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The Dual Rationale of Judicial Independence

Abstract

This paper considers the rationale of judicial independence in constitutional discourse. A look at the expression of this principle in normative instruments of various periods and sources shows how the universal requirement of independent adjudicators, which aims at ensuring justice in particular cases, and the widely shared desideratum of a powerful judiciary with "a will of its own", aimed at checking the exercise of power by the political branches, provide two distinct and largely independent grounds for protecting judicial independence. These grounds overlap in many respects but must be distinguished in order satisfactorily to work out the detailed requirements of independence in particular scenarios. This has become pressing in the current context where adjudication is more and more often entrusted to tribunals whose members are not part of an institutionalized judiciary and where the state itself is more generally losing ground in the governance of human affairs.

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The Dual Rationale of Judicial Independence

by Fabien Gélinas[*]

Introduction

The notion that democracy and human rights are best safeguarded by judicial review of legislation under constitutional instruments has now become dominant in constitutional discourse.[1] The number of countries in which the constitution provides for judicial review of legislation went from a mere handful in the nineteen-thirties[2] to roughly half of the countries today.[3] More recently, there has been a distinct growth in the number and importance of international courts and tribunals,[4] whose role and normative output is now often viewed through the lens of constitutionalization.[5] While the importance of courts and tribunals in the governance of human affairs seems unprecedented, judicial independence remains surprisingly under-theorized. Judicial independence scholarship has been mostly local in scope and outlook; comparative and transnational approaches are relatively recent. This state of affairs

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[*] Faculty of Law and Institute of Comparative Law, McGill University.

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[1] For an exposé and criticism of this notion, see Richard Bellamy, *Political Constitutionalism: A Defence of the Constitutionality of Democracy* (Cambridge, CUP, 2007).

[2] Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judge: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), p. 135.

[3] Ran Hirschl, *Toward Juristocracy : The Origins and Consequences of the New Constitutionalism* (Cambridge, MA : Harvard University Press, 2004), at p. 1. In this comparison, one should bear in mind that the numbers are affected by the post-war de-colonization movement and concentrate on the formal powers of courts.

[4] On the proliferation of international tribunals, see Cesare P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", (1999) 31 N.Y.U. J. Int'l L. & Pol. 709, 710, 711-23.

[5] See, for example, Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: OUP, 2009).

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has created much confusion in the way we understand and invoke the reasons why judicial independence should be fostered as a matter of political and legal principle.

This paper briefly considers the rationales of judicial independence as they appear in legal and constitutional discourse and sheds light on the distinction between, on one side, the requirement conveyed by the maxim that one ought not to be a judge in one's own cause, which enjoys near-universal recognition as an essential pre-requisite of adjudication, and, on the other side, the separation of powers requirement of a judiciary with "a will of its own", which is widely viewed as an effective check on the abuse of power by the political branches. Recognizing this distinction has become pressing in the current context where adjudication is more and more often entrusted to tribunals, often arbitral tribunals, whose members are not part of an institutionalized judiciary[6] and where, more generally, the role of the state in the governance of human affairs may be decreasing.

1. A Global Perspective on Judicial Independence

Both the Universal Declaration of Human Rights[7] and the International Covenant on Civil and Political Rights[8] guarantee the right to an "independent and impartial tribunal". These rights represent a general international consensus on a principle that is expected to be recognized and implemented in all domestic legal systems. Before looking at the possible content of a guarantee of judicial independence, a few remarks on sources and terminology are in order.

1.1 Sources and Terminology

There are obviously many ways of approaching the subject of judicial independence. It would be well beyond the modest scope of this paper to offer even a superficial account of judicial independence from the perspective of any particular legal or political system. At the same time, it is not my intention entirely to detach the analysis from the decisions human societies have reflectively made and continue to make in respect of independence. In other words, this paper is the result of an exercise in the kind of analysis which builds on past and existing normative practices.

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[6] On the relative dearth of scholarly attention dedicated to the independence and impartiality of international tribunals, see Ruth Mackenzie and Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge", (2003) 44 Harvard International Law Journal 271.

[7] *Universal Declaration of Human Rights* (Paris: 1948). See article 10. [hereinafter Universal Declaration]

[8] *International Covenant on Civil and Political Rights* (New York: Adopted: 1966 - Effective: 1976) See article 14. [hereinafter International Convenant]

The paper adopts a high-level global perspective that relies partly on secondary scholarly sources within the disciplines of comparative law and comparative politics. Much of the scholarship is relatively recent, but it does offer a satisfactory starting point.[9]

This scholarship can be said to have tracked a parallel and sometimes overlapping international movement which, beginning in the early nineteen-eighties, produced an impressive series of international soft-law instruments on judicial independence. These instruments represent useful resources for analysis as they may be said to embody the accumulated wisdom of domestic laws developed over the years and across borders in a reflective, normative mode that takes account of both aspirations and realities. Among the organizations involved in the preparation of these instruments were the International Association of Penal Law, the International Commission of Jurists, the LAWASIA Human Rights Standing Committee, the International Bar Association, the Conference of Chief Justices of Asia and the Pacific Region, the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association the Council of Europe, the Arab Center for the Independence of the Judiciary and the Legal Profession, the Center for the Independence of Judges and Lawyers, the United Nations High Commissioner for Human Rights, the United Nations Development Program and the United Nations General Assembly.[10]

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[9] The most comprehensive survey of judicial independence is, still, Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Dodrecht/Boston/ Lancaster: Martinus Nijhoff Publishers, 1985). See also András Sajó (ed.), *Judicial Integrity* (The Hague, Martinus Nijhoff Publishers, 2004). A number of national reports on judicial independence were presented at the congress of the International Academy of Comparative Law in July 2006 but these have not been the object of a systematic publication. For a recent collection of essays focusing on accountability *vis-à-vis* independence, see Guy Canivet, Mads Andenas & Duncan Fairgrieve (eds), *Independence, Accountability, and the Judiciary* (London : British Institute of International and Comparative Law, 2006). For an interdisciplinary collection of essays with a United States American perspective, see Stephen B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, CA: Sage Publications, 2002). A survey of judicial independence was recently conducted under the aegis of the Organization for Security and Cooperation in Europe and will be published in 2011: Anja Seibert-Fohr, ed., *Judicial Independence in Transition* (New York: Springer, 2010).

[10] This is a list of the instruments that were considered in the preparation of this paper: the *Syracuse Draft Principles on the Independence of the Judiciary, 1981* (International Association of Penal Law and International Commission of Jurists); the *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region, 1982* (LAWASIA Human Rights Standing Committee); the *International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982* (International Bar Association) [*IBA Code*]; the *Montreal Universal Declaration on the Independence of Justice, 1983* (World Conference on the Independence of Justice); the *UN Basic Principles on the Independence of the Judiciary, 1985* (General Assembly endorsement) [*UN Basic Principles*], the *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995* (Conference of Chief Justices of Asia and the Pacific Region) [*Beijing Statement*], the *Latimer House Guidelines on*

As concerns terminology, beyond the right to an "independent and impartial tribunal" mentioned in the United Nations human rights instruments, there is no uniform terminological framework for independence and impartiality considered on a global plane. Two of the most common difficulties in this respect are briefly addressed here.

The first difficulty relates to the distinction between independence and impartiality. Independence is often taken to refer to the external or ascertainable characteristics of an adjudicator or tribunal while impartiality is understood as referring to a state of mind or disposition. This distinction is not universally shared.[11] The European Court of Human Rights, for example, has tended to treat both notions together, finding it difficult to dissociate them and wishing to avoid complications viewed as unnecessary.[12] The Court, however, makes use of the distinction between "subjective" and "objective" impartiality.[13] Objective impartiality overlaps with the concept of institutional independence I shall introduce in a moment. Similarly, the comment under Principle 1 of the ALI/Unidroit Principles of Transnational Civil Procedure links the two notions as follows: "Independence can be considered a more objective characteristic and impartiality a more subjective one, but these attributes are closely connected."[14] Even though, in specific adjudicative contexts, independence essentially works to ensure impartiality, it is important to bear in mind that it is possible for an adjudicator to be impartial without being independent, and *vice versa*. Indeed, this is an important issue for international tribunals because the question of the extent to which independence may be waived or overlooked where impartiality is affirmed will often arise in practice. The distinction was discussed in 1945 at the San Francisco Conference with respect to the International Court of Justice, where the following conclusion carried the day: "it is important that the judges of the court should be not only impartial but also independent of control by their own countries or

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Parliamentary Supremacy and Judicial Independence, 1998 (Commonwealth Parliamentary Association, Commonwealth Magistrates' and Judges' Association, Commonwealth Lawyers' Association and Commonwealth Legal Education Association) [*Latimer House Guidelines*]; the *European Charter on the statute for judges, 1998* (Council of Europe) [*European Charter*]; the *Beirut Declaration 1999* (First Arab Justice Conference, Arab Center for the Independence of the Judiciary and the Legal Profession, in cooperation with the Center for the Independence of Judges and Lawyers) [*Beirut Declaration*]; and the *Cairo Declaration on Judicial Independence 2003* (Second Arab Justice Conference, Arab Center for the Independence of the Judiciary and the Legal Profession, in cooperation with the United Nations High Commissioner for Human Rights and the United Nations Development Program).

[11] See, generally, Leon Trakman, "The Impartiality and Independence of Arbitrators Reconsidered" (2007) 10 International Arbitration Law Review 999.

[12] See, *e.g.*: *Langborger v. Sweden,* 22 June 1989, § 32, Series A no. 155.

[13] See, *e.g.*: *Morel v. France,* 6 June 2000, no. 34130/96, ECHR 2000-VI.

[14] American Law Institute/Unidroit Principles of Transnational Civil Procedure, P-1A.

the United Nations Organization".[15] Unless otherwise indicated, I shall use the term independence to cover requirements of both impartiality and independence.

The second difficulty refers to the distinction between "personal", or "individual", independence and "institutional" independence. The distinction is useful in understanding the appropriate target of the legal requirements associated with the principle of judicial independence. These requirements are generally applied to adjudicators serving in a public capacity, taken individually. This is the personal, or individual, dimension of independence. There is also, in many settings, an "institutional" dimension to these requirements. To give an example, a legal guarantee of administrative autonomy may refer not only to the power of judges to control the proceedings before them and to impose the necessary decorum in the courtroom, but also to the power of courts or tribunals to manage caseloads and control their staff.

It may well be that the idea of institutional independence is modelled after that of personal independence. However, widespread reliance upon a criterion of appearance has made the two ideas difficult to disentangle: the lack of independence of a court will automatically affect the appearance of every one of its judges' impartiality.

1.2 Requirements of Judicial Independence

A careful review of the existing literature and normative materials that examine independence and impartiality from a comparative or global perspective enables one to sketch, in broad strokes, an outline of the substantive requirements of independence for domestic courts.

When formulated at a sufficiently high level of abstraction, the following requirements can be said to capture the principle of judicial independence as we know it in the domestic context: neutral appointment, security of tenure, financial independence and administrative autonomy.[16] These requirements have both a personal and an institutional mode or dimension. They are not universally imposed by domestic legal systems, let alone guaranteed by written or unwritten constitutional

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[15] Summary Report of the 7th meeting of Committee IV/1, UNCIO XIII, p. 174. A more recent internationally influential statement of the distinction can be found in United Nations Sub-Commission of the Human Rights Commission focusing on judicial administrations, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, U.N. ESCOR, 38th Sess., Agenda Item 9(c), U.N. Doc. E/CN.4/Sub.2/1985/18 & Add.1-6 (1985), §§ 76-79.

[16] See for example Andrew T. Guzman, "International Tribunals: A Rational Choice Analysis", *U. Penn. L. R.*, (forthcoming), available on SSRN, abstract 1117613, text accompanying notes 100-02 ("All commentators agree that rules governing selection and tenure, financial and human resources, and perhaps even the trappings of the institution and the judicial role are relevant").

norms, and they are probably not fully met in any legal system. Indeed, "[t]here are remarkable differences in the components or elements of judicial independence that liberal democracies find most important and in the arrangements they put in place for securing its various components."[17] Nevertheless, each of the requirements I outline here is instantiated in many legal systems and each is recognized to some degree in the international soft law instruments on judicial independence. Taking account of the two dimensions of independence, the requirements are as follows:

- *Neutral appointment* in its personal dimension calls for a nomination and appointment process focused on competence and integrity that is detached from expectations as to adjudicative outcomes.[18] The institutional dimension of the requirement calls for participation, or at least consultation, of judges in the nomination or the appointment process.[19]

- *Security of tenure* in its personal dimension demands a sufficiently long term of appointment,[20] as well as safeguards against the consideration of past adjudicative outcomes or adjudicative orientation in any renewal process. The institutional dimension of this requirement refers to the institutional protection of established tribunals.[21] It calls for safeguards against inappropriate institutional tampering by the political branches.[22]

- *Financial security* means the assurance of a minimum salary for judges fixed at a level that is compatible with the dignity of their function and safeguards against salary determination exercises that take adjudicative orientation into

[17] See Peter H. Russell, "Toward a General Theory of Judicial Independence" in Russell & David M. O'Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville/London: University Press of Georgia, 2001) 1, 2-3.

[18] See *UN Basic Principles*, art. 10; *Beijing Statement*, art. 12; *Beirut Declaration*, art. 11; *European Charter*, art. 2.1; *Latimer House Guidelines*, art. II.1.

[19] See *Beijing Statement*, art. 15; *European Charter*, art. 1.3; *IBA Code*, art. 3(a). Note that this requirement is particularly recent, if at all recognised in systems which share British heritage.

[20] See *UN Basic Principles*, arts 12 and 18; *Beijing Statement*, arts 18, 21, and 22; IBA Code, art. 22.

[21] See *UN Basic Principles*, art. 5 (providing that "Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals"); *Beijing Statement*, art. 29; *IBA Code*, arts 18(b), 21.

[22] Roosevelt's well-known court-packing plan of 1937, whereby he threatened to increase the number of Supreme Court judges to secure the majority he thought was needed to get his reform plan through constitutional review, is probably the best example of the kind of vulnerability that this addresses. The story and its consequences are related in Henry J. Abraham, "The Pillars and Politics of Judicial Independence in the United States" in Peter H. Russell & David M. O'Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville/London: University Press of Georgia, 2001) 25, 32-33; see also *Beijing Statement*, arts 38-40; *Beirut Declaration*, art. 3; *IBA Code*, arts 2, 16, and 24 (providing that "The number of the members of the highest court should be rigid and should not be subject to change except by legislation.").

account.[23] The requirement of financial security sometimes includes the institutional assurance of a depoliticized salary and benefits determination process with input from the judiciary.[24]

- *Administrative autonomy* refers to control of the proceedings by the judge, including matters of access and decorum. At the institutional level,[25] it often calls for consultation or participation of the judiciary in the relevant processes of envelope and budget determination[26] and requires that the main responsibility for court administration, including the management of caseloads, communications, outreach and human resources, rest with judges.[27]

As we shall see, these requirements are understood differently depending on the extent to which independence focuses on the litigants in a particular setting or depend upon broader considerations.

2. Rationales for Judicial Independence

Judicial independence has been associated with a surprising variety of normative purposes in the many contexts in which it has been invoked. To name but a few, judicial independence has been described as a means to "fairness embedded in due process"; [28] it has been listed as a requirement of the rule of law by the World Bank[29]

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[23] See *UN Basic Principles*, art. 11; *European Charter*, art. 6.1; *IBA Code*, art. 15; *Latimer House Guidelines*, art. II.2.

[24] See *Beijing Statement*, art. 31; *Beirut Declaration*, art. 2; *IBA Code*, art. 14; *Latimer House Guidelines*, art. II.2.

[25] The institutional dimension of administrative autonomy writ large is an evolving concept. A recent report commissioned by the Canadian Judicial Council defines administrative autonomy, based on case law, as a constitutional requirement: Carl Baar, Karim Benyekhlef, Fabien Gélinas, Robert Hann & Lorne Sossin, *Alternative Models of Court Administration*, Ottawa: Canadian Judicial Council, 2006, available at: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_Alternative_en.pdf>. One of the oldest cases dealing with administrative autonomy is *Bridgman v. Holt* (1693), Shower P.C. 111, where the question at issue was whether the right to appoint to the office of chief clerk belonged to the Crown or to the Chief Justice. Chief Justice Holt is said to have sat as one of the litigants in his own court and to have refused to participate in the decision. See Paul Jackson, *Natural Justice* (London: Sweet & Maxwell, 1979), at p. 27-28.

[26] See *Beijing Statement*, art. 37.

[27] See also *UN Basic Principles*, art. 14; *Beijing Statement*, arts. 35 and 36; *Beirut Declaration*, art. 9; *IBA Code*, arts. 9, 11.

[28] Edward L. Rubin, "Independence as a governance machine" *in* Stephen B. Burbank; Barry Friedman (eds.), *Judicial Independence at the Crossroads: an Interdisciplinary Approach* (Thousand Oaks, Calif.: Sage Productions, 2002) 69, at p. 77.

[29] Matthew Stephenson, Brief: "Judicial Independence: What It is, How It Can Be Measured, Why It Occurs", online: World Bank <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialIndependence.pdf>.

as well as by legal theorists;[30] it has been described as an essential ingredient of adjudication in dispute resolution theory;[31] it has often been conflated with the separation of powers;[32] it has even been described as a means to "a just and prosperous society".[33] Having taken the measure of this extraordinary confusion, one may well be tempted to discard the concept as, at best, useless. However, looking back on the evolution of the notion through time should help lift some of that confusion.

2.1 *Iudex in Propria Causa*: Adjudication Takes Three

The concept of independence in adjudication has ancient roots and can be traced back to documents in the earliest writing systems. One of the first documented expressions of the concept, which goes back to Egypt's First Intermediate Period, can be found in a king's instructions to his son.[34] A later inscription reproduces Pharaoh Thutmosis III's instructions to his vizier, who acted as chief magistrate:

> It is an abomination of the god to show partiality. This is the teaching: thou shalt do the like, shalt regard him who is known to thee like him who is unknown to thee, and him who is near… like him who is far… an official who does like this, then shall he flourish greatly in the place. Do not avoid a petitioner, nor nod thy head when he speaks.[35]

This tradition is also documented in Babylonian inscriptions,[36] and may well have influenced, directly or otherwise, the development of Roman legal conceptions.[37]

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[30] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), at p. 217.

[31] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353, at p. 365. [hereinafter Fuller, Forms and Limits]

[32] Eli M. Salzberger, "A Positive Analysis of the Doctrine of the Separation of Powers, or: Why Do We Have an Independent Judiciary?" (1993) 13 International Review of Law and Economics 349, at p. 349.

[33] *Monitoring the EU Accession Process: Judicial Independence* (Budapest, Hungary; New York: Central European University Press, 2001), at p. 18.

[34] "Instructions addressed to Merikere" *in* James Henry Breasted, *The Dawn of Conscience* (New York; London: Charles Scribner's Sons, 1934), at p. 155.

[35] James Henry Breasted, *Ancient Records of Egypt*, vol. 2 (London: Histories & Mysteries of Man Ltd., 1988 (Reprinted - 1907)), at p. 269, section 668.

[36] Wilfred G. Lambert, *Babylonian Wisdom Literature* (Oxford: Clarendon Press, 1960). pp. 130-133, verses 92-99.

[37] On the circulation of legal information from Egypt to Europe, see generally Pier Giuseppe Monateri, "Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition" (2000) 51 Hastings L. J. 479.

The classical statement of impartiality and independence in the Justinian *Codex* focusses on the notion that one cannot be one's own judge: *neminem sibi esse iudicem vel ius sibi dicere debere* (no one shall be his own judge or decide his own case).[38] The Digest, likewise, states that *iniquum est aliquem suae rei iudicem fieri* (it is unfair to make someone judge in his own affairs).[39] In such cases *recusatio* (recusation) was available, at least in respect of one class of judges,[40] but the law otherwise had no term for impartiality.[41] It proceeded, rather, by association from the idea of judging one's own cause to that of *making* the cause one's own: *iudex qui litem suam fecerit*, which was a quasi-delict.[42] Making the cause one's own meant "acting with partiality, deliberately favouring one side".[43] The notion was otherwise rendered by the term *suspicio*: *tamen sine suspicione omnes lites procedere nobis cordi est* (we are anxious that all lawsuits shall be conducted without any suspicion).[44]

This notion of independence made its way into European legal conceptions through the Digest and the developments of canon law, though it also likely took other routes, literary and philosophical, as an independent moral imperative.[45] In France, since

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[38] Justinian *Codex* 3.5,1 imperial decree of year 376. English translation of the Justinian Codex from Fred H. Blume, "Annotated Justinian Code", edited by Timothy Kearley, 2nd edition, online: University of Wyoming <https://uwacadweb.uwyo.edu/blume%26justinian/> [hereinafter Blume].The title is *ne quis in sua causa judicet vel jus sibi dicat*. (no one shall be judge in his own cause). Note that the older *Codex Theodosianus* appears to derive this principle from the rule that no one should be allowed to testify for oneself (II.2.1): *Promiscua generalitate decernimus neminem sibi esse iudicem debere. Cum enim omnibus in re propria dicendi testimonii facultatem iura submoriverint, iniquum ammodum est licentiam tribuere sententiae* (We decree as a general law that no one ought to be his own judge. As the law denies everyone the right to testify for oneself, it is very unjust to give one the liberty to give judgment [for oneself]).

[39] Digest 5.1.17. Unless otherwise indicated, Digest references are from: *The Digest of Justinian,* Latin text edited by Theodor Mommsen with the aid of Paul Krueger; English translation edited by Alan Watson, V.I (Philadelphia, Penn.: University of Pennsylvania Press, 1985), at pp. 166-167. [hereinafter Digest]

[40] In is unclear whether recusation was available in respect of ordinary judges, as opposed to delegated judges. On the controversy opposing Bulgarus and Martinus at the University of Bologna, see Boris Bernabé, *La récusation des juges : étude médiévale, moderne et contemporaine* (Paris: LGDJ - Montchrestien, 2009), at p. 39. [hereinafter Bernabé]

[41] *Ibid* at p. 14.

[42] Justinian's Institutes, 4.3.

[43] Olivia Robinson, "The '*iudex qui litem suam fecerit*' explained" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (rom. Abt.)*, vol. 116, 195, 197. For a comprehensive analysis of the scope of this quasi-delict, see Eric Descheemaeker, "Obligations quasi ex delicto and Strict Liability in Roman Law" (2010) 31 Journal of Legal History.

[44] See Justinian *Codex,* 3.1.16. English translation from Blume, *supra* note 38.

[45] The imperative may be said to have formed part of public consciousness before forming part of juridical science: Georges Del Vecchio, *La Justice - La Vérité* (Paris: Dalloz, 1955), at p. 129. For biblical references, see Exodus 23, 3-8; Levit 19, 15; Deuteronomy 16, 19.

medieval times, adjudicative independence has been observed through the lens of recusation, a procedural practice which canon law had embraced,[46] and which can be traced, in France, to jurisdictional decisions of parliaments as far back as 1259.[47] At about the same time in England, Bracton mentions the causes of recusation in his *De Legibus*, apparently relying in so doing on canon law sources, which also developed the treatment of adjudicative independence around the procedural vehicle of recusation.[48]

Later on in France, the practice of recusation was clarified by an Edict of 1493, and in 1667, under Louis XIV, came to be incorporated in a broad-ranging Edict on procedure known as *Code Louis*.[49] Throughout these and subsequent codifications, the focus was kept on the legal grounds of recusation. In English Law, "at least as early as the fourteenth century, common law judges were held to be incompetent to hear cases in which they were themselves party".[50] However, the common law was showing a marked reluctance to recognizing the challenge of judges and with it the canon law sources that Bracton had attempted to import.[51]

This reluctance took attention away from the detailed conditions of recusation and facilitated a return to principle. The law turned its attention back to the Digest and developed directly from general principle, independently from canon law. That a

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[46] The relevant canons in the 1917 codification were 1613 and 1614: *Codex Iuris Canonici*. For the relevant canons in the codification of 1983, see: *Codex Iuris Canonici* (Auctoritatae Ioannis Pauli PP. II Promulgatus Datum Romae: 1983). Book VII - Processes; Part 1 - Trials in general; Title III - The discipline to be observed in tribunals; Chapter 1 - The duty of judges and ministers of the tribunal. Can. 1448-1451.

[47] Bernabé, *supra* note 40, at p. 164. Note that it took another two centuries before royal judges could be challenged. Id., pp. 139-148.

[48] On Bracton's reproduction of canon law sources, see D. E. C. Yale, "Iudex in propria causa: an historical excursus" (1974) 33 Cambridge Law Journal 80, at p. 81, note 6. [hereinafter Yale]. See also S.A. de Smith, *Judicial Review of Administrative Action*, 3d ed. (London: Stevens & Sons Ltd, 1973) p. 216 [hereinafter de Smith]. For an English translation of Bracton's *De Legibus Et Consuetudinibus Angliae* (written between 1250 and 1258), refer to Henry de Bracton (1210-1268), *Bracton on the laws and costums of England.*, vol. 4 (Cambridge, Mass.: Belknap, in association with the Selden Society, 1968-1977) at p. 281. Also, note that the grounds of recusation in canon law today are the same as in Bracton's days: "Can.1448 §1. A judge is not to undertake the adjudication of a case in which the judge is involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line or by reason of trusteeship, guardianship, close acquaintance, great animosity, the making of a profit, or the avoidance of a loss."

[49] Ordonnance de Louis XIV du mois d'avril 1667, Titre XXIV, *in* Marc-Antoine Rodier, *Questions sur l'Ordonnance de Louis XIV, du mois d'avril 1667, relatives aux usages des cours de Parlement, et principalement de celui de Toulouse* (Paris : Birosse, 1761), p. 475ff.

[50] de Smith, *supra* note 48, at p. 216.

[51] *Id.*, at p. 217. The reluctance may be attributed in part to the medieval system of grants of jurisdictional franchise, wherein the grantee often found himself judge and party. See Yale, *supra* note 48, at p. 84.

judge at common law could not sit in a matter in which, though not formally a party, he had a direct financial interest, was recognized as early as 1563. But it took a long time before this could be said to rest on firm ground.[52] Edward Coke played a crucial role in establishing the idea that one ought not to be a judge in one's own cause as a fundamental principle. In *Dr Bonham's Case*, considering the power of the College of Physicians to prosecute, to judge and to fine its members, he wrote that the censors of the College could not be ministers, judges and parties, "*quia aliquis non debet esse judex in propria causa, imo iniquum est aliquem sui rei esse judicem*" (because no one ought to be a judge in his own cause, it is wrong for anyone to be the judge of his own property).[53] The charter of the College having been granted under an Act of Parliament, Coke went on famously to write that when such an Act "is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void". Whether Coke had in mind a notion we would now call "reading down", a form of interpretation, or, rather, "striking down",[54] the conclusion may well have been the same: "if any Act of Parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his mannor … yet he shall have no plea, to which he himself is party; for has hath been said, *iniquum est aliquem suae rei esse judicem*" (it is wrong to be a judge of one's own property).

The second Latin phrase and the second part of the first Latin phrase quoted above from Coke's report can be found, almost word for word, in the Digest.[55] However, it is the first part of the first phrase, *non debet esse judex in propria causa*, that caught on. It was either coined by Coke[56] or, perhaps, borrowed from a medieval gloss on the Digest. In his *Institutes of the Laws of England*, published in 1627 (after *Dr Bonham's Case*), he calls the phrase a "maxim in law".[57] This "maxim" is the form in which the principle of adjudicative independence was eventually taken up by international law.[58]

[52] *Sir Nicholas Bacon's Case* (1563) 2 Dyer 220b. See also *Earl of Derby's Case* (1613) 12 Co. Rep. 114 and *Day v. Savadge* (1614) Hob. 85.

[53] (1610) 8 Co Rep. 113b, 118.

[54] On this issue, see Theodore F. T. Plucknett, "Bonham's Case and Judicial Review" (1926-1927) 40 Harvard Law Review 30.

[55] Digest, *supra* note 39, Digest 5.1.17., at pp. 166-167.

[56] The formulation is attributed to Coke by Yale, *supra* note 48, at p. 80.

[57] Sir Edward Coke, *The First part of the Institutes of the Laws of England: or, A Commentary upon Littleton* (Philadelphia: R.H. Small, 1853 (First published 1628-1644)), 141a [hereinafter Coke's Institutes]

[58] See Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Grotius, 1987), relating the cases in a chapter entitled "*Nemo debet judex in propria sua causa*", pp. 279-89.

The ancient roots and widespread recognition of the principle quickly led to its endorsement as a general principle of law by international law tribunals.[59] In 1907, the Second International Peace Conference seemed sure of its bearing when it stated that "It is familiar doctrine that a man should not be judge and advocate in his own cause, and this provision obtains in all systems of national jurisprudence".[60] From there it was natural for the principle eventually to find its way into international legal instruments such as the Universal Declaration of Human Rights[61] and the International Covenant on Civil and Political Rights.[62] The Universal Declaration, in turn, was the main influence for Article 6.1 of the European Convention of Human Rights,[63] which gave the impetus for a return to general principle in the apprehension of judicial independence in much of Europe.[64]

What does it mean to say that one cannot be a judge in one's own cause? The most obvious common denominator in the adoption of the principle through time was most likely an understanding that adjudication requires a "third" party. It was thus understood as far as the 13th century[65] and is clearly set out by Hobbes among the "laws of nature" in his Leviathan:

> *The seventeenth, no man is his own judge.* And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause; and if he were never so fit; yet equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also;

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59 *Id*. See also Bardo Fassbinder, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Martinus Nijhoff Publishers, 1998), at p. 329 (tracing the sources of the principle for the purpose of international law).

60 Report on the Project concerning the establishment of an international Court of Arbitral Justice, *in* James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (Buffalo, New York: William S. Hein & Co., Inc., 2000). Originally published by Oxford University Press, 1899-1907. See Volume I (Plenary Conference), at p. 362.

61 Universal Declaration, *supra* note 7. See Article 10.

62 International Covenant, *supra* note 8. See Article 14.

63 *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No.14* (Rome: 1950). See generally: Zaim M. Nedjati, *Human Rights under the European Convention* (Amsterdam - New York - Oxford: North-Holland Publishing Company, 1978); Council of Europe, *Collected Edition of the "Travaux Préparatoires"*, vol. I (The Hague: Martinus Nijhoff, 1975).

64 A startling example of this is the decision of the *Première chambre civile* of the *Cour de cassation* of 28 April 1998 (Civ. 1ère, 28 avril 1998, Rapport de la Cour de Cassation, Section Avril, N° 155), which allowed recusation on the sole basis of the Convention even in cases where the ground invoked lies outside the formally exhaustive grounds of recusation provided by the Code of civil procedure (art. 341).

65 Henry Gerald Richardson and George Osbourne Sayles, *Fleta: Edited with a Translation by H.G. Richardson and G.O. Sayles* (London: Selden Society, 1953). Book I, c.17, at p. 35: "Moreover, a judgment is a threefold act of three persons at least, the plaintiff, the judge, and the defendant, without which it cannot in law exist." Fleta was originally published in London, in Latin, circa 1290.

> and so the controversy, and the condition of war, remains, against the law of nature.[66]

This may be referred to as an "adjudication theory" understanding of impartiality and independence: adjudication requires a claim, a claimant, a person against whom the claim is made, and a third party who decides. Lon Fuller would have endorsed this and added a rational basis for the decision as a fifth requirement.[67] This fifth requirement characterizes the kind of adjudication upon which this paper focuses.

Refinements about the meaning of "third party" in this context pertain to the same logic: one may be a third party in the formal sense but nevertheless be assimilated to one of the first two parties because of one's interest in the outcome. The Digest had thus extended the basic principle that one cannot be a judge in one's own cause to cover the cause of others who are related to or associated with the judge: *qui iurisdictioni praeest, neque sibi ius dicere debet neque uxori uel liberis suis neque libertis uel ceteris, quos secum habet* (one who administers justice should not do so in cases involving himself or his wife or his children or his freedmen or others whom he has with him).[68] Hobbes put it as a further law of nature as follows:

> *The eighteenth, no man to be judge, that has in him a natural cause of partiality.* For the same reason no man in any cause ought to be received for arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other; for he hath taken, though an unavoidable bribe; and no man can be obliged to trust him.[69]

This conception of adjudicative impartiality and independence focuses on adjudication as an institution isolated from its broader political and institutional context. It is driven by an understanding of justice that is primarily focused on the litigants. It says little about considerations of justice that go beyond the interests of those litigants.

At the most basic level, therefore, the principle that one cannot be judge in one's own cause reflects a conception of justice in which adjudication is abstracted from its political and institutional context and geared toward the protection of the interests of particular litigants. Thus viewed, adjudicative independence is universally accepted

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[66] Thomas Hobbes, Leviathan (New York: Touchstone, 2008 (first published in 1651)), at p. 117. [hereinafter Leviathan]

[67] Fuller, Forms and Limits, pp. 365-66.

[68] Digest, *supra* note 39, Digest 2.1.10., at p 41-42.

[69] Leviathan, *supra* note 66, at p. 118. This aspect of Hobbes' treatment is reflected in the celebrated formula put forth by Alexandre Kojève: "C is impartial in respect of A and B if his interaction is not altered and cannot be altered solely by the interchange of A and B" (author's translation), in *Esquisse d'une phénoménologie du droit* (Paris: Éditions Gallimard, 1981), at p. 75.

and should be the starting point of any analysis of independence. But the development of state institutions has caused greater emphasis to be laid upon public interest in the administration of justice.

2.2 *Iudex in Propria Causa*: Separating and Strengthening Judicial Power

The notion of a distinct judicial office with responsibility for rendering justice logically pre-dates any notion of the separation of powers considered in respect of three branches. The sense of the dignity and honour of the judicial office has long been associated not only with the importance of its conflict resolution social function, which is timeless, but also with the temporal authority of the emperor, the monarch, and eventually of the state. It is this association which defines the role of public interest in the development of legal concepts such as adjudicative independence. Even though adjudicative independence, at the most basic level, focuses on litigants and their interests, public interest considerations have always played a role in its articulation and implementation.

For example, one may well accept the principle that one cannot be judge of one's own cause and yet defend a rule banning challenges to judges. This is, in fact, exactly what Coke did in his *Institutes*, where, in the same volume, he brings forth his "maxim" that no one ought to be a judge in his own cause, and also asserts that, unlike jurors, judges and justices cannot be challenged.[70] This assertion both reflected and encouraged the common law's reluctance to allow the challenge of judges, which found echo as late as 1765 when Blackstone began publishing his *Commentaries*, wherein Coke's blunt statement is reiterated and explained thus:

> For the law will not suppose the possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[71]

The idea, here, is that the recusation of judges can bring the administration of justice as a whole into disrepute and that the value of safeguarding the authority of judges outweighs the interests of specific litigants. One may well disagree with this, calling

[70] Coke's Institutes, *supra* note 57, at 141a ("'It is against reason, that if wrong be done any man, that he thereof should be his own judge.' For it is a maxime in law, *aliquis non debet esse judex in propriâ causâ*."); 294a ("[…] that the foure knights electors of the grand assise are not to be challenged, for that in law they be judges to that purpose, and judges or justices cannot bee challenged."). See also de Smith at p. 217 ("The reluctance of the common lawyers to recognize the concept of disqualification of judges for interest or bias is illustrated by Coke's bald assertion that judges and justices, unlike jurors, could not be challenged […] And it was Coke himself who had elevated to a fundamental principle of the common law the proposition that no man should be a judge in his own cause".)

[71] Sir William Blackstone, *Commentaries on the laws of England*, vol. 3 (Oxford: Clarendon Press, [1765]-69) at p. 361

to mind the famous medieval dispute between the two great Bologna glossators Bulgarus and Martinus. Bulgarus thought that ordinary judges could not be challenged, and Martinus argued that they could.[72] To simplify greatly, much of the continent, tracking canon law, can be said to have broadly followed Martinus, while the common law sided with Bulgarus, if only for a time. When Blackstone was writing, the courts had, in fact, we may say in hindsight, finally overcome their reluctance to recusation and were allowing challenges if there was a real likelihood of bias.[73] However, in so doing, they did not give up their concern for justice and its administration beyond the interests of specific litigants.

The common law's reluctance to allow recusation lay in the notion that something of value may be lost through the challenge of a public official, a consideration which may well outweigh the interests of specific litigants in an independent judge. Not surprisingly, when recusation was finally embraced, the common law continued to pay attention to the broader interests of justice. It did so through an increasing emphasis on the importance of "appearances", which eventually carried over to European human rights law:[74] "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[75]

The broader interests of justice may well be what Hobbes actually had in mind when he spoke, in his 18th law, of greater profit, or honour, or pleasure *apparently* arising out of the victory of one party. However, there are two ways of looking at "appearances" depending on one's conception of adjudication. If one's emphasis in defining adjudication is put on discovering the "truth", appearances should not matter much to the litigants and can only further the broader interests of justice. If one, however, defines adjudication with emphasis laid on the process rather than the outcome, then the appearance of impartiality may be even more important to the litigants than the fact of the matter. This may well explain the surprising enthusiasm at one point shown by common law judges vis-à-vis appearances in statements such as this: "it is as important (*if not more important*) that justice should seem to be done, as that it should be done."[76]

As it happened, the view that it was "more important that justice should appear to be done than that it should in fact be done" was rejected as "an erroneous impression".[77]

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[72] Bernabé, *supra* note 40, at p. 39.

[73] This is said to have been unequivocally established in *R. v. Rand* (1868) L.R. 1 Q.B. 230. See de Smith, *supra* note 48, at p. 216, n. 14.

[74] E.g.: *Delcourt v. Belgium*, 17 January 1970, §31, Series A no. 11; *Campbell & Fell v. United Kingdom*, 28 June 1984, Series A no. 80.

[75] Lord Hewart C.J. in *R. v. Sussex JJ., ex parte McCarthy* [1924] 1 K.B. 256, 259.

[76] *R. v. Byles* (1912) 77 J.P. 40: *per* Avory J; emphasis added.

[77] *R. v. Camborne JJ., ex parte Pearce* [1955] 1 K.B. 41, 52.

Nevertheless, the common law's insistence upon the appearance of impartiality or independence did mark a slight shift in emphasis away from the litigants' interests, or "the simple precepts of the law of nature",[78] to "the more subtle refinements of public policy."[79] The common law's reluctance toward recusation, and then its embrace thereof, may therefore be seen as two means to the very same end: the protection of public confidence in the administration of justice.[80] Considerations akin to this had been present all along in France, where repeated references to the "dignity" and "honour" of the judiciary had been a hallmark of most debates surrounding the successive reforms to the regime of recusation, both before and after the revolution.[81]

This murmur of public interest in the apprehension of adjudicative independence is but a faint echo when compared to the profound transformation that the principle was to undergo with the development of democratic state institutions. The Western struggle to wrestle power away from the monarchy was not easily won. In both the English and the American versions of that struggle, the principle of adjudicative independence was essentially conscripted and used to help build the democratic institutions we now know.

The use of the principle of adjudicative independence in the pursuit of these broader institutional objectives is nowhere more apparent than in Edward Coke's struggle with James I to ensure the independence of the common law courts from the crown's prerogatives and to establish that the king was under the law. In the case of *Prohibitions del Roy*, in 1607, the king's right personally to decide cases in his courts or to remove cases from those courts was at issue. In Coke's report, the first step in the reasoning is quite clearly the principle of adjudicative independence:[82]

> "the King in his own person cannot adjudge any case, either criminall, as Treason, Felony, &c. or betwixt party and party, *concerning his Inheritance, Chattels, or Goods, &c*. but this ought to be determined and adjudged in some

[78] De Smith, *supra* note 48, at p. 218.

[79] *Ibid*.

[80] See notably *Sarjeant v. Dale* (1877) 2 Q.B.D. 558, 567. "One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice, which is so essential to social order and security."

[81] See generally Bernabé, *supra* note 40, e.g.: 158, 160, 162, 183, 186, 210, 222, 231, 304-05.

[82] See Yale, *supra* note 48, at p. 83 ("In Coke's hands the principle was used for something more than keeping subordinate judges to the proprieties of judicature. He employed it to tell the king to his face that the sovereign could not personally judge a cause between himself and his subjects."). The common law had been wrestling for some time with a similar problem arising out of grants of jurisdictional franchise, where the grantee, like the king, could find himself in the position of both judge and party. Jurisdiction could then be exercised, depending on the grant, by the grantee's "steward," "judge," or "court": *Day v. Savadge*, (1615) Hob. 85, 87 ("there the steward is Judge himself and not the grantee, as the King's judges are between him and the parties…").

> Court of Justice, according to the Law and Custome of England, and always judgements are given, Ideo consideratum est per Curiam, so that the Court gives the Judgement. [Emphasis added]

Upon the foundation of this principle, Coke's reasons in that case go on to establish that the king may not personally sit in judgment in any of his courts,[83] *whether or not the case concerns the king's property*. The report concludes with Coke's answer to James I's argument that it would be treason to affirm that the king is under the law. The answer is delivered through a quote from Bracton: "*rex non debet esse sub homine sed sub Deo & Lege*" (the king is under no man, but he is under God and the Law).[84] A very significant step had been taken in advancing the cause of the Rule of Law, in laying the foundation for the separation of powers, and in paving the way for judicial independence.[85]

The common denominator of the British and the continental conceptions of the Rule of Law is said to be the ideal of "a government of laws and not of men".[86] Harrington had spoken of the "empire of laws and not of men";[87] Voltaire had later defined freedom as "being dependent only on the law".[88] The promotion of the Rule of Law was accompanied, in both United-States American and French revolutionary thinking, by an attempt to implement the separation of powers as an institutional means to

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[83] Though he could still sit with his lords in the upper house of Parliament and reverse a court decision with the assent of the Lords.

[84] Henry De Bracton, *De Legibus Et Consuetudinibus Angliae* f. 5 b (c1250) ("*Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem.*"). Coke went on to become Chief Justice of the King's Bench (which was formally a promotion but actually represented a setback in terms of income) but was eventually sacked after refusing to allow for consultation of the king before proceeding in cases affecting the crown or its prerogatives. See Allen D. Boyer, *Coke, Sir Edward (1552-1634)* ((Online edition of) Oxford Dictionary of National Biography: Oxford University Press, 2004) under "King's bench and chancery", paragraphs 1, 5.

[85] Many of Coke's views prevailed with the Petition of Rights of 1628 (which he was instrumental in getting through Parliament), the Bill of Rights of 1688, and the Act of Settlement of 1701.

[86] Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002). See also Rainer Grote, "Rule of Law, Etat de droit and Rechtsstaat – The Origins of the Different National Traditions and the Prospects for their Convergence in the Light of Recent Constitutional Developments", starting at p. 271 *in* Christian Starck (dir.) *Constitutionalism, Universalism and Democacy* (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

[87] James Harrington, *The Commonwealth of Oceana* (first published in 1656) "the art whereby civil society is instituted and preserved upon the foundations of common rights and interest [… is], to follow Aristotle and Livy, the empire of laws and not of men" (p. 35 of the 1771 edition). John Adams famously took this up in *Novanglus Paper No 7* (February 1775), available from the Online Library of Liberty : http://oll.libertyfund.org.

[88] Voltaire, *Pensées sur l'administration publique*, 1756, chap. XX (originally published in 1752 as *Pensées sur le gouvernement*). English translation from Voltaire, *Political Writings* (Edited and Translated by David Williams: Cambridge University Press, 1994), at p. 216.

achieve a government of laws and not of men.[89] Montesquieu had written that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty" and that, "there is no liberty, if the judiciary power be not separated from the legislative and executive."[90] Provided it was divided, power could be used effectively to check power.[91]

Beyond a general agreement that an institutional separation of powers was necessary, the United-States American and the French models went their separate ways. In the French Constitution of 1791, the separation of powers was expressed most notably in terms of *containing* judicial power.[92] Where James Madison was able to imagine a strong judiciary with "a will of its own,"[93] revolutionary leaders in France, with the parliaments of the *Ancien Régime* in mind, had little taste for any such notion and clearly focussed their attention on a paramount legislator as the golden key to the Rule of Law. However, the possibility of abuse by the legislative branch was soon to prove all too real, particularly during the Second-World War, and the United-States American model ended up being the most widely emulated. That is the reason why

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[89] The Constitution of Massachusetts of 1780, art. XXX, provides the best evidence in revolutionary thinking of the link between the Rule of Law and the separation of powers: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men." The separation of powers principle was also spelt out in art. 16 of the 1789 French *Declaration of the Rights of Man and Citizen*: "Every society in which the guarantee of rights is not assured or the separation of powers not determined has no constitution at all." See Sean C. Goodlett, "The On-Line SourceBook", online: Fitchburg State College <http://sourcebook.fsc.edu/history/declaration.html>.

[90] Baron de Montesquieu, *The Spirit of the Laws,* Translated by Thomas Nugent (New York; London: Hafner Press, 1949 (first published 1748)), Book XI, Chapter 6, Paragraphs 4, 5, at p. 152.

[91] *Id*., Book XI, Chapter 4, Paragraph 2, at p. 150. "To prevent this abuse, it is necessary from the very nature of things that power should be a check to power".

[92] "Article 3. The courts may not interfere with the exercise of the legislative power, suspend the execution of laws, encroach upon administrative functions, or summon administrators before them for reasons connected with their duties." See English translation of Article 3 of the French *Constitution of 1791* in Sean C. Goodlett, "The On-Line SourceBook", online: Fitchburg State College <http://sourcebook.fsc.edu/history/constitutionof1791.html>.

[93] James Madison, *The Federalist No. 51*. online: Constitution Society <http://www.constitution.org/fed/federa51.htm>. See also: *The Federalist* Nos 48 & 49 <http://www.constitution.org/fed/>. For another reading of the relevant materials, drawing notably on Madison's correspondence, see Larry Kramer, 'The Interest of the Man': James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 Valparaiso University Law Review 697 ("Madison … had essentially nothing to say about the third branch" (p. 705) … "and saw the need for [judicial] independence chiefly through the lens of British and colonial experience, which had no doctrine of judicial review, but which taught that judges needed tenure and salary protection to immunize them from being influenced by the more powerful political branches in ordinary civil and criminal cases" (p. 739). The British colonial experience did, of course, know the practice of judicial review of legislation, a practice which was eventually codified by the *Colonial Laws Validity Act* of 1865 (UK 28 & 29 Vict. C. 63).

the position of judiciaries today is often assessed in terms of their ability to check the power of both political branches. Courts operate in a setting which features a powerful executive wielding the sword and a powerful legislature with vast rule-making powers and, generally, significant control over the public purse. The judiciary's effectiveness as a branch capable of checking these powerful political branches has depended on the development of guarantees which it seemed logical to link to the much older tradition of adjudicative independence.

The way in which the ancient tradition of adjudicative independence was harnessed in the pursuit of new power arrangements within the state may at first glance be perceived as a form of high jacking. But the development was likely viewed as a logical extension in a setting where at least one of the political branches appeared as party to court cases. This was the case in Coke's days and became more prevalent with the practice of judicial review of legislation. In order to be impartial when deciding cases involving the political branches, the judiciary required special institutional protections that the separation of powers independently demanded to ensure that this least dangerous branch would remain in a position to check the power of the other branches. This is the main reason why adjudicative independence and the separation of powers have become so deeply entangled. The central knot in the entanglement is the notion of judicial independence.

If one takes a good look at the institutional dimension of the requirements I outlined in the first part of this paper, one will find that they mostly have to do with the strengthening of the judiciary as one of the three branches of government in the institutional setting of the contemporary democratic state. Thence come the "neutral appointments" requirement that judges be involved in the appointment process for judges; the "security of tenure" requirement that standing tribunals benefit from institutional protection; the "financial security" requirement that the process of salary determination be depoliticized; and the "administrative autonomy" requirement that judges be involved in processes of envelope and budget determination and be broadly responsible for court administration. Much of the institutional dimension of judicial independence has to do with the requirement of a strong judiciary with "a will of its own," rather than with the need for adjudicative independence. It has to do with the assurance of a judiciary that is capable, not only of rendering justice impartially in ordinary adjudication, but also of keeping the political branches in check while remaining impartial when deciding cases in which those branches are involved.[94]

Conclusion

[94] When performed by the courts ordinarily responsible for private adjudication, public law adjudication may be viewed as using a capital of legitimacy and integrity which it would be difficult for bodies responsible solely for public law adjudication to accumulate.

Much of the confusion concerning judicial independence can be lifted if one perceives its two distinct historical and normative rationales. The first rationale is the principle of adjudicative independence, which finds its roots in ancient times and focuses on the litigants, demanding an impartial, non-party, adjudicator. The second rationale finds its considerably more recent pedigree in the enlightenment idea of the separation of powers and the related requirement – widespread but certainly not universal – of a strong judiciary with a "will of its own".

Both rationales can be explained in terms of a broad conception of the Rule of Law. However, the embrace of the requirement of a strong judiciary is the factor that has most clearly marked out the common law and, more particularly, the United-States American influence in this key area of institutional design. On the continent, resort to constitutional councils, separate systems for the adjudication of administrative law issues and judicial career paths within the civil service resulted in very different versions of the separation of powers and in the stunted development of judicial independence as a principle distinct from the ancient requirement of adjudicative independence. The work laid before us, here as elsewhere, and now as before, is one of reconciliation. We have witnessed this labour of reconciliation with the creation and interpretation of international legal instruments, hard and soft, bearing on independence and impartiality. We have witnessed the same labour in the practice of ad hoc adjudication, notably international arbitration, where the issues of independence and impartiality arise outside the context of state institutions. And we will again witness this reconciliation as we struggle with the concepts that will allow us to safeguard the *acquis* of the Rule of Law in a world with more diffuse power arrangements, a world in which state institutions and the norms they produce play a lesser role.

As we grapple with and refashion the concepts and understandings that we have inherited, it should be useful to bear in mind that adjudicative independence, the principle that one cannot be a judge in one's own cause, is not tied to the nation state or to any variant of its institutional arrangements.