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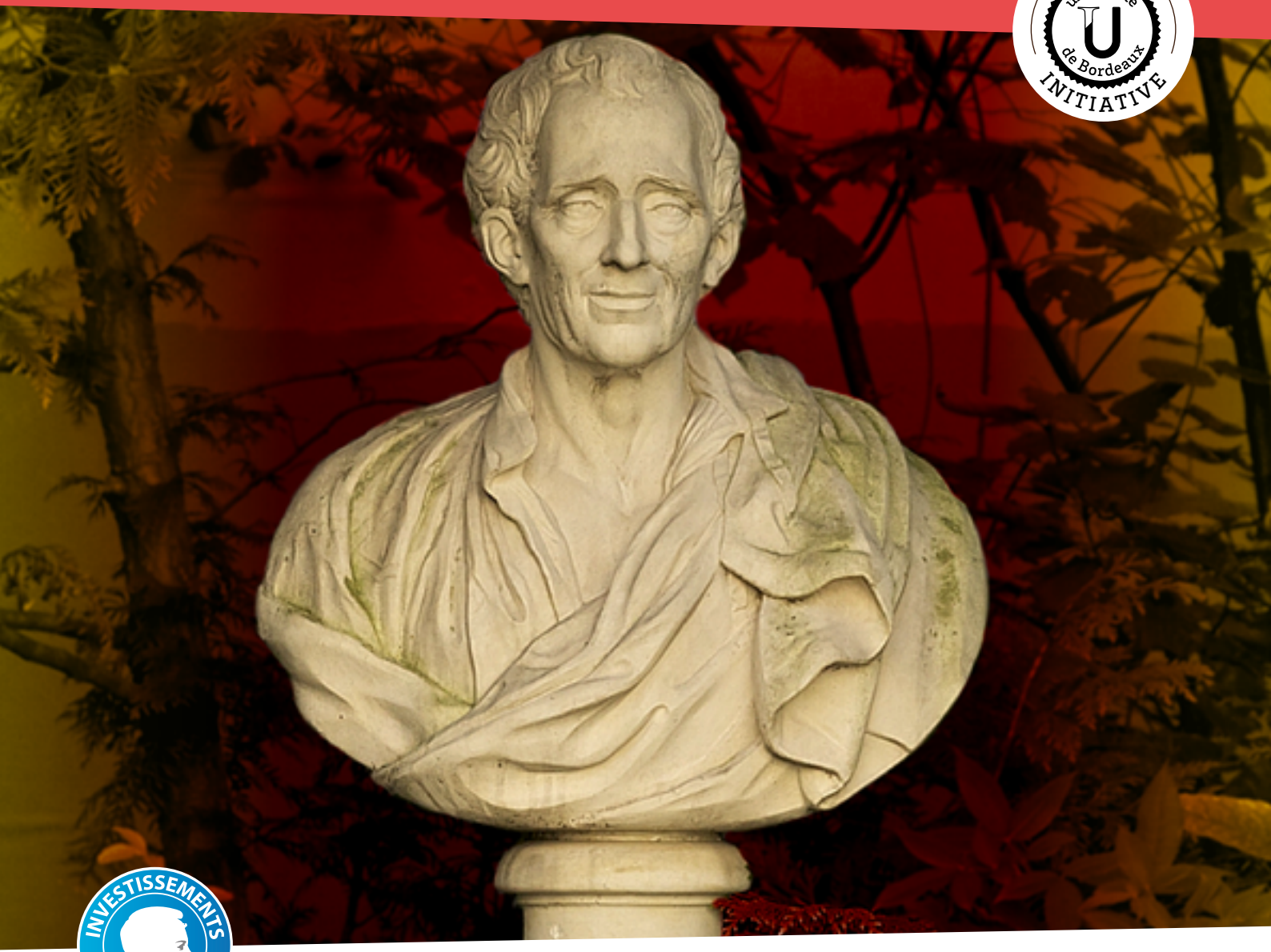

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The "mouthpiece of the law"? The different figures of the judge in *The Spirit of Laws*

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"*The laws are the eye of the prince; by them he sees what would otherwise escape his observation. Should he attempt the function of a judge, he would not then labour for himself, but for impostors, whose aim is to deceive him.*"

From *The Spirit of Laws*, Book VI, chapter 5

Should the power of judges be neutralised (1)? The question is not new: addressed by Montesquieu in the mid-18th century, the author of *The Spirit of Laws* argued that the judge ought to be a simple "mouthpiece of the law". The phrase hit the nail on the head. But what exactly should it be taken to mean? Is Montesquieu really defending a strict form of legal centrism, associated with his famous theory of the distribution of powers (2)? Does he consider the judge's power to interpret the law as a source of arbitrariness and of abuses of power?

This article seeks to show that, in Montesquieu's writings, legal philosophy remains critically dependent on political philosophy (3). The Judge's role varies depending on various forms of government; and despotism serves as a foil to those forms of judicial power that are not fatal to freedom. The reflexion on the attribution and limitation of the power to judge (I) as well as the modalities of judgment (II) cannot be separated from the critique of absolutism. While Montesquieu does not employ satire (as Voltaire is much more willing to do), and while he removed all reference to the *lettres de cachet* (4) between the manuscript and the published version, his criticism of the rise of power of royal justice must not be downplayed. As a former magistrate, *Conseiller à la Cour* (Counsellor to the Court) then *Président à mortier* (principal magistrate) of the *Parlement* of Bordeaux (1714-1726) where he heard criminal cases in La Tournelle (the chamber responsible for criminal investigations) for eleven years (5), Montesquieu had the opportunity to closely observe the judicial hearings and practices of his time and examine their effects on the freedom of French subjects. *The Spirit of Laws* thus offers a reflection on the conditions for political freedom, to which the examination of the power to judge remains subordinate.

I. The independence of the judiciary and the issue of equity

1) The *Discours sur l'équité* (Discourse on Equity)

After studying law at the Faculty of Bordeaux, Montesquieu went to Paris, where he remained from 1709 until 1713 in order to complete his studies. The *Collectio juris*, the compilation of his notes in six notebooks (recently published in his *Oeuvres completes* or Complete Works (volumes XI and XII), dates from that period. Those volumes contain notes on the *Codex* and the *Digeste*, summaries of trials that Montesquieu attended at various Parisian courts, together with excerpts from customary law such as the *Coutume de Bretagne* (1694). This in-depth work was doubtless not done without a degree of boredom, as shown in a note from Abbot Guasco, one of his close friends, who revealed that "forced by his father to spend the entire day at his Code, by evening he was so overwrought that, to entertain himself, he would start writing a "Persian letter" which

flowed from his pen without study" (6). Also from the same period is an academic speech to the *Parlement* of Bordeaux at the opening of the legal term in the autumn of 1725; it is on that same date that Montesquieu, wishing to devote himself to his writing after the stunning success of *Lettres persanes* (Persian Letters), no doubt decided to sell the title bequeathed by his uncle and regain his freedom.

This *Discours sur l'équité qui doit régler les jugements et l'exécution des lois* (Discourse on the equity that must govern judgments and the enforcement of laws) shows a particular brand of rhetoric, as it is a speech given at the beginning of the *Parlement*'s legal term, addressed to magistrates, barristers and prosecutors. We can imagine the pompous eloquence in the first line of the speech: "*May he amongst us who has made the law a slave to the iniquity of his judgments perish within the hour, may he find in every place the presence of a vengeful God, and the celestial powers angered; may a fire erupt from beneath the ground and burn his home, so that his posterity be humiliated forever; may he search for bread and never find it; may he be a hideous example of Heaven's justice as he was one of injustice on Earth*" – echoing a remark made by Emperor Constantine (7). Montesquieu did not hesitate in employing the most overused devices of hyperbole in qualifying the judge devoid of the "essential virtue" of justice as "a monster in society" (8). But what follows is even more interesting. Montesquieu effectively puts forward something resembling an ideal image of the judge, from the point of view of both his intellectual and his moral virtues. Intellectual virtues first: the judge must farsighted and enlightened, apt to thwart the treachery of barristers and the bad faith of petitioners; he must be sufficiently educated, and apply himself relentlessly to study, through "sweat" and "sleeplessness"; lastly, he must be able to deliver justice promptly, without getting caught up in the web of procedure. Next, moral qualities: an aptitude for resisting the temptation of corruption; affability and humanity; impartiality. Montesquieu places a great deal of emphasis on the need to ensure that the duty of neutrality should not be converted into severity and coldness. The judge's aptitude for hearing pleadings is deemed essential: "*Thus, in our mores, the judge must conduct himself in such a way towards the parties before him that he strikes them as being more reserved than grave, and that he makes them see the probity of the* Catons *without displaying harshness and austerity towards them*" (9).

This portrait of the ideal judge cannot be found anywhere else in Montesquieu's works. It is doubtless part of what was expected from such a rhetorical speech delivered to the *Parlement*. Conversely, the rough sketch of the genealogy of the judge's role presented in *Discours sur l'équité* would go on to resonate in *The Spirit of Laws.* From 1725 Montesquieu favoured an historical approach to legal issues. The role of judges varies with the state of law, which is itself based on the state of manners. Montesquieu contrasted two eras: that of the primitive origins of monarchy, and that of civilised times: the first are the "wild manners" of pastoral people who had only to settle disputes as to the sharing of the spoils, pasture or theft of cattle, or warlike peoples who used methods such as trial by ordeal as a means to resolve their conflicts: at that time, everyone could be a judge. The specialisation of the office of judge dates back to the emergence of more refined manners, which are those of farming and trading peoples. With the advent of agriculture and trade, forms of real estate and personal property, artifice and fraud become more common. As stated in Book XVIII of *The Spirit of Laws,* it was in order to address this new state of affairs that the law had to adapt and gain complexity (10). In *Discours sur l'équité,* the process by which the specialisation of judges and courts is masterfully sketched: as a result of this

transformation in manners and morals and the transformation in the law, "the magistrates were no more than enlightened citizens" (11).

2) The independence of the judiciary

In France under the *Ancien Régime*, where countries of written law and countries of customary law coexisted, which were partially codified and harmonized with royal decrees and the case law of the various *Parlements* (12), it was widely acknowledged that the monarch interpreted the law. The King may exercise his power *ex plenitudine potestatis* by amending or rejecting a verdict or by explicitly defining the interpretation of the law. Nevertheless, because of the multiplicity of the sources of law, royal power was compelled to concede considerable power to interpret laws to the judiciary (13).

According to Jean-Louis Halpérin, this measured conception of legal interpretation is expressed in law dictionaries published in French in the 17th and 18th centuries. It can be found in Claude de Ferrière's *Dictionnaire de droit et de pratique*, first published under the title *Introduction à la pratique* in 1684, and then as a dictionary in 1734, 1740 and 1749. A professor of Roman law and French law, Claude de Ferrière considered that the interpretation of royal ordinances was a power reserved for the King under the Roman maxim *Ejus est legem interpretari, cujus est legem condere.* However, the courts could propose a correct interpretation by extending or restricting orders, in accordance with the principles of reasonableness and equity. According to Ferrière, "*Equity is a fair temperament of the law, which softens rigour in consideration of some specific factual circumstances. […] The judge may therefore err on the side of what is fairest and closest to the kind of law that is called* summa ratio*. […] But when the law is clear and certain, it receives no interpretation in relation to its decision, or to the terms in which it is designed, the judge is bound to follow it punctiliously. Since the judge is not permitted to deviate therefrom, where he finds it too unjust to follow, he must have recourse to the Prince, to know which meaning he wishes to give it"* (14). For Ferrière, only sovereign judges may occasionally deviate in their judgments from the rigour of the law, although its decision is clear and precise, "*where the right reasons appear to demand it*" (15).

In this context, Montesquieu refuses to take part in these discussions as a "technician" of law. Unlike Domat or d'Aguessau, he does not offer a theory of legal interpretation. His perspective is political: he who calls himself a "political writer" intends both to combat legal absolutism without compromise and to curb the arbitrariness of judges as far as possible. Between these two pitfalls, his *moderation* theory attempts to find middle ground.

The Spirit of the Laws does not propose a complete theory of equity. While equity, prohibited in France by a civil ordinance of 1667, was invoked by many parliamentarians in their struggle against absolutism, Montesquieu does not choose to favour this route. He uses the term equity, most often, in the general sense of "natural laws" that preceded law (16). His fight against arbitrariness is only marginally expressed in a reflection on arbitration (17). In his work, the concept of the *spirit of the laws* is substituted for that of equity to account for what is beyond the letter of the law, or the intention of the legislator and propriety *vis-à-vis* politics and culture, geography and history (18). It is significant in this regard that the populariser of *The Spirit of Laws* in *L'Encyclopédie* – Chevalier Louis de Jaucourt – legally defined fairness in the eponymous article, but ultimately refers to Montesquieu only to evoke an agreed phrase from *Persian Letters* (83) on

the natural desire for justice (19). Only a fragment documented in the Dossier to *The Spirit of Laws* uses the concept of "equity" in connection with a judicial decision. As regards judge-made law, Montesquieu argues that "*What the law has ruled in its rigour, the magistrate judges on grounds of equity. Where the law refused a direct action, the magistrate allowed an action was called useful. […] While the Law was binding your hands, the magistrate often allowed you the freedom to act. That made the best jurisconsults exercised their art all the better, placing the reason of equity endlessly at odds with the reason of law*" (20).

The philosophical battle therefore lies elsewhere. Montesquieu pays new attention to the power to judge, broadly neglected by philosophers. He first raises the question of *the attribution* of the power to judge. Who can judge? In which systems of government can the sovereign be a judge? *The Spirit of Laws* provides a discussion that distinguishes between different regimes: despotism, which concentrates all powers, acts as a foil. Where the same person (be it *via* his henchmen or "pashas") makes the laws, enforces them and sanctions their violation, the worst abuses in an expeditious and violent justice are to be feared. In contrast, in "moderate" States, be they monarchical or republican, it is important that the power to judge is not confused with the other two branches of government (legislative and executive). In republics, especially in the ancient democracies, care should be taken to curb the power to judge people by subjecting it to an external authority able to censor (like the Areopagus in Athens). In places where, following the draw, every citizen can be a judge (21), there should be a form of "senate" that can oversee the decisions made by the people, potentially driven by their passions, manipulated by demagogues or orators. According to Montesquieu, the risk of partiality or corruption in a democracy is such that the power of the people in judicial matters absolutely must be tempered.

However, in modern monarchies, the situation differs completely. Montesquieu approves the patrimonial justice system, despite the incompetence that it sometimes arouses: in his eyes, the sale of offices promotes statutory autonomy against the prince (V, 19). Under monarchies, it is no longer a matter of preventing the abuse of power by the people, but by the monarch himself. In such a regime, the prince must not have the power to judge - otherwise the same individual would be both judge and jury. The absolutist claims to the monopoly of justice are completely contrary to freedom and would topple the monarchy into the worst sort of despotism:

"*In despotic governments, the prince himself may be judge. But in monarchies this cannot be; the constitution by such means would be subverted, and the dependent intermediate powers annihilated; all set forms of judgment would cease; fear would take possession of the people's minds, and paleness spread itself over every countenance: the more confidence, honour, affection, and security in the subject, the more extended is the power of the monarch.*

We shall give here a few more reflections on this point. In monarchies, the prince is the party that prosecutes the person accused, and causes him to be punished or acquitted. Now, were he himself to sit upon the trial, he would be both judge and party. In this government the prince has frequently the benefit of confiscation, so that here again, by determining criminal causes, he would be both judge and party. Further, by this method he would deprive himself of the most glorious attribute of sovereignty, namely, that of granting pardon, for it would be quite ridiculous of him to make and unmake his decisions; surely he would not choose to contradict himself" (VI, 5).

Against Cardin le Bret or Bodin (22), Montesquieu rejects the claim of the king to judge in person, and he opposes the indefinite extension of royal cases, which the criminal Ordinance of 1670 does not sufficiently circumscribe (23). For Cardin Le Bret, the divine right of kings requires justice to be the preserve of the monarch:

When the people wield sovereign power, it is they alone who have in their Republic the authority to make laws. But since God established kings above them, they have been deprived of this sovereign right, and the laws that have since been seen are the Ten Commandments and the Edicts of Princes [...] as Kings have been instituted by God to give justice to all [...]. In all these encounters, there is no doubt that Kings may use their power and change the ancient Laws and Ordinances of their States, which does not merely mean general Laws but also municipal laws and the particular Customs of the Provinces. [...] It does not fall to Princes to explain the meaning of Laws and to give them any interpretation as they should wish [...] Sovereignty is no more divisible than the point in Geometry (24).

Montesquieu dismisses this mystification associated with the theory of absolute sovereignty: the prince is not the living law; he is neither the incarnation of justice nor the holder of supreme jurisdiction; he is not the court of equity above the law. As for seigneurial justice systems, these are well founded, as evidenced by the analysis of feudalism included in the final historical books of *The Spirit of Laws* (25). According to Montesquieu, the right to justice being inherent in the fief, the jurisdictions of the lords are derived from a territorial rootedness (XXX, 20). In the quarrel over the origins of the French monarchy, Montesquieu remains closer to Boulainvilliers' *aristocratic thesis* than to Dubos' *royal thesis*. Where Abbé Dubos presented the appropriation of the power to judge by the lords as a scandalous usurpation, Montesquieu considers that seigniorial justice was immediately a lucrative right inherent to the fief, deriving from the "first institution" and not of its corruption (XXX, 22).

The reflection on the Constitution of England serves better to identify the challenge faced by absolutist theories of sovereignty. For Montesquieu, only the distribution of power can indeed guarantee political freedom understood as *the opinion one has of one's safety.* The reasoning is simple*:* political freedom can only be guaranteed if citizens fear neither other citizens nor the State. Thus there is no liberty where the legislative and executive powers are vested in the same person or the same body, which can make tyrannical laws in order to execute them tyrannically. Under despotic governments, the dependence of judges, subject to the favour of the prince, resulted in a reign of terror; in this case, the authority of any magistrate is thus as unbridled as the despot. Where the law is that the will of the prince, the judge cannot follow a will he does not know; he must therefore follow his own. The arbitrariness of the law leads to the arbitrariness of the judge, and to the swiftness of decisions without reasons: "*as the law is the momentary will of the prince, it is necessary that those who will for him should follow his sudden manner of willing*" (V, 16). It is the same in some republics where the people combines the powers. In the Italian republics of the eighteenth century, which gave the legislative and judicial powers to the people, the same judicial body can destroy the state by its "general will" and destroy each private citizen by its particular will (XI, 6).

Montesquieu thus delivers the conditions for regular and impartial justice, freed from the spectre of revenge. The independence of the judiciary is one of the essential conditions for political

freedom. There is no freedom "*if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression*" (XI, 6). The moderation of some European governments is that monarchs concentrate legislative and executive powers therein, but theoretically grant subjects the power to judge. The centralising trend (the abolition of aristocratic and ecclesiastical jurisdictions) must be halted, otherwise it will jeopardise the "intermediate bodies" (*Parlements*, provincial and municipal authorities) and, therefore, the nature of monarchy: "*Again, sentences passed by the prince would be an inexhaustible source of injustice and abuse; the courtiers by their importunity would always be able to extort his decisions. Some Roman emperors were so mad as to sit as judges themselves; the consequence was that no reigns ever so surprised the world with oppression and injustice*" (VI, 5). In the manuscript of *The Spirit of Laws,* Montesquieu had first written that courtiers are able to extort the decisions of the prince "as they extort favours" before changing his mind and striking out the provocative phrase in a final reading prior to going to print (26). Like the prince, his ministers or stewards should not assume the office of judge: greed, ambition and slander are likely to cause the worst abuses; heightened passions within the Council could lead to bias, whereas “in courts of judicature a certain coolness in requisite, and an indifference, in some measure, to all manner of affairs” (VI, 6).

This criticism of the judicial power wielded by the king's council reveals Montesquieu’s stance as the advocate of the rights of the *Parlement* or the seigniorial jurisdictions: according to Lebigre, the King's Council, made up of state councillors and *maîtres de requêtes*, enjoyed a reputation for impartiality often denied to ordinary courts (27). The Council could allocate disputes between different sovereign courts, each considering that they had jurisdiction; it could also “recall” the matter, removing it from the court that would usually have jurisdiction in order to rule on the case itself. The King’s Council was also the last resort in procedural matters, the Chancellor deciding only on the admissibility of the action. As recounted by A. Lebigre, recourse to the Council was more easily obtained when the applicant enjoyed high connections to the Court or to Ministries: hence the ambiguity of this “retained” as opposed to delegated justice, so hated by the *Parlements*, "*in unstable equilibrium between law and arbitrariness*" (28). In accordance with Parliamentary ideology, Montesquieu therefore rejects the influence of this institution, together with that of any testifying to the royal appropriation of the monopoly over the power to judge: in a monarchy, the "public part" serves to oversee the interests of citizens without directly involving the prince; this was the practice of the *procureurs du roi* – the Royal Prosecutors – which Montesquieu thought "admirable" (VI, 7).

Lastly, Montesquieu aims to defend judicial independence. This is how we must understand the praise of the "Constitution" (29) of England, where the jury system serves in preventing the establishment of a permanent professional judiciary "*By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate*" (XI, 6). The jury system, under which individuals drawn from the body of the people only sit for a given time, avoids the evils of a body of judicial officers. It also has the advantage of granting full rights to the defence, which cab challenges judges whose impartiality is in doubt. Lastly, it must be such that the jurors are the accused’s peers, so that he may not think that he has fallen into the hands of "people inclined to do him violence”. That is the price of freedom.

3) The judge, "mouthpiece of the law"?

However, the defence of political freedom not only assumes conditions related to the allocation of the power to judge; that power must also be exercised moderately. To avoid political freedom being placed in peril, judges must not, according to Montesquieu, be "*the mouthpiece that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour*" (SL, XI, 6).

How to interpret this famous phrase, which associates the idea of a passive judge with that of the judge as the "mouthpiece of the law" (30)? Should we conclude that Montesquieu, although favourable to softer sentences to the point of judging the liberty of the citizen by this criterion (31), did not support the arbitrariness of judges, which nevertheless served under the *Ancien Régime* to soften the severity of the law due to extenuating circumstances (32)? Are we to understand that the judge sitting at La Tournelle, although a supporter of shorter sentences and quick in wanting to moderate punishments, wished to undermine the judges' room for manoeuvre?

In order to answer these difficult questions, it should be noted that the theory of the judge as the "mouthpiece of the law" applies only to English cases. As recently showed by Till Hanish, Montesquieu refers to specific debates from the previous century when he characterises common-law judges. He adopts Cicero's expression *"magistratus est loquens lex",* which also passed into the *Corpus Juris Civilis* where the expression meant an imperial attribute (*Imperator est lex animata in Terris, Nov.* 105.2.4) (33). In the seventeenth century, the supporters of the royal prerogative to make and interpret the law were pitted against proponents of parliamentary power. Hanish recalls that in the context of a crisis of absolutism under the reign of the Stuarts, James I established his legal superiority over Parliament and the courts by affirming that the king was above the law and that, as *lex loquens,* he was also supreme judge. Relying on Cicero, the monarch declared that it was for him – not Parliament – to interpret or moderate the law when the latter is ambiguous or too strict. In his speech before the Star Chamber of 20 June 1616, James I said that the king made the law and the function of judges was limited to the interpretation thereof: *"the King that sits in Gods Throne, onely deputes subalterne Judges, and he deputes not one but a number (for no one subalterne Judges mouth makes law) and their office is to interprete Law, and administer Justice*" (34).

The outcome of the English constitutional conflict was unfavourable to the royal claims. In his canonical chapter on the Constitution of England, Montesquieu traces the interpretation thus establishing the highest court of the House of Lords. The text of *The Spirit of Laws* must be quoted in full, without isolating the phrase concerning the role of the judge:

It is possible that the law, which is clearsighted in one sense, and blind in another, might, in some cases, be too severe. But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour. That part, therefore, of the legislative body, which we have just now observed to be a necessary tribunal on another occasion, is also a necessary tribunal in this; it belongs to its supreme authority to moderate the law in favour of the law itself, by mitigating the sentence. (XI, 6).

The phrase "as we have already observed" in this case refers to a passage in the same chapter: "But

though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations". According to Hanish, Montesquieu therefore deals in the passage invoking the judge as the "mouthpiece of the law" rare exceptions justified by the interest of the person who is to be judged, in which the House of Lords must assume judicial powers. Montesquieu does not mention the jurisdiction of the Court of Chancery (considered the monarch's Supreme Court) although he was aware of its role, as evidenced by one of his *Thoughts:* "Notice that the House of Lords has jurisdiction to moderate the law, like the Chancellery Court. But it has jurisdiction only through the appeals brought to it from the Chancellery Court, whose judgments are carried out if there is no appeal" (*My Thoughts,* No. 1645).

As such, the comparison with the Chevalier de Jaucourt is again illuminating. By reading the Jaucourt's defence of the royal prerogative, we can better understand why Montesquieu does not extend the jurisdiction of equity that is the Court of Chancery:

Equity *is sometimes confused with* justice*, but the latter seems to be designated to reward or punish, in accordance with a few established laws or rules rather than according to the varying circumstances of an action. It is for this reason that the English have a court of chancery or equity, to temper the severity of the letter of the law, and to consider the matter that is brought before it, only by the rules of* equity *& of consciousness. The Court of Chancery is one of the fine establishments that there are in England, and more worthy of emulation by civilized nations. Indeed, the interests of a sovereign & his love for his people, who agrees to take care that nothing be done in his empire contrary to the common good also requires that he redress, rectify and correct any such thing as may have been done.* Thus equity, taken in this particular sense, is a will of the prince, prepared by the rules of prudence to correct that which is in the law of his state, or in a civil judgment of the judiciary established by his orders, where things have been settled otherwise than circumstances demanded in light of the common good*; for it often happens that the law using general expressions, or the weakness of the human spirit is such that it prevents legislators from providing for all possible cases, the heads of state stray from the aims towards which they sincerely strive* (35).

Unlike Jaucourt, Montesquieu retains only two characteristics of the English judiciary. On the one hand, it is the common-law judges and not the king who are *lex loquens* and have jurisdiction, which contributes decisively to guaranteeing the freedom of subjects. On the other hand, however, the judges are only the "mouthpiece of the law" and cannot express a "special opinion" which would go beyond the legal judgment. Finally, judges are *lex loquens* but not *lex animata* "*in their capacity as judges, they are animated by law. They are then not detached from the law, legibus solutus or, in other words, supra legem. Compared to the judge who bases his decisions on natural reason in order to judge in equity, the arbitrary margin, in a neutral sense, available to the English judge is, in Montesquieu's eyes, greatly reduced*" (36). Close to a republican form of government, Britain binds the judge to precedent. According to Hanish, Montesquieu did not wish to give the judge the power to judge consciously relying on natural reason, because that also formed the basis of the royal prerogative to judge. In exceptional cases and where the ordinary courts are inadequate, it falls to the House of Lords to judge, the nobility being protected *ipso facto,* as they are judged by their peers (37).

This recent interpretation is supported by the reading of the critical edition of the manuscript of the book. The end of Chapter VI, 3 initially stated (before it was removed by the author): "*In England we follow the spirit of republican government in this respect. The judge refers to the facts of the case to the jurors who are the peers of the accused. He presents the text of the law; it is a matter of bodies, and it is as if he said to them: you have eyes, see the law; you have ears, listen to the witnesses; is what you hear the case of the law you see?*". And as a footnote: "*Just as in Rome judges pronounced only that the accused was guilty of a crime and the penalty was in the law*" (38). This discovery allows for the interpretation of the famous "mouthpiece of the law": as in Rome, in England it is for the judge to perceive and not to judge in the strongest sense of the term. It is likely that Montesquieu deleted this passage out of caution and fear of censure: the "English model" could overshadow the French monarchy.

II. Pluralist theory of law

However, the theory of the judge as the "mouthpiece of the law" is not to serve as a universal model. England is a separate regime that eludes the typology of governments; as "a republic, disguised under the form of monarchy," (V, 19), it cannot simply set an example for other regimes. In *The Spirit of Laws,* the law varies according to the nature of government – civil laws vary according to political laws. Thus, republic and monarchy should not follow the same rules in the organisation and allocation of powers.

The Spirit of Laws devotes an entire book – Book VI – to the "*Consequences of the Principles of Different Governments with Respect to the Simplicity of Civil and Criminal laws, the Form of Judgments, and the Inflicting of Punishments*" (39). The question of the role of the judge and "the manner of passing judgment" cannot be given a universal answer, as in the theories of sovereignty (Hobbes and Pufendorf in particular). For Montesquieu, the "manner of passing judgment" is conceived differently, depending on how it suits various forms of government. While the manner of judging is extremely variable in despotic states where, in the absence of a fixed and stable law, the judge makes the law, it is fixed and rigid in republican states: "*The nearer a government approaches towards a republic, the more the manner of judging becomes settled and fixed*" (VI, 3). In the government where the people are sovereign, the nature of the Constitution requires that judges follow the letter of the law: this reflects the extreme case that is made of every citizen; no one should be able to interpret a law against a citizen. Therefore, in republican Rome as in England, judges or jurors who rule upon the facts of a case do not decide the sentence, which is provided by law and "*for this he needs only to open his eyes*" (VI, 3). It is not for judges to presume anything because "*[w]hen the court presumes, judgments become arbitrary; when the law presumes, it gives a fixed rule to the judge*" (XXIX, 16). Correspondingly, the republic can hope that the people are good judges in complex cases, "*[b]ut the people are far from being jurisconsults; all these restrictions and methods of arbitration are above their reach; they must have only one object and one single fact set before them; and then they have only to see whether they ought to condemn, to acquit, or to suspend their judgment*" (VI, 4).

Between the variability of despotic states and the rigidity of republican states, monarchy emerges as a middle way. Courts must guarantee the life, liberty, honour and property of the monarch's subjects:

"*Monarchies do not permit of so great a simplicity of laws as despotic governments. For in*

monarchies there must be courts of judicature; these must give their decisions; the decisions must be preserved and learned, that we may judge in the same manner to-day as yesterday, and that the lives and property of the citizens may be as certain and fixed as the very constitution of the state.

In monarchies, the administration of justice, which decides not only in whatever belongs to life and property, but likewise to honour, demands very scrupulous inquiries. The delicacy of the judge increases in proportion to the increase of his trust, and of the importance of the interests on which he determines" (VI, 1).

Montesquieu thus rejects the abusive uniformity and simplicity of despotism, which he attributes to negligence rather than a superior rationality. In monarchies, the diversity of statuses of people and goods entails a daunting complexity of the law (each kind of good being subject to special rules, people can be present in different courts which rule in accordance with distinct rules depending on their condition). The mosaic of justices inherited from the feudal system (like the multiplicity of customs) challenge attempts to codify or homogenise of law, according to Montesquieu (40). The protection of privileges justifies this complexity, although Voltaire took the opposite view. In monarchies, then, judging is an art: "*We must not, therefore, be surprised to find so many rules, restrictions, and extensions in the laws of those countries — rules that multiply the particular cases, and seem to make of reason itself an art*" (VI, 1).

Montesquieu thus opposes the standardisation of law, wherein he reads the possibility of a despotic tendency of the French monarchy. Not only does he refuse to see (as Fleury and Domat do) Roman law used as a model or common denominator (41), but he also rejects the standardisation of customs and the invention of a customary ordinary law derived from the Customs of Paris. The mosaic of traditional sources of and disparities in case law that exasperate both lawyers and philosophers (like Condorcet) is promoted here in the name of a certain conception of political freedom. Montesquieu says that he is hostile to the "notions of uniformity" that reflect both a false perfection and a real danger of despotic centralization. Diversity and complexity appear as a bastion against absolutism once uniformity and simplicity are designed as privileged instruments of arbitrariness. The *Spirit of Laws* denies a certain conception of codification (simplification, unification): the code cannot, in Montesquieu's eyes, refer to a single document containing all the rules of law in force in the same kingdom, but only particular customs, the drafting of which, deemed "reasonable" (XXVIII, 44), sanctions both the generalisation, authentication and the fragmentation of the law. The preservation of freedom supposes that plans implemented by the monarchy can be countered, be it under the leadership of President Lamoignon who attempted to make the unified Custom of Paris the ordinary law of the realm, or in the context of the great ordinances issued by the Chevalier Aguesseau (42).

While, in a well-formed republican government, laws need to be simple and accurate, the same cannot be said for monarchies, where the law is adapted to the diversity and inequality of the social structure; the different levels do not fall within the same jurisdictions. In each case, collegiate deliberation is required: "*In monarchies the judges choose the method of arbitration; they deliberate together, they communicate their sentiments for the sake of unanimity; they moderate their opinions, in order to render them conformable to those of others*" (VI, 4). The modern judicial system requires a professional body and allows judicial deliberation. Above all,

such decisions require specific skills and knowledge of case law which, in French history, only the *Robins* developed (43). In a monarchy, the judiciary cannot content itself with following the letter of the law; it must also identify the *spirit* of the law (44).

Admittedly, Montesquieu is aware of the risk associated with extending case law, including that collected in the *Arrêts des Parlements*. However, the contradictions and abuses in this area should not be blown out of proportion in order to justify abstract codification or a decrease in judicial powers: "*This is a necessary evil, which the legislator redresses from time to time, as contrary even to the spirit of moderate governments*" (VI, 1). Similarly, Montesquieu is aware of the delays and shortcomings of the French judicial system, but again refuses to remedy abuses by removing their cause. It would be unwise to argue the slowness of trials in civil and criminal matters in order to make justice the preserve of the monarch. Thus must we defend the formalities of justice: absent in despotic states where the safety or honour of citizens are of no concern, in a monarchy such procedures are "*the price that each subject pays for his liberty*" (VI, 2).

III. An example: the issue of *lèse majesté* (high treason) in *The Spirit of Laws*

The Spirit of Laws cannot therefore be interpreted as a criticism of the indiscriminate power to judge. In a monarchical context, the implicit criticism of the *royal* power to judge surfaces at several strategic points in the book. One of the few passages explicitly dedicated to the abuses of the power of the monarch in the history of France says it all:

Louis XIII being desirous to sit in judgment upon the trial of the Duke de la Valette, sent for some members of the parliament and of the privy council, to debate the matter; upon their being ordered by the king to give their opinion concerning the warrant for his arrest, the president, De Bellièvre, said "that he found it very strange that a prince should pass sentence upon a subject; that kings had reserved to themselves the power of pardoning, and left that of condemning to their officers; that his majesty wanted to see before him at the bar a person who, by his decision, was to be hurried away into the other world! That the prince's countenance should inspire with hopes, and not confound with fears; that his presence alone removed ecclesiastic censures; and that subjects ought not to go away dissatisfied from the sovereign." When sentence was passed, the same magistrate declared, "This is an unprecedented judgment to see, contrary to the example of past ages — a king of France, in the quality of a judge, condemning a gentleman to death" (VI, 5).

The trial of the Duke de la Valette reveals the dangers of royal arbitrariness. The trial of Superintendent Foucquet provides another example since the Parliament of Paris, which comprised too many of the Superintendent's followers, found itself dispossessed in favour of a made-to-measure court devoted to Colbert, his worst enemy. Montesquieu condemns the injustice of such procedures: an investigation conducted "on demand" instruction, constant pressure exerted on judges, ultimate (exceptional) aggravation of the sentence passed by the king. *The Spirit of Laws* also cites a case under Richelieu: the untimely judgment and sentencing to death of Louis XIII's favourite, Mr. de Cinq-Mars, under cover of *lèse majesté*: the Cardinal's wishes became orders (XII, 8). In all these cases, the pseudo-justice associated with the crime of treason serves the arbitrary and reasons of state, "*If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power*" (XII, 7).

For Montesquieu, the practice of judging in extraordinary commissions is draconian and impinges upon the rights of the nobility. The allocation of the power to judge to "commissioners" in derogation from the normal rules, reducing the timeframes for appearances at court, extending statutory limitation periods or using various means of coercion all go against the spirit of monarchy and no doubt run the risk of bringing the nobility under the control of the prince. From the de la Fronde decision onwards, cases of *lèse majesté* were indeed the spearhead of royal justice. The lawyers on the King's Council stressed the need, in the name of "mutual benefit", to reduce conflicts of jurisdiction between the courts and to uphold the royal court over seigniorial courts. This appeared to preclude entrusting the task of trying crimes impinging on the King's rights to the municipal, seigniorial or ecclesiastical courts: treason, counterfeiting, the carrying of prohibited weapons, highway robbery, etc. These "royal cases" continued to grow. From the 1630s onwards, extraordinary courts helped to oust the regular corps of royal judges. The penalties provided for the loss of life, honours, titles and property, which could not be tempered or moderated by the judiciary. The issue of *lèse majesté* is decisive in the balance of monarchical powers. It is discussed at length in Book XII of *The Spirit of Laws* – the book that underwent the most extensive revisions (45).

The office of judge is defined in the context of a battle against the abuse of royal power. For Montesquieu, the sole purpose of penalties being to restore civil order and not to avenge God or the monarch in their majesty, laws must grant "trust" to men and protect the presumption of innocence (XII, 4).In *The Spirit of Laws,* "we must defend society" replaces "we must defend majesty."

Montesquieu's posterity is immense. The revolutionary legal centrism was inspired by the widespread distrust of the judges under the *Ancien régime* (46). In a republican state, where the laws are made by the people's representatives, the interpretive role of the judge must be minimized: he must not be an instrument at the service of law. For Beccaria, the judge, as an arbitrary symbol, must give way to the absolute power of the law. The exercise of justice implies the removal of the judge, who must only be used to pronounce the words of the law, which is an expression of the general will. Any judicial intervention may be interpreted as an incursion of particular interests or arbitrary subjectivity. The judge must content himself with forming a perfect syllogism: the major should be the general law, the minor whether the act complies with the law, the conclusion acquittal or conviction. According to Beccaria, the author of *Of Crimes and Punishments*, nothing is more dangerous than the common axiom on consulting the spirit of the law. This maxim would open the door to prejudice and the contingency of different points of view.

Shortly after the Revolution, the Tribune and Bordeaux man of letters Jacques Joseph Garat seemed to support a similar position at the time of the debates on the Preliminary Title of the Civil Code. In his speech of 10 Frimaire Year X (10 December 1801) "Maillia-Garat" challenged the legitimacy of the interpretation of the law. The judge as arbiter is synonymous with abuse:

In a republic, tribunes, in the French Republic especially, the simplicity and uniformity of laws are a necessary consequence of the absolute equality which is the basis of the constitution [...] The interpretation of laws, the right to make up for their failure or their silence, could only disturb the determinations of the law and undermine its guarantees [...] The use of a bad law is probably fatal; but the interpretation can be disastrous use of the best law; and what abuse can compare to this

one effect of the interpretation of laws, which is to live in the midst of society as if it were without law [...] this is arbitrariness in the forms of law and lawlessness in the guise of order (47).

So it is in quoting Montesquieu that Maillia-Garat (or Garat-Maillia) comes to the conclusion that the judge must be only the mouthpiece that pronounces the words of the law. The Tribune bases his argument on the passage of *The Spirit of Laws* (VI, 3) which states that judges in the republic must respect the letter of the law. Yet it seems unreasonable to rely on such use of Montesquieu to conclude that he was the bearer of a unilateral doctrine - that of the necessary neutralization of the power of judges (48). Portalis had already criticized Garat-Maillia for attributing to Montesquieu ideas diametrically opposed to his own (49). In *The Spirit of Laws,* thinking about political freedom is structured around an analysis of the plurality of regimes and systems. Montesquieu does not advocate interpretative caution against judicial activism; he attempts to establish the conditions for political freedom in a given situation.

Notes

(1) On this power, see F. Ost, « Quelle jurisprudence, pour quelle société ? », *Archives de la philosophie du droit*, t. XXX : « La jurisprudence », Sirey, 1985 ; Ph. Raynaud, *Le Juge et le Philosophe,* Paris, Armand Colin, 2008.

(2) It is better to talk about "distribution" rather than separation. C. Eisenmann, « *L'Esprit des lois* et la séparation des pouvoirs », in *Cahiers de Philosophie politique,* Reims, n° 2-3, OUSIA, 1985, p. 3-34 ; M. Troper, « Séparation des pouvoirs », *Dictionnaire Montesquieu,* http://dictionnaire-montesquieu.ens-lyon.fr/fr/article/1376427308/fr/

(3) See in particular D. Kelley, "The prehistory of sociology: Montesquieu, Vico, and the legal tradition," *in History, Law and the Human Sciences, London,* Variorum Reprints, 1984, p. 133-144; R. Kingston, *Montesquieu and the Parlement of Bordeaux,* Geneva, Droz, 1996.

(4) Initially *EL,* XII, 22.

(5) He was president in name (and in reality assessor) from 1716 to 1723 because he had not reached the requisite age of 40. See J. Dalat, « Montesquieu magistrat au Parlement de Bordeaux », *Archives des lettres modernes,* 1971 (13), n° 132, p. 11-122.

(6) Note Guasco's letter to Montesquieu of 4 October 1752, quoted by L. Desgraves, « Montesquieu et la justice de son temps », in *Montesquieu and the Spirit of Modernity,* D. Carrithers & P. Coleman eds., Oxford, Voltaire Foundation, 2002, p. 205-211, specifically p. 207.

(7) *Montesquieu, Discours sur l'équité qui doit régler les jugements et l'exécution des loix*, texte établi et annoté par Sheila Mason, in *Œuvres et Ecrits divers,* I, in *OC,* t. VIII, sous la direction de P. Rétat, Oxford, Voltaire Foundation, Naples, Instituti Italiano per gli Studi Filosofici, 2003, p. 461-487, specifically p. 475. We will systematically modernise spelling and punctuation.

(8) *Ibid., P.* 476.

(9) *Ibid., P.* 480.

(10) See *SL,* XXVIII, 12.

(11) *Ibid., P.* 477.

(12) *SL,* XXVIII, 45. See Donald R. Kelley, *The Human Measure. The Social Thought in the Western Legal Tradition,* Cambridge, Harvard University Press, 1990, chap. 12.

(13) J-L Halpérin, "Legal interpretation in France under the reign of Louis XVI: a review of the *Gazette des tribunaux*", in *Interpretation of Law in the Age of Enlightenment. From the Rule of the King to the Rule of Law,* Y. Morigawa, M. Stolleis and J.-L. Halperin eds., Dordrecht,

Springer, 2011, p. 21-43.

(14) C.-J. Ferriere, *Dictionnaire de droit et de pratique*, rééd. V. Brunet, Paris, 1769, « Équité », p. 556.

(15) *Ibid.,* « Droit étroit », p. 504.

(16) "We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as, for instance, if human societies existed, it would be right to conform to their laws" (*The Spirit of Laws,* I, 1). See C. Spector, *Montesquieu. Liberté, droit et histoire*, Paris, Michalon, 2010 ; « Quelle justice ? Quelle rationalité ? La mesure du droit dans *L'Esprit des lois* », in *Montesquieu en 2005,* C. Volpilhac-Auger ed., Oxford, Voltaire Foundation, 2005, p. 219-242.

(17) The issue of arbitrariness retained Montesquieu's attention from the time when he was compiling Justinian's *Institutes* – laws contained in the *Collectio juris.* Montesquieu translated a passage from the *Digeste* (i, 3, 18) as follows: "Laws must always be interpreted favourably" (OC, vol, XI, p. 1). See Norbert Campagna, « Arbitraire », *Dictionnaire Montesquieu,* http://dictionnaire-montesquieu.ens-lyon.fr/fr/article/1377722783/fr/
Furthermore, he reproduces an extract from the addition to the *Causum sit* gloss: "*The judge must not stray from written law in favour of unwritten equity, unless a specific principle orders him to do so*" (*Collectio juris*, OC, vol. XII, p. 580)> From this perspective, the judge must follow written law, even where he considers that in the case before him, the application of said law will lead to an inequitable verdict. He may only rule in accordance with equity where he is permitted to do so. Montesquieu returns to this issue by mentioning rescripts: "*For, as judges under Roman law could not rule in accordance with what seemed to them to be equitable or just but solely in accordance with the letter of the law, in those cases where they felt that they had to exclude that maxim, they consulted the prince*" (p. 835). This case opens the way for judicial arbitrariness, as it falls to judges to decide when they will refer to the prince; it falls to them to assess whether the strict observance of the letter of the law may lead to an inequitable verdict. In *My Thoughts*, Montesquieu evokes the case of overly severe punishments and affirms that one must proceed "*indifferently*", particularly through the "by reduction of sentences in the most favourable cases—leaving that to the arbitration of judges" (*My Thoughts,* nº. 1897). In the *Collectio juris*, Montesquieu mentions arbitration on a number of occasions: "*He who is meant to be arbiter is he who in some way performs the role of judge, thereby wishing by his sentence to bring an end to the discussion between the parties; it is not he who intervenes in order to strive to accommodate them*" (OC, vol. XI, p. 59). Where the judge rules in accordance with the letter of the law, the arbiter is freed from that letter, and even decides in the absence of the letter of the law. Basing his argument on the *Digeste*, Montesquieu affirms that the parties must submit to the arbiter's decision, "*be it just or unjust*", unless the arbiter gives a decision that is expressly against the law (p. 60). However, in *The Spirit of Laws*, arbitration is reserved for certain forms of government. It is particularly suitable for the aristocracy, where "*[t]he quarrels of the nobility ought to be quickly decided; otherwise the contests of individuals become those of families. Arbiters may terminate, or even prevent, the rise of disputes*" (SL, V, 8).

(18) T. Hanish, « Le problème de l'équité chez Montesquieu », *Annuaire de L'Institut Michel Villey,* n° 2, 2010, p. 61-80, p. 77.

(19) Jaucourt, « Équité », *Encyclopédie de Diderot et d'Alembert*, t. V, p. 894-895.

(20) Montesquieu, Dossier de *L'Esprit des lois*, in *Œuvres complètes,* R. Caillois éd., Paris, Gallimard, t. II, 1951, p. 1030.

(21) In Greek cities, the draw would take place in the Elective Assembly which elected judges. There could then be a great many courts and tribunals (maximum 400 judges, 30 on average). Some courts, however, were composed of wise men or competent judges (including commercial courts).

(22) According to Bodin, the judge shall, in criminal matters, simply apply the law. In civil law, however, he may, if necessary, use his discretion and rule on the basis of equity. In Bodin's words, "*The office of judge acts on what is not in the law or is exposed to be too obscure, or in the case under consideration, seems contrary to equity*" (*Exposé du droit universel* (1580), trad. L. Jerphagnon, Paris, PUF, 1985, p. 7).

(23) "*The ordinance of Louis XIV concerning criminal matters, after an exact enumeration of the causes in which the king is immediately concerned, adds these words, "and those which in all times have been subject to the determination of the king's judges"; this again renders arbitrary what had just been fixed*" (SL, XXIX, 16). On Montesquieu's attitude with regard to the 1670 Ordinance, see D. W. Carrithers, "Montesquieu and the Liberal Philosophy of Jurisprudence," in DW Carrithers, MA Mosher, PA Rahe (eds.), *Montesquieu's Science of Politics: Essays on the Spirit of Laws,* Rowman & Littlefield, Lanham, 2001, p. 291-334.

(24) C. Le Bret, *De la souveraineté du roi : de son domaine et de sa couronne*, 1632, I, 9, citing *Les Œuvres de Messire Cardin le Bret, Contenant Son Traité de la Souveraineté du Roy,* Rouen, Charles Osmont, 1689, p. 18-19. See D. Parker, « Sovereignty, Absolutism and the Function of the Law in Seventeenth-Century France », *Past and Present,* n° 122, February 1989.

(25) See our article, « Féodalité » in *Dictionnaire Montesquieu,* C. Volpilhac-Auger éds., http://dictionnaire-montesquieu.ens-lyon.fr/fr/article/1376474740/fr/

(26) Montesquieu, *De l'esprit des loix. Manuscrits,* I, texte établi et annoté par C. Volpilhac-Auger, in *Œuvres complètes de Montesquieu*, t. III, Oxford, Voltaire Foundation, 2008, (with spelling and punctuation), p. 93.

(27) A. Lebigre, *La Justice du Roi,* Paris, Albin Michel, 1988, p. 50.

(28) *Ibid., P.* 51.

(29) Of course, this is not a written constitution but an organisation of the State and its major powers.

(30) In *The Laws,* Plato had argued that the judges' discretion must be restricted (876 b-c).As for the courts of the State whose well-ordered selection and organisation offer greater guarantees of impartiality, they enjoy a margin of greater freedom; but every precaution will be taken to ensure that this freedom does not exceed proper its proper boundaries. For Plato, judges should only have the power to rule on the facts and assess penalties in order to establish a punishment proportionate to the size of the fault (933e-934d).

(31) Prior to going to print, Montesquieu also struck out a passage in which he put forward a for France between "two neighbouring kingdoms in Europe": one became freer and softened its punishments, while the other saw an increase in arbitrary power and the severity of sentences *(Manuscrits, op. cit.,* p. 93).

(32) On the evolution of the concept of arbitrariness in the justice system under the *Ancien Régime*, see e.g. M. Porret, *Le Crime et ses circonstances,* Genève, Droz, 1995.

(33) Cicero, *De Legibus, 3,* 1, 2; Aristotle, *Nicomachean Ethics,* V, 7, 1132a. See K. M. Schönfeld, *Montesquieu et « la bouche de la loi »,* New Rhine Publishers, Leiden, 1979, p. 85 ; « Retour sur l'expression la 'Bouche de la loi' chez Montesquieu. La fortune d'Aristote et de Cicéron », in *Actes du Colloque international tenu à Bordeaux,* du 3 au 6 décembre 1998 pour commémorer le 250e anniversaire de la parution de *l'Esprit des lois*, Académie de Bordeaux,

Bordeaux, 1999, p. 187-192; T. Hanish, « La puissance de juger chez Montesquieu face à la tradition juridique anglaise », *Annuaire de L'Institut Michel Villey,* n° 2, 2010, p. 133-168, specifically p. 144.

(34) James I, *Political Works,* Speech in Star Chamber, 1616, p. 326.

(35) Jaucourt, « Équité », art. cit., p. 894, emphasis added.

(36) T. Hanish, cited above, p. 165. According to Hanish, Montesquieu knew Hobbes' reflections on legal interpretation at Book XXVI of *Leviathan*, and also knew Hobbes' criticism of Sir Edward Coke, on an overly strict approach to the doctrine of precedent. Montesquieu also owned a copy of *Institutiones juris anglicani* by John Cowell, a précis of common law based on the order of the *Institutes* under Justinian, and the 1729 edition of *Magnae Brittaniae Notitia* by John Chamberlayne.

(37) On this issue in terms of "struggle of orders" or class struggle, see L. Althusser, *Montesquieu. La politique et l'histoire,* Paris, P.U.F., 1959.

(38) Montesquieu, *De l'esprit des loix. Manuscrits, I, op. cit.,* p. 99-100.

(39) This book was written and re-written between 1741 and 1745. On the variants of the manuscript and the self-censorship measures taken by Montesquieu, see the introduction of C. Volpilhac-Auger, Montesquieu, *De l'esprit des loix. Manuscrits,* in *Œuvres complètes de Montesquieu*, t. III, *op. cit.,* p. 89-94.

(40) The procedure was organized by Colbert: civil ordinances (in 1667), criminal (in 1670) and commercial (in 1673).Furthermore, the Chancellor d'Aguesseau had adopted ordinances on donations (in 1731, wills (in 1735) and substitutions (in 1747). See J. Bart, « Montesquieu et l'unification du droit », in *Le Temps de Montesquieu,* Genève, Droz, 2002, p. 137-146.

(41) See P. Jaubert, « Montesquieu et le droit romain », in *Mélanges offerts à Jean Brethe de la Gressaye,* Bordeaux 1967, p. 347-372.

(42) J. Bart recalls that other authors go in the same direction, such as President Hénault, author of *Nouvel abrégé chronologique de l'histoire de France* (1744) and Louis Adrien Le Paige (1753).

(43) See C. Spector, « "Il faut éclairer l'histoire par les lois et les lois par l'histoire" : statut de la romanité et rationalité des coutumes dans *L'Esprit des lois* de Montesquieu », M. Xifaras éd., in *Généalogie des savoirs juridiques : le carrefour des Lumières,* Bruxelles, Bruylant, « Penser le droit », 2007, p. 15-41.

(44) This concept should not be linked exclusively to Domat, who was a supporter of absolute monarchy: "when the expressions of the law are defective, these must be supplemented in order to complete their meaning in accordance with their spirit" (J. Domat, *Traité des lois*, Caen, Centre de Philosophie politique et juridique, Université de Caen, 1989, p. 61)

(45) Montesquieu, *De l'esprit des loix. Manuscrits,* p. 283-290. See C. Spector, « Souveraineté et raison d'État. Du crime de lèse-majesté dans *L'Esprit des lois* », in « Penser la peine au XVIIIe siècle », L. Delia et G. Radica éds., *Lumières,* n° 20, 2012/2, p. 55-72.

(46) See M. Troper, La séparation des pouvoirs et l'histoire constitutionnelle française, L.G.D.J, Paris, 1980, p. 63 sq. ; P. Raynaud, « La loi et la jurisprudence des lumières à la Révolution française », *Archives de philosophie du droit,* tome 30, 1980, p. 61-72.

(47) See G. Canivet, « La création du droit par le juge », *Archives de philosophie du droit*, tome 50, Dalloz, 2007. The text is also cited by T. Hanish, « La puissance de juger chez Montesquieu face à la tradition juridique anglaise », art. cit., p. 150-151.

(48) In this sense, see B. Barret-Kriegel, *État de Droit ou Empire?,* Paris, Bayard, 2002, p. 134-135.

(49) Pierre Antoine Fenet, *Recueil complet des travaux préparatoires du Code civil,* 15 vol., Paris, Au Dépôt, 1827, vol. VI, p. 151 and 269.