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Rationalities and Legal Processes in Africa

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About the encounter . . .

Taking together place, time and manner, it would be possible to describe the encounter as comprising at least six modes: fragility, temporality, activity, integrity, causality and disparity.

1. Whether it is a collision or a harmonious synthesis, the encounter consists of a rather *fragile* balance, since two realities (culture, or form of rationality) in contact will never be arithmetically proportionate; asymmetry is a necessary part of the encounter with the other, as Lévinas would say. Hence that fragility, which is indeed the expression of the encounter as a place and moment of instability and thus reversibility.

2. The fragility inherent in the encounter is associated with *temporality*. The time of the encounter mobilizes expectation, tension and retention[1] at the same time: expectation of the unknown, tension between going towards it or resisting it, and holding back at the very moment when the need for giving (giving to others and giving oneself) is at its strongest.

3. And so during the encounter an entire activity takes place: the encounter is deliberate or provoked. Within this activity are the *structural element* (an encounter may be imposed by the socio-politico-economic structures), the *intentional touch* (the encounter is desired or not) and the *trick of unpredictability* (the encounter happens all the same, belying our predictions and those of the structures surrounding us).

4. The encounter also raises the issue of form, which itself refers to that of *integration* and *integrity* when two or several realities meet and merge. When the forms interweave one with another, what will be their eventual form and what is the fate of their original forms (disappearance or transformation)?

5. The encounter, insofar as it is destined to take place in the history of our human condition, insofar as it sets out to be an event, often reveals or conceals the *causality regime* it belongs to. What determinisms do certain types of encounter belong to?

6. Finally the encounter is a confrontation that expresses the existing division and

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disparity between the parties being combined. The joining together implied by the encounter is possible only because there is division and disparity of the elements at the base. The encounter is the site of tenuous relations that resist reductions. An encounter is not a *bivocal/ univocal* relationship between realities, it expresses neither their complete integration nor their integrity.

. . . between rationalities . . .

How does one recognize a rationality? From the way it sets out its modes of effectiveness, you might reply. A rationality is the ordering in a discourse, representation or practice that gives logic to both processes and results. If we stop at that point the reply seems very general and vague. And it is precisely in that vagueness that we may have to look for the sense of rationality. It assumes several meanings, the widest of which makes it generally *co-extensive with the term culture*. 'The meeting of rationalities' would in this sense mean 'the encounter between cultures or the forms of expression of civilizations'. 'Rationality' can also have the sense of its *practical activity and explanatory logic*; at this level the 'meeting of rationalities' would imply the various executive and explanatory modes of different practices either within a particular culture or between different cultures. If we look at the etymological domain, Rationality is associated with Reason – and we do not know whether that is a reality or an explanatory montage to account for certain behaviours! – which itself leads us to problems of *constitution*, *basis* and *use*. *What does a 'rationality' comprise?* If it is composed of practices, they are legitimated by narratives. So who decides which are the 'scientific' elements of a narrative and which the mythological fictions? Is mythology therefore part of rationality? At this level of analysis the encounter between rationalities means a 'meeting of narratives' that each has a pragmatic and a fictive element. *What is a rationality based on?* History, which is the site of both violence and cooperation! The historicity of a rationality is also evaluated at the level of the *uses* subjects and communities make of it. But in order for a rationality to be revealed to others it needs a *language* capable of expressing it. Thus the issue of language is inseparable from that of rationality. The latter presupposes intersubjectivity and communication that institute the Subject as a speaking being and an animal that manipulates symbols. This communicability is, as it were, an *a priori* in the exercise of Reason (Habermas). Rationality, insofar as it also claims to be communicative, is 'a hovering cable-car'.[2] Which implies that the 'encounter between rationalities' is a risky exercise in which we have to allow for misunderstanding. In this wavering encounter, how should we judge, if it is the case that we are limited in our respective enunciatory processes by our history and geography?

In places and moments of 'encounter between rationalities' we may need to take into account, even if we do not accept all its consequences, the philosopher MacIntyre's observation that what 'we must now regain is an idea of rational investigation embodied by a tradition and according to which the very criteria for a rational justification emerge from a history they are part of and they are justified by the way they transcend its limits'.[3] So is the encounter between rationalities not a meeting of competing traditions? The fact that there is no *rationality* other than a

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narrative one – every kind of rationality is embodied in a narrative – indicates that rationalities as an *ordering* of knowledge and practices appear first as *representing* and *narrating* the function of institutions. Here it is the *issue of institutions* that will provide the context for the question of the encounter between types of *legal rationality* in Africa: how should the law be instituted? How should we experience and represent normative systems when each one within its field of definition and determination tries to impose itself by 'communicating by way of enigmas, silent demonstrations that force our hand'?[4] What happens when those normative systems that 'combine' within a particular history attempt to combine with other systems?

The encounter between legal rationalities in Africa

How should we approach these rationalities? Through usage, observing how a culture's legal *processes* are built up by changing others? Focusing on processes has the unfortunate habit of making us think the problem of the law is bureaucratic and rational; and so it ignores the actors in this area. Should we stress the *actors* and especially the way people who come before the courts perceive the cross-fertilization of legal rationalities and practices in Africa? If we stop there, we would give the impression that legal rationalities are purely structural systems and conceal the fact that legal *phantasms* play on guilt, taboo, genealogy, transmission and symbolism. How do these different elements build up when normative formulations enter into competition with one another in Africa? To give a partial answer to this question I shall take not two extreme paths – one that bases law on problems of the unconscious and one that situates it at the purely rational level – but the path that consists in interrogating legal systems in their threefold aspect, which Timsit defines so admirably: predetermination, codetermination and overdetermination.[5] 'The before-saying law' (Carbonnier), the embodiment of predetermination, is as important as the text, processes and social consequences of law. Thinking about the encounter between legal rationalities leads one to say, after analysis, that the creation of the law is a multidirectional phenomenon which neither state nor civil society nor custom can monopolize in Africa. Thinking about *identities* provides the context for the encounter between rationalities, since when we reflect on this encounter, we in fact assume two *identities* coming into contact. But what if we were to abandon that paradigm of *identity* to think again about *traversing*, that is, interfaces, shifting environments, transitions and transformations of the law in Africa? Three themes will claim our attention: first, the *ethos of the judge* (i), which then leads us to the *division between form and content of the legal act* (ii) and finally the distinction in the *figure of the Third Party*, torn between conciliator and arbitrator (iii). The issue of the judge's *ethos* relates to the judicial actors' *perception*, interrogation of the judicial act is connected to *process*, and examination of the ambiguity of the Third Party figure falls within the domain of *anthropology*. Our suggestion is that the law exists in Africa today only in the tension between old and new and between imposition and negotiation. The question at issue is the *possibility of thinking 'between-two-realities'*.

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Judge and ethos: the judge's symbolic effectiveness and its failure

In Africa traditional judges used to have at least two skills: first the *linguistic competence* by which, through the interplay of the to-and-fro of speech between a pronouncing party and a receiving one, the *figurative frame of the speakers* is constituted in the speaking space that is the trial; then the *figurative skill* by which judges, those appearing before them and the other members of the jury panel *all construct at their own level an image of themselves* in the discourse of the law and *an image of others*. Two problems arise: first of all, the place of subjectivity in the judge's discourse, then the impact of the effectiveness of this discourse on those appearing before the court. To answer these questions we may need to look at the interaction ritual that structures the linguistic interchange between speech users during the trial. How do people move from *interlocution* to *interaction*? 'Speaking is exchanging, and it is changing through exchanging . . . As any communicative exchange unfolds, the various participants, whom we shall therefore call interactors, bring a network of mutual influences to bear on one another.'[6] How does the judge's 'face' appear in the interaction at a trial in Africa; in other words, how is the interplay of *figuration* played out? We should explain that here the '*face*' means 'the totality of the valorizing images that one attempts during the interaction to construct of oneself and impose on others'.[7] In the traditional trial the judge used to bring his *ethos* to bear, which is no longer the case with judges in postcolonial states. Defined interactively, *ethos* is, as Barthes says, 'the character traits that orators must show their audience (regardless of their sincerity) in order to make a good impression: they are their *airs*, the orator articulates a piece of information and at the same time says: I am this, I am not that.'[8] If we go back to Aristotle, *ethos* as compared to pathos 'is almost the most important of proofs'.[9] Why is this? Quite simply because *ethos* in Aristotle implies two orientations: a moral sense based on the notion of honesty (*epiéikeia*), encapsulating attitudes and virtues such as honesty, propriety and equity; and an objective sense (*héxis*), which includes habits, behaviour, customs and character. For traditional judges to be credible in African societies they had to show their *ethos* in speaking the norm, in other words both honesty in content and especially uprightness framing their words. In this way traditional law produces an effectiveness that present-day positive law no longer has. In their relation to articulating the law judges most often seem just to stick to technicalities without getting involved in 'speaking the law'. They are merely interpreters who try as far as possible to make facts come into line with the law. The judge is 'only the mouth that speaks the words of the law'.[10]

Ignoring the judge's *ethos* obeys a kind of syllogistic strategy among judges in present-day courts in Africa. What is at issue here is the problem of the legal definition of facts. The letter of the law must be applied; in other words the case we have before us must follow the norm that pre-exists it. And so, with this in mind, judges would simply repeat, reiterate the text of the law to be applied. Their judgment must not depart or be different from the legal text. The relationship between the norm articulated and the verdict announced must be one of transparency; here the judgment re-produces the law. From the methodological viewpoint this path followed by the judge is subject to a dualist metaphysics. 'The text of the law represents the norm . . . the verdict is always pre-judged already in the norm for which the (legal) text that

represents it is given. There is a continuity that runs from the (invisible) norm . . . and ends in the decision that applies, expresses the norm . . . in this process the judge is merely an effectively inanimate being . . . the judge's pre-judgment would distort the pre-judgment of the case in the law . . . the verdict occurs at the junction between the perceptible world and the intelligible world. In this model the verdict is inscribed in the dualist structure of metaphysics.'[11]

Application of the law and nothing but the law, this is the guarantee of objectivity. An interpretation that departs too far from the norm seems dishonest. 'In justice the danger lies in straying away in language.'[12] In this enterprise judges must never express their *ethos* as was the case with traditional judges. Present-day judges in an African lower or appeal court are not asked to make a good impression, combine self-presentation with precision of speech and honesty of character, they are expected to *interpret the text* and restrict themselves to that intellectual operation that will make the text become meaning. On one hand we have a verdict influenced by the *judge's ethos*, and on the other a verdict constructed by the *judge's technical competence*. In Africa the so-called customary courts that were established during the colonial period threw out the dimension of *ethos* that was in some sense the basis for the relationship of trust between Subjects and justice. Who is the judge who does not display his *narrative identity*? What narratives does his discourse stem from? What founding taboos and original phantasms does his legal text express? Through the writing of the law is phantasmically played out the dramatization of the establishing operation. How in Africa did the technical nature of the legal written text provide – in an environment of orality – another way of conceiving the establishing act? How, via the law, are these various theatralities constructed? In Africa the body of modern law remains quite silent about the various ways it was put together. It appears to have fallen from the colonial sky almost fully formed. European colonization in Africa concealed the progressive character of every legal system that is both 'imposed and negotiated'.[13] How have the various codes that constitute the African states manoeuvred so as to appear almost perfect while remaining silent on the *enunciatory theatre*, the *enunciation ritual* and the initiating violence that presided over their advent? How does any codification of a norm arrange both *dramatization* and *textualization*? How should we evaluate fairly the fact that the different bodies representing the texts of legal discourses are collages; a collage of customs with myths, a collage of phantasms with fears and a collage of the taboo with the acceptable? '*Corpus juris*, the body of law, body of doctrine, etc., these formulae . . . indicate the relative simplicity of the mode of social regulation that is known as *establishing*. Establishing institutions means manufacturing written collage . . .'.[14]

The issue of the judges' *ethos*, insofar as they stage the presentation of themselves (their body), character and language, brings us to the scientifico-administrative technocracy that sometimes takes hold of the law in Africa. A law that, through denial after denial, conceals its strange relationship both with myths (which it does not consider it represents) and with the bureaucratic rationality it claims to regulate. 'It is easy to see, in all the places where modern management is effectively implemented, that it works to produce a series of written documents where the subject is absent. In these places everyone takes the necessary precautions never to be suspected of being identified with what they write. Keeping your distance, as far away

as possible, that is the rule . . .'.[15] The postcolonial state, which operates *in the name of the law*, and civil society, which appeals *in the name of the law*, get along fine with this idea of a legal system that has become textually a mechanism with a language which is all the more bombastic for being sometimes complex. A language that is cleverly maintained by a few legal experts, who have become a priestly caste in Africa and a substitute body for totems. Love of procedure, proliferation of committees, inflation of 'decisions at the top' and repetition of checks are all practices that, by appealing to efficiency and 'rapid study of files in the interest of plaintiffs', make us forget that wrenching legal texts out of the imaginative source that nourishes them results in their being simply 'management doctrine, clinging fanatically to the government's beliefs'.[16]

The relationship of the law to *the image of the self*, the continually repeated production of the place of the confrontation, the maintenance of the scene of speech where what the law says meets both the old and the new, the same and the other, raise the problem of the 'space-between'; how to produce and interpret the legal text in Africa knowing that it is a 'space-between'? If we wish to restrict it to the justification that the lawmakers give for it, that the legal text indicates it is already an allusive variation, if we wish to reduce it to what is called the 'traditional core of the law' composed of nomogonic and etiological myths, it already eludes us and shows us that it remains first and foremost a rational construction. Through the judge's *ethos* we need to examine the production of subjectivity and the status of the image in African legal space.

When in Africa judges – according to jurisdictions – use their *ethos* (in the traditional courts that exist alongside the state courts) or, *a contrario*, use *technical expertise* on the hermeneutic level (by involving the self in the decision they make), what is at issue – and by that very fact relates to this encounter between rationalities – is the production of *legal subjectivity*. What is a Subject in law when it is an *intermediate subject*? The Subject in law, that autonomous entity that in a democratic space is subject to the law it has given itself, is in fact a Subject implicated in the tension between the *speaking-the-law* associated with *ethos* and another speech that refers to technical expertise. How to make a Subject emerge from that tension? How should the Subject in law be thought of, no longer within the certainty of constitutions (fundamental laws) but in the uncertainty of tension?

As far as image is concerned, traditional judges most often started from confusion (they worked in a space which did not separate legislative, executive and judiciary), whereas African judges, who have studied western law, set out from a *division* (executive, legislative and judiciary). The image of the judge in Africa today emerges from a contradictory background (both confusion and separation of spheres). This contradictory model of the judge's image has gradually become predominant since the colonial period. Except in societies that have a strong central power, other African societies with lineage structures bring together in a single person the power to judge and political authority. But with colonization two kinds of dualism were introduced: the first is associated with traditional jurisdictions and professional magistrates, and the second embedded in African societies the institution of traditional judges turned civil servants. 'The dualism that existed in African countries throughout the colonial period as regards the structures of jurisdictions also existed

in relation to their composition. Schematically it could be said that the main legal order was characterized by the professionalism of judges and the separation of administrative and judicial functions, whereas the opposite was true of indigenous jurisdictions.'[17] But within traditional power, colonial administration was turning traditional judges into administrators. A manual of French colonial legislation states that 'we are counselled by both logic and experience to use natives to assist our domination . . . that is the best way to get people and their natural leaders to support us in the common task of material and moral development which we are pursuing in the colonies . . . In French West and Equatorial Africa the native leaders, from the most to the least important, are our assistants and receive in some cases fixed honoraria and in others rebates on their personal taxes . . .'.[18]

The consequence of thus bringing some traditional leaders into the colonial judicial apparatus was on one hand the presence in the same judicial space of *magistrate-judges* and *non-magistrate judges* (a first dualism) and on the other hand the presence in the village space of the *traditional judge* with authority and the *non-magistrate judge appointed by the administration* (a second dualism). Among the Mossi, on a limited scale, the *bud'Kasma*, who is the eldest, and judge of a segment of agnatic lineage, had complete power over those in his *budu* (segment of patrilineage); after colonization the *bud'Kasma* was assisted by the *Kombere*, who was the chief of the locality appointed by the administration. 'The *bud'Kasma* lost his particular penal powers, except the right to pronounce banishment of the *budu* who had committed repeat theft . . . it seems that the death penalty could be pronounced only by the *Kombere* and carried out by his men.'[19] But after independence African states reduced or changed these courts presided over by non-magistrates. 'Because of the general movement of integration that was taking place within the judicial apparatus in most states, non-specialized personnel was to decrease substantially in jurisdictions.'[20]

This transformation and fragmentation of the judge's image encouraged people to rethink the relationship between image and the law. With this fragmentation of the *judge's image*, *what was left* of the representation of the judge in the minds of those who appear before him? Image always leaves something behind, so what has happened to *what remains* of the perception of the law after the encounter between western legal systems and traditional African ones? What is the image of the law in postcolonial states? The image is both a *trace that preserves* and also *what establishes* something different; how, in the encounter between judicial rationalities, can one both *preserve* and *establish*?

Abstraction of form and downgrading of content: misunderstanding of 'technical irregularity'

Where western judicial rationalities (particularly the Latin tradition) emphasize the form of the act, African legal systems pay more attention to content. After the warning (*mbémé*) in a traditional trial among the Beti of Cameroon, the charge (*sòman*) and the appearance (*nkat*) attend to the substance of the case. Why this stress on content over form? Quite simply because the opprobrium and offence do not harm one person alone but also 'sully the earth', poison the air we breathe and compromise the

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ethical pact with the ancestors. The content of the offence is more important than the manner, which is why the vindicatory system used to follow a certain order and did not tolerate private revenge.

Let us look at a few examples of penal customs from Chad, most of which, we should remember, have connections with Muslim law. Among the Masalit a deliberate wounding 'which does not result in inability to work does not give the victim any right to compensation'.[21] The case of woundings that give the right to claim incapacity for work confers a 'right to compensation set by the village Djemaa'.[22] In pre-Koranic custom a wounding resulting in 'loss of both testicles was worth two cows, loss of a single testicle – one cow, loss of both eyes – two cows, loss of one eye – one cow, . . . loss of a hand (or foot) – one cow, loss of a finger – a heifer . . .'.[23] For the rape, for instance, of a 'married woman, payment of compensation of a cow to the victim's husband . . . of a girl payment of compensation to the girl's father; the rate was set at half the dowry. In this case if the seducer was accepted as husband, he would have to pay the normal dowry on top of the compensation as set out above.'[24] When compensation is decided upon, traditional judges consider the seriousness of the act in its materiality and not the process of the rapist's arrest. However, in the procedure according to western judicial rationality, the rapist would have been arrested, he would have been brought before the court, there would have been questioning while he was in custody. This period of custody had to conform to certain rules that are part of what is called 'drawing up the dossier'. Here the time element is very important. A period of custody that goes beyond the regulation time can lead to the simple release of the prisoner. He will be released because of a '*technical irregularity*', in other words, the *form of the charge* determines the content. How could a Masalit from Chad understand that someone who has cut off his hand should be released simply because he was held for longer than the period of time allowed? How could he understand that kind of rationality that always separates *form* from *content* and is the result of both idealist philosophy and judicial positivism, as understood by the Austrian philosopher and jurist Kelsen?

Without going back as far as Aristotle, who in his theory of causality distinguishes efficient cause, material cause, formal cause and final cause, let us pause at Kant. In the classification of an act's morality, he emphasizes the fact that an act is moral if the *form of the act*, that is, the intention, is moral. For example, an accountant who does not steal for fear of the supervisor and prison is not then performing a moral act by not stealing. Only someone who refrains from stealing out of duty, in other words, someone whose act is intentionally good, where the *form of the act* coincides with duty, performs a moral act. We know Hegel criticized this separation of form from content as an abstraction – form being a moment in the development of content – but we can look for the origin of this distinction in the dualisms that come down from Plato, with his distinction between a formal intelligible world and an ephemeral unreliable world of the senses. The latter only drew its solidity from the former; in other words, for Plato *the forms of things* (their ideas) are more important and determine *the content* of things. Today this rampant Platonism still conditions the various codes of civil and penal procedure in Africa. It is a form of abstract judicial rationality where the form of the act – and thus the bureaucracy that establishes it – becomes the driver of justice.

On the epistemological level this *emphasis on form* is a translation of the judicial philosophy of Hans Kelsen, who to a greater or lesser extent influenced French-speaking African jurists raised 'in a Romano-Germanist tradition'. In Kelsen's view the law is defined as a collection of norms and institutions and is external to the social reality it is intended to regulate; consequently judicial science is itself external to the law it aims to study. In order to do so we have to place the content of the norms between brackets and only study their formal aspect. Legal theory has to be purified of foreign elements like psychology, sociology, ethics and political theory.[25] In distinguishing the law as a collection of legal norms (*Rechtsnormen*) from the science of law, which expresses the law's propositions (*Rechtssätze*), Kelsen goes on to make another distinction between the 'function of the will', with which law is associated, and the 'function of truth', to which the science of law refers. Kelsen gives more emphasis to the function of knowledge and the law's formal aspect than to its content as such. This move, together with the fact that for Kelsen there is no true law except where there is a state, harks back implicitly to Kant. 'And so Kelsen transposes to the legal domain Kant's famous distinction between form and content.'[26] What interests us is this emphasis given to the form of acts, doctrines and epistemological approaches.

Reconciling and arbitrating: two images of the 'Third Party'

Conflict is the site where we discover how the social bond is coming apart. It is not only the site that is at issue but also the ability to judge. Tying, untying and judging make us think of the position of the Third Party. There it is a question either of compensating the person who has suffered the wrong or of repairing the bond. *Compensating* and *repairing* correspond to two quite distinct regimes, which are implicitly connected to very different forms of justice. Compensation refers to *the past* and its link with *the present*. Compensation estimates the damage suffered by one of the opposing parties, recalls it and puts an end to the grief or suffering. Here the relationship to time is two-dimensional, it is about focusing on the present in evaluating the relation between wrong and compensation and finding a *position of equivalence*. On the other hand reconciliation has a threefold link with time: a reminder of what took place (the wrong suffered), concern with the present and a project of hope and patching up the broken bond. After compensation, which more often than not is an arithmetical relationship putting a final end to the dispute, reparation is there to allow the group to survive after the trauma of conflict.[27] Whereas, on the side of compensation, there is a struggle for *symmetry in the idea of a distributive justice*, with reparation it is *asymmetry* that reigns; the essential thing is neither in the number of objects brought into reparation, nor their importance, but the *action* and *initiative* of the subject who caused the damage. What is crucial lies in the rehabilitation of the other. Thus reparation is conjured out of anything, often the object symbolizing reparation is trifling compared with the wrong done. Western justice as it has been applied in Africa has fashioned a new image of the 'Third Party'. In it the *Third Party* is today the one who decides the dispute without demanding both compensation and reparation. The antagonism between a judges'

justice that *arbitrates* and a non-judges' justice that *reconciles* reminds us nowadays of the great challenge facing justice in Africa, because reconciliation and arbitration conform to different judicial philosophies and in particular different anthropologies. On one hand a distributive justice that is not really concerned with rehabilitation when it punishes, and on the other hand a justice that each time rehabilitates the subject by getting him to understand that he is greater than his unfortunate act. On one side the stress on *equality* and on the other on honour: that seems to be the opposition in Africa between the justice that arbitrates and the one that reconciles.

Nowadays there is a kind of return to reconciliation in western societies. The French legal philosopher Bruno Oppetit, a specialist in codification, notes that there 'has developed in the last few years, and not only in France, a very keen enthusiasm for spreading [alternative modes of resolving disputes, and particularly] extra-judicial conciliation. The disaffection on the part of the public as regards the state apparatus of justice may proceed . . . from the same reaction of rejection as the one that the social body manifests towards what is here called legislative inflation. . . . This trend has found its expression in the institutionalization of conciliators . . . whose task is "to facilitate the amicable resolution of disputes outside any judicial process".'[28] This return to conciliation is theoretically based on the reconsideration of the concept of equity: first by the very mobile character of cases in dispute, then and on a practical level by new state interventions which give rise to a 'legislative inflation'.

Conciliation revives a conception of *the just as the equitable* and not just *the legal*. It was Aristotle who long ago reminded us that 'the equitable, while it is just, is not the just according to the law but a corrective to legal justice. The reason . . . for this is that the law is always something general, and there are specific cases for which it is not possible to lay down a general statement that applies to them with rectitude.'[29] Thus equity is a corrective for the law when its generality does not include a solution for a specific case, hence the need for modes of conciliation not provided for by the law. Portalis, the editor of the French *Code civil* in 1804, took the same view and said that a 'code, however comprehensive it might appear, is no sooner completed that any number of questions occur to the judge, since once the laws are written they remain as they were drafted; but people never rest . . . and this ceaseless movement . . . produces . . . some new combination . . .'.[30] The mobility of human reality escapes the constructions of the code, which is why it is important nowadays to produce an alternative mode of dispensing justice in Africa.

Finally the form of postcolonial state justifies this urgent need for conciliation. When the state wishes to intervene in all areas of the social order by issuing legal regulations (for example legislators frame rules designed to protect consumers and regulate the behaviour of drivers), this 'legislative inflation' ('orgy of law-making') leads us to seek alternative modes[31] of making law. In general this is what international commercial law does: 'being friend[s] of the concrete and the particular, they [those who operate international commercial law] have always wanted to escape from general state provisions and submit their disputes to examination case by case by an arbiter or conciliator . . .'.[32] On the strictly philosophical level, Paul Ricoeur seems to come back to this idea of a justice that restores the social bond. For him the act of judging (in the legal sense of the word) consists of arbitrating,[33] but the

short-term aim is to decide the dispute in order to put an end to the uncertainty caused by the conflict. In the long term 'the ultimate aim of the act of judging . . . the horizon of the act of judging, is finally more than certainty, it is social peace'.[34] This is what takes us back to the conflict between a *distributive rationality*, which talks of compensation, equal shares and is the result of a society of distribution, and a *cooperative rationality*, which stresses reparation and a social peace that is not based on distribution alone but, as Ricoeur says, on 'recognition'.[35] This is why honour and reputation (*fama*) were more important than arithmetical equality in the development of traditional African law.

Rationality between time and hope: the issue of space-between

What is the goal of the encounter between rationalities? To bring humanity together in a common hope? If that is the objective, hopes will turn to despair, for a common hope to which the various kinds of rationality must submit would lead to a sort of dictatorship of hope. For the meeting of rationalities it is rather a matter of interrogating socio-politico-religious structures to discover how systems of meaning are built up. In other words how codes find representations that organize the subject's and communities' action, and how, in a world with different rationalities, *structures, meanings* and *processes* intertwine to give each type of rationality that mobility and uncertainty that will determine its logical form, programme and systems of intelligibility. To evaluate these rationalities, which are mobile (they circulate) and tactile (they touch something else), we need to return to the 'space-between'. How should we – accustomed as we are to thought that identifies, that assigns predicates to each type of rationality – conceive of what 'space-between realities' is? How should we read those in-between texts that require of our eyes attention and a particular training? The space-between assumes three ideas: 'the paradigm (of the) interval . . . interaction (and) inversion'.[36] The issue is to know how to rethink the *interval* in that it is what brings together but separates. What is an *interval* in the transcription of the law in Africa? In the area of activity, what is *interaction*? Applied to law in Africa, how have interactions, on the twofold level of handing down and reception of law, occurred in Africa? As for *inversion*, how do changes in stance and permutations of positions take place in an encounter? How does one 'cobble together' (Lévi-Strauss's phrase) meaning when there is a conflict of norms? What is the judicial norm in the final analysis and why?

To think this mobility at least two conditions must be fulfilled: (a) *evaluation of time*; (b) critique of a '*form of bivocal/univocal alterity*'. Since we do not have a single model for the future, the requirement for the 'meeting of rationalities' obliges us to think in future time. Thinking the future would mean 'seizing favourable opportunities' and 'propitious moments' (Kairos): 'let us risk that derision . . . and what if "seizing the moment" today meant "taking one's time"? And what if, in an environment of speeding up and radical change, the true alternative was the ability to go slowly?',[37] 'opposing the tyranny of urgency and the culture of impatience, we must take our time and especially think of the time and moment for the encounter in the "dissonance of times",'[38] and not the 'consonance of times', which we are

invited to strive for by globalization, that system which is entirely without love and humour.

Finally we need to reflect on what I call the practice of 'bivocal/univocal alterity', which is a form of monotheism. Bivocal/univocal alterity is the frame for the discourse about the encounter of Africans and students of Africa. When people use the expression 'the Other' in Africa, they often mean westerner! For over 45 years the writings of African philosophers on 'the Other' just conjure up the figure of the West (either to criticize or to praise it) or at best monotheisms such as Islam. The struggle of philosophers, the meaning of their action, their hatreds and loves, their dreams, their model of humanity and their picture of freedom can be conceived of only in a *bivocal/univocal* context (West>Africa>West). For them the 'meeting of rationalities' of course becomes the encounter with the West. When *the sacred merges with the divine* into *the One*, that is called monotheism, and when the African merges with *alterity* into *the One*, into a single figure (the West), it replays in a roundabout way the game of monotheism; it practises a 'secularized monotheism'. This marking of the African consciousness shows how far our narratives on the encounter between rationalities are masked by this *misrecognition* of a 'secularized monotheism' that works on the underlying thread of our options. What have we done in this paper? Study the relations between African and Japanese legal systems? Work on deliberation among the Maya and the Beti? Assess what a confession is for a Papuan and a Breton? Not at all! We have subscribed to the 'secularized monotheism' by working on the relations between the West and Africa in order to focus attention on the fact that Africans who ask questions about the encounter between rationalities are 'bogged down in stories',[39] complicated stories, among them this particular type of monotheism.

Jean-Godefroy Bidima
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Notes

1. Here 'retention' does not have the meaning Husserl gives it when he defines it as that time that is not yet of the order of the past but has just been the present. He distinguishes it from *protension* which designates what is immediately to come, whose presence is already on the horizon.
2. Jürgen Habermas, *La Pensée postmétaphysique* (1993: 184).
3. Alasdair MacIntyre, *Quelle justice? Quelle rationalité?* (1993: 8).
4. Pierre Legendre, *L'Empire de la vérité* (1983: 104).
5. G. Timsit, *Les Noms de la loi* (1991).
6. Kerbrat Orecchioni, *Les interactions verbales* (1990: 17).
7. *Idem,* 'Théorie des faces et analyse conversationnelle', in Orecchioni (1989: 156).
8. R. Barthes, *L'Ancienne Rhétorique, aide mémoire*' (1994: 946).
9. Aristotle, *Rhetoric* I, 1 356a 13, Livre de Poche (1991).
10. Montesquieu, *De l'esprit des lois*, XI, 6, edited by Laurent Versini (1995).
11. Olivier Jouanjan, 'Nommer; Normer' (1999: 105).
12. *Ibid*.
13. Here cf. François Ost, *Du Sinaï au Champ de Mars* (1999a).

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14. Pierre Legendre, *Paroles poétiques échappées du texte* (1982: 73).
15. *Ibid*.
16. *Ibid*.
17. John Glissen and Jacques Vanderlinden, 'L'organisation judiciaire en Afrique noire' (1969: 38).
18. G. François and H. Marriol, *Législation coloniale* (1929: 182).
19. Robert Pageard, *Le Droit privé des Mossi* (1969: 93).
20. M. Jeol, *La Réforme de la justice en Afrique noire* (1963: 105).
21. Claude Durand, *Les Anciennes Coutumes pénales du Tchad* (2002: 100).
22. *Ibid*.
23. *Ibid*., p. 101.
24. *Ibid*., p. 102.
25. Hans Kelsen, *Théorie pure du droit* (1962: 2).
26. Paul Dubouchet, *Le Modèle juridique, droit et herméneutique* (2001: 28).
27. See J.-G. Bidima, *La Palabre, une juridiction de la parole* (1997: 8 *et seq*.).
28. Bruno Oppetit, 'Sur le concept d'arbitrage' (1982: 237).
29. Aristotle, *Nicomachean Ethics*, 113b, 10 & 15, Vrin edition (1994: 267).
30. Portalis (1999: 18–19).
31. Oppetit, however, sees in 'codification' the movement by which we can escape this legislative inflation; see Oppetit's *Essai sur la codification* (1998).
32. Eduardo Silva Romero, *Wittgenstein et la philosophie du droit* (2002: 48).
33. Paul Ricoeur, *Le Juste* (1995: 190).
34. *Ibid*.
35. *Ibid*.
36. M. Van de Kerchove and F. Ost, *Le Droit ou les paradoxes du jeu* (1992: 61).
37. François Ost, *Le Temps du droit* (1999: 29).
38. *Ibid*.
39. See Wilhelm Schapp, *Empêtrés dans des histoires* (1992).

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