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Marc-Olivier Baruch

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VICHY AND THE RULE OF LAW

It may seem risky for the non-jurist to delve into this type of subject. However, with the reader's indulgence, I would like to present a historian's perusal of a number of avenues of inquiry, in particular legal ones. These inquiries all relate to an issue that has taken on extreme importance over the course of the century – namely the limits of one individual's power over another individual.

Introduction: Dean Bonnard speaks

The scene takes place in Bordeaux, on October 4, 1940. In the ceremony inaugurating the academic year at the Law School, Roger Bonnard, one of the leading figures in public law discusses the institutions recently created by the authoritarian state in what one of his students would soon term "the Revolution of 1940". I quote Dean Bonnard:

> The changes will be major ones. They will affect the basic principles which have guided our public law since the Revolution of 1789, namely individual freedom, democracy and the separation of powers. […] These principles will be discarded not because they have outlived their purpose, having been useful at a given point in time, but because they are fundamentally bad in themselves as destroyers of the State, and conflict with the idea of the State itself. They are absolute errors, both in theory and in practice.[1]

These comments were fairly well illustrated by the fact that a few days earlier, the Council of Ministers had adopted what was to become the law of October 3, 1940 dealing with the status of Jews. This law created a new category of citizen (or rather semi-citizen), the Jew, defined as "any individual with three grandparents of the *Jewish race*,

[1] *Revue du Droit public et de la science politique en France et à l'étranger* XLVII année, 1940, p 149-150. Dean Bonnard (who should not be confused with the Education Minister from 1942-1944 Abel Bonnard) maintained this type of judgment, writing in the same journal one year later concerning a work on the Constitution: "It is inoperative to wish to rectify the deformations of democratic institutions because these institutions bear within them the seeds of their own destruction." *ibid*, 1941, p.411.

or two grandparents of the same race, if the spouse is Jewish." The law prohibited any Jew holding a whole series of positions in the press, the cinema and the civil service. According to the memoirs of Paul Baudouin, then Foreign Minister, Marshall Pétain was not among the most lenient in his criteria for this long and severe list, since Pétain would have preferred that "the legal and educational systems no longer contained a single Jew".

After such an introduction, it may seem somewhat paradoxical to inquire whether the Vichy regime did or not exemplify the rule of law. A little semantic clarification is needed here, since words and legal concepts also have a history. After Auschwitz, after the Universal Declaration of Human Rights in 1948, after the disappearance of the Soviet Union as well, "rule of law" became synonymous with "rule of human rights." This was not the case in 1940 when the Vichy Regime was founded – if only because Human Rights and the beliefs it stood for were singularly out of favor. My question is whether the Republic of France viewed itself, and above all was viewed, as under the rule of law in the meaning ascribed to it at that time – a meaning arising from 75 years of analysis of the theory of public law. However aside from a historical response, we also need to focus on the lessons to be drawn from the issue of rule of law in the Vichy regime, and French involvement in the Nazi extermination of the Jews of Europe.

Historical Recapitulation of the concept of Rule of Law

Before it became "an umbrella term […] serving as the guarantor and the cloak for the most contradictory proposals"[2] the term "rule of law" had a highly specific history and meaning in French legal thought. Originating in the desire to strengthen the liberal concept of the State, it ended up by challenging the unbridled reign of law as defined by the French theory of parliamentary sovereignty.

The concept of rule of law emerged in France at the turn of the century as a transposition or simple translation of the German doctrine of *Rechtsstaat*. The concept can be traced back to mid-nineteenth century liberal jurists whose goal was to "police" the police state, the authoritarian state, with its unlimited power to dominate. It would be too lengthy – and in any case beyond my abilities – to describe all the ramifications of this idea of the State, the wellspring of all law, imposing limitations on its own capacity to dominate. The leading figures of French public law in the period between the two World Wars attempted to do just this, fueling heated debates, such as those

[2] Jacques Chevallier, *L'État de droit*, Montchrestien, coll. "Clefs", 2d Edition, 1994, p.151.

opposing the Bordeaux-based Duguit to Hauriou from Toulouse – on the basis of formulations by their German speaking counterparts. One of these was the Austrian Hans Kelsen who pushed the concept to its logical extreme by postulating an equation between the State and law, when the law took the form of a perfectly hierarchical and embedded order.

Nevertheless, even this purely formal definition incorporated the broad principles of political liberalism. The Kelsian State, synonymous of law, like the State subjected to law in less radical thinkers, was a State that respected these "broad principles [of] our public law," which Dean Bonnard was to denounce in 1940. The Vichy government supplanted this inheritance of the Revolution (individual freedom, democracy, separation of powers) by a political philosophy where the individual could not exist outside of society, the "tyranny of numbers" translated a false notion of equality, and the weakening of authority ruined the State. Very logically, the State proceeded to concentrate the executive, the legislative and some judicial powers in the hands of the aged Savior of the Country. Given this clear renunciation of republican principles, one would have expected an equally clear reaction from French public law specialists. This reaction did not occur because, in the troubled years of the thirties, the concept of rule of law in France conflicted less (as it did in 19th century Prussia where it was born), with the authoritarian state than with the absolute power of the law, incarnated by the paradoxical institution of a Parliament which was both all-powerful and powerless.

Further details can be found in Marie-Joelle Redor's Ph.D. in Law, in which she studies jurists' attempts to devise, between the beginning of the Third Republic and World War I, a transition from what she calls the "legal state" to the "rule of law." A legal state was defined as a state where the law can do anything as the emanation of the general will expressed by the elected representatives of the sovereign people.[3] The rule of law opposes its liberal vision to this concept, arising directly from 1789. It is distrustful of the "excesses" of universal suffrage. The objective is nothing less than to "end the Revolution" – by stopping at the liberal and bourgeois Revolution of 1789, not at the Revolution of 1793. In any case it must not degenerate – with the increment of the industrial revolution – into either "democratic despotism" or social revolution.

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[3] Marie-Joëlle Redor, *De l'État légal à l'État de droit. L'évolution des conceptions de la doctrine publiciste française, 1879-1914*, Economica-Presses de l'Université d'Aix-Marseille, 1992.

It would doubtless be an overstatement to view the comments made by Joseph Barthélemy in 1908 as forerunners of the explanation the Justice Minister would use to justify the special sections in the Riom trial. Barthélemy quoted Guizot as a reminder that "the sovereignty of justice, reason and law is the principle that should be upheld against the sovereignty of the people."[4] Hadn't this young and brilliant professor, future moderate Deputy during the inter-war period, already internalized this rejection of divisive politics symbolized by parliamentarians who became the defenders of vested interests? In contrast he championed the glorification of abilities – in particular that of the judge –all of which are ideas that promoted– in the name of legal reason – the notion of rule of law.[5]

The objective of this doctrine was ultimately to demonstrate that the law is not omnipotent. There is in fact a rightful norm – the norm of law controlled by the judge – that is stronger than the legal norm. Although the law was voted by a parliament that is formally sovereign, it was increasingly unable to comprehend the complex realities of economic and social life in a country that has fully entered the industrial age. The proof would be provided in particular in commentaries on important administrative legal decrees. The period corresponds very logically to the golden age of the Council of State whose at times daring legal rulings would fill in legislative gaps. On the ideological level, two theories destined to have a heady future were being crystallized at this same time at the turn of the century. The first was corporatism, whose main proponent was Charles Benoist, professor at the School of Political Science, and moderate representative from Paris. Disseminated widely by those who, during the thirties were looking for remedies to the crisis of the State created by weaknesses inherent to democracy, it was based on a second newly emerging theory, that of the glorification of "abilities."

This glorification resulted in the emergence of the technician, the antidote, point for point of the parliamentarian's defects and the caricatures of the time. In the conservative terminology of the Third Republic the politician had ceased to look like the lynx described by Balzac during the early 19th century. Rather he had taken on the weak silhouette of the small town bourgeois – often from the south – with his accompanying stereotypes: he is a braggart, a gossip and lazy. Combining incompetence, dishonesty and cowardliness, he is only moved by the small things: minute services to be rendered to his constituents, which prompts him to bombard the hall with petitions, but above all a disproportional ambition to earn a medal regardless of

[4] *Ibid*, p.315.
[5] *Ibid*, p. 325

type. Deputy from the Auvergne backwoods, he would not turn up his nose for the assistant secretariat of the merchant marine. If specialized in customs duties, he would develop a passion for physical education.[6]

In contrast to this opportunism neglectful of the general interest, the technician is defined by his efficiency based on ability, the result of expert knowledge – with no need for justification to the mere mortal. The technical abilities of the engineer, the administrative abilities of the civil servant, or the legal abilities of the judge, all argue for a reinforcement of the executive and the development of regulatory power. Clearly when defined in this way, the concept of rule of law would not conflict with doctrinal endorsement of the radically new regime which was emerging in the early Summer of 1940. In particular because it did not dare take its considerations to its logical conclusion; namely, if rule of law is superior to the law, control over the constitutionality of laws is the outcome. Jurists would not venture so far, doubtless out of fear of a 'government of judges' which is so contradictory to French national tradition, but also because they would have been hard put to give it a solid foundation. Neither the "social solidarity" championed by Duguit[7] or Hauriou's "social constitution" formed a solid body of norms upon which control of this type could be based. This is, incidentally, the problem of all natural law. But exploring this feature could lead us far afield … Note for our purposes that the law remains the highest norm and is not subject to appeal. The Vichy government would take ample advantage of this.

From Lack of Abilities to Abilities

Although these characteristics demonstrate that the legal philosophy of the French state is not circumstantial, they should not prompt us to exaggerate continuities by assuming erroneous consequences. In order for France to change its political regime, the shock of defeat and the very specific event of the Occupation had to occur. The amassing of powers into the hands of Marshall Pétain, which was one of the key features of the new constitutional regime was not the mere amplified continuation of the decrees used frequently by the dying Third Republic to serve executive power. This enormous upheaval, defeat, exile, and

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[6] Jean Estèbe, "Le parlementaire", in Jean-François Sirinelli (ed), *Histoire des droites en France*, vol. 3, Sensibilités, Gallimard, 1992, pp. 321- 352. The present article is adapted from a paper presented at the Workshop in honor of Jean Estèbe, professor of history at the University of Toulouse (1932-1997), whose last works deal with *Toulouse 1940-1944* (Perrin, 1997) and *Les Juifs à Toulouse et en midi toulousain au temps de Vichy* (Presses Universitaires du Mirail, 1996).

[7] M-J. Redor, *op. cit.*, p.174.

fear were all necessary for the Republic to bequeath itself, personally in a way, to the aged Marshall. Once this change in constitutional regime had been enacted formally on July 10, 1940, things happened fast. The next day, July 11, three constitutional acts eliminated the Republic, concentrated all powers except the power to declare war in the hands of Marshall Pétain, and adjourned the two chambers. This was the end of the 'principles destructive to the state' which Dean Bonnard would mention a few months later.

Among the edifices which Vichy would begin to construct – similar to the builders which Maurice Chevalier would exalt in his "mason's song" so metaphoric of the new regime – exclusion ranked highly. Note that the first law dealing with matters concerning the Vichy government (after the law appointing the members of the government) was a xenophobic text forbidding individuals born to a foreign father to belong to a ministerial cabinet. This was only the first of the "lack of qualifications" laws which legal experts would produce, civil servants would apply and the judges would validate – the most emblematic being the law of October 3, 1940 dealing with the status of Jews.

This particular law has prompted the most discussion in recent controversies on the issue of the attitude of a judge towards a malevolent law. It has been analyzed in two major symposia ("Judging under Vichy" and "Antisemitic law of Vichy") organized respectively by the Ecole Nationale de la Magistrature in 1993 and by the University of Dijon the year after, symposia whose important proceedings were both published by the review "Le Genre Humain."[8] These proceedings confirm that the extremism of the law frightened legal experts in the Republic, but no longer bothered them under Vichy. I have only found one jurist, Julien Laferriere, who argued that nothing could prevent the Council of State from drawing the conclusion that since Vichy laws were decrees issued by the Chief of State and debated in the Council of Ministers, they were no longer the expression of the general will, and could be appealed.[9] This would have made it possible – to slip momentarily into historical fiction – for the Conseil d'État to censure the emergency decrees as contrary to equality in the civil service.

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[8] *Juger sous Vichy*, proceedings of the November 29, 1993 workshop, *Le Genre Humain*, n.28, and *Le Droit Anti-Sémite de Vichy*, proceedings of the symposium held in Dijon on December 19 and 20, 1994, *Le Genre Humain*, n.30-31.

[9] *Le Nouveau Droit public de la France*, Sirey, 1941 p. 9. Among others, Bonnard defended exactly the reverse in his *Precis de droit administratif*, 4th edition ("revised and updated to include administrative reforms") LGDJ, 1943, p.303.

These new " lacks of ability" – which here again the doctrine would help legitimate – affected both Jews and children of foreigners. Free Masons were also to be expelled from the State, and more generally all opponents to the regime, starting with the civil servant union leaders who were the "pet hates". Once its ranks cleared of 'the morally inept individuals it was infested with – the terms are those of the period – the new state could allow ability to triumph. This was the era when greatest ability, the logic of skills championed. The finance minister was an inspector of finance, the communications portfolio was held by a graduate of the famous École polytechnique, and public education was in the hands of a university professor. The Council of State was granted a major role in this arrangement: a symbolic role, since it had the honor in August 1941 of receiving Marshall Pétain – the first chief of state to attend the Council since Napoleon – but a real role as well, since as the highest administrative body, as stipulated by a law of December, 1940 it was supposed to help formulate laws[10]. However its hopes were dashed. The Council of State was not systematically associated – far from that – with lawmaking of the French State (hence it did not write, as a body, the statute on Jews). Once again, however the Council was forced to admit that the new legislative body – i.e. the government and its administration – were doubtless more efficient that the defunct Parliament, but also infinitely more muddled. Its Vice-President complained to the successive justice ministers, and anyone who reads the abundant output of the normative texts of the time can only be struck by its bureaucratic, hesitant and uncertain tone.

Even the most loyal supporters of the regime were chagrined by the downward slide of authoritarian state into bureaucratic state. Any number of the long-time defenders of Pétainism saw in it a sign of the demise of the regime. Dean Bonnard, once again, drew this conclusion in a theoretical book he wrote in 1942 on *Constitutional Theory and Practice of the regime*. Compare this to the introduction to the book:

> Some people believe or pretend to believe that the current authoritarian regime is only an accident due to circumstances that will disappear with these circumstances and will, with normalcy, return parliamentary democracy. This is merely fooling oneself and taking one's dreams for reality.
>
> First of all the political regime of 1875 cannot come back to life. When a political regime falls, weighted down by so many unforgivable faults and bearing the responsibility of an unspeakable disaster, as was the case for our parliamentary

[10] Without even mentioning the flight of members of the Council of State to active administration, which refers to another analysis.

> democracy, it cannot recover from its collapse since it would then appear to be riddled with irreparable vices. Not only were men shunted aside, institutions were permanently condemned and abolished.[11]

Here is his conclusion:

> Although I believe in the superiority of the authoritarian regime over the democratic regime, I also believe that the authoritarian regime can be worse than the democratic regime, if it does not contain certain stipulations in particular to avoid it degenerating into bureaucracy. However I fear that the fatal error in which the authoritarian regime of 1940 is sinking a little more every day is indeed the domination of bureaucracy.[12]

The "great legal expert" states that what constituted this "fatal error" was the dogmatism with which the new state had dissolved all associations, groups or councils likely to suggest that the authority of the chief of state was not indivisible. I am not referring here to civil servant unions, the pet hate of both the government and many jurists . Nor am I referring to such scarcely subversive associations as the "Société des agrégés" or the "Association du corps préfectoral" – both of which were dissolved upon orders from the government. However as regards the many councils holding seats in all the ministries, the Dean of Bordeaux argued that they were "made up for the most part by people active in the departments, [they] could provide useful information to […] the central authorities."[13] By depriving itself of the advantages of this 'consultative administration' which Pierre Rosanvallon[14] has shown to be important to the running of the state under the Third Republic, (in particular in social matters), Bonnard predicted that the government risked paralysis and the decomposition of the regime by suffocation of the general interest under bureaucratic weight. The prediction was not wrong.

What weight could the Council of State's scope of independence wield in these circumstances, given this new type of State which was formally under rule of law but in practice mostly subjected to the goodwill of the

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[11] *Les Actes Constitutionnels de 1940*, LGDJ, 1942, p.2.
[12] *Ibid*, p. 177.
[13] *Ibid*.
[14] *Le peuple introuvable. Histoire de la représentation démocratique en France*, Gallimard, 1998, pp. 257-265. This book contains three consecutive chapters on the "democracy in the parties" and to democracy in the unions and the consultative administration under the generic title of "democracy and equilibrium". See also M.-J. Redor, *op. cit.*, p.91.

administrations? Doubtless, as supreme administrative arbitrator, the Council of State was prevented from fulfilling its mission. It did its duty without servility, since not all the decrees it handed down were to the government's liking. In a situation of an authoritarian state, the judge could annul ministerial decisions, even those dealing with expulsion. The jurisprudence concerning the application of the Jewish laws was obviously rejected[15] but through a process of neutralization examined by Daniele Lochak in a pioneering article.[16]. In addition most of these rulings were handed down after the Council of State had returned to its Parisian headquarters in the Palais Royal. In the slightly less than two year period that separated this return at the end of June 1942 from the instigation of the Vichy Regime, its activity was, because of circumstances, above all administrative. The rulings that I have read concerning the expulsion laws, testify to an adherence by the High Court to the principles of the National Revolution. Does this type of behavior correspond in these conditions to the canonical definition of rule of law, which posits a genuine "control of administrative activity by an independent judge"? "Independent" could easily be the topic of lengthy debate, given that the degree of independence was to increase with time[17]. As was the case for almost all the administration, the Council of State of January 1944 – the date of a ruling which overturned the removal from his post by the minister of education of a school headmaster presented as 'Gaullist' – laid the groundwork for this type of transition. Through the gradual build up by the Free French forces in London and more clearly in Algiers, of a new legal order which gained in strength as the Vichy regime declined, this transition hardly posed any problems for the administration. As a prefect of the time wrote candidly, civil servants had to serve the future government, headed by General de Gaulle, as loyally as they had served the previous government, that of Marshall Pétain.

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[15] An analysis of the Council of State's attitude can be found in an article by Jean Massot, himself a high-ranking member of the Council of State, "le Conseil d'État et le regime de Vichy", *Vingtième siècle*, n.58, April-June 1998, pp.83-99.

[16] "Les mésaventures du positivisme ou la doctrine sous Vichy," in *Les Usages sociaux du droit*, CURAPP - Presses Universitaires de France, 1989, pp. 252-285.

[17] The particularly indulgent article by the State councilor Tony Bouffandeau published in the first collection of *Etudes et documents du Conseil d'État*, 1947 should be contrasted with the severe article by Professor Olivier Dupeyroux, "L'independence du Conseil d'État judeant au contentieux", *Revue du Droit Public*, 1983, n.3, pp. 565-629.

A Return to Natural Law ?

Despite the fact that this substitute legal order had proclaimed itself legitimate since June 16, 1940, there was a need for the Gaullist political fiction that Vichy was never a State. The war had to be won on the legitimacy front, one where we find the handful of jurists who rallied to La France Libre, the first and foremost of whom was René Cassin. Today's 'historical Gaullists' – such as the ones who came to testify in favour of Maurice Papon during his trial which began in the fall of 1997 – should have understood that supporting this position more than a half a century after the facts, hence confusing the symbolic and the real, is meaningless, in particular in the eyes of the new generations.[18] The Vichy regime obviously existed, and existed as a State. One could inquire, as did a number of conservative theoreticians, whether the regime remained a state until the end. According to Michel Troper, a law professor highly critical of the concept itself of rule of law[19], what could be questioned is calling the mode of power in Nazi Germany a state, because of its lack of a stable hierarchical legal system. However, Troper argues, what do we gain by refusing to use the word "state" to describe this polycracy in which factions – in the party or the administration or the army – engaged in ferocious battles? He answers in the following way:

> [We gain] a great deal on the theoretical level, if we draw all the conclusions from identification of State and Law. This implies first of all that the State is nothing other than the name given to a political power when it is exercised in a certain form, the legal form; secondly that there is a relationship between the form of power and the content of the decisions that are made.[20]

What is needed – and would at the same time be highly complex – is to transpose this concept to the French state. Vichy France was clearly not national-socialist Germany and it has become commonplace to point out the reasons why Vichy was not a fascism, or at least only partially in its final days. When the Milice state was set up in the propaganda and public security sectors at the start of 1944, Vichy indeed began to engage in a Fascist process, which would go as far as the partial

[18] And is even counter-productive in terms of what we can imagine was the objective of these men and women – all indisputably Resistants and often associated from the start with the Gaullist movement – i.e. explaining and defending the actions of General de Gaulle at that time.

[19] Which is for him "either a contradiction in terms or a tautology", "Le concept d'État de droit", Droits, n.15, 1992, p. 51-63 (*loc. cit.* p.55).

[20] "Y a-t-il eu un État Nazi?" in *Pour une théorie juridique de l'État*, PUF, 1994, p. 177-182.

disbanding of state administrations under the authority of Joseph Darnand. This was the era of brutal violence, the era of court martial, the cruel battle against the Resistants. It was the time of the murder of Jean Zay, Hélène and Victor Basch, and Georges Mandel which would lead to the final moments of the regime. The frightened Pétain did not disavow Darnand earlier than August 6, 1944 when he criticized the Milice for making an indelible stain on French history. Darnand replied, rightly enough, that it would have been better to come to this realization earlier.

Realization could have come earlier – even before the Milice was created. The events of the summer of 1942 – the first round-ups carried out by the French police changed things a great deal. Although the fate of the Jews was an important issue for the regime, it was not crucial to its options. In the autumn of 1940 and later in June 1941, the status of Jews was only one form of exclusion among others (the period was not lacking in them since the regime had its share of enemies). We know from Serge Klarsfeld's work that the roundups of 1942, however carefully they were prepared and implemented, were designed above all to be a sign of collaborationist goodwill on the part of the French government.

These events were discussed a great deal at the time, as were many other things, and much less was said afterwards, until recently, when a definition of the rule of law was made the key to an analysis of ethical principles as regards crimes against humanity. The outcome of this debate was that natural law, after having been rejected, had to be included once again the argument. Reference to natural law is the only way to cease qualifying the Vichy regime as an example of rule of law; namely at the point in time when Vichy agreed to put government in the service of organized murder.

This particular area has been dealt with extensively in numerous and seminal legal works. The non-jurist cannot go very far except to point to the fact that the controversy, which began at the turn of the century on the basis of Kelsen's works, continues between those for whom "it is by no means necessarily true that the rules of law reflect or should reflect certain moral obligations," and those who wish to believe in contrast that "[there are] certain principles of human behavior which are waiting to be discovered by human reason and which laws made by man should adhere to in order to be valid.".[21] The latter go back to Antiquity." For

[21] Herbert L.A. Hart, *Le concept de Droit*, Bruxelles, publications de l'Université Saint-Louis, 1976, p. 224, quoted by Pierre Bouretz, "Le droit et la règle: Herbert L.A. Hart" in Pierre Bourretz (ed) *La force du droit. Panorama des débats contemporains*, éditions Esprit, 1991, p.42.

there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men", wrote Aristotle,[22] after Socrates.

Nor deemed I that thy decrees were of such force,
that a mortal could override the unwritten and unfailing statutes of heaven.
For their life is not of to-day or yesterday, but from all time,
and no man knows when they were first put forth.
Not through dread of any human pride
could I answer to the gods for breaking these. (Antigone)[23]

However, although the widespread use today of the concept of rule of law implicitly postulates natural law to be self evident, it is anachronistic to transpose these conclusions to this period. Furthermore, as Michael Troper has pointed out,[24] by interpreting and explaining the exclusion laws, and hence contributing to the process of euphemism concerning them, the jurists of the time were in no way positivists. For genuine positivists who confer upon the science of law the role of describing existing law in a neutral and objective fashion, axiological neutrality is in no way an ethical attitude.[25] The *ratio legis* – what is termed the lawmaker's intention – is not within law but rather outside of law, and any attempt to define it "can hold some interest for the psychology of the lawmaker, for the sociology of law, for history, for meta-ethics […but] is entirely useless as regards the knowledge of law itself."[26]

We must thus return to history, or more precisely the history of the relationship between Vichy power and the spiritual authorities who initially supported it. Towards the end of August 1942 – when, as prefects' reports show, the French were shocked by the brutality with which the round ups were conducted in both zones – resounded the voice of Mgr. Saliège, archbishop of Toulouse, heard by all the faithful of his diocese on August 23, 1942:

There is a Christian morality, there is a human morality which imposes duties and recognizes obligations. These duties and obligations are part of man's nature; they come from God. They can be violated. It is not in the hands of any mortal to eliminate them. […] In our diocèse,

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[22] *Rhetoric* I, 13.
[23] Sophocles, *Antigone*.
[24] In an article discussing this, quoted above, by Danièle Lochak: "La doctrine et le positivisme (à propos d'un article de Danièle Lochak)", CURAPP, *Les usages sociaux du droit*, PUF, 1989, p.286-292.
[25] *Ibid.*, p.288.
[26] *Ibid.*, p.291.

terrible scenes have taken place in the camps of Noe and Recebedou. Jews are human beings. Foreigners are human beings. All things cannot be done against them, against these men, against these women, against these fathers and these mothers. They are part of the human race. They are our brothers as so many others are. A Christian cannot forget this.

Superb words, quoted frequently since comparable examples were rare. Few in number were the prelates who followed the noble example of the archbishop of Toulouse: above all Mgr. Theas in Montauban and, in a somewhat lesser fashion Mgr. Moussaron of Albi, Mgr. Delay of Marseille and Cardinal Gerlier of Lyon. The Church of France did not react vigorously to the deportations. Nevertheless, I would go further than Jean Estèbe who viewed Mgr Saliège as "militant of the resistance to Nazi immorality, not resistance to the Vichy regime."[27] Although the archbishop never ceased respecting Marshall Pétain as a figure, and never encouraged subversion, his strident appeal to evangelical order and to morality contributed to weakening the foundations of the regime. In the archives of the secret services of the police one can find a report dated September 1942 stressing its impact on the Christian sectors of Paris which regretted the fact that more prelates – starting with Paris' Cardinal Suhard – had not been moved to follow this example. Pierre Laval was right when he let it be known to the Vatican that the French government would greatly appreciate the removal of this "rebellious archbishop"[28].

When the National Council of Reform Churches mentioned "transgression of respect for the human individual" several days later, it was taking a stance in what Michel Foucault would much later term "bio-politics", in other words "integration of individual's physical lives in the mechanisms and calculations of state power." [29]The Italian philosopher Giogio Agamben returned to this issue in a book published in Italy in 1995, and in France two years later entitled *Homo Sacer*: *Le pouvoir souverain et la vie nue*. The twentieth century has, in his opinion, given new life to *homo sacer* of ancient Roman law, defined as 'the man who can be killed without committing murder, but the one who cannot put to death in the ritual manner,[30]" since he is excluded from society. Agamben uses this metaphor to interpret Fascism and

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[27] *Toulouse..., op.cit.*, p.255.

[28] Serge Klarsfeld, *Vichy-Auschwitz*, vol 1., Fayard, 1983, p.370.

[29] Nicolas Tenzer, comments on the book by Giorgio Agamben, *Homo Sacer. Le Pouvoir souverain et la vie nue* (Seuil, 1997), in *Le Banquet*, 1st Semester 1995, n.10, p. 310.

[30] *Op. cit.*, back cover.

Nazism as having forced the relationship between sovereign power and "bare life" (the *zoe* of the Greeks, the opposite of organized life, *bios*) to its extreme. Observing that "human life is only politicized when abandoned to an unconditional power of death"[31], he claims that the concentration camp, not the city, is the emblematic locus of the political society of our century, a place where violence and law have merged.

This search for the hidden link between the legal-institutional model and the biopolitical model of power makes "bare life" a decisive political feature. It can also help show how democracies, without becoming examples of totalitarianism have implemented this adulteration of power into the politics of bare life, subjected to the sovereign's every whim. How does Vichy fit this perspective? Raymond Aron saw it as a perversion of the relationship of protection that was thought to exist between a state and its people who believe they are under its protection. Article 19 of the armistice agreement made it obligatory for the French government to return German refugees when requested to by Hitler's Reich. There is not only a difference in magnitude but in type between this first step and the acceptance by the French administration to take part in the mass murder of Jews.

"France, take care not to lose your soul!" warned the Jesuit Gaston Fessard in the first issue of *Temoignage Chretien* as early as the fall of 1941[32]. The same tone can be found in a leaflet written by the Catholic Resistance in the spring of 1941, entitled "Opinion by a group of jurists and theologians." The latter stated they were "struck by the difficulties encountered by a large number of their fellow citizens to understand the traditional doctrine of the Church regarding respect to the government," and proposed defining the upper limits of obedience to the regime required by its representatives. Defining a legitimate government as "one whose authority, accepted by the people it governs, provides for the basic requirements of the public welfare" it concludes after a lengthy proof "[that] a government is not created to hand over its people but to defend them. It should act *for* its people and not *against* them. A government which has become powerless [..] is unable to guarantee basic rights. It can only render service to the enemy."[33] By defining the boundaries of obedience in this way, it helped provide answers to the questions raised by those "civil servants who are examining their

[31] *Op. cit.* p.100

[32] The full text can be found in the volume of collected clandestine writings of Gaston Fessard, *Au Temps du prince esclave. Ecrits Clandestins 1940-1945*, Critérion, 1989, see in particular on anti-Semitism, p.87-88.

[33] AN 2 AG 609 (italics in the text)

consciences" so ironically depicted by Laval in June 1943[34]. An attempt was made to ground these answers in the legal system, given that the civil service remained devoted to legality, both because of its background and its activities, in the face of a regime which continued to appear legal and even partially legitimate. The crux of the issue is less to determine whether it is appropriate to consider the Vichy Regime as dependent on the rule of law than to acknowledge the terrible consequences of this conjunction of the formal absolute of the law, inherited from the French Revolution, and an authoritarian and counter-revolutionary ideology.

Marc-Oliver Baruch
Institut d'histoire du temps présent

[34] Speech on a radio broadcast June 5, 1943, quoted by Pierre Nicolle, *Cinquante mois d'armistice*, éditions André Bonne, 1947, vol II, p. 509 - 510.