Montesquieu revisited. The balance of power between the legislature and the judiciary in a national – international legal context*

Magistratum legem esse loquentem
Cicero, De legibus III, 1, 2

I. Introduction. Montesquieu's bouche de la loi. Metaphor and the Separation of Powers

Traditionally, the invention of the doctrine of the separation of powers is attributed to Montesquieu, in his famous *De l'esprit des lois* (1748). Insiders know better: Montesquieu was well acqainted with the works of Hobbes, Locke and Harrington, who represent seventeenth- and early eighteenth-century English thought on the separation of powers *(Vile* 1967, p. 48). Montesquieu's contribution to the legal doctrine of *Trias politica,* however, lay principally in his discussion of the position of liberty in a legal setting, in the search for boundaries to the powers that could endanger that vital human condition, which proved so inspiring to French and American revolutionaries after his time. Interesting as the discussion of the wide variation in doctrinal models of separation of powers or a balanced constitution may be, which seems to find no end, I would rather focus on another, perhaps even more famous, contribution to legal thinking, namely the concept of the judge as the *bouche de la loi,* the mouthpiece of the law. This metaphor, also presented in his treatise *De l'esprit des lois,* generally is seen as the original and independant contribution of Montesquieu to jurisprudence. It is one of the most popular concepts for describing the judicial function in its relation to the legislature, cited by generations of lawyers in the defence of legal positivism or in its rejection. In French legal doctrine it became known as the view of the judge as *l'organe, en quelque façon machinal, de la loi* (François Gény), *le juge-automate,* or as it is called by English and American authors: the 'mechanical view of the proper role of the judges' *(Vile).*

[452] It is an intriguing metaphor; although few authors still make use of it to defend a strict separation of powers, in particular between the legislature and the judiciary. It is, according to my impression, still in the back of the minds of many lawyers, when dealing with the judicial function in legal theory or practice. In the Continental tradition, of course, it is becoming more and more of a legal anachronism; but in the common law tradition, with its much greater respect for the words of statute law, and where reference to the legislative history is still not permissible in the interpretation of statutory law (as is the case under English law), its influence in contemporary law should not be underestimated. Therefore, the judge as 'the mouth of the law' is a hidden metaphor, and it serves to support

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the traditional view that parliament and the judiciary should each mind their own business, the making and the execution of the law, respectively. The legislative and the judicial powers should be kept well apart in practice, and in legal theory as well.

Since the present author is not very sympathetic with that point of view, it seems worth while to investigate what meaning the *bouche de la loi* metaphor had for Montesquieu in his legal system, and to look for the origins of the concept. It was very likely as well known to eighteenth-century readers on both sides of the Channel as the concept of separation of powers. Recent research in the Netherlands gives ample support for the view that there is a parallel situation there, a presentation of which may be of interest to the non-Dutch reader. The question is whether there was an already existing metaphor of 'the mouth of the law' to which Montesquieu was referring, and if there was, how this affected the meaning of the concept thus used by him. As we will see, our research will lead us along paths which skirt the boundaries of judicial power, an old tale which still is quite modern in essence. It may serve to shed new light on some of the typical Continental doctrines concerning legal interpretation and decision making, such as teleological interpretation of the law, and dialectical and hermeneutic approaches to the judicial process. To drop some names at this stage: Karl Larenz, Josef Esser, Arthur Kaufmann (Germany), Michel Villey, Jean-Louis Gardies (France), Paul Scholten, Jannes Eggens (Netherlands), John Bell (U.K.). It is a tradition the English lawyer comes accross to his surprise when reading a landmark decision of the Strasbourg European Court of Justice, an experience to which the American lawyer is not exposed - to his detriment perhaps. The interpretation of the Treaty of Rome by the European Court of Justice, in its development of human rights, has changed the landscape of private, criminal and administrative law in many European countries, thereby raising the issue of the role of the Court: *judicial restraint versus judicial activism.* The Luxembourg Court of Justice, dealing with the interpretation of the EEC Treaty, has a longer tradition of liberal interpretation, in the light of economic policies of the common market, but basically it concerns the same issue: the balance of power.

[453] Our little excursion in time may also be of importance for contemporary legal thought: the interpretation (and common misinterpretation) of the famous and over-cited text by Montesquieu is in itself exemplary for the interpretation of statutory law in our time, for its methodology. It is a *speculum iuris,* a mirror of law, and a reflection of all times. In some respects it is a Shakespearean plot in a plot, like the tinker's dream in the introduction to *The Taming of the Shrew*. I do not know whether Ms. Justitia appreciates being compared to Katherine in that play, she can be a bit hard-mouthed, of course, but let us settle on the association that the interpretation of the law is a tinker's job. *Kiss me, Kate!*

II. The Origins of the bouche de la loi Metaphor, its Meaning in Montesquieu's System of Law

In Dutch legal doctrine, the common cliché on *le juge-automate* is becoming abandoned, due to the convincing arguments of K.M. Schönfeld in his 1979 Leyden thesis, the composition of which took more than a decade. In the course of meticulous research, by continuously asking uninhibited questions, he tried to solve the anomalies in Montesquieu's presentation of the famous metaphor, which appears, in Montesquieu, in two separate chapters, namely VI.3 and XI.6 (*Schön-*

feld 1979, p. 34). In the former, Montesquieu is describing the role of the judge in the English trial by jury: the judge more or less mechanically follows the jury in his verdict, for which he only needs his eyes. In its original form, however, which is to be found in the manuscript in the Bibliothèque Nationale in Paris, Montesquieu's text is more elaborate:

> il (the judge) leur (the jury) 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? (*Brethe de la Gressaye* 1950-1961, p. 288, n. 13).

One finds here the eyes and the ears of the law; the mouth is missing, and is only present by implication: the judge rendering the sentence. If one now turns to the classic phrase of XI.6, the mouth of law appears, with the mysterious addition, 'as we have said':

> 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.

There is no other citation of the metaphor in the book, which leaves many questions open to the reader who is curious to know what is meant by all this, in particular, why the reference *comme nous avons dit* is left up in the air. Schönfeld is such a reader, and a fascinating search leads to sources in England, and eventually, also in France. If one is still puzzled by the first [454] citation, and its interesting original form, it should be noted that this is an essential passage, which Montesquieu worked over several times, as he confesses in a letter to David Hume (it caused him 'le plus de peine'). It therefore is by no means a phrase of minor importance in the treatise, or one of which Montesquieu could have lost sight in the process of writing.

Before moving on, some remarks on Montesquieu's knowledge of English law. He lived two years in England (1729-1730), attended sessions of parliament and was a member of the Royal Society; unfortunately, Montesquieu's accounts of his travels in England were destroyed. He was familiar with the common law system, judge-made law and the rule of precedent, and the writings of Coke. Furthermore, it should also be realized that Montesquieu was a judge by profession in Bordeaux, a function inherited from an uncle; he left the bench for Paris in 1725 (at the age of 36) as one of the court's presidents (*Richter* 1977, p.14; *Witteveen* 1990, p. 33). As will be explained shortly, Montesquieu knew the ins and outs of the judicial process from own experience, including the struggle for power with the sovereign. He presumably would have had little difficulty in understanding the English judicial system, and being of the nobility, in conversing with English judges about the intricacies of their profession. In examining the text of *De l'esprit des lois* and its sometimes obscure parts, such as the ones discussed here, we should also keep in mind that the author was not in the position to write freely about the relation between the sovereign and the judiciary: Judges of his time were recruited from the nobility, the office being in the possession of certain families. One of the main political issues of the day was the relation between the king and the nobility, which makes writing about the role of the judge in relation to the law, established by the king, a touchy subject. Actually, in order to evade censorship, Montesquieu had the book in its first edition printed in Geneva, and it was distrib-

uted further in Europe through sources in Holland, a liberal country. In his own practice as a judge in the *parlement* of Bordeaux, he was also acquainted with legislative work; the local *parlement* had to register the laws of the king before they became effective, it could ask the king for information, and even could amend the law. The king, however, had the last word; but to invoke it he had to appear in the *parlement*, thereby taking over the powers of the members of the *parlement*, which were derived from the king ('lit de justice'). In England, Montesquieu would have found a comparable institution, the king as the supreme judge, who may sit and judge in any court in the Halls of Westminster. In the words of Bancroft: 'the King being the author of the Lawe is the Interpreter of the Lawe'.

We now come to the source of inspiration for Montesquieu's mouth of law metaphor in English law. It is the clash between the Scots King James I of England (supported by Bancroft, archbishop of Canterbury) and the Lord Chief Justice, Sir Edward Coke. King James brought to England his concepts [455] of the king as an absolute monarch, derived from Roman law. As explained in 'The trew law of Free Monarchies' (1598), there is a direct relation between the king and the law: "Not that I deny the old definition of a King, and a law; which makes the king to be a speaking law, and the Law a dumbe king." In a jurisdictional dispute between common law courts and ecclesial courts, the position of the king was the central question. It reached its apex in *Calvin's case* (1608), where Coke gave his view on the case, which was without precedent ('a case of first impression', as Americans would call it). The case concerned the issue which divided the House of Commons and the Scots King, whether his Scots subjects could become English citizens by birth (after the date he took the English throne) or by an act of naturalization by law. The test case involved one Robert Colville, born in Edinburgh, whose name in England was happily corrupted to 'Calvin'.

Coke, sitting in the Exchequer Chamber, which ruled that Robert Colville was 'a natural subject of the English King', stated in his Report:

> 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 reports) never heard of nor the mouth of the law (for judex est lex loquens) the Judges our Forefathers of the law never tasted …

In this statement, Coke is taking opposition to the King's claim, supported in this case by the Lord Chancellor, Ellesmere, in the following words:

> And some grave and notable writers in the civile lawe say: "rex est lex inanimate", some say: "rex est lex loquens".

He could have quoted the King himself, who in a speech of 1607 said:

> … 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 …

Here we have a remarkable resemblance with the *bouche de la loi* concept, and also with the preceding text on the eyes and ears of the law. Montesquieu implicitly took the side of Coke in his fight against the King, placing the judge in the position of the 'speaking law', thereby replacing the King. If the author wished to stay friends with the censors of his book and still wanted to frequent the Paris sa-

lons to discuss it, it would have been wise to say this all not too openly.

One may wonder, however, whether the French reader of the book, whom Montesquieu would have had in mind at his writing desk, would have been familiar with the English metaphors mentioned. Therefore, the question comes up whether under French law the same metaphor would have been familiar to the reader, who, it should be noted, under the circumstances of the time would have needed little help to understand suggestions made by authors critical of contemporary society. That is actually the case, as Schönfeld states in his thesis. The metaphor was used in the seventeenth century [456] fight between the nobility and the king (*thèse nobiliaire v. thèse royaliste*), although in a somewhat disguised form. In one of the pamphlets of that period, called *Mazarinades* after prime minister Mazarin, which could be pro or contra the royalists, Monsieur le Président de Thou is cited, asking the king to give authority to the laws and the parlements; it says:

> 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 (dated 1652).

This concept of being 'the slave of the law' (and its paradoxical counterpart of freedom) is an image reminding us of the mouth of law idea, it actually appears in one of Montesquieu's Pensées, to be discussed in a moment. The judge quoted in this pamphlet, Jacques-Auguste de Thou, was president of the Paris *parlement.* He wrote a well-known book in 1604, *Histoire Universelle,* still reprinted in the eighteenth century (the original version was in Latin, and de Thou was in correspondence with English writers of the time; an intriguing thought is that Coke might have known his book and could have been inspired by it).

The Pensée of Montesquieu giving more insight in his view on the relation between the judge and the law is nr. 2266, and is worth while quoting. The first sentence brings us home at once:

> 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 fondements. C'est l'ouvrage de chaque monarque, et les loix d'une monarchie sont les volontés de tous les monarques qui ont régné. 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 qu'il est soumis aux circonstances comme toutes les autres choses de l'univers, parce que chaque société d'homme est une action, composée de l'action de tous les esprits. Le monde intellectuel, aussi en mouvement que le monde physique, change comme le monde physique.
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> C'est le Parlement qui connoît toutes 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 gâtes 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 à celle de tous les autres et vos successeurs respecteront 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.'

This text is a wonderful mixture of serfdom and freedom in regard to the law. It is dialectics in a pure form: only by being a slave of the law, can one be free in the name of the law. Heracleitos would have enjoyed reading it. At the same time, it is a nice illustration of the independance of the judge vis-à-vis the sovereign law-maker. Statute-law is not a finite, completed entity; perfect today, it may be imperfect tomorrow. As a consequence, a statute is only of [457] relative value. In Montesquieu's view it is the judge (*parlement*) who has the task of assessing that value, thereby correcting the law in its application. Its basic philosophy is the idea that the legislator is connected with preceding law-makers, which gives legislation a timeless character. It is not hard to bring to mind the struggle Montesquieu witnessed in his own practice in the Bordeaux court between the judiciary and the sovereign legislator.

That his contemporaries received the message given in his *De l'esprit des lois* is illustrated by a speech of the avocat général of the Provence *parlement* in 1765, Le Blanc de Castilion, who said, referring to the work of Montesquieu:

> Le Magistrat, considéré selon toute l'etendue de l'expression, est Juge, Pontife, Législateur: il est la loi qui parle, puisque la loi est appellée le Magistrat muet.
> The *judex lex loquens* has replaced the *rex lex loquens*, it may be concluded. The latter concept in fact is much older than might be inferred from 17th century quotations from writers or kings; as may be derived from the work of Kantorowicz on medieval kingdom, the source is to be found in Aegidius Romanus (who died in 1316). This author stresses the unity of *rex* and *lex*. In conclusion, the words of James I, cited before, could have been written by Romanus, centuries earlier *(Schönfeld* 1979, p. 54).

We now have a better insight in the historic origins of the *bouche de la loi* metaphor; by using it, Montesquieu is joining a long line of thinkers, extending from the Middle Ages to his time, actually even from Roman times. The citation heading this paper reveals that Cicero, that great practitioner of law, also spoke of *magistratum legem esse loquentem*, the judge is the speaking law. More important however, is the conclusion that in Montesquieu's thought it was never meant to be a description of a mechanical judge, *le juge-automate*, speaking the literal words of the law, functioning thereby as a mouthpiece. The political situation, as explained, made it impossible for the author to be very explicit here, since that would have meant direct opposition to the king, as the supreme legislator. The message for the contemporary reader, however, was loud and clear, as it should be in our time as well. The lesson which may be found in this construction of Montesquieu's text on the metaphor, is that only literal interpretation of the sentence leads to the conclusion that it is the judge's function to give a literal interpretation of statute law. We find here the prevalence of letter over spirit, both in the initial approach to the text in the act of interpretation, and in the conclusion it renders.

This brings up the question of what role the concept of *esprit* plays in Montesquieu's legal thinking, in relation to that of *loi*. One should be reminded of the book's title, De *l'esprit des lois*, which could not have been chosen by coincidence. His definition of law is quite broad:

> La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliere ou s'applique cette raison humaine.

[458] Every country, the author continues, has laws 'propre à la nature et au principes des gouvernements'. His sociological approach to law leads him to elaborate on the character of governments, the well-known troika of the republic, the monarchy and despotism, each with its typical kind of laws, requiring a specific type of judge and decision making. I will skip that part, and look for his definition of *esprit.* The sociologist of law in Montesquieu here comes even more clearly to the surface: in his description the spirit of the law has to do with 'les divers rapports que les lois peuvent avoir avec diverses choses', such as climate, religion, economy, size of the country, manners and customs.

Here we are confronted with a concept of law different from that which refers exclusively to the statute law established by the king; the difficulty here is, that the word 'law' denotes both concepts. If one takes *loi* in the sense of *la raison humaine,* governing all peoples of the earth in the true sense of natural law, the metaphor of *bouche de la loi* gets a completely different, and more general, content: 'les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, etc.' Here, the judge is the mouthpiece of human reason, and therein guided by the spirit of the law. Not a bad idea at all, according to eighteenth-century standards, and also to the norms of society of today. As will be discussed later, a contemporary source of natural law is the human rights Court in Strasbourg, which forces national judges to consult 'human reason' in the application of rules of national law.

This approach in the interpretation of the famous metaphor to my judgment is the most convincing one. It is in line with the Pensée cited before, where the judge appears as the keeper of the law, knowing all laws made by kings, knowing their sequence, and above all, knowing their spirit. This legal wisdom gives the judge the authority to oppose the monarch and legislator, telling him when a new law will corrupt existing laws. Of course, Montesquieu could never have said this explicitly, for reasons explained earlier. Another argument in support of this interpretation is that the metaphor is employed by the author when describing the English system of law. In the first place, in the same passage he explains that the House of Lords is in the position to change the law; and in the second place he is fully aware of the significance of judge-made law in the common law system, contrary to that of statutory law. In Pensée nr. 1645 he notes about statutory law in the English system, *ce source n'est pas considérable* (*Witteveen* 1988, p. 301).

It may be helpful to make a distinction here between *loi* and *droit,* the latter may be restricted to the positive law, derived from acts of the legislature. The judge then is bound to speak as the *bouche de la loi,* and not as the *bouche du droit.* Not a result to the taste of legal positivists, that is for sure, but I submit that the essence of interpretation is such that not everybody can [459] be served. The above distinction brings to mind the discussion in legal logic on the use of classic logic in the study of 'la structure *de la loi*' and not that of 'la structure *du droit*' (*Gardies* 1980, p. 109). In a more general sense the issue seems to be related to the well-known dichotomy of *langue* and *parole,* current since the days of De Saussure.

This theme cannot be elaborated here. But similar remarkes apply to the use of metaphor in general, and in law in particular (compare *Cooper* 1986; *Van Dunné* 1988, p. 170; *Witteveen* 1988, 1991; *Foqué* 1992).

Some concluding remarks on the related subject of the separation of powers, that other canonized concept taken from the *De l'esprit des lois.* Montes-

quieu's innovation, compared to John Locke's model, is the introduction of the third power: the judiciary. There is some similarity here, in the presentation of the separation of powers concept and in its common misunderstanding. For instance, the exceptions to the separation, quite important in Montesquieu's view, are usually left out in quotations. They are: the right of veto of the monarch (executive power) over legislation, and the transfer of the judicial power regarding the judging of crimes or disputes of the nobility to that part of the legislative body which is made up of nobles. Many authors find arguments herein for a form of checks and balances in Montesquieu's system. Indeed, his greatest concern was to have the three powers checked by counterpowers, sometimes with the help of the spirit of the law, in its natural law setting. As a consequence, Montesquieu's model of separation of powers should not be seen as a dogma; its social substructure is far more important than the structure itself (*Neumann* 1949/1957). It took a rational mind like Kant's to make the model of separation of powers into a strict, logical one, with no room for exceptions (*Witteveen* 1990, p. 45). Not surprisingly, in Kantian jurisprudence there is little room for the spirit of the law, neither in theory nor in judicial decision making (*Van Dunné* 1984, pp. 176, 188, 197). Therefore, to my judgment the Kantian contribution is a set-back to the development of the law.

III. The Role of the Judge in Interpreting the Law According to Some Contemporary Schools of Jurisprudence

I will now give my impression of the relevance of Montesquieu's legal thinking for some central issues in the jurisprudence of our time. Unfortunately, there is not much room left for it in this paper, and I will therefore have to be very brief in my remarks. The role of the judge as the 'keeper of the law' in the application of positive law, like statutory law (*droit*), referring thereby to general principles of law (*loi*) as a guidance in the [460] finding of the law, reminds us of several streams of contemporary legal thought. First, teleological interpretation of statutes, whereby the purpose of the statutory rule is established, may be mentioned its goal (*telos* in Greek and *Zweck* in German). This issue is the off-spring of the nineteenth-century debate on statutory interpretation, the choice between 'the words of the statute' or 'the will of the legislator'. The concept of will or intention by its very nature can be seen as either subjective or objective in character as applied to physical persons, which view can be transplanted to legal persons, here the legislator. This is what actually happened; in French jurisprudence it is well illustrated in the opposing views of two famous writers at the turn of the century: François Gény, adhering to the intention of the legislator as the source of statutory interpretation, in the tradition of the *doctrine de l'exégèse;* and on the other hand, Raymond Salleilles, advocating to *assouplir les textes et les mettre en contact direct avec la vie,* in a process of interaction between the contents of the statute and economic and societal factors (*Drilsma* 1948). It is no coincidence that Saleilles adhered to an 'organic' system of law, opposed to the traditional mechanistic one, based on the Kantian syllogistic model. In the same period we find in German jurisprudence in the work of Josef Kohler an approach comparable to that of Saleilles: teleological statutory interpretation in an organic, 'sociological' setting. In the Netherlands, in the same school of thought, the writings of Paul Scholten from the first decades of the century should be mentioned: these works had a considerable influence on the way of thinking in the judiciary.

In Continental legal decision making of our time, teleological statutory interpretation is generally accepted, especially in its 'objective' form, beyond the search of the statutory purpose in legislative history and open to societal needs involved in the dispute presented to the court (*MacCormick*/*Summers* 1991, p. 518). In German case law, the phrase *Sinn und Zweck* of the statute (sense and purpose) is common; and in Dutch decisions one finds the expression 'reasonable interpretation of the law', which sometimes leads to a result contrary to the wording of the statute in the light of the *travaux préparatoires (e.g.* the *DES daughters case*, 1992, joint and several liability of producers of the drug, see *Van Dunné* 1993). In most Continental jurisdictions, *contra legem* decisions are accepted, though still exceptional. In even more traditional jurisdictions, like the U.K., a 'purposive' approach to statutory interpretation is developing, making room for judicial policies based on value-judgments about the best balance between statutory objectives and other social goals (*Bell* 1983, p. 92; 1989, p. 55).

The most spectacular example of this aspect of judicial decision making is of course the interpretation by the European Court of Justice of the Treaty of Rome on questions of human rights. The Court's purposive interpretation of several articles of the Treaty has, for instance, changed family law and the [461] law of succession considerably, by giving a natural child the same status as a legitimate child, based on the article on the protection of the family (*Marckx case* 1979). The introduction of the concept of 'undue delay' in criminal law has had far-reaching consequences for that part of the law, especially for the policy of the public prosecutor (*Brogan case* 1988). In administrative law, a last example, an old Dutch procedure of administrative appeal to the Crown was practically banned by the Court (*Benthem case* 1985).

An interesting discussion of the development of this objective teleological interpretation of the Treaty over the last decades - the *choc des opinions* between the justices who were recruited from such different jurisdictions - may be found in the Tinbergen lecture of Gerard Wiarda, president of the Court in that period (*Wiarda* 1986, 1990, p. 90). The dissenting opinions of the English justice Fitzmaurice, adherent of a strictly subjective teleological interpretation, are characteristic for the traditional common law approach, but did not accord with the view of the majority of Continental justices.

Finally, I would like to make some remarks on the background of this development in judicial law-making by statutory interpretation, emphasizing the contribution of Montesquieu. In this connection, I would like to draw attention to the fact that most jurisprudents who advocated an objective teleological interpretation of statutes were following a dialectical approach. That is, they tried to overcome the traditional syllogistic model of decision making, based on the Kantian division of Reason and Understanding. In legal spheres, this dichotomy led to the 'is-ought' split, which was so often a thorn in the side of the judge who attempted to reach a principled decision, giving a result that could satisfy societal needs, and would not just serve black letter law (*Van Dunné* 1984, p. 188, 1986, p. 17).

Here I will mention three short examples of that approach, that would have pleased Mr. Justice Montesquieu. Karl Larenz, in his *Methodenlehre* took the development of concepts as a central theme of legal decision-making: a general-abstract concept should be realized in a general-concrete concept, the sense of which is 'transparent'; that is, it is 'shining through' when one is consulting a source, also known to the philosopher of law, a consciousness containing social-ethical and legal experience. It is illustrated with general concepts as 'person',

'property', etc. *(Larenz* 1969, p, 488; *Van Dunné* 1988, p. 118; this view is comparable to that of Telders, Eggens, *et al.,* in the Netherlands, and to that of Michel Villey in France, 'syllogismes dialectiques'). In short: the task of the judge in interpreting statutes is to develop the law, making use of general values and considerations to be found outside of the statute.

The main contribution of another German author, Josef Esser, is the connection between the legal consciousness of the interpreter with pre-conscious [462] knowlege, *Vorverständnisse,* in the tradition of the hermeneutic insights derived from Gadamer (Heidegger) and his school (*Esser* 1970, p. 134). The text of the statute is basically a draft (*Entwurf*), which awaits further finalizing by the interpreter, in view of the legal order needed for society.

Finally, I would like to mention the approach of Arthur Kaufmann, inspired by the *Natur der Sache* (as were the Freirechtler and the legal realists earlier this century): each legal interpretation/decision is characterized by three stages (*Stufen*): *Rechtsidee - Rechtsnorm - Rechtsentscheidung:* the general-abstract principles of law, the general-concrete statutory concepts, and the concrete positive law in the decision reached, respectively. The interesting part of it is, that no phase can do without the other; not one can be missed in the process of legal decision making. Therefore, a legal decision cannot be derived solely from a legal norm. One should also take the general principle of law (*Rechtsidee*) into consideration. Furthermore, no phase can be deduced from a higher phase, by a logical process. Thus the old syllogism, fetish of generations of posivists, is set aside (*Kaufmann* 1982, p. 12).

In conclusion, Montesquieu's point of view in regard to the judge's role in interpreting statutes, has been the source of an important tradition in legal reasoning which developed in the centuries that followed. The lawyers of Montesquieu's age took his metaphor of the judge as 'the speaking law' in the right sense, as I have tried to demonstrate; it would be fair for lawyers in our time to give Montesquieu credit for this, and to accept him as one of the founding fathers of modern legal thinking on judicial decision-making.

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