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RECENSION

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Cocorico! Do we not perceive in the title of the book an echo of the song of Chantecler, the French coquerel, exalting the French legal culture? That image could spring to one's mind, remembering what the *Association Henri Capitant pour la culture juridique française* proclaimed in its first international congress in 1939. Not only was the superiority of the French juridical spirit over the German enemy affirmed, but also the French legal culture (characterized by clarity, order and measure) was said to be in essence worthy of extending its influence in other countries of the world. Such an idealized image of the French juridical spirit had been produced by the First World War; a spirit:

> *formellement épris de logique, de rigueur et de précision, attaché à un idéal de justice, d'humanité et d'équité. D'une manière générale, les savants français opposent à ces qualités la lourdeur, la confusion et l'absence d'originalité de l'esprit allemand. [...] [L]a France représenterait le type même de la "conception latine du droit" portant à son summum la valeur de l'individualisme.*[1]

In their view the "French spirit" could only be the opposite of the authoritarianism, anti-liberalism and irrationalism of the German mentality.[2] Many years later René David would still write: "France is perhaps, among all the peoples of the European continent, the one which has

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1. Frédéric Audren & Jean-Louis Halpérin, *La culture juridique française: Entre mythes et réalités XIXe – XXe siècles* (Paris: CNRS, 2013) at 162-63 [Audren & Halpérin].

2. *Ibid* at 158.

the greatest respect for the law" and this deep attachment to the law would come from their logical or rational mind and from the success of the *Napoleonic Code*.[3] The authors of this book, two distinguished legal historians, do not share this chauvinist view. Their description, for instance, of the attitude of the lawyers under the Vichy regime makes this crystal-clear. The role of the legal scholarship in legitimatizing the anti-Semite laws, the abandonment of the elementary legal principles, the compromises with the new political order, the opportunism, admittedly besides some resistance of the judiciary and heroic gestures, force them to conclude to a collective failure of the legal and judicial world in those dark years of France's legal history.

Moreover the authors demonstrate that neither does the identity of the French law exist, nor the principles, inherent to the French law, which would have transited throughout the centuries by means of the teaching of the law. Not only is there a breaking point resulting from the French revolution and the Napoleonic codification, but also from then on the new law underwent continuous transformations. "*La conception française du droit"* (as René David puts it[4]) is a myth. According to the authors there is not even a method of reasoning which would be peculiar to the French. Until a recent period indeed the methodological reflections were weak, unlike—as was already said by a French author in 1840—those held in German law faculties.

It is not a culture, but cultures in plural that the authors have in mind. Legal culture in that sense refers to the shared values, attitudes, standards and beliefs that characterize members of the legal profession and define its nature. As they see it: "*un ensemble de valeurs, de savoirs et de savoir-faire qui orientent, donnent sens et cohérence aux activités des différents professionnels du droit*."[5] But one, united, French legal culture does not exist. With a truly encyclopedic knowledge of more than two centuries of the life and times of the members of the French legal profession, they describe the great variety and profound transformations of the legal cultures of the professors and lecturers, the judges, the advocates (who obtained a degree in law), the "*avoués*" (solicitors), notaries, bailiffs, clerks of the court, judges of the peace (they did not need a degree in law, but learned the trade on the job). Only historians could fulfill this huge job, because as the great Belgian

3. *Ibid* at 249 [translated by author].

4. *Ibid* at 13, 249.

5. *Ibid* at 8.

lawyer Henri De Page wrote: "*L'histoire bien mieux que la logique ou les théories, est seule capable d'expliquer que nos institutions sont telles qu'elles existent et comment il se fait qu'elles sont telles qu'elles existent.*"[6]

Except for the university culture, the realities of the professional cultures are partially unknown. So it is especially the history of the faculties of law which is told over the two centuries: recruitment of the professors, sociological background, heredity, salaries, exam-fees, housing, teaching, writing, political and religious affiliation, numbers of professors and students, feminization, organization of the studies in law, study programs of the faculty of law, political interference, attitude of students, etc. The index at the end of the book appears as a real "who is who" of the legal scholarship of the 19th and 20th centuries. This historical journey is made over five chapters, of which some impressionistic touches are rendered hereunder as a foretaste of the content of the book. Chapters 1, 3 and the second part of Chapter 5 are written by Jean-Louis Halpérin, a specialist of the history of the French codification, while Chapters 2, 4 and the first part of Chapter 5 are written by Frédéric Audren, who is more interested in legal sociology. Both wrote the introduction and the conclusion together.

The history of the slow acculturation of the Napoleonic legislation sketched in Chapter 1 extends as far as the first half of the 19th century. In the "law schools" (the term was used before 1789 and will be changed to "faculty" by a decree of 1808) the teaching is limited to the *Napoleonic Code* and is characterized by intellectual poverty. This elementary education is restricted to the formation during three years of the future advocates and "*magistrats*" (judges and prosecutors). The faculties of law have the State monopoly on the legal education. They construct a State culture, which is passed on to several generations of students by mainly oral teaching, by professors in red robe. "*Le droit civil*" plays a central role, together with reverence to the authority. After 1830 the terms "exegesis," "exegetic method" become usual. The faculties have no relation with "*le palais*," i.e. the case law. They are also out of touch with constitutional or political questions. The legal culture developed by the faculties can be characterized as imperial, dynastic and bourgeois.

6. Fred Stevens & Laurent Waelkens, *History of the Faculty of Law of the KU Leuven* (Brugge (Be): die Keure, 2014) at 13.

The textbook in German on the *Napoleonic Code* by Zachariæ, professor in Heidelberg, is translated by two professors of the Strasbourg faculty: the dean Aubry [Catholic] and Rau [Protestant].[7] A colleague of them in Toulouse, Bressolles, even starts to study the German language. Later on, the influence of the German universities, and especially of the historical school, is undeniable. The book on Roman law by Savigny is translated.[8] However, the phenomenon of the expansion of journals on legal dogmatism, which blossomed in Germany, does not appear in France. In 1847 there are, in France, all together 76 professors, all Catholic and conservative. There is a clear distinction between the Parisian and the provincial faculties. The revolution of 1830 has an immediate effect on the staff of the law faculties. On the contrary the revolution of 1848 causes no trauma at all in those faculties. Not one dean is dismissed. After the coup of 1851 of Louis-Napoleon Bonaparte the lawyers are clearly in favor of the authoritarian regime, capable to stand up to the socialist threat.

The reason why Chapter 2, about the later years of the 19th century until 1870, has the title "In the days of the well-read lawyers," is that many lawyers in the 19th century shared the taste for literature. Their position requires from them less to have a "juridical culture" than to behave as well-read lawyers. Culture, the classic "humanities" as much as fortune and lifestyle, distinguishes the world of the law. The faculty of law is undoubtedly the most important faculty. The students belong to the elite. They are 500 in Paris in the beginning, 1,700 in 1812 and their number stabilizes around 3,000 during the July monarchy. Most students are frequent visitors of cafés, balls and theatres in order to keep the boredom of the lectures at bay. They are also enthusiast amateurs of literature. Studying law is a costly affair. By monopolizing the faculties of law the leading classes confer them prestige. The faculty of law produces notability. The figure of the "*juriste-notable*," his fortunes and matrimonial strategies are a well-known aspect of the judicial society. The faculties of law are in fact not professional schools. They only deliver a State diploma which allows practicing law. They are important only for the exam which they organize, and that exam, between brackets, "*ne prouve pas le mérite, mais seulement l'absence d'incapacité assez grave pour motiver un rejet persévérant*."[9] The learning

7. Audren & Halpérin, *supra* note 1 at 45.
8. *Ibid* at 53.
9. *Ibid* at 76.

of the profession happens during the articles. The faculty forms the students above all in a "*culture réthorique*." Important for the practicing of rhetorics are the "conferences," a kind of clubs for lawyers. The bar organizes the "*conférences du stage du Barreau*."

The authors lend their attention, as they do in all the chapters, to the professions of advocate, notary, "*avoué*" and bailiff. There are few sociological studies on the justices of the peace. Half of the "*avoués*" have a law degree. In Paris the bailiffs are of rather low origin. Slowly the collective organization of the legal professions is reinvented. The professionalization progressively condemns dilettantism and forges a conscience of the corps. The legal and judicial "notability" is characterized by "*désintéressement*," "*sobriété*" and "discretion" – a detail, which did not escape the attention of Balzac.

Legal publications start to blossom. One thinks for instance of the brothers Dalloz or their competitors Sirey. Most legal professionals resist in the first years the attraction of the State law, the legalism, and turn back to Domat and Pothier. From the July monarchy on, the conception of the new law is affirmed. The "*arrêtistes*" increase the value of the case law. From the start of the legal journal "*La Thémis*," the authors are not only interested in the German legal science but also in the English originality. Unlike the German historical school—admired though for its deep scientific value—the French legal historians (dreading the reactionary tendency and wanting to deepen the liberal tendencies) affirm the conformity of the codification with the national spirit.

Chapter 3 places the law faculties at the heart of the renewal of the legal cultures (1870–1914). The war of 1870–1871 can be called a turning point in the ancient cultures of the faculties, the bar, the magistracy, the State Council, towards a growing professionalization, "*la fin des notables*," and a rapid development of democratization. Charles Beudant ("*cours de droit civil français*"), a moderate republican, is appointed as dean of the faculty of Paris. A chair of constitutional law is created in Paris for Jalabert, the dean of Nancy (republican, and Protestant). Catholic lawyers create free faculties. The faculties of law continue to refuse to be schools only preparing to legal careers; they affirm themselves as establishments of "*haute formation libérale*." The professors of Napoleonic lawyer's style are replaced by professionals of the chair stemming from the competitive examination called "aggregation," with a certain number of unparalleled professors as for

instance Planiol, Girard, Hauriou, Duguit, Saleilles, Geny, etc. Less than 80 in 1850, the group of law professors grows to 220 in the years before the First World War. The law students pass from 5,000 in 1880 to 17,000 in 1911. The law studies remain reserved to a minority of sons of rich families. At the end of the century the renowned book of Geny on the methods of interpretation and the sources of positive private law is published, as is Marcel Planiol's famous "*Traité élémentaire de droit civil*."

Let us give an idea of the total number of the members of the different legal professions: notaries (more than 8,000), magistracy (7,000, amongst them 3,000 justices of the peace), advocates (between 4,000 and 5,000), "*avoués*" (more than 2,000), bailiffs (4,500), other professionals like the "*agents d'affaires*" (2,000) and the law professors (only 200). In comparison with the number of inhabitants, France has less professional lawyers (except for the bench) than England.

The administrative law is condensed in the prestigious Council of State, a "republicanized" micro-cosmos since the purge of 1879. The creative role of the case law developed by the courts ("*la jurisprudence*") is growing but the judicial family cannot assert itself facing the academics. The great variety of legal journals, as for instance the "*Revue trimestrielle de droit civil*," is dominated by the professors, as are the "*Société de législation comparée*" (1869) and the "*Société d'études législatives*" (1902), two associations of lawyers that want to influence the evolution of the law. The *Dreyfus* affair does not greatly shake the lawyers. They are, nearly all, practicing Catholics. There are a few Protestants and Jews (e.g. Lyon-Caen) among the law professors.

Saleilles considers that "*le Code civil allemand aura été l'œuvre juridique la plus considérable du siècle qui vient de finir*" and defends the idea of a new French civil code which would even go further in the adaptation to the needs of the society.[10] But the law professors could not find a consensus as to the revision of the Code. There was nothing comparable to the discussions in the *Juristentag* before the drafting of the BGB. (It must be said that, unlike the "*Juristentag*," *no French association had been created which would have grouped all the lawyers.*) The centenary of the Code, which should have celebrated the influence of the French law, appears to have been low key.

10. *Ibid* at 150.

Chapter 4 gets as title "The roots of the French legal culture (1914–1945)." Lawyers stem now from a less wealthy background. The gradual reflux of the model of the notability in favor of the capacities leads to an improvement and an organization of the professional competences and activities. The different legal professions create specific cultures made of a constant re-invention of their traditions, collective demands, adjustments of the needs of their formation, and an increased production of specific "cultural goods" (reviews, journals, guides, etc.). At the same time emerges from the inmost depths of history a robot-photo of the French legal culture. It was of course the Great War which in the mortal confrontation between France and Germany crystallized definitely the features of "the French spirit." *Descartes v Hegel*? The debate about the German and French legal ideas mobilizes oversimplified, sometimes caricatured, references. From 1930 onwards the legal cultures "in France" (i.e. the formation, qualities and competences required for the legal professions) are coupled with the promotion of "the French legal culture." It no longer concerns a reminder of "the spirit" of the French law, or of the "national tradition," but pretends to give a unified and stable image of a legal identity of France. The staff of the faculties of law in particular is in charge of this diplomacy of influence. An interrogation about the identity of the national law comes here to light, or is it a feeling of discomfort?

The role of the judge and his freedom of interpretation increased during the First World War, especially that of the administrative judge. A well-known example is offered by the case *Gaz de Bordeaux* of 1916 about the doctrine of changed circumstances in the law of public contracts. In 1925 H. Mazeaud published an article following for the first time the famous plan in two parties and two subdivisions, which would become mandatory for all the young lawyers.[11]

There is a progression of the process of making judges employees of the State, while the notability disappears. Women remain excluded from the Bench. The bar is opening up to new social strata. In the twenties there are 17,000 law students in the country, and in the later years 27,000 (compared with 10,000 in 1900).

The authors describe at length the life of the French judicial world during the First World War, the *interbellum*, the Second World War and the Vichy regime, with the echoes of it perceived by the important law

11. *Ibid* at 191.

journals. The faculty of law in Paris reached a crisis in 1925, and again in 1936, with the affairs *Scelle* and *Jèze*, both leftist professors who were disapproved by the faculty characterized by its political conservatism.

In the Vichy period under the authority of G. Ripert, dean of the faculty of law of Paris, the freemasons, the civil servants of foreign origin and the Jews were removed from office. Exceptional courts were created for political matters. Two hundred and nine magistrates were purged. Professor L. Mazeaud was sent to Buchenwald. In 1949 the title of the book, which was published by the Public prosecutor Mornet, "*Quatre ans à rayer de notre histoire*," will be an admission.

Chapter 5 deals with the specialization and internationalization of the legal cultures (1945–2013). At the Liberation Georges Ripert is briefly arrested. After 1945 the legal education becomes characterized by mass instruction and by specialization. The course of Roman law will disappear and "*le droit civil*" will lose its supremacy. The faculties of law, on the other hand, lose their central role. In 1954 a decree reforming the studies in law attempts a compromise between a degree in social sciences and a more technical degree orientated towards the legal professions. The *summa divisio* between private and public law is maintained. Economics and political sciences get emancipated from the faculty of law. With the American business schools as a model, institutes for the administration of commercial enterprises are created. The commercial law course in the *license* program is broadened out to "*droit des affaires*." Vocational schools are created for different legal professions. The ENA is created in 1945, later on the National School for the Magistracy (the bench and the State prosecutors), and the school for advocates. One witnesses a spectacular feminization of bench and bar.

Reflecting the superiority complex still sustained by many French lawyers after the war, the discussions about the candidacy of Hans Kelsen for the degree of *doctor honoris causa* agitated the faculty of Paris in 1951–1952. The candidacy was not retained! The exaltation of the French legal culture does not, however, prevent the progress in the study of foreign legal systems. The outstanding figure here is René David.

In 1968 the faculty of law of Paris will break up. Slowly, the lawyers will become acclimatized to the European questions. The clash will take place in the years 1990–2000, when the administrative courts set aside French laws, which are contrary to European law. In 2002

Christian Von Bar gave a conference at the Court of Cassation in Paris—in English, oh dear!—about a draft of a European civil code. This was a *casus belli* for certain "*civilistes*," representing that the draft underestimated the "fundamental cultures" of the European countries. The bicentenary of the *Civil Code*, however, appeared to be rather "weary." In 2003 a report "Doing Business" is published by a group of economists working for the World Bank, insisting on the "superiority" of the common law upon the civil law as far as economical efficiency is concerned. The *Association Henri Capitant* was not slow to retaliate on behalf of the cultural diversity against the risk of a passage to a system inspired by the American model. According to Audren and Halpérin this reply risks to appear as a rearguard action fought in the name of ossified conceptions.

The reviewed iconoclastic book, published by the respectable National Center for Scientific Research (founded in 1939), should be required reading for French lawyers in order to demythologize their conception of the French law. Iconoclastic? The authors defend themselves: "*Chercher à déconstruire ces mythes ne revient ni à en sous-estimer la fonction sociale, ni à négliger les aspirations culturelles à la cohésion de la société nationale, notamment pour défendre des valeurs qui nous rassemblent*."[12] In a 21st century Europe (wherein the States share a more and more common law) and in a globalised world (wherein the legal ideas circulate with an accelerated speed), it appears to the authors that it is dangerous to withdraw into oneself on a distorted vision of the national identity and on the specificity of the sole French culture. To the comparative lawyers who are interested in French law, one of the grand contemporary legal systems, the book offers a unique overview of the French legal cultures since the Napoleonic times till our days. One is on the waiting for a panoramic book with a similar purpose and historical quality in other countries like Germany or England.

12. *Ibid* at 291.