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"The people that we have to govern being insufficiently civilized to understand the scope of 1789's principles, theory must here (...) yield to necessity."

J. Vernier de Byand (1905)[1]

"The native cannot be compared to a French (...), he has neither his moral qualities, nor his education, nor his religion (...), nor his civilization. It is a generous and very French mistake, a mistake made by those who wrote the "Declaration of the rights of man and of the citizen" instead of writing, with more modesty, the "Declaration of the rights of the French citizen".

P. Azan (1925)[2]

"The native has a behaviour, a homeland and laws which are not ours. It is neither by following the principles of the French Revolution, which is our Revolution, nor by applying Napoleon Code, which is our Code, that we could ensure his happiness."

F. Eboué (1941)[3]

1 J. Vernier de Byans, *Condition juridique et politique des indigènes dans les possessions françaises*, A. Leclerc éditeur, Paris, 1905, p. 132. This text is a doctoral dissertation in law defended in the presence of Pr. Maurice Hauriou. Doctor in law, J. Vernier de Byans became first-class administrative officer for the Colonial Army Service Corps. He is also the author, in 1912, of a *Rapport au ministre des Colonies*, followed by a *Avant-projet de loi organique des possessions françaises autres que l'Algérie et la Tunisie*.

2 P. Azan (1874-1951), *L'armée indigène nord-africaine*, CH. Lavauzelle & Cie, Paris, 1925, p.39. Azan was a general and the director of the Army Historical Service. He is the author of many works on Algeria and colonization and received the Grand Prix of the French empire as a reward for his whole career.

3 F. Eboué (184-1944), *Politique indigène de l'Afrique Equatoriale française*, 1941, p.3. Former student of the Colonial School, F. Eboué was secretary general of Martinique (1932-1934), and then governor of Guadeloupe in 1936. He joined the general de Gaule and became governor of the AEF (French Equatorial Africa) in 1940. His ashes have been transferred to the Panthéon.

The previous quotations are extracted from books written at different moments and by authors with disparate disciplinary and professional backgrounds. They bear witness of the remarkable permanency of particular representations of the others and of the world, as well as of the spirit of an age in which those who do not advocate a political and juridical radical relativism are a rare find. Based on racial and cultural accounts, this relativism sets up the ground for an anti-universalism long theorized and proclaimed by many, those who contend that the principles of the Declaration of the rights of man and of the citizen, and so the principles of the French Republic, do not apply in the colonies. Over there, in the distant territories of the empire, where the so-called "primitives" live, where people are considered too different because of the peculiarities of the civilization to which they belong, the fundamental rights and liberties cannot be established. Climate, mores, religion, ancestral customs and cultural mindsets are factors conflicting with the extension of these principles. That's what jurists and politicians keep asserting, regularly making use of the prestigious reference to Montesquieu's *De l'esprit des lois* in order to justify their own positioning. However, the most important point here is not the question of relativism, but the recent development at the time of these quotations of the so-called "colonial" sciences which, thanks to the assistance and the investment of public powers,[4] offered for their practicians essential elements, allegedly scientific, in order to legitimize the orientations and concrete actions they uphold.

1. On some foundations of colonial law

Indeed, numerous ethnologists, sociologists and anthropologists intended to place their expert knowledge and more generally their respective disciplines at the service of the empire. As to the leaders of the 3rd French Republic, who were facing the new and difficult problems caused by the rapid increase of overseas territories and by the size and the diversity of the populations which were then under the yoke of the metropolitan center, they often requested the help of the renowned figures of these various sciences. The ambition and the desire for recognition of the

4 Emerging at the turn of the century, these sciences are officially enshrined by the Third Republic in 1922 with the creation of the Académie des sciences colonials which, among other things, was meant to constitute "a full colonial brain" as P. Mille said during the tenth anniversary of the "Compagnie" (*Académie des sciences colonials*, Paris, 1933, p.20). As for G. Hanotaux, member of the French Academy and renown specialist of the colonial issue, he exclaimed enthusiastically: "Colonial science became a living and acting reality. Colonial science! This is the whole science!" (*ibid*., p.23).

scientists, the pressing needs of the leaders, and the widespread consent to the grand imperial design of the French metropolitan center, all these factors have favored the advent of unprecedented relations between the State and sciences.[5]

An overwhelming majority of the agents of French colonial politics, whether there are government advisors, legal professionals, law makers or ministers, considers then that specific provisions must be elaborated and enforced in the territories of the empire, so that the inferiority of the "natives" ("*les indigènes*"), their singularity and the land on which they live, can be accounted for, the best interests of the country and the obligations attached to the colonial public order being also part of the whole equation. The public order, which must be defended ferociously against populations named barbarian or savages, is a major task. By comparison, "juridical doubts and sentimental concerns should fade away".[6] They indeed faded away.

a) Human rights and colonies

At the heart of these dominant conceptions, we detect the triumph of a hierarchical and racial principle which ruins the very concept of humanity understood as a set composed of individuals who are certainly different from each other's but all equals and thereby likely to enjoy subjective and inalienable rights because they are recognized as fellows. These views are dominant since they structure the analysis, discourses and practices of most of the contemporaries interested in the matters of the empire, and they are numerous at that time. What is contested is that, beyond historically located and observed men and women, we could posit the existence of some *alter ego* whose differences do not matter, and who, for that reason,

5 "It is [ethnology] which must guide and will guide the rulers" wrote J. Chailley (1854-1928) in the preface of the famous book by J.-C. Van Eerde, *Ethnologie coloniale (L'Européen et l'Indigène)*, Editions du Monde nouveau, Paris, 1927. Chailley was a founding member of the International Colonial Institute created in 1894, and professor at the Ecole libre des sciences politiques where he taught "comparative colonization". Van Eerde was a university Professor in Netherlands and director of the ethnological branch of the colonial Institute in Amsterdam. As to colonial sociology, one of its most eminent representatives is R. Maunier (1887-1951), the author of a voluminous and ambitious treaty – *Sociologie coloniale* – in three volumes, published between 1932 and 1942. Maunier was a renowned jurist, a Professor at the Law Faculty in Paris, and a member of the Académie des sciences coloniales. Of his treaty, he said that it was meant for "previous students, scattered in the *bleds*", who could find in it "the living man (…) the Algerian or the Tahitian that we have to govern" (*Sociologie coloniale*, Domat-Montchrestien, 1932, t.1, p.9).

6 A. Girault (1865-1931), "Condition des indigènes au point de vue de la législation civile et criminelle et de la distribution de la justice", in *Congrès international de sociologie coloniale*, Rousseau, Paris, 1901, t.1, p.66. Famous professor at the Faculty of Law in Poitiers, Girault played a key role during this major Congress held in Paris in 1900 with the support of French authorities. He was also the author of a fundamental work, *Principes de législation coloniale*, published by Larose in 1895. This book became "the compulsory textbook for [law] students" and "scholars". This "new colonial gospel" was published six times before 1943. P. Masson, "Introduction", in *Les colonies françaises au début du 20ème siècle. Cinq ans de progrès (1900-1905)*, Barlatier, Marseille, 1906, p.23.

must benefit, in all times and places, from an equal dignity sanctioned by prerogatives protected by law. When these contemporaries gaze at the "Arabe", most of them can only see a barbarian, often deemed unassimilable and therefore all the more threatening. The "Noir" remains a savage, or a "big child", who must be guided by a strong authority until the hypothetical moment, in fact always postponed, of his final escape from minority. As to the "Annamite", who is considered mysterious and impervious, he certainly belongs to an important civilization, but an inferior one in many ways. The unity of the human spices is therefore not put into question, but inequal races and people do exist, rendering pointless the application of common rights shared by all, if not even harmful. For example, according to J. Harmand, the recent "progress" of knowledge reflects the essential and sometimes irreducible diversity of men and women, and the impossibility to submit all of them to universal laws and principles, precisely because of such diversity. These universal principles and laws, viewed as outdated legacies, are then dismissed in the name of the development of "ethnological sciences" which have enabled, thanks to the fortunate influence of "positivism" and under the direction of Broca and Le Bon, a rupture with the French "habits" of "universalism and uniform centralization", the method of assimilation applied to colonies being one of its most disastrous expression. This classical denunciation of assimilation results more fundamentally in a radical critique of "revolutionary ideas" and of their "utopies" which are presumed dangerous since they have been accused of being the cause of the decline of the country as imperial power. As to Human rights, the are reduced to the status of "artificial fantasies dear to the evangelists of the French Revolution",[7] whose conceptions would have been overturned by the progress made by the aformentioned sciences.

Putting aside the authors used by J. Harmand – the scientificity of their works was not fundamentally put into question even if their thesis were discussed – and his own particular positioning, the main assertions used here remain very common at that time. Indeed, as soon as questions are raised regarding the rules which could be applied in the colonies, the

7 J. Harmand (1845-1921), *Domination et colonisation*, Flammarion, Paris, 1910, p. 5, 18 et 248. Friend of G. Le Bon, Harmand was a medical doctor and became a French ambassador. His book is considered a classic and is often quoted by the specialists of the colonial question. Ch. Regismanset also wrote: "Humanitarism is the general superstition, a strange disease born with the false idealism of 1789, sustained by literary romantism, entertained by the pseudo-liberalism of people like Lafitte and Royer-Collard, and recently exacerbated by the awakening of the Huguenot spirit". This diatribe is concluded by: "We have to renounce to the destructive theories. No more empty abstractions. No more politics of assimilation" (*Questions coloniales*, Larose, Paris, 1912, p.52). Regismanset was a specialist of colonization. He wrote several books about it. With G. François and F. Rouget, he also wrote a best-seller – at least four editions – entitled: *Ce que tout Français devrait savoir sur nos colonies*, published by Larose in 1924.

characteristics of the "natives" are almost systematically highlighted in order to justify the impossible extension of rights considered fundamental among "civilized races". In his doctoral dissertation in law and while he was reflecting on the virtues of forced labour in Western Africa and in Congo, R. Cuvillier-Fleury wrote that one must not hesitate to suppress or considerably restrain "labour freedom" when the circumstances and the mindset of Black people require such mode of action. According to him, there are countries where and tribes for who such dispositions have "excellent effects (…) from the point of view of moral and material improvement" of the "native". This last can thus develop healthy "working habits", and be diverted from "idleness", "war", and "looting".[8] With regard to the massive and actual abolition of slavery in the colonies recently conquered by France, he judged it premature due to its damaging consequences on agriculture in these regions. The freed men and women themselves, despising "field work", would surrender to their main and natural vice: "laziness". This is the reason why he advocated the establishment "of a transitory state of semi-constraint" which is supposed to help former slaves "preparing for their new situation of freed men and women".[9] These few examples are drawn from various sources and could be multiplied. They constitute evidences that, in the lands of the empire, institutions and practices which have been long condemned in France must sometimes be continued over there, even though they undermine some fundamental principles. More generally, a direction and a course of action emerge. For many, it stands as a truth well-established by "colonial sciences": inferior and superior races must be subjugated to contradicting juridical and political regimes.

The advantages of democracy, of the rule of law and of the lengthy procedures ensuring the civic and civil prerogatives of community members are suitable for the advanced people of Europe and North America. The "belated" and "ill-"civilized people of Africa, Asia or Oceania, must be ruled by different institutions and by a justice system which, rid of the legal subtleties associated to "the separation of administrative and juridical authorities, can promptly punish

8 R. Cuvillier-Fleury, *La main-d'oeuvre dans les colonies françaises de l'Afrique occidentale et du Congo*, Larose, Paris, 1907, p.33. It should be noted that France refused to sign the Geneva Convention elaborated by the International Labor Office in 1930 which tends to prohibit forced labor in the colonies. It was finally ratified in 1937, but to be suspended two years later. We will have to wait for the law of the 11th of April 1946 to see the final abolition of forced labor in the French empire.

9 R. Cuvillier-Fleury, *La main-d'oeuvre dans les colonies françaises de l'Afrique occidentale et du Congo, op.cit.*, p.27. In an article published in the prestigious *Revue des Deux Mondes*, G. Bonet-Maury defends similar positions: "Thus, except in rare circumstances, the massive and immediate abolition [of slavery] would be more harmful than useful to black people themselves. We should prepare them to it, by educating them and warning them against their own instincts" ("La France et le mouvement anti-esclavagiste au XIXe siècle", *RDM*, juillet 1900, n°160, p.162).

the "natives", by reminding them that the "Europeans are (...) the masters".[10] The author of this statement, which earned the applause of the participants of the International Congress of colonial sociology, was none other than Girault. He was fiercely hostile to the project of assimilation of colonies and colonized people. In 1900, such policy is actually officially rejected by public powers as a fantasy endangering the stability and cohesion of the empire. He also believes that the "supreme" authority must be entrusted "to a character who somehow embodies (…) the mainland and who could break all manifestations of resistance". That is why all the "civil, juridical and military authorities must also rely upon him", as he asserted three years later during the opening session of the International Colonial Institute in London. He concluded this session with what will become a successful formula, where both the positive results, in his eyes, of the new French imperial orientation and of the safe course of action for the future are registered : "In the colonies, the good tyran is the ideal government."[11]

So here are the main elements of the quasi-official belief system underlying the juridical science and the colonial policy of the 3rd French Republic. As to those who laid the foundation of such belief system, those who deduced its practical consequences by giving birth to a colonial law as important, extensive and commented yesterday as it is ignored today, or simply considered it as secondary, they knew perfectly well that this legal system was not only outrageous but contrary to the most elementary principles of democracy. Even better, they did not hide and did not try to mitigate a situation they helped to create and which was well known because of the many works and treaties devoted to colonial legislation. This subject was notably taught at the Ecole libre des sciences politiques, in the Law Faculties, and at the ethnological Institute of the University of Paris. This last Institute was directed by L. Lévy-Bruhl and created in 1925 with the active support of public powers.[12] The jurists and politicians of that period

10 A. Girault, "Condition des indigènes au point de vue de la législation civile et criminelle...", *op. cit.* p.71 et 253. In the same context, A. Billiard declared: "In barbarous countries, judicial formalities must be simplified and the delays limited, so that we can reach *a powerful repression, mainly quick, with cursory needs*" (emphasis added) ("Etude sur la condition politique et juridique à assigner aux indigènes des colonies", in *Congrès international de sociologie coloniale*, *op. cit.*, p.47). Billiard was administrator of mixed townships and inspector for the departmental service of indigenous affairs in Constantine.

11 A. Girault, *Des rapports politiques entre métropole et colonies*, preliminary report to the London session (26th of May 1903) of the International Colonial Institute, Bruxelles, 1903, p.36. He adds: "Never have our colonies been so quick to make progress than since the government of the Republic does its best to provide for each the good tyrant I was just speaking about" (*ibid*., p.37-38). Very aware of the policies implemented by the great European powers in their respective colonies, Girault was especially inspired by Netherlands to which he pays tribute. In conformity with what he advises, the general governor of Batavia has indeed "extremely extended powers".

12 R. Maunier was in charge of the course on "Legislation and colonial economy".

were convinced of the legitimacy and of the imperative need for this particular legislation when the government of the Empire was at stake. They were supported by "colonial sciences" which provided them with sociological, anthropological, ethnological and psychological elements founding the orientations they advocated. Thus, they exposed the situation, commented it accurately, and identified it openly, as they were certain of their grounding rights.[13] In any case, many men of that period displayed a perspicacity that our contemporaries are rather lacking. These lasts forget or are unaware of the fact that the French 3rd Republic was "neither a unitary State, nor a federal State" but, "like England, an *imperial State*", as exactly argued by the specialists of consitutional law J. Barthélemy and P. Duez.[14]

b) Metropolitan laws in the colonies: the exception and the rule

On the political and juridical levels, the consequences of the partition between a republican mainland and the territories of the empire which are under a permanent regime of exception are tremendous. Indeed, "there is not a branch of law that, when transplanted in the colonies, is not enduring transformations on various scales" wrote P. Matter, the general prosecutor at the Court of Cassation. Following many others, he notices that the "regime of decrees" in the colonies stresses even more the differences and facilitates the emergence of a "special law, whose peculiarities are more and more numerous and prominent".[15] The article 109 of the Constitution of the 2nd French Republic is at the origin of such situation. It declares that the "Algerian territory and the colonies" belong to the "French" territory, but it immediately adds that they will be ruled by "particular laws until a special law places them under the regime of the present Constitution". We know what happened. The transitory nature of the regime

13 "Under the present condition of French colonies, the operative legislation is in disagreement with our republican principles", states D. Penant who is not condemning this situation. On the contrary, it is for him in perfect adequacy with the pecularities of the empire and of the diverse populations which can be found there (*Congrès colonial français de 1905*, Paris, 1905, p.86). Penant was the director of the *Recueil général de jurisprudence et de législation coloniale*. He considered that one of the main functions of the jurist was to "facilitate the task of the legislator in colonial matters" (*ibid*.). In 1906, Clémentel, who was then minister of the Colonies, argues that "the principle of separation of powers cannot be understood [by primitive people]", so we "should not think of applying "to Congo" our complicated laws and our rules of procedure which are made for a perfected civilization" (text reproduced in *Lois organiques des colonies. Documents officiels précédés des notices historiques*, Bruxelles, Institut colonial international, 1906, t.2, p.446-447). Twenty-seven years later, in their famous *Traité de droit constitutionnel*, J. Barthélemy and P. Duez wrote with lucidity: "The mainland has a liberal mode of organization; *the dependencies have an authoritarian one*. Our law states the principle of equality between all men from their birth on (…), but *our imperial system presupposes the inequality between races*". To conclude and before dealing with the institutions of the Third Republic, they add: "The following explanations *only apply to the French metropolitan population which is at the top of the hierarchy*" (*Traité de droit constitutionnel* (1933), Economica, Paris, 1985, p.289) (emphasis added).

14 J. Barthélemy and P. Duez, *Traité de droit constitutionnel*, *op. cit.*, p.283.

15 P. Matter, "Préface" of the *Traité de droit colonial* by P. Dareste, Paris, 1931, p.v.

intended by this provision became definitive, and this provision was later interpreted as nothing less than the "*expression of a principle*" to which generations of jurists and politicians, regardless of their personal convictions and their partisan commitments, have followed during almost a century.[16] This principle is very important because of the constitutional nature of the norm underlying it and because of its consequences for "indigenous" populations. It is presented by P. Dareste in these terms: "*Metropolitan laws do not automatically [extend] to colonies which are ruled by a legislation of their own.*"[17]

It is clear, accurate, and concise: two radically different politico-juridical orders can now legally develop under the fundamental, republican and allegedly generous Law of the 4th of November 1848 in which we could also read that France, remaining true to its motto "Freedom, Equality, Fraternity", will "never use force against the freedom of any people".[18] These words are commendable and peaceful, but they sound strange when, at the same time, France was actually engaged in a ruthless conflict in Algeria. In order to avoid misunderstandings and to take a closer look at the crucial procedure that we have just exposed, we can then reformulate the rule: no application of laws and rules of the mainland in the colonies, or *only exceptionally*, when it is decided by the competent regulatory and legislative power.[19] The unenforceability of the metropolitan legislation to the territories of the empire sheds light on the juridical grounds of colonial law. It also discloses an essential discovery: if the colonial law is derogatory relatively to republican principles and national dispositions, it is not marginally or superficially, and it is not because of an exceptional conjuncture limited in time and space or to the individuals concerned by this law. *On the contrary, colonial law is essentially derogatory and discriminatory* since it is systematically subtracted from all the principles proclaimed and the texts ratified in the metropolitan center.

These principles and texts were facing then two restrictions: a territorial limitation, and another

16 It is the same in Algeria where this situation and the regime of decrees have only been abrogated by the Ordinance of the 7th of March 1944 and confirmed by the law of the 20th of September 1947.

17 P. Dareste, *Traité du droit colonial, op. cit.*, p.233 (emphasis added). Son of the jurist Rodolphe Dareste (1824-1911), P. Dareste was an honorary lawyer at the State Council and at the Court of Cassation, director of the *Recueil de législation, de doctrine et de jurisprudence coloniales*, and president of the Committee of the Legal Advisors of the Colonial Union.

18 *Constitution du 4 novembre 1848*, Préambule, art. V.

19 B. Sol and D. Haranger, *Recueil général et méthodique de la législation et de la réglementation des Colonies françaises*, Société d'éditions géographiques, Paris, 1930, t. 1, p. v. Both authors are inspectors of the colonies.

related to the nature of the people. The coupling of the effects produced by these restrictions is the source of the particular situation of the colonies and of the populations living there. The colonies are considered as French as long as the affirmation of the conquering sovereign power is at stake, but they are nevertheless deprived of the benefits that a horizontal extension of metropolitan laws and decrees would imply. This particular territoriality is however not an absolute since the settlers, wherever they settle in the empire, enjoy the rights and liberties secured in the motherland. It is obviously not the case for the "natives". The jurists underline the fact that they are only "*subjects*, protected or administered by France, and *not French citizens*".[20] For the jurists, it is obvious, almost a commonplace. Therefore, if the laws are understood and enforced this way, the restrictive effects of territoriality are circumvented for the exclusive benefit of the individuals who came from the mainland. Two opposed status are thereby created: the one of the "natives" who, as we know, are only *subjects*; the one of the metropolitan French who alone enjoy full and complete civil and political rights.

In general terms, the interpretation of the article 109 of the 2nd French Republic Constitution and the review of its main consequences on the juridical conditions of the colonizers and colonized grant us access to the opening juncture where *the exception became the rule* in the territories of the empire. The exception became the rule because it is proclaimed as a permanent situation and because it is inscribed in a particular juridical order. The juridical order authorizes the exception which became then legal, and for many legitimate, while it is at the same time generated by it since the exceptionality facilitates the emergence of a colonial law which appeared to many of its contemporaries as extraordinary proliferative, complex and variable. "None of the branch of French Law is as obscure, as embroiled and fumed with contradictions than colonial legislation" noticed by R. Doucet. He goes on and writes: "There is probably only one man in France, the professor Arthur Girault, who is able to move with confidence within this maze strewn with pitfalls".[21] The causes of such situation, which is like no other, must be

20 H. Solus, *Traité de la condition des indigènes en droit privé*, préface d'A. Girault, Recueil Sirey, Paris, 1927, p.15 (emphasis added). Solus was a renowned professor of law at the university of Poitiers. The jurisprudential origin of the condition of the colonized can be found in an Order of the Court of Cassation on the 15th of February 1864 which confirms both the French nationality of the "natives" and their status of subject. Cf. G. Klein, *De la condition juridique des indigènes d'Algérie sous la domination française*, Brière, Paris, 1906, p.25. Klein was a lawyer at the Court of appeal He added that this "condition of "subject" may conflict with the modern notions of public law" (*ibid*.). It was certainly inconsistent, but it was maintained and then extended to all the colonies under the Third Republic.

21 R. Doucet, *Commentaires sur la colonisation*, Larose, Paris, 1926, p.57. Author of several books on colonization, Doucet was also chief editor of the *Monde économique*. As a great specialist of colonial law, P. Dislère noticed as soon as 1886 that "there were few [legislations which] could present to such a degree the double characteristic of diversity and variability; none can actually fully grasp such a complex issue". Later he adds:

searched in the mechanisms we have just mentioned and in the nature of the provisions operating in the different regions of the empire. These provisions add up to each other's and keep changing over time. There are several factors at play in that respect: these provisions are not subjected to any general principle; they are foreign to the fundamental Law; they are adopted in the mainland or in the colonies, since the governor has the power to issue orders valid only in the territory where he enforces his authority; they are regulated by the regime of decrees which, of course, escapes the control of parliamentarians – these lasts often become aware of the decrees only at the time of their publication in the *Journal Officiel*; [22] they are coming juridically and geographically from diverse sources.

These different factors tell us something about a major feature of colonial law. It is "distinctly particularist", [23] as noticed by Vernier de Byans who don't see in it a fatal flaw but an indispensable virtue for the peace and security of the conquered lands. This clarification is fundamental as it confirms that this law's horizon is not the universal, the Man or the abstract individual to who we would have to grant secured prerogatives in all times and places. In contrast with the principles of the permanence of Law and of the relative stability of laws, colonial legislation only deals with concrete "natives", with particular personal situations, and with peculiar conjunctures to which it is closely binded. This is the reason why it is also endowed with a remarkable "flexibility" and a constant variability. Indeed, many contemporaries praised its capacity of adaptation and the swiftness with which metropolitan and gubernatorial authorities, as they are freed from legislative and usual control procedures, can modify it so that they can face unexpected and new needs which must be addressed without delay. Here are the main advantages of the regime of decrees enabling the elaboration of its own provisions in each colony. If this regime is sometimes criticized, its existence is not really put into question, as its outstanding longevity attests. It was indeed abolished only after the

"Besides, it is easy to acknowledge that this legislation (…) do not follow any general idea, any principle" (*Traité de législation coloniale* (1886), P. Dupont, Paris, 1914, 4ème ed., t. 1, p. x). P. Dislère was a polytechnician, master of queries at the State Council in 1881, State secretary to colonies in 1882, and president of the administrative council of the Colonial School founded in 1889.

22 "Regulations and decrees are set without our knowledge, almost in secret, and we only know about them when they are registered in the *Journal officiel*" declares the deputy Gasconi with bitterness at the National Assembly the 9th of February 1888 (*Débats parlemantaires*, Chambre des députés, 9 février 1888, session ordinaire, p.344).

23 J. Vernier de Byans, *Rapport au ministre des colonies*, Imprimerie nationale, Paris, 1912, p.8. "The inherent stability of the National Assembly proceedings would not harmonize well with the clear evolutionary nature of colonial legislation. (…) we will still need for a long time a more flexible a more easily operative device than the constituent power to serve it" (*ibid*., p.10).

second World War. We can ultimately say that colonial law is a law without *Principles*, but we must immediately add that it nevertheless obeys to a subterranean and continual *principle* whose effects are widely visible: to serve a politics of subjugation of the "natives".

c) "Native" subjects and French citizens

We face then a singular situation. Juridical effects are traditionally bound to a geographical border marking the limit of a space in which all nationals have identical prerogatives. These juridical effects vanish now for the colonized people because of the setting up of a second border based on racial, cultural and cultic criteria. This second border distinguishes individuals present in the empire according to their origins and religion. Thus, it creates "two classes" divided by a "deep gap": a class of "subjects", that is of minors subjected to specific duties and legislations; and a class of "citizens".[24] The differences between the conditions of these two classes are not marginal. On the contrary, we face here differences of nature which organize two worlds ruled by provisions designed to enslave the "natives", to secure the full rights of the settlers, and ultimately to ensure the infallible domination of these lasts over the formers. This is what the necessities of the public security essential for the stability and prosperity of the empire require. As to the modern "generic concept" of the "person",[25] it obviously collapses under colonial law. This last institutes an order in which exist, not *a personality* as the principles of 1789 declared in order to abolish privileges, but many, with completely different characteristics.

In fact, this distinction is not new since Tocqueville had already advocated a similar organization. In 1841, in the famous pamphlet entitled "Travail sur l'Algérie" (Work on Algeria), he asserts: "*When it comes to Europeans, nothing absolutely prevents to treat them as if they were alone. The rules which have been made for them should always and only be applied to them*".[26] For the settlers of the Old continent, the rule of law; for the "Arabs", and

24 E. Larcher and G. Rectenwald, *Traité élémentaire de législation algérienne*, A. Rousseau, Paris, 1923, 3ème éd., t. 2, p.364. With regard to Algeria, he adds: "It is unrealistic to believe that the fusion of both classes (…) is close : (...)the whole Algerian politics during these last years tends on the contray to maintain their separation" (*ibid*.). E. Larcher was professor of law at the uiversity of Alger and lawyer at the Court of appeal. G. Rectenwald was doctor in law, advisor at the Court of appeal and vice-president of the mixed property courts of Tunis. This book became a classic and a compulsory reference known by teachers and law students of that period as "le Larcher".

25 A. Supiot, *Homo juridicus. Essai sur la fonction anthropologique du Droit*, Le Seuil, Paris, 2005, p.60.

26 A. de Tocqueville, "Travail sur l'Algérie", in *Oeuvres*, Gallimard, "La Pléiade", Paris, 1991, p.752 (emphasis added).

the "Kabyles", no equality, no civil liberties, no universality of the law, not today and not tomorrow. Indeed, Tocqueville did not set a final term for this situation which was then maintained by juridical provisions withholding the principle which was yet affirmed in the Declaration of the rights of the man and of the citizen, the principle of the generality of the law, without which there would not be equality. In France, the law, which is known to be the expression of the general will, "must be the same for all, whether it protects or punishes",[27] as the standard formula claims. That is what the Constituents have decided. In several articles of the text they had to write, they seem very eager to register the abolition of privileges which had already been declared a few weeks before. They want to register natural equality as something that the members of the social body could not be deprived of. This is the reason why, in this new society of free and equal individuals, positive law must comply to this main principle. Additionally, for this equality in front of the law to be effectively ensured in the whole national territory, there must also be an equal enforcement of the law. If we briefly recalled these fundamental conceptions and provisions, it is to better point out what has been negated in Algeria. They disappeared in a situation where, in the same land, you can find coexisting, not only two legislations, but also two regimes conceived for distinctive populations. The rule which is in effect and which is advocated by Tocqueville can be summed up by this formula: "Law must not be the same for all". Likewise, and as a direct consequence, law cannot be applied evenly in the colonial space. Therefore, it is not surprising that, instead of the equality and the equal liberty proclaimed in the mainland, you can observe in the colonies the triumph of inequalities, with the various discriminatory manifestations characterizing a juridical order dedicated to the subjugation of the "natives".

When Beaumont presents his report to the national Assembly in June 1842, he is consistent with this idea. Endorsing the standard mode of argumentation of that time, he writes : "For still a long time to come, an exceptional legislation will be necessary [in Algeria] ; and it is not only public safety which calls for it: the difference in climate, the diversity of populations, other mores, other needs, require other laws". These clarifications are interesting. They are not original, but they teach us something: even if the military situation changed in favor of the army of Africa, other less circumstantial causes like the climate, habits and customs of the "natives", would force French authorities to maintain provisions infringing on common law for an indefinite period of time. Further down, Beaumont repeats almost word for word the

27 Article 6 of the Declaration of the rights of the man and of the citizen, dated from the 26th of August 1789.

language of his friend Tocqueville who was, like himself, a member of the subcommittee in charge of the report: "Thus, there is necessarily in Africa two distinct societies which become day by day more divided and which have each their own regime and laws".[28] Unity is then followed by the radical diversity of juridical conditions, equality by hierarchy, and equal freedom by the tight submission of the "natives" and the superiority of the "métropolitains". Several decades later, the jurists and politicians of the 3rd Republic were holding similar discourses. They provided accounts of the situation which remained for the most part in conformity with Tocqueville and Beaumont's positions. In that period, the author of *Democracy in America* is still recognized as a great specialist in matters relative to colonization. His writings are quoted, commented and praised by those who fight against assimilation and campaign for the strengthening of the general governor's powers. To be clear and to avoid any kind of false debate, we don't suggest here that Tocqueville directly inspired the imperial policy of the 1900's. We only notice that some contemporaries have mobilized his texts, especially those where elements could be found to legitimize the orientations they advocated, in spite of contextual differences.[29] He was not the main source of inspiration, but he was certainly an important reference allowing those who quote his writings on Algeria to register their actions in a long and prestigious history.

In 1938, R. Mautier still observes that "in the colonies, there is no equality between the citizens and the subjects, but hierarchy (…), distinction (…), subordination, since the subjects (…) are indeed French but not citizens". He was and remained a strong defender of this situation because he considered that it was perfectly adapted to the "primitive" or "belated" people of the Empire, and also that it was necessary to secure the supremacy of the settlers as well as the authority of the French metropolitan center. In the conclusion, he adds: they "have less rights", "they are inferiors and not equal". This is why the word "subject", which is operative in the colonies (…), provides a good definition of the condition of their inhabitants".[30] In spite of the

28 G. de Beaumont, *Rapport fait au nom de la seconde sous-commission* (20th of June 1842), Imprimerie royale, Paris, 1843, p.2 and 9.

29 "In 1847, says O. Dupont, that is a long time before Jules Ferry, Burdeau, Jonnart, Jules Cambon (…) who are giving today a strong impulse to the study of the Algerian question, M. de Tocqueville was saying to the Chamber of deputies: "It is necessary to create for Africa a governmental machinery which would have simpler mechanisms and quicker movements than the one operating in France" ("Aperçu sur l'administration des indigènes musulmans en Algérie", in *Congrès international de sociologie coloniale*, *op. cit.*, t. 2, p.64). Dupont was an administrator of mixed townships and deputy of Indigenous Affairs in the general government of Alger.

30 R. Maunier, *Répétitions écrites de législation coloniale* (troisième année d'études), Les Cours du Droit, Paris, 1938-1939, p.320-321.

decree of the 24th of October 1870 which proclaimed the unity of the Algerian territory, its assimilation to the mainland and the creation of *départements*, "muslim natives" remained "French subjects". This "fundamental rule" is "characteristic of their juridical condition", as E. Larcher and G. Rectenwald wrote. These lasts notice that no "provision in the positive law allowed the creation of such distinctions among French people".[31] Actually, they worried about the dubious legality of distinctions which cannot be linked to any previous legal disposition. Their legitimacy, however, is fully acknowledged since it is the price to pay in order to maintain France in North Africa. Thus, in all the colonies, and in spite of the particular situations relative to their specific status, a "double legislation", a "double government", a "double administration", and a "double justice" emerged ; over there, "each" have "their own judges", "each" have "their own laws".[32]

There is no lack of evidence regarding the fact that, for the men of the 3rd Republic, the republican nature of metropolitan institutions has hardly weighed on the conception of the colonial State and of imperial legislation which were deemed essential for the administration of distant lands, and of "primitive" or simply "belated" races, as they used to be called then. The reality of the principles enforced within the empire and the accurate review of the juridical situation of the colonized people testify about it in an exemplary manner. As to the assimilation, which is often presented as the hallmark of a "French-style" colonization, allegedly generous and concerned about the instruction of the people composing the administered countries, it is vigorously condemned and abandoned by the majority of the contemporaries at the turn of the century. At last, the originality of many effective measures in the empire is only a myth which does not stand up to scrutiny as soon as we compare them to certain provisions adopted by other European colonial powers. In the Dutch Indies for example, and under the organic law of the 2nd of September 1854 relative to the organization of the government and justice of this territory, the "natives" and those assimilated to them – namely the Moors, the descendants of the muslims from Hindustan, and the Chinese, among others – are subject to specific laws and a particular justice system which, obviously, do not concern Europeans. It is likewise in German colonies, where is enforced a principle stated very clearly by the jurist Otto Köbner. This last note is that "the set of stated rules for private law, for penal law, for the judicial

31 E. Larcher and G. Rectenwald, *Traité élémentaire de législation algérienne, op. cit.*, t. 2, p.408 and 409.

32 R. Maunier, *Répétitions écrites de législation coloniale, op. cit.*, p.14 and 206. To illustrate this general proposition, Maunier quotes the governor Pasquier in Indochina: "To each his judges, to each his laws". Perfectly aware of the importance of this characteristic of colonial law, he adds: "Such is [its] principle".

procedure and organization can only be applied (…) for the white population". Relatively to the situation of the "natives and all the other people of color, the imperial right to issue special orders is (…) unlimited",[33] so that they fall under special measures which are valid only for them. How is it different, in substance, from certain essential provisions of the colonial legislation set up by the republican France? It is not, as we know by now. As for the Belgian Congo, some of the rules applied there are very close to the French Code of Indigenous Status. The autochthons are subject to particular controls forcing them, for example, to obtain a passport and get the authorization from the territorial administrator in order to leave the district they come from. Moreover, the chores and the poll tax are also operative there, like in many French colonies.[34] A state of permanent exception imposed to the colonized people is supported in all these cases by an exorbitant, discriminatory and racist law, in a Republic as much as in a Constitutional Monarchy or a Reich.

In the French empire, Algeria included, the oddity of such situation was recognized by many who consider that the regime of the colonies and the condition of the "natives" is not unlike the situation during the feodal regime. Initially developed by Fr. Charvériat, professor in Alger's Law School, this analysis is taken up and popularized by E. Larcher in a work of reference. It became then a kind of vulgate integrated to many studies and courses on colonial legislation. "The French citizens can be compared to nobles and lords: they alone are judged by their peers; they alone, at least in principle, are bearing arms. And the natives, simple subjects, have a situation similar to the one of the commoners or serfs", Larcher writes. Willing to illustrate this proposition with concrete examples, he adds that "muslims" are not allowed to travel without passport, that they owe "certain benefits" to French authorities such as the *diffa* and "the service of watch posts which oddly reminds us of the old feodal services". To this we must add, as noticed by Charvériat, requisitions for various works – clearance, fight against grasshopper invasions – that we can consider as particular forms of chores adapted to local conditions. Should we be surprised by this situation? Not at all, as Larcher says, for "we are in Algeria in the conditions where the Francs in Gaul were, a victorious race imposing its yoke and domination to the vanquished race".[35] In 1938, in his course on colonial legislation at the

33 *Les lois organiques des colonies, op. cit.*, 1906, t. 3, p.227, 341-342 (emphasis added).

34 L. Strouvens and P. Piron, *Codes et lois du Congo belge*, Editions des codes et lois du Congo, Léopoldville, 1945, p. 497 and 537.

35 E. Larcher, *Trois années d'études algériennes, législatives, sociales, pénitentiaires et pénales*, Rousseau, Paris, 1902, p.200. The *diffa* consists in an obligation, in return for a refund fixed by French authorities, to provide to public officials, or duly authorized agents, means of transportation, food and water. The book by Fr. Charvériat

Paris Faculty of Law, R. Maunier is inspired by these already old but still known works when he exposes pedagogically the general condition of the "natives". "In many ways, it is the vassalage which constitutes until today the relation of the colonies, strictly speaking, to the metropolitan center". This professor and famous academician also remind us that the natives are only "subjects" and that they do not have any other duties than the ones "that are recognized everywhere as the subject's duties".[36] While the thesis gains a higher level of generality, it also loses demonstrative accuracy, but it does not matter. What is important is the fact that some illustrious contemporaries who confronted themselves to the very particular legislation of the empire did not have any choice but to resort to the French feodal past and find in it some relevant elements of comparison which could satisfy their will of knowledge and understanding. The authors we have just quoted do not speak out against the situation they observe and depict. On the contrary, they approve it. The same does not apply to some of the opponents to the colonial politics. They appropriated for themselves the conclusions of these analysis but in order to denounce the "aristocracy of the race" in place in Algeria and to criticize the situation of the "natives" condemned to an "eternal plebeian condition in the name of the *raison d'Etat*". These are the words of Ch. Dumas, a socialist parliamentary in charge of an enquiry on the situation of the "muslims" in North Africa. He is also one of the few who fought for a rigorous application of human rights in the colonies in order to oppose the oppression and exploitation of the autochthons.[37] Bénito Sylvain, a doctor of law, naval officer trained in France and aide-de-camp of the Ethiopian emperor, also compares the African "indigenous" condition to the one of the serf during the Ancient Régime, "a workforce who can be exploited at will" through drudgeries, forced labor, and the many juridically sanctioned discriminations imposed upon the "natives". Therefore, to put an end to this situation, he pleads in favor of the principle of civil equality in the colonies, stressing the fact that the Third Republic is faithful to its principles only in the Old Continent. In any other place, it betrays these principles and negates in an absolute manner "what represents for the nobly born souls the ideal of civilization".[38]

published by Plon in 1889 is entitled: *A travers la Kabylie et les questions kabyles*.

36 R. Maunier, *Répétitions écrites de la législation coloniale*, op. cit., p.253. For A. Hampâté Bâ: "White people are the absolute masters of the country. There is a reason for us to call them "the gods of the bush". *They have all rights over us, and we only have duties*" (*Oui mon commandant!*, Actes Sud, Le Méjan, 1994, p.193) (emphasis added). Famous writer and winner of several literary prizes, Ampâté Bâ (1900-1991) was a public official of the colonial administration, and later a member of the executive council of Unesco.

37 Ch. Dumas, *Libérez les indigènes ou renoncez aux colonies*, Figuière & Cie, Paris, 1914, 3ème éd., p.5.

38 B. Sylvain, *Du sort des indigènes dans les colonies d'exploitation*, L. Boyer, Paris, 1901, p.398 and 523.

In all cases, both the many apologists and the rare rigorous critics of colonization knew the extraordinary nature of the foundation of colonial legislation and of the concrete measures taken to administer the empire, even though they would of course draw from these observations opposing conclusions. We will deal now in more details with three of the measures which made the Republicans so proud of themselves. We will study the administrative detention, the collective responsibility and the land confiscation (*séquestre*) which are indeed all essential provisions of the French colonial order. These provisions bear witness of the situation made for the persons and the goods belonging to the "natives", while they also make us able to observe more closely the radical and active negation of the major democratic principles.[39]

2. On some measures of exception

a) On administrative detention

According to its proponents, the administrative detention was necessary because of the "imperatives" of the war of conquest conducted in Algeria. It was defined by a ministerial order in September 1834 and completed by several other decrees during the 1840's. Becoming progressively a permanent sanction unrelated to the war context which had originally justified it, detention survived almost all the changes of political regime occurring in the mainland. It was indeed confirmed under the Third Republic by a ministerial decision on the 27th of December 1897. In the colony, the exception became then the rule and detention a practical measure which could, thanks to the swiftness of its mode of implementation, weigh on local populations the threat of an extraordinary punishment. In that sense, it helped maintaining a state of permanent fear. The reasons given for its possible use are: the defense of public order, and later in 1902 and 1910, the punishment of herd theft and unauthorized pilgrimage to Mecca.[40]

39 It was not possible to deal here with the Code of Indigenous Status (*Code de l'indigénat*) which is dubbed "monstrous" and yet necessary by Girault (*Principes de législation coloniale*, *op. cit.*, p.305). The same qualification is used by Larcher and Rectenwald when they wrote a few years later: "Some see in the Indigenous status – and they are not completely wrong – a juridical monstrosity" (*Traité élémentaire de législation algérienne, op. cit.*, t.2, p. 477). On this specific and important matter, we recommend the reading of *Coloniser. Exterminer. Sur la guerre et l'Etat colonial*, Fayard, Paris, 2005. It is also a useful reference regarding the history of the importation in France and Europe of the administrative detention and collective responsibility. On the Code of Indigenous status, also see I. Merle, "Retour sur le régime de l'indigénat", *French Politics, Culture and Society*, vol. 20, n°2, été 2002.

40 E. Sautayra, *Législation de l'Algérie*, Maisonneuve & Cie, 2ème éd., Paris, 1883, p.328. The administrative detention was extended to other colonies, and its practice reveals that it can be decided for reasons such as the failing to salute the commander or the French flag, as we now know thanks to A. Hampâté Bâ (*Amkoullel, l'enfant*

It is impossible to appeal against a decision which is taken by the general governor alone. This last can then impose measures of detention which are implemented either in the form of a detention on the territory of the colony – in a "indigenous penitentiary", to use the standard expression, or in a *douar*, a little rural village, with the formal interdiction to leave it – or in the form of a deportation to Calvi. Moreover, and this is a major specificity of such measure, *its duration is most of the time indefinite*, much like the place and form of detention which are not fixed *a priori*. The general governor has the power of decision in all these matters. Finally, and this is the second extraordinary element of the detention, it can be implemented either as *main punishment*, or as *complement of another punishment already imposed by another tribunal*. In this last case, it intervenes as a serious exacerbation of common law. It completely escapes the judicial power since there is not any appeal procedure available, neither for the convicted – it is self-evident in regard to colonial institutions –, nor for the judges. Sanctioning facts which, for a long time, have not been truly characterized by any text, detention is served on the accused without the obligation to make him/her appear in front of a court, and it only ends with the decision of the one who ordered it. In contradiction with all the principles relative to the separation of power and to custodial sentences which both fall under the domain of law, in accordance with the Declaration of the rights of man and of the citizen, an administrative agent – this is indeed the juridical status of the general governor – has the possibility to detain individuals in the conditions previously mentioned.

As a pure act of sovereignty, the detention displays the absolute nature of the power extorted against the "natives" since the individual concerned is subtracted from any system of control and deprived, as a way of consequence, of any prerogative. To be more accurate, this juridical provision makes of the convicted an *absolute non-right holder* (*un sans-droit absolu*) since there is not any text he could refer to for his defense. The convict is decidedly *ex lex*. He cannot be considered as an individual, not even as a man in the juridical sense, for he does not enjoy any of the rights related to this condition. The concrete modalities of detention and the juridical

peul, Actes Sud, Le Méjan, 1992, p.504). Introduced in the French Western Africa (AOF) in 1887, and in New Caledonia in 1897, the decree of the 21st of November 1904 has limited detention to a maximum of ten years in these territories. It is the same in the French Equatorial Africa (AEF) since the 31st of May 1910. As to Algeria, the law of the 15th of July 1914, confirmed on the 4th of August 1920, has replaced detention by "the placing under surveillance", a kind of house arrest limited to two years. To be more accurate, this new provision can only be applied in civil territories. Everywhere else, detention prevails. Cf. E. Larcher and G Rectenwald, *Traité de législation algérienne*, op. cit., t.2, p.233.

condition of the convict are at that time not comparable to any existing measure. We are therefore facing a major and apparently unprecedented innovation since the Revolution and the advent of the constitutional regimes in France.[41] Indeed, the delinquent, the criminal or the prisoner of ordinary war are, in all cases, judged according to accurate provisions which set the procedure, the nature, the conditions of implementation of the conviction, its duration as well as the possibilities for an appeal against the judgement when such possibilities exist. It is nothing like the case of the "indigenous" convict who can neither be considered as a prisoner serving a sentence handed down by a tribunal, nor as a defendant who, when he is incarcerated, has still some rights allowing him to defend himself and to request to be liberated from imprisonment. The colonial detainee cannot be identified to any of these categories since he is put in a situation where, by virtue of an administrative decision and of the necessities of public order, every law is for him held off as long as the general governor has not freed him. Thus, we clarified *the peculiarities of a detention which has the effect of depriving the man of his freedom and of abolishing, in the same movement and in a radical manner, his condition as a subject of rights*. Then, this measure cannot be confused with the custodial sentences which, if they certainly undermine important prerogatives, do not lead to the complete collapse of the legal status of the convict. So, the detention is indeed a provision of exception which has the excessive power of suppressing all rights.

b) On collective responsibility

Besides administrative detention, the general governor can also, by virtue of the Circular dated from the 2nd January 1844, to subject a tribe or a *douar* to a collective fine. In this domain too, he has discretionary power and full freedom of action. He can then use the collective fine in any ways he sees fit and according to concerns, political ones especially, for which he alone plays the role of judge since he is the one who evaluates the opportunity, the necessity and the amount. At first used to punish tribes in which certain members committed acts of hostility against the colonial power, his representants or simply Europeans, it was later extended to crimes and offences committed in groups, and also applied to cases in which the presumed culprit was not surrendered to French authorities by his original tribe or *douar*.

41 "We don't have, in French law, a penalty comparable to detention. It does not fit into usual classifications ; it is in contradiction with all its principles" writes E. Larcher who adds : "We easily acknowledge its excessive nature, the fact that it is in contradiction with the principles the most secured of our public law" and that it "violates the separation of powers..." (*Trois années d'études...,op. cit.*, p.87 and 90).

It is through the enforcement of such penalty, which is outside of the scope of common law and without any equivalent in the legislation dedicated to settlers and people coming from France, that kabyle tribes, which rebelled in 1871, were subjected to the payment of a fine amounting in total 63 millions francs. They were unable to pay such a sum, and many were then forced to sell their livestocks and their lands. It was the direct cause of a lasting impoverishment of this region. "In contradiction with the least questionable principles of our criminal law", E. Larcher notes, especially the essential principle that "penalties must fit the offence",[42] long guaranteed and sanctioned by French legal texts, the collective fine was nevertheless included in the law of the 17th of July 1874, and limited by this law to cases of fires and to their prevention in Algeria. Relatively to its enforcement, the general governor kept, like in the past, all his powers and an unrestricted freedom of action. He only had to follow a summary procedure: make an order during a government council.

The Third Republic maintained this provision in this particular form. Some innocents, whose sole crime was to belong to the same tribe or douar as the alleged arsonist, could then be punished for facts they have nothing to do with. In the eyes of the colonizers, and according to a radical turnaround of the principles applied to Europeans, the "native" is by definition, if not essentially, an alleged offender. He must therefore pay for the mistakes of his fellow countrymen, even when he managed to prove that he could not have committed the imputed actions. Once again, these provisions testify of the demise in colonial law of the concepts of individual and man, for the benefit of a kind of obscure mass composed of de-individualized colonized people, and for that absolutely interchangeable, threatened by the measures of permanent exception. These measures do not target them as persons who would need to be identified so that we could ensure their involvements in the committed offences, but as members of a "racial" community from which they are not allowed to escape. The purpose is to make them dependent upon one another, which means, in the eyes of the French legislator, always culprits. It is sustained by a new juridical concept, precedently unheard of, as far as we know: a guilt without fault or responsibility. In 1935, J. Mélia summed up this situation: "Never a regime aroused more complaints by indigenous people (...) than the forestry regime in Algeria. A forest is burning. The muslim native of Algeria who lives there or around is *a priori* suspected of being an arsonist. He becomes guilty, and being the true culprit, his guilt is extended to all his tribe. A sentence taking the form of a fine, always exaggerated, falls then on innocent people

42 E. Larcher and G. Rectenwald, *Traité élémentaire de législation algérienne*, *op. cit.*, t.2, p.537.

who, because of this, are driven to misery".[43]

c) On land confiscation (séquestre)

After the detention which is a capture of bodies, the collective fine which is a financial penalty, the land confiscation hits the real property of the colonized people. The State gets its grip on their real estate. This measure is even worse than the fine. It is added to the juridical means at the disposal of the general governor who can decide to order it all by himself. Regulated by an Ordinance issued the 31st of October 1845 and then incorporated in the law of the 17th of July 1874, this penalty is like the others, restricted to "natives". It is enforced against an individual or a local community according to the same mechanisms previously described. It punishes the acts of hostility committed against French people or subjected tribes, the assistance to the enemy and the land abandonment assisting the opponents of colonization. The complete dispossession is not immediate since the confiscated estate is ruled by the administration which can rent them to the settlers. The "natives" remain the owners, without being able to enjoy their properties, until further notice. The penalized individuals or tribes can redeem the confiscation by paying a sum of money equivalent to the value of the confiscated estate. As Ernest Picard once said at the National Assembly when he supported what will become a law of the Third Republic, this particular procedure helped create "a crucial mode of execution for the collect of collective fines and for the capture of the true culprits". Perfectly aware of the stakes which, for him, made the adoption of the text he defended indispensable, he added: "The confiscation makes a great and necessary impression on the natives mind by showing them through visible actions that the government has the will and the mean to take action", "the government and the committee" advice then "to introduce this salutary provision in the law".[44] Finally, this penalty can be confirmed by a confiscation order under which the confiscated lands are definitively united to the State's domain. The State can then dispose of them at will. In Algeria in particular, the enforcement of confiscation was a fundamental means of legal spoliation of "native" lands

43 J. Mélia, *Le triste sort des indigènes musulmans d'Algérie*, Mercure de France, 2ème éd., Paris, 1935, p.71. Melia was hostile towards the Code of Indigenous status. He criticized its most injust provisions, and yet remained an advocate of French Algeria and of the colonial empire. It is to preserve them that he advocates extensive reforms. The collective fines, imposed to the villages suspected of having favored "the rebellion" or having damaged forests, were used in Indochina at the end of the 19th century (Decree of the 9th of January 1895). Similar provisions were also set up in AOF under the decree of the 4th of July 1935 relative to the forestry regime, as well as in New Caledonia. Such kind of measures were also in place in British India (see A. Nielly, *Codes coloniaux de l'Inde anglaise*, Zamith & Cie, Alger, 1898).

44 Law of the 17th of July 1874 quoted by L. Rinn (1838-1905), *Régime pénal de l'indigénat en Algérie. Le séquestre et la responsabilité collective*, Jourdan, Alger, 1890, p.15. Rinn was lieutenant-colonel and head of the central service of the military staff in Alger in 1881.

for the benefit of the settlers.

The seemingly technical nature of land confiscation must not overshadow the fact that it is first and foremost a wartime measure which, by depriving the "Arabs" of their estate, can be considered as a juridically rationalized form of raid and retaliation, with all the advantages they involve, but with no inconvenience at all. The confiscation of lands is also made to punish tribes by seizing their resources, that is, to use Bugeaud's clear language, by attacking them in their immediate and vital interests. In that respect, this measure is an essential instrument of conquest and pacification. It allows the colonizers to harshly hit the enemy and its allies, and to deter the other tribes in engaging into resistance activities against France. However, unlike raids and retaliations, the confiscation does not result in material destructions. It would then be ruinous for France. The colonial power can swiftly seize the lands and let the settlers exploit them as quickly as possible. Considered as crucial for the colonization of Algeria, this provision was used to feed the State's domain and to enable the reception in the best conditions of numerous people coming from France. Thus, the collective confiscation of lands was massively used to punish the kabyle tribes which rose up in 1871.[45] During a long period of time, the situation of the concerned regions and the condition of the affected "natives" were unsettled by its application. Taking advantage of the circumstances, French authorities used this measure to extend like never before the State's domain. A few years later, Leroy-Beaulieu wrote openly: "In 1870, there was not much more land for colonization. The insurrection happened at the right time to allow the government to replenish its reserve of available lands "since" goods of all kind belonging to the tribes or to the natives who committed acts of hostility had been confiscated". The professor at the Collège de France added: "France, stripped of Alsace Loraine, became more attached than ever to the old child for which it did not show much concern so far. (…) A law voted on the aftermath of our disasters has allocated one hundred thousand acres of land to the people of Alsace and Lorraine".[46]

45 Defined by an order of the 15th of July 1871, it can be applied to "all the real properties of all tribes, douar or family" (E. Larcher and G. Rectenwald, *Traité historique, théorique et pratique des juridictions répressives musulmanes en Algérie, op. cit*., p.79). The land confiscation was also in place in Indochina – decree 25th of May 1881 –, in New Caledonia – decree 18th July 1887 – and in AOF – decree 21st November 1904.

46 P. Leroy-Beaulieu (1843-1916), *L'Algérie et la Tunisie*, Guillaumin & Cie, Paris, 1897, p. 73 and 75. Professor at the Ecole libre des sciences politiques and then at the Collège de France, as well as member of the Académie des sciences morales et politiques, Leroy-Beaulieu argued for the abolition of the Code of Indigenous status, but he thought that it was necessary to maintain the collective responsibility "in the cases of armed insurrections" (*ibid*., p. 297). According to certain sources, almost 2 600 000 acres were confiscated in the aftermath of the 1871 uprising, that is the equivalent of 5 French departments (numbers provided by L. Rinn, *Régime pénal de l'indigénat en Algérie...*, op. cit., p.45 and by Cl. Collot, *Les institutions de l'Algérie durant la*

The administrative detention, the collective responsibility and the confiscation of lands are all measures which prove that the bodies and properties of the "natives" can be seized according to summary procedures which derogate from the principles affirmed since 1789. They confirm the extraordinary nature of their status and, by extension, of their possessions which are not protected by any unalienable and sacred rights, for the "natives" are all permanently exposed to the sovereign and unlimited power of the colonial State and of its main agent: the general governor. For reasons of public order, this last can freely do whatever he wants with the colonized and his possessions, either by making of him a real outlaw in the case of detention, or by dispossessing him through confiscation. This is how freedom, property and safety, which are allegedly guaranteed "for all men and for all times" according to the well-turned phrase of a French revolutionary of 1789, are negated for the colonized and let place to a situation where juridical and personal insecurity constantly prevail since the "natives" can be seriously punished for general facts, or even worse, for acts they did not committed. Thus, we found out that this juridical and personal insecurity is a major and structural effect of the regime of decrees, and a specific consequence of the different measures studied here. These lasts underlay and somehow institutionalize this insecurity by making it an essential element of the "indigenous" condition. The "natives" are not only subjugated, as the jurists and politicians of the Third Republic kept repeating. Because of all that, they are also men and women condemned to live in a world where nothing can be secured or guaranteed, because of a "legislative anarchy"[47] specific to the imperial law. This particular situation confirms the strong words of Girault and Maunier on the nature of the regime imposed in French colonies.[48] The juridical and personal insecurity is indeed, as we know since Aristotle, one of the features of tyranny, and in our contemporary time, of dictature and of the totalitarian mode of domination so well analyzed by H. Arendt.[49]

"Let's not use cunning. Let's not be deceptive. What is the point of covering the truth? Colonization, at first, was not an act of civilization, a will of civilization. It is an act of force, of interested force. It is an episode of the fight for life, of the great vital competition which, from men to groups, from groups to nations, has spread around the vast world. Colonization,

période coloniale (1830-1962), Ed. du CNRS, Paris, 1987, p.194).

47 R. Doucet, *Commentaires sur la colonisation*, op. cit., p.64.

48 Of the governors in the colonies, Maunier said: "They do all the professions, they perform all the functions, they are, dare we say, dictators, in more than one way" (*Répétitions écrite de législtion coloniale, op. cit.*, p.281).

49 H. Arendt, *The Origins of Totalitarism*, Mariner Books, Boston, 1973.

in its origins, is only a venture for personal, unilateral, egoistic interests undertaken by the strongest on the weakest. Such is the reality of history".[50] Who is the author of these lines? A fierce opponent to colonization who was discredited because of the partiality of his political positioning? Not at all. Albert Sarraut was the minister of Colonies and these lines are extracted from his very official discourse at the opening of the courses in the Colonial School the 5th of November 1923. It constitutes a healthy reminder for us when we know that, on the 23rd of February 2005, a majority of French parliamentarians voted with the approval of the government and its Prime Minister a law in which the so-called "positive" aspect of "the French presence overseas, notably in North Africa",[51] was officially proclaimed. We live in strange times.

50 A. Sarrault, *Discours à l'ouverture des Cours de l'Ecole coloniale*, 5 novembre 1923, Edition du journal "La presse coloniale", Paris, 1923, p.8.

51 Art. 4 of the law n° 2005-15 of the 23rd of February 2005, voted "as an acknowledgment of the Nation and a national contribution in favor of French returnees".