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Dialogues: Léon Duguit, « Traité de droit constitutionnel »
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Dialogues:

Excerpt from *Traité de droit constitutionnel* by Léon Duguit

(3rd edition, 1923, Chapter VI, L'Etat et le droit, reprinted 1930 with different pagination p. 547 et seq in 1923, p. 589 et seq in 1930)

While the State, administrator and judge, is bound by the law that it makes; while all bodies must defer to a judicial decision finding that an individual act was performed contrary to the law [...], the State as legislator is itself bound by a higher law. The State as legislator cannot do everything [...].

In the system of declarations of rights, an assembly gathering under exceptional circumstances formulates certain higher legal principles that are binding on the State, not only on the legislative branch but also on the constituent power [...] and all law must be made in accordance with those principles [...].

The system of declarations of rights tends to establish the limits imposed on the actions of the State [...].

From what I have said... it emerges that the positive legislature has no power to make law, it may only confirm it and enact constructive provisions to implement the same. The consequence is that a law that is contrary to objective law... is a law without value, a law without executive force [...].

Whether or not there is, in a given country, a body responsible for assessing the compliance of legislation with objective law [...], there must be no hesitation in drawing out all the consequences of the preceding proposition and say that the refusal to obey legislation that is contrary to the law is perfectly legitimate [...] When one formulates that proposition, one is generally labelled an anarchist because, it is said, society would not be possible if citizens could refuse to obey laws. My answer is that there are laws to which it would never occur to a person to refuse to obey, as they express or implement a legal rule that is undisputed. And to assert a right to resist is the best guarantee against the arbitrariness of the legislature, which will consequently strive only to make laws that will be obeyed almost unanimously [...].

Besides, governments are also bound thereby [...] to formulate and implement the legal rule, are at the same time under a specific obligation. They must give the State an internal structure and take such measures as are necessary to minimise the possibility for them to make laws that breach their obligations [...].

The courts must above all apply the law, that is to say resolve, in accordance with the law, all questions of law. They are bound by the law, obviously by all laws in force [...]. Where there is a conflict between the ordinary law, on the one hand, and constitutional law on the other, the court may not apply the ordinary law [...]

This outcome must also follow, I could say especially in the countries that operate the separation of powers, as understood in the 1791 French Constitution and the United States Constitution. According to that conception, the legislative and judicial powers are also sovereign in their respective spheres. They are completely independent of each other; yet they have a common superior, the constituent power [...]. If the legislative branch has breached a constitutional rule, it cannot require that the judicial branch associate itself with that breach. Were it compelled by the legislative power to apply an unconstitutional law, it would cease to be independent and sovereign in its sphere, and the principle of the separation of powers, like that of constitutional superiority, would be negated.

Commentary by Bernard Pacteau,
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One hesitates to invoke the works of Léon Duguit, a legal theoretician of historic and universal renown.

We will simply mention that he was born in 1859 in Libourne, near Bordeaux. His father was a solicitor there, while his mother had connections to the world of wine (the famous *Château Cheval blanc*, also of worldwide renown). From 1876 onwards, he was a student at the Faculty of Law, Bordeaux, which had just been re-founded after having been abolished, like so many others, during the Revolution. He was awarded a doctorate in 1882, an *agrégation** following two years later.

After a brief sojourn in Caen, Duguit pursued his career as professor of law in Bordeaux, even becoming the Dean of the Faculty, until his death in 1928. Léon Duguit was thus very much *bordelais* in terms of his origins and his social and university position. He was also very involved in local public life, serving as a municipal councillor and standing unsuccessfully in parliamentary elections. He was no less global in his outlook, his academic authority, the translations of his works, not to mention his travels in Europe, Egypt, the United States and South America (1).

Duguit was part of a wider trend of renewal in legal thinking which emerged in the 1900s, especially in France, and particularly alongside Maurice Hauriou, his contemporary and fellow student at Bordeaux, who also took the competitive examination for the *agrégation* in 1884 (Duguit being the younger, Hauriou the elder).

Duguit had one great enemy: the State. His battle against all that could exalt or recall political sovereignty took him far. Thus he viewed the social demands of solidarity as the sole source of Law.

Duguit was the subject of lively jurisprudential debate, even being dubbed the *anarchiste de la chaire* (literally, “anarchist of the chair”), a phrase which soon caught on. Hauriou, in particular, circulated it in a 1912 article titled *Les idées de M. Duguit*.

Duguit himself acknowledged it without, for all that, ever accepting its harshness. He did not seek to repudiate the State as an organisation, but rather the all-powerful State, the tutelary State – one might even say the metaphysical State, author and creator of law, as German legal scholars

presented and conceived of it. For Duguit, the State's only functions were precisely those of serving and speaking the Law, the fundamental reality of which was older, external and superior.

This was quite revolutionary; it also boiled down to natural law, which Duguit nonetheless rejected. It was also visionary, as Duguit's conception of the State continues to fuel constitutional jurisprudence today.

The excerpt above bears witness to Duguit's veneration for the primacy of the law over legislation; hence his obsession with "*laws that are contrary to the law*".

This was certainly not usual in Duguit's time. The French Republic displayed and asserted then, quite to the contrary, the full sovereignty of legislation. Laws being the expression of the will of the people, which court or judge would have dared declared them invalid? There was no such thing then as a constitutionality review. Moreover, the founding texts of the Third Republic were only institutional and procedural. They formulated no principles and guaranteed no personal rights. It was the age of what was called *légitimisme*: nothing without laws, nothing against laws.

All this seems a distant memory now – and yet generations of French jurists have been trained in that same mindset.

A century ago Duguit argued, with all his well-known vigour and in his lively – even vehement – style, that legislation could not be allowed to do anything and everything; on this point, he was joined by Hauriou who was, in any event, hostile to political omnipotence and concerned about balances within the State.

He even went so far as to prove that the courts could counter such laws with the principles of the Declaration of the Rights of Man and of the Citizen 1789, which had been kept aside from the constitutional laws of 1875 – and this even when Duguit himself disputed the highly individualistic nature of the Declaration. However, in his view, it contained the seeds of an essential concept: a law above the law! He would even eventually, in stating that idea, write that the constituent power of 1789 was "*greater than Napoleon at Austerlitz and Jena [...]*". What greater compliment is there for a Frenchman?

Assuredly, France's legal experts in 1900 were not only attached to democratic sovereignty, but also trusted in the wisdom of the legislature and wary of any government by judges/courts having at their disposal higher principles all too often so imprecise and malleable that any law could thereby potentially be set aside on that basis.

The modern "abatement" of the law is sometimes shocking; even troubling, at times. It is, however, in line with a genuine legal pyramid, and it is all credit to Léon Duguit to have had such a hand in its creation.

Notes:

* Translator's note: the *agrégation* is a competitive examination for the public education system, whereby successful candidates become full university professors

(1) See our study: « Léon Duguit à Bordeaux », *Revue du droit public*, 2010 pp. 505–521.