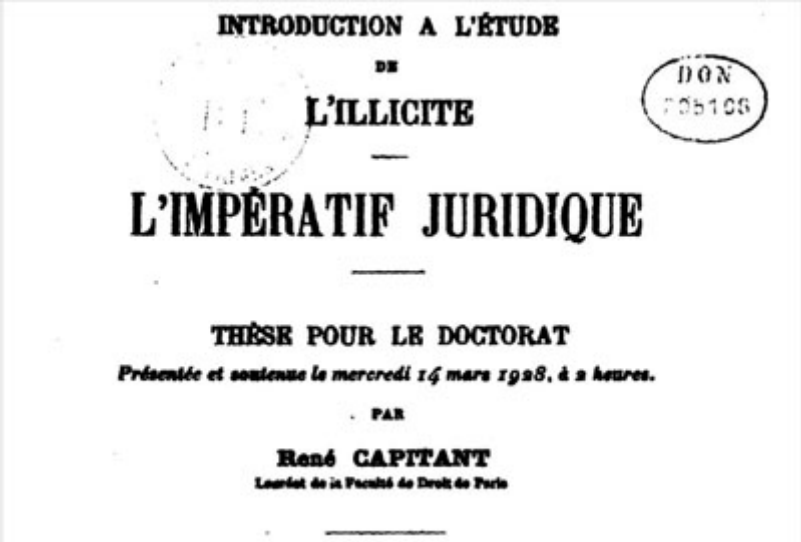
From the “legal war” to the “Roaring twenties” of legal science



INTRODUCTION A L'ÉTUDE

DE

L'ILLICITE

L'IMPÉRATIF JURIDIQUE

THÈSE POUR LE DOCTORAT

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Law was at the heart of the struggle between the Axis and Entente powers. French jurists used all their rhetorical weapons to spread the values of “Latin civilization” in the face of “Teutonic barbarism”. The propaganda of the war of law against force revived hatred and the desire for revenge against an enemy hated as much as it was admired since its victory in 1870, which is attributed to the supposed superiority of German universities. Argument of mobilization of the fighting masses, the legal war was transformed into an ideological opposition between two models with hegemonic pretensions, one valuing “the French genius”, the other the German “*kultur*“. In this confrontation of paroxysmal violence, jurists were on all fronts. Engaged in the trenches or serving at the rear in the administrations at war, the bourgeois elites from the faculties of law did not escape general mobilization. Those exempted also participated in the war effort, pursuing their professions as practitioners, teachers or law theorists. The greatest names among the masters of juridical dogmatics endeavored to convince

the neutral powers of the validity of the French cause. The entire community of jurists was thus engaged on the side of the power against the German invader. Revealing of this confrontation between the German imperial legal model and that of the French Republic, internationally recognized professors of public law such as Duguit, Hauriou or Carré de Malberg elaborated general theories of the State to determine the democratic foundations of State power as opposed to the theories that were elaborated across the Rhine. Duguit, for example, whose main objective was to limit the power of the State by law, was strongly opposed to the German conceptions of self-restraint developed in particular by Jellinek.

Committed to the common front of ideological struggle, academic jurists implicitly admitted a sacred union within their community and tended to abandon the controversies that opposed them, although they were the engine of their "science", to concentrate their attacks against the theories of their enemy colleagues. The professors of German law, who enjoyed great prestige within the Reich, were accused of having supplied the legal weapons of imperialism, of being promoters of force in defiance of all international conventions and of justifying the worst atrocities committed on the soil of the invaded regions. Germanic scholars such as Savigny, Jhering, Mommsen, Gerber, Laband, who had been very influential before the conflict, were vilified and their theories, despite the attraction they had aroused, were unanimously condemned as the instrument of German barbarism. At a time when social Darwinism and the race theory of Spencer and Gobinot were still very much present in the minds of intellectuals, many jurists and legal historians insisted on the violence and vitiated character of the German mentality, like the courses taught by Jacques Flach at the Collège de France between 1914 and 1919. German philosophy was also decried and opposed by French jurists such as Duguit who, in an article entitled *Rousseau*, *Kant* and *Hegel*, established the genealogy of the cult of State omnipotence. Anti-Germanism was so present in opinion that some French jurists, such as Carré de Malberg for example, were under attack from their own colleagues who saw in their conceptions the mark of German influence.

The brutalization of society radically changed the exercise of power and the law suffered the consequences of wartime totalization. Republican legality was transformed under the effect of the state of exception engendered by the conflict. A law of armed conflicts was being developed outside the constitutional framework to deal with the

aggressions of the German army and meet the urgent needs of the civilian and military populations. The unpreparedness of the rulers in the face of a war that lasted beyond any prediction forced the Government and Parliament to abdicate in favor of a military dictatorship in the first months of the conflict.

Restored to office, the Republican executive drastically reduced safeguards against arbitrariness by instituting genuine courts martial. It also tightly controlled the exercise of fundamental freedoms by organizing preventive censorship of the press and prohibiting any public assembly or demonstration. The exercise of power was thus dominated by authoritarianism and empiricism of legal solutions, with the Government making massive use of decree-laws and circulars to organize the administration at war. The Conseil d'Etat (highest administrative court in France), while affirming its role of monitoring the legality of the acts of the administrative authority, admitted the existence of exceptional circumstances justifying breaches of the generally accepted legal principles. With its jurisprudential power in a field where texts are insufficient to provide precise solutions, it supported the State in its role of creating the norm by developing "theories" founding the main principles of administrative law. The admission of unpredictability in public contracts and the recognition of the status of public service for companies pursuing a mission of general interest symbolized this empowerment of the judicial order in the construction of administrative law.

In parallel with the resumption of executive power over the military, war parliamentarism managed to gradually impose itself to control the action of the army and ministers. Postponed during the first months of the conflict, parliamentary sessions resumed in 1915. The deputies, at the same time as they passed numerous laws intended to facilitate the daily life of the populations at war and to restrict the rights of the naturalized natives of enemy countries, organized themselves into secret committees. They then conducted investigations into the reality of the management of state affairs. Judicial scandals of corruption and espionage at the highest levels of government were exploited by political parties against a backdrop of social paranoia. The most resounding resulted in the condemnation of Ministers Malvy and Caillot by the Senate, then serving as a High Court of Justice.

Faced with these upheavals on an unprecedented scale, lawyers, mainly law professors, commented on and analyzed legal developments. Joseph Barthélemy, perhaps the most prolific publicist of the war period, regularly reported on political

events that changed the data of his discipline in the *Revue du droit public*. Albert Wahl, in the *Revue trimestrielle de droit civil*, reported, day after day, the details of the civil laws of war. Jurists of all disciplines were similarly engaged in explaining the developments brought about by the conflict in their respective fields. Criticism of the rulers was not absent from their analyses, Joseph Barthélemy not hesitating to remonstrate against a parliamentarism that he had always repudiated or to note the inconsistencies of censorship.

The period of the Great War was therefore particularly intense for law professors engaged in all contemporary legal issues. Mobilized on the front to fight, engaged in the rear to conduct the propaganda of the legal war, commissioned by the Government to conduct conferences abroad, solicited as technical experts by ministries and international structures, law professors were leading actors in the defense of French legal interests.

After four terrible years, the Armistice was finally signed between the plenipotentiaries, but the traumas and hatred remained deeply rooted in the minds of the rulers and the populations. Despite President Wilson’s 14-point pacifist program, adopted by all the belligerents, France intended to make its enemies pay for human sacrifices and economic losses. The Treaty of Versailles, signed at a ceremony orchestrating the expiation of German delegates, bore the mark of humiliation desired by France. Since Germany could not pay the considerable sums demanded by the victors, the economic and political crises affecting the whole of Europe, international relations remained tense despite the creation of the League of Nations. The victorious powers organized peace by force by occupying the territories of the defeated powers and dividing the colonies and protectorates under their yoke. Despite the continuation of war logic, international lawyers, already very committed to fighting against violations of humanitarian law during the conflict, worked to develop a universal peace, such as Georges Scelle, who sat as an expert delegated by the government to peace conferences. Many societies bringing together international lawyers maintained efforts to strengthen and unify international standards and to advance the idea of a European and global conscience that went beyond sovereignties.

In the aftermath of the conflict, the theoretical controversies of legal doctrine took on particular acuteness. Law, the standard of the civilizing mission led by France, had been radically transformed under the effect of the state of emergency. The traditional

individualistic and legalistic dogmas inherited from the French Revolution and the Napoleonic codes, already shaken at the turn of the 19th and 20th centuries, had collapsed under the effect of arbitrariness, empiricism and the social necessities of wartime. Law definitively rose beyond common codes, in jurisprudence and custom, within groups and institutions, and this phenomenon, already observed and theorized on the eve of the conflict, continued to develop. The executive power emerged strengthened from the war ordeal. The use of decree-laws, regulations and circulars became more democratic and indispensable in the management of the administrative apparatus, all the more accentuating the fragmentation of the sources of law.

The social question, stifled by repression during the conflict, resurfaced with violence in post-war Europe. Exasperated by the difficult living conditions of the post-war period and by the sacrifices demanded of them by governments always imbued with authoritarianism, proletarians of all countries rose up to demand more justice and equality. The communist ideals proclaimed during the Bolshevik revolution of 1917 spread to working class circles. Great strikes broke out everywhere in France and revolutionary communist movements were organized to overthrow the power, like the Spartacus League of the young Weimar Republic. Despite a stifling bloodshed, the demands of the working class were heard by a ruling bourgeoisie that increasingly feared the red peril. Trade unionism made progress, working hours were reduced, social protection was improved and workers' delegates succeeded in establishing themselves in international peace conferences. An international labor organization was created under the aegis of the League of Nations to disseminate a new social model, protect the interests of workers and work for the sustainability of social gains. The lawyers of industrial legislation, the ancestor of labor law, became the pegs of the movement of socialization of law. In France, a progressive nebula in Lyon composed of teachers such as Emmanuel Lévy or Paul Pic gathered around socialist figures such as Édouard Herriot and Albert Thomas to work on improving the living conditions of the disadvantaged classes.

Faced with this increased complexity of social and legal phenomena, doctrine, this community of legal thinkers and theorists, had to rethink its methods while seeking the foundations capable of legitimizing a legal system mutilated by war. As a scholarly source of law, heir to the jurists of ancient Rome, doctrine contributed to the effort to understand and systematize laws, acts of government, administration and

jurisprudence. Its members were mainly professors of law faculties, but university doctrine differed from the organic doctrine constituted by jurists who were members of the courts of the judicial or administrative order. Its method, which was based on an exegesis of Napoleonic codes until the mid-19th century, was at the heart of the controversies that agitated teachers at the beginning of the 20th century. Indeed, on the eve of the first world conflict, jurists such as Esmein, Saleilles and Lambert had integrated the data of history, sociology and comparative law to adapt exegetical methods to the new social realities generated by industrialization, technical progress and the excesses of machinery. The debates of these forerunners, who succeeded in renewing the formal presentation and teaching of law, reappeared at the end of the conflict. The professors then took the necessary step back to appreciate the profound transformations of the law in all legal fields. Aware of their essential role in exposing and analyzing the various sources of law, the doctrine asserted itself as a homogeneous entity capable of providing logical principles on which the complex reality of law rested. Academic jurists were grounded in an analysis of law based on comprehensive legal principles developed within treaties and law textbooks. This dogmatic method, which grouped together the various concrete solutions under general theories ordered according to a logical and rational plan, would be imposed in all the works of post-war law professors.

The political instrumentalization and empirical elaboration of the law upset the foundations on which the juridical edifice rested. During the 1920s, doctrine was divided between realists, whose methods were based on the study of positive law derived from metaphysical questions, and idealists, who advocated a revival of natural law or advocated a Christian morality that transcended positive norms. From this opposition arose many controversies between jurists who defended an objective vision of the rule of law, rather advocates of a socialization of the law, and those attached to legal subjectivism, more faithful to the traditional principles of liberal individualism. However, despite these divergences that reveal the political and religious beliefs behind the theoretical constructions supposed to achieve the objectives of neutrality and scientificity, law professors all claimed to be positivists. Indeed, after the war, it was out of the question to return to a method that has its roots in facts and social realities. The science of law was now based on the systematization and ordering of all legal facts from which the doctrine derived general principles. It was no longer based on principles induced by the codes that were interpreted to make them correspond to positive

solutions.

Since it was up to the doctrine to deduce the legal principles capable of ordering the complexity of concrete solutions, the latter invested itself in the improvement of technique by clarifying concepts and legal vocabulary. It must be noted that the semantic constructions specific to the language of law remained confused in the aftermath of the conflict insofar as they reflect the differences of opinion and philosophy between the different currents of thought to which law professors belong. The same technical term became polysemic and gained a different definition according to the use made of it by this or that jurist. Word quarrels thus invaded theoretical constructions and disturbed the meaning of legal concepts. The effort to renew the legal language was then noticeable in authors like Henri Capitant, who worked in particular on the development of a *Vocabulaire Juridique* [Legal Vocabulary] with the assistance of Henri Lévy-Bruhl, and also in René Capitant who, like his father, had a particular interest in the language of law. In his doctoral thesis entitled *Introduction à l'étude de l'illicite : l'impératif juridique* [Introduction to the study of the illicit: the legal imperative], defended in 1928, René Capitant indeed pursued the objective "de dissiper les confusions de terminologie qui prolongent depuis plus de vingt ans une querelle sans objet et masquent les véritables problèmes [to dispel the confusion of terminology that for more than twenty years has been prolonging an irrelevant quarrel and masks the real problems]". His study, he writes, merely aimed at "référer à tous les termes de la langue juridique pratique, de leur marquer une place à chacune et de préciser leur sens avec le souci, et le sentiment de ne pas le déformer [refering to all the terms of practical legal language, marking a place for each and clarifying their meaning with concern, and the feeling of not distorting it]". Through this work, this young professor believed that he had managed to overcome the opposition between objectivism and subjectivism through a "systématisation complète [full systematization]" of the law "en fonction de la notion première de règle de droit ou impératif juridique [according to the primary concept of rule of law or legal imperative]".

Influenced by Kelsenian normativism, the doctrine took up the pyramidal structure of the rules of law in most of its theoretical constructions. It thus founded a syncretic positivist system that merged objective conceptions, the State being placed at the top of the legal edifice, and subjective conceptions, the State having to ensure respect for individual rights. It gradually emerged from the reflections on the foundations of law to focus on

the development of theories accessible to practitioners. It was anchored in a technicist positivism that legitimized its role of logical ordering of the rules of law between them and affirmed its power of opinion and influence as a scholarly source of law. The war thus contributed to the emergence of a doctrine that was assured of its science and techniques but increasingly hermetic to the contributions of other social sciences in explaining legal phenomena.

To legitimize its role as a gray eminence, doctrine built its identity by forging its own history and perfecting its language and technique. As early as 1919, Bonnecase was looking back at the evolutions of legal thought since 1804 and analyzing how doctrine had managed to extricate itself from the exegesis of codes. By condemning the methods of their predecessors who had supposedly based law solely on the literal interpretation of the law, university jurists legitimized the creation of a scientific school to replace the school of exegesis. Going beyond the quarrel over sources of law, the doctrine admitted the creative power of the judge and legitimized their role as interpreter and their power of opinion, supposed to be neutral and rational. The war confirmed this seizure of power in the analysis of legal developments. Thus, while historiography always mentions a “1900 switch” that allowed the renewal of legal doctrine, it is only in the post-war era that the characteristic features of this science monopolized by jurists were truly drawn.

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