

# LA FORCE DU DROIT

## ELEMENTS

«De mihi factum, dabo tibi jus»

Une science rigoureuse du droit se distingue de ce que l'on appelle d'ordinaire la «science juridique» en ce qu'elle prend cette dernière pour objet. Ce faisant, elle s'arrache d'emblée à l'alternative qui domine le débat scientifique à propos du droit, celle du *formalisme*, qui affirme l'autonomie absolue de la forme juridique par rapport au monde social, et de l'*instrumentalisme*, qui conçoit le droit comme un *reflet* ou un *outil* au service des dominants. La «science juridique» telle que la conçoivent les juristes, et notamment les historiens du droit qui identifient l'histoire du droit à l'histoire du développement interne de ses concepts et de ses méthodes, appréhende le droit comme un système clos et autonome, dont le développement ne peut être compris que selon sa «dynamique interne» (1). La revendication de l'autonomie absolue de la pensée et de l'action juridiques s'affirme dans la constitution en théorie d'un mode de pensée spécifique, totalement affranchi de la pesanteur sociale ; et la tentative de Kelsen pour fonder une «théorie pure du droit» n'est que la limite ultra-conséquente de l'effort de tout le corps des juristes pour construire un corps de doctrines et de règles totalement indépendant des contraintes et des pressions sociales et trouvant en lui-même son propre fondement (2).

Lorsque l'on prend le contrepied de cette sorte d'idéologie professionnelle du corps des docteurs constituée en corps de «doctrine», c'est pour voir dans le droit et la jurisprudence un *reflet direct* des rapports de force existants, où s'expriment les déterminations économiques, et en

particulier les intérêts des dominants, ou bien, comme le dit bien le langage de l'*Appareil*, réactivé par Louis Althusser, un instrument de domination (3). Victimes d'une tradition qui croit avoir rendu compte des «idéologies» lorsqu'elle en a désigné les fonctions («l'opium du peuple»), les marxistes dits structuralistes ont paradoxalement ignoré la *structure* des systèmes symboliques, et, dans le cas particulier, la *forme* spécifique du discours juridique. Cela parce que, ayant réitéré l'affirmation rituelle de l'autonomie relative des «idéologies», ils ont omis de poser la question des fondements sociaux de cette autonomie ; c'est-à-dire, plus précisément, la question des conditions historiques qui doivent être remplies

## POUR UNE SOCIOLOGIE DU CHAMP JURIDIQUE

pour que puisse émerger, à la faveur des luttes au sein du champ du pouvoir, un univers social autonome, capable de produire et de reproduire, par la logique de son fonctionnement spécifique, un corpus juridique relativement indépendant des contraintes externes. Ils s'interdisaient par là de déterminer la contribution spécifique que, par la vertu même de sa forme, le droit peut apporter à l'accomplissement de ses fonctions supposées. Et la métaphore architecturale de l'infrastructure et de la superstructure, qui soutient les usages ordinaires de la notion d'autonomie relative, continue à guider ceux qui, comme Edward P. Thompson, croient rompre avec l'économisme, lorsque, pour restituer au droit toute son efficacité historique, ils se contentent d'affirmer qu'il est «profondément imbriqué dans la base même des relations productives» (4) : le souci de situer le droit au lieu profond des forces historiques interdit, encore une fois, d'appréhender dans sa spécificité l'univers social spécifique dans lequel il se produit et s'exerce.

Pour rompre avec l'idéologie de l'indépendance du droit et du corps judiciaire sans tomber dans la vision opposée, il faut prendre en compte ce que les deux visions antagonistes, internaliste et externaliste, ont en commun d'ignorer, c'est-à-dire l'existence d'un univers social relativement indépendant par rapport aux demandes externes, à l'intérieur duquel se produit et s'exerce l'autorité juridique, forme par excellence de la violence symbolique légitime dont le monopole appartient à l'État et qui peut s'assortir de l'exercice de la force physique. Les pratiques et les discours juridiques sont en effet le produit du fonctionnement d'un champ dont la logique spécifique est doublement déterminée : d'une part, par les

1—Cf. par exemple J. Bonnet, *La pensée juridique française, de 1804 à l'heure présente, les variations et les traits essentiels*, 2 vol., Bordeaux, Delmas, 1933.

2—La démarche de Kelsen, fondée sur le postulat de l'autolimitation de la recherche au seul énoncé des normes juridiques, à l'exclusion de toute donnée historique, psychologique ou sociale, et de toute référence aux fonctions sociales que peut assurer la mise en œuvre de ces normes, est tout à fait semblable à celle de Saussure qui fonde sa théorie pure de la langue sur la distinction entre la linguistique interne et la linguistique externe, c'est-à-dire sur l'exclusion de toute référence aux conditions historiques, géographiques et sociologiques du fonctionnement de la langue ou de ses transformations.

3—On trouvera une vue d'ensemble des travaux marxistes en matière de sociologie du droit, et une excellente bibliographie in S. Spitzer, *Marxist Perspectives in the Sociology of Law, Annual Review of Sociology*, 1983, 9, pp. 103-124.

4—E. P. Thompson, *Whigs and Hunters. The Origin of the Black Act*, New York, Pantheon, 1975, p. 261.

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**Arturo Cuomo**



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