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A Comparative Landscape of the Criminal Liability of States

In his lecture on *Moral Personality and Legal Personality*, F.W Maitland tells us the following story: “Lately in the House of Commons (in 1904) the Prime Minister (Mr Balfour) spoke of trade unions as corporations. (...) a distinguished lawyer (...) interrupted him with ‘The trade unions are not corporations.’ ‘I know that’ retorted Mr Balfour, ‘I am talking English, not law.’ A long story was packed into that admirable reply “¹.

Far from the promise of a long and rich history of the corporation and the State, I will focus solely on the criminal liability of the latter; it is an opportunity to single out the peculiarity of a specific compound word, State-Crime. For instance, if I were to speak about State crimes committed by France, I would be talking in English, not law. This fundamental divide between facts and norms or simply between everyday language and legal language participated in my choice of sketching a landscape, instead of drawing a map or drafting an exhaustive study. According to geographer Yves Lacoste, “The landscape is fundamentally characterized by sliding scales and masked spaces that depend on the place of observation. The same space may have different landscapes depending on the points from where it is observed”². Hence, objects may appear very clearly in the foreground while the background remains blurry until a shift of perspective. So, this presentation is limited in its object and the comparison at a small scale. I sketch it horizontally between two domestic legal systems, two States, France and Belgium and do not offer a vertical comparison with the international order, for it does not know of the criminal responsibility of the State. Thus, in its ruling of 26 February 2007, the ICJ stated that “International law does not recognize the criminal responsibility of the State and I would add that a long story is again packed into that reply”³.

This comparative landscape aims to explore two distinct situations: France with the exclusion of the criminal liability of the State and Belgium where it became part of the penal code in July 2018. Since it is too soon to assess the Belgian application of the law, I then use these two models to understand the logic of a specific French case in administrative law (Hoffman-Gleman), a hard case, about the State’s responsibility and complicity in the Holocaust. Next, I will shift perspective, leave the realm of

¹ F.W Maitland, “Moral Personality and Legal Personality” in *State Truth and Corporation*, Cambridge, Cambridge University Press, 2003, pp. 62-74, p. 63.

² Jean Yves Lacoste, “A quoi sert le paysage ? Qu’est-ce qu’un beau paysage”, *Hérodote*, n°7, 3^{ème} trimestre 1977, p.16. When not specified otherwise, all translations are done with the help of *Deepl then* corrected by me.

³ International Justice Court, *Bosnia and Herzegovina v. Serbia and Montenegro*, 26 February 2007, § 170.

statutes, and enter the domain of public management, of the day-to-day life of the State. There, I hope to find fragments of the answer to my main question, could the criminal liability of the State put an end to the techniques that ensure its impunity?

I. A comparative landscape:

A. An exclusion of the State criminal liability (France)

The French Criminal Code provides in its article 121-2 that "legal entities, to the exclusion of the State, are criminally liable (...) for offences committed on their behalf by their bodies or representatives. "The criminal liability of the French State is then inexistent both in the international and the domestic order, without prejudice to the existence of an international responsibility and an administrative or civil one. The initial line of questioning could be: is it highly problematic? Could we say that consequently, France is not really under the rule of law?

I outline here three key questions and issues at stake:

- 1- If other legal entities are criminally liable, is the principle of equality between persons under the law fully realised in the French legal order?
- 2- Would a criminal investigation be more effective than administrative or civil litigations? Would it have material means and legal prerogatives that are inaccessible otherwise? Would this criminal liability be a decisive step towards better accountability?
- 3- Furthermore, is the absence of criminal liability a form of impunity? Impunity is defined by the United Nations as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account (...) since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims"⁴. Here impunity is understood as a differentiated legal treatment of a fact that creates the impossibility of an adequate legal qualification. Impunity is paradoxically a legal technique as it can prevent the enforcement of law thanks to legal means. It falls within the broader field of what the legal historian Yan Thomas calls a "juridical operation ". He writes that it does not "consist of imposing law upon facts, which would be unthinkable and impossible. Rather, the juridical operation is an exercise in reconfiguration: it remodels the facts to qualify them to make them fit into the practical value judgement it imposes"⁵. This mechanism is of utmost importance in this landscape and acts as a potential and important limit to the *effectiveness* of the State's criminal liability.

⁴ United Nations, *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Definitions: A, 2005.

⁵ Yan Thomas, "Legal History for Historians: A Presentation" in *Legal Artifices: Ten Essays on Roman Law in the Present Tense*, translated by Chantal Schütz & Anton Schütz, Edinburgh University Press, pp. 8-9.

B. A criminal liability of the State (Belgium)

The international situation of Belgium is the same as the French one yet since 2018, criminal proceedings are possible against the Belgian State. The provisions of the Criminal Code are as of July 11, 2018:

Article 5: Every legal person is criminally liable for offences which are intrinsically linked to the achievement of its object or the defence of its interests...

Article 7bis: As regards to Federal State (...) only a simple declaration of guilt may be pronounced, to the exclusion of any other penalty.

According to Professor Franklin Kutu, “the pronouncement of a simple declaration of guilt may be considered as the judicial affirmation of guilt that makes possible to establish criminal responsibility and civil liability (...) This formulation is unfortunate because it suggests that a mere declaration is already a punishment”⁶. Is the declaration of guilt a punishment? Besides, the principle of equality under the law seems still partially harmed by these legal provisions. For instance, the declaration of guilt is not meant to be publicised, to mutate into an official declaration of criminal responsibility. In a way, the Belgian State is still immune, this time not by exception (which is the absence of a legal ground for incrimination) but by exemption as it is not facing the same punishments as other legal entities, for instance, fines⁷.

This critic was central in a motion filed for the annulment of the law before the Belgian constitutional court. In its decision of 14 May 2020, the court opposes the argument by quoting the Belgian Council of Ministers “As far as the budget is an act by which the annual revenues and expenses of the legal person of public law are foreseen and authorized, these forecasts would necessarily be undermined in the event of the imposition of a fine that could not be foreseen”⁸. Nevertheless, this law opens a door that is beyond the scope of the foreseeable. For certain crimes, time is central to discovering their existence, collecting evidence, and seeing through the fog of war and the secrecy of the State.

Thus, Belgium as a State is criminally liable, it exposes itself to linked criminal and civil proceedings that are not subject to any statutes of limitation notably for the crimes of genocide, crimes against humanity and war crimes⁹. If this law lasts in time, it means that since 11 July 2018, Belgium is perpetually liable to criminal prosecution for these specific crimes. For individuals, the absence of a statute of limitations has an end, the duration of the life of the accused; for the State, this time seems like an eternity. If damages are understood as debts of the State; therefore, this debt will never expire, and, in France, this possibility was deemed unthinkable by the Council of State. The advisor of the Council, the *rapporteur public* writes in the Hoffman-Gleman case that “the prescription of the State's debts and its lack of criminal liability are simply two consequences drawn from the observation of its

⁶Franklin Kutu, *Principes généraux du droit pénal belge* –, 2^{ème} édition, Bruxelles, Larcier, 2020, 3. L’auteur, pp 111-112.

⁷Michel Cosnard, “Immunité“ in Denis Alland, Stéphane Rials dir., *Dictionnaire de la culture juridique*, Paris, Puf, p 803.

⁸ Cour Constitutionnelle Belge : *arrêt n° 69/2020 du 14 mai 2020*, Numéro de rôle : 7099.

⁹ Article 21 of the Preliminary Title of the Code of Criminal Procedure and Article 91 of the Criminal Code (Belgium).

permanent vocation". He adds that "applied to the State, whose vocation is permanent, the absence of statutes of limitations is eternity. And we cannot resolve to propose to you to adopt such a dizzying decision."¹⁰. In other words, if the King never dies, he can do no criminal wrong. The possibility of civil proceedings devoid of any statutes of limitations would then be difficult to foresee and it raises the necessity for the State to prevent the transformation of its criminal liability into a financial one.

C. Judging a perpetual estate (Hoffman-Glemane)

The decision Hoffman-Glemane is technically not a ruling but an opinion of the whole court, "*un avis contentieux*" which is "a procedure allowing a lower administrative court to ask a new legal question to the French Council of State"¹¹. It follows the request of the daughter of Joseph B. arrested and deported under the Vichy Regime (1940-1944). She asks for reparations to the State and to the French railway company (SNCF) for the direct damages done to her father as well as for the moral and psychological damages resulting for her. This case is the follow-up of a previous historic ruling in 2002 where the highest administrative court, the French Council of State, recognized a shared responsibility of the French State in the deportation and consequently in the extermination of Jews during the German occupation¹². The legal question at stake now is the statute of limitations which is of four years for any debts of the State. Yet in the case of a crime against humanity, the Criminal Code gives no statute of limitations, and the civil proceedings are dependent on the penal one. Consequently, one of the questions asked to the Council of State is the following "The penal code provides no statute of limitations to crime against humanity (...) can it be extended (...) to the proceedings willing to hold the State liable for actions that contributed to such crime? "The importation of a principle of criminal law into the administrative realm is legally impossible and the Council of State offered a very atypical answer.

It begins with a full recognition of the continuity between the Vichy Regime and the French Republic, achieving the reversal of 50 years of jurisprudence that gave no legal effects to specific legal acts promulgated during the Vichy Regime (based on the ordinance of 9 July 1944)¹³. It ended normative impunity and having accepted the unequivocal responsibility of the French State, the opinion sets out the various measures that allow the damage to have already been compensated. The statement intends to cover the greatest number of cases, establish an equivalence between the French approach and those of other European countries and finally puts forward the idea that the prejudice is so immense that it can never be fully financially compensated. The *rapporteur public* writes that "its irreducible singularity makes it illusory, in our opinion, to evaluate it in money (...). To put it differently, such a prejudice cannot be compensated. It must be repaired according to us by act, gesture, or symbolic word of the authorities of the State¹⁴". Exceptional damage does not, accordingly, call for a financial

¹⁰ Frédéric Lénica, « Conclusions sur Conseil d'État, ass. 16 février 2009, Mme Hoffman Glemane, req. n°315499 », *Revue Française de Droit Administratif*, Paris, Dalloz, 2009, p.316 s.

¹¹ Conseil d'État, avis, ass., 16 février 2009, *Mme Hoffman-Glemane*, req. n°315499. The official English translation of this opinion is available: <https://www.conseil-etat.fr/en/judging>.

¹² CE, Assemblée., 12 avril 2002, *Papon*, n°238689.

¹³ *Journal Officiel de la République française*, 10 août 1944, p. 688.

¹⁴ Frédéric Lénica, *op.cit.*

reparation of exceptional value, but for the transition to another order of reparation, the memorial and symbolic one. The French State accepts its responsibility and considers that it has discharged its financial and "memorial" debt. Thus, it affirms an uninterrupted continuity in the responsibility of the public power and certainly mobilizes logic proper to the maintenance and good administration of its estate. Professor Danièle Lochak asks herself "whether the primary objective pursued was to contribute to getting out of the 'Vichy syndrome', to draw a line on this past that does not want to pass, or more prosaically, to protect public funds"¹⁵.

It could be analysed as well as an example of a legal decision that mobilizes the concept of formal legal rationality as introduced by Max Weber. In his work, the rational State is the one that carries the requirement of the primacy of formal rationality over substantial rationality. This means a formal, codified, and predictable law. Whereas substantial law is based on fairness (the justice of the *Cadi*, the Muslim judge who produces an informal legal decision based on concrete ethical or practical assessments). Formal legality is then related to the procedure and not to the content. A judgment relying on subjective fairness leaves room for indeterminacy and does not allow for calculation and predictability. Indeed, in the economic order, formal rationality is linked to the model of an activity that can be evaluated in accounting terms and substantial rationality to an activity that involves requirements of another nature: ethical, political, etc. Max Weber writes in *Economy and Society*: "Economic activity is **formally** "rational" to the degree that vital "provision" for any rational economy can be, and is, expressed by numerical, "calculable" estimation (initially quite independently of what technical form these calculations take, whether, that is, they are expressed as monetary calculations or calculations *in natura*). This concept is therefore at least **unambiguous** (although as we shall see, only relatively unambiguous) insofar as the monetary form represents the maximum of **formal** calculability (and of course, *ceteris paribus*)"¹⁶ “.

This specific French case law seems to oscillate between formal and substantial rationality as the damages are finally judged impossible to quantify. Also, the first decisions that nullified the acts committed by the Vichy Regime and rejected the French State responsibility were qualified as inexplicable by the doctrine whereas they are a formal and strict application of statutes¹⁷. It can seem a cynical interpretation but at the end of World War II, such individualised reparations would have necessitated a projection of budgetary expenses that would have been both indeterminate and colossal. Formal rationality allows predictability; on that matter, the absence of any ground for litigation is formally a legal means to reach an economic end. Of course, there have been reparations throughout time, they were gradual, progressive, and especially foreseeable. This foresight is at the core of the administrator's work and highlights three specific domains of its action that can delay or impede both civil and criminal liabilities. This second part is then a follow-up on my initial question thus rephrased: To what extent can the criminal liability of the State be an effective response to its impunity?

¹⁵ Danièle Lochak, « Le droit, la mémoire, l'histoire : La réparation différée des crimes antisémites de Vichy devant le juge administratif. », *La Revue des Droits de l'Homme*, CTAD-CREDOF (Centre de recherche et d'études sur les droits fondamentaux) 2012, p. 29.

¹⁶ Max Weber, *Economy and Society*, translated by Keith Tribe, Cambridge, Harvard University Press, p 172: I, 2, § 9, 2.

¹⁷ Marcel Waline, "Conseil d'État, ass. 4 janv. 1952, Époux Giraud, 1.530., *Revue du droit public*, 1952, p. 487.

II. Managing State impunity

A. The financial estate:

Public management is, in my view, related to the concept of reason of State. In his 1979 lectures, “*Omnes et singulatim: Towards a Criticism of Political Reason*”, Michel Foucault reminds us that the reason of State is not focused on the strengthening of the power of the prince but that of the State. It is not a question of conquering power, of maintaining individual power, but of the very duration of what one conquers¹⁸. The challenge is then to increase its power to ensure its 'sustainability'. Otto Hintze also studied this link and writes in 1931 “*Raison d'état* and capitalism are closely allied sociologically. What else is capitalism than modern *raison d'économie*? *Raison d'état* and *raison d'économie* stem from the same root (...) The heightened intensity and rationality of economic operations and State administration and policy, the subordination of the individual arbitrariness of leaders in politics and economics to the interests of the “firm” or the ‘State’ in its new character: all these fit together”¹⁹.

This vision may necessitate to be nuanced nevertheless the identification of the State as an administrative apparatus closely related in form to private corporations is useful in our undertaking. The State can then be considered on an equal foot with other legal corporations, to use Maitland's words, with other “right-and-duty bearing units “. Thus, as an organisation like any other, the actions of its administrators could rely on the same processes that managers in private corporations. This idea, highly debatable, was widely spread after WWII and a course in Public Administration given at Science Po Paris in 1962 tells us that “the Administration is *men* who are grouped in the frameworks of the general services of the State. It is they who play “*mutatis, mutandis*”, on behalf of the State, the role that men play inside a private corporation. In concrete terms, the State is men grouped in the administrations and who manage the general interests of the nation”²⁰. The author, Bernard Chenot, writes above this quote that, the State is a legal personification of the nation, I assume thus that the interests of the State are here *thought as* identical to the general interests of the nation. In that case, the reason of the State is focused on its durability which requires a sort of economic fitness, financial health, and a duty to care about what I will call its *financial estate*. In the words of Foucault, “It's a government whose aim is to increase this strength within an extensive and competitive framework”²¹.

At the beginning of the paragraph, I just quoted, Foucault speaks indirectly of another technique that plays an immense role in managing impunity, the control of knowledge, of the knowledge that the State possesses on itself. What I will call an *epistemic estate*. He writes: “The art of governing, characteristic of the reason of State, is intimately bound up with the development of what was then called either

¹⁸ Michel Foucault, « *Omnes et singulatim* »: Towards a Criticism of Political Reason » in McMurrin S., ed., *The Tanner Lectures on Human Values*, t. II, Salt Lake City, University of Utah Press, 1981, pp 244-246.

¹⁹ Otto Hintze, “Calvinism and *raison d'Etat* in Early Seventeenth-century Brandenburg,” *The historical essays of Otto Hintze*, ed. with an introd. by Felix Gilbert with the assistance of Robert M. Berdahl, New York, Oxford university press, 1975, p 92.

²⁰ Bernard Chenot. *Cours sur les Institutions administratives* (1962-63), Université de Paris et IEP de Paris, pp 84-85.

²¹ Michel Foucault, op.cit., p 245.

political *statistics* or *arithmetic*; that is, the knowledge of different States' respective forces. Such knowledge was indispensable for the correct government.²² “ A government that puts first the protection of the State's interests.

B. The epistemic estate

The *rapporteur public* in the Hoffman-Glemane case wrote, “For this type of illegality, the time of the judge comes necessarily after the historian's one”. The work of the latter calls upon another estate, that of the knowledge that the State has about itself, its acts, its population, its finances, its territory, and materially its archives. Their access is framed by specific provisions which limit the capacity of historians and private individuals to access this epistemic estate. Derogations are possible and, in most cases, given but when public servants in ministries refuse to grant access, it is, at the end of the 20th century, for archives related to World War II. The head of this section at the French National Archives tells us: “It appears that (the denial of access) is influenced by a kind of solidarity between generations. Just as they do not want their present action to be revealed too much in the future, they respect the same law of silence for those who have been before them. It is a corporate culture “²³. For instance, in France, one must wait 50 years for the communication of archives related to the security of the State, which is longer than any statutes of limitations except for the examples already cited. The time of the State is not the one of human beings and if the public prosecution is not allowed to have access to highly classified pieces of information, it will not go far. For instance, a case concerning the selling of weapons and ammunition that are used to commit war crimes would need a long time to be documented. Thus, time is mostly on the side of the State thanks to the management of its archives. Durability is at the core of its *raison d'être* and depends as well on the effectiveness of the values that it bears, what I will call, its *axiological heritage*.

C. The axiological heritage:

In French political rhetoric, the distinction between the Republic and the State is often mobilized in speeches notably when they are an admission of responsibility for mass crimes or violation of human rights. The Hoffman-Glemane opinion refers to the Vichy regime as "the de facto authority calling itself the government of the French State" and declares that its acts (the anti-Semitic persecutions) were carried out "in absolute rupture with the values and principles, in particular the dignity of the human person, enshrined in the Declaration of the Rights of Man and of the Citizen and in the Republican tradition. “In another context, Emmanuel Macron gave a speech on September 13, 2018, regarding the disappearing, torturing and assassination of Maurice Audin during the Algerian War. He says, “that his disappearance was made possible by a system that successive governments allowed to develop” and

²² Ibid. p 246.

²³ Paule René-Basin Table ronde sur la sûreté de l'État in « Transparence et secret, l'accès aux archives contemporaines », 28-29 mars 1996 in La *Gazette des archives*, », n°177-178, 2^{ème} et 3^{ème} trimestre, p : 178.

then he differentiates the Republic from these "successive governments"²⁴. He continues: "A "duty of truth" falls to the French Republic, which in this area as in others, must show the way."

Is it then conceivable, that the criminal responsibility of the State could never call into question a political resource, the appeal to the Republic and its values, or the promotion of an axiological heritage that is dissociated from the legal person of the State?

The French case is extremely specific here, however, this scission could, for example, lead to a declaration of guilt of the State in the name of the people, in other words of the Republic. Could we even say that if torture is used illegally, it is an act committed by the State and not by the Republic?

Impunity is here built through the distinction between the apparatus and the values it bears. On that matter, the preface written by Pierre Vidal-Naquet to the book of Karl Jaspers, *Die Schuldfrage*, poses a very interesting problem, which Emmanuel Macron has recalled during his speech: During the Algerian War, torture was an illegal and criminal act, and Pierre Vidal-Naquet reminds us that "France at the time was in no way a totalitarian society. (...) What we must evaluate in this case, as in the American war in Vietnam, is the criminal capacity of a democratic society. This capacity is not unlimited. – (...)– but it is vast"²⁵. In that framework, the dissociation is quite uneasy²⁶.

To understand the fragile balance between the dissociation and the confusion of these two *forms*, the State and the Republic, a concept created by F.W Maitland could be useful. In his 1904 lecture, he distinguishes the corporation as a right-and-duty-bearing unit and as a moral unit to initiate an interrogation about the moral agency of the collective entity²⁷. I propose to pinpoint an intermediary stage between the legal person and the moral person, an axiological form of *legal unit* that I will call a *value-bearing unit*. The latter could be extremely disrupted by the introduction of criminal liability of the State. For instance, if it were implemented in France and were followed with consistent case law, would it still be possible to sentence individuals to training sessions in citizenship? While the State is found guilty of crimes, would it not be strange to attend sessions of training meant, according to the penal code, to "remind convicted persons of the republican values of tolerance and respect for human dignity?" Would it not be "fair "or at the very least formally coherent that in return specific organs of the State may also be convicted to compliance supervision, and training sessions, on the model of the measures used in certain provisions of Corporate Criminal Law?

²⁴ <https://www.elysee.fr/emmanuel-macron/2018/09/13/declaration-du-president-de-la-republique-sur-la-mort-de-maurice-audin>

²⁵ Pierre Vidal-Naquet in Karl Jaspers, « *La culpabilité allemande* », trad. J. Hersch, Paris, Editions de Minuit, 1990, pp18-19.

²⁶ In his discourses, Robespierre says that democracy and Republic are "two synonymous words" " since "the essence of the Republic or democracy is equality". In his words, at least, a democratic France is the Republic. Maximilien Robespierre, Discours du 5 février 1794, in *Œuvres*, Vol. 10 , Discours 5ème partie, Paris, 1967, pp. 352-354.

²⁷ F.W Maitland, *op. cit.* pp 70-71.

The criminal liability of the State is quite rare, and I wanted to highlight that it can become a legal reality in the domestic order as well as a truly progressive reform. It is also quite a bet, both political and financial. The French case introduced the idea that there is a form of public management of the legal, political, and economic liabilities linked to the State's illegal acts, whether criminal or not. This management is built on a mix of substantial rationality, values that direct human actions and institutions, and formal rationality, processes linked to impersonal rules and predictability of the sanction and its cost. The history of the French admission of responsibility and complicity in the Holocaust is the result of decades of efforts from individuals, academics, associations and primarily from the victims and their descendants. In the end, the financial liability was formally rationalised, and the epistemic estate was well preserved and classified thus it took more than 50 years to have access to facts whose legal reality was annihilated in 1944. The Hoffman-Glemane case opens to us a *perspective*, a picture of a specific type of public management of impunity that is rooted in French political culture. At that point, I underlined two types of estates and one type of heritage whose management would be critical if a choice were made in France to implement such a law.

Now if we consider that one of the purposes of criminal law is the preservation of social peace and that political obligation is also founded on this promise of peace. Then could the subjection of State violence to the control of the criminal judge undermine the very justification of its existence? A justification which is also a ground for its primacy on other legal persons within its jurisdictional landscape.

On the opposite, the criminal liability of the State may eventually be one of the highest realisations of the rule of law. To that extent, if we isolate the Weberian ideal-type of legal-rational legitimacy, it does not exclude at all State violence. On the contrary, it creates the conditions of a legal framework where the treatment of the illegality of the State does not undermine its legitimacy but reinforces it. Thus, this dynamic of normative integration of the illegalities of the State, and the weakening of its immunities could be a milestone in the combat against its impunity, at the condition that it is effectively enforced. The criminal liability of private entities was also promising and then was very poorly enforced or now mainly realised through transactional mechanisms, like deferred or non-prosecution agreements. However, the criminal liability of the State is a credible response to its impunity for at least one other reason: The introduction of the absence of a statute of limitations when pressing charges or claiming damages for some of the most heinous crimes. Hence the Belgian bill is a leap forward, that can become a game changer if it produces new configurations of legal temporality where the passage of time does not profit inevitably to the *interest* of a unique person, the State.