbonne, 1995-1996, and during his lectures on “Legal anthropology” in the Master programme of Legal Theory at the European Academy of Legal Theory in Brussels, 1996-

1997. I will then propose a synthesizing model of the precedent ones inspired by another of LE ROY's models given in these lectures.

The first of these models is related to the subject of Human Rights. The second is related to the different normative orders which can be seen as constituting Law. The third is related to the different kinds of "social rules" grounding Law. The last one is a summary, adding the different societal archetypes and locating in it our different Common Humanities in relation to each other.

### **1. The Subject of Human Rights**

In the archetypes we have developed, there appeared three kinds of relationships between the individuals and their society. In the Western world view it is the individual as an autonomous legal person (*personne juridique*) who is valorized, the state being an assembly of equal individuals. In the animist it is the human being who is valorized with an equilibrium between his "individual human" and his social or "collective human" aspect and who forms a community with those with whom he shares his life. In the Confucian world view, the global society, the collectivity takes precedence over the individual who is mainly a subject (*Figure 1*) :

*Figure 1*

### **2. The Different Social Orders**

For LE ROY every society seems to know at least four types of ordering in social organisation which he calls social orders (*ordres sociaux*) : the imposed order (*ordre imposé*), the accepted order (*ordre accepté*), the negotiated order (*ordre négocié*) and the contested order (*ordre contesté*). The imposed order is usually imposed by an exterior and superior instance, in our western societies mostly by the state. Its regulation is mediated through general and impersonal rules, best illustrated by state law. The accepted order is the expression of a



socialisation realised in harmony with the values and the representations of the project of the society. It is in our societies the frame of our daily casual experience. It is the product of the systems of lasting dispositions (*systèmes de dispositions durables*) which BOURDIEU calls “habitus” and which ensure that we for example usually stop in front of a red light, or accept the authority of our teachers or professors etc ... The negotiated order privileges the resolution of the conflict within the group where it originated and corresponds to a functional approach to conflict resolution. It orients itself rather than on rigid norms, on “models of conduct and behaviour” (*modèles de conduite et de comportement*) and is characteristic of customary law as we have met it in relation with the animist societies. The contested order rather than a really “autonomous” order of regulation is rather a challenge to the existing order and invites to a rethinking of the dominant order if one wants to avoid open and violent confrontation (LE ROY 1995c : 34-36, 1997b : 81-84, ROULAND 1988 : 446-448). We can represent the model of these different social orders as follows (*Figure 2*):

*Figure 2*

### **3. The Legal Tripod<sup>26</sup>**

According to LE ROY (1995a : 26) recent anthropological studies show that Law (*droit*) rests on three feet : it rests on general and impersonal rules best illustrated by law (*loi* - state law) , on models of conduct and behaviour crystallized as custom, and on habitus, systems of lasting dispositions in which the relationship to law is incultured and in which Law is in its daily living represented and interpreted in particular laws, which rely largely on education. It appears that the normative phenomenon can only be grasped adequately through the prism of these three “feet” or “foundations” (LE ROY 1995a : 26, KUYU 1995 : 83-84). In our modelling of this “prism” we will represent the three feet with their counterparts of social regulation (*Figure 3*):

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<sup>26</sup> For a more detailed description see LE ROY 1997c : 128 ff

Figure 3

It may be interesting to see how the legal tripod may permit to model Law of different societies in intercultural research by using a table presented by LE ROY in a recent article (1997c : 131). This table shows the different valorisations of the three feet or foundations of Law in the order of importance attributed to them in the Western, Animist, Confucian and Muslim traditions. It gives also a good visual illustration of our Common Humanities with its bundle of common traits valorised differently in different cultures but present in all of them (*Figure 4*):

Figure 4

**4. A Platform for Intercultural Dialogue on Human Rights**

Not to get confused, we will first give a model summarizing the models above, by complementing them with their legal archetypes. Indeed as we have seen in relation with the different legal archetypes and their logics, different cultures' Laws always form coherent systems. Thus we can relate the different archetypes to the different logics which valorise different conceptions of the individual, different social orders, different "foundations" of Law. We should recall here that all societies reveal all these elements but differentiate each other through the different weight they give to them. After having given the abstract model we will place it in the context of the different cultures. The model will thus show the respective relation of the different cultures with regard to each other, and can thus constitute a platform for intercultural dialogue. It can constitute this platform, this *topos* of encounter, as it helps to determine the respective *topoi* of the partners to the dialogue (*Figure 5*) :

Figure 5

We will now place it in the context of the different cultures. In order to keep the diagram clear I will only indicate at each summit of the triangle the corresponding archetype without representing all the other correlated notions (*Figure 6*) :

Figure 6

The purpose of this model is not to provide a comprehensive explanation, but it merely intends to show how a platform for intercultural dialogue could be conceived and modelled. It is mainly intended to provide us with a visual support for our pluralistic Human Rights' thought, and to constitute an intellectual support or platform for an intercultural Human Rights' approach. It should not evoke a relativistic view of cultures. As already mentioned above, the elements by which we have characterized the legal archetypes can be found in all cultures, though they may be weighted differently. Furthermore the model should not suggest a frozen and immobile picture of legal cultures. Through time cultures change. The actual picture of a society at one specific moment would also show us the pluralism of societal organisations in different fields of socio-legal regulation. Thus, to stay on the purely legal level, trade law (*droit des affaires*) in continental Europe for instance seems much closer to custom and negotiated order than to codified state law and imposed order. The model should rather try to evoke a

platform, a forum where we can meet and share, and which acknowledges the peculiar enrichments that our Common Humanities can offer in an authentic intercultural dialogue.

In his lectures, Etienne LE ROY has also characterized the different Western streams, stemming either from the Reform (protestants) or from the Counter Reform (Catholics), those issued of the Counter Reform being closer to the unitarian archetype of submission than those issued from the Reform. He has also characterized the conceptions of ancient Rome and of Byzance as well as the Jewish tradition. As we have not dealt with them in our thesis I did not include them on the above model, which without doubt can still be improved considerably. Nevertheless, it already opens up, in its present form, a way to think our Human Rights problematic in a “healthy” pluralism, acknowledging our Common Humanities, our unity in our diversity. This model invites us also to go further and to reflect upon the Community which our cultures in their mutual tension and cooperation represented above can give rise to, and which will have to deal with one aspect left aside for the moment, though announced through the diagram : the dynamic aspect of our living together, our actual living together.

**Part II :**

**Our Human Community :**  
**Towards a Plural and Praxis Oriented**  
**Human Rights Paradigm**

“The Mulla, who had just been freshly nominated as a judge, heard his first case.

The plaintiff exposed his problem in such a convincing manner that the Mulla exclaimed :

“I think you are right !”

The clerk of the court asked him to refrain himself, as the defendant had not yet been heard.

Nasrudin was so moved by the defendant’s eloquence, that he exclaimed, as soon as the latter had stopped to speak :

“I think you are right !”

The clerk of the court could not stand it anymore :

“Your Honour, they cannot *both* be right.

- I think you are right !” said Nasrudin.” (SHAH 1989: 67) -22-

In Part I, we had a brief encounter with our Common Humanities. We have discovered that different cultures share different outlooks on reality and on life, declining thus in various ways our Common Humanity into Common Humanities. We have also tried to show that these

different outlooks are not necessarily contradictory but can be seen as complementary, thus making a mutual enrichment possible. We have also tried to propose a model which could help us to think about Human Rights in intercultural, dialogical and plural terms. What we have not done until now, is to deal with the issue raised above, in the little story of the Mulla Nasrudin's first trial.

It may be very nice to agree with everybody by trying to understand him from within, by looking at things from his *topos*. But this does not seem to allow to reach solution, a settlement, and thus does not seem to fit the demands of legal life. The main problem we will try to deal with in this Part will therefore be to try to think the pluralism which has emerged in the precedent Part in the legal field. The whole reflection will be centered on two main problems : how to think the “and” and how to think our practice or rather praxis of Human Rights.

Thinking the “and” will invite us to favour cooperation, articulation instead of exclusion or imposition. Thinking the praxis will invite us to think about Law as “legal phenomenon” (*phénomène juridique*) as ALLIOT defines it, thus taking into account its social practices, instead of merely thinking about law, reduced only to its “state law” aspect and to its rules. It will be the concept of Community, of Human Community or rather of Human Rights' Community which will permit us to link those two approaches.

The concept of game in legal theory will then provide us with tools to analyse and to shape our “Human Rights' Community”.

So let us start by having a look at the possible emergence of “Community” as a paradigm for intercultural Human Rights' thought (Chapter III) before reflecting upon its possible operationalization through the help of the concept of “game” (Chapter IV).

### **Chapter III : Community - A Paradigm for Intercultural Human Rights'**

### **Thought**

A paradigm, in the large sense in which we will use it here, is, according to KUHN, a set of beliefs, recognized values, techniques and methods shared by a scientific community. It is thus the more or less explicit frame underlying a scientific community's work (KUHN 1994 : 29 ff, OST 1993b: 364, OST, van de KERCHOVE 1993a : 192-196). In this Chapter I will try to present the paradigm of “Community” in order to permit us to think and to realize the “healthy pluralism” needed for a genuinely intercultural conception of Human Rights. In my opinion thinking in terms of “healthy pluralism” in the domain of Human Rights' Law is only possible if we cease to think in terms of a “Human Rights' system” and if we start to think in the terms of a “Human Rights Community”. This paradigmatic shift entails, as already noted above, a shift from the emphasis on law (state-law-like law) on an emphasis on Law as legal phenomenon, *phénomène juridique*.<sup>27</sup>

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<sup>27</sup> From now on I will use Law with a capital “L” in order to speak of the *phénomène juridique* as defined by ALLIOT and law with a small “l” in order to speak of what is usually referred to as law, mostly state law. Further, it is also to be noted that the French *juridique, juridicité* etc... is generally used in a much broader meaning than is usually attributed to “legal”, “legality” etc... in English, especially in our perspective inscribed in ALLIOT's perception of Law. In the following I will use these terms predominantly in their broader (“French”) meaning.

This will lead us to an acknowledgement of the specific social character of Law and of the existence of legal pluralism or even *multijuridisme*, which, according to my use of law/Law, I could translate as “multilegalism”. It will further entail a change of perspective by taking the point of view of the Legal actors rather than that of the “legal system”, thus spotting attention on social Legal practices and so emphasizing the emancipatory aspect of Law, usually too much neglected in favour of its regulatory aspect.

To be able to grasp the relevance of the proposed paradigm, it is necessary to locate it in the paradigm from which it emerged and to which, and also to a large extent against which, it is a reaction. We will thus start by putting into perspective our approach by expliciting the contemporary dominant “modern” paradigm of Law, in which the majority of Human Rights’ thought is still embedded, and which is maybe already changing into a “postmodern” paradigm (I). We will then try to propose the concept of “Community” as a paradigm for intercultural Human Rights’ thought in order to reflect upon a “Human Rights Community” (II).

### ***I. The Modern Paradigm of Law and its Transformations***

“We have quickly learned that the dreams of the modern epoch were nothing but illusions. Time has unveiled the imperfections of “modern” law; it has shown to what extent universalism was a delusion, and that the supreme reign of law does not solve everything. The observation of daily legal experience has led numerous legal experts who are interested in the problems of the foundations of law, to admit that all law is relative, that there is a pluralism of the sources of law, and that a return to pragmatism is required.” (ARNAUD 1990: 81) -23-

Let us briefly outline what the modern paradigm of Law consists in (1), before presenting its “postmodern” evolutions which, I will argue, should lead us to a change of perspective, especially in the domain of intercultural Human Rights’ thought, from an emphasis on the legal system to an emphasis on the legal actors and their interaction (2).

#### **1. The Modern Paradigm of Law<sup>28</sup>**

What is the modern paradigm ? A first answer can be that it is the paradigm which has marked western thought in the modern age. Historians and philosophers understand this age as the period expanding from the end of the middle ages until the French revolution. The lawyers of the European continent extend this period until the promulgation of the French civil code in 1804 (ARNAUD 1990 : 81). The modern conception of law can thus be seen as the child of Enlightenment which was mainly characterized by the central role it assigned to Reason. According to TOURAINE (1992 : 51) :

“Modernist thought affirms that human beings pertain to a world governed by natural laws that reason discovers and to which it is itself submitted. And it

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<sup>28</sup> For a deeper historical presentation of the emergence and development of modern legal thought(s) see ARNAUD 1991 : 101 ff



identifies the people, the nation, all the individuals with a social body, which also functions along natural laws and which must free itself irrational forms of organisation and domination which fraudulently try to get legitimized by reference to a revelation or to a supra-humane decision.”

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Even though dating back to Enlightenment, the modern conception of law still seems to be quite influential nowadays, although it starts to be more and more challenged (ARNAUD 1991 : 102). In what does it consist ? In the modern perspective, law (*droit*), as rational law, is characterized by its foundation in the belief that it is universal and that it is through the general and impersonal law (*loi*) that the common good can be achieved. State law is thus equated to Law in general and all other legal phenomena are negated. State law becomes The Law - there is no more space for the previously accepted legal pluralism as it represents a potential threat to the State's authority (ARNAUD 1990 : 81). For COTTERRELL (1992 : 306) :

*“Modern law is the law of the Rechtsstaat. Freeing itself from traditional roots in culture, and discarding old common law ideas of legal doctrine as an expression of communal values or timeless wisdom, law became recognised as a technical instrument of rational government for modern states.”*

Furthermore, according to COTTERRELL (1992 : 306) modern law is characterized by its moral and intellectual autonomy, its comprehensiveness, its unified and systematic structure and its principled character reflecting the values of modern civilisation. ARNAUD (1990 : 81) also mentions the legalist positivism which is linked to it and which is the means of its uniformising systematisation of life in society. De SOUSA SANTOS highlights another important aspect, already present in what we have presented above but not yet explicitly formulated : modern law is fundamentally entrenched in positivism, which he defines as follows :

*“Positivism is the philosophical consciousness of knowledge-as-regulation. It is a philosophy of order over chaos both in nature and society. Order is regularity, logically or empirically established through systematic knowledge. Systematic knowledge and systematic regulation are the two sides of order. Systematic knowledge is the knowledge of observed regularities. Systematic regulation is the effective control over the production and reproduction of observed regularities. Together, they constitute the positivistic effective order, an order based on certainty, predictability and control. Positivistic order is thus Janus-faced : it is both an observed regularity and a regularized way of producing regularity. (...) Modern science and modern law are the two sides of knowledge-as-regulation.(...) Scientism and statism are the main features of modern rational law as it developed in the West during the nineteenth century.”* (de SOUSA SANTOS 1995 : 73)

De SOUSA SANTOS' contribution is relevant as it shows the links between Law as a social practice and as a scientific theory. It makes us aware of the fact that ways of thinking, paradigms, more or less delimit the scope of how a thing can be thought of. In a positivistic paradigm, as defined by de SOUSA SANTOS, it thus seems for example difficult to think of Law in terms of emancipation or in the plural terms we have encountered while dealing with Law in animist societies.

The last but not the least feature of the modern paradigm relevant to us is its individualism. To us the notion of “individual”, of “person”, on which our Human Rights' declarations are based, may seem self-evident . But as MAUSS (1995 : 362) remarks, this notion is only the outcome of our specific historical evolution :

“from simple masquerade to mask, from character to person, to a name, to an individual, from there to a metaphysical value, from a moral conscience to a sacred being, from there to a fundamental category of thought and of action (...) Who knows if this ‘category’ that all of us here believe to be founded, will always be recognized as such ? It is only formed for us, by us.” -25-

Let us briefly outline what modern individualism consists in. For that purpose, I would like to emphasize two of its traits : the uniform and abstract conception of the individual and its central place in the thought of social organisation and Law. These two traits are interrelated. As ARNAUD (1991 : 107 ff) remarks, the focus of interest on the individual is closely linked to the emergence in natural law thought, with Occam, of voluntarism, legal positivism and subjectivism which will lead to the modern paradigm with the individual in its center (ARNAUD 1991 : 120 ff). As DUMONT (1991 : 87 and 97) writes :

“Law which in its most fundamental aspect was an expression of the order discovered in nature by the human mind, becomes in its totality expression of the ‘power’ or of the ‘will’ of the legislator. Furthermore, while law was thought of as a just relation between social beings, it becomes social recognition of the power (*potestas*) of the individual. Occam is thus the founder of the ‘subjective theory’ of law, which in fact is the modern theory of law. (...) For the moderns (...) Natural Law (...) does not deal with social beings but with individuals, this is to say men who are self sufficient as made in the image of God and entrusted with reason. Therefore (...), the fundamental principles of the constitution of the State (and of society) have to be extracted or deducted, from the inherent properties of man, considered as an autonomous being, free of any social or political binding. To deduce from this logical or hypothetical state of nature the principles of social life can appear as a paradoxical and ungrateful task. It is nevertheless into what theoreticians of modern Natural Law ventured, and it is by doing so that they prepared the bases of the modern democratic state.” -26-

For our purpose, I would describe the modern view of the “individual” as a “system’s view” of the individual. He is an abstraction permitting the operationalization of a rational system of law, which is composed of the State, its law, and its addressee, the individual. As the whole system is intended to emancipate Man by permitting him to live a good life through rational means, the notion of individual rights becomes paramount. The individualism embodied in modern law sees individuals above all as entities abstracted from social and cultural contingencies, characterized and completely autonomous as to the way in which they want to lead their lives (COTTERRELL 1992 : 119). They thus need rights in order to act, and also to be protected against the State they have instituted. It is interesting to observe that, through rationalization and the linked systematisation process, the individual, though formally remaining at the center of the system and still viewed as a *homo faber*, in fact gets dissolved in an abstraction.

Of course, modern law and the modern vision of law cannot be reduced to the simple picture portrayed above. De SOUSA SANTOS in his *Toward a New Common Sense* (1995 : 56 ff) gives a good perception of the complexity of the trajectory of modernity, or should we maybe even speak more appropriately of the “trajectories” of modernity, or even of “modernities”. If we have drawn a simple, unified picture, we should not forget that, from the outset “this legal modernity contained its own contradictions” (COTTERRELL 1992 : 307) which are maybe crystallizing nowadays more visibly than before. We should also keep in mind that there is no clear limit between “modernity” and what some call “postmodernity” and that it may not even be very appropriate to “*talk of a qualitatively different postmodern condition of Western law*” (COTTERRELL 1992 : 309). We have in this section only tried to present, in a modelled form, our current paradigm, in which in my opinion the large majority of Human

Rights' thought is still embedded, and which does not seem to provide an adequate frame for a fruitful research on the intercultural Human Rights' problematic. Furthermore, this paradigm is more broadly questioned as a paradigm of thinking of Law, even in a solely Western, "monocultural" context. As COTTERRELL (1996a : 294-295) notes, in the context of a reflection upon "Legal Theory and the Image of Legality" :

*"Images of system, cohesion in law, together with the idea of law's intellectual distinctiveness as doctrine and practice, seem less plausible than even in the quite recent past. (...) legal theory will address lawyers' (and citizens') concerns by continuing to examine the nature and conditions of ratio in law (...) But it must recognize the very nature of ratio as dependent on context and therefore variable, disputed, and contingent. (...)The recognition that law's community is not a matter of unproblematic unity but of complex diversity puts the nature and consequences of this diversity at the heart of legal theory's concerns. (...) In legal studies a sociological perspective is a necessary corrective to legal romanticism. It alerts us to the fact that the search for the morally meaningful legality will be unproductive without rigorous empirical study of the complex and varied conditions in which legality is to be sought."*

ARNAUD, in his article "Repenser un droit pour l'époque postmoderne"<sup>29</sup> (1990 : 81-82) invites us to rethink a "postmodern" Law, on tracks parallel to those outlined in the quotation above. He advocates the acknowledgement of the relativity of all law which has to be sustained by its legitimacy in the eyes of those to whom it applies or who practice and use it, the acknowledgement of the pluralism of the sources of Law which cannot be reduced to state law, and finally the withdrawal from legal idealism in favour of pragmatism. Let us follow ARNAUD's reasoning and try to outline, on this basis, the requirements for intercultural Human Rights' thought. I will take ARNAUD's proposition as an invitation for a change of perspective which could be seen as the shift from a "legal system's" perspective to a "legal actors'" perspective and which will permit us to reflect upon the emancipatory aspect of law and upon the concept of "individual".

## **2. A Change of Perspective : From a "Legal System's" to a "Legal Actors'" View ?**

We will try to outline the stakes in an intercultural Human Rights' approach, to leave the classical "modern" conceptions of Law in order to take into account legal relativism, legal pluralism and legal pragmatism. We will present our argument by taking the standpoint of the legal actors, rather than the one of the "Human Rights' system", although we do it in order to reflect upon a "Human Rights' system" which could stand up to the demands flowing from such a change of perspective. As we have mentioned in our introduction, large populations of the world do not live under a regime of "Human Rights" as we perceive them - they are outside the "System". Our "universal" system seems to apply more readily to Western societies than really universally. That is the reason why I think that, instead of starting to tackle our issue from the standpoint of a "universal solution" which we have shown in our first part to be rather a local universalized solution, we should try to approach it from our concrete problematics which have a universal scope. It is this "actor's" perspective, this pragmatic approach, which will demand us to acknowledge legal relativism and pluralism. As VANDERLINDEN (1989 : 153) writes :

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<sup>29</sup> "Rethinking law for post-modern times"

*“Let us now consider the problem from the standpoint of the individual. He and he alone finds himself in a situation of legal pluralism. It is his behaviour which is governed by multiple and various regulatory orders, be they of a legal or non-legal nature, which issue from the various social networks to which he belongs and which pretend to impose upon him their own regulatory and, possibly, ‘legal’ orders. It is he who will have to make a choice between these mechanisms in determining his behaviour. It is at this level, that which so many political theorists somewhat complacently call the basis, that a possible conflict in socio-legal regulation will acquire its full meaning. Thus, instead of looking at the legal pyramid from the top, from the centres of decision, from the standpoint of power, one is brought to contemplate it at the level of ordinary men in their daily activities.”*

Legal pluralism is necessarily paralleled by legal relativism, as this quotation shows. It emphasises relativity of state-law, as the existence of other regulatory orders is also acknowledged. State-law thus does not appear as an all powerful, absolute tool for social engineering, abstracted from all socio-cultural conditions in which it is supposed to apply. We rather seem invited, instead of thinking in terms of one all-pervasive regulatory field monopolistically organized by the state, to think in the terms of “semi-autonomous social fields” as developed by Sally Falk MOORE. This is important as it seems to permit to break out of a “social engineering view” on Human Rights in order to elaborate a “Human Rights’ Community”, as we will see below. MOORE reminds us (1973 : 730) that :

*“Since we live in a period in which the potential effectiveness of central planning and the use of law as the tool of social engineering are heavily emphasized, it is perhaps worth stressing what is probably obvious, that by no means all, nor even the most important social changes necessary get their principal impetus from legislated or other legal innovations, even in centrally planned systems. (...) Legislation consists of conscious attempts at social direction. But clearly societies are in the grip of processes of change quite outside this kind of control.”*

Therefore she (1973 : 720, 742) proposes an approach in terms of “semi-autonomous social fields”, which she describes as follows :

*“The approach proposed here is that the small field of observation to an anthropologist be chosen and studied in terms of its semi-autonomy - the fact that it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at its own instance. (...)*

*The concept of the semi-autonomous social field is a way of defining a research problem. It draws attention to the connection between the internal workings of an observable social field and its points of articulation with a larger setting.”*

MOORE’s concept of “semi-autonomous social fields” may open up ways permitting to take into account “non-legal impetuses” which can contribute to the elaboration of a fruitful ground for the growing of Human Rights and to theorize the articulation of different relevant semi-autonomous Human Rights’ fields. It may permit to study, in relation to the legal tripod presented in Part I, the articulation between different orders of “Human Rights’ law”, understood in a very broad sense, including local practices aiming to realize similar ideas as our Human Rights even if not explicitly stated in those terms. This may permit us to prepare a

fertile ground for global/local social change towards a “Human Rights’ ideal”. We seem also invited to think legal pluralism in plural terms, as LE ROY (1996a : 7) advocates. He argues that until now legal pluralism has rather be thought of in a unitary way based on the principle of the encompassing of the contrary. The legal order is constructed as the referent, the encompassing category. Other legal experiences, which are not state-law, are explicitly or implicitly constructed as inferior (LE ROY 1996a : 3-4). He thinks that the anthropological “detour” may permit to conceive legal pluralism, or “multilegalism” (“multijuridisme”) in a plural way as we have for example encountered it in the animist societies. In this view, legal pluralism is the expression of multiple specialised and interdependent regulations which valorise complementarity of the differences (LE ROY 1996a : 5). But before all, as he says (1996a: 8) :

“(…) multilegalism (*multijuridisme*) which integrates the idea of the multiple in the Legal idea must be approached not as a set of static injunctions or of sanctions but as an open, dynamic system, like a game or a process of which the rules must be reformulated through a new paradigm.” -27-

This emphasis runs parallel to MOORE’s emphasis on law as process. She argues (1983 : 6) :

*“The continuous making and reiterating of social and symbolic order is seen as an active process, not as something which, once achieved, is fixed. The view is taken that existing orders are endlessly vulnerable to being unmade, remade, and transformed, and that even maintaining and reproducing themselves, staying as they are, should be seen as a process. To try to understand something about law and society in these terms is to address the question how such processes and counterprocesses operate together, and what the preconditions are for reproduction or transformation. It is far more than a set of enforceable rules and the logical principles which may be inferred to lie behind them.”*

We will try to acknowledge law’s plural and processual character in the Human Rights field by presenting the paradigm of a Human Rights’ Community. But before doing so we still need to highlight the demands of practice because, as MOORE (1983 : 4) notes :

*“Social transactions usually take place in the service of objectives to which legal rules are merely ancillary shapers, enablers or impediments. Conformity to the rules is seldom in itself the central objective.”*

And she argues (MOORE 1973 : 743) that :

*“The law (in the sense of state enforceable law) is only one of a number of factors that affect the decisions people make, the actions they take and the relationships they have. (...) The operative “rules of the game” include some laws and some other quite effective norms and practices.”*

This stresses a point very relevant to intercultural Human Rights’ thought and especially for countries to which the content as well as the form of the Human Rights’ rules are foreign and where the possibilities of their enforcement (the necessary institutional structures) are widely lacking. The decentering in our approach by paying attention to actual legal regulation (*régulation juridique*) on local levels (which can be more or less narrow) and its interference with legal regulation on more global levels (which can be more or less broad) seems thus especially paramount in reflecting upon Human Rights’ Law in non-Western societies, in which state-law is often only a very far away reality for big parts of the population.

The failures of the export and the reception of the Western model of the state, stemming from the Western colonizations, should make us sceptical towards any kind of evolutionary optimism. Africa's example since the independances is striking (ROULAND 1988 : 360-387). Immediately after the access to independence, Western law was perceived as "The" key to progress and to the access of modernity. Traditional laws were seen as obstacles to development which had to be eliminated as quickly as possible (CONAC 1980 : XVI). Today, thirty years later, this view has shown to be largely an illusion. The mimetism has turned out to be to a broad extent ineffective or even counterproductive. As CONAC (1990 : 17) remarks, "the rule of Law cannot be decreed, it must be lived, wanted and culturally assimilated"<sup>30</sup>. The process of export and reception has also given birth to some unforeseen *mestizajes*, to use again de SOUSA SANTOS' term. And nowadays one seems to assist to the birth of a new African law which again integrates and builds on traditional African conceptions of Law (ALLIOT 1980).

LE ROY (1991 : 118, 1997c : 134) speaks in the contemporary context of a "taming of the Leviathan" which gives rise to a new emerging law, which is neither the traditional law, neither the imported state-law, and which he calls "law of practice" (*droit de la pratique*). This emerging law has to be located in the context of the emergence of new common cultures which build as much on modernity as on local traditions and thus give rise to a neo-customary law, a *mestizaje* between indigenous and exogenous legal cultures. This law of practice is characterized by its realist, pragmatic and future oriented outlook (LE ROY 1997c : 135). It can take a pragmatic or a more "learned" (*savant*) aspect, depending on whether it uses the written form, knowledge about official institutions and the capacity to manipulate the actors and the administrations (LE ROY 1997c : 136-137). This emerging phenomenon gives nowadays rise to a real legal and judiciary pluralism in African states, which according to LE ROY (1997c : 137), must now be institutionally organised so as to permit the transition to an African "rule of law".

This kind of transition towards an African rule of law appears thus as something very different from the "legal or institutional transition", advocated by the World Bank (LE ROY 1997c : 135), and which we traditionally have in mind when thinking of the democratization processes, but which seems to be highly tainted by ethnocentric evolutionism. It is a transition which does not go in the direction of the spreading of a uniform universal model of the rule of law, but on the contrary seems to prepare the emergence of original systems. Furthermore these "systems" themselves seem to be rather rooted in a plural approach to Law rather than in the uniform approach we cherish. It may be interesting to contemplate a lengthy quotation of LE ROY (1990b : 118-120) on "law in practice" in a Senegaleze context, in order to approach a phenomenon which to us is uncommon and may be quite puzzling :

"By favouring negotiation and by orienting the subject of law (*justiciable*) towards the search for consensus which is less concerned with applying the law but than with reconciling points of views and interests, these societies are inventing a new type of law which does not need to be expressed in the canonic form of a legal code, nor to be enunciated by a legislative instance.

This experience which we design as "law of practice", in the double sense that it depends on its effective usages and on those who adhere to it, does only very incidentally rely on precedents. Rather than by working in reconstituted time like in a criminal trial, or in real time (for juvenile justice, (...), the African mediator invests in the future and in the long term of the social relations to come.

Further, he is embedded in a very interesting new societal context : the one of new common cultures. (...) Though opposing themselves to official cultures, "à la française" in the cases observed in Western Africa, these new cultural

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<sup>30</sup> "(...) l'Etat de droit ne se décrète pas, il doit être vécu, souhaité et culturellement assimilé."

manifestations do not show an orientation to the past and a privileging of ethnic foundations, except (...) within some fundamentalist Muslims from Kaolak to Kano. (...)

It is a real culture that is emerging. It can be called common not solely because of its popular character but also because it shares common traits with the previous cultures. Rooted in the local values like the native cultures from which it spread, sensitive to a tolerant and world open Islam, aspiring to immediate efficacy, and concerned about performances, at least political ones, like in modern societies, this wolophone culture is both synthesis, and thus *mestizaje* of previous cultures and the manifestation of a postmodernity. As a culture of action, of “make do” (...), of the tensional management of contradictions, wolofisation expresses modalities of a life in society without caring to sacrifice to the cult of modernity. It is not the institutions which are invoked but their beneficiaries. (...)

As the reflection developed, one could perceive that it is not through law or subject of law (*justice et justiciable*) that a certain pacification of the social relations is sought. Less and less sensitive to our fictions and to our legal myths, African societies say bluntly that State justice is only one *arena* of negotiation among others, often less efficient than direct management of the conflict. For them, law is the putting into forms of conflicts, emergence of consensus and management in the long term of solutions which allow the “reproduction” of the principal “articulations” of social life.

All these explanations are both familiar and commonplace to the African and the Africanist and astonishing to the foreign observer (...). The institutional representations which have founded modernity from the XVIth to the XVIIIth century are now outdated. Without knowing it we are already in post-modernity<sup>31</sup> (...)

We have not found a legal subject (*justiciable*) but have in turn discovered the emergence of a new aspiration to social justice and to the reconciliation of Africa with its history.” -28-

I think that this last quotation has provided us with a good illustration of the challenge that is facing us of developing a *mestizaje* of Human Rights which will only be possible through the acknowledgement of Legal pragmatism, relativism and pluralism. It has also reminded us of law’s aspect of emancipation. De SOUSA SANTOS (1995 : 25) links it to “knowledge-as-emancipation” which for him is knowledge entailing a trajectory between a state of ignorance he calls *colonialism* and a state of knowing which he calls *solidarity*, and which he opposes to “knowledge-as-regulation” which for him entails a trajectory from *chaos* to *order*. We will develop this idea further below by presenting the paradigm of the Human Rights’ Community.

But before we should emphasize that our shift of perspective has also affected our view of the “individuals”. It has rendered them very real, and has given a rather plural outlook on them. They are not defined anymore in an abstract and uniform way, but through their action in different legal “worlds” to use BOLTANSKI’s and THEVENOT’s expression. They term “worlds” the different situations characterized by a specific “grammar of justification” through which we go in our daily life (1991: 177). These “worlds” are thus ideal worlds rather than social worlds. They distinguish the inspired, the domestic, the civic, the merchant and the industrial world and the world of opinion (1991 : 192 ff). In their view the individual becomes a concrete plural and becoming being who can be characterized through his passing from one to

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<sup>31</sup> In the African context LE ROY now rather speaks of a “contemporary” than of a “post-modern” law (LE ROY 1997c : 135).

the other of these ideal worlds in his evolution in the social world(s) permitting him to play the social game (1991: 266-267) :

“(…) in a differentiated society, each person is every day exposed to situations pertaining to distinct worlds and must be able to recognize them and to adjust to them. These societies can be qualified as “complex” in the sense that their members must possess the necessary competence to identify the nature of the situation and to go through situations pertaining to different worlds (...) Although the game is tightly limited by the setting of the situation, a model of multiple worlds gives the actor the opportunity to avoid a challenge (*épreuve*) and to contest its validity or even to turn around the situation by engaging in another challenge valid in another world. It thus includes the possibility of critique of which determinist constructions cannot give account.” -29-

## ***II. The Human Rights' Community - A New Paradigm for Human Rights' Thought***

Let us start by clarifying the scope of the proposed paradigmatic change (1) before presenting the paradigm of the Human Rights' Community (2)

### **1. The Scope of the Paradigmatic Change**

We will take as a starting point a quotation already referred to further up in our general introduction :

*“The truth is that, after centuries of modernity, the absence of a future cannot be filled out by either the past or the present. The lack of future is but an empty future.*

*We must, therefore, reinvent the future by opening up a new horizon of possibilities mapped out by new radical alternatives. Merely to criticize the dominant paradigm, though crucial, is not enough. We must also define the emergent paradigm, this being the really important and difficult task.” (de SOUSA SANTOS 1995 : 479)*

In this part we will follow de SOUSA SANTOS' invitation. We will try to propose Community as a new paradigm for Human Rights' thought. This presentation of Community can be seen as what de SOUSA SANTOS (1995 : 481) terms “heterotopia”. Let us recall that if “utopia” is the imagination of new modes of human being which can constitute an alternative to the present ones but are projected in an elsewhere or a nowhere, for de SOUSA SANTOS, “heterotopia”, “*Rather than the invention of a place elsewhere or nowhere*” is “*a radical displacement within the same place : ours.*” It is a shift from “*orthotopia to heterotopia, from the center to the margin.*” Although not strictly applying his reasonings, and thus using his term in a maybe slightly different sense than he does, I think that this idea of a radical displacement inside our global system in order to propose an alternative global “system”, captures very well what I will intend to do in the following pages by presenting the paradigm of



a Human Right's Community. In this thesis we have already made a number of decentering steps which we will now try to articulate together in the form of the Community paradigm.

Our first steps away from the centre were made in Part I. From monological imposition of a transcendent Human Rights' ideal we have shifted towards proposing a dialogical dialogue on this ideal. We have thus not only operated a shift from abstract Reason, to reason which is linked to its socio-cultural surroundings, but also from a monocentric to a polycentric perspective on the Human Rights' problematic. We have decentered our outlook on Man and on Law, without nevertheless losing sight of both. To recall the metaphor of the windows : we have started to look at our problematic from different windows, offering different perspectives, instead of contenting ourselves with the view out of our own window. This shift of perspective was already crystallized in the concept of Common Humanities which intended to make us aware of the twofold nature of Humankind. Like a prism, this concept invited us to think both our common abstract humanity, the white light, and the different shapes or colours into which it has been diffracted in the concrete and diverse human experiences, like the white light is diffracted into the colours of the rainbow. By putting Common and Humanities at the same level Common Humanities invited us to think both human unity and diversity, both human transcendence and immanence at the same time - and not one prior and superior to the other. If the notion of what we share in common, our "humanity", is essential in Human Rights' thought, the correlated notion of what differentiates us, of how this "humanity" is concretely lived through different ways of being human, in our "humanities", is too. This aspect of living and living together is what leads us from our concept of Common Humanities to our concept of Human Community

In this Part II we have therefore continued our decentering, this time in relation to our modern conceptions of Law. We have shifted the point of view from the "system" to the "actor". We have thus operated a paradigmatic shift from universality to relativity, from uniformity to plurality, from theory to practice. And we now try to propose the paradigm of Community which should enable us to think differently about Human Rights in order to enable a different practice of Human Rights. As de SOUSA SANTOS (1995 : 489) remarks :

*"The paradigmatic transition is double : epistemological and societal. The two transitions are autonomous but intimately related. Alternative forms of knowledge generate alternative social practices, and vice versa."*

Before dealing more exclusively with the Community paradigm, we should underline that the paradigm of Human Community or of Human Rights' Community can only be understood in its relation to the paradigm of Common Humanities, and also to the one of Dianthropological Praxis of Human Rights. As I have outlined in my introduction, the three concepts "Common Humanities", "Human Community" and "Dianthropological Praxis of Human Rights" are in my mind three paradigms constituting the three cornerstones of a broader paradigm, a pluralist myth, which could underlie intercultural Human Rights' thought. Although all are dialectically related to each other, the paradigm of Community plays a special role because, apart of its own original contribution, it is this paradigm that can link together, that can constitute a space of encounter, of concrete crystallization and of mutual enrichment for the two others.

It is in their interrelation that it becomes clear why I have chosen to speak of "Common Humanities and Human Community" and not of "Common Humanity and Human Communities", which would maybe appear more natural. We usually tend to think of our Humanity as an abstract category encompassing all human communities which are seen as its concrete manifestations. By doing so we stress a transcendent unity. But as we make a sharp distinction between mind and matter, between the ideal and the real, we nevertheless sometimes tend to think of "Others", of people belonging to other communities as radically different from ourselves. It is the view of an abstract shared Humanity and the recognition of ethnic, cultural,

religious etc ... belonging to different communities, which gives rise in my opinion to radical cultural relativist views.

The problem seems to be that in the modern paradigm, as de SOUSA SANTOS puts it, we are mostly applying knowing-as-regulation. This means that we think of chaos as ignorance and of order as knowledge (de SOUSA SANTOS 1995 : 25). The rational paradigm is marked by its uniformity. Reason discovers universal and uniform laws which underlie the seemingly chaotic universe. It thus permits to order this chaos by reducing the plurality to uniformity. Rational abstract concepts are thus tainted by this universality and uniformity. But we have seen, especially while dealing with animist thoughts, that to reduce plurality to uniformity is only one way to conceive “order”. Not only this : we have seen that for the animist societies uniformisation was seen as a threat to their harmony, to their “order”. Our challenge, in order to be able to engage in intercultural human Rights’ thought, as we have already shown it, is to learn to think in pluralist terms. I thus found it necessary to introduce the plurality where it is generally implicitly always lacking : at the very root of our rational thought on Human Rights - there where we are accustomed to find unity before it gets “contaminated” by the contingencies of life and thus degenerates in plurality and diversity. We have to learn to think pluralism plurally, which is only possible if even our fundamental axioms are plural. This necessitates to change our outlook on chaos, order, unity and diversity. We have to fundamentally reorient our way of knowing, as de SOUSA SANTOS (1995 : 25-26) reminds us :

*“The paradigm of modernity comprises two main forms of knowledge : knowledge-as-emancipation and knowledge-as-regulation. (...) In the terms of the paradigm, the mutual binding between the pillar of regulation and the pillar of emancipation implies that these two forms of knowledge balance each other in a dynamic way. What this means is that the knowing power of order feeds the knowing power of solidarity, and vice-versa. The fulfilment of this dynamic equilibrium was entrusted to three forms of rationality mentioned above : the moral-practical rationality, the aesthetic-expressive rationality and the cognitive-instrumental rationality. In the last two hundred years, I have been arguing, the cognitive-instrumental rationality of science and technology overcame the other two forms of rationality. In this process knowledge-as-regulation won primacy over knowledge as emancipation : order became the hegemonic way of knowing and chaos became the hegemonic form of ignorance. (...)*

*This is the predicament we are in now, and must get out of. And there is no other way but to reassess knowledge-as-emancipation (...) This implies, on the one hand, that solidarity be turned into the hegemonic form of knowing, and, on the other, that a certain degree of chaos be taken in as a consequence of the relative negligence of knowledge-as-regulation. This entails two significant epistemological commitments. The first one consists in the reassessment of chaos as a form of knowledge rather than ignorance. This transition can be observed within modern science itself in the theories of chaos. Rather than transcending chaos, order coexists with it in a more or less tense relation. (...) Chaos invites us to a praxis that insists on immediate effects, and warns against distant effects, a style of action that privileges a transparent, localized connection between action and its consequences. That is chaos invites us to a prudent knowledge. Prudence has some family resemblances with pragmatism. (...) The near is to be privileged as the most decisive form of the real.”*

To think in terms including chaos and acknowledging differences, we seem invited to make a step towards “animist” conceptions of “order” which consists in the complementarity

of differences, in the solidarity in our differences instead of a uniform order. As LE ROY (1997a : 15) writes :

“It is in the perspective of an intercultural model that it will be necessary to renew the principle of the complementarity of differences from a philosophical, political and practical point of view.

Already acknowledged in the animist and Indian traditions, not really foreign to the Confucian and Muslim traditions, this principle of the complementarity of differences gives rise in the western tradition to difficulties which research must subsequently identify and contribute to resolve. (...)

In the present state of affairs of anthropological research, and taking into account anthropology’s inscription in a Western concept of science, and thus in its world view, priority must be given to the “enrichment” of western conceptions underlying Human Rights, by valuing again the idea (*noumen* ?) of respect of the other and by reintroducing the principle of the complementarity of differences. Without denying the difficulties which appear in front of us, we must be convinced that to face the turbulences which we can foresee, only an ethical and epistemical exigencies can possibly found a common future and a pacified society.” -30-

The challenge of contemporary intercultural Human Rights’ thought thus seems to be to search for its roots in an eminently pluralist myth, of which the paradigm of Common Humanities is one manifestation - on the more intellectual plane. But as de SOUSA SANTOS says, and as we have already observed above, a plural outlook on reality, stressing the solidarity and complementarity of differences, also obliges us to shift from theory to praxis, from system to actors. That is why we have to conceptualize the paradigm of Human Community. The Human Community permits us to think of our Common Humanities not in an abstract, uniform and immobile way but in a concrete, plural and processual way, in the way FINNIS (1996 : 135) invites us to do :

*“(...) it is helpful to begin by thinking of community or association not as a community or an association (an ‘entity’ or ‘substance’ or ‘thing’ which ‘exists’, acts, etc.) but rather as community or association, an ongoing state of affairs, a sharing of life or of action or of interests, an associating or coming together. Community in this sense is a matter of relationship and interaction.”*

It is the paradigm of a Human Rights’ Community as the ground, where knowledge and regulation-as-emancipation can flourish and where an intercultural *mestizaje* of Human Rights can emerge, which I want to present now. My paradigm of Community is thus closer to the legal archetypes as we have presented them in our first part, than a sociological reality - the sociological reality of my Community coinciding with what we usually term Humankind. The proposal of this paradigm is thus really “a radical displacement within the same place”. We are still talking of the same reality : Humankind. But by looking at it from a completely different perspective in fact we radically change what we see.

## **2. The Human Rights’ Community**

We will start by presenting the paradigm of a Human Rights’ Community (a) before showing its relationship to actual communities (b).

(a) As already indicated, the paradigm of the Human Rights' Community is heavily rooted in the lessons to be drawn from the communitarian archetype of differentiation characterizing animist societies and presented in Part I. Let us briefly recall the main features of this archetype by showing their respective relevance for intercultural Human Rights' thought.

First of all it is rooted in plurality and is characterized by a perspective viewing life as the tensional though harmonious dynamic interplay of different forces. This aspect seems most important in intercultural Human Rights' thought as it invites us to acknowledge plurality without immediately reducing it to chaos (as ignorance), and to not to think in terms of exclusion but of inclusion. It may thus permit us to start thinking pluralism in pluralist terms, as LE ROY (1996a : 7) advocates : by acknowledging unity only where it imposes itself as the sum of identifiable elements and not as a set of which parts are negated or reduced. The Community paradigm may thus permit us to proceed along the principle of addition instead of the principle of subtraction. Plurality and relativity of Law are in that perspective not seen as the enemies of Law but as potential cornerstones for an efficient Law which needs to be articulated around a common ideal.

Second the communitarian archetype favours the resolution of conflicts inside the group where they arose, in the "womb" of the family or of the village. It is linked to a logic of responsabilization. It leaves the responsibility of its future within the society or community. It stays thus centered in itself and does not abandon its responsibility for its life to an exterior and superior instance. This has two consequences : negotiation (*palabre*) is valued and praxis is valued. The valuing of negotiation seems extremely relevant in our domain. There is no global superior instance to which we could refer to and who could tell us what to do. There is no superior instance to which we could abandon the responsibility of our common human future. This is all the more so as for the moment a universally accepted and effective "Human Rights' system" is not established and appears rather to be a demand, a requirement, which still needs to be realized. To establish such a "system" we thus need to negotiate. We need to find a solution in the "womb" of our Common Humanity (Humanities). Trying to impose an abstract perfect humanity will not do. We will have to build our Common "Humanity" in our Human Community by building on the best of our Common Humanities. Therefore negotiation demands dialogue, which as we have shown cannot be reduced to chatting or a mere exchange of points of views, but has to be understood as a real journey through different cultural logics, which may permit the emergence of a new intercultural myth of "Human Rights".

But the challenge takes us further than that. As we have seen, the acknowledgement of chaos in our concepts of order invites us to privilege praxis over systematising theory, the local perspectives in their mutual enrichment over a global unified perspective. That is why, in my mind, an intercultural Human Rights' system will never possibly be a "System" but has to be thought of as a Community marked by ongoing dialogue in which a common praxis is built by the interfecundation of praxes. The Community, contrary to the System, is not closed to real life and to the acknowledgement of multiple perspectives. On the contrary, the multiple perspectives linked to the various praxes are at the core of Community. Dialogue is as much linked to negotiation as it is linked to praxis. Dialogue is a constant rediscovery of the other and a constant reinvention of our common future. It is not to be reduced to a means of finding knowledge which could then be institutionalised. It can contribute to a certain kind of institutionalisation, but not of a closed system but rather of an open dynamic "system" which, because of its multiplicity, its dynamism and its link to praxis, I prefer to conceptualize as Community. Dialogue is in that perspective deeply embedded in the paradigm of Community. Community is the additive structuring principle which can sustain the never ending process of invention, reinvention, production and reproduction of our human society, or rather community.

We have now briefly outlined what we consider to be the main pillars of a Human Rights' Community as a paradigm for intercultural Human Rights' thought in a healthy

pluralism : plurality approached through dialogue and the principle of the complementarity of differences, and praxis which is closely linked to the responsabilization of the Human Rights' actors. To present this paradigm I have, in a short text "Droits de l'Homme - Vers une communauté comme écosystème ?"<sup>32</sup> declined Community as *écosystème* ("ecosystem"), *écho-système* ("echo"-system) and "*et/co*"-*système* ("and/co"-system) (EBERHARD 1997) : Community seems to me a viable ecosystem for plural Human Rights thought as it emphasises a praxis as "echo"-system, meaning a system based on dialogue in which we advance by the echoes we receive from our theory and practice when they encounter theories and practices originating from different points of views, and a praxis as "and/co"-system, meaning a system that emphasises the principle of addition and of complementarity of differences<sup>33</sup>.

(b) We have outlined our paradigm. We should now say a few words as to its relations to "real" communities. We will first reflect upon the extrapolation we have operated of the communitarian archetype from the structuring principle of animist societies to the structuring principle of our global society. We will then reflect upon its operationalisation through different Human Rights' communities.

The communitarian archetype functions in communities which ALLIOT (1980a : 156 ff) characterizes by a triple sharing : sharing of the same life, sharing of all its specificities and sharing of a common decisional field. The first sharing is the sharing of a same space, of a same daily life, of games, food, ancestors, language etc... (ALLIOT 1980a : 156) The second is the sharing of all the specificities. Communities are composed of different specific groups accomplishing specific functions. The specificity of the groups (ex : peasants, blacksmiths ...) and their complementarity is thus at the core of the group's cohesion and survival. This second sharing is thus the sharing in the complementarity of the group's differences (ALLIOT 1980a : 157). The third is a sharing of common "rules of the game", the community being defined by the area where its rules, which it has in its own control, apply (ALLIOT 1980a : 159).

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<sup>32</sup> "Human Rights - Towards a Community as Ecosystem ?"

<sup>33</sup> It may be interesting to contrast this presentation with the thoughts expressed in "Le dialogue interculturel : un éclairage dialogal de l'universalité et une négociation entre fusion et articulation des logiques" (EBERHARD 1996 : 48-59). There I did not yet think in terms of Community but in terms of an open and dynamic Human Rights' System and of a dialogical and plural conception of the universality of Human Rights. I wrote (p 51) : "Basically we must try to provide Human Rights themselves with a dialogical and plural character. In order to be universal it is not enough that they emerge from intercultural dialogue if they are then frozen into an absolute and eternal, Judeo-Christian form of order uniformly imposed on all. The dialogical and plural character must be safeguarded in their form itself. The question which arises then is to determine what will then constitute the unity, the universality of those rights. I think that we must think of Human Rights as a cross-roads or platform (*plaque tournante*) between the different societal logics, or to use again Raimundo Panikkar's image of the person (...) as a "knot" being an intrinsic part of the network of relationships and problematics which constitute the reality of Human Rights. This role of platform can be played by a declaration of homeomorphic character which would outline the objectives to be attained by Humankind while at the same time referring each culture back (*renvoyer*) to its own representations, thus permitting it to find there the foundations and the means to attain the objective. We must thus construct Human Rights in the form of an open dynamic system, structured through knots, the homeomorphic concepts. Universality will thus not reside in the abstract *being* of a concept born of rationality and which has to impose itself on all, but in the fact that this concept will refer to (*renvoyer*) universal objectives, formulated as homeomorphic concepts, in the way they are conceived, comprehended and concretized by and in the different cultures, from whom, by the way, those concepts have originated in intercultural dialogue." Thus when I wrote this passage, although feeling the importance of dialogue and praxis, I could not break out of a "systemic" view on Human Rights, as I have done now by trying to think in terms of Community.

In the context of these “given” communities which have been studied by anthropologists these three sharings are given. For our Human Rights’ Community I think that they can be said at the same time to exist and still need to be constructed. I will try to show that all the elements are there to invite us to such a triple sharing but that we still need to enable this sharing by taking a “Communitarian” outlook on these elements. We need to think in terms of Community in order to enable the realisation of a Community. As we have said above, our paradigmatic shift is epistemological as much as social and consists in heterotopia, in the radical displacement of ourselves in the contemporary “system”. I will try to show that the displacement in favour of Community does not seem to run counter to what is sociologically happening or to what can happen, even though it is not self-evident and demands conscious effort.

It may at first be puzzling to speak on the global level of a “shared life”. Does not our whole thesis tend to show that we live our Common Humanity in our Common Humanities, in original and specific ways, which stems from the fact that we live different lives? We should of course not neglect this aspect. But at the same time our whole thesis only makes sense in a paradigm in which we acknowledge more and more our “global condition”, our “world culture”, or the “common challenges to humankind” may they be ecological, economical or political ... We thus certainly share more and more of a common life - even if that does not mean that we become homogeneous. It only means that besides our local horizons we also share in a broader global horizon. And our life is influenced by both. If globalisation is for the moment rather a phenomenon which “imposes” itself and which does not yet really seem to have been “assimilated” by us, I think that by looking at our global condition through the eyes of Community, we may be able to assimilate it. Our pragmatically shared global condition may thus little by little turn into a shared global living-together sustained by intercultural founding myths and shared references. This “common life” or rather “life in common” which seems to become more and more important as we increasingly have to assume responsibility for our own global future, seems only possible to emerge if we acknowledge a sharing in the totality of our differences. A life in common can only emerge if we do not deny any culture the access to the sharing. And sharing is giving and taking. It is mutual enrichment. It is the acceptance of complementarity in the differences.

This thesis tries explicitly to contribute to the “sharing in the totality of our differences”. Remains the sharing of a common decisional field. We should note that theoretically this common decisional field already exists as we talk of the universality of Human Rights and as there exists a working international law. Nevertheless, I feel that this common decisional field has to be rethought in order for it to become really “common” and that decision is not monopolised by some (few) members of the Human Community.

In order to start building a common life, a federative myth, like the one of Human Community is necessary. In order to share the totality of our specificities and a common decisional field it becomes necessary to rely on Human Rights’ communities which in their interrelation can make up the Human Rights’ Community.

COTTERRELL (1996c : 5-6) distinguishes four ideal types of community : “traditional community” (living in the same geographical space or sharing the same language), instrumental community or community of interest, community of belief and affective community. Our Human Rights’ communities would in this terminology be communities of interest. They can be defined by their location in different regions and on different scales (the village, the infrastate region, the state, the suprastate region, the continent, the world for example) or by their specific function (rebuilding of peace, protection of children, action against torture ...). It should be clear that belonging to one of these communities does not exclude belonging to others at the same time. As we have advocated, by basing ourselves on BOLTANSKI’s and THEVENOT’s idea of plurality of worlds, the individual in our Communitarian view must be conceived as eminently plural : to talk in terms of Community only makes sense if we

acknowledge the plural character of the individual and his plural inscription in different communities. Otherwise our “Communitarianism” could quickly turn into some kind of communalism. This communalism, although acknowledging the plurality of communities nevertheless stays committed to a unitary way of thinking, as it recognizes a plurality of communities but conceives them as monopolistical entities. If it admits a choice of the community of belonging it sees this choice as exclusive - multiple allegiances are not permitted.

In order to be effective Human Rights’ communities must of course be rooted in local communities (“local” at the different levels as illustrated above), of which the state is only one, and often not the most relevant one. It is only the reliance on local communities which can permit active involvement of the concerned people and can assure the proximity between regulation and the specific moral outlooks, views of life and socio-economic conditions of the concerned populations. It becomes thus necessary to reflect, as COTTERRELL does in his *Law’s Community* (1996a), upon the relationships between Law and Community in order to understand the possible contributions communities can make to Law and to step out of a purely static view of Law which does not seem to be able to stand up to the challenges presented by the intercultural Human Rights’ problematic. As COTTERRELL (1996a : 296) writes :

*“Although contemporary law’s dominant character is as a policy-instrument of centralized government, social studies of law should not necessarily adopt the policy-maker’s agenda, nor, indeed, the policy-maker’s view of law’s scope and nature. An appropriate focus is on the diversity of regulatory forms and requirements arising directly out of experience in particular social fields. Socio-legal studies might include within the scope of ‘the legal’, alongside state law created by the agencies of centralized government, many other forms of institutionalized doctrine constituting socially significant regulation. In this way social science might point towards new understandings of law’s relation with community.”*

At this point, we will not take this enquiry any further as it would lead us to far away from our present problematic. Let us instead, just give a last quotation of COTTERRELL (1996a : 322) which shows the important link of a reflection on Community as a plural archetype for intercultural Human Rights’ thought, and the reflection on Community as way to “give Law back to the citizens” and to make it morally meaningful :

*“Thus, even judicial rhetoric from relatively unified legal systems of contemporary states suggests that a concern for relationships between law and community is a concern with legal and moral pluralism. The issues that emerge as central are how to express in regulatory form the values of numerous communities and how to develop regulation to co-ordinate, integrate, and respect the experiences of social existence characteristic of different communities.*

*An emphasis on community values is thus, in contemporary conditions, an emphasis on the localized as against the centralized, and on diversity as against uniformity. The reason is that any emphasis on a shared underpinning of values as a defining element of community becomes unrealistic unless accompanied by a corresponding recognition that the scope for agreement on values, or even for significantly shared social experience, is necessarily limited in contemporary conditions of social complexity. To postulate, with some sociological sensitivity, the utility of a concept of community is necessarily to recognize diversity in social arrangements and radical pluralism in moral life as the essential conditions of existence of those areas of moral agreement that can underpin social solidarity today.”*

We have presented our paradigm of a Human Rights' Community. Let us now try to see how this paradigm could be operationalized in Legal science and practice.

#### **Chapter IV : Operationalizing the Human Rights' Community Through the Concept of Game**

In this Chapter we will try to see how the idea of a Human Rights' Community could be operationalized in Legal theory through the concept of game. Of course, "game" and "Community" are two different paradigms of legal thought. Nevertheless, they share some common perspectives. That is why putting them in relation may turn out to be conducive in providing useful insights in the domain of "game" as much as in the one of "Community". I will start by presenting van de KERCHOVE's and OST's paradigm of game in legal theory (I) before presenting a processual approach to Law which can more specifically help us to think of the Human Rights' Community. This approach has been developed by the Laboratoire d'anthropologie juridique de Paris and is illustrated in the form of the *Jeu de l'oie*, which corresponds to the British "Snakes and Ladders" game and which one might also term "Legal Monopoly" (II).

##### ***I. The Concept of Game in Legal Theory*** <sup>34</sup>

We will present here van de KERCHOVE's and OST's ludic approach to Law. This approach is still a "systemic", although not a closed one. As we have advocated, we seem invited, in an intercultural reflection upon Human Rights, to leave the "systemic" paradigm in favour of a Communitarian paradigm. Nevertheless, the development of a Human Rights' Community cannot avoid tackling problems of legal systematicity. The construction of a Human Rights' Community will partly have to integrate classical approaches to Law. A certain degree of systematisation on different levels will be necessary. The Community will have to be put into forms, even though these forms may not be the forms of a unique "system", but of partially articulated systems. Institutionalisation, at least to a certain extent, is necessary for a

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<sup>34</sup> For a comprehensive presentation see van de KERCHOVE, OST : 1992



“working” Human Rights’ Community. It is thus important to explore ways in which a “Community outlook” on Law could be reconciled with a “system outlook”.

The paradigm of game may offer a welcome bridge. Maybe that this bridge is especially needed in a Western context, marked by systematic thought and practice of Law. It may also be that this bridge may be less relevant in other cultural contexts. But for us the paradigm of game may permit to open up our actual legal experience towards a more “communitarian” approach to Law. The interest of the game approach to Law lies in the fact that it tries to bring the actors into the picture of the legal system, and favours a dialectical, complex approach to Law, and to the relations of Law and society. The dialectical approach can be mainly characterized by the fact that it tries to think the “and”, the fertile “in-between” between opposites. It thus favours a plural approach to Law which recognizes the plural aspects of the legal system as well as of its actors. As OST (1997b : 3, 10) writes :

*“(...) we think that we can see more deeply in the very idea of game an explanatory model or paradigm for the understanding of law in general. On this respect, the idea of game offers to legal theory a conceptual frame that can, by analogy, enlighten many aspects of legal phenomena. This frame includes concepts such as play, player -partner and adversary -, stake, rule of the game, move, score, scorer, out of play, fair play, and so on. The idea of game also offers a logical structure in terms of which we can conceive legal theory, that is a dialectical and paradoxical structure (an “and-and” way of thinking) that we can substitute to a binary and disjunctive structure (an “either-or” way of thinking) that is more traditional.*

*(...) a legal system is animated by a game that, because it involves the intervention of players who are not exclusively its own product but also participate in other social games, necessarily modifies itself in response to its environment. Therefore, it seems impossible to adopt any theory of a legal system that would insist radically on its closeness or openness, and a dialectical conception of the relations between legal system and social order is obviously required.”*

The dialectical game approach to law may thus permit us to bridge the gap between “Law’s Community (ies)” and the “Legal System”, as the dialectical approach shares in the plural logic of the communitarian archetype - even though it stays in my opinion on a lesser level of acknowledging of pluralism and practice than the communitarian archetype. Indeed, as it still is a “systemic” view, it postulates a unity of the system. The different polarities in which it is inscribed, which constitute the frame for the legal play (which is movement in a frame), are still dialectical polarities. This means that they are polarities inside a same system of reference. Van de KERCHOVE and OST develop their paradigm of game more especially in the frame of five pairs of polarized notions : strategy and representation, cooperation and conflict, reality and fiction, regulation and uncertainty, internality and externality (OST 1997b : 2, and more generally: van de KERCHOVE, OST 1992). The novelty of the dialectical approach is to acknowledge those polarities and to see them as complementary, rather than as opposites. It thus permits to think in a plural and complex way :

*“It appears that in pair with the model of game goes a dialectical method. This dialectical theory aims at providing a coherent representation both of the legal phenomenon itself and of the epistemology of its science and the ethics of its practice. On every of these planes plurality is substituted to unity, recursivity to linearity, graduality is preferred to binarity, while uncertainty (which does nevertheless not mean complete random), adapted to present times, is assumed and replaces the pseudo-security which the thoughts of simplicity believe to grant.” (OST, van de KERCHOVE 1993a: 191) -32-*

However, this approach does not attain the dialogical character of the Communitarian paradigm, which reveals itself paramount in intercultural Human Rights thought. As we have seen while presenting the dialogical dialogue, intercultural pluralism cannot be reduced to dialectical pluralism, which presupposes a shared unitary myth and a shared frame of rationality. Different cultures share in different myths in which rationality grows differently. These different myths are not in a dialectical relation. I have argued that they can nevertheless be in a dialogical relation if we acknowledge the idea of a Human Community in our Common Humanities, which opens our mutual understanding to our respective praxes and their correlative witnesses. Rationality is thus in the Communitarian paradigm not only invited to think together poles which seem opposed inside a rational system underlaid by a common myth. It is also invited to acknowledge different practices and experiences and to think them together. These experiences are not necessarily opposed. And one should even avoid to think of them in terms of opposition as this may lead us into the trap of the encompassing of the opposite, thus hindering us to discover what is really different behind what appears as different to us. PANIKKAR (1984c : 205, 212-213) writes in relation to the dialectical and dialogical approaches to reality :

*“(...) the ultimate nature of reality does not have to be dialectical. If we postulate it to be so, we do it by the already dialectical axiom that affirms reality to be solely or ultimately dialectical. Reality has no other foundation than itself, and if we assume it to be dialectical we are already postulating what reality has to be, and imprisoning it in the dialectical frame, large and flexible as one may conceive this latter to be. The postulate of the dialectical nature of reality is an extrapolation of the conviction about the dialectical nature of the mind ; it subordinates reality to mind.*

*(...) It is one thing to assert that thinking tells us what being is and another thing to make being utterly dependent on thinking. In other words, the justification of dialectics does not depend on the often uncritically accepted hypothesis that the nature of reality is dialectical. Reality certainly has a dialectical aspect, but this aspect does not have to be all of the real. It is in this hiatus between thinking and being that the dialogical dialogue finds its ultimate justification.”*

It seems to me that every approach in terms of systems necessarily tends to reduce plurality to unity and that the only way to think pluralism plurally is to break out of a system's approach in favour of a Communitarian approach. Let us not forget that the attempt to render pluralism and complexity through plural and complex unifying models (systems) is still an attempt towards unification. Thus the game model and its dialectical method may appear quite revolutionary. This is because it commits an epistemological break from a Cartesian logic of excluding opposites to a logic acknowledging their complementarity :

*“To isolate objects (...) from their environment and from the observer who studies them (...), to establish linear and hierarchical relationships between these elements : that is peculiar to rationality, to the Cartesian “paradigm”. Philosophy of the “excluded third” (*tertium non datur*), solidly anchored in the principles of identity ( $A=A$ ) and of non-contradiction ( $A$  is not non- $A$ ). The dialectical model of complexity is, on the contrary, the model of the “included third”. This model presupposes that recursive relations of interaction between the distinct and nevertheless solidary elements are established, as for example between the object and its environment, between the observed and the observer, between cause and effect, between internal and external, etc ...” (OST, van de KERCHOVE 1993a : 201) -33-*

The innovation consists in moving away from a partial hierarchical representation of reality excluding the contraries, to a comprehensive way of representing it reconciling them and showing their dialectical interdependence. This evokes the circular symbol of the *Tao* showing

the intertwined *yin* and *yang* which we have already encountered and which van de KERCHOVE and OST (1992 : 108) use as one illustration of their dialectic approach, although they see their approach more as an ever open spiral than as a closed circle. What strikes us in their approach is its circularity which takes precedence over hierarchy emphasised in former approaches. But if circularity can evoke complementarity and comprehensiveness, it is nevertheless not the only way to think of complementarity, and is not to be equated to comprehensiveness. It may be that it is particularly attractive to us as it seems to be based on an egalitarian outlook on life. Thinking in terms of a dialectical circularity is thinking in terms of two theoretically equal poles. But we have seen that other ways to think of complementarity and comprehensiveness exist. Animist thought with its eminently plural outlook on the world is one illustration. Indian thought (especially *advaita*), with its hierarchical outlook on the world in which oppositions are resolved and constructed as complementary by being put on different hierarchical levels, is another one. This should make us aware of the fact that there is not just one way of thinking plurality, complementarity and globality. And it is to prevent us to fall into the illusion that thinking of Law in terms of game in a plural, complementary and dialectical way necessarily gives us a comprehensive outlook on Law. The paradigm of game is not an all comprehensive view on the legal phenomenon in that it does not exclude any point of view but integrates them all - we must not forget that all points of view are integrated from a specific perspective : the dialectic one. But why then dwell on the paradigm of game if we advocate the necessity to leave dialectics in favour of dialogue and system in favour of community in the intercultural context ? It is, as already said, to enable to build a bridge between the Community and the "system", the global Human Rights' Community and our local Human Rights' system, our present episteme and the emerging one.

In one of their articles, OST and van de KERCHOVE put their paradigm of game in relation to four paradigms influential in social sciences in their general orientation as well as in their focus on Law (1993a). These paradigms are the paradigms of interest, of system, of actor, and of field (*champ*). I would term those paradigms as "systemic" as they are underlaid by a rationalistic abstracting and systematising methodology. By this I mean that they emphasise one aspect of reality, one point of view. They then construct a global picture of reality from this point of view by drawing the rational consequences of this point of view and by thus constructing explicative systems. The difference to the Communitarian approach we propose for intercultural Human Rights' thought is that we always try to approach our problematic globally. Nonetheless, we never get a global perspective as our outlook on reality always depends on the view out of multiple windows, and not only out of one, even if it is a huge one. We meet the demand of globality not by trying to see globally but by trying to understand the links and the articulations between our different local perspectives. Looking at our specific problematic from all points of view which may be relevant, and trying to articulate the so gained insights does not enable us to propose comprehensive explanatory systems, but only partial models which can prove their usefulness in their application to concrete problematics. The following paragraphs try to give an idea in what sense the paradigm of game can play for us the role of a bridge between "systematic" and Communitarian approaches to Law.

The paradigm of interest, well illustrated by utilitarianism, permits to shed light on the instrumental and strategic dimension of legal activity. The problem is that to do so it often neglects to consider the concrete individual or collective actors and the sociological contexts in which they are embedded. It thus loses some of its explanatory power as it turns into a rationalisation of the real which heavily simplifies it by limiting itself to an abstract, axiomatic maximisation of personal interests or of those of the largest number. The paradigm of game seems to permit to keep the insights of the interest paradigm but without falling into excessive reductionism. Indeed the notion of game, through the stakes of the game, opens an analysis in terms of interests. But at the same time it emphasises the players who through their activity try to get what is at stake. And it emphasises the game as such which gives sense to the players' actions and fixes the rules of the game. Furthermore the idea of game draws attention to the

symbolic aspect of the actions (*Wertrationalität*) and does not limit itself to their instrumental aspect (*Zweckrationalität*). It even highlights the dialectic relationship existing between those two poles as game is always “struggle for” and “representation of” (OST, van de KERCHOVE 1993a : 209-211).

The paradigm of system is maybe the fundamental aspect of modern legal theory. Different sorts of systematization have been proposed. The systematic approach permits to give a coherent picture of Law. But it seems to privilege logical approaches to Law which emphasise its deductive, formal and axiomatic character. Internal inconsistencies or the dependence of the legal system on its environment often seem to be neglected. The paradigm of game, although acknowledging a certain systematicity of Law by giving account of a certain closure of the legal phenomenon, nevertheless suggests that its borders are partially changing, porous and reversible. It also suggests that the legal system is in-between order and disorder. If it insists on the necessary regulation and ordering of legal activity it nevertheless accepts a part of indecision. If it accepts the objective dimension of the Legal phenomenon as a globality, it also recalls the necessary creative subjectivity of its actors. And again it permits to think all those aspects in a dialectical relationship (OST, van de KERCHOVE 1993a : 212-214).

The paradigm of the actor seems to become more and more relevant in social sciences since the last two decades. The actor is reemerging as the actor of the market, the social actor understood in a functional sense through its social integration and the “historical subject” which is defined by his capacity to make sense out of his life. The paradigm of game invites to think the actor not in opposition to the system, but in its complementarity to it. It also emphasises the plural identity of the actor who can play different games (OST, van de KERCHOVE 1993a : 214-215)

Finally the idea of field (*champ*) is closely related to the idea of game and could maybe be enriched by the latter (OST, van de KERCHOVE 1993a : 216).

It seems to me that by acknowledging the different points of view and by integrating them in a coherent approach by putting them into dialectical relationships, the paradigm of game, although remaining in a “systemic view”, as it privileges the game point of view which orders the rest of reality, permits an opening up to the Communitarian paradigm we defend to tackle the intercultural Human Rights’ problematic.

Let us now present a specific game, the *Jeu de l’oie*, or “Legal Monopoly”, which in my opinion can constitute not just a bridge towards our more classical, “systemic” conceptions of Law, but serve as a tool enabling us to put into practice a Communitarian methodology, a Communitarian tool to think about the Human Rights’ Community. It is a plural tool which may permit us to think a healthy Human Rights’ pluralism plurally.

## ***II. The “Jeu de l’oie” or “Legal Monopoly”***

Before presenting the approach, a short word on its name and on its translation. The *Jeu de l’oie* is a French game which can be compared to the British “Snakes and Ladders” game. Its literal translation is the “game of the goose”. It has the form of a spiral. The purpose of the game is to arrive first at the final square and thus to win the goose. The players advance their draughts by throwing a dice. In French *Jeu de l’oie* permits a pun as it can be understood as *jeu de lois*, a game of laws. I have chosen to translate it as legal monopoly as monopoly is an internationally well known game and as the term “Legal Monopoly” has a similar double connotation as implied by the homeophonic character of the French pun.

The spiralic *Jeu de l'oie* is the child of a processual approach to Law which has first used a circular support for its presentation, on the model of Monopoly, and which has been developed through the research of the Laboratoire d'anthropologie juridique de Paris (LAJP). It has been mainly used for research in the domain of African land law and agricultural reforms and for research in the domain of the justice of minors<sup>35</sup>. As LE ROY says, the processual approach privileges two essential poles : the point of view of the observer and the individual and collective goals (*enjeux*) that are sought to be achieved (LE ROY 1988a : 36). It thus joins our actor's perspective and our emphasis on praxis. For our presentation here we will mainly rely on LE ROY's presentation in "Prolégomènes à une analyse dynamique de la gestion foncière"<sup>36</sup> (1996b). There he presents the *Jeu de l'oie* in the context of the search for an African rule of law in the specific context of "land management" (*gestion foncière*). According to him it is not sufficient to acknowledge the existence of multiple, specialised and interdependent laws. One must find ways to operationalize this view in order to permit the crystallization of a concrete device permitting to realize a working legal system, or as we prefer to say in our context, a working legal community. For us the *Jeu de l'oie* is relevant as it provides a Communitarian approach to our Human Rights' Community which permits to operationalize it. The *jeu de l'oie* enables us to focus on the dynamic character of the Human Community and to represent it. It thus provides us with a welcome complement to our more static models in relation with our Common Humanities. It permits us to undertake the necessary epistemological break which can permit us to think the articulation between traditional Western state-law and the regulations inspired by "living law" or by the "law of practice", between a global Human Rights' Law and local Human Rights' Laws.

The processual analysis crystallized in the *Jeu de l'oie* has its roots in "dynamic anthropology" as initiated in Great Britain by Max GLUCKMAN and in France by Georges BALANDIER and as represented in the United States by Sally Falk MOORE, and can ultimately be traced back to MALINOWSKI's approaches to Law (LE ROY 1988a : 35, 1996b : 187). As LE ROY notes, it encounters François OST's and Michel van de KERCHOVE's paradigm of game, as the dynamic approach permits to escape classical hermeneutics and permits to take into account the part of improvisation, the necessary margin of uncertainty which is part of any social game and which Law has to express in the form of rules and norms. It permits to approach the complexity of Law as a dialectical relationship between certainty and uncertainty, which can be summed up in the idea of the "open texture" of Law. Furthermore LE ROY acknowledges that the *Jeu de l'oie* places itself in the "in-between" paradigm advocated by OST and van de KERCHOVE (LE ROY 1996b : 188), the five couples of opposition framing law and presented above being the raw material of the processual analysis.

Let us now present the approach of Law through the *Jeu de l'oie* which constitutes a support for our dynamic approach to Law. Instead of moving randomly on the squares according to the values shown by the dice, in the social *Jeu de l'oie*, the player is seen as moving according to the social and legal positions from which he can expect to win (or to loose) advantages in the social game. The *Jeu de l'oie* is constituted of ten squares. On the last one we do not find a goose as a price but the rules of the social game itself which are effectively shared by the largest number. The way to the last square, to the rules of the game, is made up by the following squares representing different social and legal positionings :

**1. Statuses, 2. Resources, 3. Conducts, 4. Logics, 5. Scales, 6. Time processes, 7. Forums for interaction, 8. Social orders, 9. Stakes, 10. Rules of the game.**

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<sup>35</sup> Examples can be found in LE ROY 1995c, 1996b, 1997b.

<sup>36</sup> "Prolegomena to a dynamic analysis of land management"

Below is a representation of the *Jeu de l'oie* (Figure 7) which may help us to visualize more clearly the dynamic aspect of the game. I have adapted it from the *Jeu de l'oie* presented in “‘Espace public’ et ‘socialisation’ dans les métropoles : quelques préliminaires à une problématique interculturelle”<sup>37</sup> (LE ROY 1995c : 39) to fit our purpose.

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<sup>37</sup> “‘Public sphere’ and ‘socialisation’ in major cities : Some preliminaries to an intercultural problematic’

Let us now have a closer look at the different squares. In the frame of this thesis I will content myself with presenting the general methodology of the *Jeu de l'oie*. I will not try to explicitly apply it to our Human Rights' problematic. Nevertheless, the link between this processual approach and our concept of a Human Rights' Community will appear very clearly. I will also try to present relevant perspectives on the intercultural Human Rights' problematic that can be opened through the different squares.

### **Square One : Statuses**

The first square are the statuses. Man is a social being. As such he is always embedded in a network of relationships. He does not exist independently as our abstract individualism may suggest. Thus in order to take an actor's, or player's perspective, we must start by locating him in the social context. Every individual has a plurality of statuses, which are related to his inscription in different collectivities or communities. We have already encountered this plurality of the individual and of its inscriptions in different communities above by presenting BOLTANSKI's and THEVENOT's idea of plurality of worlds and by discussing legal pluralism (see especially our quotation of VANDERLINDEN on p 52). A distinction can be made between his legal statuses and his social statuses (LA ROY 1996b : 190-193). In our research this square is relevant as it invites us to draw attention to the relevant communities, and legal orders for the tackling of different Human Rights' problematics. It permits to locate from which Human Right's community, as defined above, an analysis is led. It thus conditions all the further choices of analysis. Furthermore, the square of statuses invites us, in relation to the model of the "subject of Human Rights" presented in Part I, to reflect upon the possible status of the Human Rights' actor or/and subject : is it the citizen, the legal person, the human being, or still another status ? As outlined in Part I, in African societies marked by the Communitarian archetype, an analysis in terms of status reveals itself as essential.

### **Square Two : Resources**

The square of resources invites us to consider the material, human and ideal resources available to the actor. Different ways of practising Human Rights may necessitate different material resources. Our Western way for example needs a huge bureaucratic and administrative institutionalisation. This may be a pragmatic obstacle to the transfer of our model in contexts where the necessary infrastructures are lacking and cannot be established and entertained. But not only the material resources must fit to enable an effective Human Rights' practice. The ideal world of the concerned societies must provide a resource for Human Rights' theory and practice. If cultural specificities are taken into account in the local praxises of Human Rights, the local ideal worlds can be turned into such a resource instead of being perceived as an obstacle, and of being an obstacle to an unadapted and exterior system. This may also help to resolve the problem of often lacking material resources - building on local conceptions and

already existing legal practices seems to be more realistic than trying to create a completely new system out of the blue. In this context the acknowledgement of human resources also becomes very important. We often neglect them as we favour institutional thought. But human relationships, networks, communities are what constitutes our living together. They hold a tremendous potential for the realisation of a Human Rights' ideal. The square of resources also invites us to reflect upon globally mobilizing projects or intercultural myths or ideals which could foster the Human Rights' Community. Let us not neglect the power of ideas. Before being put into practice things are thought of, conceived, even if this can happen in a more or less conscious way and if there may be quite a gap between theory and practice.

### **Square Three : Conducts**

Nowadays conducts find a renewed interest as it shows that models of conduct and behaviour lie at the core of all legal systems. Conducts can basically be envisaged either as tactics or as strategies. Tactics are reactive or adaptative conducts. They are the support of our practice in daily life. They suppose the ability to take chances, to evaluate situations. They permit to display the habitus, our encultured systems of lasting dispositions. They are also the precondition for strategies. Strategies are more long term oriented. They aim at mobilising resources, selecting the most efficient statuses, in order to achieve specific goals through social, political, economic action. It is through tactics and strategies that the actors' models of conduct and behaviour are operationalized. Sometimes the actors apply these models, sometimes they try to adapt or modify them. But they always try to use them in a way permitting them to achieve their goals. They thus introduce us to the logics existing in a social field and which we will deal with in the next square (LE ROY 1996b : 195-196).

Focus on tactics and strategies is important because it provides a glance at the feedback that Human Rights' "policies" can produce. They capture attention on what is actually done with the proposed Human Rights' system. It can thus open to a rethinking of the proposed model rendering it more effective. The focus on tactics and strategies also invites us, as we will develop further in square six on time processes, to reflect upon the frame of our actions. Do we have to respond to immediate problems (an acute crisis for example which could degenerate in gross "violations of Human Rights" as was the case for example in former Yugoslavia or Rwanda), or are we trying to build common and solid bases for the future? In which temporality do we inscribe our action ?

### **Square Four : Logics**

As we have already seen, there is not one legal logic. We can at least distinguish an institutional and a functional logic. This square invites us to think of both and to think them in a complementary and not in a mutually exclusive way<sup>38</sup>. We will not dwell on them here as we have already extensively treated them above. But this square can also invite us to leave the purely legal domain. As we have noted in our introduction, thinking of our Human Rights' Community is closely linked to the thinking and structuring of our global condition. What are the predominant logics in globalisation thought and discourse ? Is it an economic logic which conceives globalization in terms of market ? Is it a cultural logic seeing it in terms of cultural imperialism, relativism or *mestizaje* ?.. What is the relationship between those logics ? What are

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<sup>38</sup> For a more detailed approach to these two logics see LE ROY 1997e



the relevant relations to think and practice a Human Rights' Community between politics, economics, law ? Must new logics be invented and be put into practice ?

### **Square Five : Scales**

This is another very important square. We may get a very blurred picture of the analysed social game if we do not locate it in a space of observation. We must choose our scale of analysis which will determine our perspective. As LE ROY (1996b : 198) reminds us : what is true on one scale is not necessary true on another, because of a different qualification, and thus of a specific use. It can be very productive here to deepen de SOUSA SANTOS' approach to Law as "a map of misreading" (de SOUSA SANTOS (1987). He writes (1987 : 282) :

*"The main structural feature of maps is that in order to fulfil their function they inevitably distort reality. (...) Maps distort reality through three specific mechanisms and since they are used systematically they become intrinsic or structural attributes of any map. Such mechanisms are : scale, projection and symbolisation. (...) Maps should be convenient to use. There is thus a permanent tension in maps between representation and orientation. (...) In the analysis of the relations between law and society we should substitute the complex paradigm of scale/projection/symbolisation for the simple paradigm of correspondence/non-correspondence."*

More directly related to scales, he writes (1987 : 287-288) :

*"The legal developments reveal the existence of three different legal spaces and their correspondent forms of law : local, national and world legality. (...) Local law is a large-scale legality. Nation state law is a medium-scale legality. World law is a small-scale legality. This concept has broad implications. First, it means that, since scale creates the phenomenon, the different forms of law create different legal objects upon eventually the same social objects. They use different criteria to determine the meaningful details and the relevant features of the activity to be regulated. They establish different networks of facts. In sum, they create different legal realities. (...) Thus the different legal orders operating on different scales translate the same social objects into different legal objects. (...) We can only compare or contrast social interests and degrees of class consciousness within the same legal space. The difficulty lies in that socio-legal life is constituted by different legal spaces operating simultaneously on different scales from different standpoints. So much is this so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but rather of interlaw and interlegality. More important than the identification of the different legal orders is the tracing of the complex and changing relations among them. But if while doing this we forget the question of scale, we may find ourselves in the same distressing situation as a tourist who forgot to pack the voltage transformer that would enable him to use his electric razor in foreign country."*

So in order to stay "clean shaved" during our intercultural Human Rights' journey let us not forget about scales, their interrelations and their articulations ! This square also invites us to shed new light on the role of Human Rights' communities on the global, supra-state regional,

state, infra-state regional and local levels and on more or less local initiatives, like for example the different non-Western declarations of Human Rights. It invites us to see their interrelations and to think about their articulation in order to permit the emergence of a Human Rights' Community at the global level.

### Square Six : Time Processes

Processes are to historical analyses what scales are to geographic analyses. Although, processes and scales are different paradigms, both are interrelated. Sally Falk MOORE has underlined that a processual analysis is not merely analysis of social change. It also has to be considered as the way in which diverse experiences acquire meaning and coherence in relation to a specifically chosen period (LE ROY 1996b : 201, and see MOORE 1983 : 42 ff). It is related to our square of conducts dealing with tactics and strategies and also to the one of scales. De SOUSA SANTOS' analysis on scales presented above can be transposed here from the spatial to the temporal field. The emphasis on different temporalities is all the more important as we sometimes tend to think of Law as timeless, as above time, as eternal. Even if we acknowledge that Law can change through the ages we seldom are aware of the fact that society is not determined by a unique temporality, attuned to Law, but that it shares in different temporalities. It may thus be useful to draw "temporal maps" of our societies. The three temporalities retained here are the macro-processes, the meso-processes, and the micro-processes which remind us of de SOUSA SANTOS' large-scale legality, medium-scale legality and small-scale legality in the spatial field.

The macro-processes correspond to large periods of time, at least several decades but usually more. An example of a macro-process would be the emergence of the modern conceptions of Law or the process maybe in the making presently towards "postmodern" conceptions of Law. The meso-processes correspond to the period of a generation, after which the meaning of founding events get lost. Thus for example for the contemporary African elites, the access to political independence does not bear the same signification anymore as for the first heads of government, at least in terms of legitimacy. The meso-processes can be approached through the important political choices leading to reforms or the play of alliances between actors or through the observation of the changes of public opinion explicating cultural shifts in the approaches to societal problems. The micro-processes are processes lasting a few months, at the most of a few years, periods during which the founding event is always remembered. This remembered founding event provides justification for solidarities, oppositions, conflicts or struggles which are of the domain of tactics evoked above. It is in the micro-process that the daily social game is played and where the actor can deploy all his social skills (LE ROY 1996b : 201-202).

In our intercultural Human Rights' thought this square is important as it puts into perspective our Human Rights' tactics and strategies in relation to the scale and process in which they find themselves embedded. This square, as suggested above, also invites us to rethink the role of time in Law, and to leave the current *tabula rasa* approach. Past, present and future are realms interrelated and very influential on our practice of Law, the past being linked to our memory, our traditions, the future being linked to our prospects, and the present being in some sense the point of articulation of both. And we should not forget the density of our present in which different temporalities exist which have to be coordinated and which, in fact, reflect our multiple pasts and possible futures. The analyses developed by OST seem here very relevant to me (1996, 1997d), although I cannot further develop these ideas here. Let us just quote a passage of OST's synthesis of his article "Déployer le temps. Les conditions de possibilité du temps social"<sup>39</sup> (1997c : 1 and 3-4) to have a glance of the offered perspectives :

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<sup>39</sup> "Unfolding time. The conditions of possibility of social time"

“The aim of this text is to reflect upon the conditions of possibility of the *constitution of social time*. A *negentropic* social time (which means creative), a human time *filled with meaning*.(...) ”

Between the immobility of the time of eternity and the empty fleetingness of fleeing time, the voice of public opinion and of political action, creative of organized memory (Arendt) arises (...) To be “capable of history” (Hegel), societies must be able to fertilize (make interact) the memory of the past by the expectations of the future and the project by experience (Ricoeur). (...) In order to do so, we must rethink the notions of “generation”, of “humanity” and of “heritage” (*patrimoine*). This inscription in duration should nevertheless not be reduced (...) to the repetition of the same. (...) Time, in an open society, is thus partly undetermined : it is the time of *praxis*, different of the time of the programmed manufacturing of things (*poiesis*). We must remember this with regard to all antidemocratic political philosophies which would like to replace the (political and collective) “acting” by the (technocratic and elitist) “doing”. (...) We will both have to affirm the right of everyone to his own rhythm, and to think the conditions for a harmonisation of temporalities which cannot be reduced to the timing of physical time (planning-timing) and must not lead to a synchronization (*mise au pas*) of the whole society (...)

Return to square one ; on one side *Kronos* : an arbitrary power, violent and solitary, associated to a static temporality, without past or future, without event or initiative ; on the other side the *Hours* : symbols of harmony in the City, associated (...) to a dynamic, fertile (negentropic), alternating and plural temporality.” -34-

### **Square Seven : Forums of Interaction**

This square is a transitional square between the previous (statuses, resources, conducts, logics, scales, time processes) and the following ones (orders, stakes, rules of the game). We can say that the forums of interaction are constituted through all the squares we have seen above. They are the places in which actors in their statuses mobilize their resources, and turn them into conducts according to logics. All this in order to project themselves in a more or less near future in reference to their scale of action. The processes observed here are always processes of confrontation and of negotiation. Of confrontation because the forums are a meeting place for different and often diverging interests. Of negotiation because at least minimal consensus must be found in order to maintain the “social contract”. As we will see in the next square, solutions can be formalised differently according to the privileged social orders, in more or less adequate ways in relation to the pursued objectives, which constitute the substance of our square nine, the stakes (LE ROY 1996b : 202).

Forums, places of encounter and exchange are paramount for the regulation of the social game. But as LE ROY notes, they must be adapted to the problems they intend to tackle. They must also be invested by a certain authority so that its decisions can bear concrete effects. In Africa, for example, the context seems “critical” as often neither the traditional forums like the “chieftains’ tribunals” (*tribunal de chefferie*) or the “council tree” (*arbre à palabre*), nor the modern forums constituted by administrations, legal institutions or parties enjoy the necessary legitimacy and authority to pacify social relationships, protect minorities and securize the actors (1996b : 203). We seem thus invited to reflect in our Human Rights’ problematic on the elaboration of adequate forums through which the tackling of diverse

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problems can be efficiently operationalized. To do so, sociological analysis of the different contexts is necessary but also a more general reflection upon the relations between the forums, the stakes, and the relevant social orders.

### **Square Eight : Orders**

We will not dwell on that square here as we have extensively dealt with the different social orders, their related forms of regulation and their related logics in Part I. Let us just recall that in order efficiently to put into forms Human Rights problematics in different cultural contexts, the proposed forms should be adapted to the orders valorised in those different cultural contexts. Approaching for example Human Rights from the point of view of imposed order in societies valorising the negotiated or accepted order turns out to be problematic, if not completely inefficient. Furthermore, next to the specific contexts of action, the purpose of the action itself should be taken into account in the choice to valorise an approach in the terms of one order or another, or in the choice of their articulation. In the long run for example it appears more appropriate to build on the accepted order and its correlated habitus. In short term operations, an imposed order approach, to maintain peace for example, may reveal itself necessary.

### **Square Nine : Stakes**

The stakes are what gives meaning to the game. These stakes can be material as well as immaterial, just like the resources we have encountered on Square Two. These stakes can also be more or less explicit or implicit. In the social game, strategies and tactics trying to hide the players' aims are commonplace. Furthermore, the actors themselves may not always pursue some very clearly defined aims. The expected gains also need not to be immediate but could be differed in time. Stakes bring us back to the reflections developed around strategies and tactics. What are the aims we pursue ? What is at stake ? Is it the well being of our generation, of future generations, of individuals, of communities ? Is it the well being of a more local or of a more global community ? Is it a more material or immaterial well being? Is it life in dignity, peace ? Is a life in dignity a life in which a minimum of material conditions are fulfilled ? Is it a life which is recognized by the community or the communities of belonging and which can actively participate in the community's or the communities' life or lives ? Furthermore, this square reminds us that in the social game different players want to get different things. In our Human Rights' thought we must not forget to take into consideration that there may be very diverse political, economical, sociological, cultural etc ... stakes.

### **Square Ten : Rules of the Game**

By patiently playing our Human Rights' *jeu de l'oie* we may little by little be able to work out the Rules of an intercultural Human Rights' game. On the global level this may help us to operationalize our Human Rights' Community and to deepen our understanding of it. The patient advancement, step by step, from square to square may permit us, on the one hand to help shedding light on partial Human Rights' games which make up (or could make up) the global game, thus enabling their articulation, and, on the other to take us deeper into the mechanisms (those already existing and those still to be invented) necessary to understand and to play the global intercultural Human Rights' game.

We come now to the end of our Part II. We have in Part I outlined a possible intercultural meeting place for Human Rights' practice : the forum of our Common Humanities. We have in Part II focused on our actual meeting and sharing by presenting our Human Community as a frame for intercultural Human Rights' practice. By doing so we have advocated an emphasis on "Praxis" rather than on "System" in our Human Rights' thought. This led us to propose an operationalization of the concept of Human Community in legal theory through the perspective of game. Van de KERCHOVE's and OST's paradigm of game already provided us with a praxis and plurality oriented frame for thought, although it still staid a "systemic" one. But to really be able to think in terms of Community we have advocated the necessity to completely leave a "systemic" approach in favour of a Communitarian, "living" approach to Law. The *Jeu de l'oie* seemed to provide us with the frame for such an approach. Its perspective is the one of the actor. Each square reminds us of one of the relevant aspects of life he is "knotting together" in his person and action in particular ways in particular situations in order to play the "legal game", the *jeu de lois*. The *Jeu de l'oie* thus permitted us to approach the Human Rights' problematic in an ordered and although dynamic and plural way. By starting on the actual practices of the actors it may permit to elaborate the most adequate "rules" for a working "Human Rights' Game".

But in order to play together our Human Rights' Game, we need some common horizon which provides it with sense. We will know, in Part III, try to approach this common though plural horizon for intercultural Human Rights' practice through the concept of Dianthropological Praxis of Human Rights.

**Part III :**

**Towards a**

**Dianthropological Praxis of**

**Human Rights**

Let us start by meditating the famous parable of the elephant in the dark of Djalâl ud-Dîn RUMI<sup>40</sup> :

*“Hindus had brought an elephant ; they exhibited it in a dark house.  
Several people entered, one by one, in the dark, to see it.  
Not being able to see it with their eyes, they touched it with their hands.  
One put his hand on the trunk ; he said : “This creature is like a water pipe.”  
Another touched its ear : it felt to him like a fan.  
Having gripped its leg, another one declared : “The elephant has the shape of a pillar.”  
After having laid his hand on its back, another one said : “To say the truth, this elephant is like a throne.”  
Also, each time that one heard a description of the elephant, he understood it according to the part he had touched.  
Their affirmations varied according to what they had perceived : one called it dal, the other alif<sup>41</sup> .  
If each of them had had a candle, their sayings would not have differed.  
The eye of perception is as limited as the palm of the hand which could not comprehend the totality (of the elephant).  
The eye of the sea is one thing, the foam is another ; leave behind the foam and look with the eye of the sea.  
Night and day, coming from the sea, the flakes of foam are moving ; you see the foam, not the sea. How strange this is !  
We collide with each other like small boats ; our eyes are blinded ; and yet the water is clear.  
Oh you, who fell asleep in the ship of the body, you have seen the water ; contemplate the Water of the water.  
Water has a Water which pushes it, spirit a Spirit which is calling it.” -35-*

Until now we have approached the intercultural Human Rights’ problematic in a way corresponding to the first part of the parable. We have considered that “Human Rights” are something like the elephant in the dark. To get an idea of what they could be, we have advocated the necessity to acknowledge the existence of different perspectives, and thus also the relativity of our own perspective. We have emphasized that the fact that we have for example grabbed the “trunk” of Human Rights should not induce us in the error to think that Human Rights are a water pipe, nor to negate *a priori* the point of view of those who have touched the “ears” or “legs” of Human Rights. We have advocated the necessity in order to get a more complete picture of Human Rights to acknowledge the complementarity of perspectives. Thus, have we argued, we could maybe build up, through the articulation of partial perspectives, an intercultural and more complete picture of Human Rights. We have in Parts I and II given account of a praxis of Human Rights, constituted of a never ending

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<sup>40</sup> Djalâl ud-Dîn RUMI, *Mathnavî* , III, 1259 ff, quoted in : de VITRAY-MEYEROVITCH 1995 : 23-24

<sup>41</sup> These two are letters of the Arab alphabet, respectively *d* and *a*. The first one has the shape of an angle. The second has the shape of a vertical line.

process of dialoguing, acting, reflecting, etc, paralleling what the people of the above story could do : touch the elephant, get a mental picture of it, exchange their views among them, and thus little by little come to know what the real elephant looks like.

We can say, that what we have done in Parts I and II, is to engage in a “dianthropological (*dia - anthropos -logos*) praxis of Human Rights”. Indeed, as we have already defined it, the dialogue is a journey through different logics. But we have not confined ourselves to logics only, but have also included practices in reflecting upon intercultural Human Rights. Further, we have seen that logics are determined by different standpoints, perspectives, which are underlaid by different myths to which dialogue provides an entry. We have thus put into practice the fundamental demand of legal anthropology, which is always “to bring back the legal discourses and practices to the systems of thought and to the logics which generate them”<sup>42</sup> (LE ROY 1993b : 235). That is the reason why I have chosen to speak of “dianthropological praxis” in order to characterize our demarche which is an outlook on Human Rights as emerging from the different anthropologies of our Common Humanities, and an emphasizing of a shared Human Rights Praxis, a practice sustained by theory and a theory sustained by practice, embedded in our Human Community.

But for the moment, we have not embedded our dianthropological endeavour itself in a broader horizon which could provide it with meaning and common perspectives in which all cultures could share. We have staid at an analytical level without yet providing an outlook on a possible synthesis of the insights that could be gained through dianthropological endeavour. We have not yet come to the second part of the parable. We have not yet left the domain of *logos*. Our dianthropology may have led us to the *mythoi* underlying the different cultural *topoi*. But in our journey we have nevertheless remained in the domain of *logos* and have not yet dealt with the intercultural *mythos* in which our demarche may be embedded. We have remained in the realm of what can be perceived by our “limited eye of perception”, by the “eye of the foam” (what this exactly means will become clearer in Chapter V). In order to access a possible intercultural founding myth of intercultural Human Rights’ Praxis, a Dianthropological Praxis of Human Rights (in upper-case), it may be fruitful to complement dianthropological praxis as developed until now, “social sciences’ dianthropological praxis” by a “spiritual dianthropological praxis” characterized by the aim of spiritual traditions to take us beyond the realm of *logos*, beyond *anthropologos*, through a spiritual praxis emphasizing direct experience of what we are, and thus giving a more “synthesized”, but also more “mythical”, account of what we are than a “social sciences’ approach” based on analysis through the *logos*. We will thus in this Part, in order to be able to approach our possible intercultural myth of Dianthropological Praxis of Human Rights, engage in a dialogue with spiritual traditions.

In Chapter V, we will reflect upon the possible enrichments of our Human Rights’ thought in the intercultural context through dialogue with spiritual traditions. We will try to see in which way this dialogue could permit us to enrich our picture of Man in order to help us to think of an “intercultural universality of the Human”, which could permit to found an “intercultural universality of Human Rights” and thus provide us with a shared horizon for our common praxis of Human Rights. Further, Chapter V will also provide us with a bridge towards Chapter VI, in which we will dwell rather in the realm of *mythos* than of *logos*. Indeed, building on the insights gained in Chapter V, we will try in Chapter VI to identify a possible intercultural grounding myth, Dianthropological Praxis of Human Rights, which could provide a shared horizon for action, and a terrain for growth to the Common Humanities’ Human Rights’ Praxis in the Human Community.

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<sup>42</sup> “(...) l’exigence fondamentale qui caractérise cette recherche (of the Laboratoire d’anthropologie juridique de Paris) est de toujours rapporter le discours et les pratiques juridiques au système de pensée et à la logique qui, l’une et l’autre, les génèrent.”



**Chapter V : A Dialogue with Spiritual Traditions in  
Enrich our “Picture of Man”**

**order to**

“Nasrudin started haranguing the people on the market place. “Hey ! You ! Do you want knowledge without pains, truth without the false, success without effort, progress without sacrifice ?”

In the wink of an eye, an immense crowd had assembled around him. And all shouted : “Yes ! yes!”

“Perfect ! said the Mulla. I only wanted to get an idea. If I ever discover such a thing, you can count on me not to hide it from you.” (SHAH 1989: 125) -36-

This little story should warn us not to believe that the spiritual traditions will be able to provide us with a “ready-to-wear” conception of the Human, with “the” truth about Human nature, which should impose itself in our Human Rights’ thought. But we should also be aware of a different danger facing us when dealing with spiritual traditions. It is the danger to dismiss what those traditions could teach us, before we have even taken the time to have a closer look at them because they appear too strange to us at first sight.

In my opinion, our conception of spirituality often suffers of the “encompassing of the contrary”. We either construct it, positively, as all-encompassing, absolute in opposition to our rational or scientific knowledge which we think of as partial and relative. Or we construct it, negatively, as emotional, irrational, unscientific, unproven in opposition to our rational, scientific, proven knowledge. I think that here again genuine dialogical dialogue is necessary if we want to be able to understand the spiritual traditions’ teachings and to fertilize our Human Rights’ thought by them. In order to enable genuine dialogue and understanding, I will thus in the following pages not try to present spiritual traditions from an exterior point of view. I will rather try to draw on the testimony provided by spiritual masters of different traditions, in order to enable us to get a glance from within. As in intercultural dialogue, if a dialogical approach is necessary to enable us to get in contact with those traditions, it does not end there. As we have argued in relation to our Common Humanities, the dialogical approach aiming at understanding is only the first necessary step which could lead us to “creative dialogue”, a dialogue of mutual interfecundation and enrichment, a dialogue which from acknowledgement of the existing becomes creation of the (commonly) possible. It is my firm conviction that dialogue among spiritual traditions and among them and secular traditions on the problem of “human nature” can turn out to be very fruitful in the context of a search for an intercultural universality, a *mestizaje*, of Human Rights.

As my own experience has made me more familiar with the Indian teachings (Buddhist and Hinduist) and with AIVANHOV’s Christian esotericism (which also draws on traditions like the Jewish Kabbala or the Indian Yoga systems) my reasoning will largely rely on this perspective. My knowledge is thus very partial and my intent is rather to invite through this chapter to a dialogue with spiritual traditions, than to propose any final conclusions. I hope that this chapter will be able to familiarize the reader to some extent with the way some spiritual traditions tackle the problem of “human nature”. I further hope that it will succeed to show the

interest which could lay in enriching our Human Rights' theory by "spiritual" perspectives. It is, of course, self-evident that the proposed approach to the dialogue with spiritual traditions is only one possible proposition stemming from my personal experience, which must be enriched by criticisms and contributions from different perspectives and by the contributions from other traditions.

To me, fecundation of Human Rights' thought through dialogue with the spiritual traditions seems relevant as reflection upon Human Rights to a large extent relies upon reflection upon "human nature" and its universality. ROSENBAUM (1981 : 25) notes that most philosophers agree on the fundamental character of the issue of "human nature" in Human Rights' thought. And he remarks (1981 : 25) that :

*"In basing human rights on human nature or personhood, one must have a defensible concept of the latter; otherwise, human rights will be arbitrarily defined, with no inevitable link having been established between the morality of being human and the facts of existence."*

It thus seems interesting to try to outline what the spiritual traditions could contribute to the building of a "defensible concept" of human nature, which could turn out to be useful for intercultural Human Rights' thought.

Let us remark with ROSENBAUM (1981 : 33) that, although there are not many of them, there are a few recent philosophers inclined to found human rights at the cosmic or spiritual levels. He writes (1981 : 33-34) :

*"Some philosophers (...) do speak of human reality as profoundly as they would of a god, whereas others in this perspective are unable to separate morality from broader religious and metaphysical considerations.*

*(...) Although the neo-Kantian view of natural law may be an attempt to circumvent the modern bias against absolutes, it relies upon a metaphysical, or even theological, conception of universal order which ultimately authenticates human rights, values and purposes.*

*It is in this sense that natural-law metaphysics is closely aligned with religious conceptions of human rights, as has been illustrated by the favorable comparisons of the spirit and purpose of human rights with the basic principles of certain religious traditions in respect of human nature and human destiny."*

So let us now engage in a dialogue on "human nature" with the spiritual traditions. We will do so, not in order to discover some natural law, but rather to open perspectives in order to contribute to the elaboration of a picture of man, which could be shared by all cultures and give rise to an intercultural myth of Human Rights able to sustain our intercultural Communitarian Human Rights' Praxis.

In the following pages I will try to show in what an enrichment of our "picture of Man" by the spiritual traditions could consist in. I will start by presenting what I call "spiritual traditions" and by giving a first glance of their approach to the Human and of their possible contributions to Human Rights' theory (I). I will then try to show one possible way of opening up our notion of dignity by those insights, in order to enable its transition from a "localised universalism" into a homeomorphic concept which could make sense across several cultures (II)<sup>43</sup>. But before doing so, it may be appropriate to listen to a Tibetan Buddhist master's,

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<sup>43</sup> For the relations between spirituality and science see for example : ATLAN 1986, CAPRA 1992, JUNG 1994, also : EBERHARD 1996 : 65-69. For an overview on mysticism in the world's religions see BOCK 1993.

SOGYAL RINPOCHE's, advice to those wanting to enter into contact with spirituality (1995 : 131) :

*“Read the great spiritual books of all the traditions, come to some understanding of what the masters might mean by liberation and enlightenment, and find out which approach to absolute reality really attracts and suits you most. Exercise in your search as much discernment as you can ; the spiritual path demands more intelligence, more sober understanding, more subtle powers of discrimination than any other discipline, because the highest truth is at stake. Use your common sense at every moment. Come to the path as humorously aware as possible of the baggage you will be bringing with you : your lacks, fantasies, failings, and projections. Blend, with a soaring awareness of what your true nature might be, a down-to-earth and level-headed humility, and a clear appreciation of where you are on your spiritual journey and what still remains to be understood and accomplished.”*

### ***I. Spiritual Traditions and the Human***

Let us start by presenting what we understand under “spiritual traditions” and how we think that they could enrich the Human Rights’ discussion (1) before having a closer look on their outlook on Man (2).

#### **1. What are Spiritual Traditions and what Could they Contribute to the Human Rights’ Discussion ?**

I will use the term “spiritual” tradition in order to designate all traditions aiming at an understanding of Man and of his transformation in order to permit him to live in harmony with himself, his fellows, his environment, the world, the cosmos, and, in the theist traditions, with God or the Gods. I thus do not limit the term “spiritual tradition” either to an institutionalised form of belief, nor to a religion which would be characterized by a belief in God or Gods. Furthermore, I would like to emphasize that spiritual traditions have an exoteric and an esoteric aspect. Their exoteric aspect can be understood as their form, their esoteric aspect as that which is put into forms, the essence of the teachings. It is the realisation of the essence of the teachings and not the mere observance of the exterior forms which has produced what are considered as the great sages of the world, the great spiritual masters, the great initiates. KALOU RINPOCHE (1993 : 32) an important contemporary master of Tibetan Buddhism said :

“All traditions, Christian, Hindu, Jewish, Muslim, Buddhist ..., teach that the comprehension of what we are on the most profound level is the essential point : this comprehension of the nature of the spirit enlightens from within the teachings of all traditions. In each of them, whoever reaches the intimate comprehension of the mind and makes its direct experience, ends up with an essential vision, without any common measure to the one he could have had before this direct experience. The comprehension of the nature of the mind is the key which opens the comprehension of all teachings. It sheds light on what

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we are, on the nature of all our experiences and reveals the most profound form of love and compassion.” -37-

We can put those words in a Christian perspective through the sayings of Omraam Mikhaël AIVANHOV, in which it becomes very clear that the core of spiritual traditions is not constituted by their forms, which are variable, but by the content these forms seek to express. He says (AIVANHOV 1994 : 11 and 26) :

“Since millenniums human beings have taken the habit to dwell on forms and the appearance of things and to leave aside their content and their meaning. This is also what they have done with the Sacred books which also have a form, a content and a meaning. The form, the narrative is for ordinary people ; the moral, symbolic content is for the disciples who try to deepen and to live it ; whereas the spiritual meaning is for the Initiates who know how to interpret it. (...)

Every form, that means every thing or being which is born must die and must leave its place to others. Only, the spirit which has no beginning has no end, and it is him who gets successively incarnated in ever new forms. God did not provide form with eternity ; form is friable, ephemeral, it cannot stand the test of time. Only the principle, the spirit, which pertains to the realm of the divine, is indestructible, eternal.” -38-

And Shri RAMAKRISHNA a very influential Hindu master of the last century illustrates in my opinion very well, that spiritual endeavour is before all self-discovery. Although speaking in terms of God, he sees God not as something remote from the Human, but rather as its very essence. He says (in HERBERT 1972 : 464) :

“A man who attains true Wisdom does not see God as a remote being, he does not feel Him outside of himself, but in himself, in the depths of his soul. God is in all, those who seek Him find Him in themselves.” -39-

I hope this quotations have permitted to describe what we will designate as spiritual traditions. Through these quotations, spiritual traditions appear not as mere systems of ideas, symbols, rites etc, but more essentially as ways leading us to an understanding of ourselves and to the realisation of our “true nature”, may we call it “the mind”, “human nature”, “God” or still something else. They are thus closely connected to our research on the “universal” in Man, which could constitute a horizon for a shared Human Rights’ Praxis. Their original contribution is that they can lead us beyond the realm of pure logos by permitting us to enter into a direct relation to our life and its realm(s) - or at least do they permit us to enter into dialogue with people who have “directly experienced life” through spiritual training. Indeed, spiritual traditions can be seen as the paths, the ways to our own (human, divine, living, cosmic, or whatever it may be called) “nature”. They can be seen as the mirrors which can permit us to discover our “real face”. KALOU RINPOCHE (1993 : 46) says :

“It is only if we are able to make the detour of using a mirror that we will be able to see our face. As the eye needs this particular object to see itself, the mind needs a particular means which plays the role of the mirror in which it can discover its true face : this means is the dharma<sup>44</sup> as it is transmitted to us by a spiritual guide. It is in our relation to the teachings and to this spiritual friend or to this guide that the mind will little by little be able to waken up to its true nature and will finally go beyond the initial paradox, by discovering another

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<sup>44</sup> Here “dharma” designates the Buddhist tradition.

mode of knowing. This discovery is made in diverse practices, called practices of meditation. (...)” -40-

As people are different, as the conditions in which they live are different, there are numerous different “mirrors”, numerous different spiritual traditions. We should never forget this fact while engaging in intercultural dialogue on Human Rights. Even if there may be a “universal human nature” which could provide us with a shared horizon for Human Rights’ Praxis, we must never forget that this “universal human nature” must limit itself to the role of horizon and permit different ways of living under it. As the DALAI-LAMA (1994 : 84) says :

“(…) to respond to the diverse needs of beings and to satisfy their different dispositions, aspirations and tendencies, a great variety of philosophies, religions and spiritual traditions are needed. Considering the huge diversity of needs of all, it would appear very difficult that solely one religion could suffice. The more there are spiritual paths, the better it is ! At the same time, it is certain that the different beliefs can coexist harmoniously, as the fundamental, universal ethic is an important place for agreement. It will suffice that those practising those different paths learn to know each other better and that they benefit of what the other religions teach them in order to improve their personal practice.”

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I would even extend this invitation of mutual dialogue and enrichment between spiritual traditions to a dialogue between religious and secular traditions. But what seems paramount to me is that we start acknowledging the richness of diversity, in order to be little by little really able to appreciate it. There is not one truth, which of course we hold, and which we have to share with all the others. Most of the time this missionary attitude leads us to try to convert the others to our point of view, or even to impose our point of view on them - as we think - for their sake. But in any way this attitude leads us to not taking the testimony of the other’s life seriously, to negate him in a way, and to preclude thus right from the start any genuine dialogue. Mutual exchange and enrichment thus turns out to be impossible. Maybe we should meditate Swâmi VIVEKANANDA’s words reflecting upon a universal religion when we reflect upon a universal Human Rights’ “system” (1972 : 374-375) :

“You know that there are minds of different kinds. One can be a materialist who believes in common sense and in earth to earth realities ; one can not be interested in forms and in ceremonies ; one can demand solid facts, which resound and which speak to intelligence, and can not be contented with anything else. There are also Puritans and Muslims who do not tolerate in their places of worship neither statues nor images. Very well, but there may be such other man who is more of an artist and needs great artistic deployment, beautiful lines, gracious curves, (...) ; his mind conceives God by these exterior forms just as your mind conceives Him through intelligence. There is also the man of devotion, whose soul frantically cries out for God ; his sole idea is to adore God and to sing His praises. Further there is the philosopher, who stays at some distance and makes fun of the others. ‘What foolishness, he thinks, what strange ways to conceive of God !’

They can laugh of each other, but each of them has his place in the world. All these different minds, all these diverse types are necessary. If there should ever be a universal religion, it will have to be vast and broad enough to provide all these minds with what they need. It must give to the philosopher the force of philosophy, to the worshipper the heart of the devotee, to the ritualist all that the most marvellous symbolism can provide for, to the poet as much feeling as he can absorb, and still something else. To build a religion vast enough, we will have to come back to the time where all religions started and embrace them all.”

-42-

So if we ever want come to a “universal picture of Man”, we seem invited to conceive it vast enough to keep a place for the aspirations of all humans. The acknowledging of the diversity of approaches to the Human seems to be a fundamental requirement in this endeavour and seems underlined by at least some representatives of spiritual traditions. Universality thus does not seem to be by its nature “against” diversity. The acknowledgement of diversity does not preclude a search for universality - it only precludes the search for a “uniformizing universality” built on the principle of subtraction. But it does not preclude the research for a universality built on the principle of addition and acknowledging the worth of plurality. One will never be able to reduce the various traditions and world views to a uniform tradition or world view. At the best it may be possible to come to a united tradition or world view in the image of our Human Rights’ Community. In order to think pluralism in the domain of “universals”, intercultural dialogue may again turn out to be fruitful. A religion’s universality for instance must not necessarily rely upon the uniform submission of all to it, as we tend to think in a Christian perspective. In Indian thought for example, where the differences of characters and the necessity of adapted spiritual paths for each are an accepted fact, different yogas, or spiritual paths, coexist and complement each other. In each of them realisation of God is sought in a different way. There is for example Karma yoga or “yoga of disinterested action”, Bhakti yoga or “yoga of devotion”, Jnâna yoga or “yoga of knowledge”, etc ... (see VIVEKANANDA 1970, 1972). But us we have seen through the quotations, if the mirrors, the forms are numerous, the underlying reality is nevertheless seen as one.

Maybe should we think of a universality of Human Rights on similar lines. Forms are important in order to render reality intelligible to us, and to enable us to make sense out of it. Without a window, without a standpoint, without a perspective we could not see anything - we would be lost. Limitation is necessary to our perception and to our life. But these perspectives do not mean radical subjectivism and relativism. It may be possible to see the same thing differently. And it may be a big step forwards to start to understand that at first sight contradictory statements and views can in fact turn out to be complementary. Nevertheless this does not entail that all views are right, just because they have been uttered by someone. If there can exist different correct views on an object as the result of different perspectives, there can also exist blurred views, incorrect views of it, not to speak of fantasies ! If a man having touched the ears of the elephant constructs them as wings and concludes that elephants can fly, he is wrong - Dumbo (Disney’s flying elephant) exists ... but only in our imagination. Views on the Human can thus be correct but partial, but they can also be wrong. This is why it is necessary to have a possibility of testing the proposed views. Contrary to what one may think, the spiritual traditions are very concerned with testing their teachings, with providing tools for testing and realizing them. They are not just opinions on “human nature”. They are a methodic enquiry on “human nature” (SHAH 1994 : 54, KRISHNA 1994 : 2 ff). Like any enquiry or any science, they have their methods which can have their advantages and their drawbacks. It seems thus important to me that spiritual traditions engage in mutual dialogue and in dialogue with “normal” science in order to shed clearer and clearer light on “human nature”. Their main contribution can be in my opinion their stock of lived experience through which deep insights on the human have emerged and still emerge. Their main draw-back to be overcome is maybe their very often strong dogmatism which does not allow the questioning of fundamental cornerstones of their belief. We should thus maybe, as VIVEKANANDA says “go straight to the facts”. He writes (1972 : 136) :

“There are certain religious facts which must be perceived just like facts in material science, and it is on these facts that religion will be built. (...) The sages of the world only have the right to tell us that they have analysed their mind, that they have made such and such observation, and that if we proceed alike we also will believe, but not before. That is all that there is in religion.” -43-

Let us note that we should not understand religion here in its traditional sense but rather in the sense of an endeavour in self-knowledge, which can of course be seen, or which can turn out to be, search for knowledge of the “world” or of “God”. It seems that the different spiritual traditions, as spiritual practices which “*constitute different methods for the attainment of spiritual objectives, for verifying the doctrines formulated by prophets and sages, and for experiencing the Transcendent*”, as Gopi KRISHNA (1994 : 2) writes about Indian Yoga, have lead to the experience of similar, “universal” facts about the human all over the world. Nevertheless they have weighed differently different aspects of the experience of the human and have expressed this experience in multiple ways. Our challenge may be to come now to a mutual enrichment of all these traditions, to an exchange of perspectives on the experiences of “human nature”. This may permit, maybe not to replace the old concepts, but at least to complement them by a federative concept in which all different traditions could share.

I hope to have allowed through this short presentation to provide a glimpse on the potential interest of spiritual traditions for the Human Rights’ dialogue, especially in what concerns the problem of the “human nature”.

The time seems therefore ripe to engage in “interdisciplinary” dialogue with them on the Human. To sum up I think we could expect this dialogue to be fruitful from two points of view. First of all reflection on the spiritual teachings by contrasting them with “normal science”, and among themselves may enable us to crystallize what is universal in Man. It may permit us to get closer to the underlying “human reality”. The dialogical approach permits us to do so, without necessarily having to undergo ourselves a spiritual training. Of course we will in that way not acquire first hand experience, and will not go beyond the realm of *logos*. But we cannot all become spiritual masters. And this is not even necessary. We are not all top scientists and engineers and nevertheless we daily use their findings without often having the slightest clue of how the things we use work. Generally speaking, for example, we trust doctors who want to cure us, teachers who instruct us etc, and experience may confirm that we are right in doing so. In the same way it is not necessary to all become specialists in spiritual matters. But we should at least develop a common culture, a basic understanding of what spirituality is about. This could help us to discriminate the “true” from the “fake” and may permit us to build up the necessary trust in the yet unknown, to be able to engage in mutually enriching dialogue. In our enlightened tradition this trust can, in my eyes, best be built through a rational analysis of what spiritual traditions propose. We should not accept anything without checking. But at the same time we should not reject anything without checking. To dismiss a priori the teachings of often millenary traditions, which still today influence the lives of millions of people in the name of a Western science or rationality would seem to me - actually, taking into account the immense Asian context, probably the majority of humankind - not only intolerant but foolish. I do believe that the teachings of spiritual traditions can enrich the Human Rights’ debate through their insights on the basic structures and processes which make up the Human and which stem from lived experiences reaching to the most profound realms of the Human.

This anchoring in praxis brings us to the second enrichment that interdisciplinary dialogue with spiritual traditions may provide. Although deeply embedded in “Human nature” the spiritual traditions are nevertheless not abstract. On the contrary, as ways of living, they are integral part of their cultural environment - and we have seen in Part I to what extent social organisation and world views are linked. I thus think that by going to the common ground of spiritual traditions we find ourselves at the base of homeomorphic equivalents in what concerns the most basic and fundamental aspects of human life. This may permit us to work out not so much a universal image of Man in the classical sense, but rather a shared “picture of Man”. This would be a picture of Man which could be shared by all human beings. It would provide a certain “global” outlook on the human but which would at the same time send each culture back to its own conceptions. It would be a homeomorphic picture of Man rather than a

universal one. It would permit rootedness in the “local”, open to cross-fertilisation through the “global”. Let us now move on and look at Man through the prism of the spiritual traditions.

## 2. Man Seen through the Prism of the Spiritual Traditions

SOGYAL RINPOCHE (1995 : 56) relates the enlightenment of the BUDDHA as told by the Vietnamese master Tich Nhat Hanh<sup>45</sup> :

*“Gautama felt as though a prison which had confined him for thousands of lifetimes had broken open. Ignorance had been the jailkeeper. Because of ignorance, his mind had been obscured, just like the moon and stars hidden by the storm or clouds. Clouded by endless waves of deluded thoughts, the mind had falsely divided reality into subject and object, self and others, existence and non-existence, birth and death, and from these discriminations arose wrong views - the prisons of feelings, craving, grasping and becoming. The suffering of birth, old age, sickness, and death only made the prison walls thicker. The only thing to do was to seize the jailkeeper and see his true face. The jailkeeper was ignorance.... Once the jailkeeper was gone, the jail would disappear and never be rebuilt again.” (SOGYAL RINPOCHE 1995 : 56)*

We see here that Buddhism, like other spiritual traditions, insists on the fact that what we perceive as the Human being, a body, its intellect, its emotions, are only one limited aspect of the Human in its totality. Human nature is not seen as confined in the individual - one could maybe even say in the spiritual traditions’ perspective that it is the individual who is confined in “human nature”. The individual is only seen as the partial reflection of a much broader reality. Through patient work man may become more and more Man by gradually discovering his broader reality. And by doing so he may get more and more aware of his link with life, or the cosmos, or nature or God - however he conceives of existence. What we cling to as our individuality is seen by the Indian spiritual traditions as a mere delusion. It is a limitation of our true being due to ignorance. According to the spiritual traditions we are always Man or/and God or/and the Cosmos, but our ignorance hinders us to recognize this. That is why we have to unroot ignorance in order to recognize our real being, and to get freed from our limited prison through this knowledge. This understanding may turn out to be relevant in the Human Rights’ discussion as it can permit, as we will develop further (p 94 ff), to enrich our notion of human dignity which lies at the core of our Human Rights’ thought. Our dignity must not necessarily be seen as relying exclusively on our personal individuality, somehow seen as confined in us. It can also be seen as the consequence of the fact that the human being is a manifestation of a much broader reality linked to all of humanity, to all living beings, to the whole universe or if one conceives of God to God. Ramana MAHARSHI, a Hindu sage of this century, characterized by the fact that he always led back all questions to the fundamental question “Who am I ?” said (1993 : 417-418) :

“Everyone on this earth is the Self, which is infinite.  
(...) Nobody is remote from the Self. Consequently everybody is in the Self, and thus realised. (...)  
The realisation thus consists in rejecting the false idea, that one is not realised. Realisation is not something new to be acquired. As it is permanent, it must exist of all time. Otherwise it does not have any value.

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<sup>45</sup> Thich Nhat Hanh, *Old Path, White Clouds* , Berkeley, CA : Parallax Press, 1991, p 121



From the very moment on where the mistaken idea “I am the body” or “I am not realised” is dissipated, only remains the supreme Consciousness, the Self to which the name of realisation is given to satisfy the level of understanding of ordinary men. But to tell the truth, realisation is eternal, it exists since always, at present and here and now. In the end realisation comes to eliminating ignorance and nothing else.” -44-

It becomes clear now what RUMI meant in his parable of the elephant in the dark with the “eye of the Sea” and the “eye of the foam”. The eye of the sea is the enlightened eye of the Self, to use Ramana MAHARSHI’s terminology. The eye of the foam is the deluded eye of our limited self. Spiritual traditions thus acknowledge the existence of a state of ignorance and of a state of knowledge - the passage from one to the other being enlightenment. But as MAHARSHI notes this passage is only elimination of our misconceptions about our Selves. It is not the acquiring of some new knowledge but the realisation of an already present knowledge. This insight can be relevant in Human Rights’ thought as it can put into perspective the idea of an inherent dignity of Man. Dignity could be seen as the result of every human being’s potential for self-knowledge, or rather for Self-knowledge, which seems deeply embedded in his very being which is the Self, and which seems universal as all human beings share in it.

But this idea of the passage from a state of ignorance about our human nature to a state of knowledge about it, can also lead us to more pragmatic considerations on possible ideals which could orient our living together in our Human Community. Indeed, one often has the picture of enlightenment happening out of the blue - a total change from a state of complete ignorance to a state of complete knowing. But this is not how things happen. And by the way, that is the reason why spiritual traditions do exist. In order to attain enlightenment patient work on oneself is necessary. This work leads to physical, psychological and spiritual change. We become more sensitive to more subtle realities of life. Our view of it gets clearer. We start to feel more space in us. We start to increasingly feel our link to the rest of creation. Little by little a process of opening up occurs. This opening up permits the “light of the spirit” to shine. Thus our whole human existence can be seen as a process, a struggling, between two poles : one attracting us to a never ending opening up, the other to the clinging to our limitations. The spiritual traditions intend to lead us to the pole of opening up, of enlightenment. That is why at the basis of their teachings they all have the rule : “not I, you”. Omraam Mikhaël AIVANHOV conceptualises these two opposite poles of the Human being as a superior “individuality” and an inferior “personality”. Personality is the egoistic, limited, human pole of the Human being. Individuality is the altruistic, unlimited, divine pole of the Human being :

“Since the thousands of years where men have studied themselves in order to know the structure of their psychical life, they have imagined numerous modes of division. (...) Whatever the adopted point of view, it is always truthful, it depends under which angle the things are observed.

To simplify the question, we will say that the human being is a perfect unity, but that this unity is polarised. This means that it manifests itself into two directions, through two different aspects. Man is made of two natures : the inferior nature and the superior nature, which have the same faculties to think, to feel and to act, but in two opposite directions. I have called these two natures personality and individuality.” (AIVANHOV 1984 : 23-24)

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For the sake of simplicity we will keep up with this terminology where “individuality” designates the human pole of opening up, “personality” the human pole of clinging to one’s limitations. It appears thus from what we have said above that the two notions of knowledge, or Wisdom, and of Love are profoundly intertwined. Knowledge, presupposes opening up, broadening our perspective. But how could we broaden our perspective if we do not manage

to progressively abandon the idea of “I” ? In order to know, we must open ourselves up to others. We must learn to think : “not I, you .” Thus to pass from personality to individuality, from ignorance to knowledge, we need to learn to love. Swâmi VIVEKANANDA said about Love (1972 : 352-353) :

“The device of all well-being, of all moral good is : “Not me, but you.” (...) Forget about yourselves ; this is the first lesson to be learned, may you be religious or atheistic, agnostic or vedantist, Christian or Muslim. The great lesson which is evident for all, is the destruction of the little self and the construction of the Real Self.

Two forces have been at work side by side and parallelly. One says “me”, the other says “not me”. (...) from one end to the other of creation, this two forces work side by side. Each time you find one, you also find the other. One is egoism, the other altruism. One is acquisition, the other renouncement. One takes, the other gives.

(...) Is there anybody who can deny that this love, this “not-me”, this renunciation is the sole positive power in the world ? The other is only a badly oriented use of the power of love (...) A man who murders another one has maybe been pushed to this act by the love for his child. His love has limited itself to a little child and millions of other beings populating the universe have been excluded. Nevertheless, limited or unlimited, it is always the same love.” -

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It thus seems that the spiritual traditions invite us in the Human Rights context to reflect upon “human nature” and its universality in relation to the concepts of Wisdom (knowledge) and Love. We will develop these insights further in Chapter VI where we will also develop the important idea of Peace. For the moment let us just remark that our gradual opening up may lead us step by step to the recognition of the fundamental interconnectedness of things, by revealing us the broader nature of ourselves.

Nevertheless if spiritual traditions can provide us, as we could see, with potentially fruitful insights on human nature in the frame of Human Rights’ thought, we must nevertheless note that Human Rights’ theory must complement the reflections upon the “individuality” of Man (according to AIVANHOV’s terminology) which can contribute to the elaboration of a concept of universality of Human Rights, by taking into account human “personality”. We will try to do so in the next part by reflecting on ways to mutually fecundate the western notion of individual dignity, which demands respect for the concrete individual, with the kind of dignity having its roots in human “individuality” as presented here. Indeed the aim of spiritual traditions is not to organize social life but to further personal self-realisation. It will therefore be necessary to engage into a dialogue on how the spiritual traditions’ insights could be fruitfully integrated in the Human Rights’ Context. I will try in Chapter VI to make a first proposition for this dialogue by proposing a picture of how we could constitute an underlying myth for intercultural Human Rights’ Praxis. Indeed, as lawyers we cannot content ourselves with dreaming of a world peopled only by “individuals” and not by “persons” and propose a completely utopian model. We must try to propose models which are viable in our concrete world. Let us not forget that what we advocate in this thesis, is heterotopia, displacement in this world, not utopia, displacement in an unreal elsewhere. In this perspective, I think that the role of spiritual traditions in Human Rights’ theory could be to contribute to the building of a picture of Man which could firmly root Human Rights in our human existence. Through their roots in millenary praxis, renewed generation after generation, I firmly believe that they can help us to consolidate our reflection on Human Rights by enriching our classical natural law’s approaches as well as our legal positivism’s approaches.

For the moment we have especially worked out two aspects of Man in a spiritual perspective : his constitution in two poles and its dynamism resulting from the struggle between

those two poles. We have also said a few words on how these insights could enrich our notion of dignity. Let us now deepen this endeavour. By doing so, we will try to enable the concretization of these spiritual insights into a notion which could be operationalized in the legal field, by stressing again the importance of the individual in the world as we conceive it in the western tradition, and which seemed to get a little dissolved in our holistic spiritual approaches. This endeavour may also permit us to open up our Western notion of dignity, the basis of our Human Rights' thought, to a more homeomorphic image of Man. We will thus try to make a Western contribution to the building of a shared homeomorphic concept of Man, which will, as we will see, necessarily have to be of a plural and dynamic, and thus Communitarian nature.

## ***II. Enriching the Notion of Dignity by the Spiritual Teachings : Towards a Homeomorphic and Communitarian Picture of Man***

The notion of Human Dignity, as already noted, seems paramount in order to be able to found and to put into practice Human Rights. It seems to me closely linked to the spiritual nature of Man and I thus think that it can be beneficially enriched and fostered by the contributions spiritual traditions can make to its understanding.

MASSINI-CORREAS in his article "El pensamiento contemporáneo acerca de los derechos humanos"<sup>46</sup> (1991) identifies a few impasses of contemporary Human Rights' thought. I have selected three of them which seem very relevant to me. First, contemporary Human Rights thought, influenced by legal positivism hostile to Natural Law approaches, largely refuses to thematize the ultimate foundations of Human Rights (1991 : 263 ff). The Human Rights' discussion refuses to acknowledge the transcendent and remains in the realm of the immanent. It thus strongly weakens the possible bases for Human Rights as they can only be relative :

“(...) it follows, according to one of the most elementary rules of logic which we have already mentioned, that the fundamental conclusions cannot be ‘stronger’ than their founding premises ; thus, of a series of purely immanent affirmations - and which thus are not of absolute character - one cannot draw affirmations on absolute rights.” (1991 : 268-269) -47-

Second, all attempts to justify Human Rights merely in a “procedural”, “contractual” or “intersubjective” way turn out to be sterile as they can only provide “plausible”, “reasonable” or “possible” justifications which fundamentally always only stay embedded in our subjectivities. There is no objective criterion which could permit us to favour and to absolutise one specific content rather than another. As he remarks, the authors of such theories themselves consider them only as formal theories which cannot ultimately found any specific content of Human Rights (1991 : 265-266).

Finally, a purely material conception of the individual is inconsistent with the acknowledging of his dignity which could found Human Rights. He writes :

“(...) the anthropological basements of the most current attempts to found human rights, are not the most adequate to justify them rationally ; there is an obvious contradiction between eminently materialistic, phenomenological or

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<sup>46</sup> “Contemporary thought around Human Rights”

empirical theories of man and the affirmation that man has a special ‘dignity’, which makes him the bearer of inalienable ‘rights’ which he can dispose of freely.” (1991 : 267-268) -48-

In order to get out of the actual impasse of Human Rights’ thought, MASSINI-CORREAS advocates to reorient modern philosophy towards its roots as metaphysics trying to understand the ultimate nature of things and to stop merely deconstructing their appearance (1991 : 273).

Our approach goes in this direction. The main difference is nevertheless that we do not think that we will be able to find one universal Man with universal rights through metaphysics. We rather think that metaphysics, as reflected in the different spiritual traditions, can lead us through their dialogue to a shared picture of Man which would at the same time stay deeply rooted in those different traditions, and would give rise to an appropriate corresponding Human Rights’ Law, made up of local laws and their more global articulations. This is so, as all those traditions point at the same ultimate reality, but nevertheless from different standpoints. It is thus a homeomorphic picture of Man emerging from interspiritual dialogue, and not a “universal” picture of Man which seems to me to be able to provide a solid basis for an intercultural understanding of “dignity” and for an intercultural Praxis of Human Rights. As the spiritual traditions provide us with a picture of Man as a being made of the two poles of “personality and “individuality” and whose aim it is to realise more and more completely his “individuality”, they point to a “universal human potential” which we can conceptualise in our Western tradition as dignity. As TAYLOR writes (1994 : 41) :

*“The politics of equal dignity is based on the idea that all humans are equally worthy of respect. It is underpinned by a notion of what in human beings commands respect, however we may shy away from this “metaphysical” background. For Kant, whose use of the term dignity was one of the earliest influential evocations of this idea, what commanded respect in us was our status as rational agents, capable of directing our lives through principles<sup>47</sup>. Something like this has been the basis for our intuitions of equal dignity ever since, though the detailed definition of it may have changed. Thus, what is picked out as of worth here is a universal human potential, a capacity that all humans share. This potential, rather than anything a person may have made of it, is what ensures that each person deserves respect.”*

Thus what in spiritual traditions is conceptualized for example as the “Buddha nature” or the “divine nature” of all beings which manifests as their potential to enlightenment, we conceptualize it as a “universal human potential”. What is interesting is, that by introducing the lived testimony of the spiritual traditions in the notion of dignity, the latter first of all gets anchored in a praxis. Second, it is thus linked to the attainment of the “Good”, as the universal human potential is a potential which can provide us self-knowledge through a continuous process of opening up, leading us thus to our “Human Nature”, which is assumed as being rooted in openness, wisdom, love, peace. This is important because in the Human Rights context we could wonder why we should insure respect for dignity, if this dignity would be rooted in the human potential to destroy which would constitute the ultimate nature of Man. In that extent we can somehow say that we can deem us lucky that millenary experience, through the ever repeated realisation by men of their “spiritual nature”, has shown and continues to show that ultimately “Human Nature” may be “good” - even if this may not appear as being its most apparent form of manifestation. This may provide us with a good reason to try to contribute to an environment in which our human nature could freely unfold, and which therefore necessarily must be an environment in which respect among human beings is

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<sup>47</sup> KANT, *Grundlegung der Metaphysik der Sitten* , Berlin, Gruyter, 1968, p 434

guaranteed. Third, to draw on living spiritual traditions influencing the life of a lot of people may permit to open the notion of dignity to its appropriation in cultural contexts in which our concept of dignity does not exist as such. Ongoing dialogue between the traditions may further this process and contribute to the emergence of a common ground for human “Human Rights” models of conduct and behaviour. It may be able to contribute to the progressive opening up of our notion of dignity towards a homeomorphic intercultural and Communitarian picture of Man.

Let us now try to present one way in which, it seems to me, the notion of dignity could be opened up to a homeomorphic intercultural understanding. In order to do so, we will reflect upon the relation in our Western tradition between the concepts of dignity and of authenticity. This will permit us to conceptualize in a dialectical relationship the Western individualistic view of the Human Being and the holistic view of the spiritual traditions, the acknowledgement of the unity of the Human being and the acknowledgement of its diversity. In order to do so we will base ourselves on Charles TAYLOR’s article “The Politics of Recognition” (1994). We will especially use the insights he provides there on the notions of “dignity” and “authenticity”.

For Charles TAYLOR, the evolution of the concepts of dignity and of authenticity go hand in hand. The notion of dignity, as we understand it today, is the result of the collapse of social hierarchies, which used to be the basis for honour, and of their replacement by equal citizenship. Honour in the *ancient régime* sense is intrinsically linked to inequalities. “*For some to have honour in this sense, it is essential that not everyone have it.*” (1994 : 27). On the contrary the underlying premise of dignity is that everybody shares in it. The rise of dignity runs parallel to the

*“(…) new understanding of individual identity that emerges at the end of the eighteenth century. We might speak of an individualized identity, one that is particular to me, and that I discover in myself. This notion arises along with an ideal, that of being true to myself and my own particular way of being. Following Lionel Trilling’s usage in his brilliant study, I will speak of this as the ideal of “authenticity”<sup>48</sup>.” (TAYLOR 1994 : 28)*

For TAYLOR one way to describe the development of “authenticity” is to see in it the development of the eighteenth-century notion that “*human beings are endowed with a moral sense, an intuitive feeling for what is right and wrong.*” in which the moral accent gets displaced. By this he means that “*being in touch with our feelings takes on independent and crucial moral significance.*” It is no more only valued because it keeps us in touch with our moral feelings and thus permits us to act rightly but for itself. “*It becomes something we have to attain if we are to be true and full human beings.*” (1994 : 28). TAYLOR develops the evolution of the concept through the contributions of ROUSSEAU who “*frequently presents the issue of morality as that of our following a voice of nature within us*” (1994 : 29) and of HERDER who

*“(…) put forward the idea that each of us has an original way of being human : each person has his or her own “measure”<sup>49</sup>. This idea has burrowed very deep into modern consciousness. It is a new idea. Before the late eighteenth century, no one thought that the differences between human beings had this kind of moral significance. There is a certain way of being*

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<sup>48</sup> Lionel Trilling, *Sincerity and Authenticity*, New York, Norton, 1969

<sup>49</sup> “Jeder Mensch hat ein eigenes Maass, gleichsam eine eigne Stimmung aller seiner sinnlichen Gefühle zu einander.” Johann Gottlob HERDER, *Ideen*, chap. 7, sec. 1, in *Herders Sämtliche Werke*, SUPHAN Bernhard (ed.), Berlin, Weidmann, 1877-1913, 13 : 291.

*human that is my way. I am called upon to live my life in this way, and not in imitation of anyone's else's life. But this notion gives a new importance to being true to myself. If I am not, I miss the point of my life ; I miss what being human is for me. (...)*

*This new ideal of authenticity was, like the idea of dignity, also in part an offshoot of the decline of hierarchical society. In those earlier societies, what we would now call identity was largely fixed by one's social position. The birth of a democratic society doesn't by itself do away with this phenomenon, because people can still define themselves by their social roles. What does decisively undermine this socially derived identification, however, is the ideal of authenticity itself. As this emerges, for instance with Herder, it calls me to discover my own original way of being. By definition, this way of being cannot be socially derived, but must be inwardly generated." (TAYLOR 1994 : 31-32)*

To conclude TAYLOR's presentation of dignity and authenticity we should also note that he emphasises the fundamental dialogical feature of human life (1994 : 32 ff). He writes (TAYLOR 1994 : 34) :

*"Thus my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. That is why the development of an ideal of inwardly generated identity gives a new importance to recognition. My own identity crucially depends on my dialogical relations with others."*

Thus, if there is a "universal human potential" which can found human dignity and the equal treatment of all human beings there is also a "universal human potential" which should lead to the recognition of Man's differences :

*"In the case of the politics of difference, we might also say that a universal potential is at its basis, namely, the potential for forming and defining one's own identity, as an individual, and also as a culture. This potentiality must be respected equally in everyone. But at least in the intercultural context, a stronger demand has recently arisen : that one accord equal respect to actually evolved cultures." (TAYLOR 1994 : 42)*

What contributions can spiritual traditions bring to the notion of authenticity correlated to the notion of dignity as presented above ? First, spiritual traditions present themselves as ways of discovering ourselves. They should thus be easily conciliable with the ideal of authenticity which is familiar to us. And they may permit to enrich our understanding of authenticity as the "authenticity" they propose to find is broader than the one we usually think of in Western terms. It is not only discovering our specific, limited nature, but also discovering our "universal", "unlimited nature", our "link with the whole universe". In the context of an atomised society such as the ones in which we live (see TAYLOR 1992) this enlarging of our perspective on authenticity may provide us with a springboard towards a more connected view of the individual, through the discovery of what we are "deep inside ourselves". By broadening and deepening our search of authenticity through spiritual teachings we may be able, though starting with us, with the individual, to come to a view of ourselves embedded in the whole of reality and linked to all of it. We may come to insights similar to Albert EINSTEIN's (quoted in : SOGYAL RINPOCHE 1995 : 98) :

*"A human being is part of a whole, called by us the "Universe", a part limited in time and space. He experiences himself, his thoughts and feelings, as something separated from the rest - a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our*

*personal desires and to affection for a few persons nearest us. Our task must be to free ourselves from this prison by widening our circles of compassion to embrace all living creatures and the whole of nature in its beauty.”*

This nevertheless does not entail negation of our individuality in the Western sense. We do not get deluded in some homogeneous all encompassing reality. On the contrary, getting a broader perspective on ourselves permits us also to understand better “our original way of being”, our specificity and its role in the broader context of reality in which it is embedded. Lama Anagarika GOVINDA writes (1993 : 184-185, 210-211 and 231) :

“In order to live, our self must submit to continuous growth and change, which one could call a continuous death and a continuous life which go on parallelly. (...) Thus the transformation embraces both change and stability, plurality and unity, movement and constancy. It has the nature of life. This is to say that it organically links the opposite poles, which constitute unsurmountable problems for logic, and unites them in a rhythm which embraces the whole. (...)

To attribute too much importance to unity is an as serious mistake as to attribute too much importance to duality or plurality. If we conceive of duality as an irreconcilable opposition between two independent principles which mutually exclude each other and not as the necessary polarity between two aspects of reality or of a superior unity - or if we only cling to one side, completely excluding or negating the other - we definitely are the victims of a serious illusion. If we try to negate the fact of polarity (by imagining that reality solely consists in unity), we only close our eyes to the most obvious reality. (...)

Just as like in an orchestra every instrument plays its own score but finds its fulfilment, its supreme realisation in the perfect coordination of all instruments and the harmonious relationship between them, each individual conscience finds its fulfilment in a perfect relationship to the universe in all its variety of forms of life and of individual forces, in a relationship which does not permit immobility or stagnation.

But only he who knows the whole of the score can play his role to perfection. This entails that without attaining the state of enlightenment or of universal consciousness (...), without attaining this ultimate state we cannot find our supreme fulfilment.” -49-

Knowledge of ourselves sustained by the spiritual traditions may thus permit us to become “authentic” through “Self-realisation” (with capital “S”, realisation of our universal nature) which also entails “self-realisation (with small “s”, realisation of our individual nature). We have already met this tension between universality and individuality while presenting the notions of dharma and of svadharma in the presentation of the Indian archetype (p 29)<sup>50</sup> .

Relating authenticity to dignity as manifestations of a universal human potential and enriching these notions by the spiritual traditions may thus possibly enable us to think our human unity without forgetting about its diversity, our human universality without forgetting about its individuality. The Western concept seems thus to be able to be enriched by a more dynamic and plural outlook on Man which views him as a process, participating in complementarity with other processes in the “cosmic” or “divine” processes of life. We may

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<sup>50</sup> see also VIVEKANANDA on Karma yoga, the yoga of disinterested action, where he develops the ideas of duty and work even if he does not explicitly speak of *dharma* and *svadharma* (1970 : 25 ff). Everyone has its own personal duty or work to accomplish (*svadharma*). If he recognizes it adequately and fulfils it he thus inscribes himself harmoniously in the *dharma*. Everyone has to discover his *svadharma* for himself : it is not possible to determine one’s “duty” or *svadharma* from outside, even if different social statuses and positionings may entail a certain number of specific duties.

have here a first step towards a Communitarian view of the self acknowledging its unity in the complementarity of its differences. This seems absolutely essential to me for a Communitarian conception of Human Rights. As we have already outlined in Part II, while explicating our choice of the paradigms of “Common Humanities” and of “Human Community” and their relationship, a healthy plural Human Rights thought and practice cannot grow on unitary premises. If we want to think plurally, we seem invited to open up the most fundamental premises of our Human Rights’ thought to pluralism. In Parts I and II we have already done so by rethinking Human Rights’ Law in an eminently plural way through the prism of a first dianthropological praxis of Human Rights. We have called it the “Social Sciences’ dianthropological praxis of Human Rights”, as it still stays on the level of *logos*, or rather of *logoi*. As we have noticed it corresponds to the first part of RUMI’s parable. We try to enrich our common perception through the dialogue of our different points of view but still stay on the level of *logos*. In this first Chapter of Part III, we have started to propose ways permitting us to rethink the Human Rights’ subject, the Human Being in plural terms through the contribution of a second kind of dianthropological praxis which we could call “spiritual dianthropological praxis”. This “spiritual dianthropological praxis” is still characterized by dialogue. But furthermore the standpoints of which the dialoguing discourses emerge do not pertain anymore to the domain of the mere anthropologos, but bear testimony to a reality beyond it, experienced through spiritual experience. We have noted that the spiritual dianthropological praxis could be seen as corresponding to the second part of RUMI’s parable.

Let us now try to reconcile these two “lower-case” dianthropological praxes in an “upper-case” Dianthropological Praxis of Human Rights. I understand this Dianthropological Praxis of Human Rights as a possible emerging intercultural myth of Human Rights’ thought and practice which could provide us with a common horizon for intercultural Communitarian Human Rights’ praxis and with a nourishing ground for a healthy intercultural Human Rights’ pluralism. This Dianthropological Praxis of Human Rights will have to “emerge” in our intercultural dialogue as the frame of this dialogue, as the underlying “myth” nourishing it and rendering it meaningful. It cannot be set a priori. Therefore we will only try in the next chapter to imagine what such a fruitful myth could consist in. And by doing so we will hopefully take part in “shaping” and “vivifying” it.



## Chapter VI : Towards a Dianthropological Praxis of Human Rights

In this chapter we will try to imagine what a potentially fruitful grounding myth for an intercultural praxis of Human Rights', which I will call Dianthropological Praxis of Human Rights, could look like. The purpose is to reflect upon the paradigms in which intercultural Communitarian Human Rights' thought and practice could be embedded in order to be able to unfold. If I have chosen to speak of myth, it is to emphasize that we try to deal here with what could underlay, without maybe ever being very conscious, our common intercultural Human Right's practices and discourses. We want to approach that which could give meaning and coherence to our dialoguing Common Humanities and to their sharing in our Human Community. As PANIKKAR writes (1979 : 344) :

*“Mythos is the second dimension of speech itself, the silence between the words, the matrix that bears the words.”*

It is this “silence between the words, the matrix that could bear the words” of intercultural Human Rights' dialogue that we will try to approach here. Of course we will not be able to grasp the *mythos* by our *logos*. PANIKKAR reminds us that if *logos* pertains to the realm of the thought, *mythos* belongs to the realm of the unthought. Thus at the moment where we reveal a myth it ceases to be a myth. But PANIKKAR also tells us, that if we cannot reveal myths, we can nevertheless contribute to their unfolding. He writes (PANIKKAR 1979 : 345-346):

*“Now we cannot perceive our own myths qua myths ; we can only recognize the myths of others or those of our own past. Myths are ultimate because they do not have any other background over against which they could be recognized as such. We can only take up living myths and allow them to unfold.*

*(...) Although myth ceases to be myth each time it is discovered, detached, made logos, it still remains the inexhaustible source of renewal.”*

Thus, by trying to approach Dianthropological Praxis of Human Rights we in fact intend to contribute, by trying to explicit it, to its unfolding. It is our dialoguing in the frame set by this myth, which may in fact give life to it. Thus, the proposals I make in order to think about Dianthropological Praxis of Human Rights, should not be seen as definitive statements on what an underlying myth or paradigm of intercultural Human Rights' thought should be. I rather intend those proposals to be an invitation to dialogue about our common Human Rights' praxis, to reflect upon the image we can more or less consciously have of it, to see if we could share in the image of its “founding myth” as I propose it, and to see how we could refine or enrich our perception of this myth. It is the possible dialogue stemming from the picture I try to

give of this myth and from the reactions it may provoke that the myth itself could be vivified and could thus become able to nourish our conscious Human Rights' theory and practice, thus permitting us to live a Dianthropological Praxis of Human Rights.

It seems to me that two ternary structural principles could give an image of Dianthropological Praxis of Human Rights : the first one we could see in the outlook on Man in PANIKKAR's cosmotheandric intuition, the second is rather linked to the ground in which Human Rights' thought and practice could be embedded and where they could unfold. Let us start by presenting PANIKKAR's cosmotheandric view of Man (I) before presenting the grounding of our Human Community delimited by the cornerstones of Love, Wisdom and Peace (II). We will then make the synthesis of both in Dianthropological Praxis of Human Rights (II).

### *I. The Cosmotheandric Intuition*

In Chapter V, we have already emphasized the importance of a Communitarian picture of Man, in order to think about Human Rights in a Communitarian way. We have suggested that it may be useful to try to develop homeomorphic notions which could serve as springboards to an intercultural picture of Man, instead of trying to think in terms of universal notions. What we have tried to do so far, is to show how we could open up our notion of dignity to an intercultural understanding, by opening it up to the insights of (to a large extent Asian) spiritual traditions, thus at the same time opening up these traditions to our understanding of dignity. For this kind of endeavour, we have seen that it might be relevant to take into account different dimensions of Man, and to try to articulate them. Thus, in order to broaden our concept of "dignity", we have proposed to enrich it by the acknowledgement and the articulation of two dimensions of Man : his Human dimension and his spiritual dimension, which we could also call his "Divine" dimension, in the sense that it is a Dimension transcending the human although constituting it, and to keep up with the terminology PANIKKAR uses to explicit his "cosmotheandric" intuition<sup>51</sup>.

PANIKKAR, as we will see, takes our endeavour further. He argues that in human cultures, one not only finds the "Divine" and the "Human" outlooks on reality, but also a "Cosmic" outlook. He further argues that these three "archetypes" of seeing the real (the Human, the Cosmic and the Divine) are not contradictory or even interdependent, but should be seen as what fundamentally makes up human reality. I think that we could understand PANIKKAR's cosmotheandric outlook on life as an outlook acknowledging the importance for human life of a consciousness of the individual (the Human outlook), of his or her environment and of his or her link to it (the Cosmic outlook) and of his or her consciousness of something that is beyond his or her comprehension but nevertheless important for his or her life such as "reality", or "human nature", or "life", or "God" as it provides it with some "transcending unity" (the Divine outlook), and of the consciousness of the interrelation of those three consciousnesses. PANIKKAR (1993b : 60) explains his intuition as follows :

*"The cosmotheandric principle could be formulated by saying that the divine, the human and the earthly - however we may prefer to call them - are the three irreducible dimensions which constitute the real, i.e., any reality inasmuch as it is real.(...)*

*What this intuition emphasizes is that the three dimensions of reality are neither three modes of a monolithic undifferentiated reality, nor three*

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<sup>51</sup> The term "cosmotheandric" is made up of the roots: *cosmos* - *theos* - *ander* : Cosmos - God - Man. For further explanations on the choice of the word, see : PANIKKAR 1993 : 54-55.

*elements of a pluralistic system. There is rather one, though intrinsically threefold, relation which manifests the ultimate constitution of reality. Everything that exists, any real being, presents this triune constitution expressed in three dimensions."*

PANIKKAR proposes the circle as an appropriate way of symbolizing the cosmotheandric intuition, as there is no circle without a center and a circumference, and that thus the three are not the same and yet not separable. And he makes the following analogy:

*"The circle, only visible from the circumference, is matter, energy, the world. And this is so because the circumference, Man, Consciousness, encompasses it. And both are what they are because there is God, a center, which alone - i.e., qua God, as the ancients would put it - is a sphere whose center is everywhere and whose circumference is nowhere."* (PANIKKAR 1993b : 75)

As already mentioned "God" does not have to be understood literally. We can also understand under "God" the "reality" providing the "link" between Man and the World, the horizon into which Man and the Cosmos are inscribed.

This outlook on the real is all the more interesting in the search for an intercultural homeomorphical picture of Man as it seems that *"envisioning all of reality in terms of three worlds is an invariant of human culture, whether this vision is expressed spatially, temporally, cosmologically or metaphysically."* (PANIKKAR 1993b : 56)

To create interculturally meaningful concepts of the "Human" in Human Rights' thought, PANIKKAR's cosmotheandric outlook on Man seems promising as it could permit a *mestizaje* of "Human Rights'" concerns through a homeomorphic picture of Man. His cosmotheandric outlook on the real and on the human is a possible way of articulating different "archetypes" of seeing the world, differently weighed by different cultures or individuals but which nevertheless seem present in one way or another in all of them. If either the "Divine", or the "Cosmic", or the "Human" point of view may predominantly characterize a specific culture, it seems very likely that in fact all cultures to a certain extent display these different "archetypes", although weighing them differently, as we have already seen it in relation to the "legal archetypes" exposed in Chapter II. We should not get blocked on words such as "Cosmic" or "Divine" to decree that the reality that lies behind those words has no relation to our personal or cultural experience. We could for example note, that although for example our Western culture is characterized, according to PANIKKAR, by a Human vision of reality, "Cosmic" and "Divine" perspectives nevertheless seem to play an important role in it. The importance of ecological consciousness in our culture shows that we do not completely lack a "Cosmic" outlook. And as concerns the Divine, I think we have shown in Chapter V, that search for the Divine can also be thought of in terms of "search of what transcends us", of our "human nature", of "reality", and not necessarily of "God" - we have also noted that concepts as the concept of "universal human potential", although rational, are structurally near to "Divine" conceptions of reality, as they have a certain ultimate character founded beyond our understanding.

In his article "Is the notion of Human Rights a Western Concept" (1984b) PANIKKAR explains himself the relevance he sees in his cosmotheandric intuition for an intercultural approach to Human Rights :

*"Room should be made for other world traditions to develop and formulate their own homeomorphic views corresponding to or opposing Western 'rights'. (...) Here the role of a cross-cultural philosophical approach is paramount. The need for human pluralism is often recognized in principle, but not often practised, not only because of the dynamism which drives the*

*paneconomic ideology, linked with the megamachine, to expand all over the world, but also because viable alternatives are not yet theoretically worked out.*

*(...) An intermediary space should be found for mutual criticism that strives for mutual fecundation and enrichment. Perhaps such an interchange may help bring forth a new myth and eventually a more humane civilization. The dialogical dialogue appears as the unavoidable method.*

*Perhaps a suggestion here may prove helpful. Playing on the metaphor of the knots (individuality) and the net (personhood) we could probably affirm that traditional cultures have stressed the net (kinship, hierarchical structure of society, the function to be performed, the role of each part in relation to the whole), so that often the knot has been suffocated and not allowed sufficient free-space for its own self-identity. On the other hand, Modernity stresses the knots (individual free will to choose any option, the idiosyncracies of everyone, the atomization of society) so that often the knot has been lost in loneliness, alienated by its own social mobility, and wounded (or killed) in competition with other more powerful knots. Perhaps the notion of personhood as the interplay between the knots and the net, as well as the realization that freedom is not just the capacity to choose between given options but also the power to create options, could provide a starting point for the proposed mutual fecundation.*

*If many traditional cultures are centered on God, and some other cultures basically cosmocentric, the culture which has come up with the notion of Human Rights is decisively anthropocentric. Perhaps we may now be prepared for a cosmotheandric vision of reality in which the Divine, the Human and the Cosmic are integrated into a Whole, more or less harmonious according to the performance of our truly human rights.” (PANIKKAR 1984a : 42-43)*

After having now outlined a picture of Man reconciling and articulating his “Divine”, “Cosmic” and “Human” dimensions, differently emphasized by different cultures, and having thus laid down possible basements for a possibly homeomorphic, intercultural picture of Man, which could be at the foundation of a *mestizaje* of Human Rights, let us now outline a possible terrain of a Dianthropological Praxis of Human Rights between Love, Wisdom and Peace.

## ***II. Love, Wisdom and Peace as the Cornerstones of a Dianthropological Praxis of Human Rights***

Figure 8

We can represent the developments of this part as the triangle represented above (*Figure 8*). Its summits are Love, Wisdom and Peace and its center is the Dianthropological Praxis of Human Rights which emerges through the underlying matrix made up by the summits.

Why have I chosen Love, Wisdom and Peace as the possibly relevant cornerstones of our Dianthropological Praxis of Human Rights ? A first answer is that they seem to be universal longings of the Human, fundamental experiences of human life which have their structural equivalent and are thematised in every culture. Further they seem to correspond to the underlying ideal Human Rights seek to realise : a fraternal life (Love) of mutual understanding (Wisdom) in Peace. But there is more to this choice. We have advocated that in order to be sustained it could be relevant that Human Rights plunge their roots deep into human spirituality, deep into the most profound Human experience. And it seems that Love and Wisdom are intimately linked to the realisation of our “true nature”, as we have seen it in Chapter V (p 92-93). Let us just remind the importance of Love and Wisdom in spiritual endeavour by a short quotation of AIVANHOV (1977 : 22 ; see also KALOU RINPOCHE 1993 : 202-204, TRUNGPA 1993 : 4) :

“Truth is a medal of which one face is love and the other wisdom. If you seek truth independently of love and wisdom, you will not find it. But from the very moment on where you possess love and wisdom, you possess truth also, independently of the fact that you seek it or not.” (1970 : 222)

-50-

A quotation of Swâmi VIVEKANANDA, reflecting a Hindu perspective can help us make the transition from Love and Wisdom to Peace (1972 : 114) :

“What we need to do now, is to combine the greatest heart and the highest intelligence, infinite love and infinite knowledge. The vedantist does not give to God other attributes than these three : He is Infinite Existence, Infinite Knowledge and Infinite Bliss, and the vedantist considers that these three are One. Existence without knowledge and without love cannot be ; knowledge without love and love without knowledge cannot be. What we want, is harmony of Infinite Existence, Knowledge and Bliss. That is what our goal is.” -51-

This idea of harmony thus can lead us to the notion of Peace. Peace can be seen as the harmony between Infinite Existence, Knowledge and Bliss, between Infinite Truth, Wisdom and Love which could result from “enlightenment”. The historical BUDDHA, is said to have said after having attained enlightenment, but before having started to teach (quoted in TRUNGPA 1981 : 31) :

“A profound peace and without limits, that is the Teaching I have found.”

-52-

We can relate these words to our quotation of Râmana MAHARSHI on the front page of the thesis :

“Peace is always present. You only have to move the obstacles which blur it.  
This peace is the Self. (1993 : 416) -53-

MAHARSHI’s quotation points us to an important aspect of Peace. Peace is not only the harmonious integration of the whole. It is also the space in which this whole integration can take place. In my view, Peace can fundamentally be seen as the space which permits the deployment of life as Existence, Wisdom and Love. Or rather it can be seen as the spacious aspect of Existence in which Existence can deploy itself. Peace seems thus to be an essential aspect complementing Love and Wisdom. It can be seen as the space in which Love and Wisdom can grow. We could maybe say that it may be in Peace (the space) that we could be able to “return” to Peace (the harmony).

I think that I have given by now an insight into why Love, Wisdom and Peace seem relevant to me as potential cornerstones of a Dianthropological Praxis of Human Rights. I think it is very clear that these notions rather pertain to the realm of *mythos* than to the realm of *logos*. Nevertheless, in order to enable us to fertilize the domain of Human Rights’ *logos* by them, and thus also to vivify the myth of Dianthropological Praxis of Human Rights itself, I would like to shortly present Love, Peace and Wisdom in a way seeking to further stimulate our thought and practice of them.

In order to do so, I will propose to present the notion of Love as Link, Responsibility and Respect ; the notion of Wisdom as Theory, Praxis and Dialogue ; and the notion of Peace as Harmony, Freedom and Justice. All these notions seem to me to be intimately intertwined and to lie one in each other. I will not go into deep developments and do not intend to start an argumentation on the reasons of my choice. I simply intend, if I could say, to plant a seed, which I hope will grow.

### **Love as Link, Responsibility and Respect**

Love is the feeling, the understanding to be linked : to be linked to others, to oneself, to life, to one’s environment, to the cosmos, to the divine. Love in its highest expression can be summed up according to VIVEKANANDA (1972 : 45) in one insight : “I am the universe, the universe is one”. This insight requires us not to do to others what we would not want others to do to us. It requires us to put ourselves in the place of others, and not to bring everything back to ourselves. It makes us aware of the responsibility we bear towards us and the others. We are linked. We cannot exist independently. People have cared for us, helped us, loved us. We must do the same. And even if we may think that nobody has ever done anything for us (which is hard to imagine!), it seems nevertheless difficult to deny that we are interlinked, that we can only live through our link with the others, and that at least to some extent, the sufferings of the others are also our sufferings. We thus have a responsibility to help others in their lives and to contribute to the easing of their possible sufferings. But if love stresses unity, we should not forget about our human condition marked by diversity. The unity of Love should not lead us to a uniform outlook on the world. We should not impose our love on others, as this is not true Love but selfishness. True Love starts with the other, not with oneself. True Love thus calls for respect. Only through respecting the other in his individuality can we really love him. Respect is the element of prudence Love needs in order not to become excessive. It leads us to reflect upon “enlightened” Love, which is Love illuminated, guided by Wisdom.

### **Wisdom as Theory, Praxis and Dialogue**

Wisdom is theory, if we understand theory as *theôrein*, as observation or contemplation<sup>52</sup>. It is detachment, putting into perspective. It is understanding. If Love could be related to warmth, Wisdom can be related to light. It permits us to see where we are going. If warmth, Love, puts things into movement, light, Wisdom, permits to orient this movement. Wisdom is thus not theory abstracted from reality, from action. Wisdom is theory informing action. And it is theory stemming from action. Wisdom is thus praxis. It is linked to bearing testimony to our existence. It therefore demands for dialogue. This dialogue is at least double. It is dialogue with existence itself as it emerges through praxis. It is also dialogue between the different witnesses to existence, the others. As it makes us aware of the same reality we share, but from different points of view, it directs us back to Love as seen above.

### **Peace as Harmony, Freedom and Justice<sup>53</sup>**

Peace is harmony. It presupposes the insights of Love and of Wisdom that everything is linked and though is different. It presupposes a global perspective on the real which understands the complementarity of its manifested differences. Building on this understanding, Peace is the harmonious integration of reality. The harmonious integration of reality presupposes articulation of the differences, not destruction of these differences. It thus presupposes freedom or space for existence. Without freedom existence could not unfold itself harmoniously as it would be limited in its unfolding, as it would encounter resistances. But it not only presupposes freedom and space of the whole but also of the parts. It thus presupposes the existence of multiple spaces and freedoms which can constitute a frame for the unfolding of existence(s). Peace is therefore linked to justice as it presupposes that none of these spaces invades the others. Harmonious articulation therefore necessitates just articulation permitting the realisation of the freedom of the parts in complementarity to the freedom of the whole. Here again justice leads us back to freedom and harmony and further to Wisdom as theory, praxis and dialogue and to Love as link, responsibility and respect.

We have now approached what could constitute three mythical cornerstones of a Dianthropological Praxis of Human Rights and have thus gained some insights in the underlying matrix of a possible Dianthropological Praxis of Human Rights. We have now given an image of the *mythos* which could sustain a Communitarian Human Rights' Praxis. Let us now see how we can articulate this *mythos* with the *mythos* of Man reflected in the cosmotheandric intuition in the *mythos* of a Dianthropological Praxis of Human Rights.

### ***III. Towards a Dianthropological Praxis of Human Rights***

To approach Dianthropological Praxis of Human Rights, we will proceed in two steps. First we will try to link the frame provided by Love, Wisdom and Peace with the Praxis of Human Rights it is intended to sustain. We will then add to the picture, the actor of this praxis, the Human being in all his cosmotheandric dimensions.

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<sup>52</sup> see the definition of "théorie" in the "Petit Robert" : *Dictionnaire alphabétique et analogique de la langue française par Paul Robert* , France, Société du nouveau Littré, 1973, 1969 p

<sup>53</sup> This presentation is inspired by PANIKKAR's presentation of Peace as Harmony, Freedom and Justice in PANIKKAR 1995 : 63 ff

We have said that Love, Peace and Wisdom could constitute the underlying mythical ground on which a Dianthropological Praxis of Human Rights could grow. We will now refine the diagram we have already given. Indeed we have said that praxis is the link of theory and practice. It is theory informed by action and action informed by theory. Praxis is thus what gives meaning to both. We have advocated in this thesis an approach to Human Rights based on Praxis, by which we meant an approach as made up by the mutually depending and interrelating of theorie(s) and of practice(s) meeting in a common Human Rights' Praxis. We could thus, in two dimensions, represent our Human Rights Praxis as follows (*Figure 9*) :

*Figure 9*

Our Human Rights' theory and practice thus meet in a shared myth of Love, Wisdom and Peace, in our Human Rights Praxis. But what is this Praxis ? We could say that it is life. It is that which integrates the parts, theory and practice, and permits them to unfold as life. If we see praxis as life, praxis is always the self and the Self. Thus the cosmotheandric intuition could be seen as at the center of our cross above - it is there where our praxis is. We have already represented the cosmotheandric intuition as a circle. We can thus complement the diagram above, by a circle, whose center is our Human Rights praxis. This will remind us that our praxis is not only one-dimensional, but multidimensional, Human, Cosmic and Divine. To sum up the myth of Dianthropological Praxis of Human Rights, we can thus draw the following symbol (*Figure 10*) which resumes it and permits its unfolding, which in a certain way is the seed, which can grow and unfold if it is taken care of, if it gets light (wisdom), water (love) and space (peace) :



Figure 10

## **Conclusion :**

### **Building a Common Future as Bright and Coloured as the Rainbow**

We have gone a long way since the beginning of this thesis. We have followed the path of “healthy pluralism”, which in fact was already mapped out by the three quotations on the front page. We have started by playing the role of “living rosettas” in order to be able to approach our Common Humanities characterized by unity in diversity, by trying to immerse ourselves in the different cultures and to approach them from within. We have thus laid down the first foundations for a dialogical pattern of interaction for cultures, for the elaboration of a platform of mutual enrichment in intercultural dialogue on the Human Rights’ ideal. This pattern permitted us to avoid uniformising universalism or absolute relativism. It laid down the bases permitting us to think unity as a complementarity of differences, and not as necessarily uniformization of all differences.

This led us to reflect upon our Human Community or Human Rights' Community. We advocated that it is in the Human Community that our Common Humanities could be able to meet in their shared praxis.

We could conceive of our life as made up of parallels. In our specific context of an intercultural reflection on Human Rights, theory and practice or our different ways to be Human could be approached as parallels. Parallels cannot exist alone. They can only exist in relation to one another. On similar lines, we could think of theory and of practice or of humans as parallels : theory cannot exist without practice ; and a human being cannot exist alone - but only "parallelly" to others. Thus thinking in terms of parallels may permit us to get aware of the dialectical relations between things - of the necessarily at least dual structure of reality. But it may be possible to see more in the image of parallels. Could we not also see them as opening the way to a dialogical and not merely dialectical approach to reality ? Parallels can be seen not only as representing a dialectical relationship through their parallelism. They could also be seen as an invitation to a dialogical approach to life if we try to reflect upon their possible meeting. Where could such a logic defying meeting of parallels take place ? Well, maybe as the mathematical axiom of their meeting in infinity, which may have provided the inspiration to Christian MORGENSTERN's poem on the two parallels quoted on the front page, suggests : in the infinite. Parallels could maybe meet in the infinite and become a "circle whose center is everywhere and whose circumference is nowhere". By being seen as possibly meeting in the circle, in the infinite, the image of parallels may give us a hint on how to "think" contradictions together, without necessarily having to limit ourselves to dialectics. We have to change the frame of reference : in the finite parallels can never meet - if they can they only can in the infinite. In a similar way it may be difficult to make "parallels", for instance universalism and relativism, meet in the Human Rights' discussion on a purely rational, theoretical level - which necessarily constitutes a limited frame. So it seems that in order to break out of unsolvable paradoxes, we might be invited to open up our frame of "reflection" to the infinite, to life and therefore to practice and Praxis. That is what I have tried to show in Part II : a truly dialogical approach to Human Rights in the intercultural context cannot remain in the pure domain of dialectics - it must open itself up to praxis : merely thinking in terms of "Human Rights' System" or even of "dialectical game" will not suffice. A dialogical approach to Human Rights seems to me only possible within a paradigm of a Human Community which could maybe be approached through a *Jeu de l'oe* methodology.

Common Humanities and Human Community permitted us to engage in a "social sciences' dianthropological praxis of Human Rights" characterized through a praxis of Human Rights informed by the different anthropologies of Men and by their mutual dialogue and interfecundation. In Part III we have sought to complement this dianthropological praxis of Human Rights by a "spiritual dianthropological praxis of Human Rights". The idea was to enrich our view on Human Rights by a dialogue founded in bases beyond the pure realm of logos, in deep inner spiritual experience. We have tried to see how spiritual experience could enrich our Human Rights' thought. We have then tried to propose a picture of what a fruitful myth which could sustain pluralistic and dialogical praxis of Human Rights could look like. We have called this myth we tried to approach Dianthropological Praxis of Human Rights. And we have described it as a myth "structured" through a "cosmotheandric" outlook on Man and through a fertile ground for the growing of intercultural Human Rights characterized by Love, Wisdom and Peace

We have noted in our introduction that Common Humanities, Human Community and Dianthropological Praxis of Human Rights constitute three paradigms for intercultural Human Rights praxis which could lead to an intercultural *mestizaje* of Human Rights. We should maybe specify that Dianthropological Praxis of Human Rights as a myth certainly has a paradigmatic aspect, but as we have seen, it in fact goes far beyond what one would call a simple paradigm which pertains more to the domain of logos and of methods or techniques

(*poiesis*) than to the domains of myth and *praxis*. Though keeping this in mind, let us nevertheless keep on talking here of “paradigms” for the sake of simplicity. We have advocated that the three proposed paradigms are not independent one of another, even if they can be thought of and criticized independently. They seem to me intimately interrelated and eminently complementary. They are the organic parts of a whole whose founding myth and horizon is Dianthropological Praxis of Human Rights, whose basements in the “real world” is our Common Humanities and whose place of concretisation is the Human Community. There can be no Human Rights’ Praxis without a base, a place for its unfolding, and a horizon for its unfolding. We see how much our whole outlook is permeated by a triune view of reality, already presented above by PANIKKAR.

We have now arrived at our conclusion. But our conclusion is rather the planting of a seed. It is thus just the very beginning of a new process of unfolding. I hope that the readers will take up the invitation to the caring for that seed. I hope that they will help it to grow through their contribution of Love, Wisdom and Peace, permitting thus its wonderful unfolding. Omraam Mikhaël AIVANHOV encourages his disciples to work on themselves, and we can also see it as an encouragement to work on our Dianthropological Praxis of Human Rights (1997 : 270-271) :

“You can start building your future from this very moment on. Through desire, thought, prayer, imagination, you can choose the best orientation, to manifest yourselves one day as beings of peace, of goodness, of light. But above all, once you have chosen this orientation, cling to it. Learn to channel all your energies and to orient them towards this world of harmony and of love. Even if some shadows appear from time to time, this will not last : if you always keep the right interior orientation, a day will come where you will not be deflected anymore. That is the essential, and I only deal with the essential. (...)

Whatever may happen, continue to build your future, do not get discouraged : your sufferings, your ordeals will soon seem to you like the waves of a tempest over which you would be floating. If you happen to feel weighed down by your ordeals, it is because you did not manage to keep a view on your luminous future. Your horizon is obstructed, but it is obstructed because you have obstructed it, and it is up to you to open up a window to see the sun.” -54-

So let us build our future, but not only our individual future, but the future of our whole Human Community. Let us let the sun shine in. But especially in our intercultural context, let us not forget that the Sun of Humanity shines through all the bright colours of the rainbow. Let us thus build a common future, as bright but also as coloured as the Rainbow. Let us follow the invitation of Tierno BOKAR, a sufi master born in the second half of the last century in the present Mali, and who died in the first half of this century. We can again extend his invitation from its solely religious context to the broader context of the endeavour towards a peaceful and shared living together characterized by its enrichment through our diversities of beliefs, world views and traditions but nevertheless sharing in a common horizon which we can call whatever we want : “Humanity”, “God”, the “Cosmos” or still something else, according to our own personal perspectives. Tierno BOKAR said (in BA 1994 : 145-146) :

“The rainbow owes its beauty to the varied tones of its colours. Similarly, we consider the voices of the diverse believers which raise from all points of the world like a symphony in praise of God who can only be Unique.

We bitterly deplore the lack of understanding of certain religious people (...) which leads them to reject as dissonant the anthem of their neighbour. To fight

against this tendency, my brothers in God, whatever religion or congregation you may be affiliated to, meditate longly on this verse<sup>54</sup> :

The creation of the heavens and of the earth,  
the diversity of your languages and of your colours  
appear as as many marvels to those who think.”

-55-

## **ANNEXES**

### **TRANSLATIONS OF THE QUOTATIONS ON THE FRONT PAGE**

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<sup>54</sup> Koran XXX, 22

MORGENSTERN (1973 : 298-299) :

### **The two parallels**

Once went to parallels  
out in the infinite,  
two straight souls  
and from a solid home.

They did not want to intersect  
until their peaceful grave  
this was, what to say,  
both's secret pride and way.

But after ten lightyears  
of such common travelling  
the lonesome couple felt  
not really earthly anymore.

Were they still parallels ?  
They couldn't say, -  
they were only like two souls flowing  
together through eternal Light.

The eternal Light permeated them  
thus they became one in Him :  
eternity swallowed them  
just like two seraphim.

MAHARSHI (1993 : 416) :

Peace is always present.  
You only have to move the obstacles  
which blur it.  
This peace is the Self.

## **ORIGINAL QUOTATIONS**

### ***INTRODUCTION***

**-1- (p 4-5) :**

“Penser le droit, c'est d'abord se méfier de ce qu'en disent les spécialistes.  
CLAUZEWITH, le fondateur de la stratégie moderne, disait que la guerre était trop importante

pour la confier aux seuls militaires. Quelques-uns d'entre nous, anthropologues, disons : 'le droit est trop important pour être confié aux seuls juristes'.

Le droit, ce n'est pas ce qu'en disent les juristes, c'est ce qu'en font les acteurs. C'est ce qu'en font les citoyens. Ce sont les pratiques des citoyens qui nous permettent de mesurer l'efficacité du droit. Le droit n'est pas dans les textes, il est dans les pratiques." (LE ROY 1994a : 29)

## ***PART I***

### **INTRODUCTION**

#### **-2- (p 11) :**

"On jouait à toutes les tables, et souvent gros. La nuit avait été longue et la fumée qui depuis longtemps avait envahi le tripot empêchait de voir de l'une à l'autre. Il eût fallu se déplacer et l'on aurait alors été émerveillé par la variété. Chaque table jouait un jeu différent : ici les tarots, le lasquet, le pamphile, le polignac et le mistigri, là le whist, le bridge et le boston, plus loin la belote, la bataille et même le bonneteau. Tout à coup les joueurs de belote quittèrent leur table pour observer celle de bridge. L'un d'eux revint assez vite ayant remarqué que les bridgeurs ne connaissaient pas les règles du jeu (il songeait à celles de la belote) et commettaient beaucoup d'erreurs : optimiste et bienveillant, il pensa qu'ils finiraient par les apprendre et par savoir jouer. Les ayant observés plus longtemps, un de ses camarades comprit qu'ils ne s'essayaient pas à la belote mais à un autre jeu : il nota la façon dont ils classaient les cartes et les abattaient et rejoignit le premier pour lui faire part de sa découverte. C'est alors que le troisième joueur de belote, ayant deviné qu'il fallait connaître les règles du bridge pour comprendre la partie s'en enquit auprès des joueurs : ils lui remirent un manuel, ajoutant qu'il ne suffirait pas de bien lire et qu'il lui faudrait une longue pratique du tripot pour prétendre connaître le bridge.

Ainsi vont les sociétés humaines. Chacune joue un jeu particulier que les autres peinent à déchiffrer." (ALLIOT 1984 : 269)

### **CHAPTER I**

#### **-3- (p 13-14) :**

"A partir du moment où on se refuse à la sécurité du particularisme disciplinaire et au rêve d'une totalisation du discours, on renonce aux assurances du savoir établi (parcellaire ou total, peu importe), pour ordonner la production du savoir à un incessant travail d'écart entre les discours existants. C'est dans le creux de cet "entre-deux" que se dévoile la figure de notre épistème, comme c'est dans l'échange du dialogue que s'articule le sens de notre praxis." (van de KERCHOVE, OST 1992: 52)

#### **-4- (p 14) :**

"Le relativiste ne porte pas de jugement sur les autres. L'universaliste conscient peut les condamner; mais il le fait au nom d'une morale ouvertement assumée, qui du coup peut être mise en question. L'universaliste inconscient est inattaquable, puisqu'il prétend être relativiste; mais cela ne l'empêche pas de porter des jugements sur les autres et de leur imposer son idéal. Il a l'agressivité du second et la bonne conscience du premier : il est assimilateur en toute

innocence, parce qu'il ne s'est pas aperçu de la différence des autres." (TODOROV 1992b : 71)

**-5- (p 15-16) :**

"Dieu crée d'abord Adam, soit l'homme indifférencié, prototype de l'espèce humaine. Puis dans un deuxième temps, il extrait en quelque sorte de cet être indifférencié un être de sexe différent. Voici Adam face à Eve, cette fois en tant que mâle et femelle de l'espèce humaine. Dans cette curieuse opération, Adam a en somme changé d'identité tandis qu'apparaissent un être qui est à la fois membre de l'espèce humaine et différent du représentant majeur de cette espèce. Adam, ou dans notre langue l'homme, est deux choses à la fois: le représentant de l'espèce humaine et le prototype mâle de cette espèce. A un premier niveau homme et femme sont identiques, à un second niveau la femme est l'opposé ou le contraire de l'homme. Ces deux relations prises ensemble caractérisent la relation hiérarchique, qui ne peut être mieux symbolisée que par l'englobement matériel de la future Eve dans le corps du premier Adam. Cette relation hiérarchique est très généralement celle entre un tout (ou un ensemble) et un élément de ce tout (ou ensemble): l'élément fait partie de l'ensemble, lui est en ce sens consubstantiel ou identique, et en même temps il s'en distingue ou s'oppose à lui. Il n'y a pas d'autre façon de l'exprimer en termes logiques que de juxtaposer à deux niveaux différents ces deux propositions qui prises ensemble se contredisent. C'est ce que je désigne comme "englobement du contraire." (DUMONT 1991: 140-141, dans une version un peu différente : DUMONT 1979 : 397)

**-6- (p 18) :**

"Le "bon" universalisme est donc d'abord celui qui ne déduit pas l'identité humaine d'un principe, quel qu'il soit, mais qui part d'une connaissance approfondie du particulier, eût qui avance par tâtonnements (...). Il est de plus celui qui repose sur au moins deux particuliers (...) et donc sur l'établissement d'un dialogue entre eux; Rousseau détruit ici la fausse évidence dont part l'éthnocentriste, la déduction de l'universel à partir d'un particulier. L'universel est l'horizon d'entente entre deux particuliers; on ne l'atteindra peut-être jamais, mais on a néanmoins besoin de le postuler pour rendre intelligibles les particuliers existants." (TODOROV 1992b : 34)

**-7- (p 20) :**

"(...) ce qu'il faut bien comprendre, c'est que ce "nous" dialogal ne se construit pas de la sommation brute de deux entités monolithiques: un "je" et un "tu" constitués tels qu'en eux-mêmes... Ce "je" et ce "tu" entre lesquels circule la parole sont, dès l'abord, divisés, scindés par la fracture où l'autre se fait entendre. Il n'y a de dialogue possible que parce que s'est déjà creusée au sein du "je" la place où s'inscrira la voix de l'interlocuteur." (van de KERCHOVE, OST 1992 : 64)

**-8- (p 21) :**

"L'ethnologue qui a tellement bien assimilé la vue du monde des Bororos qu'il ne peut plus le voir qu'à leur façon, n'est plus un ethnologue, c'est un Bororo - et les Bororos ne sont pas des ethnologues. Sa raison d'être n'est pas de s'assimiler aux Bororos, mais d'expliquer aux Parisiens, aux Londoniens, aux New Yorkais de 1965 cette autre humanité que représentent les Bororos. Et cela, il ne peut le faire que dans le langage, au sens plus profond du terme, dans le système catégoriel des Parisiens, Londoniens, etc. Or, ces langages ne sont pas des



“codes équivalents” - précisément parce que dans leur structuration, les significations imaginaires jouent un rôle central.” (CASTORIADIS 1992 : 228)

**-9- (p 21) :**

“(…) ne sont pas seulement de l’ordre du logos mais de l’ordre du mythos c’est-à-dire de l’ordre des différences ultimes. Or les différences ultimes ne sont pas dialectiques (ce qui ne veut pas dire qu’elles sont non-dialectiques ou anti-dialectiques).” (VACHON 1990 : 169)

**-10- (p 22) :**

“Standpunkte und Perspektiven rücken notwendig ins Zentrum der Aufmerksamkeit, sobald das Konzept des universellen Beobachters verabschiedet oder seine Gültigkeit eingegrenzt ist. Mit dem Verständnis der Bedeutung der Wahl des Bezugs- oder Beobachtungspunktes zeigt sich auch die Hohlheit des Relativismusgezetters in der Pluralitätsdiskussion. Wie Mandelbrot (...) zeigt, hängt selbst im physikalischen Mesobereich, dem Inbegriff von Objektivität und Stabilität, der Messwert vom Beobachtungsstandpunkt ab (...) Die Wahl des Massstabes (des Standpunkts) wird zur Frage der Angemessenheit im Zusammenhang der jeweiligen Ziele und Interessen. Ist der Beobachtungspunkt aber gewählt und definiert, dann ist das ermitteln (...) eine Frage der Messgenauigkeit, wie eh und je. Dasselbe gilt für die Argumentation von Übergängen zwischen inkommensurablen Paradigmen. Solche können nur im konkreten Zusammenhang argumentiert werden, daher ist sowohl die Angemessenheit des gewählten Standpunkts (Meta-Diskurses) als auch die Korrektheit der - aus der gewählten Perspektive - durchgeführten Beobachtung zu belegen.” (BAUER 1996: 199-200)

## **CHAPTER II**

**-11- (p 23) :**

“Sa généralité vient de ce qu’il est dans la nature de l’homme et de la société. Etre, c’est lutter, individuellement ou collectivement. Mais nul ne peut lutter sur une marche de son domaine que s’il est assuré de la paix sur toutes ses autres frontières. Et la lutte de ses membres n’est pas sans danger pour le groupe. Dans les domaines qu’une société considère comme vitaux - et là-dessus chacune a sa propre conception - son existence n’est possible que si ses membres contrôlent, quand ils le peuvent, ces luttes ou du moins les pratiques qui en résultent. Vivre en société, ce n’est donc pas seulement lutter, c’est aussi s’entendre sur la légitimité ou l’illégitimité de ces pratiques et sur la suite qu’il convient de leur donner. La socialité exige le consensus. Le phénomène est général parce qu’il tient à la nature de l’individu (la lutte) et aux exigences de la vie en société (le consensus). (...)”

Le droit d’une société s’ordonne ainsi autour des limites des sphères d’action de chacun dans les domaines qu’elle tient pour vitaux : il est à la fois consensus sur ces limites et pratiques visant ou aboutissant à les confirmer ou à les déplacer.

Ainsi défini le droit n’est lié par nature ni à l’existence d’un Etat, ni à la formulation de règles, ni à la reconnaissance de sa rationalité.” (ALLIOT 1983b : 209-210)

**-12- (p 23) :**

“Qui veut comprendre la forme et le sens des institutions juridiques d’une société a donc intérêt à les rapporter non aux institutions de sa propre société - le rapprochement serait superficiel - mais à l’univers de celle dans laquelle il les observe.” (ALLIOT 1983b : 215)

**-13- (p 25) :**

“Le modèle constitue une représentation du phénomène à la fois simplifiée et globale. En effet on ne fait pas un modèle pour présenter toutes les propriétés d’un phénomène, toutes les relations que les êtres ont entre eux, tous les aspects du fait concret. Au contraire, on envisage le phénomène d’un certain point de vue (...) On abstrait certains aspects du concret, ce qui simplifie. Par ailleurs les aspects retenus ne sont pas arbitraires; ils sont choisis d’un certain point de vue, mais tous ceux qui importent à ce point de vue doivent être choisis, ce qui rend globale la représentation fournie par le modèle.” (RÉGNIER 1971 : 18-19)

**-14- (p 27) :**

“Un quelque chose était, non défini mais accompli  
Né avant Ciel-et-Terre  
Sans parole comme sans borne  
Indépendant inaltérable  
Se jouant partout sans fatigue  
En somme la Mère du monde  
Ne sachant pas son nom je la dénomme Voie  
(...)  
(...) l’Homme est l’un des quatre Grands du monde  
L’Homme suit les voies de la Terre  
La Terre suit les voies du Ciel  
Le Ciel suit les voies de la Voie  
Et la Voie suit ses propres voies.” (LAO-TZEU 1979 : 69)

**-15- (p 27) :**

“Gouvernez à force de lois, maintenez l’ordre à coups de châtements, le peuple se contentera d’optempérer, sans éprouver la moindre honte. Gouvernez par la Vertu, harmonisez par les rites, le peuple non seulement connaîtra la honte, mais de lui-même tendra vers le Bien.” (CONFUCIUS (1981 : 33)

**-16- (p 30) :**

“A l’image de ce Dieu, fonction absolue au-delà de l’être, l’univers n’est pas un ensemble d’êtres mais un ensemble de fonctions qui déterminent des êtres.

C’est le cas des fonctions familiales et sociales qui déterminent le statut des individus. En Europe l’individu est une personne de la naissance à la mort, avec un droit aux droits invariables pour chacun et identique pour tous. La notion de personne juridique n’appartient pas aux Droits originellement africains. On y trouve celle de statut et de statut déterminé par les fonctions exercées : le statut individuel est d’autant plus important qu’on avance en âge, qu’on est marié (et, pour un homme, polygame), qu’on a des enfants, qu’on est à la tête d’un lignage, etc. (...)

L’être est si peu stable qu’on passe facilement d’une forme d’être à une autre.” (ALLIOT 1984 : 274-275)

**-17- (p 30-31) :**

“La coutume n’est pas un être, comme serait un corpus de lois : elle est la manière d’être, de parler, d’agir qui permet à chacun de contribuer au mieux au maintien de la cohésion du groupe. (...) De plus cette même fonction de cohésion fait qu’on évite souvent d’invoquer la coutume : on fait en sorte que les conflits n’aillent pas jusqu’à un affrontement ouvert. Et lorsqu’on ne peut faire autrement, on avance sur la voie de la solution, moins par référence à des règles antérieurement arrêtées que, cas par cas, conformément à ce qu’on estime l’intérêt du groupe. A l’application de la loi, on préfère la solution qui se dégage “dans le ventre du village”.” (ALLIOT 1984 : 277)

**-18- (p 31) :**

“Nous somme aux antipodes du système dans lequel, à l’image d’un Dieu dont tout dépend dans une création continue de chaque instant, les droits des uns et des autres ne leur sont maintenus que par la grâce de celui qui est l’auteur de tous les droits, l’Etat. Le droit des communautés n’a pas besoin d’un pouvoir qui veuille le maintenir. Il est la conséquence nécessaire de leur structure.” (ALLIOT 1980a : 158)

**-19- (p 31-32) :**

“(…) pour l’occident chrétien Dieu est Celui qui est avant d’être celui qui crée : il Est de toute éternité, il aurait pu ne pas créer, ou créer autrement. En lui l’Etre prime l’action. A son image, les occidentaux affirmeront le primat de l’être sur la fonction. (...) De même il n’est pas indifférent de savoir que pour l’occident chrétien le Dieu unique est radicalement extérieur à sa création, qu’il la recrée à chaque instant et qu’il la gouverne souverainement par la contrainte uniforme de ses lois et décrets.” (ALLIOT 1984 : 271)

**-20- (p 32) :**

“La société est alors décentrée : elle projette son centre en dehors d’elle même; au dessus d’elle même. Les rapports entre ces membres changent totalement. Il ne s’agit plus de rechercher à chaque instant entre soi l’attitude juste. L’attitude juste, c’est de se conformer au système de règles établi par le pouvoir ou, si elles ne sont pas satisfaisantes, de réclamer une nouvelle loi, une nouvelle réglementation.” (ALLIOT 1983b : 234)

**-21- (p 36) :**

“L’homme religieux verra en dharma la loi de Dieu; l’homme moral le verra comme le principe intérieur qui fournit un critérium du bien et du mal; le juriste le verra comme loi (...); le psychologue soulignera la tradition, la coutume, l’esprit social; le philosophe y verra la conscience de l’espèce ou la conscience de l’unité, qui par sa nature même poussera finalement l’homme à manifester la bonté ou le sens de l’unité; l’idéaliste y verra l’idéal; le réaliste, la loi qui est derrière le spectacle apparent de la vie; le mystique pratique y verra la force (...) qui amène l’harmonie dans l’unité. Mais en vérité le *dharma* est le principe à la base de ces manifestations, contenu en elles toutes, et sous-jacent à toutes ces conceptions.” (MEES cité dans : Herbert, 1988: 117-118)

## *PART II*

### **INTRODUCTION**

**-22- (p 47) :**

“Le Mulla, qui venait d’être nommé magistrat, jugeait sa première affaire.

Le plaignant exposa son problème de façon si convaincante que Nasrudin s’exclama:

“Je crois que tu as raison!”

Le greffier le pria de se contenir car le prévenu n’avait pas encore été entendu.

Nasrudin fut si transporté par l’éloquence du prévenu qu’il s’écria, dès que celui-ci eut fini de parler:

“Je crois que tu as raison!”

Le greffier n’en put supporter davantage:

“Votre Honneur, ils ne peuvent avoir raison tous les deux.

- Je crois que tu as raison!” dit Nasrudin.” (SHAH 1989: 67)

### **CHAPTER III**

**-23- (p 48-49) :**

“Nous avons vite appris que les rêves de l’époque moderne n’étaient que des illusions. Le temps a dévoilé les imperfections du droit “moderne”; il a montré combien l’universalisme était un leurre, et que le règne suprême de la loi ne réglait pas tout. L’observation de la réalité juridique quotidienne a amené de nombreux juristes qui s’intéressent au problème des fondements du droit, à reconnaître que tout droit est relatif, qu’il existe un pluralisme des sources du droit, et qu’un retour au pragmatisme s’impose.” (ARNAUD 1990: 81)

**-24- (p 49) :**

“La pensée moderniste affirme que les êtres humains appartiennent à un monde gouverné par des lois naturelles que la raison découvre et auxquelles elle est elle-même soumise. Et elle identifie le peuple, la nation, l’ensemble des hommes à un corps social qui fonctionne lui aussi selon des lois naturelles et qui doit se débarrasser des formes d’organisation et de domination irrationnelles qui cherchent frauduleusement à se faire légitimer par le recours à une révélation ou à une décision supra-humaine.” (TOURAINÉ 1992 : 51)

**-25- (p 50) :**

“(d)’une simple mascarade au masque, d’un personnage à une personne, à un nom, à un individu, de celui-ci à un être d’une valeur métaphysique et morale, d’une conscience morale à un être sacré, de celui-ci à une forme fondamentale de la pensée et de l’action (...)” And he adds : “Qui sait même si cette “catégorie” que tous ici nous croyons fondée sera toujours reconnue comme telle ? Elle n’est formée que pour nous, chez nous.” (MAUSS 1995 : 362)

**-26- (p 50-51) :**

“La loi qui dans son aspect le plus fondamental était une expression de l’ordre découvert dans la nature par l’esprit humain, devient dans sa totalité expression du “pouvoir” ou de la “volonté” du législateur. De plus, tandis que le droit était conçu comme une relation juste entre êtres sociaux, il devient la reconnaissance sociale du pouvoir (potestas) de l’individu. Occam est ainsi le fondateur de la “théorie subjective” du droit, qui est en fait la théorie moderne du droit. (...)”

Pour les modernes (...) le Droit naturel (...) ne traite pas d’êtres sociaux mais d’individus, c’est-à-dire d’hommes dont chacun se suffit à lui-même en tant que fait à l’image de Dieu et en tant que dépositaire de la raison. Il en résulte que (...) les principes fondamentaux de la constitution de l’Etat (et de la société) sont à extraire ou à déduire, des propriétés et qualités inhérentes à l’homme considéré comme un être autonome, indépendamment de toute attache sociale ou politique. L’état de nature est l’état (...) où l’on considère seulement l’homme individuel, (...) où les hommes sont supposés avoir vécu avant la fondation de la société et de l’Etat. Déduire de cet état de nature logique ou hypothétique les principes de la vie sociale et politique peut bien apparaître une tâche paradoxale et ingrate. C’est pourtant ce qu’ont entrepris les théoriciens du Droit naturel moderne, et c’est en le faisant qu’ils ont jeté les bases de l’Etat démocratique moderne.”

(DUMONT 1991 : 87 and 97)

**-27- (p 53) :**

“(...) le multijuridisme qui intègre le multiple dans l’idée juridique doit être abordé non comme un ensemble statique d’injonctions ou de sanctions mais comme un système ouvert, dynamique, comme un jeu ou comme un processus dont on doit reformuler les règles par un nouveau paradigme.” (LE ROY 1996a : 8)

**-28- (p 55-56) :**

“En privilégiant la négociation et en orientant le justiciable vers la recherche d’un consensus qui ne se soucie pas de dire le droit mais de concilier des points de vue et les intérêts, les sociétés inventent un nouveau type de droit qui n’a pas besoin de s’exprimer dans la forme canonique du code juridique et d’être énoncé par une instance législative.

Cette expérience que nous désignons sous l’expression “droit de la pratique”, au double sens qu’il dépend des applications qui en sont faites et des clients qui y adhèrent, ne recourt que très accessoirement aux précédents. Plutôt que de travailler en temps reconstitué comme dans le procès pénal, ou en temps réel (pour les juges des mineurs, (...)) le médiateur africain investit dans le futur et dans le long terme des rapports sociaux à venir.

En outre, il s’inscrit dans un contexte sociétairé nouveau et fort intéressant : de nouvelles cultures communes. (...) Tout en s’opposant aux cultures officielles, “à la française” dans les cas observés en Afrique de l’Ouest, ces nouvelles manifestations culturelles ne se présentent pas comme tournées vers le passé et privilégiant les fondements de l’ethnicité, sauf (...) chez certains fondamentalistes musulmans de Kaolak à Kano. (...)

C’est bien une véritable culture qui émerge et que l’on dit commune non point parce qu’elle serait seulement populaire mais surtout parce qu’elle partage des traits communs avec les cultures antérieures. Enracinées dans les valeurs du terroir comme les cultures natives dont elle est issue, sensible à un islam tolérant et ouvert au monde, se voulant immédiatement efficace et soucieuse de performances, au moins politiques, comme dans les sociétés modernes, cette culture wolophone est à la fois une synthèse, et donc un métissage de cultures antérieures et la manifestation d’une postmodernité. Culture de l’action, de la débrouillardise (...), de la gestion tensionnelle des contradictions, la wolofisation (...) exprime les modalités de vie en société sans se soucier de sacrifier au culte de la modernité. Ce ne sont pas les institutions qui sont invoquées mais leurs bénéficiaires. (...)

Au fur et à mesure que la réflexion s'est développée, on a pu s'apercevoir que ce n'est pas en termes de justice ou de justiciable que la recherche d'une certaine pacification des rapports sociaux s'exprime. De moins en moins sensibles à nos fictions et à nos mythes juridiques, les sociétés africaines disent crûment que la justice d'Etat n'est qu'une arène de négociation parmi d'autres, souvent moins efficace que la gestion en face à face du conflit. Pour elles, le droit est mise en forme des conflits, émergence des consensus et gestion sur le long terme des solutions dès lors qu'elles assurent la "reproduction" des principales "articulations" de la vie sociale.

Toutes ces explications sont à la fois familières ou banales pour l'Africain et l'africaniste et étonnantes pour le spectateur étranger (...) les représentations institutionnelles qui, du XVIe au XVIIIe siècles ont fondé la modernité sont maintenant dépassées. Sans le savoir nous sommes déjà en post-modernité<sup>55</sup> (...)

A défaut de justiciable on a donc découvert l'émergence d'une nouvelle aspiration à la justice sociale et à la réconciliation de l'Afrique avec son histoire." (LE ROY 1990b : 118-120)

**-29- (p 56) :**

"(...) dans une société différenciée, chaque personne doit affronter quotidiennement des situations relevant de mondes distincts, savoir les reconnaître et se montrer capable de s'y ajuster. On peut qualifier ces sociétés de "complexes" au sens où leurs membres doivent posséder la compétence nécessaire pour identifier la nature de la situation et traverser des situations relevant de mondes différents (...) Bien que le jeu soit étroitement limité par le dispositif de la situation, un modèle à plusieurs mondes donne aux acteurs la possibilité de se soustraire à une épreuve et, prenant appui sur un principe extérieur, d'en contester la validité ou même de retourner la situation en engageant une épreuve valide dans un monde différent. Il inclut par là la possibilité de la critique dont les constructions déterministes ne parviennent pas à rendre compte." (BOLTANSKI, THEVENOT 1991 : 266-267)

**-30- (p 59-60) :**

"C'est dans la perspective d'un modèle interculturel qu'il conviendra de renouveler, d'un point de vue philosophique, politique et pratique, le principe de la complémentarité des différences.

Déjà reconnu dans les traditions animistes et indiennes, peu éloigné des traditions confucéenne et musulmane, ce principe de complémentarité des différences pose dans la tradition occidentale des difficultés que la recherche devra ultérieurement identifier et contribuer à résoudre. (...)

Dans l'état actuel de la recherche anthropologique, et compte tenu de l'inscription de l'anthropologie dans une conception occidentale de la science, donc dans sa vision du monde, la priorité doit être accordée à un "enrichissement" de sa conception sous-jacente aux droits de l'homme, en revalorisant l'idée (noumen ?) de respect de l'autre et en réintroduisant le principe de la complémentarité des différences. Sans mésestimer les difficultés qui apparaissent devant nous, nous devons être convaincu que face aux turbulences qui s'annoncent, seule une exigence éthique et épistémique est susceptible de fonder un futur commun et une société pacifiée." (LE ROY 1997a : 15)

**-31- (p 62) :**

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<sup>55</sup>Dans le contexte africain LE ROY préfère maintenant parler de contemporanéité plutôt que de post-modernité (LE ROY 1997c : 135).

“Au fonds il s’agit de donner aux droits de l’homme même un caractère dialogal et plural. Pour que les droits de l’homme puissent être universels il ne suffit pas qu’ils émergent d’un dialogue interculturel s’ils sont ensuite figés dans une forme, absolue et éternelle, judéo-chrétienne, d’ordre imposé uniformément à tous. Il faut sauvegarder dans leur forme même leur caractère dialogal et plural. La question qui se pose est alors de savoir ce qui fera l’unité, l’universalité de ces droits. Je pense qu’il faut concevoir les droits de l’homme comme une plaque tournante, comme un échangeur entre les différentes logiques sociétales, comme, pour reprendre l’image de Raimundo Panikkar à propos de la personne (...), un “noeud” formant partie intrinsèque du réseau des relations et des problématiques qui constituent le réel des droits de l’homme. Ce rôle de plaque tournante peut être joué par une déclaration à caractère homéomorphe qui énoncerait les objectifs à atteindre par toute l’humanité tout en renvoyant chaque culture à ses propres représentations pour y trouver les fondements et les moyens d’atteindre ces objectifs. Il s’agira donc de construire les droits de l’homme sous la forme d’un système dynamique ouvert, structuré par des noeuds, les concepts homéomorphes. L’universalité ne résidera donc pas dans l’être abstrait du concept né de la rationalité qui devra s’imposer à tous, mais dans le fait que ce concept renverra aux objectifs universels, formulés sous forme de concepts homéomorphes, comme ils sont conçus, appréhendés et concrétisés par et dans les différentes cultures, desquelles les concepts homéomorphes ont d’ailleurs eux même émergés dans le dialogue interculturel.” (EBERHARD 1996 : 51)

#### CHAPTER IV

##### **-32- (p 66) :**

“(…) il apparaît qu’avec le modèle du jeu s’annonce une méthode dialectique. Cette théorie dialectique entend fournir une représentation cohérente tant du phénomène juridique lui-même que de l’épistémologie de sa science et de l’éthique de sa mise en oeuvre. Sur chacun de ces plans, la pluralité est substituée à l’unité, la récursivité prend la place de la linéarité, la gradualité est préférée à la binarité, tandis que l’incertitude (qui ne signifie pas pourtant l’aléa complet), adaptée à la complexité des temps présents, est assumée en lieu et place de la pseudo-sécurité que croient garantir les pensées de la simplicité.” (OST, van de KERCHOVE 1993a : 191)

##### **-33- (p 67) :**

“Isoler des objets (...) de leur environnement et de l’observateur qui les étudie (...), établir des relations linéaires et hiérarchisées entre ces éléments : tel est le propre de la rationalité, du “paradigme” cartésien. Philosophie du “tiers exclu”, qui s’ancre solidement sur les principes d’identité ( $A=A$ ) et de non-contradiction ( $A$  n’est pas non- $A$ ). Le modèle dialectique de la complexité est, au contraire, celui du “tiers inclus”. Ce modèle suppose que soient établis des relations récursives d’interaction entre les éléments distingués et pourtant solidaires, qu’il s’agisse de l’objet et de son environnement, de l’observé et de l’observateur, de la cause et de l’effet, de l’interne et de l’externe, etc ...” (OST, van de KERCHOVE 1993a : 201)

##### **-34- (p 75-76) :**

“Le but du texte est de réfléchir les conditions de possibilité d’une constitution du temps social. Un temps social néguentropique (c’est-à-dire créateur), un temps humain chargé de sens. (...)”

Entre l’immobilité du temps de l’éternité et la fugacité vide du temps qui fuit, se fait valoir la voie de la parole publique et de l’action politiques créatrices de “mémoire organisée” (Arendt). (...) Pour être “capables d’histoire” (Hegel), les sociétés doivent pouvoir féconder (faire interagir) la mémoire du passé par l’attente du futur et le projet par l’expérience (Ricoeur)

(...) Pour ce faire, il s'impose de repenser les notions de "génération", d'"humanité" et de "patrimoine". Cette inscription dans une durée ne doit cependant pas se ramener (...) à la répétition du même. (...) Le temps d'une société ouverte est donc en partie indéterminée : c'est le temps de la *praxis*, distinct de celui de la fabrication programmée des objets (*poiesis*). Il faut le rappeler à l'encontre de toutes les philosophies politiques antidémocratiques qui voudraient bien remplacer "l'agir" (politique et collectif) par le "faire" (technocratique et élitiste). (...) Il faudra à la fois affirmer le droit de chacun à son propre rythme, et penser les conditions d'une harmonisation des temporalités qui ne se ramène pas au minutage du temps physique (*planning-timing*) et ne conduise pas à une "mise au pas" de toute la société (...)

Retour au point de départ ; d'un côté *Kronos* : un pouvoir arbitraire, violent et solitaire associé à une temporalité statique, sans passé ni avenir, sans événement ni initiative, sans harmonisation de la pluralité des rythmes ; de l'autre les *Heures* : symboles de l'harmonie dans la Cité, associées (...) à une temporalité dynamique, féconde (néguentropique), alternée et plurielle." (OST 1997c : 1 and 3-4)

### **PART III**

#### **INTRODUCTION**

**-35- (p 81) :**

"Des Indous avaient amené un éléphant ; ils l'exhibèrent dans une maison obscure.

Plusieurs personnes entrèrent, une par une, dans le noir, afin de le voir.

Ne pouvant le voir des yeux, ils le tâtèrent de la main.

L'un posa la main sur sa trompe ; il dit : "Cette créature est telle un tuyau d'eau."

L'autre lui toucha l'oreille : elle lui apparut semblable à un éventail.

Lui ayant saisi la jambe, un autre déclara : "l'éléphant a forme de pilier."

Après lui avoir posé la main sur le dos, un autre dit : "En vérité, cet éléphant est comme un trône."

De même, chaque fois que quelqu'un entendait une description de l'éléphant, il la comprenait d'après la partie qu'il avait touchée.

Leurs affirmations variaient selon ce qu'ils avaient perçu : l'un l'appelait dal, l'autre alif<sup>56</sup>.

Si chacun d'eux avait été muni d'une chandelle, leurs paroles n'auraient pas différé.

L'oeil de la perception est aussi limité que la paume de la main qui ne pouvait cerner la totalité (de l'éléphant).

L'oeil de la mer est une chose, l'écume en est une autre ; délaisse l'écume et regarde avec l'oeil de la mer.

Jour et nuit, provenant de la mer, se meuvent les flocons d'écume ; tu vois l'écume, non la mer. Que c'est étrange !

Nous nous heurtons les uns contre les autres comme des barques ; nos yeux sont aveuglés ; l'eau est pourtant claire.

O toi qui t'es endormi dans le bateau du corps, tu as vu l'eau ; contemple l'Eau de l'eau. L'eau a une Eau qui la pousse, l'esprit un Esprit qui l'appelle."

(de VITRAY-MEYEROVITCH 1995 : 23-24)

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<sup>56</sup> Ces deux lettres de l'alphabet arabe, respectivement d et a, ont, la première la forme d'un angle, la seconde d'un trait vertical.



## CHAPTER V

### -36- (p 83) :

“Nasrudin se mit à haranguer les gens sur la place du marché. “Hé ! vous autres ! Voulez-vous la connaissance sans peine, le vrai sans le faux, la réalisation sans effort, le progrès sans sacrifice ?”

En un clin d’œil, une foule immense s’était assemblée autour de lui. Et tous de crier: “Oui! oui !”

“Parfait ! dit le Mulla. Je voulais seulement me faire une idée. Si jamais je découvre une chose pareille, vous pouvez compter sur moi pour n’en rien vous cacher.” (SHAH 1989: 125)

### -37- (p 85) :

“Toutes les traditions, qu’elles soient chrétienne, hindouiste, judaïque, musulmane, bouddhique..., enseignent que la compréhension de ce que nous sommes au niveau le plus profond est le point essentiel : cette compréhension de la nature de l’esprit éclaire de l’intérieur et illumine les enseignements de toutes les traditions. Dans chacune d’elles, quiconque parvient à la compréhension intime de l’esprit et en fait l’expérience immédiate aboutit à une vision essentielle, sans commune mesure avec celle qu’il pouvait avoir avant cette expérience directe. La connaissance de la nature de l’esprit est la clef qui ouvre la compréhension de tous les enseignements. Elle éclaire ce que nous sommes, la nature de toutes nos expériences et révèle la forme la plus profonde d’amour et de compassion.” (KALOU RINPOCHE 1993 : 32)

### -38- (p 86) :

“Depuis des millénaires les humains ont pris l’habitude de s’arrêter sur la forme et l’apparence des choses en négligeant leur contenu et leur sens. C’est également ce qu’ils ont fait avec les Livres sacrés qui possèdent aussi une forme, un contenu et un sens. La forme, le récit est pour les gens ordinaires ; le contenu moral, symbolique, est pour les disciples qui essaient de l’approfondir et de le vivre ; quant au sens spirituel, il est pour les Initiés qui savent l’interpréter. (...)

Chaque forme, c’est-à-dire chaque chose ou chaque être qui naît doit mourir et laisser la place à d’autres. Seul, l’esprit qui n’a pas de commencement n’a pas de fin, et c’est lui qui s’incarne successivement dans de nouvelles formes. Dieu n’a pas donné l’éternité à la forme ; la forme est friable, éphémère, elle ne peut résister au temps. Seul le principe, l’esprit, qui appartient au monde divin, est indestructible, éternel.” (AIVANHOV 1994 : 11 and 26)

### -39- (p 86) :

“Un homme qui arrive à la vraie Sagesse ne voit pas Dieu comme un être lointain, il ne Le sent pas hors de lui, mais en lui, dans le fonds de son âme. Dieu est en tous, ceux qui Le cherchent Le trouvent en eux.” (HERBERT 1972 : 464)

### -40- (p 86) :

Ce n’est qu’en sachant faire le détour qui consiste à utiliser un miroir que nous pourrions voir notre face. De même que pour se voir lui-même l’œil doit avoir recours à cet objet particulier, l’esprit pour s’étudier lui-même doit faire appel à un moyen particulier qui joue le rôle du miroir dans lequel il peut découvrir son vrai visage : ce moyen est le dharma tel que

nous le transmet un guide spirituel. C'est dans la relation que nous entretenons avec l'enseignement et cet ami spirituel ou ce guide que l'esprit va pouvoir s'éveiller petit à petit à sa nature véritable et finalement dépasser le paradoxe initial, en découvrant un autre mode de connaissance. Cette découverte s'effectue dans diverses pratiques, dites de méditation. (KALOU RINPOCHE 1993 : 46)

**-41- (p 87) :**

“(…) pour répondre aux besoins divers des êtres et satisfaire les dispositions, aspirations et tendances propres à chacun, il faut une grande variété de philosophies, de religions et de traditions spirituelles. Au vu de l'immense diversité des besoins de tous il semble bien difficile qu'une seule religion convienne. Plus il y a de voies spirituelles, mieux c'est! En même temps, il est certain que les différentes croyances peuvent vivre en harmonie puisque l'éthique fondamentale, universelle, est justement un terrain d'entente important. Il suffira que les pratiquants de toutes ces voies apprennent à mieux se connaître et qu'ils profitent de ce que les autres religions leur enseignent pour améliorer leur pratique personnelle.” (Le DALAI-LAMA 1994 : 84)

**-42- (p 87) :**

“Vous savez qu'il y a des esprits de plusieurs catégories différentes. On peut être un matérialiste qui croit au bon sens et aux réalités terre à terre ; on peut ne pas s'intéresser aux formes et aux cérémonies ; on peut exiger des faits solides, qui résonnent et qui parlent à l'intelligence, et ne pas se contenter d'autre chose. Il y a aussi les puritains et les musulmans qui ne tolèrent dans les édifices consacrés au culte ni statue ni image. Fort bien, mais tel autre homme peut être plus artiste et avoir besoin d'un grand déploiement artistique, de belles lignes, de courbes gracieuses, (...) ; son esprit conçoit Dieu par ces formes extérieures tout comme votre esprit Le conçoit par l'intelligence. Il y a aussi l'homme de dévotion, de qui l'âme appelle Dieu éperdument ; sa seule idée est d'adorer Dieu et de chanter Ses louanges. Il y a encore le philosophe, qui se tient à l'écart de tous les autres et qui se moque d'eux. “Quelles sottises, pense-t-il, quelles manières de concevoir Dieu!”

Ils peuvent rire les uns des autres, mais chacun d'eux à sa place dans ce monde. Tous ces esprits différents, tous ces types divers sont nécessaires. S'il doit jamais y avoir une religion universelle, il faudra qu'elle soit suffisamment vaste et large pour fournir à chacun de ces esprits ce dont il a besoin. Il faudra qu'elle donne au philosophe la force de la philosophie, à l'adorateur le coeur du dévot, au ritualiste tout ce que peut fournir le symbolisme le plus merveilleux, au poète autant de sentiment qu'il en pourra absorber, et encore autre chose. Pour construire une religion assez vaste, il nous faudra revenir à l'époque où les religions ont commencé et les embrasser toutes.” (VIVEKANANDA 1972: 374-375)

**-43- (p 88) :**

“Il y a certains faits religieux qui, comme dans la science matérielle, doivent être perçus, et c'est sur eux que la religion sera construite. (...) Les sages du monde ont seulement le droit de nous dire qu'ils ont analysé leur esprit, qu'ils y ont fait telle et telle constatation, et que si nous agissons de même nous croirons aussi, mais pas auparavant. C'est tout ce qu'il y a dans la religion.” (VIVEKANANDA 1972 : 136)

**-44- (p 90-91) :**

“Chacun, ici-bas, est le Soi, à dire vrai infini. (...) Personne n’est éloigné du Soi. Par conséquent chacun est en Soi, c’est-à-dire réalisé. (...)

La réalisation consiste donc à rejeter l’idée fautive, que l’on n’est pas réalisé. La réalisation n’est pas quelque chose de nouveau à acquérir. Comme elle est permanente, elle doit donc exister de tout temps. Sinon, elle n’a aucune valeur.

Dès lors que l’idée erronée “Je suis le corps” ou “Je n’ai pas réalisé” s’est dissipée, il ne reste plus que la suprême Conscience, c’est-à-dire le Soi auquel on donne le nom de réalisation pour satisfaire le niveau de compréhension ordinaire des gens. Mais, en vérité, la réalisation est éternelle, elle existe depuis toujours, à présent et ici même. Finalement la réalisation revient à éliminer l’ignorance et rien d’autre.” (MAHARSHI 1993 : 417-418)

**-45- (p 91) :**

“Depuis des milliers d’années que les hommes essaient de s’étudier pour connaître la structure de leur vie psychique, ils ont imaginé de nombreux modes de division. (...) Quel que soit le point de vue que l’on adopte, il est toujours véridique, cela dépend sous quel angle on regarde les choses.

Pour simplifier la question, nous dirons que l’être humain est une unité parfaite, mais que cette unité est polarisée, c’est-à-dire qu’elle se manifeste dans deux directions, sous deux aspects différents. L’homme est fait de deux natures: la nature inférieure et la nature supérieure, qui ont les mêmes facultés de penser, de sentir et d’agir, mais dans deux directions contraires. J’ai appelé ces deux natures la personnalité et l’individualité.” (AIVANHOV 1984: 23-24)

**-46- (p 92) :**

“La devise de tout bien-être, de tout bien moral est : “Pas moi, mais toi.”

(...) Oubliez-vous vous-même ; c’est la première leçon qu’il faille apprendre, que vous soyez religieux ou athée, agnostique ou védantiste, chrétien ou musulman. La grande leçon qui est évidente pour tous, c’est la destruction du petit moi et la construction du Moi Réel.

Deux forces ont travaillé côte à côte et parallèlement. L’une dit “moi”, l’autre dit “pas moi”. (...) d’un bout à l’autre de la création, ces deux forces travaillent côte à côte. Lorsque vous trouvez l’une, vous trouvez l’autre aussi. L’une est égoïsme, l’autre altruisme. L’une est acquisition, l’autre renoncement. L’une prend, l’autre donne.

(...) Y a-t-il quelqu’un qui pourrait nier que cet amour, ce “non-moi”, cette renonciation est le seul pouvoir positif dans le monde ? L’autre n’est qu’une utilisation mal dirigée du pouvoir de l’amour (...) Un homme qui en assassine un autre a peut-être été poussé à cet acte par l’amour qu’il porte à son propre enfant. Son amour s’est limité à un petit enfant et des millions d’autres êtres qui peuplent l’univers en ont été exclus. Pourtant qu’il soit limité ou qu’il ne le soit pas, c’est toujours le même amour.” (VIVEKANANDA 1972 : 352-353)

**-47- (p 93) :**

“(...) sucede que, según una de las más elementales reglas de la lógica que ya hemos mencionado, las conclusiones fundamentadas no pueden resultar más “fuertes” que las premisas fundantes ; por lo tanto, de una serie de afirmaciones acerca de la mera imanancia - y por consiguiente, no absolutas - no pueden seguirse afirmaciones acerca de derechos absolutos.” (MASSINI-CORREAS 1991 : 268-269)

**-48- (p 93-94) :**

“(…) las bases antropológicas de las más corrientes fundamentaciones de los “derechos humanos”, no son las más adecuadas para justificarlos racionalmente ; hay una evidente contradicción entre unas teorías acerca del hombre eminentemente materialistas, fenomenistas o empiristas y la afirmación de que ese hombre tiene una especial “dignidad”, que lo hace titular de “derechos” inalienables de los que puede disponer con libertad.” (MASSINI-CORREAS 1991 : 267-268)

**-49- (p 97) :**

“Pour vivre, notre moi doit se soumettre à une croissance et un changement continuel de sa forme, ce que l’on pourrait appeler une mort continue et une vie continue qui se poursuivent parallèlement. (...) Ainsi la transformation embrasse à la fois changement et stabilité, pluralité et unité, mouvement et constance. Elle a la nature de la vie, c’est-à-dire qu’elle relie organiquement les pôles opposés, pierres d’achoppement de la logique, et qu’elle les réunit dans un rythme qui embrasse le tout. (...)

La trop grande importance attribuée à l’unité est une faute aussi grave que la trop grande importance attribuée à la dualité ou à la pluralité. Si nous concevons la dualité comme une opposition inconciliable entre deux principes indépendants qui s’excluent mutuellement et non comme la polarité nécessaire entre deux aspects mutuellement complémentaires de la réalité ou d’une unité supérieure - ou si nous nous attachons seulement à un côté, en excluant ou en niant complètement l’autre - nous sommes vraiment en proie à une sérieuse illusion. Si nous essayons de nier le fait de la polarité (en imaginant que la réalité consiste uniquement en l’unité), nous ne faisons que fermer les yeux à la réalité la plus évidente. (...)

Tout comme dans un orchestre chaque instrument joue sa propre partition mais trouve son accomplissement, sa réalisation suprême dans la coordination parfaite de tous les instruments et les rapports harmonieux entre eux, chaque conscience individuelle trouve son accomplissement dans un rapport parfait avec l’univers en toute sa variété de formes de vie et de forces individuelles, rapport qui ne permet ni immobilité ni stagnation.

Mais seul qui connaît l’ensemble de la partition peut jouer son rôle à la perfection. Cela signifie qu’à moins de parvenir à l’état d’illumination où de conscience universelle (...), à moins d’atteindre cet état ultime nous ne pouvons pas trouver notre accomplissement suprême.” (GOVINDA 1993 : 184-185, 210-211 and 231)

## **CHAPTER VI**

**-50- (p 103) :**

“La vérité est une médaille dont un côté est l’amour et l’autre la sagesse. Si vous cherchez la vérité indépendamment de l’amour et de la sagesse, vous ne la trouverez pas. Mais dès que vous possédez l’amour et la sagesse, que vous cherchiez ou non la vérité, vous la possédez aussi.” (AIVANHOV 1970 : 222)

**-51- (p 103) :**

“Ce qu’il nous faut maintenant, c’est combiner le cœur le plus grand et l’intelligence la plus haute, l’amour infini et le savoir infini. Le védântiste ne donne pas à Dieu d’autres attributs que ces trois-ci : Il est Existence Infinie, Connaissance Infinie et Béatitude Infinie, et le védântiste considère que ces trois ne font qu’Un. L’existence sans la connaissance et sans l’amour ne saurait être ; la connaissance sans l’amour et l’amour sans la connaissance ne sauraient exister. Ce que nous voulons, c’est l’harmonie de l’Existence, de la Connaissance et de la Béatitude Infinies. C’est cela notre but.” (VIVEKANANDA 1972 : 114)

**-52- (p 103) :**

“Une paix profonde et sans limite, tel est l’Enseignement que j’ai trouvé.” (le BOUDDHA dans TRUNGPA 1981 : 31)

**-53- (p 103) :**

“La paix est toujours présente. Vous n’avez qu’à écarter les obstacles qui la troublent. Cette paix, c’est le Soi.” (MAHARSHI 1993 : 416)

### *CONCLUSION*

**-54- (p 110-111)**

“Dès aujourd’hui, vous pouvez préparer votre avenir. Par le désir, par la pensée, par la prière, par l’imagination, vous choisissez la meilleure orientation, afin de vous manifester un jour comme des êtres de paix, de bonté, de lumière. Mais surtout, une fois cette orientation choisie, tâchez de vous y tenir. Apprenez à canaliser toutes vos énergies et à les orienter vers ce monde de l’harmonie et de l’amour. Même si quelques ombres apparaissent de temps en temps, cela ne durera pas : dans la mesure où vous maintenez intérieurement la bonne orientation, il arrivera un jour où vous ne dévierez plus. Voilà l’essentiel, et moi je ne m’occupe que de l’essentiel (...)

Quoi qu’il arrive, continuez à construire votre avenir, ne vous découragez pas : vos souffrances, vos épreuves ne vous apparaîtront bientôt que comme les vagues d’une tempête au-dessus desquelles vous planez. S’il vous arrive de vous sentir écrasé par les épreuves, c’est que vous n’avez pas su garder une échappée sur votre avenir lumineux. Votre horizon est bouché, mais il est bouché parce que c’est vous qui l’avez bouché, et il ne tient qu’à vous d’ouvrir une fenêtre pour voir le soleil.” (AIVANHOV 1997 : 270-271)

**-55- (p 111) :**

“L’arc-en-ciel doit sa beauté aux tons variés de ses couleurs. De même, nous considérons les voix des divers croyants qui s’élèvent de tous les points de la terre comme une symphonie de louanges à l’adresse de Dieu qui ne peut être qu’Unique.

Nous déplorons amèrement la méprise de certains religieux (...) qui les amène souvent à rejeter comme discordant l’hymne de leur voisin. Pour lutter contre cette tendance, frère en Dieu, quelle que soit la religion ou la congrégation à laquelle tu es affilié, médite longuement sur ce verset<sup>57</sup> :

“La création des cieux et de la terre,  
la diversité de vos langues et de vos couleurs  
sont autant de merveilles pour ceux qui réfléchissent.”

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<sup>57</sup> Coran XXX, 22

(BOKAR cité dans BA 1994 : 145-146)

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