Chapter 5
Adjudication as Grammatication: The Case of French Judicial Politics

Pierre Legrand

> *Law, says the priest with a priestly look,*
> *Expounding to an unpriestly people,*
> *Law is the words in my priestly book,*
> *Law is my pulpit and my steeple.*
> —Auden (W.H. Auden, "Law Like Love", in *Collected* Poems, ed. by Edward Mendelson (London: Faber and Faber 1976 [1939]): 208).

There is compelling empirical evidence to the effect that over the long term France fashioned legal configurations which at certain junctures supplied important models across Europe and beyond, not least through military conquest or colonization. A mainstay of French legal culture, indeed one of its most famous exports, concerns a singular articulation of adjudication marked by a primordial tension between the *overt* legal/constitutional enframing *of* the judge and the *covert* practical/interpretive performing *by* the judge. In this text, I wish to consider aspects of this entrenched paradox.

Officially, the French judge is bereft of any law-making attribution and wields no political power at all. Not only does Article 5 of the 1804 *Code civil* expressly emphasize this restricted existential condition, but the 1958 Constitution draws a formal distinction between the judiciary which, though mentioned, does not feature as a power (or "*pouvoir*") while the executive and the legislature expressly do.[1] In this regard, the 1958 document follows earlier constitutions which had either expressly confined the judicial role (as in 1791, 1793, 1795, 1814, and 1830) or remained silent on the topic of judges (as in 1852 and 1946). Already, a 1790

[1]In this regard, the French Constitution closely follows Montesquieu who held that the executive and the legislature were the only two powers. Discussing the act of judging and addressing "judicial power" (in his words, "*la puissance de juger*"), he called it "in any way non-existent": Montesquieu, *De l'esprit des lois*, in *Œuvres complètes*, ed. by Roger Caillois, vol. II (Paris: Gallimard, 1951 [1748]), bk XI, ch. 6: 401 ("*en quelque façon nulle*").

P. Legrand (✉)
Ecole de droit de la Sorbonne, 12, place du Panthéon, 75005 Paris, France
e-mail: Pierre_Legrand@orange.fr

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post-revolutionary statute had introduced the "legislative reference" ("*référé législatif*") in order to compel judges to solicit a decision from the legislature whenever they believed the interpretation of a statute to be necessary. This procedure, which became increasingly cumbersome over time, lasted well until 1837. But its abolition, though freeing the judiciary from an awkward bureaucratic burden, did not in any way signify a revision of the official understanding of the judge as "the mouthpiece that utters the words of the statute"—which Montesquieu famously defended in his 1748 *De l'esprit des lois*.[2]

The fame of Montesquieu's metaphor notwithstanding, theoretical credentials justifying a reductionist view of adjudication deserve to be attributed in substantial part to Rousseau and to his *Contract social* argument from indivisible sovereignty. For Rousseau, the advocates of separation of powers are not unlike what he calls these "charlatans from Japan" who, he recounts, are said to dismember a child before throwing his limbs up in the air so as to have the child fall back alive and fully assembled.[3] Rousseau scorns political theorists who likewise purport to be able to dismember sovereignty while somehow pretending to preserve its unity. It is not, says Rousseau, that sovereignty features discrete parts, but that it boasts various "emanations".[4] However, state reservation of power from judicial hands is hardly a modern phenomenon as Justinian's Christianization of Roman law fifteen centuries ago well illustrates.

Having had the supreme deity repeatedly vouchsafe for his *Digest*,[5] Justinian also theorized the divine provenance of his own imperial power. It followed from this holy warrant that, in Justinian's own words, "the Emperor shall justly be regarded as the sole maker and interpreter of the laws" ("*tam conditor quam interpres legum solus imperator iuste existimabitur*").[6] And such uncontested imperial preeminence meant that no alternative legal power, whether doctrinal or praetorian, would be countenanced—the terms "interpretations", "perversions",

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[2]Montesquieu, *supra*, note 1, bk XI, ch. 6: 404 ("*la bouche qui prononce les paroles de la loi*").

[3]Jean-Jacques Rousseau, *Du contract social*, in *Œuvres complètes*, ed. by Bernard Gagnebin and Marcel Raymond, vol. III (Paris: Gallimard, 1964 [1762]), bk II, ch. 2: 369 ("*charlatans du Japon*").

[4]*Id*.: 370 ("*émanations*").

[5]Thus, Justinian's *De conceptione digestorum*—his instructions to Tribonian, his chief compiler—begins with the famous words "By the authority of God" ("*Deo auctore*"), a phrase which can arguably be offered as an early formulation of the European idea of theocracy: *Deo auctore*, pr. [530]. For a currently authoritative English translation of the *Digest*, see *The Digest of Justinian*, ed. by Theodor Mommsen, Paul Krueger, and Alan Watson, transl. by Alan Watson et al., vol. I (Philadelphia: University of Pennsylvania Press, 1985): xlvi [hereinafter *Digest* (*Watson*)].

[6]*Codex*, 1.14.12.5 [529]. For a published English translation of the *Codex*, see S.P. Scott, *The Civil Law*, vol. XII (Cincinnati: Central Trust, 1932): 89. See also *Novels*, 72, pr. [538], where Justinian mentions "those to whom permission has been given by God to enact laws" ("*eis qui proferendi leges a deo licentiam*"). He adds: "We mean by this him who is invested with sovereignty" ("*dicimus autem de eo qui imperat*"). Justinian is, of course, referring to himself. For a published English translation of the *Novels*, see S.P. Scott, *The Civil Law*, vol. XVI (Cincinnati: Central Trust, 1932): 269.

"confusion", and "discredit" being used by Justinian in his second preface to the *Digest* to cast negative aspersions on all commentative initiatives which he deemed, so to speak *ex ante*, to operate contrapuntally.[7] While he relegated legal scholars to the subordinate role of "priests" of the law ("*sacerdotes*"),[8] he confined the judge to behave as a ventriloquist in as much as he would be acting strictly as the law's "living voice" ("*viva vox*").[9] Only reverential repetitions of the *Digest*—after all, knowledge of the law was "a most hallowed thing" ("*res sanctissima*")[10]—would ensure that "no offense arises through interpretation".[11] Interestingly, nearly six hundred years before the coming into force of the *Digest* as imperial law, Cicero, in his *De legibus*, had already defended the idea that the judge is the voice of the statute, "a speaking law" ("*magistratum esse legem loquentem*").[12]

Montesquieu's relegation of the judge to the role of "mouthpiece" is thus in important respects but an avatar of a Roman understanding of adjudication, itself very much reflecting a biblical attitude towards the text of the law regarded as sacred, which antedates the French Revolution by many centuries.[13] To be sure, the events of 1789 significantly amplified the French distrust of judges on account of the defiant displays of judicial autonomy that had been increasing in the provinces over many centuries and that would now be curbed (hence, for instance, the "legislative reference" I mentioned earlier).[14]

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[7] *Tanta*, 21 [533]. For these English translations, see *Digest* (*Watson*), *supra*, note 5, vol. I: lxii–lxiii.

[8] *Digest*, 1.1.1. For this English translation, see *Digest* (*Watson*), *supra*, note 5, vol. I: 1.

[9] *Digest*, 1.1.8. For this English translation, see *Digest* (*Watson*), *supra*, note 5, vol. I: 2.

[10] *Digest*, 50.13.5. For this English translation, see *Digest* (*Watson*), *supra*, note 5, vol. IV: 929.

[11] *Deo auctore*, 12. For this English translation, see *Digest* (*Watson*), *supra*, note 5, vol. I: xlix.

[12] *De legibus*, III.1. For this English translation, see Cicero, *The Republic [and] the Laws*, ed. by Jonathan Powell and transl. by Niall Rudd (Oxford: Oxford University Press, 1998 [*c.* 52 BCE]): 150.

[13] In his work, historian Pierre Legendre (the historical garb being one of Legendre's many scholarly guises) probes the profoundly theocratic fabric of French legal culture. In particular, see Pierre Legendre, *L'Amour du censeur*, 2d ed. (Paris: Le Seuil, 2005). See also Peter Goodrich, "Historical Aspects of Legal Interpretation", (1986) 61 *Indiana Law Journal* 331.

[14] In the main, such initiatives took two forms. First, a superior provincial court—then known as a "*parlement*"—could issue decisions that went beyond the specific facts of the case and addressed a problem in general terms. Such judgments, akin to legislative measures, were called "*arrêts de règlement*" (a possible translation would be "regulative judicial decisions"). Secondly, a superior provincial court could refuse to register, and therefore to apply, a royal ordinance which it felt did not conform to existing provincial law. From the XIIIth to the XVIIIth centuries, fourteen superior provincial courts were established which steadfastly imposed themselves as an evermore significant alternative to royal power. In 1790, soon after the Revolution, all judges sitting in these superior provincial courts, who had owned their offices and been regarded as nobility, were replaced by judges named by the state. In this way, revolutionary leaders sought to overcome centrifugal forces and tame arbitrariness.

Law is a profoundly traditionary practice,[15] and in any ascertainable legal culture examples of iterations over the *longue durée* are legion. Yet, it cannot be easy to devise a case of cultural earnestness more firmly embedded in legal history than the French desire to continue to keep the judge firmly bereft of any law-making power. Indeed, it is hard to imagine a more unifying rallying cry in France, whether within the legal community or beyond, than the call against the "*gouvernement des juges*" ("government by judges")—a translinguistic and transcultural transposition (though not an equivalence) of "judicial activism".[16] This expression is said to work as a "*repoussoir absolu*", the word "*repoussoir*" being derived from the verb "*repousser*", which means "to repel" or "to repulse". The idea, then, is that the terms "*gouvernement des juges*" would act to generate "absolute repulsion".[17] Incidentally, the formula "*gouvernement des juges*" itself is not as old as may be assumed since it was devised by Edouard Lambert, a professor of comparative legal studies in Lyon, who used it as the title of his 1921 book on U.S. constitutional adjudication.[18] But Lambert was translating "government by judiciary"—the name of a 1911 article in the *Political Science Quarterly*[19]—and "government by

[15]If scholarly authority be needed, see Martin Krygier, "Law as Tradition", (1986) 5 *Law & Philosophy* 237.

[16]Only the most naive appreciation of translation, whether strictly linguistic or more generally cultural, would indulge the existence of "equivalences". For an extensive theoretical account with specific reference to law, see Simone Glanert, *De la traductibilité du droit* (Paris: Dalloz, 2011). See also *Comparative Law—Engaging Translation*, ed. by Simone Glanert (London: Routledge, 2014). Briefly, the argument against the idea of "equivalence" can be said to run as follows. In order to have an "equivalence", the singularity of each language-term has to be weakened, but cannot be entirely lost: since something must be equivalent to something else, the two terms cannot collapse into unity. However, if the singularity of each language-term continues to obtain, no matter how minimally, there cannot be an equivalence. Differential meaning is therefore a condition of possibility of an equivalence, but at the same time it stands as a prohibition on it.

[17]The expression is on the Wikipedia page devoted to "*Gouvernement des juges*": http://fr.wikipedia.org/wiki/Gouvernement_des_juges. I accessed the site on 19 July 2014 and kept a pdf of the text. For other uses of the word "*repoussoir*", see Séverine Brondel, Norbert Foulquier, and Luc Heuschling, "D'un non-sujet vers un concept scientifique", in *Gouvernement des juges et démocratie*, ed. by Séverine Brondel, Norbert Foulquier, and Luc Heuschling (Paris: Publications de la Sorbonne, 2001): 11; Bastien François, "Pourquoi et comment les juges gouvernent? Prolégomènes problématiques", in *Gouvernement des juges et démocratie*, ed. by Séverine Brondel, Norbert Foulquier, and Luc Heuschling (Paris: Publications de la Sorbonne, 2001): 327. In countries like Austria or Germany, the expression "*Richterstaat*", which is far from being in common use, can be deployed in a laudative sense. A well-known illustration is in René Marcic, *Vom Gesetzesstaat zum Richterstaat* (Vienna: Springer, 1957).

[18]Edouard Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité* (Paris: Giard, 1921; repr. Dalloz, 2005).

[19]L.B. Boudin, "Government by Judiciary", (1911) 26 *Political Science Quarterly* 238. A Russian-born lawyer and activist in socialist and communist politics, Boudin (1874–1952) was a foremost authority on Marxism and a leading contributor to scholarly journals on Marxist theory. His 1911 article arguing the usurpation of the people's democratic rights by the judiciary led to a book by the same title in the same year and prompted a subsequent two-volume work, again bearing the identical designation, in 1932.

judges"—the title of a 1914 address by Chief Justice Walter Clark.[20] (Perhaps because of my interest in the transnational scene, I find it fascinating that an expression like "*gouvernement des juges*", which has become such a significant cultural marker in France, should have been imported from the common-law world.)

For what anecdotal-empirical evidence is worth, it is clear to me on the basis of the nearly twenty years that I have spent as a postgraduate student or teacher in French law faculties that the currency of Montesquieu's oral metaphor remains unimpeachable in today's France, and that it is in fact unimpeached. Indeed, adjudication, being apprehended along the lines of an evil the necessity of which is only most reluctantly conceded,[21] is openly and incessantly disdained.[22] However, upon a close reading of any judicial decision, it ought to be apparent that, irrespective of all desire and all denial, the French judge wields enormous power, including political power, at the very least in the sense in which judicial decisions reveal discretionary determinations, and therefore inherently value-laden decisions, regarding the regulation or administration of the *polis*—or so I want to claim. Now, the idiosyncratic workings of French adjudication raise, it seems to me, three threshold questions.

First, as a matter of political theory the French concern with "*gouvernement des juges*" can largely be traced to the fact that, in a country where judges are civil servants having graduated soon after the completion of their basic law degree from a school specifically designed for the training of aspiring judges, judicial interventionism of any kind is regarded as profoundly anti-democratic. No French judge is elected or subjected to hearings before elected representatives of the French people. Though a consensual definition of "democracy" seems implausible, in France the idea of the "general will" ("*volonté générale*") as theorized by Rousseau supplies what remains a widely-accepted understanding of the term. According to Rousseau, it is essential that there should not be an alternative

[20]Clark (1846–1924), a Chief Justice of the Supreme Court of North Carolina, argued the unconstitutionality of judicial review as devised by the U.S. Supreme Court in *Marbury* v. *Madison* (1803). For the text of his speech delivered in New York on 27 January 1914, which later made its way into the U.S. Senate papers, see http://famguardian.org/Subjects/LawAndGovt/LegalEthics/govtbyjudges.pdf. I accessed the site on 19 July 2014 and kept a pdf of the text.

[21]Montesquieu expressly uses the words "a necessary evil": *supra*, note 1, bk VI, ch. 1: 308 ("*un mal nécessaire*").

[22]Speaking on "France 2", a French public television network, on Sunday, 7 October 2007 in response to questions from the presenter of "Vivement dimanche prochain", one of France's most popular programmes, President Nicolas Sarkozy, making reference to French "supreme court" (or *Cour de cassation*) judges, called them "peas in a pod" ("*petits pois*")—the idea, it appears, being to underline through this belittling characterization, the matter of judicial indifferentiation, the irrelevance of the judge as individual, and ultimately the insignificance of the act of adjudication. I am certainly not claiming that every analyst in France would subscribe to those specific words, but the very fact that the President of the Republic feels able to express himself in this way before millions of viewers says much about the low regard in which French judges are generally held. No doubt, this fact also reveals something about the French President.

regulatory body—such as the "judicial body" (or "*corps judiciaire*")—operating within the state that would, in the pursuit of an alternative interest, seek to supplant the (democratic) state as a source of law.[23] Such a body would, perforce, prove non democratic. It is not difficult to correlate this distrust of alternative locales of power with the revolutionary ban on corporate bodies (the word "corporate" being understood in the widest terms), which was to find its expression within thirty years of *Du contract social*'s release first in Article 3 of the 1789 *Déclaration des droits de l'homme et du citoyen* to the effect that "no body" ("*nul corps*") can wield an authority "that does not emanate expressly" ("*qui n'[…]émane expressément*") from the state, and then in a famous statute dated 14 August 1791 known as "*loi Le Chapelier*". The French take anti-corporationism very far, so that in contemporary France it continues to be the case that "hatred of the 'corporate spirit' must prevail everywhere".[24] In fact, the matter is primordial: "To fashion society under the shape of the One allows for […] the expression of difference from the *Ancien régime*".[25] It follows that "the right to the last word" would be denied to the judge in the name of democracy.[26] But it seems relatively easy to reply that in the end, no matter how activist the judge, it is always open to the French legislature to enact a statute nullifying a judicial decision.[27] In other terms, the judge never has the last word, and it therefore becomes difficult to see, as a matter of political theory, how judicial interventions, no matter how bold, can genuinely be regarded as anti-democratic.

If the French problem is that of "*gouvernement des juges*", one must ask—and here is the second issue that I want to address—whether there is, properly speaking, an act of "*gouvernement*" manifesting itself within a given adjudicative configuration. In order to ascertain if there is indeed such an instance of "*gouvernement*" being deployed—which according to French official discourse would make the judgment *ex hypothesi* objectionable—it becomes necessary to consider the semantic extension of the verb "*gouverner*". What must a French judge do to be engaged in what it is to "*gouverner*", so that he can be said to be indulging in what is deemed to be a reprehensible act of "*gouvernement*"? The answer calls for some observations on the question of interpretation.

Arguably, any interpretive situation, as it features ascription of meaning to words, must involve, structurally so to speak, a measure of latitude, of lee-way, of room, of play, which the interpreter cannot but bring to bear on the words awaiting

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[23]Rousseau, *supra*, note 3, bk II, ch. 4: 372.

[24]Patrick Savidan, *Le Multiculturalisme*, 2d ed. (Paris: Presses Universitaires de France, 2011): 49 ("*la haine de l''esprit de corporation' [doit] partout prévaloir*").

[25]Pierre Rosanvallon, *Le Modèle politique français* (Paris: Le Seuil, 2004): 28 ("*Figurer la société sous la forme de l'Un permet […] d'exprimer sa différence avec l'Ancien régime*"). The "One" Rosanvallon has in mind is, of course, the state.

[26]Brondel, Foulquier, and Heuschling, *supra*, note 17: 17 ("*[l]e droit du dernier mot*").

[27]In France, a famous legislative intervention took place in 2002 openly countermanding a 2000 judicial decision that had vindicated a claim for wrongful birth. See Olivier Cayla and Yan Thomas, *Du droit de ne pas naître* (Paris: Gallimard, 2002). Such French legislative reaction to a judgment is not an isolated instance.

interpretation. The alternative would involve regarding words as harbouring meanings that would exist *an sich*, that is, irrespective of time and place and moreover that would impose themselves *an sich*, that is, irrespective of who the interpreter happens to be—a view which the most cursory examination of the matter must regard as unsustainable. Is, then, the practice of interpretation, as the judge inevitably inserts himself within the semantic play that is structurally inherent to any exercise in ascription of meaning to law-texts, an instance of "*gouvernement*"? One could answer affirmatively by claiming that even as he purports to be confining any interference with the text as much as he possibly can, to be deploying but the "[m]eremost minimum" interpretation,[28] the judge is always already partaking of the normative order in as much as, even as he seeks to implement this limited-intrusion policy, he is inescapably involved in the formulation of what will be the applicable law-text.[29] Even assuming that the degree zero of interpretation could somehow be achieved, to not-interpret would still be to interpret in the sense at least that the judge would still be applying the allegedly non interpreted text with a view to the words carrying a certain meaning—an outcome it would be open to him to circumvent through ascription of an alternative meaning, the decision not to avoid a particular semantic result implying at least a tacit endorsement of it and therefore a choice in its favour.

On the question of the assemblage between law-text and judicial interpreter so that the two are ultimately seen to form part of one integrated configuration, a very fruitful line of reasoning, it seems to me, is Peter Sloterdijk's. As the judge transports himself away from himself towards the law-text, as he puts himself outside himself, *hors de lui*, as the law-text becomes the medium of his expansion, he creates a space of co-existence, an interior, a solidarity, a sphere of intimacy embracing the text. In Sloterdijk's language, the judge's exoteric mission resolves itself as "an act of sphere formation".[30] This situation, which has nothing to do with "a merely dominating control by a subject over a manipulable object mass",[31] involves the law-text being ascribed a meaning through a breathing-in of inspiration. There takes place an arousal of the law-text to animated life so that it can be

[28]Samuel Beckett, *Worstward Ho*, in *Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still*, ed. by Dirk Van Hulle (London: Faber and Faber, 2009 [1983]): 82.

[29]The interlacing between "interpretation" and "application" is one of the most important themes in Hans-Georg Gadamer, *Truth and Method*, 5th ed., rev'd Eng. transl. by Joel Weinsheimer and Donald G. Marshall (New York: Continuum, 2004 [1986]): 321: "[A]pplication is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning" ("*die Anwendung [ist] nicht ein nachträglicher und gelegentlicher Teil des Verstehensphänomens […], sondern [bestimmt] es von vornherein und im ganzen [mit]*"]; p. 385: "[T]he experience of meaning that takes place in understanding always includes application" ("*die Erfahrung von Sinn, der derart im Verstehen geschieht, [schließt] stets Applikation*").

[30]Peter Sloterdijk, *Spheres*, vol. I: *Bubbles*, transl. by Wieland Hoban (Los Angeles: Semiotext(e), 2007 [1998]): 12 ("*eine Sphärenbildung*").

[31]*Id.*: 40 ("*[einer] bloß herrschaftliche[n] Verfügung eines Subjekts über eine manipulierbare Objekt-Masse*").

seen "as a *canal* for breathing by an inspirator".[32] But there is mutuality at work. In other words, "a reciprocal, synchronously interchanging relation between the two breath poles [the breather and the one breathed on] comes into effect as soon as the infusion of the breath of life into the [other] is complete".[33]

In effect, therefore, because the law-text, "a hollow-bodied sculpture awaiting significant further use",[34] "only awakens to its destiny" on account of the judicial attribution of meaning to it,[35] the interpretive process "expresses itself as a correlative duality from the start".[36] It is "a dyadic union from the start, a union that can only last on the basis of a developed bipolarity. The primary pair floats in an atmospheric biunity, mutual referentiality, and intertwined freedom from which neither of the primal partners can be removed without canceling the total relationship".[37] In other words, there exists an entity like the-law-text-and-the-judge, and "[t]he two are bonded by an intimate complicity".[38] Because "there cannot possibly be such a sharp ontological asymmetry between the inspirator and the inspired",[39] it may help to think of "a relationship of pneumatic reciprocity", to envisage a "pneumatic pact".[40]

But this understanding suggests that there would be taking place an act of "*gouvernement*" every single time the merest judicial interpretation materializes. And since the judge is unceasingly interpreting, even when he is approximating something like the degree zero of interpretation, what could he do that would not amount to an act of "*gouvernement*"? Or is it that the judge would have to engage in, say, "heavy" interpretation in order for his intervention to be castigated as "*gouvernement*"? But if a distinction were to become operational between something like "minimal" interpretation—which would not count as an instance of "*gouvernement*"—and other forms of interpretation, a criterion would need to be identified. It quickly becomes awkward to ascertain what such a criterion could be and who would be the arbiter overseeing its deployment. Would commentators such as law professors determine whether a particular interpretation falls on the hither or

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[32] *Id.*: 39 ("*[als ein]* Kanal *für Einblasungen durch einen Inspirator*") [emphasis original].

[33] *Id.*: 40 ("*so tritt doch, sobald die Eingießung des Lebensatems in [den Text] vollzogen ist, eine reziproke, synchron hin und her gespannte Beziehung zwischen den beiden Polen der Hauchung [dem Hauchenden und dem Angehauchten] in Funktion*").

[34] *Id.*: 33 ("*eine Hohlkörperplastik, auf die eine signifikante Weiterverwendung wartet*").

[35] *Id.*: 36 ("*zu seiner Bestimmung […] erwacht*").

[36] *Id.*: 42 ("*bekundet sich von Anfang an als korrelative Zweiheit*").

[37] *Id.*: 42–43 ("*von Anfang an eine dyadische Union, die nur bei entfalteter Zweipoligkeit Bestand hat. Das primäre Paar schwebt in einer atmosphärischen Zweieinigkeit, Aufeinanderbezogenheit und Ineinandergelöstheit, von der sich keiner der Urpartner abtrennen läßt, ohne das Gesamtverhältnis aufzuheben*").

[38] *Id.*: 44 ("*Zwischen beiden herrscht eine intime Komplizenschaft*").

[39] *Id.*: 40 ("*zwischen dem Inspirator und dem Inspirierten [kann] unmöglich ein so scharfes ontologisches Gefälle herrschen*").

[40] *Id.*: 41 and 44, respectively ("*ein Verhältnis pneumatischer Gegenseitigkeit*"/"*pneumatische[r] Pak[t)]*").

tither side of "*gouvernement*"? As rapidly becomes apparent, one is back to the matter of interpretive latitude as one encounters the age-old infinite-regress problem (while a commentator interpretively pronounces on whether a given instance of adjudication counts as "*gouvernement*", a second commentator will interpretively pronounce on the first commentator's interpretive pronouncement while a third commentator will interpretively pronounce on the second commentator's interpretive pronouncement while …, and so on and so forth).

I claim that it is much more reasonable to accept that whenever a judge undertakes to interpret a law-text, which must be done for all intents and purposes every time there is a case of adjudication, he is in effect engaging in an act of "*gouvernement*", no matter how seemingly innocuous. It is a matter of *inherence*. In other words, the reading and application of law-texts is inherent to adjudication; interpretation is inherent to the reading and application of law-texts; decision or choice is inherent to interpretation; and in the specific context of adjudication where judgments have an inherent impact on the regulation or administration of the *polis*, decision or choice means there is "*gouvernement*". That the act of "*gouverner*" should be inherent to adjudication is emphatically not to say that judges can do whatever they want. To take a silly example, it is hard to imagine a judge who would adjudicate on a medical liability case by drawing on a statute governing shareholders' rights. Adjudication, no matter how daring, remains framed on account of the legal materials before the court: the judge must work with the law-texts at hand, which he cannot transgress.[41] Adjudication is also constrained, though less visibly, through an assemblage of strictures such as the exercise of self-control by the judge on account of a concern for one's reputation or for the judicial institution's credibility (or, ultimately, for fear of disciplinary sanctions); the demands of collegiality; and the stock of available arguments deemed persuasive within the legal community.[42] What French official discourse therefore contests as it opposes "*gouvernement des juges*" is a feature of the act of adjudication that is inherent to it, structurally so. Even as it is systematically stigmatized, "*gouvernement des juges*" is inevitably happening every time a judge decides on a case.

In effect, what French official discourse would want to efface is therefore the very idea of adjudication. And there is indeed a long tradition, conventionally known as "*mos geometricus*" (or "geometrical wont"),[43] that has been aiming for the mathematization of the law so that all adjudication would become superfluous. Jean Domat (1625–1696), a scholarly figure who continues to be regarded as one of France's most distinguished lawyers—every French jurist today would be "a child

[41]"[T]he reading […] cannot legitimately transgress the text toward something other than itself": Jacques Derrida, *De la grammatologie* (Paris: Editions de Minuit, 1967): 227 ("*[la lecture] ne peut légitimement transgresser le texte vers autre chose que lui*").

[42]For a detailed analysis of the various constraints impacting on judicial behaviour in the United States, see Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2010): 125–268.

[43]For a useful account, see James Gordley, *The Jurists* (Oxford: Oxford University Press, 2013): 165–94.

of Domat"[44]—was adamant that law must aim to be as geometry.[45] While intellectual influences over Domat ranged from Ramus (1515–1572) to his close friend Pascal (1623–1662), it is arguably Descartes (1596–1650) who exercised the greatest philosophical ascendancy. Perhaps one can begin with a few of Descartes's choice metaphors as he repeatedly sought to inscribe his radical lack of faith in man's epistemological processes. In the *Discours de la méthode*, Descartes thus talks about razing buildings to their foundations.[46] Elsewhere, he mentions wiping bad paintings clean.[47] In yet another text, he suggests emptying the whole basket of apples.[48] As two of Descartes's best-known and most authoritative commentators observe, Descartes's method emphatically illustrates a "general mathematicization of reality",[49] "a grasp at once mathematical and technical of reality".[50] Descartes's theory, "named *mathesis universalis*" in one of his posthumously released texts,[51] left one in no doubt that for him mathematics reigned supreme on account of the

[44]The quotation is from Laurent Aynes, Pierre-Yves Gautier, and François Terré, "Antithèse de 'l'entité'", D.1997.Chron.229: 230.

[45]For samples of Domat's statements on "law-as-geometry", see Jean Domat, *Les Quatre livres du droit public* (Caen: Université de Caen, 1989 [1697]), bk I, tit. XVII: 307; Jean Domat, *Les Loix civiles dans leur ordre naturel* (Paris, 1689), "préface" ("foreword"). On Domat's mathematics, see André-Jean Arnaud, *Les Origines doctrinales du code civil français* (Paris: LGDJ, 1969): 142–47. Later, Chancellor d'Aguesseau (1668–1751) would say of Domat that "according to the method of the geometers after which this author had trained himself, he first formulated rules and something like general axioms that influence all the parts of the law": D'Aguesseau, "Première instruction [à son fils aîné sur les études propres à former un magistrat]", in *Œuvres de M. le chancelier d'Aguesseau*, vol. I (Paris: Les Libraires associés, 1759 [1716]): 274 ("*suivant la méthode des Géometres sur laquelle cet Auteur s'étoit formé, [il] établit d'abord des regles & comme des axiomes généraux qui influent sur toutes les parties de la Jurisprudence*"). For an interesting discussion of Domat's adhesion to mathematization as a response to what he perceived to be the demands of his Christian faith, see Marie-France Renoux-Zagamé, *Du droit de Dieu au droit de l'homme* (Paris: Presses Universitaires de France, 2003): 83. On the relationship between geometry and religion, see generally Robert Lawlor, *Sacred Geometry* (London: Thames and Hudson, 1982).

[46]Descartes, *Discours de la méthode*, in *Œuvres philosophiques*, ed. by Ferdinand Alquié, vol. I (Paris: Garnier, 1997 [1637]), II: 581 (hereinafter *Discours*).

[47]Descartes, *La Recherche de la vérité par la lumière naturelle*, in *Œuvres philosophiques*, ed. by Ferdinand Alquié, vol. II (Paris: Garnier, 1999 [1701]): 1116.

[48]Descartes, *Septièmes réponses*, in *Œuvres philosophiques*, ed. by Ferdinand Alquié, vol. II (Paris: Garnier, 1999 [1647]): 982.

[49]Alexis Philonenko, *Relire Descartes* (Paris: Grancher, 1994): 120 ("*mathématisation générale du réel*").

[50]Ferdinand Alquié, *Leçons sur Descartes* (Paris: La Table ronde, 1955): 81 ("*une saisie à la fois mathématique et technique du réel*").

[51]Descartes, *Regulae ad directionem ingenii*, in *Œuvres de Descartes*, 2d ed. by Charles Adam and Paul Tannery, vol. X (Paris: Vrin, 1986 [1628]): 378 ("*Mathesim universalem nominari*"). Descartes never finished his text which was published in its incomplete state in 1701, more than fifty years after his death. On Descartes and *mathesis universalis*, see Gilles Olivo, *Descartes et l'essence de la vérité* (Paris: Presses Universitaires de France, 2005): 72–80. For a detailed exploration of "*mathesis universalis*" (a notion that long precedes Descartes), see David Rabouin, Mathesis Universalis (Paris: Presses Universitaires de France, 2009).

reliability it could offer: "Whether I stay awake or I sleep, two and three put together will always give the number five and the square will never have more than four sides".[52] Accordingly, Descartes's goal was unabashedly to philosophize like a geometer, specifically, to formulate the "long chains of all simple and easy reasons that geometers are in the habit of using in order to achieve their most difficult demonstrations".[53] For his part, Spinoza (1632–1677) went so far as to geometrize ethics in his posthumously released *Ethica, Ordine Geometrico demonstrata* (or *Ethics, Demonstrated in Geometrical Order*). Domat would also have found guidance in the work of some notable jurists who came before him. Thus, François Le Douaren (1509–1559) was one of many French law professors who held that "the elements of law, the bases of its maxims and of its fundamental problems are like the points, the lines, and the surfaces in geometry".[54]

No doubt on account of the law's deeply traditionary character—French legal culture's staunch commitment to formalism demonstrably showing France's law-world to be, on the whole, even more traditional than would be the case in many other places[55]—precisely the same craving for mathematization appears in a late-twentieth-century French introduction to legal methodology where the author claims that "ideally, *of course*, the solution to any litigation would be mathematically deduced from clearly defined legal rules".[56] To be sure, the tropism towards mathematization can express itself in more subtle fashion. Christian Atias, a leading French scholar, thus writes that "[t]he judge is there to ascertain the right answer and to impose it".[57] The author's verb to designate the basic task he assigns to the judge is "*retrouver*", which translates awkwardly into English on account of a range of senses it may carry. But whatever meaning one wishes to ascribe to the French verb, it subordinates the judge to an act of discovery or identification of "the right answer" and denies any judicial initiative or creativity in the production of it—a process immediately evocative of the resolution of mathematical problems.[58]

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[52]Descartes, *Première méditation*, in *Œuvres philosophiques*, ed. by Ferdinand Alquié, vol. II (Paris: Garnier, 1999 [1641]): 408 ("*Car, soit que je veille ou que je dorme, deux et trois joints ensemble formeront toujours le nombre de cinq, et le carré n'aura jamais plus de quatre côtés*").

[53]Descartes, *Discours*, *supra*, note 46, II: 587 ("*longues chaînes de raisons, toutes simples et faciles, dont les géomètres ont coutume de se servir, pour parvenir à leurs plus difficiles démonstrations*").

[54]François Le Douaren, *In primam partem Pandectarum, sive Digestorum, methodica enarratio*, in *Opera omnia*, vol. I (Lucca, 1765 [1561]): 3.

[55]I am fully confident that I could persuasively marshall any number of indicators to substantiate this claim. Suffice it to mention the persistent and pervasive ascendancy of formalism, which one illustration can establish. I refer to Appendix I.

[56]E.S. de la Marnierre, *Eléments de méthodologie juridique* (Paris: Librairie du Journal des notaires et des avocats, 1976), no. 91: 193-94 (emphasis supplied).

[57]Christian Atias, *Devenir juriste* (Paris: LexisNexis, 2011): 3 ("*Le juge est là pour retrouver la bonne réponse et pour l'imposer*").

[58]Perhaps it bears adding that this formalistic thesis has nothing to do with Ronald Dworkin's argument by the same designation which is to the effect that there exists objective moral truth.

In France, the commitment to the mathematization of law must be seen as one instantiation amongst many of the larger argument to the effect that law is a scientific configuration and that the study of law is a scientific pursuit. The list of quotations from French legal scholars in support of the idea that law exists as science and legal scholarship as a scientific venture is literally endless, and I have to limit myself to three brief statements which I regard as epistemologically significant in as much as they display the *obviousness* of French law and of French legal scholarship's scientificity for French jurists.[59] According to Jean-Louis Bergel, "[l]aw is uncontrovertibly a science",[60] and leading French theoretician André-Jean Arnaud observes that "[t]he assertion of the scientificity of [l]aw […] has become a truism".[61] Unsurprisingly, perhaps, it has been said that "one will not dwell on a refutation [of the claim against scientificity], since it is so convenient to show that the approach of the jurist is scientific at every step of the way".[62]

While French arguments for the mathematization or scientificization of law correlate closely with the refusal of any law-making power to the judge in as much as they deploy at once a remorseless desubjectivization and a relentless depoliticization of the act of adjudication, there is another way for legal analysts to parry "*gouvernement des juges*", and it is to deny, not that there is "*gouvernement*" (this is the question that I just addressed as my second theme), but that there is a "*juge*". The claim that the adjudicator is not a "*juge*" takes me to the third of the three issues I want to raise.

It is Hans Kelsen who makes what has become a famous claim to the effect that when a court annuls a statute—which is arguably the most consequential act of judicial "*gouvernement*" possible—what is taking place is not the work of a "*juge*", but of a second legislator, albeit a "negative legislator".[63] Now, when the act of judicial "*gouvernement*" unfolds in plain view, so to speak, and when French jurists are content to engage in a Kelsenian pirouette with a view to arguing that, well, "a government by judges remains something conceptually impossible",[64] I submit that one is either pushing formalism beyond any plausible configuration or else must be

[59]For a more detailed examination from a comparative standpoint, see Pierre Legrand and Geoffrey Samuel, "Brèves épistémologiques sur le droit anglais tel qu'en lui-même", (2005/54) *Revue interdisciplinaire d'études juridiques* 1.

[60]Jean-Louis Bergel, *Méthodologie juridique* (Paris: Presses Universitaires de France, 2001): 34 ("*le droit est incontestablement une science*").

[61]André-Jean Arnaud, *Les Juristes face à la société* (Paris: Presses Universitaires de France, 1975): 195 ("*[l]'affirmation de la scientificité du Droit […] est devenue un poncif*") (emphasis omitted).

[62]Henri Roland and Laurent Boyer, *Introduction au droit* (Paris: Litec, 2002), no. 284: 109 ("*on ne s'attardera pas […] à la réfutation, tant il est commode de montrer que la démarche du juriste est scientifique à chacune des étapes de son activité*").

[63]Hans Kelsen, "La garantie juridictionnelle de la constitution (La justice constitutionnelle)", (1928) *Revue du droit public et de la science politique* 197: 226 ("*législateur négatif*").

[64]Otto Pfersmann, "Existe-t-il un concept de gouvernement des juges?", in *Gouvernement des juges et démocratie*, ed. by Séverine Brondel, Norbert Foulquier, and Luc Heuschling (Paris: Publications de la Sorbonne, 2001): 49 ("*un gouvernement des juges demeure quelque chose de conceptuellement impossible*").

said to be navigating perilously close to the shoals of "bad faith" (I use the expression roughly in Duncan Kennedy's sense to refer to a situation where one is openly making an assertion while at once denying the claim to oneself).[65]

To summarize, I argue that no matter how unpleasant to the French, the fact is that adjudication is inherent governance, if only on account of a necessary moment of undecidability, an instance of instability preceding the making of any judgment. Formalist circumventions that persist in denying the judge's agency ring hollow—as does the claim that judicial governance would be undemocratic, as long as it is open to the legislature to cancel a judgment. To say, as I do, that adjudication is legal governance, that it is political governance also, is not to defend the view that adjudication is only politics or that adjudication and politics are interchangeable or that judicial governance is not different in significant ways (including discursive ways) from other types of governance. And it is not to say either that it is a good thing that the political be present within adjudication. Rather, I reject the implausible assumption that adjudication French style can be neatly delineated from political determination, which means that I refute the idea that there could be a judicial decision that would be purely a matter of law (though I find it impossible to understand what "pure law" indicates, I think it gestures towards strictly conceptual and systemic outcomes that would somehow be sealed from any infiltration by the political and therefore prove value-neutral). If you will, within adjudication I claim the absence of an ascertainable border between law and politics, *even in France*.

Ultimately, then, French judges are to be seen as fully-fledged political agents—though in France it remains *sacrilegious* to say so. I use the word "sacrilegious" advisedly given that the outrage being perpetrated is against a *theological* order, that is, a system which seeks, through primary texts, hierarchically to map and control an epistemological space by instituting in censorial fashion the authoritarian motifs of reverence and repetition. To be sure, the "religious" is not located in the contents of the primary texts themselves. However, it is very much to be found in the material conditions of the primary texts' enunciation, in the forms in which these texts are communicated and applied through a structured relation which purports to link ("*religare*") law-giver to law-receiver—the unique and authoritative, and uniquely authoritative, sender standing above the plurality of subordinated recipients. To this day, in France, the exegetical and hermeneutic traditions of legal interpretation as religious interpretation, survive, live on—and are meant to survive, to live on—so as to support the persistent status of law as definite written text, as univocal inscription of a sovereign will. Accordingly, it is properly sacrilegious to suggest that judges are in effect subverting the biblical attitude that they are supposed to uphold, and that there is anything in effect existent as a matter of adjudication that would look like a "*gouvernement des juges*".

While judicial legal/political power is deployed on a daily basis from Calais to Arles and from Biarritz to Strasbourg, it manifests itself covertly. Instead of the

[65]See Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1999): 23–38.

spectacular policy statements associated with adjudication practice in the common-law world, French judicial law-making occurs most significantly under the guise of what I shall style "grammatical" interventions. There is at work a grammatical logic, a *grammatology*.[66]

The deeply-ingrained French unwillingness to countenance "*gouvernement des juges*", that is, judicial activism, is everywhere visible. Consider a typical French "supreme court" (or *Cour de cassation*) decision as printed in the official law reports. Most strikingly, it is short, sometimes as short as three paragraphs only. From a common-law standpoint, a French judgment is in fact *shockingly* short. There is just enough institutional room to allow for a brief statement of the material facts and of the ground for appeal (which are both lifted from the record), to permit a mention of the relevant legislative text, and to register in the most formulaic terms what is offered as the syllogistic application of the statute to the case. This discursive strait jacket, which leaves the judgment bereft of any expression of even the merest policy consideration, purports to avoid any personalization of the opinion and by extension to obviate any personalization of the law and ultimately any self-fashioning of the law, that is, any appearance of any fabrication of the law.

On the subject of the institutional structures built into the judicial system so as to foster a brand of adjudication that would seem to be hovering around the degree zero of judicial activism, one could also mention the anonymity of every court opinion (the reader never knows who authored the judgment) and the impossibility of a dissent. Through such commitment to the bureaucratization of adjudication, on account of an "administrative conception" of the judge (think of the way in which one's entitlement to a social security card ought not to be allowed to vary depending on who happens to be the clerk staffing the desk on any given day),[67] the proclaimed official view is that, both descriptively and prescriptively, the individual person of the judge ought not to matter in the least, that judges ought to be perfectly interchangeable.[68] In the words of Pierre Legendre, "the personality of the judge is supposed not to count and Justice descends from Heaven".[69] The postulate about the irrelevance of any particular judge connects with an appreciation of the law as being in the process of working itself scientific, as being on the way to achieving logical self-evidence, not unlike mathematics.

Imagine a case having to do with an entitlement to damages for breach of contract. Addressing a law of contract deemed to be scientifically, mathematically foreordained (have scholars not been hard at work over a very long time through the writing of countless textbooks and monographs, dissertations and articles?), the

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[66]It is no doubt unnecessary to trace the currency of this word to Derrida, *supra*, note 41.

[67]Pierre Legendre, "Qui dit légiste, dit loi et pouvoir", (1995/32) *Politix* 23: 31 ("*conception administrative*").

[68]In the words of leading political scientist Lucien Jaume, "[i]t is very difficult and socially risky, in France, to speak in one's own name": Lucien Jaume, *L'Individu effacé* (Paris: Fayard, 1997): 456 ("*Il est très difficile, et socialement risqué, en France, de parler en son nom propre*").

[69]Pierre Legendre, *Trésor historique de l'Etat en France* (Paris: Fayard, 1992): 247 ("*La personnalité du juge est censée ne pas compter et la Justice descend du ciel*").

judge, whoever the individual happens to be, is meant to slot the material, pre-existing facts in the proper, pre-existing law-box so as to generate the irresistible outcome. Given the scientific or mathematical inevitability of the operation, any argument or discussion becomes pointless—hence 350-word judgments. After all, what is there to argue or discuss in the face of scientific, mathematical evidence? The brevity of the judgment purporting to confer upon it the air of sententiousness befitting an objective ascertainment of what would be the semantic truth of the matter, one is reminded of Descartes who, in a 1640 letter, held that "our mind is of such a nature that it cannot help assenting to what it clearly conceives".[70]

A decision such as the French "supreme court"'s (or *Cour de cassation*'s) opinion of 17 December 1997 pronouncing on whether a tenant's homosexual partner is legally entitled to remain on the rented premises after the tenant's death provides a typical illustration of the way in which the French judge engages in governance or activism under cover of what would appear to be the strategy least suggestive of any effective governance or activism.[71] What, indeed, could be more seemingly innocuous than a grammatical discussion, a "grammatication"? As one reads a French "supreme court" (or *Cour de cassation*) decision, it shows itself typically to be about the composition of law-texts—with a focus on clauses, phrases, and words—or, more abstractly, about the composition of the conceptual legal system—with a predilection for qualifications, categories, and distinctions. In the 17 December 1997 case, the court would have its readers believe that the issue is exclusively about "the" meaning of the word "*concubin*" which, it says, can *only* refer to a relationship involving a male and a female. As any good French dictionary will show, however, the etymology of the word "*concubin*" ("*concumbere*", "to sleep with") reveals that it can refer to any person having regular sexual intercourse with any other person irrespective of the sex of the partners. As it substitutes its preferred, reductive interpretation for the word's acknowledged broader meaning, the court is engaging in a grammatical motion which is effectively a deed of legal/political governance, an instance of judicial activism. As the court pronounces on the semantic extension of a definition or delineates the limits of a category, as it makes decisions objecting to any idea of semantic heterogeneity in

[70]Descartes, [Letter to Regius], in *Œuvres de Descartes*, 2d ed. by Charles Adam and Paul Tannery, vol. III (Paris: Vrin, 1988 [24 May 1640]): 64 ("*mens nostra est talis naturae, ut non possit clare intellectis non assentiri*").

[71]I refer to Appendices II and III where this decision appears both in the original French and in my English translation. The judgment is the work of the French "supreme court" as regards matters falling within "private law" (or *Cour de cassation*) as this category is understood in France. In particular, the opinion is by the Third Civil Chamber ("*Troisième chambre civile*") specializing in real estate law. Note that in terms of the posited law, this judgment has been superseded by Article 515-8 of the *Code civil* which came into force on 1 January 1989 and states that "[c]oncubinage is a de facto relationship, characterized by a cohabitation presenting a character of stability and of continuity, between two persons, of different sex or of the same sex, who live as a couple" ("*Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple*").

pursuit of fixation of meaning, there takes place, on each occasion, not only an exercise in lexical control but also a discretionary—and therefore a partisan—determination regarding the regulation or administration of society, of the *polis*: "The law becomes a sort of reality imposed upon the social data, shaping it, and in short becoming in the end more 'real' than the facts".[72] In other words, judicial grammatology is judicial governance or judicial activism—no matter how much the institutions of French law (and the desire of French lawyers and of French society at large) aim to deny it. Emphasizing what judges would most willingly not deny doing—grammatication—I contend that the provision of "grammatical" solutions registers as governance or activism, that it therefore counts as a politics.

Fascinatingly, even as the court issues its decision, it acts so that its judgment refuses to locate itself in a fully autonomous analytical space. As one considers the opinion one can see that the key wording is framed in apodictic language very much in the way one expects a statute to operate. In other words, the court is content to claim that it is offering a reprise or a restitution of the statute (it will tell the legal community *the* meaning of the statute) and certainly not an interpretation of it, which would be tantamount to proclaiming judicial independence from it through the adoption of some meta-language. In the way it writes *ex auctoritate*, the court very much wants to behave, and to be seen to behave, like the legislator instead of suggesting itself as the author of an independent speech. Even as it effectively dilutes the distinction between *interpretandum* and *interpretans* (as befits interpretation), the court continues to act as if the statute was intangible and as if it deemed it to be such. Effectively, though, the judicial decision will graft itself to the statute so that the statute will no longer be able to signify without it. The selfhood of the statute will henceforth consist in part of the otherness of the judgment.

The French judicial system, as it is structured, as it is said officially to work, as it is practiced, as it is taught in law faculties, as it is oh so relentlessly defended by French legal actors and within French society at large,[73] offers a striking illustration of institutional bad faith in as much as the massive smoke-screen that has been draped over French courts and French judges simply cannot hide the fact that in every single case—of which the "supreme court" (or *Cour de cassation*) alone hears approximately 30,000 each year—in every single case, then, the French judge engages in an act of legal/political governance, of judicial activism—that is, he does precisely what he is officially claimed not to be doing, what he is said not to be

[72]Jacques Ellul, *Histoire des institutions*, 9th ed., vol. III (Paris: Presses Universitaires de France, 1982): 27 ("*Le droit devient une sorte de réalité imposée au donné social, le mettant en forme, et finissant en somme par devenir plus 'vrai' que les faits*").

[73]In France, teaching and scholarship are largely reduced to the exposition of the state's laws in "connivence" with the state itself: Philippe Jestaz and Christophe Jamin, "L'entité doctrinale française", D.1997.Chron.167: 172 ("*connivence*"). To my knowledge, such a critique of French legal academia by two prominent French legal scholars—what by the light of local standards of obsequious collegiality would have been perceived as a vitriolic attack—remains well-nigh unique. It is, in fact, so inhabitual that even these academics' subsequent publications fail to sustain it.

allowed to be doing, and what he is desired not to be doing. If it were a matter of a sentence to say, then, I would claim that in the way in which it is structured with a view to promoting a certain set of beliefs about the passivity of the French judge, and given the manner in which these beliefs are obediently disseminated by legal agents, the French institutional system tells a resounding lie. The empirical fact is that the French judge is not passive but active, that he is politically active also, every word of the way—all strategies of dissimulation notwithstanding.

Appendix I

French Legal Culture and the Preponderance of Formalism

I must begin with a few words about what the French know as the "*concours d'agrégation*" ("the aggregation competition"). A mid-nineteenth-century institution, the "*agrégation*" (the Latin source means "herd" or "flock" as in "gregarious") is relentlessly—and unquestioningly—promoted in France as the "incarnation of the egalitarian ideal"; specifically, "[t]he *concours d'agrégation* uproots candidates from what is vaguely felt as evil (the provinces, the land, the local particularisms) to transform them completely into missionaries of the public spirit and of the state".[74] In law, the two major "*concours*" concern private law ("*droit privé*"), held every other year, and public law ("*droit public*"), conducted on a quadrennial basis (incidentally, such structure assumes an evident and meaningful distinction between the two spheres). For each "*concours*", the jury consists of a president directly appointed by the state, who selects six fellow jurors (who must be confirmed by the state). A "*concours*" spans an entire academic year during which each of the candidates, barring elimination along the way, undergoes four examinations, all of them oral. At the end of the year, a ranking of successful candidates is issued. A characteristic feature of a "*concours*" is that the list of successful candidates is made to match exactly the number of vacant posts. If, in response to the many requests submitted by the various French law schools, the state has authorized thirty professorships in private law to be opened in a given academic year, the relevant "*concours*" will generate thirty successful candidates exactly, ranked (publicly) from one to thirty. In the order of their rank, the new "*agrégés*" ("aggregated individuals")—those who, literally, are joining the herd or flock—then proceed to select the law school where they want to teach. Importantly, the law schools themselves have no say whatsoever in the selection of posts by *agrégés*, the controlling idea being, again, to avoid localism. As often as not, the last-ranking candidate will inherit a post in one of the universities located in France's overseas departments, such as La Réunion (*Université de la Réunion*) or the French West

[74]Vincent Descombes, *Le Même et l'autre* (Paris: Editions de Minuit, 1979): 16 ("*incarnation de l'idéal égalitaire*"/"*le concours d'agrégation arrache les candidats à ce qui est vaguement ressenti comme le mal (les provinces, les terroirs, les particularismes locaux) pour les métamorphoser en missionnaires de l'esprit public et de l'Etat*").

Indies and French Guiana (*Université des Antilles et de la Guyane*). On account of state regulations, it is impossible to move from one's chosen post, except with special permission, for an initial period of three years. Being a public servant, each "*agrégé*", now a "*professeur des universités*" ("professor in the universities"), can decide to occupy the chosen professorship until retirement. Very many do.

Allowing for the fact that exemplarity is never simple in as much as it entails its elisions, its conflations, that is, its folds—the case of Julie Klein, who placed first in the 2011 "*agrégation*" in private law, is instructive in a number of respects. Before all else, one must be clear that in France to rank first at the "*agrégation*" is a most signal honour that attaches to one for the entire duration of one's career. In a country where there is no tradition of prestigious scholarships, this distinction is, in effect, the greatest badge of recognition available to a young academic. Now, amongst the many signals it sends, the conferment of the first rank at the "*agrégation*" acts as a heightened form of institutional validation of the candidate's (necessarily anterior) doctoral dissertation. In fact, the doctorate is very much the exclusive or near-exclusive focus of the first "*agrégation*" examination. While this examination bears on all of the candidate's written work, it is unlikely that anyone will have written anything apart from a doctorate, except perhaps one or two case-notes, if only because French law professors actively discourage early publication. For various reasons revolving around the perceived inadequacy of the doctoral dissertations under consideration, a substantial number of candidates fail at this preliminary stage. To be sure, the candidate who will, in time, be ranked first by the jury will have had to offer not only what counts in the eyes of the jurors as an excellent doctoral dissertation, but will also have had to deliver superior performances in the other three "*agrégation*" examinations. Yet, it remains fair to say that no one can conceivably rank first at the "*agrégation*" without the jury deeming the candidate's doctorate to be excellent. In other words, Klein's doctorate, given the official recognition that she earned at the "*agrégation*", offers a compelling indicator of what the French academic establishment values as a noteworthy exercise in the construction of legal knowledge and, indeed, as meritorious legal scholarship. As I shall argue presently, this doctorate also attests to French academia's unstinting commitment to unalloyed formalism.

Klein's 644-page typewritten dissertation, which she wrote at a leading Paris law school and defended in May 2010, is entitled, *Le Point de départ de la prescription*, or "The Starting-Point of Limitation Periods". As befits French legal scholarship, the argument is divided into two parts. These are respectively entitled, "*Le constat du désordre*", or "Attesting to Disorder", and "*La mise en ordre*", or "Putting Into Order". In a legal culture where formal aesthetics is most highly valued, neither the semantic contrapunct nor the assonance are accidental. The first part of the dissertation offers a detailed inventory of the various points of departure of the different limitation periods to be found in French private law and is supplemented by a fifteen-page chart tabulating this data; the second part aims at a rationalization of the author's findings. In this regard, Klein adopts what she styles a "functional" approach, which prompts her to reject the idea of a unitary function or goal that would characterize all limitation periods under scrutiny. Rather, she asserts that one

must accept that different limitation periods fulfil different functions. Klein then articulates those functions under two headings according to whether they are common to all limitation periods or specific to given limitation periods (pp. 507–581 and 475–505, respectively). She identifies three instances—the question of statutory warranties; the matter of professional liability; and the cases having to do with the avoidance of the debtor's ruin—where the limitation period's function can properly be said to be specific. Her conclusions, which are summarized over three-quarters of a page in the epigrammatic mode typical of the peremptory and formulaic French civil code, are meant to operate *de lege ferenda*. They enunciate a general proposition to the effect that the limitation period would start to run "from the origin of the right to sue" (p. 589: "*à compter de la naissance du droit d'agir*"). This statement is followed by three further provisions that would govern the three exceptions mentioned previously with respect to which three specific criteria would obtain.

Apart from an early literary allusion to Flaubert and a perfunctory nod to Henri Bergson's work on time (though it fails to earn a quotation)—two French, established, "safe" figures—the dissertation does not include any source material from any discipline other than law (as traditionally understood in France). Just as typically, the text does not, if one excepts half a dozen cursory references or so, purport to address any law other than French law. Some of the rare mentions of foreign law are strikingly outdated, not to say embarrassingly ill-informed, as when a French comparatist writing in 1970 is quoted as saying that "for the English, the law consists […] essentially of rules of procedure" (p. 461, not. 2: "*pour un Anglais le droit consiste […] essentiellement en des règles de procédure*"). (The fact that such a reductive assertion would not alarm Klein's supervisor says much concerning the knowledge that circulates about foreign law within French law schools, on the one hand, and reveals the utter lack of interest in the matter shown by French law professors, on the other. Indeed, after fifteen years of teaching "comparative law" in Paris, I have come to the firm conclusion that the local significance of this undertaking ranks on a par with what I can imagine to be the relevance of the teaching of "The Thought of Simone de Beauvoir" in Khartoum or of "Oceanography" in La Paz.)

In sum, Klein's doctoral dissertation is thoroughly "French legal", that is, it is informed by an abiding respect for the clear semiotic boundaries assumed to be afforded by disciplinary palisades, a deep concern for the kind of doctrinal exposition that allows her to remain homogeneous with the existing discursive hegemon through the re-organization of extant information into new forms located well within the doctrinal box, and a keen preoccupation with systematic integrity and logical rectitude. Having mortgaged her thesis, in the names of certainty and predictability, to the ideas of conceptual amelioration and formalist reconciliation, Klein externalizes all other discourses, whether originating from other fields or other laws. Meanwhile, her text is profoundly animated by a formalistic epistemological drive as revealed by her relentless desire for enhanced terminological clarity, improved logical consistency, and reinforced systematic coherence—that is, for optimized formalization of the law. It is precisely that effort that the 2011 "*jury d'agrégation*" in private law proceeded to reward in such compelling terms thus reminding observers of what matters as a matter of French law.

Appendix II

Cour de cassation
Chambre civile 3
Audience publique du mercredi 17 décembre 1997
N° de pourvoi: 95-20779
Publié au Bulletin **Rejet.**

Président: M. Beauvois, président
Rapporteur: M. Toitot, conseiller rapporteur
Avocat général: M. Weber, avocat général
Avocats: la SCP Waquet, Farge et Hazan

Texte intégral
REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS

Sur le moyen unique

Attendu, selon l'arrêt attaqué (Paris, 22 mars 1995), que Mme Z… a donné un appartement à bail à M. X…; qu'après le décès du locataire, son ami, M. Y…, qui vivait avec lui et était demeuré dans les lieux, a assigné la bailleresse en transfert du bail à son profit;

Attendu que M. Y… fait grief à l'arrêt de le débouter de sa demande, alors, selon le moyen, qu'aux termes de l'article 26 du Pacte international relatif aux droits civils et politiques, publié par décret n° 81-76 du 29 janvier 1981, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe,… ou de toute autre situation; qu'en estimant que l'article 14 de la loi du 6 juillet 1989, qui dispose que « lors du décès du locataire, le contrat de location est transféré (…) au concubin notoire (…) qui vivait avec lui depuis au moins 1 an à la date du décès », ne visait que le cas de concubinage entre un homme et une femme, alors que ce texte ne contient aucune restriction autre que celle tenant à la durée du concubinage, la cour d'appel a violé les textes précités, ensemble l'article 8, alinéa 1er, de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales;

Mais attendu qu'ayant retenu, à bon droit, que le concubinage ne pouvait résulter que d'une relation stable et continue ayant l'apparence du mariage, donc entre un homme et une femme, la cour d'appel n'a violé ni l'article 26 du Pacte international relatif aux droits civils et politiques, ni l'article 8, alinéa 1er, de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales;

D'où il suit que le moyen n'est pas fondé;
PAR CES MOTIFS:
REJETTE le pourvoi.

Appendix III

Cour de cassation
Civil Chamber 3
Public Hearing of Wednesday 17 December 1997
Petition No.: 95-20779
Published in the *Bulletin*[75] **Rejection**.

President: Mr Beauvois, President
Reporter: Mr Toitot, Reporting Judge
Advocate General: Mr Weber, Advocate General
Lawyers: SCP Waquet, Farge & Hazan

Full Text
THE FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

On the single ground

Whereas, according to the challenged decision (CA Paris, 22 March 1995), Mrs Z… leased an apartment to Mr X…; after the death of the tenant, his friend, Mr Y…, who lived with him and had remained on the premises, sued the landlady for [being granted] the transfer of the lease to his benefit;

Whereas Mr Y… claims against the decision to refuse his request even as, according to the ground, pursuant to article 26 of the International Covenant on Civil and Political Rights published by decree no. 81-76 dated 29 January 1981, the law must prohibit all discrimination and guarantee all persons an equal and efficient protection against all discrimination, for instance that arising from race, color, sex, … or from any other circumstance; in estimating that article 14 of the statute dated 6 July 1989, which lays down that "upon the death of the tenant, the contract of lease is transferred (…) to the recognized cohabitee (…) who had lived with him for at least 1 year at the time of death", concerned the case only of concubinage between a man and a woman, while this text contains no limitation other than that concerning the duration of the concubinage, the appeal court has violated the aforementioned texts together with article 8, paragraph 1, of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

But whereas having held, lawfully, that the concubinage could result only from a stable and continuous relationship having the appearance of marriage, therefore between a man and a woman, the appeal court has violated neither article 26 of the International Covenant on Civil and Political Rights nor article 8, paragraph 1, of

[75]The *Bulletin des arrêts des chambres civiles* is one of the court's official law reports. Only a fraction of the total number of decisions are retained for publication in the *Bulletin* every year. Unofficially, these are the only judgments that are deemed to be worthy of reference as a matter of law.

the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Whence it follows that the ground is not well-founded;

FOR THESE REASONS:

REJECTS the petition.