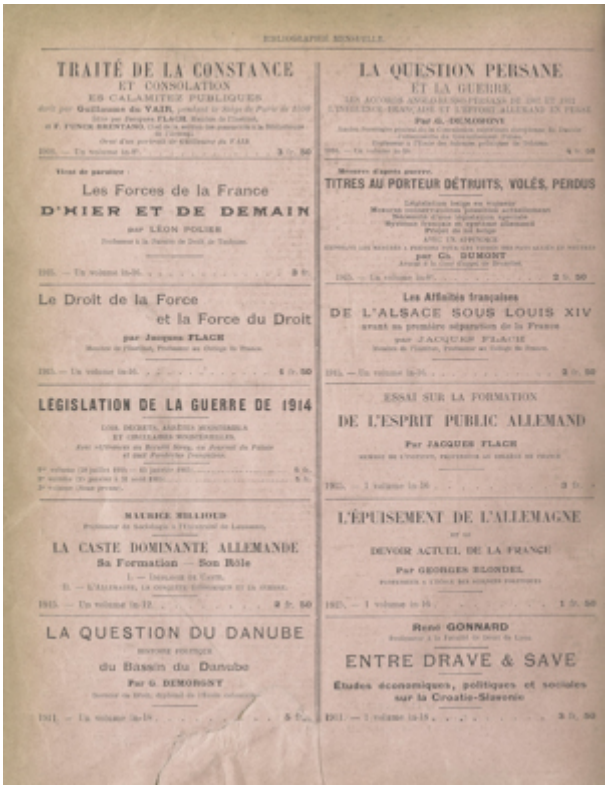
Between science and patriotism: legal journals at war (1914-1918)



In the summer of 1914, an unprecedented armed conflict broke out in Europe. The breadth, brutality and global spread of this war, which was imagined to be short, earned it the name of “the Great War”; it was also to be “the war to end all wars”.

However, before the sound of the first cannons, before the first trenches were dug, a class of the population was already particularly mobilized on another front.

Indeed, French and German scientists had been engaged for several decades already in a real “war of science” in physics, chemistry, medicine, war exalted by patriotic

sentiment and by continuous progress in these disciplines. In law, the scholarly conflict had been raging for much longer still, opposing French jurists, their “rational” model and their “universal” codes to German jurists, defenders of the *Volksrecht* and proud of the dynamism and notoriety of their universities. Revived by the defeat of Sedan, by the spirit of revenge and by the promulgation of the remarkable *Bürgerliches Gesetzbuch (BGB)* at the turn of the 20th century, the scientific rivalry between French and German jurists then reached its climax with the entry into war of the two countries.

To say that the French jurists mobilized body and soul in the war is not an empty word. Like their compatriots, many legal practitioners, academics and students, young or old, at the height of their careers or promised the best hopes, committed to or were called up to serve. The uninterrupted succession of tributes paid by scientific journals to their collaborators who died for their homeland, as well as the evocation of their dedication and sometimes their heroism on the battlefield, indicate an acute sense of duty and sacrifice among jurists. Those who were too old to go to the front did not hesitate to return to university, sometimes leaving, like Bordeaux professor Camille Levillain, their peaceful retirement to replace their young colleagues who went to the front; the others fought the war in their own way, and with their weapons, especially in journals.

Looking through the major legal periodicals of the time, we can see that their authors mobilized around two dynamics that were both complementary and at odds with each other. In the first place, a very classic dynamic, which could be described as “doctrinal”, consisting in explaining the law and above all in rearranging – or even reconstructing – it on a daily basis in the particular context of war and the state of siege. Untiring builders of “theoretical cathedrals”, academics watched with concern as war and its train of exceptional laws demolished their intellectual edifices and their great principles. While they were quick to resign themselves to the fact that the conflict was shaking up the law in a deeper and longer way than expected, the authors nevertheless took to heart their role as “system builders” and rebuilt legal principles, theories and architectures in an urgent and precarious manner. Useful to practice and to affairs greatly disturbed by war, these doctrinal works also fall under the notion of catharsis: dogmatism reassured jurists who lost their bearings and marked the symbolic permanence of law on the fact of thought built and ordered over improvised events and acts of power.

The second dynamic, on the other hand, ignored the doctrinal precautions and the scientific neutrality that the legal thought of the Belle Époque claimed. This was indeed

a “combat dynamic”, which was quite surprisingly superimposed on the technical work mentioned above. Cluttered with a multitude of articles that no longer had much to do with legal science, law journals were transformed into veritable media of anti-German propaganda, where scientific settling of scores, revenge spirit and “patriotic duty” were mixed together. In these periodicals, it was not soldiers of flesh and blood – sad similarities and adversaries of misfortune – that were confronted: it was the “Enemy”, the “German” that was essentialized and whose intellectual, moral and civilizational defects were “scientifically” exposed. Carried by exalted patriotism on every page, and, perhaps also, by a form of guilt at remaining far from the front while others risked their lives there, many great minds of doctrine, heralds of their disciplines, thus forgot in their writings any sense of measurement and reason.

Journals on the Legal Frontline: Doctrine and Dogmatics in War

One should not misunderstand here the intentions and achievements of doctrine during the Great War. Jurists did not struggle to safeguard the law of the Belle Époque, but to safeguard the very idea of law, a constructed, systematized law, although adapted to the rigors of time.

Admittedly, some authors were initially moved by the exceptional measures taken in the weeks preceding the conflict, as well as the declaration of the state of siege, voted without debate, from the first days of the mobilization in August 1914. In the *Revue trimestrielle de droit civil (RTDCiv)*, Albert Wahl wondered about the consequences of the many regulatory provisions that constrained private relations, enacted urgently in July 1914: savings bank safeguard clauses, suspension of prescriptions and lapses of mortgage registrations, suspension of transcripts… The Parisian professor was especially concerned about the important delegation that the legislator granted to the executive power by the law of August 5, 1914: ” Cette délégation est-elle conforme à la Constitution ? L’affirmative, à notre avis, ne peut guère se soutenir. [Is this delegation in accordance with the Constitution? The affirmative, in our view, can hardly be sustained.]” However, the author’s warning ended there. Indeed, Wahl recalled that ” comme il n’existe aucun moyen d’attaquer une loi inconstitutionnelle [as there is no way to attack an unconstitutional law]”, lawyers were essentially disarmed on this point. He evaded the question by a very convenient editorial and disciplinary spin, reminding that constitutional matter ” sort du cadre de cette revue [goes beyond the scope of this

journal]", the very one that was devoted to private law. And if the very many decrees, orders and circulars that fell on the country and upset the rule of law often ruled outside the framework of this delegation, there was no doubt that Parliament would soon " ratifier tous ces documents par des lois ultérieures [ratify all these documents by subsequent laws]". In short, while exceptional measures prejudicial to the great principles and freedoms abounded since the summer of 1914, the republican framework of the regime and the great mechanisms of the rule of law remained; as long as these two points held on, the jurists accept the inevitable and necessary twistings – not to say infringements – of individual rights and public liberties.

In general journals such as the *Sirey* and *Dalloz* collections, and even in public law journal, the position was identical. While the state of siege conferred broad powers on the military authority, the jurists stuck to a kind of vigilance of principle as to the maintenance, through power, of a diminished but acceptable form of Republican legality. In his series of articles devoted to "public law in times of war" (*Revue du droit public*), Parisian professor Joseph Barthélémy, future Minister of Justice under Vichy, defended the idea of a "legality of war", which implied severe limitations on rights and freedoms, and which went so far as to accept a certain level of illegality and injustice to preserve the higher interests of the homeland. Only decisions " entachées d'une illégalité dépassant la mesure ordinaire des erreurs [vitiated by illegality exceeding the ordinary threshold of error]" could therefore be legitimately called into question.

Barthélémy noted, moreover, that this new order of things and law had naturally taken hold in the country: " La déclaration de l'état de siège et surtout le fait de la guerre ont créé dans l'opinion, et jusque chez les autorités gouvernementales, administratives et juridictionnelles, une mentalité spéciale, favorable au pouvoir, et tendant par conséquent à admettre avec plus de facilité les sacrifices individuels à l'intérêt général. [The declaration of the state of siege and especially the fact of war have created in public opinion, and even in governmental, administrative and judicial authorities, a special mentality, favorable to power, and consequently tending to admit with greater ease individual sacrifices to the general interest.]"

Whether this "special mentality" really existed or not, total commitment to the conflict profoundly changed the lives of the French. "Peacetime" law was erased in favor of "wartime" law, whose rules and principles were upended.

Faced with the incessant parade of texts, norms and martial jurisprudence, the doctrine actively mobilized to explain this new law, to organize it, to give it principles, in short, to put it in order. In this task, journals were at the forefront: their method of periodic publication required authors to report continuously on the state of the law. To do this, most of them had sections devoted exclusively to the law resulting from the war; in indexes or tables, the “war” vocabulary occupied a considerable place.

Whether in civil and commercial matters (among others, A. Wahl, “La guerre considérée comme force majeure, spécialement en matière de vente de marchandises” [War Considered as Force Majeure, Especially in the Sale of Goods], *RTDCiv*), the status of soldiers and their legal acts (Ch.-L. Julliot “Sur la nature juridique du testament militaire et les modalités de son dépôt chez les notaires” [On the legal nature of the military will and the modalities of its deposit with notaries], *RTDCiv*) or the functioning of the services of the State (L. Rolland, “L’administration locale et la guerre” [Local Administration and War], *RDP*), the new normative order was analyzed daily. At the forefront of law, doctrine urgently composed a mosaic of studies in journals, preluded to broader work of systematization: in 1918, the indefatigable Albert Wahl thus completed his Droit civil et commercial de la guerre ([*Civil and Commercial Law of War*]), a remarkable summary treatise of which many passages had already been sketched in the form of chronicles or articles in the *Revue trimestrielle de droit civil*.

Unquestionably, the journals allowed the doctrine to operate a form of “legal orthopedics” of everyday life, maintaining, in the law of “wartime”, a certain coherence and a certain spirit transcending force and fact. In this harrowing but life-saving “struggle for the law”, scientific journals have thus played the leading role.

However, besides this scientific and dogmatic work, many articles surprise and confuse today’s reader. Fully committed to the conflict, French jurists transformed their journals into real propaganda tools, and held speeches with political inflections quite unusual in French legal prose and thought.

From science to propaganda: legal journals, “combat journals”

Legal patriotism first manifested itself in the disappearance, after 1914, of German scientific work from the pages of journals. Those were no longer the subject of bibliographical reviews and German authors and works were no longer cited, not even

in footnotes; basically, German legal science no longer existed! While legal literature from across the Rhine was, by far, the most studied and abundant foreign literature in French periodicals of the 19th century, the latter soon opened their columns only to the work of allied or neutral countries. Anglo-saxon doctrine, in particular, received an unprecedented welcome.

The legal journals only reported intermittently on the “actions of the enemy powers”, diplomatic agreements or internal norms of Germany and its allies, whose brutality and iniquity were always emphasized.

Most importantly, good luck to anyone who dared claim a legal, theoretical or philosophical concept attributed to Germanic thought! In the *Revue du droit public*, Toulouse professor Maurice Hauriou would thus be accused by his Parisian colleague Henry Berthélemy of having adhered to the German theory of the subjective sovereignty of the State. His patriotism unjustly questioned, Hauriou would reply in the same review that the excerpt reproached to him on this theory came from an old edition of his *Principles of Administrative Law*; that this excerpt had since been deleted, and that, moreover, its vocation had always been criticism and not adhesion.

The time when German thought was admired – perhaps even a little envied– by French scholars and jurists was well and truly over. When it was not ignored, German thought was directly attacked and deconstructed in French legal journals. Thus, in a ruthless rereading of Fichte’s Speech to the German Nation published in the *Revue du droit public* in 1917, Toulouse professor Joseph Declareuil wrote a veritable pamphlet against Germany and against its scholars in the service of German imperialism. The author claimed that the war finally opened the eyes of the French to “German nature” and its thinkers: ” Les rêves fous de l’Allemagne, ses ambitions formidables, la communion de tout un peuple en des espérances sauvages, sa jactance intellectuelle, l’orgueil énorme et pédantesque dont il accablait par avance les nations, ses futures sujettes, sont devenus les lieux communs de la littérature depuis la guerre. Auparavant, la plupart des Français les ignoraient ou n’y voulaient prendre garde. [Germany’s wild dreams, its formidable ambitions, the communion of a whole people in wild hopes, its intellectual wittering, the enormous and pedantic pride with which it overwhelmed the nations in advance, its future subjects, have become the clichés of literature since the war. Previously, most French people did not know or care about them.]” Revisiting the political and social history of Germany since Otto and the Holy Roman Empire,

Declareuil sought to demonstrate that German scholars, so unjustly admired throughout the world, has always supported the savage project of domination of Germany through corrupt doctrines and reasoning. While French scholars sought truth “outside” of themselves, knew how to recognize it with “selflessness” and went so far as to sacrifice their “prejudices”, their “passions” and their “dearest feelings”, this was not the case for German thinkers, chief among them being Fichte. ” L’Allemand tire sa vérité de lui-même comme l’araignée la substance de sa toile […]. Ses désirs, ses appétits, ses penchants composent tout l’aliment de ses pensées qui sont, Fichte nous l’a dit, le seul univers réel, car il n’y a d’existant que la pensée. [Germans derive their truth from themselves, as spiders do with the substance of their web. Their desires, their appetites, their inclinations compose all the nourishment of their thoughts, which are, as Fichte told us, the only real universe, for there exists nothing but thought.]” Thus, ” l’Allemagne crée des idées pour ses besoins et pour sa défense, comme elle crée des canons, des zeppelins, des submersibles. Ses philosophes, ses historiens, ses penseurs sont, à leur manière, des Thyssen et des Krupp, ses universités autant d’Essen. [Germany creates ideas for its needs and for its defense, just as it creates cannons, zeppelins, submersibles. Its philosophers, historians, and thinkers are, in their own way, Thyssens and Krupps, its universities as many Essens.]”

In legal matters, more precisely, German thought was wholly reduced to the idea that force “creates” law, when it does not “take precedence” over it. This violent principle, contrary to the very idea of law, was attributed to the whole of Germanic doctrine, and was illustrated by the German exactions in Belgium, widely denounced in legal journals. It also materialized in Germany’s numerous breaches of international law and treaties (see in particular Alexandre Mérignhac, “De la sanction des infractions au droit des gens commis, pendant la guerre européenne, par les empires du centre” [On the punishment of the infringements of the law of nations committed, during the European war, by the empires of the center], *Revue générale de droit international public*, 1917). For Declareuil, this fatal spirit of the German *race* explained ” l’arrogance, la confiance folle, la brutalité, la sauvagerie avec lesquelles ces gens se sont jetés au pillage et au viol de l’univers [the arrogance, the insane confidence, the brutality, the savagery with which these people threw themselves into the plunder and rape of the universe]”.

Gradually, articles in legal journals converged on the exhibition of two irreconcilable worlds: the world of law, reason and civilization embodied by France and its allies, and

the world of barbarism and brute force materialized by Germany and the vassal empires of Central Europe. While the French jurists, the leading figures of the civilized world, would aspire only to peace, universalism and respect for the rules – especially international ones, the Germanic barbarians would only understand that “might makes right”, and their scholars, too long overestimated, would in reality have served only the offensive and brutal interests of their nation.

By reconfiguring history and law in their journals, French jurists postulated their cultural superiority and claimed the *leadership* of legal science in the face of a Germany no longer the seductive pre-war counter-model, but a hated nation, reduced to a caricature of savage Germania.

It should be noted, however, that these “combat” articles, which sometimes turned to mad nationalism and primary anti-Germanism, were mainly present in public law journals such as the *Revue du droit public et de la science politique*, or the *Revue générale de droit international public*. This is not really explained by the personality of their editors or directors (Parisian professor Gaston Jèze for the first, and lawyer Paul Fauchille for the second), but rather by the scientific purpose of these periodicals, naturally open to political and diplomatic studies and analysis.

It was moreover in the pages of the *Revue du droit public* that Bordeaux Dean Roger Bonnard called, a few years later, lawyers and administrators to leave their axiomatic neutrality to commit themselves fully to Marshal Pétain and his “national revolution”.

In comparison, private law journals kept a less martial tone, with their editors taking more refuge in technical studies and dogmatics. This would not prevent their authors from regularly recalling how much “German aggression” disrupted legal, economic, social and democratic balances, nor from boycotting German scientific work. But the frontal, political and ideological commitment found in public law journals was much more tenuous.

When they were not directly called to the front, lawyers fought daily in scientific journals against two enemies: (legal) disorder and Germany. Journals then became leading media for lawyers who, during the time of war, reconnected with their traditional role as “social specialists”, architects of legal and political life. Indeed, the authors were convinced that they worked daily to maintain order and social, political and economic

equilibrium in a deeply destabilized France. Certainly, this order was a new order, rough, authoritarian, unjust at times; but the legal spirit must remain central to it. The outrageous and overused caricature of barbaric and discretionary Germany was also there to remind that military victory would only make sense if the “law” also came out victorious from the conflict.

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