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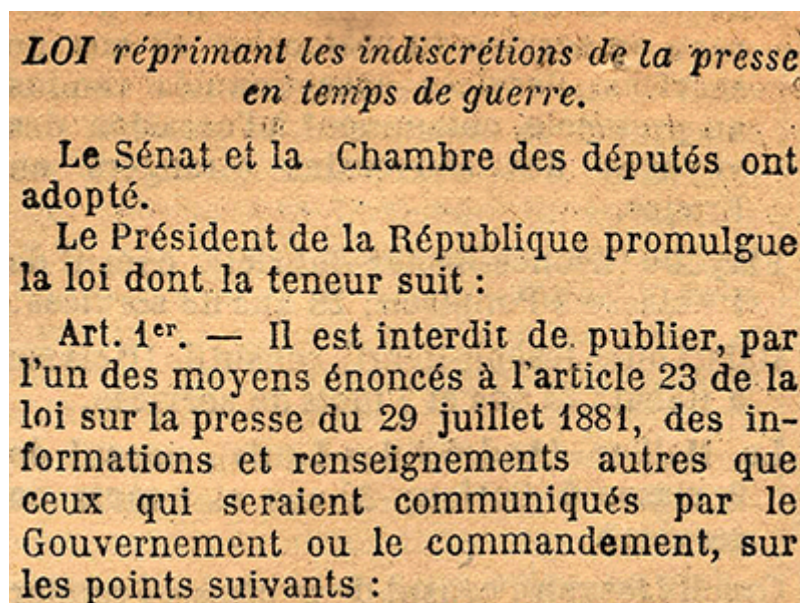
## The reflections of a Bordeaux law professor on freedom of opinion: Duguit and press censorship during the 1914-1918 war

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Propaganda occupied a prominent place in the history of the Great War, because of its total and spectacular character. Even today, few textbooks address the years 1914-1918 without mentioning the word “brainwashing”, describing the unanimous and ubiquitous media tone at the beginning of the conflict, exacerbating heroism and national assets while demonizing – even ridiculing – the German enemy. The main challenge was then to convince citizens of the correctness and the merits of the war. Censorship, a negative and complementary aspect of propaganda, was an equally total institution. Total, because the control it exercised extended to all political actors (members of the government, political parties), to all written production (press and publishing) as well as live performances (theater, songs). If the First World War

contributed to the spread of the expression “brainwashing”, it was also during this period that the allegory of censorship, Anastasie, spread into the popular culture.

## **Censorship during the Great War: an institutional and legal organization**

At a time when censorship was insidious (induced by the rules of the market, by the collusion of the political and mediatic worlds, by the lack of plurality of the latter, etc.), we tend to forget its institutional and legal aspect. Its organization during the Great War reminds us of the fundamental character that this last aspect can assume. Indeed, from the first days of August 1914, the government demonstrated its concern to establish a control of information in accordance with the law, and in doing so relied on the law on the state of siege of August 9, 1849. The law vested the military authority with all the powers normally vested in the civilian authority in matters of policing and maintaining order. Among these powers was that of prohibiting publications likely to stimulate or cultivate unrest. As for President of the Council René Viviani, he called on Parliament to vote on some twenty laws, two of which aimed at establishing preventive control of the press. The two texts in question were voted in the climate of the Sacred Union, and therefore without provoking debate. Note in particular that of August 5, 1914 “sur les indiscretions de la presse en temps de guerre [on the indiscretions of the press in time of war]”, to which we will return later.

These legal arrangements could not be without causing comments from some jurists, and it was not the lesser known that took the pen for the occasion. It is worth mentioning the names of Joseph Barthélemy, Maurice Hauriou, Adhémar Esmein, Paul Duez and also in their ranks, one of the most illustrious jurists of the Bordeaux Faculty of Law, Léon Duguit.

## **Bordeaux and history: censorship, law school and war.**

The Great War was not without [consequences](#) on Bordeaux as well as on its law school. It is paradoxical to note that although the daily newspaper *La Petite Gironde* was little concerned by discourse due to its constant alignment with the government’s political line, the newspaper was nevertheless the starting point of a controversy over censorship following the suppression in its own pages of an article by member of parliament Charles Chaumet on “pen-pushers” (the censored publication focused on

officers assigned to posts far from the front), a controversy in which Henry Bérenger and Georges Clemenceau in particular participated. In addition, the transfer to Bordeaux from September to December 1914 of the Government, the Presidency, parliamentarians, soldiers and journalists contributed to Gironde being, along with the Paris region, one of the territories most monitored by censors.

The transfer in question also upset the law school: its premises on Place Pey-Berland were almost entirely requisitioned, retired teachers ([Charles Le Coq de Kerland](#) and Camille Levillain) returned voluntarily to give lessons, while their demobilized colleagues took up the teachings of teachers gone to the front, refusing any compensation. The case of Georges Ferron deserves to be mentioned on this occasion, because if the professor of commercial law extended his war effort to become a member of the Committee of Patronage of Student Prisoners of War and the Departmental Supply Commission, his mobilization as a member of the Commission of Diplomatic and Military Censorship is less known.

On the side of the mobilized, the teachers distinguished themselves by various feats of arms, which earned Maurice Palmade a “citation à l’ordre de la Nation” [recognition title linked to a civil or military award] for having led the assault of a trench, and André Boyé both the Légion d’Honneur, the Croix de Guerre and the “médaille des évadés” for having managed, after six attempts, to escape from the prison camp where he was held captive for three years. For the law school, the track record of the war was heavy: Professor Gustave Chéneaux was killed in Verdun while trying to rescue a wounded man, and 72 students were killed in action. The number of wounded remains unknown.

Duguit was no exception to the prevailing patriotic momentum. Demobilized professor of constitutional and public law in Bordeaux during the war, he created a temporary military hospital and, following the death of Chéneaux, he largely financed his commemorative plaque, the faculty then lacking the means. It should be remembered here that Verdun took from him not only a colleague, but also one of his two sons, Pierre.

## **Censorship debated among lawyers: Duguit’s opinion**

A constitutionalist in Bordeaux, [Léon Duguit](#) tackled the issue of civil liberties during the First World War, and thus censorship. It should be noted that few jurists wrote on

Anastasie's scissors during the years of the conflict, most commenting on the subject in the Interwar period: let us nevertheless cite the case of Gaston Jèze and especially that of Joseph Barthélemy in the pages of the *Revue du droit public et de la science politique en France et à l'étranger*, as early as 1915. It was the analyses of the latter that served most of the time as a basis for debates.

As for Duguit's developments on this restriction of freedom of opinion, they are recorded in the fifth and final volume of the second edition of his monumental *Traité de droit constitutionnel* published in 1925, in which he devoted several pages to freedom of the press during the 1914 war. "la censure, telle qu'elle a ainsi fonctionné, était-elle légale ? [Was censorship, as it worked then, legal?]" Duguit asked.

Two legal mechanisms need to be analyzed. The law of August 5, 1914, "repressing the indiscretions of the press in time of war ", and the law of August 9, 1849, which governed the state of siege in France. The first, created at the outset of the war, prohibited the publication of information and intelligence other than that communicated by the government or the army concerning national defense. The memory of the indiscretions of the press in 1870, revealing to the enemy crucial strategies of the French army, largely explain this legislative precaution. Duguit noted that the penalties for the new offense were severe, and that the wording of the law left a wide margin of appreciation to the judges; he nevertheless considered that under this law alone, "la presse [reste] pendant la guerre soumise au régime de droit [the press [remained] during the war subject to the rule of law]". Traditionally, Duguit understood censorship only in its preventive dimension, that is to say in the *a priori* control it exercised over publications.

The second rule was the main point of reflection for lawyers. Article 9 of the law on the state of siege stated that "l'autorité militaire a le droit (...) d'interdire les publications (...) qu'elle juge de nature à exciter ou à entretenir le désordre [the military authority has the right (...) to prohibit publications (...) that it deems likely to stimulate or cultivate unrest]". The state of siege was not formally declared by decree, noted Duguit, its announcement was made through a note communicated to the newspapers and reported by Barthélemy, in which the government "compte sur le bon vouloir patriotique de la presse (...) pour ne pas publier une seule information sur la guerre (...) sans qu'elle ait été visée au bureau de la presse établi au ministère de la Guerre [relies on the patriotic goodwill of the press (...) not to publish a single information on the war (...)]

without the approval of the press office established at the Ministry of War]”. Duguit also noted that censorship was not only confined to the information concerned, “mais encore sur les articles purement politiques ou les informations ne touchant en rien aux affaires militaires ou diplomatiques [but also to purely political articles or information that has nothing to do with military or diplomatic affairs]”, and also observed that censorship, a prerogative of military authority, was exercised by commissions managed by prefects. Finally, he noted the purely administrative execution of censorship decisions, a system in which the government imposed “[de] véritables peines (...) à son gré [real penalties (...) at its own discretion]”.

However, if these abuses were noted, and although the Bordeaux professor admitted the existence of “des réclamations et des protestations assurément fondées [certainly founded claims and protests] ” on the part of newspapers and politicians, he rejected the idea of the illegality of the law of the state of siege, which would have been repealed by the 1914 one. On the contrary, he justified the behavior of the State authority: “Il est évident que dans les moments tragiques que nous traversons le gouvernement devait avoir des pouvoirs plus étendus qu’en temps normal [It is obvious that in the tragic moments we were going through, the government had to have more extensive powers than in normal times]”. Duguit concluded, without further substantiating: “La légalité de la censure sous le régime de l’état de siège n’est donc pas sérieusement contestable [The legality of censorship under the state of siege is therefore not seriously questionable]”.

## **Duguit and censorship, a failed reflection?**

The first observation that must be made is that Duguit’s positions on censorship are far from being contentious. He who was described by Hauriou as a “anarchiste de la chaire [pulpit anarchist]” and an author “imbu de valeurs démocratiques [imbued with democratic values]” by Ripert (which, from him, was far from a compliment) showed here a relatively classical, even conservative speech.

However, these titles were not undeserved. Léon Duguit’s thought was indeed symptomatic of an ambitious desire at the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> to reflect the law in the light of human, social and economic sciences. The influence of Émile Durkheim, a founding figure of sociology with whom he developed a strong friendship, is palpable on his reflections around solidarity. In his theories, the rule

of law was indeed justified by social solidarity, which based society on the bonds of interdependence between individuals. In this sense, Duguit energetically criticized traditional concepts that he believed should be relegated to metaphysics, and which highlighted a voluntarist and individualistic conception of private law. With the notion of public service as his main idea, the Bordeaux professor no longer made the fundamental criterion of the State his *imperium*, but his social function in the service of the collective.

Where did this consensual approach to censorship come from? This was in part a consequence of the choice of the medium, the treatise, which must be a didactic work exposing its subject in a systematic way. However, the fact that Duguit conceded that preventive censorship was legal despite the number of defects that it entailed indicates a lack of in-depth reflection on the matter, or at least a circumstantial reflection. If the argument of the supposed abrogation of the state of siege by the law of August 5, 1914 was indeed weak (since no express provision went in this direction), it goes otherwise for the absence of a formal declaration of the state of siege by decree, yet required by the law itself, and in fact merely signified by a note communicated to newspapers. As for the excesses of war censorship extending to purely political articles, they elicited little reaction for a jurist who wanted “suivre les réalités sociales d’aussi près que possible [to follow social realities as closely as possible]”. However, the censorship institution was rightly preventing some of these realities from being followed, notably by ignoring all the workers’ strike movements of 1917 and 1918 in Paris, Isère, Nièvre and Gard, where more than 200,000 metallurgists and “midinettes” were mobilizing in numbers for peace.

It seems to us that two complementary aspects can explain the lack of depth of the analysis, one theoretical and the other, contextual. Theoretical weakness there was, because his master notion of solidarity, which focuses on the interdependence of individuals founding society, revealed itself in the present case as a floating concept that excessively obscured the existence of antagonistic interests present within the same society. Consequently, Duguit thought of the action of the State only through the prism of a single interest, that of a “society” which nearly existed per se. In this sense, Duguit’s theory is reduced here to a shift from the essentialist character of the State to society. Added to this is a classic concept of freedom of opinion, the individualistic concept of human rights, where individual freedoms are limited to each other, and which

the author did not call into question here. The same bourgeois conception was also found in Duguit's contempt for popular spectacles, to which he refused the qualification of manifestation of the spirit and consequently the regime of freedom of opinion.

The analysis is also determined by a contextual aspect, which should be attributed to the effects of the ideological propaganda of the Great War itself. Evolving in the bourgeois sphere of the Faculty of Law, Duguit's objective class interest had resided in the promotion of the Sacred Union which put aside any revolutionary impulse in the time of conflict as much as it accorded with his solidarist conception of society. Without diminishing the sacrifices and acts of bravery, this subjective unification animated the patriotic feeling that guided the commitment of the teachers and students of the Bordeaux Faculty of Law. It should also be noted, more prosaically, that it was perhaps difficult to criticize (if there was critical will) an institution in which one of his colleagues, Georges Ferron, had participated.

The Interwar period marked a climate of caution and anxiety throughout French doctrine, contrasting with the desire for innovation that had marked the turn of 1900. Duguit bent his thinking by integrating into his legal theory the feeling of justice, which convinced some of his detractors that the Bordeaux professor had finished falling into jusnaturalism. He traveled to many countries as a lecturer, founded the University of Cairo and his influence continued to increase, marking the French and international legal doctrine. His arguments were mobilized in concrete political struggles, whether by Marxist jurists who opposed Soviets in the 1930s, or by Fidel Castro himself during his trial. As Marc Malherbe noted: "son rayonnement personnel rejaillit sur la faculté de droit de Bordeaux [his personal influence is reflected in the Bordeaux Faculty of Law]".

What impact did the war have on Duguit's legal thinking? No one can say, but it seems that in this case it was more propaganda that subjugated the lawyer rather than the lawyer who denounced the propaganda.

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