

BELGIUM UNDER THE GERMAN OCCUPATION.

A PERSONAL NARRATIVE 1

Chapter LXIV. The decision.

THE moving argument in which the Bâtonnier, speaking for the Bar of Belgium, defined his country's rights before the tribunals of international law, and impeached one of the greatest Powers in history of having violated that law, was crowned on April 22, 1915, by a decision of the court in which the decrees of the Governor-General were declared null and void, and of no force in Belgium. This decision, however, was reversed by the Court of Appeal, and when the case was carried to the Court of Cassation the decision there, coming, so the gossips in the corridors of the Palais de Justice said, out of divided councils, was against Maître Théodor on the merits of the case at bar ; that is, the court decided that the occupant, under international law, had not gone too far in creating the tribunals it had set up. But the decision did lean toward Maître Théodor's contention that the occupant's powers were limited by international conventions, and it left the door open to that decision two years later, when the entire magistracy of Belgium resigned as a protest against the inroads on Belgian sovereignty and independence which the Germans had gone on making. If Maître Théodor was not immediately and entirely vindicated by the court at the time, he may be said to have had a moral victory when the courts, or the judges of the courts, adopted in that other emergency the attitude he had asked them to adopt in this. But whatever view may be taken of that aspect of the matter, Maître Théodor's attitude was as great and courageous an act of resistance as any ever made by patriots. It set a lofty standard for official attitude and conduct in those later crises which menaced the very existence of the Belgian nation. Other deeds were more sensational, more dramatic, others more deeply impressed the popular imagination, but without in the least detracting from their courageous quality or their moral beauty, they were not of the fundamental and lasting importance of this which honours the name of Léon Théodor.

I used to meet Maître Théodor occasionally ; he would come to the Legation now and then to see me. He realized, of course, precisely what he had done ; he knew that punishment was inevitable, and the thought of leaving his home, his family, and of going into prison and exile, was saddening to him. But he was always smiling, always brave, and I think his slender figure, with the habitual scholar's stoop, was resolutely held a little more erect during those fast few weeks he spent in Brussels waiting for the end he knew to be certain.

He sent a copy of his argument to Dr. von Sandt, and he wrote two other letters, or protests, which must be noticed in order to complete the record of his patriotic services. One of those letters, addressed to Dr. von Sandt, relates to the same subject as the argument of the *loyers*, as it was always referred to, and was the reply of the lawyers of Brussels to the gratuitous indignity that had been offered them. The Council of the Order of Advocates, at its sitting on the 19th, had adopted this rule :

It is forbidden to all lawyers and to all *stagiaires* (law students) to contribute by whatever means, even by the simple recording of adjournments, conclusions, memoirs, or notes, to the functioning of the exceptional jurisdictions instituted by the decree of the German Government, dated February 3, 1915, modifying the decree of the 10th Vendémiaire, Year IV, and that of February 10, 1915, creating tribunals of arbitration of disputes in the matter of rents.

The Council of the Order of Advocates, not wishing any doubt of its intentions to exist, charged the Bâtonnier to transmit its resolution to Dr. von Sandt with a statement of the motives that had led to its adoption, and the Bâtonnier sent it to the chief of the *Zivilverwaltung* with a fearless letter.*

Brand WITHLOCK

London ; William HEINEMANN ; 1919.

* *"It is hardly necessary to say that the decision taken is in no way an act of hostility against the exercise, by the occupying Power, of the rights which international law and the Convention of The Hague confer upon it. The Bar knows the rights of the occupant, respects them, and will scrupulously avoid interfering with their exercise. The feeling that has guided the members of the Council is entirely otherwise. They are inspired only by the oath which the law requires, and which those who aspire to wear the robe solemnly take. The lawyer, on being called to the Bar, takes an oath of fidelity to the Constitution and to the laws of the Belgian people. This oath is not a vain formula ; it binds the conscience.*

"Now our Constitution says : 'Nobody can be deprived against his will of the judge which the law assigns him (Article 8). There can be created no commission nor exceptional tribunal under any denomination whatsoever.'

"The decrees of the German Government of February 3 and 10, 1915, violate these provisions. The Convention of The Hague, far from excusing these violations, forbids them. According to the terms of the Convention, the occupying Power, in taking into its hands the authority of the local Power, will respect, except in the case of absolute impossibility, the laws in force in the country.' The text is as precise as it is imperative."

The Bâtonnier quotes from German legal authorities to sustain his point, cites the case of the occupation of Alsace-Lorraine before its annexation to Germany, and continues :

*"The inevitable exigencies of the war, such is the condition, **sine qua non**, of the modification of the existing laws of the occupied country. Outside this case, the occupying Power is without mandate, and any disposition to take it, if the Convention of The Hague is not a dead letter, must be held as illegal and null and void.*

"Do the decrees of February 3 and 10 respect the laws in force in Belgium ?

"The decree of February 3 modifies the decree of the 10th Vendémiaire, Year IV, which is a Belgian law. The decree of February 10, 1915, modifies profoundly our laws on the competence of the courts. Both are in derogation of our laws as to the organization of judiciary power and violate our fundamental pact. Was there any inevitable necessity that brought about these decrees ?

"The decree of Vendémiaire has been in operation in Belgium for more than a century. Frequent applications have been made of it in the case of victims of pillage without any complaint from them. Communes alone have complained. The decree of Vendémiaire creates for towns and communes a very difficult situation ; many times they have tried to escape its application for legal reasons ; invariably the Belgian tribunals have decided that the decrees would continue in force.

*"The decree of the Governor-General introduces a considerable change in this decree. It takes away from civil tribunals the right to apply the decree of Vendémiaire, it establishes an exceptional jurisdiction, with a number of measures that literally place the communes at the discretion of the executive power. The decree of February 3 invokes '**obstacles of law and of fact**'. What are these obstacles ? No one discerns them. The decree does not try to define them, it contents itself with affirming them. The text of the 'decree removes all doubt as to its interpretation and denotes the thought that inspires it.*

*"The decree aims at '**the excesses that were committed in the month of August 1914 in several communes of Belgium**.' Now the greater part of those who suffered from these excesses were German subjects. The tribunal, said the decree, will be composed of three judges, of which two will be designated by the German authorities, and the third by the Belgian authorities."*

"The end sought is clear ; it will reflect on the moral authority of the decisions that will be pronounced by the tribunals to be instituted ; it is an insult to our bench. The bench does not merit this blame ; it has never failed in its duty ; it has treated the stranger with impartiality and has always given him good measure. The Germans have never complained. Our justice has been as hospitable to them as we have been ourselves. The war has in no way diminished this desire to be impartial ; perhaps it has been accentuated by a scruple of professional delicacy, easily explained and very natural.

*"Does the '**inevitable necessity**' required by the framers of the Convention of The Hague exist so far as disputes as to rent are concerned ? Not at all. Since the beginning of the occupation the goodwill of the court and of the Bar has manifested itself in the desire to facilitate, with the minimum of cost, the transactions between landlord and tenant. A new jurisprudence has been inaugurated by the president of the referees to decide on cases of evictions ; a special chamber has been arranged for the amicable adjustment of disputes born and to be born. The public prosecutor has given instructions to the bailiffs not to intervene except when forced to do so ; and to avoid as much as possible the creation of costs. The justices of the peace are inspired by the same desire. The Bar has created an office of free consultation, a section of rents. Where does the absolute necessity for change appear ?*

"And what necessity is there to surround a justice of the peace with two assessors ? Why place him under this tutelage ? Does there exist in Belgium a person better situated to settle alone the disputes which our law gives to his jurisdiction ? What competence, what light will the assessors, landlord and tenant, bring to him in a matter where everything has been settled by good sense, law, and custom ?

"The decree excludes the lawyers from these arbitrary tribunals. The Bar does not complain of this exclusion. Had the decree not done so the Bar itself would have forbidden its members access to these courts. That which it recalls of this provision of the decree is its principle and the intention that dictated it. The Bar is aimed at in this decree as was the bench in the other. In this sense the decree will mark a date in its history. For the first time since the Order existed it will have suffered, on account of the legislator, a real stigma. This stigma it has not merited. The Belgian legislator, the Belgian public, the stranger, have rendered it on many occasions the most striking homage. The Belgian Bar is a great and splendid Bar. It will continue its task and hold to its motto: **'All by Right. All for Honour' (Tout par le Droit. Tout pour l'Honneur)**."

Maitre Théodor had written another letter, on February 17, 1915, addressed to the Governor-General himself, which, while of a more general nature, so boldly and so clearly describes the German judicial system in Belgium and the German attitude in the administration of justice that it is worthy of more than a casual reading.

"Looking at this question without passion and without prejudice", Maître Théodor said, "the man of law cannot fail to recognize that everything in the German judicial organization is contrary to the principles of international law. The first principle of all, the most essential, without which one cannot conceive either the legitimacy or even the possibility of a judicial power, is that of publication; that is to say, giving notice to the public of everything of a nature to enlighten it as to the institution of established power, the laws of its functioning, its competence, the prescriptions which it authorizes, and the measures that should guarantee their efficiency.

"Before giving the order to a citizen the Power that commands must reveal its existence. Before imposing a penalty on a punishable act it must make known judicially the act which it punishes and the penalty that it prescribes for it. This is commanded by common sense, this is in conformity with international law, this is required by the Belgian Constitution, which is obligatory on the occupying Power in the same way that it is obligatory on the national Power."

The Bâtonnier cites the terms of the Belgian Constitution that provide that no tribunal, no jurisdiction can be established except in virtue of the law, that no penalty can be established and applied except by virtue of the law, that no law is obligatory until it has been published, and continues:

"Contrary to these imperative requirements the Belgian public has not been advised by any publication of the establishment of German military tribunals on our soil. A vague allusion was made to it in an affiche of the Baron von Lüttwitz in the month of September 1914, where very incidental mention is made of a 'tribunal legally constituted.' In what consists a tribunal legally constituted, what is its composition, what is its competence, what is the extent of its jurisdiction? Are its sentences sovereign or are they susceptible of remedy or appeal? What are these remedies? Is it true that beside this tribunal legally constituted there are others represented by single magistrates, temporary and revocable at pleasure, sovereign judges of fact, of procedure, of the offence, and of the penalty; at once legislative, executive, and judicial power, able to pronounce the gravest penalties?"

"Is it true that between these two jurisdictions there exists no line of demarcation, that for the same act the culpable may equally have to respond before each of them, and that thus the guarantee offered by the establishment of a tribunal legally constituted is no more than a vain appearance?"

"Of all this the public knows nothing. The lawyer himself, called by his mission to enlighten the public, cannot say anything definitely. Questioned as to the possible consequences of an act from the German repressive point of view, he will find neither in the laws, nor in the works of juriconsults, nor in his conscience the elements of an accurate response.

"The necessity of a publication, legally organized, imposes itself in a way much more imperious when it is a question of infractions and penalties. It is a principle admitted and proclaimed by all the jurists of every country. How many infractions, however, have been brought to the knowledge of the Belgian public by simple **affiches**, without having been made precise or definite in any of their constituent elements? How many acts have been punished the unlawful character of which is unknown to the population? How many times has not the penalty been announced by this brief formula, **'The guilty will be punished' or 'I will punish'**?"

"This absence of certitude is not only the negation of all principle of law; it weighs on the mind and on the conscience. It confuses the imagination; it seems to be a permanent menace for all, and the danger is all the more real because these jurisdictions admit of no public procedure, because the accused is not told what is alleged against him, and no right of defence is assured to him. It is justice without control, it is the judge left to himself, that is to say, to his impressions, to his prejudices, to his surroundings. It is the accused abandoned in his distress, alone, grappling with an all-powerful adversary. This justice without control and without warrant constitutes for us the most dangerous and the most oppressive of illegalities. We cannot conceive of justice as a juridical or moral possibility without free defence.

"Free defence; that is to say, the light thrown on all the elements of the proceeding, the public conscience making itself heard in the bosom of the court, the right to say all in a most respectful manner, and the courage as well to dare all, placed at the service of the unfortunate, of justice, and of right. It is one of the great conquests of our internal history, it is the corner-stone of individual liberty.

"What are our means of information? Beside the police magistrates [the Bâtonnier's generous allusion is to German police magistrates], who are men of integrity and of high conscience I am profoundly convinced, I see two sources of judicial information, the secret police and the informer. The secret police, without external mark, mixing with the population in the street, in the cafés, on the platforms of trams, eavesdropping, listening to conversations, lying in wait not only for acts but for intentions. And the informers — the race of them, it is said, has multiplied. Of what value can be their declarations, inspired by hatred, by rancour, and by base cupidity? Such auxiliaries cannot bring to the work of justice any useful collaboration. If one adds to this total absence of verification the preventive arrests, the long detentions, the domiciliary searches (perquisitions), one will have an idea of the moral tortures to which our aspirations, our thought, and our liberties at this moment are subjected.

"The Belgian, free by atavism, accustomed to think and to speak freely, without constraint in the intimacy of his home as in the public place, exercising the right of criticism against men, things, and institutions, sparing no one, no matter how highly placed, nor himself, watches himself henceforth, trusts no one, not even himself. He empties his drawers of the most inoffensive papers. Thinkers hesitate to gather facts for the purpose of history for fear that one day an indiscreet hand may take possession of them and there uncover a crime, the crime of intention.

"Will you say that we live under martial law, that we endure the hard necessities of war, that all must give way before the superior interest of your armies? I understand martial law for armies in the field. It is an immediate reply to an aggression against troops, represented without phrases, the summary justice of the array chief responsible for his

soldiers. But our armies are far away ; we are no longer in the zone of military operations ; nothing menaces your troops ; the population is calm. The people have resumed their work, as you have invited them to do. Every one applies himself, judicial magistrates, provincial magistrates, communal magistrates, the clergy, are all at their posts, admirable in their civicism, united in the same glow of national fellowship and of fraternity. However, this calm is not oblivion . . . The Belgian people used to live happy in this corner of the earth, confident in its dream of independence. It has seen this dream broken. It has seen its country ruined and devastated, its old soil, so hospitable, has been sown with millions of tombs where sleep our very own. The war has caused tears to flow that no hand will ever dry. Its bruised soul will never forget. But this people has a profound respect of its duty ; it knows the laws of war, and your rights as occupant. It will respect them. Is not the hour come to consider as closed the period of invasion, and to substitute for exceptional measures the regime of occupation such as is defined by international law and the Convention of The Hague, which traces the limits of the occupying Power and imposes obligations on the occupied country ?

"Is not the hour come also to restore the Palace of Justice to the judiciary body ? The military occupation of the palace is a violation of the Convention of The Hague. It has been stated in this connexion, and with reason, that the occupying Power is only a tenant. Whoever says tenant says care of the thing and usage in conformity to its ends. But to my way of thinking the question is still higher.

"The Convention of The Hague protects establishments consecrated to religion, to science, and to art. It likens them to private property. It is the homage that it renders to the great moral forces of which these establishments are the visible expression. For the same reason the Palace of Justice should enjoy the same immunity. Among the moral forces exists there one superior to justice ? This dominates all. Old as humanity, eternal as the need of man and of peoples to be and to feel themselves protected, it is at the base of all civilization. Art and science are its tributaries. Religions live and prosper in its shadow. Is it not itself a religion?

"Belgium has erected a temple to it in her capital. This temple, which is our pride, is transformed into a barracks. A slight part, growing smaller every day, is reserved to the courts and tribunals. Magistrates and lawyers have access to it by the back stairs. However painful the conditions under which they are called to render justice, the magistrates have decided, nevertheless, to stay. The bar has placed itself beside the magistrates. Used to an atmosphere of deference and of dignity they do not recognize each other in this scenery of the guard-room. And, in fact, justice surrounded by so little respect, is it still justice ?

"It is not the proximity of your soldiers that offends us ; we honour their courage and their patriotism ; what offends us is the contact with bayonets and the thousand indefinable things that accompany all quartering in barracks. That which wounds us is the small regard that they seem to have for our persons and for our functions.

"You have your legitimate pride of the soldier, we have our professional pride. They are inspired by the same high sentiment of our duties and of the mission that we are called upon to fulfill. They have the right to an equal respect.

"Excellence !

"You represent among us one of the most powerful empires that the world has known. You are might. Might does not exclude right. You hold from your Sovereign and your conscience the task to conciliate them in such measure as the necessities of war will permit, and as the respect of imperishable right and of human conscience commands.

"I know no mission higher or more beautiful.

"I beg your Excellency to accept, etc . . ."

Le Bâtonnier de l'Ordre, L. THÉODOR.