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Why Should Judges Be Independent?

Reflections on Coke, Montesquieu and the French Tradition of Judicial Dependence

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I. INTRODUCTION

SINCE MONTESQUIEU, judicial independence appears to be one of those modern principles that nobody in a democracy would contest.[1] Even dictatorships sometimes feel obliged to pay lip-service to judicial independence. Thus, the answer to the question raised in this part of the book—'What was/is the role of (the French) Parliament in the establishment of judicial independence?'—should, prima facie, be quite obvious: given (a) the apparently universal consensus on judicial independence and (b) the specific fact that the latter principle has been theorised by one of France's most outstanding political thinkers, one would expect the French legal tradition to be most favourable to it.

The truth is, however, more complicated. First of all, to call Montesquieu the intellectual father of 'judicial independence' may be misleading as there exists more than one definition of that principle. Montesquieu certainly developed one definition of 'judicial independence', but his definition is slightly different from the conception that first emerged in

[1] JC Colliard, 'Séparation des pouvoirs' in O Duhamel and Y Mény (eds), *Dictionnaire constitutionnel* (Paris, Presses Universitaires de France (PUF) 1992) 974 ('an uncontested dogma'). This may explain why the majority of French legal scholars rarely go deeper into the question, *why* judges should be independent. Very often they simply quote Montesquieu. See the entries 'Séparation des pouvoirs', 'Indépendance de la justice', 'Inamovibilité' or 'Justice' in *Dictionnaire constitutionnel* ; L Cadiet (ed), *Dictionnaire de la justice* (Paris, PUF 2004); D Alland and S Rials (eds), *Dictionnaire de la culture juridique* (Paris, PUF/Lamy 2003); P Raynaud and S Rials (eds), *Dictionnaire de philosophie politique*, 3rd edn (Paris, PUF 2003); MA Cohendet, *Droit constitutionnel*, 2nd edn (Paris, Montchrestien 2002). For a deeper insight see JD Bredin, 'Qu'est-ce que l'indépendance du juge ?' (1996) 3 *Justices* 161.

England in the 17th century. It differs even more from the contemporary French conception of 'judicial independence'. In order to reach a more sophisticated appreciation of this concept, section II of this essay will discuss the various possible meanings of the expression 'judicial independence'.

Similarly, the link between democracy (or the rule of law) on the one hand and judicial independence on the other needs to be analysed carefully. France provides an excellent example of this problem. Until recently, the attitude of French law towards judicial independence was highly ambiguous.[2] In the native country of the Baron de La Brède et de Montesquieu, the concept of judicial independence faced major problems, not only under authoritarian regimes (which may not be a surprise), but also under democratic or quasi-democratic regimes. What was the nature of these problems? According to most French observers, the problematic status of the principle in the past can be described in the following way: (a) on the theoretical level, Montesquieu solidly established the principle of judicial independence in the famous Book 11, chapter 6 ('De la Constitution d'Angleterre') of *De l'Esprit des lois*; (b) his ideas were widely accepted in France in the official legal and political discourse; but (c) in practice things went wrong because the legal decision-makers behaved hypocritically. According to this view, a discrepancy existed between Montesquieu's excellent theory and 'bad' practice.

My own view would be quite different. It seems to me that the political and legal practice did not deviate from Montesquieu's theory (as stated in Book 11, chapter 6[3]). On the contrary, it scrupulously followed Montesquieu's ideas and thereby revealed its shortcomings in matters of judicial independence. Indeed, as section III will show, judicial independence was grounded by Montesquieu on the assumption that the courts did not have any power. However, to justify the courts' independence by their lack of power is a very weak argument. It may be easily turned against judicial independence once it appears that judges are not powerless. That is precisely what happened in France from 1789 to the second half of the 20th century as will be demonstrated in section IV: instead of being independent, French courts often were dependent on political authorities, especially on the executive. Neither Parliament, in a radically democratic

[2] For a critical account see: J Georgel, 'La dépendance de la magistrature en France' in *Mélanges Velu*, vol 2 (Bruxelles, Bruylant 1992) 845*f*; F Gerber, *Justice indépendante, justice sur commande* (Paris, PUF 1990); JD Bredin, 'Insupportable indépendance', *Le Monde* (20 November 1987) 1–2.

[3] This further information is important as one may wonder whether Montesquieu's position can be entirely summarised by reference to Book 11, ch 6.

context, nor the head of State, in authoritarian regimes such as that under Napoleon, were willing to suffer the existence of courts which would be both independent *and* powerful.

Today the terms of the debate have fundamentally changed, as we shall see in section V. Due to the influence of new social demands, of new theoretical models (some imported from abroad) and of new legal rules, the French courts enjoy a totally new situation: their powers have increased and, at the same time, their independence has been strengthened. Whereas in the past French judges were either independent *or* powerful, today they are both. However, this cultural revolution is not yet complete. One may argue that judicial independence is still problematic, although to a lesser degree and in a different way compared to the former situation. Indeed, this new practice of judicial independence still lacks a firm theoretical basis in the sense of a single common theoretical basis. The old basis (Montesquieu's theory as described in section III) has proven to be insufficient and unpersuasive. A new paradigm, which would be accepted unanimously, has not yet emerged as one may distinguish at least three different theoretical models in the contemporary debate.

II. WHAT IS 'JUDICIAL INDEPENDENCE'? IN SEARCH OF AN ANALYTICAL FRAMEWORK

Before starting our historical and comparative investigations, we have to know what we are looking for. What does the expression 'judicial independence' mean? Or more precisely: what could it mean? The term is indeed polysemic. The purpose of this part is not so much to say how judicial independence ought to be understood, but essentially to describe how it could be or has been understood. Its aim is to draw up a list of the various definitions, either extensive or restrictive, that may be encountered in legal theory or in positive law, in France or abroad, in the past or in the present. This conceptual framework will be useful to identify the logic and dynamics of judicial independence in French legal history.[4]

Independence should not be confused with the simple existence of courts of justice. Since the early times of law, there have always been some institutions called 'judge', 'tribunal', or 'court of justice', whose function

[4] The generally accepted narrative of the development of judicial independence in French history may be outlined in the following way: in 1789, French law adopted a very restrictive concept of judicial independence. Moreover, it was regularly infringed. Since 1945, France has respected this restrictive concept and even has adopted a broader concept, setting much higher standards.

was to settle disputes. Solomon and Saint Louis[5] were judges; they were even *impartial*, unbiased judges as they had no link with either of the two parties and had no personal interest in the case. Yet, we could not say that they were *independent* because, at the same time, they were also the king. Judicial independence is a more recent idea: it is a modern principle which is closely linked to the theory of separation of powers. The concept of judicial independence may be captured through three inter-related questions:

1. *Who* (or what) is supposed to be independent?
2. *From whom* is the judiciary supposed to be independent?
3. What does it mean for a judge or for the judicial corps to be *independent*?

A. Who (or What) is Independent?

Are all judges independent with regard to all of their activities? What are the *proper functions* of a judge which, as such, should be protected by independence? To state the issue in typically French terms: what is the exact denomination of the principle which is at stake in this debate: independence of 'judicial power (*pouvoir judiciaire*)' or, more restrictively, independence of 'judicial authority (*autorité judiciaire*)'?[6]

This question is quite awkward as the following two aspects demonstrate. (a) In French private law there are two kinds of judges: the *juges du siège* (the judges sitting on the bench) and the *juges du parquet* (the state prosecution service). Whereas the former are independent, the latter are not as they may receive orders from the government, by whom they may be dismissed. Today, the dependence of the *parquet* is seriously criticised—so far without success—in the name of judicial independence. Is that a material claim for present purposes? (b) The definition of the core function of the judges sitting on the bench is also discussed. Referring to England and France, one may distinguish two theoretical models of the *judiciary* and, consequently, two theoretical models of judicial *independence*. According to the first one (the English concept of the judiciary), the specific role of a judge is (i) to settle a dispute between two parties and (ii) to say in general what the law is (ie to interpret the law and to establish precedents). According to the second model (the concept of the French Revolution), the function of a judge is restricted to point (i). The judge is the *bouche de la*

[5] Saint Louis or Louis IX (b. 1214, d. 1270) was King of France from 1226 to 1270. He was famous for his moral integrity and his fairness in delivering justice. The popular image represents him as a judge trying under an oak ('*Saint Louis sous son chêne*'). He was canonised in 1297.

[6] On the historical and conceptual background of this French semantic debate, see JP Royer, *Histoire de la justice en France*, 3rd edn (Paris, PUF 2001) 867–70.

loi (Montesquieu) who simply applies the statutes made by Parliament. To say what the law is, or to make the law, is the exclusive right of the political authorities, of the legislator. Whereas in the English model independence is granted to a real judicial power, in the French model of 1789 independence is recognised to a judicial authority with no powers, at least no law-making power. As a result, when French courts interpreted the (statute) law, they could claim no right to do so independently from Parliament, as interpreting the law was not considered to be part of the judicial function.

B. From Whom Should Judges Be Independent?

Who is the potential enemy of the courts' good functioning? What is, intrinsically, extraneous to the administration of justice? Historically, the idea of judicial independence has been opposed to the *other state powers* as defined by Montesquieu's famous triptych. The principle of independence was claimed by the courts, first of all against the absolutist kings, and later against the executive as the modern heir of the absolutist king. But what was or is the attitude of Parliament? Does the Parliament:

(a) act as an ally of the courts against their common opponent: the executive[7];
(b) form a coalition with the government (the other 'political' power) against the courts which are not elected;[8] or
(c) try to treat both the executive and the judiciary as subordinate?[9]

This has a major impact on the content and scope of judicial independence. Parliament may be more or less open or reluctant to grant to the courts certain powers (law-making powers, powers of judicial review of the executive, etc) and, also, some degree of independence (from itself and/or from government).

Nowadays, some authors have given the idea of judicial independence a much wider significance.[10] According to them, independence requires the isolation of the courts not only from the other state organs, but also from any exterior actor. This includes: (a) the parties to the trial; (b) the other judges (colleagues or higher judges); (c) the magistrates' trades unions; (d) the wider society (the media, public opinion, the social needs, the common moral values, etc). Further, (e) judges should also be independent from their own personality, their own opinions and preferences. This new

[7] Eg: England after the Glorious Revolution of 1688.
[8] Eg: France under the Third and Fourth Republic.
[9] Eg: France at the beginning of the French Revolution.
[10] Bredin (n 1) 164; JM Varaut, 'Indépendance' in Cadiet (n 1) 627.

definition raises a lot of questions.[11] In any case, the use of the concept of judicial independence towards the parties (point (a)) is misleading, as it is redundant given the specific requirement of *impartiality*. Regarding points (b), (d) and (e), the answer depends on the scope of the principle of the courts' subordination to law. Indeed, no matter how independent judges may be, they are never supposed to be independent from law. Therefore, if these various parameters are a constituent part of law, the judges are obliged to consider them. This raises the crucial, and controversial, question of the concept of law.

C. What Does It Mean, for the Judiciary, to Be 'Independent'?

What does it mean—specifically for a *judge*—to be independent? In common language, and even in legal language (eg an 'independent state'), the word 'independence' has quite a strong meaning. It refers to the idea of 'not depending on authority or control', not depending 'on others', and even of 'self-governance'.[12] As such, the word suggests the idea of an organisation which would be totally free to behave as it likes ('self-governing'). It depends only on itself, either because it depends on its own will and desires (first meaning) or because it depends on its own rules (it is autonomous; second meaning). A state is said to be independent precisely because it is sovereign and has the right to make its own legislation. Does this meaning also apply to the judiciary? Is it correct to say that a judge, because he is independent, may act as an *électron libre* (literally, a free electron), subject only to his will (first meaning) or to the rules defined by himself (second meaning)? The answer would be certainly 'no' as regards the first meaning. The second meaning is more controversial.[13] Indeed, a judge is supposed to settle a dispute *in accordance with the law*. The question is whether the law 'pre-exists' the judge (it is made by the legislature or it exists objectively), or whether it is also made by the judge

[11] For a different point of view see eg AW Bradley and KD Ewing, *Constitutional and Administrative Law*, 14th edn (London, Longman 2006) 393 ('Judicial independence does not mean judicial detachment, and it is inevitable and in some cases appropriate that judges will be engaged in wider public policy issues.'); A Garapon, *Le gardien des promesses. Justice et démocratie* (Paris, O Jacob 1996) 245f; E Zoller, 'La justice comme contre-pouvoir: regards croisés sur les pratiques américaine et française' (2001) *Revue internationale de droit comparé* 570f.

[12] JB Sykes (ed), *The Concise Oxford Dictionary of Current English*, 7th edn reprint (Oxford, Clarendon Press 1986) 509 ('independent'). Similar definitions in *Duden. Deutsches Universalwörterbuch*, 5th edn (Mannheim, Duden Verlag 2003) 1647 ('unabhängig'); *Le petit Larousse illustré* (Paris, Larousse 1983) 522 ('indépendant'). See also Varaut (n 10) 622.

[13] Affirmative: Varaut (n 10) 622. Negative: O Pfersmann, 'Existe-t-il un concept de gouvernement des juges?' in S Brondel, N Foulquier and L Heuschling (eds), *Gouvernement des juges et démocratie* (Paris, Publications de la Sorbonne 2001) 39 ('To judge is to settle particular disputes by applying general rules *made by somebody else*'; emphasis added).

himself. Anyway, independence is not isolation from *law* but from *extra-legal* (so-called 'political') parameters and actors.[14]

Thus, the idea of judicial independence requires that courts are free to execute their 'judicial functions' (as defined above) without any 'political' interference either from Parliament, from government or from any other political actor. This is the *functional* point of view. The idea of judicial independence has also been put forward in matters of organisation and staffing of the judiciary. This *institutional* point of view concerns both the status of the individual judge and the status of the judicial body as a whole. According to one definition of judicial independence, the admission of a judge into the judicial corps, his promotion within the judicial hierarchy and his removal in case of misconduct can be decided only by the judiciary itself. This assumes the existence of an institution representing the judiciary as a collective body (eg the Conseil supérieur de la magistrature in France, the Consejo General del Poder Judicial in Spain, the Consiglio Superiore della Magistratura in Italy, the Consejo Nacional de la Magistratura in Peru, etc).[15] This institutional independence (or isolation) may even imply that the members of this institution should be elected by the judges and only by them. This body would be in charge of the recruitment and career of judges, the internal organisation of judiciary and—why not?—the definition of the judiciary's budget.[16]

Having now had this first impression of what judicial independence might mean, we turn to France in order to see what it has actually meant in legal theory, in positive law and in legal practice.

III. THE INITIAL THEORETICAL JUSTIFICATION OF JUDICIAL INDEPENDENCE: FROM COKE TO MONTESQUIEU

The idea of judicial independence is a modern idea. Although one may argue that some of its aspects already existed earlier on,[17] these elements

[14] This point will be developed later in section III.

[15] JF Kriegk, 'Les conseils supérieurs de la justice, clef de voûte de l'indépendance judiciaire?' (2004) *Recueil Dalloz* 2166*f*.

[16] So far this hypothesis does not apply to the judiciary in general. In France, it is still government and the Parliament which determine the financial framework of the courts' working and may be tempted to use this means in order to impede the courts' functioning. However, some judges such as the constitutional courts (in Germany and France) enjoy financial autonomy. In England, the salaries of the senior judiciary are paid from the Consolidated Fund rather than being voted by Parliament. See: Union internationale des magistrats (ed), *Traité d'organisation judiciaire comparé*, vol 1 (Zurich/Baden Baden/Bruxelles, Schulthess/Nomos/Bruylant 1999) 115.

[17] In England, the Statute of Northampton from 1328 ordered that the king was not allowed to interfere with the course of the royal courts. The latter were not supposed to take into account any royal command or wish (Bradley and Ewing (n 11) 413). For France, one may refer to the '*principe de vénalité des offices*': the members of the ordinary royal courts

were only aspects of a larger reality which was clearly dominated by the feudal conception of the king being the ultimate source of justice.[18] The principle of judicial independence appeared first in 17th century England with the action and writings of Sir Edward Coke. Later, in 1748, Montesquieu proposed his famous theory of separation of powers of which judicial independence was an inherent part. Although Montesquieu was inspired by the English Constitution, his model of judicial independence is slightly different from Coke's model.

A. Coke and the Common Law Model of Judicial Independence

One of the first advocates of the idea (of a *certain* idea) of judicial independence was Sir Edward Coke (1552–1634).[19] In his struggle against James I, he rejected the ancient feudal principle of the *rex fons justitiae*. According to him, the common law courts ought to be subject not to the king and his personal will, but solely to the precepts of the law. In his famous interview with the King in the case of *Prohibitions del Roy* in 1607, Coke declared that the

> the law [and only the law] was the golden met-wand and measure to try the causes of the subjects.[20]

As the King had no knowledge of the science of law—especially of the 'artificial reason' of the common law –,[21] he was entitled neither to deliver justice by himself nor to give orders to the judges appointed by him. The principle that courts should be *independent* from any political interference is presented by Coke as the logical consequence of their close *dependence* on law. Both aspects are linked: judges are independent (from politics) because, and inasmuch as, they are dependent (on law).

were the legal owners of their office which they had bought in the past from the king. Therefore, the king could neither appoint nor dismiss the judges. But the French king could summon the judges to submit a case to the King's Council (*droit d'évocation*). In feudal England the function of the royal courts was, to a certain degree, protected, but not the organ (the king could appoint and dismiss the judges). In France, under the Ancien Régime, it was the judicial organ but not their function that was safeguarded

[18] JL Halpérin, '1789–1815: un quart de siècle décisif pour les relations entre la Justice et le Pouvoir en France' (1996) *Justices* 13–14.

[19] J Beauté, *Un grand juriste anglais*: Sir Edward Coke (1552–1634) (Paris, PUF 1975) 99f.

[20] 12 Co Rep 63 quoted by M Loughlin, *Public Law and Political Theory* (Oxford, Clarendon Press 1992) 44.

[21] *Ibid*: 'God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience.'

This may prima facie appear paradoxical. Yet independence is not to be confused with a free, arbitrary power: the reign of the judges' will. Otherwise, judicial independence would subvert its own ultimate foundation, ie the rule of law. Ideally, the people shall be subject to the government of laws and not to the government of (other) men. Indeed, Coke concluded his answer to James I by quoting Bracton: 'I said, that Bracton saith, *quod Rex non debet esse sub homine sed sub Deo et lege*'. Thus, the fundamental presupposition of Coke's argument is the objective existence of law, that is distinct both from the will of the king and from the will of the judges themselves. The last point is strongly assumed in the classical theory of common law of the 17th and 18th centuries.[22] According to this, the judge is only the *lex loquens*, the simple inventor of a pre-existing common law. The judges do not make the law; they only discover and declare it. This is, of course, a 'fairy tale' as stated later by Lord Reid in 1972.[23] But when judicial independence was established in 1701 by the Act of Settlement, the law-making power of the judges was well hidden under the myths and fictions of the classical common law doctrine.

B. Montesquieu and the French Rationalist Model of Judicial Independence

In France, most people would consider Montesquieu to be the intellectual father of judicial independence. The term 'judicial independence' does not appear in his famous *Esprit des lois*. Yet the *idea* (a *certain* idea) is developed in his theory of the so-called separation of powers, a term which is neither used by him, nor very appropriate to describe Montesquieu's theory. This theory is quite complex as it is the result of several successive and somewhat contradictory arguments and principles.[24]

(a) The *telos* of every political regime—of every moderate regime, distinct from despotism—is to safeguard human liberty.

(b) Montesquieu rejects the absolutist idea of the unity of political power. In his eyes, it is an eternal and universal experience that every man who has power—even the most virtuous man—is tempted to abuse it,

[22] On the classical common law theory see: G Postema, *Bentham and the Common Law Tradition* (Oxford, Clarendon Press 1986) 3*f*; R Cotterrell, *The Politics of Jurisprudence* (London, Butterworths 1989) 21*f*; L Heuschling, *Etat de droit, Rechtsstaat, Rule of Law* (Paris, Dalloz 2002) 176*f*.

[23] Lord Reid, 'The Judge as Lawmaker' (1972) *The Journal of Public Teachers of Law* 22.

[24] See C Eisenmann, 'La pensée constitutionnelle de Montesquieu' in B Mirkine-Guetzevitch and H Puget (eds), *La pensée politique et constitutionnelle de Montesquieu. Bicentenaire de l'Esprit des lois (1748–1948)* (Paris, Sirey 1952) 133*f*; M Troper, 'Séparation des pouvoirs' in *Dictionnaire de philosophie politique* (n 1) 708*f*.

and thus to infringe the liberty of the individuals (the principle of *distrust*).[25] Liberty is safeguarded only if one power may be counter-balanced by another power.

(c) The political power ought to be divided into three branches (legislative, executive, judiciary). Each should be *separated* from the others and consequently be *independent*. Thus, the principle of independence applies to all three powers, and not only to the judiciary.[26]

(d) However, if every institution were to be totally independent (self-governing or isolated) within its own department, it could—see point (b)—abuse its power. Thus, the various powers, once they are separated, have to control each other (checks and balances). This principle of *interdependence* limits or contradicts the former principle of independence.

(e) The principle of interdependence does not apply, according to Montesquieu, to the judiciary. This branch is put aside by him in order to leave it totally independent. This may be surprising given the general scope of the principle of distrust (see point (b)). After all, judges (even the wisest) are only men, and not infallible gods or half-gods.

But according to Montesquieu, the third branch is in a special situation as it is not really a power.

> *Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle. Il n'en reste que deux.*[27]

Only the legislative and executive powers are real powers and therefore need a power which may moderate them (*une puissance réglante pour les tempérer*).[28] The third power is supposed by Montesquieu to be non-existent (*nul*) as the judges are only the *bouche de la loi*.[29] Their decisions, in the form of a syllogism, apply the exact letter of the law to the cases brought before them. They do not express a proper will and, consequently, they have no (personal) power. As they have no power, they are logically unable to commit any abuse; thus, there is no need for control. Argument (d) does not apply to courts, which may remain entirely independent. Their

[25] Montesquieu, *De l'Esprit des lois*, Bk 11, ch 4 in *Œuvres complètes*, vol 2 (Paris, Pléiade 1951) 395. For a recent English translation, see Montesquieu, *The Spirit of the Laws*, ed AM Cohler, BC Miller and HS Stone (Cambridge, CUP 1989).

[26] Concerning the legal impact of the principle of independence on the status of the executive and the legislative, see eg: D Rousseau, *Droit du contentieux constitutionnel*, Vol I, 6th edn (Paris, Montchrestien 2001) 255; PO Caille, *L'inviolabilité pénale du chef de l'Etat sous la 5e République* (thesis, Lille 2, 2002) 175*f*.

[27] Montesquieu (n 25) Bk 11, ch 6, 401.

[28] Ibid.

[29] Montesquieu (n 25) Bk 11, ch 6, 404: '*Les juges de la nation ne sont . . . que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur.*' See also (n 25) 399 and Bk 6, ch 3, 311.

functioning should be entirely guided by the general principle of independence. This implies that the two other powers are not allowed to exercise any influence on courts except by enacting legislation. Besides, there should logically be no need for any further, political or extra-legal, pressure: all the courts need in order to settle a dispute is to read and apply the clear provisions of the statute law.

C. A Dialogue Across the Channel: Convergences and Divergences

The two models of Coke and of Montesquieu are based on the same core idea: judges must be independent of any exterior, political influence, as they are dependent on the law.[30] The courts are supposed to be either the *lex loquens* (Coke) or the *bouche de la loi* (Montesquieu).

However, the definition of law and, generally, the social and political backgrounds of both models are quite different. Whereas Coke, Hale and Blackstone believed the common law to be the spontaneous product of society, Montesquieu and the French rationalist philosophy considered law to be a construct of the (enlightened) will of the sovereign. In the French view, the law is much closer to the political sphere than it is in the English common law doctrine. According to the revolutionaries of 1789, law is ultimately founded on Reason and on the objective idea of human rights. In principle, law is drawn from two sources, natural law and positive law (statutes of Parliament). Yet the determination of the exact meaning of natural rights belongs to Parliament. Thus, the initially broader meaning of the term 'law' (*droit*) is in fact reduced to 'statutes' (*lois*). As a consequence, the symbolic and institutional location of the French courts is very close to the political sphere. In England, judges tend to consider themselves as occupying a position *between* state power and society. This seems quite strange, at first sight, to a continental observer. After all, even the English judges participate in state power and are appointed—and paid—by the Queen. Yet, it is not totally strange if one remembers that they owe their appointment as a judge to their former career as barrister: in some way, they are 'extracted' out of 'society' as they are selected from the lawyers' society. Furthermore, they implement a law (the common law) which, at least in the 17th and 18th centuries, was the major part of English law, and whose origins were located outside the political sphere (either in popular customs, in so-called 'artificial reason', or in judicial precedents). On the contrary, French judges are considered and do consider themselves as a part of the state. Their entire career, after their academic studies, takes

[30] This point has been clearly stressed by C Schmitt, *Verfassungslehre* (reprint of 1st edn of 1928, Berlin, Duncker & Humblot 1993) § 13, 155: '*Die Unabhängigkeit der Richter von dienstlichen Befehlen hat ihr wesentliches Korrelat in der Abhängigkeit der Richter vom Gesetz*.' See also *ibid* § 12, 133.

place in the bureaucratic hierarchy of the state judiciary and their symbolic position, as in 1789, is subordinate to the state legislative power. In France, the barrier separating courts from politicians—ie their independence—is quite thin as it is founded philosophically on the assumption that courts have no power and technically on the formal requirement of a legal text (the courts being subordinated only to the will of politicians as expressed through the medium of a general legal norm).

But what happens if the crucial assumption of the 'nullity' of the courts' power is discovered to be wrong? The English courts do not simply declare a pre-existent law; they also make law. Nevertheless, in England, the principle of judicial independence was upheld.[31] Several hypotheses may be advanced as explanation. The first is the historical background to the relationship between the Strand and Westminster. In the 17th century battle against royal absolutism, the common law courts were, to a certain extent, allies of Parliament. One may add the fact that the traditional, uncritical hagiography of the 'wise' and 'experienced' judges tends to impede possible (political) criticisms against the use of their law-making power. Last but not least, Parliament may safely leave such an important law-making power to independent courts as it may: (a) unmake the common law rules very easily (the doctrine of parliamentary sovereignty); or (b) dismiss a judge by an address from both Houses to the King (this power is left in England to the Parliament and not, as in France, to the courts themselves).

By contrast, in France, the idea of the independence of a real judicial power was, in the past, considered to be a *contradictio in se*. Therefore, one of the two terms had to disappear: either the courts' power or their independence.

IV. THE AMBIVALENT ATTITUDE OF FRANCE IN THE PAST TOWARDS JUDICIAL INDEPENDENCE

From 1789 and until recently, the attitude of France towards judicial independence was quite ambivalent. Some regimes recognised the principle or various aspects of it in the formal Constitution. Others (like the Third Republic) did not. And some did in a very hypocritical way.[32] Moreover, every political regime established from 1789 to 1945—even where the

[31] See: R Stevens, *The English Judges. Their Role in the Changing Constitution* (Oxford, Hart Publishing 2002) 79*f*.

[32] Art 68 of the 1799 Constitution (Consulat) granted life tenure to judges so long as their name was not struck off the official register of eligible citizens. But this list was drawn up by Napoleon's administration. Art 58 of the Charte of 1814 assured life tenure to the judges 'appointed by the king'. In 1814, on the arrival of Louis XVIII, all the judges had been formerly appointed by Napoleon, and none of them could claim the protection of Art 58.

Constitution provided life-tenure of office to the judges—proceeded to purges amongst the civil and administrative courts. This ambiguity is undoubtedly due to certain power struggles, the spoils system being applied to the judiciary[33]. But it is also due to the philosophical shortcomings of Montesquieu's theory. If judicial independence is legitimate only because the courts' power is null, two options are possible once it is proven that in fact it is not. The first is to deprive the judges of all power before recognising judicial independence. The second is to suspend judicial independence every time it appears that courts have some power or use it inappropriately.

A. The Nullification of the Courts' Power as Precondition to Judicial Independence

Montesquieu's famous phrase about the courts' power being null is not a descriptive statement which reflected the reality of the French or English[34] judiciary at the time. It is a normative ideal: it refers to the status of the judiciary in what Montesquieu calls a moderate republican government. The question is whether this ideal is realistic. In 1789, French Revolutionaries were aware of the fact that, in reality—in the reality of the Ancien Régime—the courts' power had been all but null. In their eyes, the highest royal courts had been invested with large discretionary powers which they had abused. The courts had pretended to be the nation's representatives and they had used their right to review the validity of royal proclamations in order to safeguard the interests of their own social class (the fiscal immunity of the aristocracy). Thus, in the crucial period of the French Revolution, judges were regarded by the legislators not as allies, as in England, but as enemies to the new spirit and as rivals to the legislative power of Parliament.

In 1791, the Constitution recognised the existence of a 'judicial power'[35] which should be independent. However, this language is profoundly 'misleading'.[36] It is a *trompe l'œil* as the vast majority of the authors of the Constitution believed that, logically, there were only two powers: the

[33] R Martinage, 'L'épuration sous les régimes monarchiques' in Association française pour l'histoire de la justice (ed), *L'épuration de la magistrature de la Révolution à la Libération* (Paris, Loysel 1994) 48*f*.

[34] Although the idea of the *juge bouche de la loi* is developed in the famous chapter on the English Constitution, it can hardly be said that it describes the functioning of the English judiciary.

[35] See Constitution 1791 (title III Art 5). The term 'judicial power' reappeared later in the Constitution of 1795 (title V), in the Additional Constitutional Act of 1815 (title V) and in the Constitution of 1848 (c VIII). All the other French Constitutions simply speak of the 'courts', the 'judicial function' or 'judicial authority'.

[36] Halpérin (n 18) 14.

power to make the legislation and the power to apply it.[37] The judiciary was part of the government. It was neither a real nor a distinct power. Indeed, the proclamation of the courts' independence was closely linked to a series of legal measures whose purpose was to deprive judges of any discretionary or political power. We may note the following matters.

(a) Any judicial control over the validity of Acts of Parliaments as regards the Constitution was strictly prohibited.[38]
(b) The courts' jurisdiction did not include the right to construe statutes. Interpreting the law was considered to be part of the law-making power which belonged to political authorities. This idea had already been asserted, under royal absolutism, by Louis XIV in 1667.[39] Under the French Revolution, the ultimate right to interpret statutes was reserved, first—in a democratic context—to Parliament through the mechanism of the *référé législatif* (Art 12 Loi 16–24 August 1790; title III c V Art 21 Const 1791) and, second—under the autocratic regime of Napoleon—to the head of State (Loi 16 September 1807).
(c) The courts, especially the higher courts, were not allowed to lay down general rules by means of precedent (Art 5 Civil Code). The rationalist credo of the French Revolutionaries was perfectly summarised by Robespierre in his famous speech of 18 November 1790:

> The term case-law (jurisprudence) has to be deleted from our language. In a State with a Constitution and legislation, the case-law of the courts ought to be nothing else than the legislation.[40]

The law is determined by statutes, not by judicial decisions. The binding authority of the latter is strictly limited to the particular case submitted to the judge (Art 1351 Code civil).
(d) The courts were not allowed to review the acts of the government and administration (Art 13 Loi 16–24 August 1790).
(e) The trial of members of the executive accused of having violated the criminal law in their office was reserved either to a political organ (the second Chamber) or to a special court, whose members were appointed from amongst judges and politicians.

To put the position positively, the courts' role was restricted to settling the disputes between individuals in private law matters and punishing criminal

[37] R Carré de Malberg, *Contribution à la théorie générale de l'Etat*, reprint of 1st edn of 1920–22, vol 1 (Paris, Dalloz 2004) 719*f*; Royer (n 6) 274*f*.

[38] Art 10 Loi 16–24 August 1790; title III c V Art 3 of the Const 1791; Art 203 Const 1795.

[39] Royer (n 6) 278.

[40] *Archives parlementaires*, 1st series, vol 20, 516.

acts. With regard to this role, the courts were independent. During the French Revolution and the 19th century, the idea of judicial independence referred to two technical rules:

(a) A judge, once he was appointed into a particular judicial office, held it until his retirement. He could not be removed from it by the government—even for promotion—without his consent (*principe d'inamovibilité*).[41]
(b) When trying a case, he was subject only to general rules and not to particular instructions from the executive or legislative.[42]

On a larger scale, judicial independence meant that the courts were excluded or insulated from the political sphere. On the one hand, politicians should not interfere in the normal course of justice. On the other hand, the courts should not interfere in the course of politics. They should have no part in the exercise of sovereignty, either directly (when trying the disputes of the civil society they should be the will-less mouth or eye of the legislator), or indirectly (they may not review the acts of those organs which exercise political power, ie Parliament and government).

B. The Nullification of Judicial Independence as a Consequence of Judicial Power

In practice, however, this first option—the recognition of their independence after the abolition of their power—was doomed to remain partially ineffective.[43] When trying a particular case, courts had at least two major prerogatives: the power to determine the facts of the case and the power to determine the sense of the relevant legislation (the mechanism of the *référé législatif* was abolished progressively first in 1804 and ultimately in 1837). Thus the courts had some power and the politicians were tempted to supervise the use of this power, even at the cost of infringing judicial independence. In a democratic context, politicians could argue that:

(a) according to Montesquieu's theory, judicial independence is founded on the presupposition of the nullity of the courts' power; and

[41] Art 2 Loi 16–24 August 1790; title III c V Art 2 Const 1791 ; Art 206 Const 1795 ; Art 41 and 68 Const 1799 ; Art 58 Charte 1814 ; Art 49 Charte 1830 ; Art 87 Const 1848 ; Art 26 Const 1852 ; Art 84 Const 1946.
[42] See title III c V Art 1 Const 1791.
[43] One may doubt whether French politicians ever seriously believed in the myth of the judge being *bouche de la loi*. If they had, they would not have decided, at every change of the political regime, to purge the judicial body. A change of the constitution and the legislation would have been utterly sufficient.

(b) democracy implies that every decision-maker must be accountable to the people itself or to its elected representatives. Thus judicial independence, if linked with the exercise of a real power, contradicts the principle of the Republic.[44]

Given these arguments, one would expect that the supervisor of the judiciary would be Parliament or the people itself. Indeed, at the beginning of the French Revolution, under the Constitution of 1791 and 1795, judges were elected and could be re-elected by the citizens for a limited mandate. Parliament also kept a close eye on the functioning of justice. In 1790, it established a *Tribunal de cassation* (later called the *Cour de cassation*) whose task was to check, whether the courts (the inferior courts) strictly obeyed the statutory law.[45] During the parliamentary debate, some speakers like Robespierre[46] or Le Chapelier argued that, as supervisor of the courts, the Tribunal de cassation should logically be exterior to judiciary. Thus it would be part of the legislative power and its members would be appointed by Parliament. This view was, however, rejected by the majority. The Tribunal de cassation was established as a court, even as the apex of the so-called judicial power. Its members were, as all the other judges, elected by the citizens. Yet, at the same time, the official position of the Tribunal was to be 'near the legislative body' (title III c V Art 19 Const 1791). Every year, it was obliged to make a report to Parliament on the way it executed its mission.[47] Furthermore, it was obliged by the mechanism of the *référé législatif* to submit ultimately to the interpretation of the law given by Parliament.

Yet, this dependence of the courts on Parliament—which reached its peak under the *Terreur*—was replaced later by a strong dependence on the executive. There are two reasons for this radical change. First, it was favoured by the intellectual position of those liberal or democratic authors who considered that there existed only two powers, and not three powers. As the courts have the same function (applying the law) as the 'other' civil servants, they are part of the executive. The judiciary is simply a *service public* depending on the ministry of justice, with the only exception that judges do not receive specific orders and may not be dismissed or removed. The second reason is that the French judicial tradition of the 19th and even

[44] The argument is used at the beginning of the Second and the Third Republic in order to justify the purges amongst the judicial body (Royer (n 6) 543 and 626).
[45] See Carré de Malberg (n 37) 728*f*.
[46] Speech of 9 November 1790: '*Il est nécessaire d'avoir une surveillance, qui ramène les tribunaux aux principes de la législation. Le pouvoir de surveillance fera-t-il partie du pouvoir judiciaire? Non, puisque c'est le pouvoir judiciaire qu'on surveille . . . Ce droit de surveillance est donc une dépendance du pouvoir législatif. En effet, selon les principes reconnus, c'est au législateur à interpréter la loi qu'il a faite.*'
(*Archives parlementaires*, 1st serie, vol 20, at 336).
[47] Today the annual report of the Cour de cassation is addressed to the minister of justice.

the 20th centuries was deeply marked by Napoleon's authoritarian state-building.[48] Under his rule, the judiciary's symbolic prestige and hierarchical authority were strengthened. Its links of dependence on the citizens (election) and on Parliament (*référé législatif*, etc) were cut in favour of a new subordination to the executive.

Several aspects prove the traditional dependence of the courts on political power (the executive or, sometimes, Parliament). First of all, the executive had a major influence on the *composition* of the judicial body, which is highlighted by the following:

(a) From the time of Napoleon, French judges were no longer elected, but were appointed by the head of State. The choice of the executive, amongst the persons who held a licence in law and had made their articles during a two years' period, was entirely free. Even in the 19th century, the liberal and republican politicians never claimed a right to participate in the appointment process on behalf of Parliament.[49] In the 19th century, judges were appointed according to their political loyalty as certified by the letters of recommendation from members of Parliament, ministers, local authorities, etc.
(b) As, in contrast to England, French judges enter the judicial corps at a relatively young age, the question of their advancement is a crucial issue. Since Napoleon, and until recently, it was the executive who decided freely on this matter.
(c) In the past, and notwithstanding any legal guarantee of life tenure, the members of the bench (*juges du siège*) had been systematically the victim of purges at the beginning of every new regime: in 1789 (abolition of the former royal courts), in 1792, 1793 and 1794 (under the rule of the Convention and the *Terreur*), in 1795 and 1797 (*Directoire*), in 1807–08 and 1810–11 (Napoleon), in 1815 (Louis XVIII), in 1836 (the July Monarchy), in 1848 (Second Republic), in 1852 (Napoleon III), in 1877 and 1883 (the Third Republic), in 1940 and 1941 (the Regime of Vichy), and, finally, in 1944 (at the *Libération* under the transitional government of de Gaulle).[50]
(d) Concerning the *juges du parquet* (the prosecution service), the situation was even easier for the executive as, de jure, they are appointed and dismissed by a discretionary decision of government.

The executive and/or legislative also had a major influence on the *functioning* of the courts which is illustrated by the following:

[48] JC Farcy, 'Jurisdictions (Evolution du système français)' in *Dictionnaire de la culture juridique* (n 1) 872*f*.
[49] Halpérin (n 18) 22–3.
[50] See: Royer (n 6) and Association française pour l'histoire de la justice (n 32).

(a) In 1802, Napoleon restored the former King's right to grant pardon (*droit de grâce*), which had been abolished at the beginning of the French Revolution.
(b) The members of the *parquet* were (and still are) subject to the general and individual instructions given by the minister of justice. Through these magistrates the government is able to keep an eye on justice and may express its wishes to the judges of the bench.[51]
(c) Parliament enacted different kinds of retroactive statutes (*lois interprétatives, lois de validation*, etc) in order to alter the outcome of current trials.[52]
(d) The political authorities created extraordinary courts in order to deprive the ordinary courts of controversial litigation (eg the repression of political opponents).
(e) The administration, and especially the police, sometimes refused to co-operate with the courts or to obey the decisions of the courts.[53]
(f) The budget of the courts was (and still is) determined and thus may be restricted by the government, with the support of Parliament.[54]

V. TOWARDS A NEW PARADIGM: THE EMERGENCE OF AN INDEPENDENT JUDICIAL POWER

Judicial independence is a principle of growing importance in the recent history of French law. In 1789, the Revolutionaries adopted a very restrictive concept of judicial function and, consequently, of judicial independence. All the latter meant was the principle of life tenure. Yet, this restrictive concept was either implicitly bypassed (the judges' promotions being decided on political criteria) or explicitly suspended (by the systematic use of purges). The statutory or constitutional guarantee of the *inamovibilité* proved to be quite inefficient. During the second part of the 20th century, the situation has considerably changed: the courts enjoy greater powers and greater independence. This constellation—a judiciary which is both 'powerful *and* independent'(emphasis added)[55]—is rather new in France. It requires an intellectual *aggiornamento* concerning the theoretical justification of judicial independence.

[51] F Sarda, 'L'intervention du pouvoir dans les instances judiciaires' (1981) 16 *Pouvoirs* 69*f*.
[52] See J Vincent, S Guinchard, G Montagnier, A Varinard, *Institutions judiciaires. Organisation, Juridictions & Gens de justice*, 8th edn (Paris, Dalloz 2005) 111*f*.
[53] See the examples quoted by: Georgel (n 2), Halpérin (n 18) and Sarda (n 51).
[54] The magistrates' trades unions frequently criticise the courts' lack of resources. For a specific example of this type of pressure, see *mutatis mutandis* the financial difficulties of the Commission de déontologie de la sécurité, *Le Monde* (9 September 2005) 10.
[55] Zoller (n 10) 560.

A. The Institutional and Cultural Metamorphosis of the French Judiciary at the End of the 20th Century

The judiciary in France has gone through a far-reaching metamorphosis. It has become a crucial and powerful actor in social and political life, whose legitimacy is less fragile, and whose independence enjoys a much higher degree of legal protection and public support than before.[56] This new trend is the result of a series of evolutions, of which some were institutional and others intellectual, some internal to France and others external. The first legal steps of this metamorphosis were taken around 1945 and 1958, but the cultural revolution—the transformation of the intellectual context of judiciary and of the spirit of the judges themselves—only took place after the 1970s and especially the 1990s.[57] This phenomenon is quite complex, as complex as the French judicial system. As a matter of fact to speak of 'one' judiciary (or 'one' judicial power) is somewhat misleading, given the existence of three distinct courts systems in France: the civil and criminal courts whose pinnacle is the Cour de cassation, the administrative courts headed by the Conseil d'Etat and finally the Conseil constitutionnel. They are undergoing a similar evolution, but there are some slight differences.

The first point to be stressed is the growing power of these various courts. Since the abolition of the mechanism of the *référé législatif*, the courts have the right to interpret the law, both the internal law and—recently—international law[58]. However, according to the 1789 tradition, they had no right to set aside the legislative will of Parliament. This crucial barrier was only removed under the Fifth Republic. In 1958, a special organ (the Conseil constitutionnel) was created on the initiative of De Gaulle's government in order to decide the constitutionality of statutes. Furthermore, according to Article 55 of the Constitution, the civil and administrative courts may set aside a statute that is incompatible with EU law or international treaties like the European Convention on Human Rights (ECHR). These two mechanisms enable the courts to overturn any Act of Parliament, especially those which may try to interfere with judicial

[56] On this general evolution see: Garapon (n 11); D Salas, *Le tiers pouvoir. Vers une autre justice* (Paris, Hachette 1998); D Salas, 'Juge (Aujourd'hui)' in *Dictionnaire de la culture juridique* (n 1) 862*f*; P Raynaud, 'Juge' in *Dictionnaire de philosophie politique* (n 1) 361*f*.

[57] Royer (n 6) 853*f*. From a sociological point of view see the various writings of V Roussel, eg: 'L'indépendance de la magistrature comme ressource et comme enjeu' (1999) *Revue juridique des barreaux* 127.

[58] Conseil d'Etat 29 June 1990, Gisti, concl R Abraham (1999) *Actualité Juridique Droit Administratif* 621*f*. The administrative judge still refers questions of interpretation to the Ministry of Foreign Affairs (*référé diplomatique*), but he no longer considers himself to be bound by the latter's replies. In contrast, since 1839 the civil courts have in most cases been considered to be competent to construe international treaties. See F Terré, *Introduction générale au droit*, 5th edn (Paris, Dalloz 2000) 491.

independence.[59] More generally, in various fields (family affairs, labour relations, administration, politics, etc), the courts are playing an increasing role in the resolution of conflicts which, in the past, were solved by extrajudicial means. Specifically the role of the criminal courts in the so-called *affaires* (the corruption scandals) of the 1990s had a major impact on this cultural revolution. The courage of some famous *juges d'instruction* in France (Renaud van Ruymbeke or Eva Joly) has profoundly changed the image of the judiciary in the media and public opinion. In general, judges[60] are no longer suspected of being implicitly subordinate to the politicians; on the contrary, they are admired for their courage. Thus their claim to act independently, in order to apply the law to everybody, including high-standing personalities from politics or economics, gains wider support.

Protection of the courts' independence has also been strengthened[61] as follows:

1. The legal instruments safeguarding judicial independence are, to a large degree, out of reach of the political majority in Parliament. Judicial independence is guaranteed by Article 6 of the ECHR and by the French Constitution.[62] The legal status of the members of the civil and criminal courts and of the Conseil constitutionnel has to be approved by Parliament according to a special procedure (*loi organique*, Art 46 of the Constitution). The Act is automatically submitted to review by the Conseil constitutionnel, which is very sensitive to the issue of judicial independence.

2. The interference of politicians in the appointment of judges has not entirely vanished, but its impact has been progressively diminished. Some judges are still appointed by discretionary choice of the politicians.[63] Some lay judges are chosen amongst the citizens (popular jury) or elected by the members of a certain professional group.[64] But most professional judges, like the members of the civil and administrative courts, enter the judicial

[59] On the judicial review of the *lois de validation*, see Vincent *et al* (n 52) 113*f*.

[60] With the exception of the *juges du parquet*, whose legal status is different.

[61] For an exhaustive overview see Vincent *et al* (n 51) 105*f*. In English see J Bell, *French Legal Cultures* (London, Butterworths 2001).

[62] Regarding the civil and criminal courts the principle is enshrined in Art 64 Const. The independence of the members of the administrative courts is guaranteed by the case law of the Conseil constitutionnel (see DC 80-119, 22 July 1980).

[63] All the members of the Conseil constitutionnel (Art 56 Const), some members of the Conseil d'Etat (those appointed on behalf of the *tour extérieur*), all the members of the Haute Cour de la justice (Art 67 Const) and the majority of the members of the Cour de la justice de la République (Art 68-2 Const). The French judges in international or European courts are also chosen by (French) political authorities, but the candidates have to comply with high professional standards required by international or European law.

[64] The first instance courts in labour law and in commercial law.

corps by reason of their skills and knowledge.[65] After their academic degree, the candidates for a judicial position have to pass a special examination (the *concours*) and are trained at a professional college. The future members of the administrative courts have to go through the *Ecole nationale d'administration* created in 1945, and the future members of the civil courts through the *Ecole nationale de la magistrature* established in 1958.

3. Promotion, especially for the highest judicial positions, is still decided by the executive (the President of the Republic). According to Article 64 of the Constitution the head of State is supposed to be the guarantor of judicial independence. However, this legal provision is not entirely satisfactory given the current situation in which the President of the Republic is suspected of being mixed up in corruption scandals. Fortunately, the prerogative of the President of the Republic to appoint the highest civil judges is limited by the Conseil supérieur de la magistrature (CSM). In 1958, this organ was considered to be a political guardian of the courts, as all its members were chosen by the President of the Republic. In 1993, after many criticisms, the composition of the CSM has been deeply modified and has become less political. It includes now the President of the Republic, the minister of justice, six judges elected by their peers, one representative appointed by the Conseil d'Etat and three external persons, of whom one is appointed by the President of the Republic, one by the President of the National Assembly and one by the President of the Senate. The powers of the new CSM have also been extended: whereas in 1958 it could only advise the President in matters of promotion, it may now limit the choice made by the head of State.[66] Since its creation, the Conseil supérieur de la magistrature is also in charge of implementing the internal disciplinary rules to the civil judges in case of miscarriages of justice involving judicial misconduct.

4. Since 1945, there has been no purge of the judicial corps.[67] Such an act would now be considered to infringe the Constitution and the ECHR.

[65] On this requirement as a major basis of judicial independence see: Rousseau (n 26) 266; Vincent *et al* (n 52) 707.

[66] See Art 65 of the Constitution.

[67] One exception: in 1960 André Jacomet, member of the Conseil d'Etat, was dismissed by order of de Gaulle. Afterwards, in 1968, he was re-established in his position. This (unique) example shows the legal fragility in the past of the independence of the Conseil. Until the decision of the Conseil constitutionnel, it was grounded only on a non-written tradition which, moreover, had in the 19th century been frequently violated See: E Arnoult and F Monnier, *Le Conseil d'Etat. Juger, conseiller, servir* (Paris, Gallimard 1999) 44; B Pacteau, *Contentieux administrative*, 7th edn (Paris, PUF 2005) 58.

B. Looking for a New Theoretical Basis for a New Judicial Independence

France is confronted today with a new theoretical challenge. How is it possible to conceive the legitimacy of a judiciary which is both powerful *and* independent? Compared to the 1789 tradition and Montesquieu's theoretical model, this combination is radically new and disturbing. It raises a certain number of questions, doubts and criticisms. The old revolutionary logic has not entirely vanished, as reflected in the example of the debate on whether the members of the *parquet* should become independent from the government. The main argument in favour of the status quo is the fact that the prosecution service exercises a real power. Yet in a democracy, political decisions should be taken by authorities elected by the citizens.[68] In fact, various legal and political actors and thinkers are trying to work out a new theoretical model of judicial independence. In this debate, foreign and supranational institutions and ideas such as Article 6 of the ECHR, the new discourse of the *Etat de droit* imported from Germany, the role of foreign constitutional courts and of the European Court of Human Rights in defending the fundamental values of democratic societies, the action of the Italian prosecution service in the *Mani pulite* operation, etc—all these have exercised a major influence. Although public opinion is today more confident in respect of the judiciary, a unique and unanimously accepted justification of independence has—so far—not emerged in the academic debate. One may distinguish at least three different theoretical models, which are very often confused in the various discourses on judicial independence.

A first argument is to justify independence in relation to the idea of impartiality.[69] Whereas judicial independence may be controversial,[70] impartiality is not. Everybody would agree that, in order to settle a dispute, a judge has to stand above the two parties. He has to be a third person that is exterior to both parties, and has no link (either direct or indirect) with them. However, if one of the two parties has a connexion with politics (whether he is himself a politician or is a friend of a politician), he might be tempted to use his influence in the political sphere in order to change the

[68] The same argument is used by some French politicians of the left wing parties against the independence of the European Central Bank.

[69] Bredin (n 1) 165.

[70] In his famous press conference of 31 January 1964, de Gaulle claimed: 'the undivided State authority is entirely vested in the President of the Republic by the people who elected him... Every authority, be it the authority of the ministers, of the civil administration, of the army or of the *judiciary* is granted and maintained by him.' (emphasis added)

In 1991, at the climax of the Urba-scandal which implicated a member of his own party, Henri Nallet, Minister of Justice, took the floor during a colloquium on 'Justice and State. Independence, Responsibility and *Liberty* of the Courts' and asserted that 'independence is not an essential criteria of the judicial function' (quoted by Royer (n 6) 947; emphasis added).

outcome of his trial. Thus he would infringe both judicial independence and judicial impartiality. This example demonstrates that the guarantee of judicial impartiality requires logically the guarantee of judicial independence. The question whether the judges have a discretionary power or not, is pointless in this reasoning. This view has been put forward in the political corruption scandals: if the implicated politicians are to be punished (and who would be opposed to that?), justice has to be independent of politics. However, this argument is unable to justify why courts should be allowed to exercise independently a normative power when trying a case between two individuals, neither of whom has a connection with politics.

The second argument is to the effect that the courts should be independent from politics in order to be entirely subject to the ideal of justice. The political, extra-judicial actors should not be able to impede the courts in delivering 'good justice'.[71] Every citizen should have the right to have his case heard by a judge and tried according to the classical ideal of *suum cuique tribuere*. According to this model, the independence of the courts may not be justified any longer by referring simply to their subordination to statute law. That idea is still important, but it is insufficient: the courts do construe the written law and thus are in possession of a political power. Therefore, independence of the courts is justified by a certain ethical background. At the first level, courts are subject to the statutes and, on a higher level, to the general principles or ethical values of justice, equity, human rights, etc.[72] This argument is very similar in its structure to Montesquieu's argument as stated above (in section III): that judges must be totally independent of politics in order to be totally dependent on the only parameters which are relevant in judicial matters. This implies, however, that these abstract principles or values may be defined objectively. One has also to prove that the courts are better fitted than political organs to discover this objective meaning.

[71] See: Bredin (n 1) 165 ('*bonne justice*', '*justice juste*'), Varaut (n 10) 623 and the recent speech of the First President of the Cour de cassation, Guy Canivet, in *Le Monde* (7 January 2006) 21. For the entire version of the speech see: www.courdecassation.fr (under the heading: '*Les audiences solennelles*', '*Audience solennelle du 6 janvier 2006*'). This speech aroused the fury of the Prime Minister Dominique de Villepin who provoked a major diplomatic indicent at the official reopening session of the Cour de cassation. See: *Le Monde* (9 January 2006) 8 and *Libération* (7 January 2006) 15. The Prime Minister's behaviour, which on its turn gave rise to severe criticisms from the judges' trade unions (see: www.ldh-toulon.net/spip.php?article1124), is highly symbolic of the still controversial status of judiciary amongst some French politicians.

[72] See Varaut (n 10) 622 and Canivet (n 71) 21: '*Le juge est, par essence, ministre d'équité envers le justiciable . . .. Et bien davantage qu'à l'application automatique d'une règle, cette personne [le justiciable] a droit au juste droit.*' Judges are increasingly defined as the guardians of the fundamental values of society. See Garapon (n 11) and the literature on the new discourse of the *Etat de droit*: J Chevallier, *L'Etat de droit*, 4th edn (Paris Montchrestien 2003); Heuschling (n 22).

The third argument is the key idea of counter-balance (*contre-pouvoir*). The judiciary should be a *third* (real) power, whose function is to control the legislative and executive in order to safeguard the freedom of the citizens.[73] Therefore, the judiciary needs to be independent from political power; if not, it would be unable to stop the latter. This new model goes back to Montesquieu, and his idea of checks and balances.[74] But, at the same time, it goes beyond Montesquieu as it gives a different concrete expression to the latter idea. Whereas according to Montesquieu the principle of interdependence applies exclusively to the relationship between executive and legislative,[75] in this new model the judiciary is included. The possession by the courts of real power appears legitimate as:

(a) only a real power may stop another real power;
(b) the judicial power defends the fundamental values of a democratic society;[76]
(c) the courts are non-elected representatives of the people.[77]

However, this argument is double-edged. On the one hand, the courts are the 'beneficiary' of this argument as it justifies their independence. On the other hand, the courts may, on their turn, be the 'victim' of the idea. Once the courts are included in a system of interdependence, they may not claim any longer to be totally independent, unless they claim—which would be very problematic—that the idea of checks and balances applies only to the others, but not to themselves. Indeed, why should one believe that judges, who are only human, may not be tempted to abuse their power? The idea of the courts being 'the least dangerous branch of government' (Hamilton) is an interesting hypothesis, but it is not uncontroversial. Thus their independence may be limited by reason of this argument.[78]

Thus it appears that the new independence of the French courts is still problematic from a theoretical point of view. But it is possible that OW

[73] See Zoller (n 11); F Hourquebie, *Sur l'émergence du contre-pouvoir juridictionnel sous la Ve République* (Bruxelles, Bruylant 2004).

[74] See above section III.B.(d) and Montesquieu (n 25) Bk 11, ch 6, 397: '*Il n'y a point de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice.*'

[75] See above section III.B.(e).

[76] See (n 72).

[77] See Rousseau (n 26) 477; D Turpin, 'Le juge est-il représentatif? Réponse: oui' (1992) *Commentaire* 381*f*.

[78] For the USA see: JJ Darby, 'Garanties et limites à l'indépendance et à l'impartialité du juge aux Etats-Unis d'Amérique' (2003) *Revue internationale de droit comparé* 351. For France see especially the rich discussion in France on the liability (responsabilité) of the judiciary and the recent creation of a first parliamentary investigatory commission on judicial miscarriages (in the context of the Procès d'Outreau). The latter commission has been accused of infringing the principle of judicial independence by the Conseil supérieur de la magistrature and by the First President of the Cour de cassation. See *Le Monde* (18 February 2006) 1, 11; *Le Monde* (19 February 2006) 1, 9; *Le Monde* (22 February 2006) 1, 13.

Holmes[79] is right: the life of the law is not logic. More precisely: being the historical outcome of a variety of intellectual, social and political parameters, law is not necessarily governed by *one* logic.

[79] OW Holmes, *The Common Law* (Boston, Little Brown & Co 1881) 5: 'The life of the law has not been logic: it has been experience.'