Rex, Lex et Judex: Montesquieu and *la bouche de la loi* revisited

K.M. Schönfeld*

> 'Is there any other point to which you would wish to draw my attention?'
> 'To the curious incident of the dog in the night-time.'
> 'The dog did nothing in the night-time.'
> 'That was the curious incident,' remarked Sherlock Holmes.
>
> A. Conan Doyle, *The Memoirs of Sherlock Holmes* (1894) 'Silver Blaze'

Doubts about the traditional, positivistic interpretation of Montesquieu's 'bouche de la loi'-text – Reading Montesquieu in his historical context – England and France: judge made law and *parlementaire* ideology – Natural law context – *Lex animata, lex loquens*: King versus judge – The Ciceronian and English background of the 'bouche de la loi' – The *Fronde* and *les Mazarinades* – George Buchanan, Sir Edward Coke and Calvin's Case

Preface

In the 1950s, whilst doing research into the genesis of the French Civil Code, I came across a reference to Montesquieu. At issue was the question whether the Courts, in deciding a case, did have a certain freedom, some discretion in interpreting the law. There was a difference of opinion here: a controversy manifested itself.

On the one hand were the authors – those who had drafted the Code. They maintained that a law text, as such, is not entirely comprehensive; it never covers every possible situation. Accordingly, the judge should have some scope to freely interpret the text under discussion.

* The Hague, fax +31-(0)70-324.20.43. The present article is a shortened account of the contents of my doctoral thesis presented at the law faculty of Leyden University in 1979; the book is written in Dutch. The text has been updated. Post-1979 findings enabled me to introduce Cicero and the sixteenth-century Scotsman George Buchanan as architects of the *bouche de la loi* idea. In this way my views are given a wider scope.

European Constitutional Law Review, 4: 274–301, 2008

doi:10.1017/S1574019608002745

By contrast the members of the Tribunat[1] held the opposite, rather 'positivistic' view: they insisted that a law text should be self-explanatory. Their spokesman – Maillia-Garat – maintained that the judge was a mere *organe machinal de la loi* who should stick to the letter of the law. To sustain this claim he referred to Montesquieu and the latter's statement in *L'Esprit des Lois* (XI,6) that the judges were *'la bouche de la loi, des êtres inanimés'*.[2]

Portalis, as the official spokesman, in his defense of the law text which gave rise to this discussion, pointed out that Montesquieu had been misrepresented.[3] It was all in vain: Maillia-Garat's reading of the *bouche de la loi*-text prevailed – both in France and elsewhere. His views – minus Portalis' response – are to be found in *Méthode d'interprétation* by François Gény.[4] The latter's work, published for the first time in 1899, has marked and shaped almost everything written on the subject ever since. Indeed, the *la bouche de la loi*-rendering, described here, became accepted wisdom – an almost unchallenged tradition. This does not mean, however, that Maillia-Garat's concept of law, as such, was equally acknowledged as self-evident.

Michel Troper, professor of public law at the University of Paris (X), has indicated that even those authors who consider themselves to be legal positivists have their reservations about the feasibility of the concept.[5] The experience of the nineteenth and eighteenth centuries – both in Europe and America – seems to confirm these doubts: the idea of self-sufficiency of the text[6] too often has been gainsaid by the facts of life.

This may be so – but does it make the Montesquieu thesis less relevant, less plausible? Not directly – however, there is a problem. Maillia-Garat's statement should be judged against the background of his *Code Civil* mentality. A different world altogether from the eighteenth-century France and England of Montesquieu's era.

Why mention *England*? Because the *bouche de la loi* text is to be found in book XI,6 of *L'Esprit des Lois*: the chapter which, according to its heading, deals with the English Constitution. *La Constitution d'Angleterre*: is this really what Montesquieu had in mind? It has sometimes been alleged that the chapter was not intended to be a proper description of what it claims to be. According to Mirkine-Guetzévitch, the picture painted in XI,6 is no more than a Utopia, *'un pays de rêve'*.[7] An unlikely theory, as far as I am concerned.

[1] The Tribunat was established by Napoleon in 1799 as a legislative assembly.

[2] François Gény, *Méthode d'interprétation* (1932), tome I, p. 101.

[3] P.A. Fenet, *Recueil complet*, tome VI, p. 269.

[4] *Supra* n. 2

[5] M. Troper, *Le Positivisme juridique*, p. 279, 280.

[6] In America they would call it 'Original Intent' (vide Leonard Levy, *Original Intent and the Framers' Constitution*).

[7] B. Mirkine-Guetzévitch, *De l'Esprit des Lois à la démocratie moderne*, Bicentenaire, p. 14.

First of all, the English friends of Montesquieu – people like David Hume, Charles Yorke, and Lord Chesterton – all acknowledged and praised the accuracy and authenticity of the description.[8] However, there is an additional reason why the Utopia thesis is flawed. When Montesquieu was preparing his *magnum opus* – in the 1740s, let us say – the relationship between France and England was not a happy one. They were at war, or, at best, involved in a cold war. He himself refers to *'l'affreuse jalousie'* existing between the two countries.[9]

All the same, he had the nerve to pay tribute to the English Constitution. If he had intended to invoke a Utopian model, he would have been wise to choose a less unpopular prototype. He did not. So, when mentioning England apparently he meant business. Besides, he settled the question himself by criticising James Harrington.[10] The latter, by writing *Oceana*, had committed the very same sin (Utopianism) of which Montesquieu would be posthumously accused.

All things considered, a *'bouche de la loi à l'Anglaise'*, with a pedigree of its own, would seem to be a much more likely scenario than one modelled on ideas which took shape in France, fifty years after *L'Esprit des Lois* was written. But, of course, the French aspect has to be examined too. The *Parlements* and their role during the *Ancien Régime* and Montesquieu's point of view as a *parlementaire* should not be overlooked.

The following pages will allow us to study the matter.

Cicero, Buchanan, Coke, and Montesquieu – the ancestry of an idea

The following quotations may give us a lead towards a proper grasp of our problem:

> It is quite a three-pipe problem and I beg that you won't speak to me for fifty minutes.
>
> (A. Conan Doyle, *The Red-Headed League*)

> I Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur.
>
> (*L'Esprit des Lois*, XI,6 (49))

[8] J. Brethe de la Gressaye, *Esprit des Lois*, tome II, p. 44-45; C.P. Courtney, *Montesquieu and Burke*, p. 5-6.

[9] Ch.L. Montesquieu, *Notes sur l'Angleterre* (l'Intégrale édition, p. 333).

[10] *L'Esprit des Lois*, XI, 6, 71, final observation.

[But as we have already observed, the 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.]

II Ce tableau de la constitution anglaise est-il véridique?
Il s'agit bien de la Constitution d'Angleterre comme l'indique l'intitulé du chapitre (XI,6).

On se serait attendu à un tableau descriptif de l'agencement des trois pouvoirs dans l'Angleterre du XVIIIe siècle.

Montesquieu a adapté une autre méthode [...] Bien qu'il suive d'assez près la constitution britannique, ses allusions sont parfois si indirectes qu'on hésite sur leurs significations.

(Jean Brethe de la Gressaye, *Esprit des Lois* II, p. 44 jo. 40-41)

[This picture of the English constitution, is it realistic? The title of chapter XI,6 indicates that Montesquieu, indeed, did have the constitution in mind. One would have expected a description of the operating of the separation of powers in eighteenth-century England. Montesquieu used a different method [...] He followed the British constitution fairly closely in its set-up; all the same, his allusions, sometimes, are so indirect as to make one hesitate about their actual meaning.]

III Equally, there is a historical question of the greatest fascination in the issue of just exactly what it was that Montesquieu was engaged in doing in his famous discussion of the English constitution and how this enterprise was related to the entire social and intellectual tradition of the *thèse nobiliaire*.

(John Dunn, *The Historical Journal* 1967, p. 474)

IV Anyone who studies the influence of Cicero on later generations must marvel at how differently his historical figure was viewed in successive centuries.

(Hans Baron, 'The memory of Cicero's Roman Civic Spirit in the Medieval Centuries and in the FlorentineRenaissance'. In: *In Search of Florentine Civic Humanism,* volume 1 (Princeton University Press, 1988), p. 94)

V Es wäre interessant, das Nachleben dieses Ausspruches Ciceros (magistratum legem esse loquentem) und seiner Variationen bis auf [...] Montesquieu's Esprit XI,6 zu verfolgen.

(Artur Steinwenter, 'Νομος εμψυχος', *Anzeiger der Akademie der Wissenschaften in Wien* 1946, p. 267, n. 81)

[It would be interesting to pursue this statement of Cicero (that the magistrate is a speaking law) as it evolved over the times, with its variations up to Montesquieu's *Esprit des Lois* (XI,6).]

> VI Aurons-nous assez fait pour retrouver, dans *l'Esprit des Lois*, tout ce qui conserve un parfum d'anglicisme?
>
> (J. Dedieu, *La tradition politique anglaise en France – les sources anglaises de l'Esprit des Lois*. Paris 1909 – reprint Genève 1971, p. 12)

[Will we have done enough to unearth, in *l'Esprit des Lois*, everything that retains a taste of Englishness?]

In 1966 I went to see Professor Eisenmann at his house in Paris. This visit – the first of a number of visits both in France and England – was prompted by my ambition to write a thesis on XI, 6 (49) of *L'Esprit des Lois*.

The idea behind it – a very tentative one, at first – stemmed from doubts about the traditional reading of the *bouche de la loi* passage: the *juge-automate* phrase coined by Eisenmann himself [ann. 1 and 2]. I had doubts on two counts: English and French.

1) The *English* background of the XI, 6-chapter pointed in a different direction: *judge-made law* seemed to be incompatible with a *juge-automate* concept;
2) The *French parlementaire* ideology[11] of which Montesquieu himself was supposed to be one of the main protagonists, the spokesman even, also made me wary of accepting the traditional view.

And – it should be added – similar doubts about the *bouche de la loi*-text and its meaning have already been voiced by Professor Ehrlich, 90 years ago, and Georges Vlachos, in 1974 [ann. 3a and b].

More recently – during the last fifteen years – the logic of the *juge automate*-account has again been questioned – in France itself. Witness the writings of Jean-Pierre Airut, Jean Ehrard, Guillaume Bacot, and Gérard Timsit.[12]

[11] *Thèse parlementaire* (or *nobiliaire*): the claim put forward by the *noblesse de robe* (i.e., the legal profession) that the *Parlements* should be accorded a proper role in the affairs of State.

[12] J.P. Airut, 'l'Abaissement du juge.' (In: 'Le juge dans le ruisseau: la faute aux profs ou à Rousseau?', *Crises* 4 (1994), p. 112.). J. Ehrard, 'Ces réflexions décapantes qui débouchent sur la défense du pouvoir judiciaire en général, et tout particulièrement sur celle du contrôle de constitutionnalité, doivent beaucoup à une relecture précise de *L'Esprit des lois*.' (À propos de l'article de Jean Pierre Airut, 'Le juge dans le ruisseau', *Bulletin de la Société Montesquieu* (1996), p. 12.). G. Bacot, 'Eisenmann [...] mais il me semble pas en avoir parfaitement mesuré la porteé, car si la puissance de juger est si terrible aux yeux de Montesquieu, c'est qu'elle ne se réduit pas à une simple application mécanique de la loi.' (In: 'l'Esprit des Lois, la séparation des pouvoirs et Charles Eisenmann', *Revue du droit public et de la science politique en France* (1992), p. 655.). G. Timsit, 'Car il me paraît, a relire Montesquieu [...] le discours de Montesquieu est en fait bien différent et beaucoup plus riche que tout ce que l'on pu – et même Charles Eisenmann [...]– y découvrir.' (In: *Mélanges René Chapus – Droit administratif* (1992), p. 617.)

England and France, how do they compare? At first sight these two positions would seem to corroborate each other. Montesquieu, however, thinks differently. In book II, ch. 4, he tells us that in a monarchy, les *pouvoirs intermédiaires* (the French *Parlements*, that is) are to be considered the backbone of the whole constitutional system.

This indicates the dual task the *Parlements* were supposed to perform. On the one hand they were law-courts; in addition – and more importantly – they had a political, a constitutional role to play. By the way of the *dépôt des lois* they were given an advisory voice in the legislative process. When they did not approve of a Governmental proposal they would state their objections in a petition called *'remontrance'*.

The Government could overrule the *parlementaire* criticism by issuing a *lit de justice* – a measure by which the King, through personal intervention, enjoined the *Parlement* to abandon their opposition.

Sometimes a proper crisis ensued – witness the confrontation between the Queen-Regent and her Prime Minister, Mazarin, and the *Parlement* of Paris in the mid-seventeenth century. A similar situation occurred in the eighteenth century, during the reign of Louis XV, when the members of the same *Parlement* were sent into exile. These events have been extensively dealt with by A. Lloyd Moote and Julian Swann (*see* Bibliography).

Montesquieu criticised England because, gradually, its parliament had gained a dominating position; as a result the prerogatives of the nobility were being lost. In this way – thus Montesquieu – the *pouvoirs intermédiaires* would lose their rightful place in the constitutional system [ann. 4]. This statement makes it more unlikely that, in XI, 6, Montesquieu would have visualised a 'passive' judiciary, with no initiative or role of its own.

There is a second issue that should be dealt with here, one which – if only indirectly – is indicative of the meaning of the *bouche de la loi*-passage. It might help us to put things in perspective. The problem referred to is the one of natural law: it has occupied Eisenmann. The latter's understanding of the XI, 6 (49) text was coloured, influenced by his own positivistic, legal point of view. In this way he makes us believe that Montesquieu's views on natural law, embodied in book I of *L'Esprit des Lois* were superseded by a more positivistic outlook acquired later on, as his work progressed.

This thesis has been criticised by Guillaume Bacot,[13] and equally challenged by C.P. Courtney, Jean Ehrard, Melvin Richter, Tzvetan Todorov, and Mark Waddicor.[14] As Professor Ehrard puts it, *déterminisme* and *idéalisme* coexist in Montesquieu's work: the latter was simultaneously a *moraliste* and a *sociologue*. If

[13] 'L'Esprit des Lois, la séparation des pouvoirs et Charles Eisenmann', *Revue du Droit Public* (1992), p. 637.

[14] *See* the Bibliography *infra*.

https://doi.org/10.1017/S1574019608002745 Published online by Cambridge University Press

Montesquieu had really converted to a (purely) positivistic position he would have suppressed what he had written before in book I about natural law [ann. 5].

All this was summarised by Mme Goyard-Fabre. In a paper read at a colloquium held at Bordeaux in 1998, she reflects that Montesquieu, like Cicero in his *De Legibus*, 'has glorified the natural law-tradition' [ann. 6].

It is only fair to let Montesquieu himself have the last word. In a letter to Msgr. de Fitz-James, bishop of Soissons, dated the 8th of October 1750 – thus after the publication of *L'Esprit des Lois* – he refers to his intention, conceived 25 years earlier, to write a *Traité des Devoirs,* modelled on Cicero's *De Officiis*. He had to abandon this idea because, as he puts it, *'Dans la suite, je trouvai qu'il me serait très difficile de faire un bon ouvrage sur les devoirs, que la division de Cicéron qui est celle des Stoïciens était trop vague; surtout je craignais un rival tel que Cicéron et il me semblait que mon esprit tombait devant le sien'*[15] ['Gradually I became aware that it would be very difficult to write a good essay on the subject of moral obligations. The distinction which Cicero borrowed from the Stoics was too vague. Above all, however, I feared for a rival like Cicero: it seemed to me that I wouldn't be able to emulate him.'] [ann. 7].

The historical aspect of our problem, likewise, should be noted: Eisenmann dealt with it in a rather lopsided way. He merely paid attention to Montesquieu's influence on posterity – on those who were the precursors of the French Revolution as well as on the jurists of the nineteenth and twentieth centuries [ann. 2]. That our eighteenth-century author might have himself been influenced by his predecessors eluded him: it is a question Eisenmann never bothered to look into.

This omission has been noted by Cecil Courtney and Stéphane Rials [ann. 8 and 9]. Rials tells us that Eisenmann, to his own admission, was not historical-minded: he did not think history was of much use for those undertaking a study in law.

One might also put it differently by saying that Eisenmann had his own approach, his own way of assessing Montesquieu's position within the ancestry of ideas. He saw the latter as a prime mover, a forerunner rather than one who, in the relay of ideas, was a recipient as well as a contributor.

The most intriguing commentary on this score is to be found in the thesis written by Michel Troper.[16] This book, on the separation of powers and French constitutional law, was supervised by Professor Eisenmann: he was the 'promoteur de thèse'.

[15] Jacques Chomarat: 'Le De Officiis et la pensée de Montesquieu', in *Présence du Latin, de Catulle à Montesquieu* (Genève, 1991), p. 200. Idem, Brethe de la Gressaye, book XXIV, 10, n. 28 (t. III, p. 425).

[16] Later to become professor at the University of Paris X Nanterre – chair of the Theory of Law.

Troper himself advocated, and endorsed the *juge automate*-concept [ann. 10]. All the same, he was well aware of the reverse of the picture: the risk of anachronism, of relying too much on the posthumous perception of a text, the meaning it gradually acquires after its publication. In his book he tells us that, from the nineteenth century onwards, Montesquieu has always been seen as the 'inventor' of the separation of powers. And Troper adds: '*Il est évident que cette conception essentialiste de la séparation des pouvoirs rend illusoire toute étude des sources de Montesquieu*' ['It is quite clear that a similar view of the separation of powers precludes any effort to look into the origins of Montesquieu's thought.'] [ann. 11].

Eisenmann is not mentioned here; indeed, I do not think it would have been proper to involve in such a way the professor who supervises one's doctoral thesis.

Besides, Troper himself was mainly interested in *la fortune de la séparation des pouvoirs* as it developed during the French revolution. If, instead, he had intended to study its sources his book would have been a different one. His *demonstrandum* was forward looking, not backward in the way I went about my own thesis.

As I have indicated my Montesquieu project was started in 1966. In the following years the English problem (*Ce tableau de la constitution anglaise, est-il véridique?*; vide Quotation II on page 277) was my main concern. Consequently, in 1967 I went to see Professor Brethe de la Gressaye. From him I got all possible help and encouragement. However, he was not able to suggest an alternative – a better grasp of the *bouche de la loi*-text, one more in tune with his own (realistic) analysis of the XI, 6 chapter: in his commentary our text fragment is not mentioned.

So it became clear to me that it might be necessary to make enquiries elsewhere. In 1968, I attended a congress in Leyden of French, Belgian and Dutch legal historians. I asked several participants whether they were able to help me: were they familiar with the *bouche de la loi*-concept, and did they know of a precedent? Almost all those whom I addressed had nothing to suggest. One French professor came up with an answer: 'Apart from the Montesquieu text, a similar – or identical – maxim is unknown to me. But in the Middle Ages they used a comparable expression, be it in a different context: *rex lex animata*, or the *king* as *bouche de la loi*.'

At the time I did not quite know what to make of this. The Latin text is well-known: Kantorowicz has written about it in his *The King's two bodies* [ann. 12]. But what about a French equivalent?

Gradually it dawned on me that for a proper understanding of the *bouche de la loi*-concept, the King versus Judge relationship was of vital importance. So much so that, ultimately, the latter idea would provide the clue to solving the *bouche de la loi* problem.

Ultimately because, as it turned out, the analysis of this relationship proved to be a complex and long-winded affair. In fact, our story will cover almost three

centuries (not counting the Ciceronian ancestry; a matter that will be dealt with later on).

Thus Kantorowicz initiated an idea. Next, the work of Professor Brethe de la Gressaye should be mentioned. In his *Esprit des Lois* text he noted the terminological similarity between fragments contained in VI, 3 (the headline) and XI, 6 (17): in both cases Montesquieu used the phrase *'un texte précis de la loi'* [ann. 13].

This was no mere coincidence. The closing paragraph of VI, 3, in its original manuscript form, was much more suggestive than the final text: *'[En Angleterre] le juge représente aux jurés le texte de la loi. C'est une affaire d'organes, et c'est comme s'il leur disoit: vous avez des yeux, voyez la loi; vous avez des oreilles, écoutez les témoins; ce que vous entendez est-il le cas de la loi?'*[17] ['In England, the judge submits the law-text to the members of the jury. It is a matter of the senses and, as it were, he tells them: you have eyes, look at the law; you have ears, listen to the witnesses; what according to you, is the legal position?'] [ann. 14].

Now, it was obvious to me that in this fragment the judge indicates – but does not say – that he himself is *la bouche de la loi*. The text is cut short and the remainder of what Montesquieu wanted to convey is to be found in XI, 6. Why? As yet I can only suggest that the *bouche de la loi*-notion, to him, was a problem to be dealt with in the *English* context.

The Englishness is only implied – but strangely enough, this makes our case all the more convincing. Brethe de la Gressaye would be able to explain why Montesquieu behaved in this way. According to him, the latter was reluctant to show 'an excessive admiration for a government not too friendly towards France; such an attitude would imply criticism of the French monarchy' [ann. 18].

So here we are with an Anglo-French dilemma. When Montesquieu wrote his chapter on the English constitution, as a precaution he had to look over his shoulder to France. What did he have in mind? As far as the XI, 6 text is concerned we are left in the dark. So, in order to read Montesquieu's thoughts it might be useful to look elsewhere. Fortunately, serendipity came to my rescue.

The first clue is to be found in an article written by an Austrian professor, Artur Steinwenter. The text reads as follows: *'Es wäre interessant, das Nachleben dieses Ausspruches Ciceros (de Legibus III, 1, 2: lex loquens) und seiner Variationen bis auf [...] Montesquieu's Esprit XI,6 zu verfolgen'* [Quotation V on page 3 jo. ann. 15 and 16]. A rather tentative text admittedly: a mere hypothesis which prompts us to do the proper fact – finding ourselves.

Some time later I came across a text which, again, conveyed a Ciceronian flavour. Like the XI, 6 text it had an eighteenth-century background; moreover – if we are to believe the American professor Robert Tate – it enunciated the *thèse parlementaire*.

[17] The idea, obviously, was borrowed from John Salisbury's *Policraticus* (Nederman-edition, p. 67).

Its author was Le Blanc de Castillon, *avocat-général* of the Provence *Parlement*, who, in a speech delivered in October 1765, had this to say: '*[...] La connaissance de la loi naturelle doit être l'unique étude du Magistrat [...] Le plus grand et le plus vaste génie du siècle passé a connu la loi naturelle mieux que personne [...] Montesquieu a corrigé ce qu'il pouvait y avoir d'outré dans son système, il a vu toutes les choses dans leur principes [...] L'Esprit des Lois a dégénéré chez presque toutes les nations [...] Le Magistrat, considéré selon toute l'étendue de l'expression, est Juge, Pontife, Législateur: il est la loi parlante, puisque la loi est appelée le Magistrat muet*' ['It should be the Magistrate's prerogative to study and interpret natural law. [...] The greatest and most remarkable genius of the past century knew natural law better than anyone else [...] Montesquieu has corrected whatever was not in keeping with the natural law-system; he saw everything in its proper context [...] *L'Esprit des Lois* has degenerated almost everywhere [...] The Magistrate, in every sense of the word, is Judge, Pontiff, Legislator: he is the voice of the law, because the law is called the silent Magistrate.'] [ann. 17].

The text is interesting for several reasons. First of all, it should be noted that natural law is mentioned; Cicero on the other hand is *not* named – he remains anonymous. All the same I am convinced that Le Blanc de Castillon had him in mind when writing his speech. The terminology is almost the same – it can be traced back to the *De Legibus*-original.

The use of the word *magistrat* should be enough to convince us that Cicero, indeed, was intended.

The claim made by Steinwenter is vindicated, it would seem – but only for, let us say, 50%. He himself mentions the variations, the various forms in which the *lex loquens*-saying has manifested itself. And Professor Baron in his essay, written a few years earlier, agrees: he mentions 'the variety of effects produced in history by this one figure' (Cicero, that is – vide Quotation IV on page 3).

But what about England? It has not, as yet, been accounted for properly.[18] The discovery which I made of an English precedent that could have inspired Montesquieu was a fortuitous one. I found it when consulting Edward Corwin's *Liberty against Government*. The text reads as follows: 'Another is Cicero's description of the magistrate as "the law speaking (magistratum legem esse loquentem, legem autem mutum magistratum)". The sense of this passage from the De Legibus is reproduced 1600 years later in Coke's Reports in the words, "Judex est lex loquens".' (p. 18)

Here Steinwenter's words [ann. 15] come to life once more: a Ciceronian text with an English background. So what did Montesquieu have in mind? There is one event in English history that exactly fits the bill: *Calvin's Case*, also known as the *Case of the Post-Nati*.

[18] *See* Quotation VI on page 3 jo. ann. 18.

https://doi.org/10.1017/S1574019608002745 Published online by Cambridge University Press

After the accession of James (VI and I) to the English throne, in 1603, the question arose which status, henceforth, his Scottish subjects would have in England. About the *post-nati* Scots – those born after James' coming to England – there was no consensus. A test case helped to clarify the issue. The Exchequer Chamber, in 1608, decided that Robert Colville,[19] born in Edinburgh in 1605, was a 'natural subject of the English King'.

However, one of the judges – Sir Edward Coke – raised a side issue: the role of the judiciary. This is what he had to say: 'This case, such a one as the eye of the law never saw, as the ears of the law never heard of nor the mouth of the law (for judex est lex loquens) the judges our forefathers never tasted [...]' [ann. 19c]. This challenge was taken up by Lord Ellesmere, who, while agreeing with Coke on the status of *post-nati*, rejected his *judex*-statement: 'And some grave and notable writers in the civile lawe say: "rex est lex animata", some say: "rex est lex loquens".' One of the grave and notable writers alluded to by Ellesmere was King James himself (*see* Knafla, *Law and Politics in Jacobean England*, p. 248).

James, already in his younger years as King of Scotland, had been boastful about the royal prerogative; more recently, in his 'Speech of 1607', with a direct reference to 'this case of the post-nati', he had declared that 'in such a question wherein no positive Law is resolute Rex est judex for he is Lex loquens...' [ann. 19b(2)].

The likeness of the two texts: *la bouche de la loi* and 'the mouth of the law' is, indeed, remarkable. Besides, there is the context. In Calvin's Case the *rex/judex* confrontation manifests itself quite clearly.

Fortunately, there is additional evidence to support the idea that Montesquieu, when writing about *la bouche de la loi,* did in fact have Calvin's Case in mind. Edward Coke, when describing the law and the way it operates, uses the metaphor of the senses: the eye, the ears and the mouth of the law. Montesquieu, as we have seen, in a similar situation, resorts to the same expedient. He talks about *l'affaire d'organes* (VI, 3-manuscript jo. XI, 6, 49) [ann. 14, 19c, and 20].

There was, besides, a preliminary event of equal importance. In a prelude to Calvin's Case, written about thirty years beforehand, George Buchanan had voiced his radical ideas. In *De Jure Regni apud Scotos* – the work in question – he refers to the *De Legibus* text which we quoted earlier. And, apparently, James I and Edward Coke had the Scotsman in mind when formulating their opinion in Calvin's Case – both for and against [ann. 19a].[20]

[19] The English made *Colville* into *Calvin* because they 'know that the Scots are Calvinists and sometimes assume that they cannot spell their own names'. (Bruce Galloway, *The Union of England and Scotland 1603-1608* (Edinburgh, 1986), p. 159, n. 66.)

[20] It should be remembered that Buchanan had been James' tutor during the latter's youth (in Scotland). Obviously, Buchanan's radical ideas (*rex* esset *lex loquens*, not est) were anathema to his pupil.

A Ciceronian text with a British background. So what did Montesquieu have in mind when he alluded to this event? Or, to put it differently – for Le Blanc de Castillon and his contemporaries – how familiar, and recognisable were Cicero, and – if that is not too far-fetched – Calvin's Case?

Let us take Cicero first – he is the easiest to handle. The most likely scenario and precedent I could think of was the seventeenth-century episode known as the *Fronde*.[21] This is the most likely scenario indeed, as Brethe de la Gressaye has indicated: 'Montesquieu himself belonged to the Bordeaux-parlement – a court *célèbre par ses mazarinades*.[22] As such, the latter should be counted among *les parlementaires frondeurs*' (*Esprit des Lois*, book II, ch. 4, n. 40, p. 249).

Professor Neumann, apparently, was of the same opinion. In his Introduction to Thomas Nugent's translation of *L'Esprit des Lois* he tells us that 'no contemporary of Montesquieu was in doubt about Montesquieu's position and his effect upon the scene of French polities. His *Esprit des Lois* became one of the bibles of the Parlements' (*The Spirit of the Laws*, p. XXVII).

Between 1643 and 1652 the *Parlement* of Paris confronted the Queen-Regent and her Prime Minister, Mazarin. The whole conflict has been put on record by thousands of pamphlets (*les Mazarinades*); the period itself – to quote the title of a book by the American A. Lloyd Moote – could be referred to as the 'Revolt of the Judges'.

Thousands of pamphlets – so I was lucky to find one with which to prove my point. In P. Doolin's *The Fronde* I found a reference to a *Mazarinade* entitled: 'Observations véritables et dés-intéressées sur un escrit imprimé au Louvre, intitulé: *les Sentiments d'un fidelle suiet du Roy Contre l'arrêt du Parlement du 29 Décembre, 1651* Par lesquelles l'authorité du Parlement et la Justice de son Arrest contre le Mazarin est plainement déffenduë et l'imposteur qui le condamne, entièrement refuté' (Moreau 2574) ['True and unbiased Observations on a paper printed at the Louvre, called: "The Sentiments of a faithful subject of the King against the ruling of the *Parlement* of 29 December, 1651". In these Observations the authority of the *Parlement* and the justification of its ruling against Mazarin is explicitly maintained and the impostor who condems the judgement, refuted.'] [ann. 21].

The pamphlet – and the fragment which I will quote presently – are of interest for several reasons. It is written by Louis Machon, one of the best-known and most prolific pamphleteers. It is written in support of the *Parlement* of Paris, and its prerogatives. Besides, the fragment which is to be examined refers to the Preface, part of *l'Histoire Universelle* by Jacques Auguste de Thou, a well-known work. *'Monsieur le Président de Thou, dans l'Epistre qu'il escrit au Roy touchant le sujet de son*

[21] Fronde (1643-1652): name given to the period when, in France, the *Parlements* revolted against Mazarin and the Queen-Regent Anne d'Autriche.

[22] Mazarinades: pamphlets and chansons against Mazarin during the Fronde.

Histoire, l'exhortant à la Justice, il luy dit sur la fin: Rendez l'authorité aux Lois et à vos Parlements, Or les Juges et les Magistrats sont les Ministres et les interprètes des Loix, desquelles enfin nous devons tous estre serfs, pour pouvoir estre tous libres' ['Monsieur the President de Thou, in a letter written to the King with reference to his *Histoire*, admonishing him to show justice, at the end tells him: Return the authority to the Laws and your *Parlements*. The Judges and the Magistrates administer and interpret the Laws, to which we are all subservient in order all to be free.'] [ann. 21 and 22].

As I suggested, the text is interesting for several reasons. Its author (L. Machon) apparently supports the claims of the Paris *Parlement – la thèse parlementaire*, one might say (so the passage to the effect that *'[...] les juges sont les serfs [...] des lois'* cannot be adduced to support a *juge-automate*-thesis).

Furthermore, the fragment is part of a network of texts. Steinwenter's *Das Nachleben [... eines] Ausspruches Ciceros* comes to life here once more. On the one hand it contains a quotation from Cicero's *Pro Cluentio Oratio* [ann. 23]: 'The magistrates are the servants of the laws, the judges its interpreters; in this way we are all subordinate to the laws in order to be free.' On the other hand, the *Mazarinade*-fragment was echoed in one of Montesquieu's *Pensées* (2266) in its opening words: *'Le Parlement est l'esclave de la lettre de la loi. C'est le Parlement qui connoït les loix faites par tous les monarques, qui en a appris la suite, qui en a connu l'esprit. Il sçait si une nouvelle loi perfectionne ou corrompt l'immense volume des autres, et il dit: les choses sont ainsi, c'est de là qu'il faut partir sans quoi vous gátez tout l'ouvrage'* ['The *Parlement* is subservient to the letter of the law. The *Parlement* knows about the laws made by all the monarchs; their development, and their objective (*l'Esprit*). It knows whether a new law improves the whole of the existing laws. Or, on the contrary, harms them. Ultimately, it passes judgment: such are things, you have to act accordingly – otherwise you will spoil the whole set-up.'] [ann. 24].

Of course, one should not be misled by the words *'lettre de la loi'* – it has nothing whatever to do with Eisenmann and his *juge-automate*-concept. Its use by Montesquieu, and its *parlementaire* background, ought to convince us that it has not.

The text in question (*'le Parlement est l'esclave de la lettre de la loi'*) should be read in its proper, natural law-context. Each law – as we are told – is an integral part of the structure of the monarchy; the State itself, *l'ouvrage des siècles*. It is up to the *Parlement* to make sure that a new law fits in with what has been decreed before: that it is in keeping with *l'ouvrage des siècles*.

How to explain the apparent submissiveness to the verbatim text (*lettre de la loi*)? It was a stratagem, a smokescreen, no more. By appealing to the Law the *Parlement(s)* intended to disguise the true situation: that they, themselves, were in full control, and able to decide the issue.

The scenario depicted here reminds one of a somewhat similar situation which is to be found in America: the judicial review process. In the United States, the

Supreme Court reviews state and federal legislation and acts of state and federal executive officers. In this way the Court seeks to determine whether they are consistent with the text of the Constitution.

Here the verbatim-dilemma manifests itself much more clearly. Should the Original Intent of the Framers of the Constitution be respected? And – more to the point – did the Constitution itself demand this submissiveness; and did the Framers themselves expect, and claim, that this Original Intent be heeded?

We have no way of knowing – but it seems most unlikely – considering that the text of the Constitution does not provide for judicial review. Whatever the answer, in actual practice the concept proved to be an illusion.[23]

But let us go back to Europe and its own problems – to the *bouche de la loi* issue proper. The assignment given us by Steinwenter to explore *das Nachleben* of the Cicero-text has been dealt with adequately, I would say. Earlier in my account, rather tentatively, I raised the question of to what extent Montesquieu's contemporaries (Le Blanc de Castillon et cetera) would have been familiar with the English background of XI, 6: Calvin's Case, for instance?

Now, in the final analysis I have to admit that this event was, indeed, too 'far-fetched' to have been known by most eighteenth-century French scholars.

However, I am able to offer a substitute – a person, and a text, which, their Scottish sixteenth-century origin notwithstanding, played a part in eighteenth-century France. But, in order to understand what it was all about we have to go back to sixteenth-century France.

The relevant text is to be found in a tract entitled *Résolution claire et facile sur la question tant de fois faite de la prise des armes par les inférieurs* (Basel, 1575) [A Resolution, clear and unequivocal, as to the question repeated time and again whether the people are allowed to take up arms] [ann. 25]. Mme Jouanna, in her *Le devoir de révolte* (1989), mentions this tract; in it, the most noteworthy fragment – for our purpose – reads as follows: *'le Roi, la bouche des lois'*. Noteworthy in the first place on account of the *bouche de la loi*-bit; next, because the words do not signify what, at first sight, one would expect.

As to its proper meaning, Mme Jouanna remarked on its radical, monarchomach[24] character [*'cet ouvrage remarquable, qui se trouve à la frontière entre le domaine idéologique des nobles malcontents et celui des Monarchomaques'* (p. 285)].

The expression 'monarchomach', it should be noted, is of mixed, Scottish and French, origin. It was first used – coined as it were – by William Barclay. In his work, entitled *De regno et regali potestate* (1600) he challenged the ideas put forward

[23] The reader is referred to Leonard Levy's *Original Intent and the Framers' Constitution* (New York/London, 1988).

[24] Monarchomachs: those who challenge, or resist, tyrannical rule. It is now applied more widely to resistance theorists of the sixteenth century.

by George Buchanan and his political friends. The full title reads: *De Regno et Regali Potestate, adversus Buchananum, Brutum, Boucherum et reliquos Monarchomachos.*

Buchanan and the author of the *Résolution* were contemporaries. Besides, the figure of speech used in the *De Jure Regni* text and the one in the *Résolution* fragment are almost identical: both can be traced to the *De Legibus*-text of Cicero, mentioned earlier [ann. 16]. Although the two passages might have been written independently, that is unlikely. It is much more likely that either Buchanan, or the Frenchman, initiated the subject, and that his counterpart, on reading it, followed suit. The official dates of publication, in this case, are not conclusive; it has been established that *De Jure Regni*, in manuscript form, was circulating in England, Scotland, and France around 1570 – if not earlier.[25]

This situation indicates that it was Buchanan who came first, and not the other way round. There is an additional reason to favour his authorship. According to John Grey, 'By the 1560s, Buchanan was the leading humanist and classical scholar North of the Alps.'[26]

The renown, and influence, of Buchanan outlasted his own lifetime as well as the seventeenth century: his work has been republished in 1715 (*Opera omnia*) and 1762.[27]

Legendre de St. Aubin – himself a contemporary of Montesquieu – in his *Traité de l'Opinion* (1733) censured the Scotsman because the latter, contrary to Aristotelian teaching, had claimed that the King should be *infra legem* [ann. 26].

From the sixteenth century onwards – if not earlier – the relationship between King and Law, in Europe, has been an issue. Bracton's ideas on Kingship (*infra et supra legem*) were maybe the first, tentative probe.[28] Those who wanted to prove their point quoted Aristotle, or Cicero; the dispute crossed borders and seemed to be never-ending. In the eighteenth century, both names were still used as slogans. Legendre de St. Aubin, by his criticism of Buchanan, in fact affirmed the topicality, the relevance of the latter's ideas in eighteenth-century France.

But what about Montesquieu – whom did he have in mind when writing about *la bouche de la loi*? Mme Goyard-Fabre suggests that maybe, he was not familiar with the monarchomach polemics.[29] I do not think so. Unless I am mistaken the *bouche de la loi* text was inspired by, and modelled on Calvin's Case: *judex lex loquens*. And, within the Ciceronian ancestry, Edward Coke, for his part, was prompted, and inspired, by George Buchanan.

[25] *A Dialogue on the Law of Kingship among the Scots* (De Jure Regni apud Scotos Dialogus), Roger Mason and Martin Smith (eds.), p. 1.

[26] *The Sixteenth Century*, Patrick Collinson (ed.), p. 129.

[27] *A Dialogue*, Roger Mason and Martin Smith (eds.), p. 1.

[28] Kantorowicz, p. 43 et seq.

[29] Montesquieu: *La Nature, les Lois, la Liberté*, p. 198.

Besides, as I have indicated, from the sixteenth century onwards Buchanan's ideas left their mark in France: the *Résolution claire et facile* is there to prove it. The imprint was a lasting one – of this Legendre de St. Aubin bears witness.

Would all of this have escaped Montesquieu? Calvin's Case – and its Buchanan-prelude – makes this unlikely. Besides it would seem that he, himself, was actively involved in the dispute which Legendre de St. Aubin had provoked. In book XI, ch. 11 – only a few pages beyond the well-known XI, 6 – Montesquieu mentions Aristotle in order to disprove the latter's thesis that the King was given the power to judge himself [ann. 27].

Was this a riposte to Legendre de St. Aubin's stand? Of course it was. Montesquieu, according to Shackleton, may have been familiar with Legendre's work. How could it have been otherwise? The *Traité de l'Opinion* – we are told – enjoyed sufficient success to pass through several editions; its pages contain more than one resemblance to *L'Esprit des Lois*.[30]

In XI, 11 Montesquieu did not mention Buchanan. He had good reason not to. Similarly, in XI, 6 he refrained from mentioning Calvin's Case. Praising the English Constitution too much would have implied criticism of the French monarchy – something he was reluctant to do.

Annotations

1. [Montesquieu]

Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur.

(*L'Esprit des Lois*, XI,6 (49))

2. [Ch. Eisenmann]

Comme beaucoup d'hommes de son siècle, beaucoup de nos Révolutionnaires – et nombre de juristes du XIXe siècle et même jusqu'à nos jours –, Montesquieu adopte l'idée de la juridiction-'machine à syllogismes', c'est-à-dire du juge-automate ou pur logicien. On donne au juges les éléments de fait; après quoi, par le jeu d'un mécanisme de rapprochement entre ces faits et la loi, qu'il connait, automatiquement, sans aucune initiative véritable, intellectuelle ni surtout juridique, le juge rend son jugement; proprement, il ne crée rien, il fait de la logique formelle, de la déduction syllogistique pure et simple.

('La Pensée Constitutionnelle de Montesquieu', *Recueil Sirey du Bicentenaire de l'Esprit des Lois* (Paris, 1952) and *Cahiers de Philosophie Politique*: Montesquieu (1985) ad 55)

[30] Thus Shackleton in his biography of Montesquieu, p. 269-270.

https://doi.org/10.1017/S1574019608002745 Published online by Cambridge University Press

3a. [E. Ehrlich]
Die berühmte Lehre von Montesquieu über die Trennung der Staatsgewalt in eine vollziehende gesetzgebende und richterliche ist dagegen gerichtet. Jede Rechtsbeugung soll dadurch ausgeschlossen werden, daß der Richter strenge auf das Wort des Gesetzes gewiesen wird: Si les tribunaux ne doivent pas être fixes, les jugements doivent l'être à un tel point, qu'ils ne soient jamais qu'un texte précis de la loi [...] 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. Des trois puissances dont nous avons parlé celle de juger est en quelque façon nulle. Es entsteht die Frage, wie sich Montesquieu, der in seinem bewegten Leben genügend Einblick in die Staatsgeschäfte gewonnen hatte, eine Verwaltung vorstellte, die in nichts anderem als im Ausführen bestünde, wie er, der ja Gerichtspräsident war, eine Rechtspflege für möglich halten konnte, bei der die Richter des êtres inanimés, die Urteile nichts wären qu'un texte précis de la loi.

('Die Juristische Logik', in: *Archiv für die Civilistische Praxis* – 115 Band 1917 ad 225-226)

3b. [G. Vlachos]
Cependant, il nous paraîtrait surprenant que le président du parlement de Bordeaux ait pu faire si peu de cas du rôle constitutionnel du pouvoir judiciaire à propos, justement, d'un pays comme l'Angleterre où a vue le jour, on le sait, pour la première fois au cours des temps modernes, l'idée d'État de droit!

(*La politique de Montesquieu* (Paris, 1974) ad 125)

4. [Montesquieu]
Les pouvoirs intermédiaires, subordonnés (et dépendans) constituent la nature du gouvernement monarchique, c'est-à-dire où un seul gouverne par des loix fondamentales. Il y a des gens qui avoient imaginé, dans quelques États en Europe, d'abolir toutes les justices des seigneurs,. Ils ne voyoient pas qu'ils vouloient faire ce que le parlement d'Angleterre34 a fait. Abolissez dans une monarchie les prérogatives des seigneurs, du clergé, de la noblesse et des villes; vous aurez bientôt un État populaire, ou bien un État despotique. [See notes 34 and 40]

(*Esprit des Lois*, II,4)

n. 34. C'est la première fois que M. cite le Parlement d'Angleterre, et c'est, curieuse, pour le désapprouver. Il lui reproche de dénaturer la monarchie en affaiblissant l'un des pouvoirs intermédiaires, la noblesse, par la tendance à supprimer les droits seigneuriaux.
n. 40. Pour parler clair, il faut des Parlements, avec le droit d'enregistrer les ordonnances royales, et le droit de remontrance. M. est vraiment traditionaliste: il n'imagine pas de monarchie française sans Parlements, ayant à la fois un pouvoir judiciaire, et un droit de regard sur le pouvoir législatif du souverain [...]. Mais pourqoui présenter, comme loi naturelle de toute monarchie, une institution propre à la royauté française? C'est que M.,

qui a fait partie du Parlement de Bordeaux, célèbre par ses mazarinades, est essentiellement de la race des parlementaires frondeurs.

(*Esprit des Loi*s II,4 – ed. J. Brethe de la Gressaye, t. I, pp. 246 and 249)

5. [Jean Ehrard]
L'affirmation d'un déterminisme coexiste dans *L'Esprit des Lois* avec un idéalisme moral non moins ferme: le grand problème que le livre pose à ses exégètes, c'est précisement de savoir comment l'auteur parvient à les concilier.
Comment Montesquieu peut-il être à la fois moraliste et sociologue? Supposer qu'au cours de la rédaction le 'dessein de l'ouvrage' ait pu évoluer d'un point de vue à l'autre, c'est recourir à une hypothèse plus spécieuse que solide et qui, en fait, ne résout rien: ou bien le second dessein exclut le premier, et l'on comprend mal que l'auteur n'ait pas supprimé ce qu'il avait écrit d'abord, ou bien la contradiction n'est qu'apparente, et il reste à le prouver...

(*l'Idée de Nature en France dans la première moitié du XVIIIe siècle*, t. II, pp. 724-725)

6. [Madame S. Goyard-Fabre]
Contre tous les positivismes à venir dont il redoute la montée, Montesquieu glorifie la tradition jusnaturaliste dont Cicéron, dans son *de Legibus*, lui avait révelé la force pure et diamantine.

('Pourquoi les lois ont besoin d'esprit', *Actes du Colloque international, l'Esprit des Lois* (Bordeaux, 1998), 41)

7. [Montesquieu]
Dans la suite, je trouvai qu'il me serait très difficile de faire un bon ouvrage sur les devoirs, que la division de Cicéron qui est celle des Stoïciens était trop vague; surtout je craignais un rival tel que Cicéron et il me semblait que mon esprit tombait devant le sien.

(Lettre à Mgr. de Fitz-James, 8 octobre 1750, vide Jacques Chomarat, *Présences du Latin – de Catulle à Montesquieu* (Genève, 1991), 200)

8. [Cecil Courtney]
To acknowledge Montesquieu's originality does not mean of course that we should study him in isolation from his predecessors or, like so many of his commentators from Comte and Durkheim to Althusser, assume that he was a man so much ahead of his time that he can only be understood in the light of the principles of nineteenth- or twentieth-century positivist sociology or Marxism.

(*Montesquieu and Natural Law*, 1).

9. [Stéphane Rials]
A deux reprises, connaissant mon vif intérêt pour l'histoire, Charles Eisenmann me dit ce qu'il pensait de cette discipline et ceci est important pour le présent sujet. Quoique fils d'un grand historien, dont l'oeuvre fait encore autorité, le très grand juriste n'appréciait

que médiocrement le travail de l'historien. Sa culture historique était certes consistante, mais il jugeait que l'histoire n'était pas vraiment utile au juriste.

('Charles Eisenmann, historien des idées politiques ou théoricien de l'État', *La Pensée de Charles Eisenmann* (Presses Universitaires d'Aix-Marseille), 105)

10. [M. Troper]
a. On trouve, dans les débats à l'Assemblée constituante, de très nombreux signes qui indiquent l'existence de cette théorie du jugement-syllogisme. Par example, Cazalès déclare le 6 mai 1790: 'le jugement n'est plus que l'acte matériel de l'application de la loi'. Montesquieu exprimait déjà cette idée: 'Mais, si les tribunaux ne doivent pas être fixes, les jugements doivent l'être à un tel point qu'ils ne soient jamais qu'un texte précis de la loi', ce qui lui permettait d'affirmer un peu plus loin: 'Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle'. Autrement dit, la fonction juridictionnelle n'est pas créatrice de Droit.

('La séparation des pouvoirs et l'histoire constitutionnelle française', L.G.D.J. (Paris, 1973) ad 50)

b. Selon les positivistes, le juge aurait simplement pour tâche, d'appliquer la loi. Il n'est donc pas créateur. Cette thèse, qui n'est que le développement de la remarque de Montesquieu que la puissance de juger est en quelque sorte nulle, ne peut cependant être énoncée telle quelle, sans que soient réglées d'autres questions, notamment celle des lacunes et celle de l'interprétation. [...] Il ne se trouve que bien peu de positivistes pour adopter telle quelle la thèse de Montesquieu: même si plusieurs auteurs paraissent appeler de leurs voeux un système juridique dans lequel les deux conditions ci-dessus seraient remplies, rare sont ceux qui prétendent *décrire* un système juridique réel, dans lequel elles le sont.

('Le positivisme comme théorie du droit', in: *Le positivisme juridique*, L.G.D.J. (Paris, 1992) ad 279-280)

11. [M. Troper]
On n'a jamais fait l'histoire de la séparation des pouvoirs; on s'est borné à celle de sa découverte et de ses applications. C'est que, depuis le XIXe siècle, la théorie de la séparation des pouvoirs est considérée, tantôt comme une maxime d'art politique ou comme une vérité scientifique dont Montesquieu aurait été l'inventeur. [...] Il est évident que cette conception essentialiste de la séparation des pouvoirs rend illusoire toute étude des sources de Montesquieu. Elle revient en fait à traiter la séparation des pouvoirs comme une découverte scientifique dont il conviendrait de rechercher la genèse; elle est, au contraire, l'acte de naissance de la théorie, le point de départ et le point d'arrivée.

('La séparation des pouvoirs et l'histoire constitutionnelle française', L.G.D.J. (Paris, 1973) ad 109-110)

12. [E. Kantorowicz]
The concept of the prince as the 'animate Law' was a denizen with regard to Roman legal thought. The notion itself, νομος εμψυχος, derived from Greek philosophy; it was blended

with the idea of the Roman Emperor being the embodiment of all Virtues and all else worth the living; and perhaps it was not free from Christian influence either—at least in the form in which Justinian finally applied the metaphor to his own person. At the end of one of his *Novels*, the emperor proclaimed: 'From everything we have decreed [in the preceeding edict] there shall be exempt the *Tychē* of the emperor, to whom God has submitted the laws themselves by sending him down to men as the living Law' (p. 127)

If we may trust Godfrey of Viterbo, the famous Four Doctors of Bologna addressed Barbarossa at the Diet of Roncaglia, in 1158, with the following words: 'You, being the living Law, can give, loosen, and proclaim laws; dukes stand and fall, and kings rule while you are the judge; anything you wish, you carry on as the animate Law' (p. 129).

(*The King's two bodies*)

13. [Montesquieu]
a. Dans quels gouvernements et dans quels cas on doit juger selon *un texte précis de la loi.*

(*Esprit des Lois*, VI, 3)

b. Mais, si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être à un tel point, qu'ils ne soient jamais qu'*un texte précis de la loi.* S'ils étoient une opinion particulière du juge, on vivroit dans la société sans sçavoir précisément les engagemens que l'on y contracte.

(*Esprit des Lois*, XI, 6, 17)

14. [Montesquieu – *Une affaire d'organes* I]
En Angleterre, l'on suit en cela l'esprit du gouvernement républicain. Le juge rapporte aux jurés, qui sont les pairs de l'accusé, le fait du procès. Il leur représente le texte de la loi. C'est une affaire d'organes, et c'est comme s'il leur disoit vous avez des yeux, voyez la loi; vous avez des oreilles, écoutez le témoins; ce que vous entendez est-il le cas de la loi?

(*Esprit des Lois* – ed. Brethe de la Gressaye, VI, 3, n. 13, tome I, p. 288)

15. [Artur Steinwenter]
Es wäre interessant, das Nachleben dieses Ausspruches Ciceros (magistratum legem esse loquentem) und seiner Variationen bis auf [...] Montesquieus Esprit XI, 6 zu verfolgen [...]

('Νομος εμψυχος' (*Anzeiger der Akademie der Wissenschaften in Wien*, 1946), 267, n. 81)

16. [Cicero]
Cum legibus, ut enim magistratibus leges, ita populo praesunt magistratus vereque dici potest, magistratum esse legem loquentem, legem autem mutum magistratum.

For as the laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law, and the law a silent magistrate.

(*De Legibus*, III,1,2 – C. Walter Keyes ed. (London/Harvard U.P. 1961), 460-461)

17. [Robert Tate / Le Blanc de Castillon]
One of the most brilliant enunciations of the 'thèse parlementaire' is to be found in a speech by Le Blanc de Castillon, avocat général of the Provence parlement, in October 1765. Extracts from the speech, heavy with echoes of Montesquieu, were printed in the mémoires secrets: '[...] La connaissance de la loi naturelle doit être l'unique étude du Magistrat [...] Le plus grand et le plus vaste génie du siècle passé a connu la loi naturelle mieux que personne [...] Montesquieu a corrigé ce qu'il pouvait y avoir d'outré dans son système, il a vu toutes les choses dans leur principes [...] L'Esprit des Lois a dégénéré chez presque toutes les nations [...] Le Magistrat, considéré selon toute l'étendue de l'expression, est Juge, Pontife, Législateur: il est la loi parlante, puisque la loi est appelée le Magistrat muet.'

('Petit de Bachaumont, his circle and the mémoires secrets', 197-198).

18. [*Esprit des Lois* – ed. Brethe de la Gressaye]
Il s'agit bien de la Constitution d'Angleterre, comme l'indique l'intitulé du chapitre, mais le nom même de l'Angleterre n'est pas répété une seule fois au cours du chapitre, à la différence d'autres pays qui sont cités. [...] Ici, il n'a pas voulu désigner expressément l'Angleterre, alors que précisément, il donnait en modèle sa constitution. A-t-il craint qu'on lui reprochât une excessive admiration pour un gouvernement qui n'était pas l'ami de la France et une implicite réprobation pour la monarchie française?

(*Analyse*, livre XI, p. 40)

19. [*Rex/judex loquens*/Buchanan/Calvin's Case]
a. [George Buchanan]
Denique quemadmodum ait summus administrandae rei publicae Magister: ut Rex esset lex loquens, lex Rex mutus.

In short, as the greatest teacher of the art of administering a state puts it, 'As the king should be the law speaking, so the law should be the king dumb'.

(*De Jure Regni apud Scotos, Dialogus* / A Dialogue on the Law of Kingship among the Scots, Roger A. Mason and Martin S. Smith, eds (2004), 34-35)

b. [James VI and I]
(1) Not that I deny the old definition of a King, and of a law, which makes the king to be a speaking law, and the Law a dumbe king...

(The Trew Law of Free Monarchies (1598), *Political Works*, ed. C.H. Mc Ilwain, p. 63; Cambridge – Sommerville edition, 75)

(2) [...] that in this case of the *post nati*, the Law of England doth not clearly determine, then in such a question wherein no positive Law is resolute, *Rex est Judex*, for he is *Lex loquens*...

(Speech of 1607, *Political Works*, ed. C.H. Mc Ilwain, p. 299; Cambridge – Sommerville edition, 171)

c. [Edward Coke]
[...] In this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for *Judex est lex loquens*) the judges our forefathers of the law never tasted [...]

(Opinion in Calvin's Case; *the English Reports*, volume 77, King's Bench Division, 7 Co. Rep 4a, 381)

d. [Montesquieu]
Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur.

(*Esprit des Lois*, XI,6 (49))

20. [*Une affaire d'organes* II]
[Montesquieu]
En Angleterre, l'on suit en cela l'esprit du gouvernement républicain. Le juge rapporte aux jurés [...] le fait du procès. Il leur représente le texte de la loi. C'est une affaire d'organes, et c'est comme s'il leur disoit: vous avez des yeux, voyez la loi; vous avez des oreilles, écoutez les témoins; ce que vous entendez est-il le cas de la loi? [...]

(*Esprit des Lois*, ed. Brethe de la Gressaye, VI, 3, n. 13, p. 288)

[James I]
And therefore must I now turne me to you that are Judges and Magistrates under me, as mine Eyes and Eares in this case.

(The Kings Majesties Speech, as it was delivered by him in the Upper House of the Parliament ... on Monday the 19 day of March 1603; Cambridge – Sommerville edition, 142)

[Montesquieu]
Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur.

(*Esprit des Lois*, XI,6 (49))

[Edward Coke]
[...] In this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for *Judex est lex loquens*) the judges our forefathers of the law never tasted...

(Opinion in Calvin's Case; *the English Reports*, volume 77, King's Bench Division, 7 Co. Rep 4a, 381)

21. [*Mazarinade (Judex)*]
Monsieur de Président de Thou, dans l'Epistre qu'il escrit au Roy touchant le sujet de son Histoire, l'exhortant à la Justice, il luy dit sur la fin: Rendez l'authorité aux Lois et à vos

Parlements, tenant pour certain que les Villes et Citez n'ont ame, vie et mouvement que par les Loix, et ne peuvent non plus que nos corps n'auroient point d'ames, Or les Juges et les Magistrats sont les Ministres et les interprètes des Loix, desquelles enfin nous devons tous estre serfs, pour pouvoir estre tous libres.

> (Observations véritables et désintéressées sur un escrit imprimé au Louvre, intitulé: *les Sentiments d'un fidèle sujet du roi contre l'arrêt du Parlement du 29 décembre, 1651*; Moreau 2574).

22. [J.A. de Thou]
Continuez donc, Sire, en cette belle et généreuse résolution; et de plus en plus affirmissez cette paix que vous avez par tant de travaux et fatigues acquise à la patrie, en rendant aux loix leur force et leur aurotité, et tenant pour maxime très certaine que les loix sont l'ame, le coeur et le conseil d'Etat, et que ny plus ny moins que les membres sans la vie ne servent de rien au corps; aussi les nerfs, le sang et les membres de la République lui sont inutiles sans la loy, qui est sa vie. D'ailleurs que les Juges et Magistrats sont les ministres et interprètes de la loy, et en un mot, que nous sommes tous les esclaves des loix, afin de pouvoir vivre en liberté.

> (L'excellente Préface de M. de Thou, sur son *Histoire (Universelle)*; mise en Français par le Sieur de Villiers Hotman, 1604).

23. [Cicero, *Pro Cluentio Oratio*]
Legum ministri magistratus, legum interpretes iudices, legum denique idcirco omnes serui sumus ut liberi esse possimus.

> (LIII-146. The magistrates are the servants of the laws, the judges its interpreters; in this way we are all subordinate to the laws in order to be free).

24. [Montesquieu, *Pensée* 2266]
Le Parlement est l'esclave de la lettre de la loi. Les monarchies n'ont point un jour, c'est l'ouvrage des siècles. Les loix en sont la contexture et les fondemens. C'est l'ouvrage de chaque monarque, et les loix d'une monarchie sont les volontés de tous les monarques qui ont regné. Une volonté ne peut pas détruire toutes les volontés, mais chaque volonté est le complément de toutes. Il faut que chaque monarque ajoute à cet ouvrage car cet ouvrage n'est jamais fini; parfait aujourd'hui, demain il est imparfait parce qu'il est soumis au temps comme les autres choses de l'univers, parce que chaque société d'hommes est une action, composée de l'action de tous les esprits. Le monde intellectuel, aussi en movement que le monde physique, change comme le monde physique.

C'est le Parlement qui connoît les loix faites par tous les monarques, qui en a appris la suite, qui en a connu l'esprit. Il sçait si une nouvelle loi perfectionne ou corrompt l'immense volume des autres, et il dit: les choses sont ainsi, c'est de là qu'il faut partir sans quoi vous gâtez tout l'ouvrage. Il dit au Prince, vous êtes un législateur, mais vous n'êtes pas tous les législateurs, vous faites bien exécuter toutes les loix, mais vous n'avez pas fait toutes les loix. Elles sont avant vous, elles sont avec vous, elles seront après vous. Vous avez ajouté votre volonté â celle de tous les autres et vos successeurs rspecteront votre volonté tout de

même. Vous serez dans le corps, vous en ferez partie et vous ne serez soumis qu'à l'Empire du temps.

25. [Madame A. Jouanna]
C'est en 1575 que la théorie du corps politique du roi a été exposéee, parmi les textes retenus ici, avec le plus de clarté, sous sa forme à la fois juridique et organique. Il s'agit du traité intitulé *Résolution claire et facile sur la question tant de fois faite de la prise des armes par les inférieurs*. Dans cet ouvrage remarquable la place de l'individu royal dans le corps politique était clairement indiquée: 'Car cette société populaire est comme un corps civil, duquel la justice est l'âme, les lois, les facultés de l'âme, et le Roi, la bouche des lois: car les lois seront toujours muettes sinon que le Roi les fasse parler.'

(*Le devoir de révolte* (Fayard 1989), 285/6)

26. [G.Ch. Legendre de St. Aubin]
Buchanan établit un principe qui est le renversement de tout ordre politique. Aristote dit au contraire qu'un gouvernement où le roi est soumis à la loi est destitué de tout fondement, et n'a aucun forme assurée.

(*Traité de l'Opinion ou Mémoires pour servir à l'Histoire de l'Esprit Humain* (Paris 1733) tome IV, Livre V, chapitre 10 'De la monarchie en général', 95)

27. [Montesquieu, *Rex/judex lex*]
Des rois des temps héroiques chez les Grecs.
Chez les Grecs, dans les temps héroiques, il s'établit une espèce de monarchie qui ne subsista pas ... Ils étaient rois, prêtres et juges. C'est une des cinq espèces de monarchie dont nous parle Aristote; et c'est la seule qui puisse réveiller l'idée de la constitution monarchique. Mais le plan de cette constitution est opposé à celui de nos monarchies d'aujourd'hui.

Les trois pouvoirs y étaient distribués de manière que le peuple y avait la puissance législative; et le roi, la puissance exécutrice avec la puissance de juger; au lieu que, dans les monarchies que nous connaissons, le prince a la puissance exécutrice et la législative, ou du moins une partie de la législative, mais il ne juge pas.

On n'avait pas encore découvert que la vraie fonction du prince était d'établir des juges, et non pas de juger lui-même.

(*Esprit des Lois* XI,11)

Bibliography

Airut, Jean Pierre, 'Le juge dans le ruisseau: la faute aux profs ou à Rousseau?', *Crises* 4 (1994) 111-134.

Bacot, Guillaume, 'L'Esprit des Lois, la séparation des pouvoirs et Charles Eisenmann', *Revue du droit public et de la science politique en France et à l'étranger* (1992), 617-656.

Baron, Hans, 'The Memory of Cicero's Roman Civic Spirit in the Medieval Centuries and in the Florentine Renaissance', in *In Search of Florentine Civic Humanism*, volume I (Princeton University Press, 1988), 94-133.

Beauté, Jean, *Un grand juriste anglais: Sir Edward Coke 1552-1634 – Ses idées politiques et constitutionnelles* (PUF, 1975).

Brethe de la Gressaye, Jean, *Montesquieu, de l'Esprit des Lois, texte établi et présenté par* –, tomes I-IV (Paris, Société des Belles Lettres, 1950-1961).

Buchanan, George, *De Jure Regni apud Scotos, Dialogus,* Roger Mason and Martin Smith (eds.) – a critical edition and translation (Ashgate, 2004).

Burns, J.H., 'The Political Ideas of George Buchanan', *The Scottish Historical Review* (1951), 60-68.

—, 'George Buchanan and the Anti-monarchomachs', in Roger A. Mason (ed.), *Scots and Britons-Scottish Political Thought and the Union of 1603* (Cambridge UP, 1994), 138-158.

—, *The True Law of Kingship. Concepts of Monarchy in Early Modern Scotland* (Oxford, 1996).

Carrier, Hubert, *Le labyrinthe de l'État. Essay sur le débat politique en France au temps de la Fronde (1648-1653)* (Paris, Honoré Champion, 2004).

—, 'Des guerres de religion à la Fronde: l'héritage des monarchomaques dans les Mazarinades', in: Jean Lecointe (ed.), *Devis d'amitié – Mélanges en l'honneur de Nicole Cazaurau* (Paris, Honoré Champion, 2002), 901-918.

Chomarat, M.J., 'Le "de Officiis" et la Pensée de Montesquieu', in *Présences du Latin – de Catulle à Montesquieu* (Genève, Droz, 1991), 204-215.

Cicero, Marcus Tullius, *De Re Publica – De Legibus.* Text with translation by Clinton Walker Keyes (London, Heinemann/Harvard UP, 1961).

—, *Cicero, the Speeches – Pro Cluentio.* Text with translation by H. Grose Hodge (London, Heinemann/New York: Putnam's Sons, 1927).

Coke, Edward, *Postnati. Calvin's Case. The English Reports,* volume 77, King's Bench Division, 381-392.

Collinson, Patrick (ed.), *The Sixteenth Century*, 129.

Corwin, Edward S., *Liberty against Government: The Rise, Flowering and Decline of a Famous Juridical Concept* (Louisiana State UP, 1948).

Courtney, C.P., Montesquieu and Burke (Oxford, Basil Blackwell, 1963).

—, 'Montesquieu and Natural Law', in David Carrithers (ed.), *Montesquieu—Science of Politics. Essays on the Spirit of Laws* (New York/Oxford, 2001).

Dedieu, J., *La tradition politique anglaise en France: Les sources anglaises de l'Esprit des Lois* (Paris, 1909; reprint Genève, 1971).

Doolin, P.R., *The Fronde* (Harvard UP, 1935).

Egerton, Thomas (Lord Ellesmere), *The Speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the* Post-Nati (London, 1608); vide Louis A. Knafla, *Law and Politics in Jacobean England*, 202-262.

Ehrard, Jean, *L'Idée de nature en France dans la première moitié du XVIIIe siècle* (Paris, 1963).

—, 'À propos de l'article de Jean-Pierre Airut, Le juge dans le ruisseau. Compte-rendu' par —, *Bulletin de la Société Montesquieu* (1996), 12-14.

Ehrlich, E., 'Die juristische Logik', *Archiv für die Civilistische Praxis* (1917), 125 et seq.

Eisenmann, Charles, 'L'Esprit des Lois et la séparation des pouvoirs'. Étude parue initialement dans les *Mélanges Carré de Malberg* (Paris, 1933); réimprimée dans les *Cahiers de Philosophie Politique* (Montesquieu, 1985), 3-34.

—, 'La pensée constitutionnelle de Montesquieu'. Étude parue initialement dans le *Recueil Sirey du Bicentenaire de l'Esprit des Lois* (Paris, 1952); réimprimée dans les *Cahiers de Philosophie Politique* (Montesquieu, 1985), 35-66.

Engammare, Max, 'Calvin monarchomaque? Du soupçon à l'argument', in *Archiv für Reformationsgeschichte*, vol. 89 (1998).

Fenet, P.A., *Recueil complet des travaux préparatoires du Code Civil* (Paris, 1827).

Fiorentino, Karen, *Les monarchomaques Britanniques* (P.U. d'Aix-Marseilles, 2003).

Ford, Franklin, *Robe and Sword* (New York, Harper Torch Books, 1953).

Galloway, Bruce, *The Union of England and Scotland, 1603-1608* (Edinburgh, John Donald, 1986).

Gaudemet, E., *L'interprétation du Code Civil en France depuis 1804* (Bâle/Paris, 1935).

Gény, François, *Méthode d'interprétation et sources en droit privé positif* (Paris, 1954).

Goyard-Fabre, Mme Simone, 'Pourquoi les lois ont besoin d'esprit', *Actes du Colloque International de Bordeaux 1998* (Bordeaux, 1999), 37-44.

—, *Montesquieu: la Nature, les Lois, la Liberté* (PUF, 1993).

Granpré Molière, Jean Jacques, *La théorie de la Constitution Anglaise chez Montesquieu* (Presse Universitaire de Leyde, 1972).

Gwyn, W.B.: *The Meaning of the Separation of Powers* (New Orleans, Tulane University/The Hague, Martinus Nijhoff, 1965).

Hill, Christopher, *'Sir Edward Coke—Myth-maker', Intellectual Origins of the English Revolution* (Panther, 1972), 225-265.

Hudson, W.D. (ed.), *The Is/Ought Question* (London, Macmillan, 1969).

Hufteau, Yves-Louis, *Le référé législatif et les pouvoirs du juge dans le silence de la loi* (PUF Paris, 1965).

John of Salisbury, *Policraticus,* edited and translated by Cary J. Nederman (Cambridge UP, 1995).

Jones, Howard, *Master Tully – Cicero in Tudor England* (Nieuwkoop, 1998).

Jouanna, Mme Arlette, *Le devoir de révolte. La noblesse française et la gestation de l'Etat moderne, 1559-1661* (Fayard, 1989).

—, *La France du XVIe siècle 1483-1598. Le combat des monarchomaques pour la souveraineté du peuple* (PUF, 1996), 479-490.

—, "'Constituer l'Etat Monarchique": Les préceptes d'un traité Ligueur (De la Puissance des Rois et Droict de Succession aux Royaumes, 1589), in Jean Lecointe (ed.), *Devis d'amitié – Mélanges en l'honneur de Nicole Cazauran* (Paris: Honoré Champion, 2002), 813-820.

Kantorowicz, Ernst H., *The King's Two Bodies* (Princeton UP, 1957/1981).

King James VI and I, *Political Writings*, edited by C.H. Mc Ilwain (Cambridge/Harvard UP, 1918).

— , edited by J.P. Sommerville (Cambridge UP, 1994).

Knafla, L.A., *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge UP, 1977).

Le Blanc de Castillon, J.F.A., 'Discours de M. Le Blanc de Castillon, Avocat-Général du Parlement de Provence, le jour de la rentrée de cette Cour, le 1 Octobre 1765, au palais d'Aix'. (A fragment of this speech is to be found in L. Petit de Bachaumont, 'Mémoires secrets de la République des Lettres', quoted in Robert S. Tate, *Petit de Bachaumont, his circle and the mémoires secrets* – q.v.)

Legendre de St. Aubin, G.Ch., *Traité de l'Opinion ou Mémoires pour servir à l'Histoire de l'Esprit Humain* (Paris, 1733).

Levack, Brian P., *The Formation of the British State, England, Scotland and the Union: 1603-1707* (Oxford, Clarendon Press, 1987).

Levy, Leonard W., *Original Intent and the Framers' Constitution* (New York/London, 1988).

Lloyd Moote, A., *The Revolt of the Judges* (Princeton UP, 1971).

Mc Farlane, J.D., *Buchanan* (London, Duckworth, 1981).

Mason, Robert A., 'George Buchanan, James VI and the Scottish Polity, in John Dwyer, Robert A. Mason, and Alexander Murdoch (eds.), *New Perspectives on the Politics and Culture of Early Modern Scotland* (Edinburgh, 1982), 9-33.

—, 'James VI, George Buchanan and the True Law of Free Monarchies', in Roger A. Mason, *Kingship and the Commonweal: Political Thought in Renaissance and Reformation Scotland* (East Linton, 1998), 215 et seq.

— and M.S. Smith (eds.), *A Dialogue on the Law of Kingship among the Scots. A critical edition and translation of George Buchanan's De Juri Regni apud Scotos Dialogus* (Ashgate, 2004).

Mazarinade, Observations véritables et désinteressées sur un écrit imprimé au Louvre, intitulé: *les Sentiments d'un fidèle sujet du roi contre l'arrêt du Parlement du 29 décembre* (1651). Moreau 2574.

Mellet, Paul-Alexis (ed.), 'Et de sa bouche sortait un glaive: les Monarchomaques au XVIe siècle', *Cahiers d'Humanisme et Renaissance* 75 (2006).

—, *Les Traités Monarchomaques (1560-1600)* (Genève, Droz, 2007).

Mirkine-Guetzévitch, Boris, 'De l'Esprit des Lois à la démocratie moderne' (Bicentenaire de l'Esprit des Lois 1748-1948), 11-24.

Montesquieu, Ch.L., *De l'Esprit des Lois*. Vide J. Brethe de la Gressaye.

Montesquieu, *Oeuvres Complètes*, *l'Intégrale*-edition (Paris, 1964).

Petit de Bachaumont, L., 'Mémoires secrets de la République des Lettres' ... vide Robert S. Tate, Jr.

Pocock, J.G.A., *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge UP, 1957, 1987).

Résolution claire et facile sur la question tant de fois faite de la prise des armes par les inférieurs (Basle, 1575).

Rials, Stéphane, 'Charles Eisenmann, historien des idées politiques ou théoricien de l'Etat?', in Paul Amselek (ed.), *La Pensée de Charles Eisenmann* (Marseille, Presses Universitaires d'Aix, 1986), 105.

Richter, Melville, *The Political Theory of Montesquieu* (Cambridge UP, 1977).

Schönfeld, K.M., *Montesquieu en 'la Bouche de la loi': Lex – Rex – Judex* (thesis in Dutch; Leiden, New Rhine Publishers, 1979).

—, Papers read at the colloques-Montesquieu held in Bordeaux:
(1989) 'Montesquieu et "la Bouche de la loi": Jacques Ier, Edward Coke et l'antithèse rex – judex', *La fortune de Montesquieu* (Bordeaux, 1995), 207-223.

(1998) 'Retour sur l'expression "la Bouche de la Loi" chez Montesquieu. La fortune d'Aristote et de Cicéron', *L'Esprit des Lois* (Bordeaux, 1999), 187-192.
(2001) 'Encore Cicéron', *Montesquieu Oeuvre Ouverte, 1748-1755* (Oxford, Voltaire Foundation, 2005).

Senarclens, Mme Vanessa de, *Montesquieu – Historien de Rome* (Genève, Droz, 2003).

Shackleton, R., *Montesquieu: A Critical Biography* (Oxford UP, 1961).

Skinner, Q., *The Foundations of Modern Political Thought*. Vol I: *The Renaissance*, Vol II: *The Age of Reformation* (Cambridge UP, 1978).

Soulié, Mme Marguérite, 'La Résolution Claire et Facile sur la question tant de fois faite de la Prise des Armes par les Inférieurs: le Problème du Destinataire', *Cahiers V.L. Saulnier* 2 (Paris, 1984), 45-53.

Steinwenter, Artur, 'Νομος εμψυχος. Zur Geschichte einer politischen Theorie', *Anzeiger der Akademie der Wissenschaften in Wien – Philosophisch Historische Klasse* 19 (1946), 250-267.

Swann, Julien, *Politics and the Parlement de Paris under Louis XV, 1754-1774* (Cambridge University Press, 1995).

Tate, Robert: 'Petit de Bachaumont, his circle and the mémoires secrets', *Studies on Voltaire and the Eighteenth Century*, vol. LXV (Genève, 1968).

Tillet, Edouard, *La Constitution Anglaise, un modèle politique et institutionnel dans la France des Lumières* (Marseille, Presses Universitaires d'Aix, 2001).

Timsit, Gerard, 'M. Le Maudit: Relire Montesquieu', *Mélanges René Chapus – Droit Administratif* (1992), 617-632.

Todorov, Tzvetan, 'Montesquieu', in Alain Renaut (ed.), *Histoire de la Philosophie*, tome II: *Naissance de la Modernité* (Calman-Lévy, 1999), 384-410.

Troper, Michel, *La séparation des pouvoirs et l'histoire constitutionnelle française* (Paris, L.G.D.J., 1973).

—. 'Charles Eisenmann contre le Mythe de la Séparation des Pouvoirs in Montesquieu', *Cahiers de Philosophie Politique* (1985), 67-79.

—, 'Le positivisme comme théorie du droit', in *Le positivisme juridique* (Paris, L.G.D.J., 1992), 273-284.

—, 'Fonction juridictionelle ou pouvoir judiciaire?', in *Pour une théorie juridique de l'Etat*, ch. VI (PUF, 1994), 95-105.

Vile, M.J.C., *Constitutionalism and the Separation of Powers* (Oxford, Clarendon Press, 1967; 2nd edition Indianapolis, Liberty Fund, 1998).

Vlachos, Georges C., *La politique de Montesquieu—Notion et Méthode* (Paris, 1974), 125.

Waddicor, Mark K., *Montesquieu and the Philosophy of Natural Law* (The Hague, Martinus Nijhoff, 1970).