The uses of war in public law controversy

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LE FONDEMENT DE L'AUTORITÉ POLITIQUE

Sommaire : 1. Lettre du professeur Hauriou. — 2. Lettre du professeur Berthélemy. — 3. Réplique du professeur Hauriou.

A la suite de la publication de l'étude du professeur Berthélemy sur *le fondement de l'autorité politique*, il a été échangé entre M. le doyen Hauriou et le professeur Berthélemy les lettres suivantes :

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« Monsieur le Directeur,

« M. H. Berthélemy, dans un article sur *Le fondement de l'autorité politique* (*Revue du Droit public*, t. 32, p. 672), me reproche d'être un partisan convaincu de la doctrine allemande de la souveraineté subjective de l'Etat et il s'appuie sur un prétendu passage de la 6e édition de mon *Précis de droit administratif*. M. Berthélemy a fait erreur, le passage en

The doctrinal positions of lawyers were directly impacted by the conflict. A double re-reading of legal thought was carried out: *because of* the war, by the rediscovery and the highlighting of the radical opposition of the French and German doctrine of law and the state, but also *in relation to the war*, according to an enterprise of labeling and denial of certain theoretical commitments that could be demonized from their supposed kinship with the doctrine on the other side of the Rhine. In this case, the divisions were reinterpreted using the passions and affects generated by the conflict.

If, under the first aspect, the legal doctrine was therefore clearly instrumentalized in the service of the victory of the nation, under the second, it was on the contrary the very context of the war which was wisely used, sometimes to corroborate a doctrinal opposition, sometimes to promote a theoretical, if not political, position.

The two deans of the law schools of Paris and Toulouse, Ferdinand Larnaude and Maurice Hauriou, contributed to these different uses of war. We propose here to return briefly to four types of uses, singled out from some of their selected publications and citations.

Reinterpreting the oppositions of German and French doctrine of law and the State

The war was an opportunity for jurists to brandish opposition to absolutist German theory, that of an omnipotent state whose only constraint would come from its own self-limitation and not from its submission to an external right since it was the State itself that gave substance to the law. This denunciation found its public translation in the political slogan according to which, for the Germans, “force prevails over law”.

Dean of the Paris Faculty of Law Ferdinand Larnaude castigated ” cette autre monstruosité juridique, la théorie du droit de nécessité (*notrecht*), qui autorise, selon lui, tout ce que l’intérêt réclame, et par laquelle un illustre universitaire allemand justifiait récemment encore, la violation de la neutralité de la Belgique, théorie devant laquelle aucune sécurité, ni pour les individus, ni pour les peuples, ne peut plus être garantie [this other legal monstrosity, the theory of law of necessity (*Notrecht*), which authorizes everything that interest demands, and by which an illustrious German academic justified until recently, the violation of the neutrality of Belgium, a theory before which no security, either for individuals or for peoples, can be guaranteed any more]”. The aim theory would only lead to legitimizing the abuses of the army: ” théorie qui, appliquée par les hommes d’État et par les théoriciens militaires allemands à la guerre, a pour conséquence logique que la guerre ne saurait être conduite d’une manière contraire à ses fins, ces fins étant l’épouvante, la terreur, le désespoir jetés dans la population et brisant tout élan national, légitimant ainsi, rendant “scientifiquement nécessaires” les plus abominables atrocités ? [a theory which, applied by German statesmen and military theorists to war, has the logical consequence that war cannot be conducted in a way contrary to their ends, these ends being fear, terror, despair thrown into the population and breaking all national momentum, thus legitimizing, rendering ‘scientifically necessary’ the most abominable atrocities]”. (Minutes, Paris Faculty of Law, AN, AJ16/ 1799, Assembly of Sept. 30, 1914, p. 105-106).

The simplification of this diatribe of “law against force”, however, did not escape the Dean of the Paris Faculty of Law. It is interesting on this point to note the divergence of positions according to the supports, between the doctrinal writings within scientific journal articles and the public pronouncements in sometimes simplifying speeches, sometimes pronounced within the faculties, but intended to be mobilizing because widely reproduced outside. The denunciation of the law of force must be reconsidered on the basis of the nuances to be brought between, on the one hand, a teleological theory of the law of force (the goal to be achieved defines the rule of law) which was not, moreover, comparable to the assertion that “force takes precedence over law”, and, on the other hand, the “force of law” necessary for the recognition of justice. For the German aggiornamento of the 19th century cannot be understood as a definition of force as the goal of law, of “force for the sake of force” in a way. But it deserves above all to be considered from the point of view of the substitution “of force for reason as the first principle of law” (the right to fight), as it emerges from Ihering’s theory. His masterpiece *Der Zweck im Recht* was then in its fifth edition in 1916.

Ferdinand Larnaude very clearly presented this political and legal ambivalence of German theory. According to him, far from saying only ” […] que c’est la force qui non seulement prime le droit – ce qui est, hélas ! toujours possible, ce qui suppose en tout cas que le droit subsiste, momentanément impuissant, subjugué provisoirement par elle, – mais ce qui est bien différent, que c’est la force qui crée le droit, qui se confond avec lui ! [[…] that it is force that not only takes precedence over law – which is, alas! always possible, which assumes in any case that law subsists, momentarily powerless, temporarily subjugated by it – but what is quite different is that it is force that creates law, merging with it!]” (*ibid.*). On this point, he agreed with Georges Ripert, then a young professor at the Aix Faculty of Law, who stated in an article that ” On a bien souvent reproché à Bismarck la fameuse parole : la force prime le droit. Juriste plus subtil, il aurait dit : la force c’est le droit [Bismarck has often been criticized for the famous quote: force prevails over law. A more subtle jurist would have said: Force is law]” (*Revue internationale de l’enseignement*, 1915, p. 177).

These nuances to be brought to bear on the very essence of German legal doctrine were accompanied by divergences on the kinship and genesis of the theories held responsible. For Maurice Hauriou of Toulouse, the war also served as an illustrative context in his desire to promote the teaching of natural law in French universities.

Promoting the doctrine of classical natural law in the light of conflict

Since, as Maurice Hauriou argued, " à une doctrine il faut en opposer une autre [one doctrine must be opposed to another]" (*Le Correspondant*, Sept. 25, 1918, p. 919), the war revealed the fundamental nature of the opposition between natural law and positivism.

In the pages of the *Correspondant*, a liberal Catholic journal, the Dean of the Toulouse Faculty of Law signed a virulent article in which he castigated the triple misdeeds of "legal nationalism", of "legal brigandage" which constituted the identification of law and force, as well as of "juridical collectivism", already presented by his young colleague Georges Ripert, as the misunderstanding of the real organic life of the State. " Nous les Alliés, qui nous battons pour la justice et la liberté, écrit-il, il faut que nous sachions que c'est le drapeau du droit naturel immortel que nous relevons […] [We the Allies, who are fighting for justice and freedom, must know that we are raising the flag of immortal natural law […]]" (ibid., p. 913). This opposition was also expressed by other jurists in press articles: William Loubat, correspondent of the Institute and prosecutor in Lyon, denounced " les plus capitales violations de ce qu'on appelait autrefois les "lois divines et humaines" [the most important violations of what were once called 'divine and human laws']" in the pages of the newspaper *Le Temps*, in November 1914.

But even more, opposition to the German doctrine was an opportunity for Maurice Hauriou to promote classical natural law against the modern one. The thesis is that of a deviance initiated by German thought. " Pendant plusieurs siècles les allemands se sont posés en champions du droit naturel, ils l'ont cultivé, prôné, accaparé. En réalité, ils étaient ses pires ennemis. Ils viennent de jeter le masque et de le renier ouvertement. Mais dès le xviie siècle ils l'avaient trahi, ils l'avaient fait dévier de son contenu [For several centuries, the Germans have been standing as champions of natural law, they have cultivated it, advocated it, monopolized it. In truth, they were its worst enemies. They just threw away the mask and openly denied it. But as early as the 17th century, they had betrayed it, they had deviated it from its content]", wrote Dean Hauriou (*ibid.*, p. 913). According to him, the misdeeds of German militarism were closely linked to the abandonment of immutable principles by the same Germans who were already at the root of this perversion of the law. The "mortal blow" to the doctrine of natural law was " par la faute de l'Allemagne qui s'y est reprise à deux fois pour consommer la ruine de son adversaire, au xviie et au xixe [to be blamed on Germany,

which twice took it upon itself to consume the ruin of its adversary in the 17th and19th centuries]" (*ibid.*, pp. 919-920).

Maurice Hauriou agreed with Otto Gierke's demonstration that the paternity of the foundation of the school of the law of nature and people belonged to German jurist Johannes Althusius, at the expense of the Dutchman Grotius. This allowed him to support his own demonstration that " la laïcisation du droit naturel est l'œuvre de l'Allemagne [the secularization of natural law is the work of Germany]": did not a German master concede it himself? "It is all the better to concede it to him," he writes, " On peut d'autant mieux le lui concéder, écrit-il, que Pufendorf et Wolf, qui reprirent l'œuvre d'Althusius et de Grotius, sont encore deux allemands [as Pufendorf and Wolf, who took up the work of Althusius and Grotius, are still two Germans]" (*sic*). To reconsider this thesis in the context of the national debate offered a challenge to the French doctrinal weakness that Maurice Hauriou opposed to the vitality of German legal doctrines. " Hélas ! Nous ne savons plus, poursuit-il. Nous avons conservé la foi instinctive, mais nous avons perdu la foi éclairée. Dans nos universités, les chaires sont muettes sur le droit naturel ». Un savant retour aux enjeux du conflit permet ainsi d'incriminer ce droit « naturel à contenu variable [Alas! We don't know anymore, he continued. We have retained instinctive faith, but we have lost enlightened faith. In our universities, chairs are silent on natural law.]" A scholarly return to the stakes of the conflict thus made it possible to incriminate this "natural law with variable content" advocated by the new generation of lawyers.

If some were thus keen to see in Jean-Jacques Rousseau the herald of universal values and the defense of individualistic principles and opposition to the law of force, for Maurice Hauriou, Rousseau's contractualism was only the result of the inclination resulting from the school of the law of nature and people, since it founded an "optimistic individualism" (itself resulting from the state of nature), making political society an artifact resulting from the agreement of the wills. However, according to the latter, it was indeed, a contrario, in the "human species" that the doctrinal solution must be found since, as a result of the "foundation of law", it is the guarantee of the universality and fixity of its principles. For his part, he referred to the "sacred tradition" based on "pessimistic individualism", not this time without an implicit relationship to the Christian theme of the Fall, so dear to Dean Hauriou.

Using war in doctrinal differences: the Berthélemy-Hauriou controversy of 1916

This phenomenon of contextualization of the debates was supported by the controversy that occurred in 1916 between Professors Berthélemy and Hauriou, this time in the pages of a scientific journal, formally based on differences over “the basis of political authority” (*Revue de droit public*, 1915, p. 672).

The controversy followed the publication in the *Revue du droit public et de la science politique* of an article by the Parisian jurist at the end of 1915; in which he called his colleague from Toulouse ” d’être un partisan convaincu de la doctrine allemande de la souveraineté subjective de l’État [a convinced supporter of the German doctrine of the subjective sovereignty of the State]” (*Revue de droit public*, 1916, p. 20). It took the form of an exchange of letters reproduced by the journal.

If Maurice Hauriou laconically conceded the benevolence of his opponent’s intentions, he vigorously defended himself from the accusations made against him. Above all, he intended to recall that ” ce contresens [this misrepresentation]” was ” *dans les circonstances présentes*, quelque chose de particulièrement déplaisant [*in the present circumstances*, something particularly unpleasant]” which forced him to ” protester [protest]”. He denied ever adopting the doctrine of the *Herrschaft*, which he opposed instead, in particular through ” l’édification d’une théorie objective de l’institution politique [the construction of an objective theory of the political institution]”. ” Ce que M. Duguit a essayé par la théorie de la règle de droit, précise-t-il, je l’ai essayé par celle de l’institution corporative, et l’une des tentatives est aussi objective *et aussi anti-allemande* que l’autre ! [What M. Duguit has tried by the theory of the rule of law, I have tried by that of the corporate institution, and one of the attempts is as objective *and as anti-German as* the other!]” Contrary to the theories of Léon Duguit, the agreement *a minima* between Berthélemy and Hauriou lay in the necessary persistence of a subjectivism whose field of application had yet to be determined.

The retort to Maurice Hauriou’s reply sheds light on the issue at stake in the debate. For the question inevitably diverged into a divergence between, on the one hand, those who intended to limit the legal personality of public administrations to the sole domain of private personality, as advocated by the first masters of administrative law at the end of the 19th century , and those, on the other hand, such as Maurice Hauriou, who intended

to use the distinction between administrative matters where the subjective personality of the State was possible, and constitutional matters where it was not. Rather than a question about the “foundation of political authority” and its relation to the “theory of German source” which made it “the exercise of the subjective rights of the person State”, the opposition was thus in fact reduced to “distinctions as to the use of the subjective personality in public law”.

Beyond the question of the fiction of the personification of the moral person-state, the holder of subjective rights, lay the real content of the opposition and the meaning of the quarrel. Far from being a purely theoretical question on the basis of political authority, it regarded the very criteria for defining administrative law. The controversy opposed the old guard, which advocated for the durability of the recourse to the distinction between “acts of authorities” and “acts of management” as did Henry Berthélemy, and the supporters of the theory of the personality of the public power, such as Maurice Hauriou (although to a lesser extent for the latter, since conceding it only for the exercise of administrative rights and not for the state organization itself). From this point of view, the supposed adoption of German theories by Maurice Hauriou, although initially presented as the source of the quarrel, appears in reality to be quite secondary, a simple contextual pretext wisely used in the face of the real stakes for Henry Berthélemy the fight against a questioning of the old criteria of autonomy of administrative law: a fight however already lost on the eve of the First World War (see on this point chapter 5 of the *Transformations du droit public* [Transformations of public law] by Léon Duguit, 1913).

Politicizing State theory: Pangermanic hegemony and State socialism

The context of the conflict could also be the occasion for a more directly political instrumentalization, by using individualistic and socialist theories from the correlation this time considered between pangermanic hegemony and state socialism. Under the guise of a critique of the German doctrine of an omnipotent and self-limited state, it was the presentation of the danger of collectivism and its inclusion in the national debate that were incidentally carried out.

The qualification and the amalgamation were, moreover, presented in an ambivalent manner, the pangermanist policy would have been considered sometimes as the fruit of collectivism, — this ” patriotisme qui est collectiviste autant qu’il est allemand

[patriotism which is collectivist as much as it is German]" —, sometimes as its instigator, — Germany seen as the " foyer de la doctrine du collectivisme marxiste [cradle of the doctrine of Marxist collectivism]" according to Maurice Hauriou (*Le Correspondant*, pp. 916-917). Under the generic term of "juridical collectivism" was thus condemned the doctrine that made the individual no longer an end, but a means at the service of the State. Liberticidal, as an individual would be nothing but a cog of power, Maurice Hauriou described the German organization as "practical" collectivism, because it emanated from the State (from "above") and not from the people, and defined it much more as a power of control than of any of direction. Economical, political, and even social, this centralization proved to be absolute. He denounced the collusion of the "working world" and the German government, material security via the laws on pensions or insurance appearing to him only as the counterpart of a subjugation of trade unions and political groups. " Leur nation satisfait à leur idéal. C'est ainsi que les forces des organisations ouvrières se sont associées aux forces de l'empire, que les socialistes allemands ont travaillé à la révolution russe, à l'aventure de la conférence de Stockholm et que Scheidermann et Lénine sont devenus des agents de Guillaume. [Their nation lives up to their ideal. Thus the power of the workers' organizations joined forces with the power of the empire, the German socialists worked for the Russian revolution, the adventure of the Stockholm Conference, and Scheidermann and Lenin became agents of William.]" (*ibid.*)

A few months after the October Revolution, the amalgamation thus made between the pangermanic danger and the Bolshevik danger, according to the idea that "for the Marxist collectivists of the whole world, Germany is a kind of Mecca" aimed at clarifying this collusion of enemies from outside and qualifies the new stake of the conflict, the war against Germany also becoming, *in the end*, a liberal struggle against state collectivism.

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