Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)
2(2): 193-200 julho-dezembro 2010
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Prolegomena to a Theory of Judicial Power: The concept of judicial independence in Theory and History

Prolegômenos a uma Teoria do Poder Judiciário: o conceito de independência judicial na Teoria e na História

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Abstract

This paper discusses the exercise of judicial power, analyzing it from a theoretical and historical point of view. It focuses on the independence and impartiality of this power in making decisions, which is different from the other roles played by the State that also involve decision-making activities. It is necessary to understand judicial power as independent in the sense that independence entails impartiality, so that the judge is not subordinated to external powers in a case and the decision does not contain personal elements of the judge.

Key words: Judicial power, independence, impartiality.

Resumo

Este texto trata do Poder Judiciário, analisando-o teórica e historicamente. Ele foca a independência e a imparcialidade deste Poder de tomar decisões, que é diferente das outras funções exercidas pelo Estado que também implicam tomada de decisões. É importante entender o Poder Judiciário como independente no sentido de esta independência poder trazer consigo a imparcialidade; assim, o juiz não estaria subordinado a poderes externos em um processo, ao mesmo tempo em que a decisão não conteria elementos pessoais do juiz.

Palavras-chave: Poder Judiciário, independência, imparcialidade.

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Exercising judicial power, as distinct from other State functions, has been justified in different ways. All of them are somehow connected with the impartiality/independence or competence/expertise of the judicial decision-makers. This article is a first attempt to classify these discourses. Two *Erkenntnisinteressen* motivate the research: on the one hand, the attempt to rewrite the doctrine of the constitutional State distinguishing types of organs and their forms of legitimacy; on the other, the will to understand better what is now called the *global expansion of judicial power*.[2]

The focus here is not going to be on an analytical or normative doctrine of the "independence of judicial power" inside the modern political and constitutional theory,[3] but more on what can be called the (self-) justification of the judicial function as distinct from other governmental decision-making activities – some would say its "legitimacy".[4]

Independence, what?

To begin with, it may be useful to bear in mind something we may tend nowadays to forget. For a long time, and in societies as different as the Athenian democracy (Hansen, 1991, notably ch. 8 about the dikasterion), the Ch'ing Chinese Empire (1644-1911) (Sprenkel, 1962a, 1962b; Bodde and Morris, 1967a, 1967b; Chü, 1962), or the African cultures based on customary law (Epstein, 1954; Gluckman, 1969), the *function of adjudication* was not attributed to a distinct and "professional" judicial body. It was exercised directly by the political authority, as in Athens, or indirectly by State officials, such as mandarins in China. It was towards the end of the Roman Empire (certainly not during the Roman Republic) (Girard, 1901; Jolowicz, 1954) that the judicial function[5] started to be exercised by specialized (not independent) officials. And it was only in England between the 16th and 17th centuries, to my knowledge, that members of courts of common law put forward the idea of independence *vis-à-vis* the King's prerogatives. This is a point which will be addressed later.

Here shall be suggested a typology of *recurrent discourses* that have been used to justify the independence/distinctiveness of the judicial power – *vis-à-vis* the other functions of the State (legislative and executive) or, more simply, *vis-à-vis* the actor or the agency entitled to exercise political authority (sovereignty, as political and legal theorists started to say after Bodin and Hobbes); but also, and more basically, independence as impartiality, which justifies the exercise of judicial power, without taking into consideration the agency exercising it.

It may be worth saying a few words about the concept of "independence", traditionally used in two different ways in connection with judicial function/power. By speaking of independence, in this context, we may design a similar structure of relation betwe-

[2] Tate and Vallinder (1995). John Ferejohn rightly suggested that it is important to distinguish between the expansion of power of judges, meaning that they exercise greater and greater percentages of executive or legislative power, and the expansion of the jurisdiction of courts as such. Torbjörn Vallinder, in his contribution to the quoted book, speaks of "expansion of the *province* (italics mine) of the courts and judges at the expense of politicians and/or administrators", a phenomenon described as "judicialization of politics". In the last few years I explored a special dimension of this expansion: the spreading of constitutional adjudication in the contemporary world, mostly in the framework of the post-authoritarian states: Ferejohn and Pasquino (2002, p. 21-36, 2003; s.d.).

[3] The last book on the topic is, to my knowledge, Russell and O'Brien (2001).

[4] See on the same topic: Pasquino (1998, p. 38-50; 2001); also, Grimm (1999, p. 193-215). It is appropriate here to quote a text by Max Weber that is profound and fascinating. In *Wirtschaft und Gesellschaft*, in which Weber introduced his classification of the forms of legitimacy of the *Herrschaft*, he wrote: "We have encountered the problem of *legitimacy* already in our discussion of the *legal order*. Now we shall have to indicate its broader significance. For a domination [*Herrschaft*], this kind of justification of its legitimacy is much more than a matter of theoretical or philosophical speculation; it rather constitutes the basis of very real differences in the empirical structure of domination. The reason for this fact lies in the general observable need of any power, or even advantage of life, to justify itself. The fates of human beings are not equal. Men differ in their states of health or social structure or what not. Simple observation shows that in every such situation he who is more favored feels the never ceasing need to look upon his position as in some way 'legitimate', upon his advantage as 'deserved', and the other's disadvantage as being brought about by the latter's 'fault'. [...] This same need makes itself felt in the relation between positively and negatively privileged groups of human beings. […] Indeed, the continued exercise of every domination (in our technical sense of the word) always has the strongest need of self-justification through appealing to the principle of its legitimacy. Of such ultimate principles, there are only three […]" (Weber, 1954, p. 335-336). An interesting aspect, among others, of this text is that Weber turns the standard perspective, claiming that in modern society those who have to obey want reasons for their obedience, upside down. In the quoted text, the stress is different: those who speak of *Legitimitaet der Herrschaft*, address first of all [or also?] themselves! A small change of perspective in the Weberian approach may suggest the following consideration: those who speak of legitimacy or produce such discourses do not address simply themselves or the *Herr* in order to produce self-justification. They address also other actors: those who have to obey as well as those who try to impose a monopoly of the *Herrschaft*; in any event, if we consider a modern rational (in the Weberian sense) society. One could imagine the "public sphere" of the exercise of authority as a closed space which it is not possible to access without producing arguments that justify the legitimacy of exercising part of that public authority. Weber did not discuss this issue probably because he was trying to characterize the "pure" (*idealtypisch*) forms of *Herrschaftslegitimitaet*. But it is apparent that the exercise of public authority is a polyarchic reality most of the time divided by conflicts concerning the distribution of authority itself among different actors. It is inside this battlefield that discourses concerning the legitimacy and independence of the judiciary may be analyzed, as will be attempted in this text, or more exactly in this research project.

[5] It should be recalled that Aristotle was probably the first to single out a *judicial function*, long before the modern theory of the separation of powers, and by the way in a different perspective of developing conceptual tools, in order to provide a comparative analysis of different forms of government (politeiai). In his Politics (IV.11 = 1297b37ff.) he distinguished three elements (mória, more exactly "constituent parts") of any politeia: to bouleuómenon, to perì tas archás, to dikázon (or dikastikón). The latter is normally translated as "judiciary" (Rackham) or "judicial element" (Barker) (δικαζειν, according to Liddell-Scott, means to give a judgement, to decide between persons and judge their cause). At 1300b13ff, he qualifies the dikastikón as the system of law courts (dikasteria).

en types of actors we have to distinguish.[6] On one hand, we may want to stress that in the conflict resolution between two parties, we/they want to rely on a neutral, unbiased third party to settle the conflict. A case in point, among many others, which clarifies this idea, is the Roman *iudex* (Broggini, 1957). The word designated a sort of juror or arbiter *chosen, with the consent of the two parties of the trial, from a list* (*album iudicum*) that the magistrate who prepares the case (the *praetor*) presented to the parties. The *iudex*, who is neither a magistrate nor a specialist of the law, will render the judgment (*sententia*) that ends the trial. The independence (neutrality) of the third party in charge of the adjudication is a possible (and perhaps necessary) condition for moving from the dyadic to the triadic structure of conflict resolution.[7]

On the other hand, we have spoken for some centuries of an independent judge/judiciary in a slightly different sense. What we have in mind most of the time nowadays is not simply or essentially the neutrality *vis-à-vis* the two parties of a trial, but the non-dependence on the other branches of political authority in a constitutional system *based on the separation of powers*.[8] This seems important for two reasons. The first was argued by Montesquieu in his criticism of the *despotic government*. To avoid the dangers threatening individual liberty that stem from the connection between legislative and judiciary, he wanted, as we know, to separate the "*puissance de juger*" from the other State functions.[9] The second reason is connected to the American tradition of judicial review of statutes and with the French development of "administrative" law in the 19th century (Cassese, 2000). In the latter case, judiciary independence seems to be welcome when the conflicts are between branches of the national government or quasi-sovereign entities (states, *Länder*, etc. – what Germans call Organstreit and the Italians *conflitti di competenza*), as well as in cases of conflicts between citizens and the government. It is exactly in this connection that Germans started to use the word *Rechtstaat*: a legal system where citizens can sue the government and hope to have a fair conflict resolution by an "independent" judge. Indeed, we have to notice that we find once again in this last case the first form of independence: the possibility for the judge to be unbiased *vis-à-vis* the two parties of the trial![10]

To avoid misunderstandings, it must be stressed that the type of analysis engaged in from now on is different from an historical-sociological project. It is not asked here why a more or less independent judicial power was established in modern society; in that perspective something like a Pontius Pilate theory of "washing the hands" can make sense.[11] The question to be discussed is what type of *ideology*[12] social actors produced in order to find support for some (thin or thick) version of a independent/distinct judicial power.

Moving from such a question, the triadic typology that is proposed for consideration goes under the names of three rightly "celebrated" authors: Montesquieu, Edward Coke and Thomas Hobbes.

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[6] In other words, in speaking of independence we must ask: independent from what/whom?

[7] On this conceptual distinction, see Aubert (1983, p. 58-76).

[8] It is clear that in the international arena the equivalent of these branches can be either States or any other biased or partisan international actor.

[9] "There is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator" (Montesquieu, s.d., p. 99). Elsewhere (Pasquino, 1994), the author offered the following comment on this doctrine: "A judiciary power, separated from the legislative, in an institutional system which distinguishes the organs exercising these two functions and not only the functions themselves, is, in its autonomy, according to Montesquieu's literal phrasing, a *null* power. The judges act as nothing more than the 'bouche de la loi'. They should also confine themselves to applying a general and abstract norm to concrete cases without any possibility of modifying, in particular instances, the set definition of crimes and punishment. That definition is in the hand of the legislator, who must enact laws without considering any influence they might exert when applied to this or that concrete case. Characterized in this way, the judiciary power also appears as a sort of neutral power which protects citizens from the legislative while depriving both legislators *and* judges of the possibility of modifying the law in response to concrete cases. The judges become accordingly the guarantee of citizens' equality before the law. However, Montesquieu was perfectly aware that the person who exercises judicial power is the one who owns the most worrying power of all. In daily life it is not the legislator who renders judgments or passes sentences, but the judge. Now, the separation of powers guarantees that the judge will pass judgment only on the basis of a norm of which he is not the author, but simply the material executor. The judge protects the citizen from caprices and the arbitrary will of the legislator, just as the existence of the law protects the accused from the caprices and arbitrary will of the judge. All that is the substance of the principle of the juridical culture called the independence of the judiciary. If this independence is threatened, there is no longer any protection for citizens confronting the possibly arbitrary will of the legislator. The *Rechtssicherheit* would disappear if the judge could pass his judgment without being bound by the existence and the content of a law. Finally, the essential and unavoidable core of this version of the separation of powers lies in the principle of a strict distinction between those who enact the law and those who pass judgments." This commentary to Montesquieu's text was written without awareness of a problem that limits the dependence of the judge on the law – the other side of his independence from the legislator. As Gustavo Zagrebelsky has shown in a recent text, *Studi in onore di Livio Paladin* (unpublished), the judge sometimes has the possibility to define the legal character of a fact. A killed B. This is not yet a legal fact if the judge does not state that the action is murder or was carried out in self-defense. The text by Zagrebelsky illustrates the important implications of such philosophical platitude.

[10] On these questions, see the important article by Eckhoff (1965, p. 11-48).

[11] This is the idea that the sovereign delegated judicial power to a specialized organ to avoid paying the costs of exercising directly a repressive and unpopular function. This theory was put forward by Savigny (s.d., p. 286-287) at the beginning of the 19th century, concerning the distinction in Rome during the Republic between the *praetor* and the *iudex*. Versus: Girard (1901, p. 79): "C'est trop peu dire que de traiter cette supposition de gratuite".

[12] The word has here a neutral sense, without derogatory implications.

The *pouvoir nul*. The "zero" degree of power

The ideology of the French Revolution, which has long been very influential in the European continent, proposed a special interpretation of Montesquieu's formula according to which the judiciary is a "null power". To summarize briefly, the idea is that the legitimacy and the justification of an independent judiciary originates from the paradoxical circumstance of its *lack of power*! In fact, the exact meaning of the expression "*pouvoir nul*" in the *Esprit des Lois* XI.6 was that the judicial power had to be exercised (or more precisely was exercised in England, according to Montesquieu)[13] by popular juries, and not by professional judges. The point here is not to re-examine the historical truth of what Montesquieu did really say.[14] It is a destiny common to many great thinkers that they have been misunderstood and become famous and influential through misunderstandings.[15] It suffices simply to draw attention to the fact that the French Revolution and a large part of the continental legal culture introduced both professional, bureaucratic judges and the fiction of a null power. Michel Troper goes even further, writing that "le système juridique français, parce que il est fondé depuis la Révolution sur la primauté de la loi, ne saurait admettre l'existence d'un *pouvoir* judiciaire."[16] Cazalès, an ultra-conservative and monarchical member of the first French National Assembly, spelled out the same point: "le jugement est l'acte matériel de *application* de la loi" (Royer, 1996, p. 263). What does that mean?

The judge produces decisions concerning the liberty (and sometimes unfortunately the life) of citizens by a judgment, a sentence. But what is a sentence? The French Revolution, Cazalès, Condorcet and Kant (names which are not normally associated!) claim that the sentence is simply the conclusion of a syllogism. Kant, in the *Metaphysische Anfangsgründe der Rechtslehre* (1797), paragraph 45, writes:

> Every state contains three powers, i.e. the universally united will is made up of three separate persons (*trias politica*). These are the *ruling power* (or sovereignty) in the person of the legislator, the *executive power* in the person of the individual who governs in accordance with the law, and the *judicial power* (which allots to everyone what is his by law) in the person of the *judge* (*potestas legislatoria, rectoria et iudiciaria*). […] They can be likened to the three propositions in a practical operation of reason [*syllogism*]: the major premise, which contains the *law* of the sovereign will, the minor premise, which contains the *command* to act in accordance with the law (i.e. the principle of subsumption under the general will), and the conclusion, which contains the *legal decision* (*the sentence*) as to the rights and wrongs of each particular case[17].

We know that this doctrine of the practical syllogism, applied to the judicial power, has been denounced as fiction for a long time.[18] It is less well known, parenthetically, that Carl Schmitt published a radical criticism of the same doctrine in 1912, in his first book *Gesetz und Urteil*,[19] the starting point of his so-called "*Decisionismus*". Nonetheless, that fiction produced two practical effects. This is, by the way, a good reason to take it into account. On the one hand, it justified the absence of responsibility of the judge. An automaton that does not exercise any will cannot and does not need to be accountable, notably since there is always a superior court (the *Cour de cassation*) checking the logical deduction of the judge.[20] On the other side, the same "fiction" justified the constitutional subordination of the judiciary to its two more important brothers: the legislative and

[13] This claim is historically wrong, but it is not the intention of the author to discuss here the accuracy of Montesquieu's description of the English "constitutional" system. On this topic, see Landi (1981).

[14] The author is unaware of any important inquiry about Montesquieu's theory of the judiciary. A possible starting point is Vile (1967, p. 94-106).

[15] Machiavelli and Rousseau, alongside Montesquieu or Nietzsche, are very good examples of this claim.

[16] Italics added by the author. Quoted by Royer (1996, p. 263).

[17] *Metaphysics of Morals*, in Kant (1977, p. 138). Cesare Beccaria (1764) put forward a similar argument: "In ogni delitto si deve fare dal giudice un sillogismo perfetto; la maggiore dev'essere la legge generale; la minore, l'azione conforme o no, alla legge; la conseguenza, la libertà o la pena." (ch. IV: Interpretazione delle leggi). ("In every criminal case, the judge should come to a perfect syllogism: the major premise should be the general law; the minor premise, the act which does not conform to the law; and the conclusion, acquittal or condemnation").

[18] Nonetheless, two among the best specialists of the European judiciary wrote recently: "the still prevalent treatment of the continental European civil law judiciaries depicts them as mostly bureaucratic organizations, made up of politically irrelevant judges whose role can be summarized in Montesquieu's words: to be the 'mouth that speaks the words of the law'", Guarnieri and Magalhães (2001).

[19] A small sample of this book is now available in the English translation in Jacobson and Schlink (2000, p. 63-65).

[20] The Founding Fathers during the French Revolution did consider that at times the law could have been unclear and in need of interpretation, but they were anxious to strip away this power from the courts. This is the reason why the revolutionary legislation introduced the so-called *référé législatif* that gave the legislative assembly the monopoly of the statutory (and *a fortiori* constitutional) interpretation. See Troper (1980, p. 58-68); and "judges shall have recourse to the legislative body whenever it appears desirable to interpret a law" (Act, 7 July 1790 = référé législatif); "Courts cannot interfere with the exercise of legislative powers or suspend the application of the laws" (Law of 16-24 August 1790).

the executive powers. As Adrien Duport said in the debate on the organization of the judiciary in the Constituent Assembly: "il n'y a réellement de pouvoir dans l'ordre judiciaire que le pouvoir exécutif [...]" (Royer, 1996, p. 263).

To summarize that point, the doctrine of the independent,[21] subordinate judiciary[22] asserts that where there is no will, there is no responsibility, since responsibility, accountability and control imply the exercise of some decision, volition or discretion that by this ideology are denied to judges and judicial function. So if it is accepted that the judge does not do anything else than applying/enforcing the law, then there will be no specific problem of legitimacy for the judicial authority! This must be obeyed because the judge is just the *mouth of the law*, applying the general will of the people to a concrete case. To speak like Rousseau, in obeying the judge, we just obey ourselves (or the elected legislator) and remain perfectly free because no heteronomous will is imposed on us.

A special knowledge. Edward Coke, Artificial Reason and James I

The second model or discursive ideal type of legitimizing judicial power comes from a conceptual world older than democracy, or French liberal culture. It is found in the universe of competence or expertise, among judges of English common law courts, which, in a context different from the French Revolution, opposed the monarchical power.

Why do we obey the prescriptions of a medical doctor? We certainly believe she is making a choice and even imposing prescription on our behavior. But we believe also that we will be better off in obeying her if we really think the doctor knows what she is doing. A sophisticated version of this type of argument was first spelled out by the judge Sir Edward Coke in the conflict between King James I and the English courts of common law, of which Coke was the chief justice. In a remarkable text he argued against James that the knowledge of the laws of England "requires long study and experience before that a man can attain to the cognizance of it". This argument was made to persuade the King that he might have the constitutional power to be the final judge of a conflict, but he had not the "artificial reason" in order to correctly exercise it. So, King James would have to leave that power/competence to his *competent* judges.

To understand better this type of argument we may turn briefly to the contemporary historical context. The English 17th century was characterized by a conflict of arms and words among different segments of the ruling elite. The best-known aspects of this conflict are those between the crown and the aristocracy and the clash between the King and the Parliament concerning the question of the *prerogative*, when the Stuarts tried to break the mixed government in favor of an absolutist version of the monarchy (this at least is the parliamentary version of the conflict). The focus here will be on a different aspect, probably less well known, but of great interest to the present topic: the conflict between James I and the courts of common law.

Sir Edward Coke is famous in the history of legal doctrine as the champion of the judiciary independence *vis-à-vis* the political power of the King.[23] The victory in 1688, thanks to the *Glorious Revolution*, of a strong parliamentary version of the ancient doctrine of *King in Parliament* puts this event into perspective.[24] The reason why it is also addressed here is that it contains the matrix of one of the important ideologies of a legitimate judicial power, the ideology that in a particular taxonomy can be called "legitimacy through expertise". In 1607, in connection with a dispute between the High Commission, an ecclesiastical court of which the chief justice was the Archbishop Bancroft, and the Court of Common Pleas, its chief justice, Coke, issued an opinion that may be considered as the manifesto of that ideology. In the opinion known as *Prohibitions del Roy* (12 *Coke's Reports* 63) we read:

> [Bancroft claimed that] the King himself may decide [= judge] in his royal person; and that the Judges are but delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the words of God in the Scripture. To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, con-

[21] Here, independence in the narrowest sense of the word means that the judiciary is not exercised by the legislative power and that judges cannot be fired because of their judicial decisions.

[22] For the conception of the judiciary as an independent and "coordinate" power in America at the end of the 18th century, see Kramer (2001).

[23] I am fully aware that it is a little bit of an anachronism to speak of judicial power, as such, in England during the 17th century. But I am not taking sides here on this institutional question. Coke seemed to believe that legislation and jurisdiction are basically the same function.

[24] The Septennial Act of 1730 forbade the courts to overrule legislative enactments.

> cerning his inheritance, chattels, or goods, etc., but this ought to be determined and adjudged in some court of justice, according to the law and the custom of England […] Then the King said, that he thought that the law was founded upon reason, and that he and others had reason, as well as the Judges; to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden met-ward and measure to try the causes of the subjects; and which protected his Majesty in safety and peace; with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*.[25]

We have to bear in mind that, since the 13th century, England was one of the first countries in western society where an elite group of law specialists existed,[26] exercising, by the King's delegation, the judicial power. Coke was the ideologue and spokesman of those judges of common law. To follow the traces of this ideology in the American continent would be an interesting inquiry, but it is certainly not possible here.

The direction shall turn instead to the third element of the taxonomy directly connected with Coke's doctrine. Indeed, his defense of the independence of judicial power and its foundation on the judges' expertise became the polemical target of a radical criticism by one of the strongest and least-listened to supporters of the King's power: Thomas Hobbes.

Impartiality. The moral foundation of Judicial Power

During the 1760s, Hobbes wrote a book, *The Dialogue between a philosopher and a student of common law of England*,[27] entirely devoted to the criticism of Coke (who died much earlier, in 1633 or 1634). But the essential core of his argument was presented in chapter 26 of his *Leviathan* devoted to "civil laws".[28] It is important to analyze this text in some detail, since it incorporates the essential core of what might be called the ideology of *impartiality* as a foundation of the judicial function.[29]

Hobbes (Hobbes and Curley, 1994, p. 197-198) starts by distinguishing the role of judge [*the good Interpreter of the Law*] from the figure of the attorney [*Advocate*]. Only the latter, he claims, needs to study the law of the land. As to the former, he is only supposed to know facts from the witnesses and statutes with the help of competent individuals authorized by political authority. Intuitively, it appears that Hobbes is opposing Coke herein on the Roman republican division of competencies between the *praetor* and the *iudex*! In any event, his argumentative strategy consists of separating *expertise* from *judgment/adjudication*. In order to support his point, he puts forward examples drawn from English institutions: the House of Lords as a court of justice ("*few of them were much versed in the study of the Laws, and fewer had made profession of them*") and the popular jury ("*Twelve men of the common People are the Judges, and give Sentence not only of the Fact, but of the Right*"). Now, says Hobbes, since these "judges" are not supposed to know the law, there is somebody "*that hath the Authority to inform them of it*" [of its content].

Having established this distinction between the two functions of judging and knowing the law – exactly the contrary of what Coke argued – Hobbes goes on to explain the (moral) qualities that are "*required in a Judge*". In opposition to competence and expertise, he puts at the bottom of judicial power the moral quality of *impartiality*, which in his own language is called, surprisingly enough, *equity*.

> The things that make a good Judge, or good Interpreter of the Laws, are, first, *A right understanding* of the principal Law of Nature called *Equity*; which depending

[25] "For the King ought not be under any man but under God and the Law". On Coke's theory of law and reason, see Lewis (1968, p. 330-342).
[26] On the professionalization of English judges at the end of the Middle Ages, see J.H. Baker, "The Legal Profession" and "The Legal Profession and its learning" (unpublished manuscript communicated by the author).
[27] The *Dialogue* was first published posthumously in 1681, by William Crooke. "The *Dialogue* is less a survey and exposition of the law than it is an attempt to show how it should be understood on Hobbesian lines and an attack on English legal theorists, especially Edward Coke, who adopted a position that Hobbes regarded as theoretically wrong and politically pernicious" (Goldsmith, 1996, p. 287). ("From Hobbes's point of view, Coke's theory asserts the authority of judges, courts, and lawyers over that of the legislator", *ivi*, p. 293; "Hobbes's hostility to Coke and the common law is a direct result of his adherence to the primacy of legislation. From Hobbes's point of view, Coke's view attributes sovereignty to the judges", *ivi*, p. 296).
[28] Opposed by Hobbes to "natural laws".
[29] *Stricto sensu*, it is not possible to speak of independent judiciary in Hobbes' political theory since he rejected any separation of power. He presented nonetheless a doctrine of judicial function that will be analyzed.

> not on the reading of other men Writings, but on the goodness of a man own natural Reason,[30] and Meditation, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate thereon. Secondly, *contempt of unnecessary Riches*, and Preferments. Thirdly, *To be able in judgment to divest himself of all fear, anger, hatred, love,* and *compassion.* Fourthly, and lastly, *Patience to hear; diligent attention in hearing; and memory to retain, digest and apply what he hath heard*.

"Equity" in the language of contemporary English jurisprudence meant "the recourse to general principles of [natural] justice to correct or supplement the provision of a law" (Oxford English Dictionary). According to Grotius: "the correction of that, wherein the law (by reason of its universality) is deficient" (in Blackstone, *Commentaries of the Laws of England*, vol. I, p. 14).[31] Hobbes, as he often does, modifies the sense of a word – remember his sovereign defines the meaning of words! Equity is according to him a law of nature, exactly the 11th. Here is the definition from chapter 15:

> If *a man be trusted to judge between man and man*, it is a precept of the law of nature, *that he deal equally between them*. For without that, the controversies of men cannot be determined but by war. He therefore that is partial in judgment, doth what in him lies, to deter men from the use of judges, and arbitrators; and consequently, against the fundamental law of nature, is the cause of war. The observance of this law, from the equal distribution to each man, of that which in reason belongeth to him, is called EQUITY, and, as I have said before, distributive justice: the violation, *acception of persons*, προσωπολημψία [partiality].[32]

I do not want to offer here a conclusion to this first genealogical exploration, but perhaps only stress that *independence* of the judicial power has always to be understood as an instrument to achieve the goal of *impartiality*; and that independence has to be conceived of as neutrality, and absence of the subordination of the judge to (a) the parties to the conflict, (b) to any other power interested in a given resolution of the conflict, and as far as possible (c) to the bias of passions and partiality of the judge himself or herself.

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[30] "Though it be true", Hobbes added in the *Dialogue* (1840, p. 14), "that no man is born with the use of reason, yet all men may grow up to it as well as lawyers; and when they have applied their reason to laws […] may be as fit for and capable of judicature as Sir Edward Coke himself, who whether he had more or less use of reason, was not thereby a judge, but because the King made him so" [!].

[31] In his *De aequitate*, Grotius wrote: "lex non exacte definit, sed arbitrio boni viri permittit". Pufendorf (*De jure naturae ac gentium*, l.5 ch. 12, § 8) mentioned a Bolognian law which determined "that whoever drew blood in the streets should be punished with the outmost severity", adding that for the sake of equity it was held, after a long debate (sic!), not to extend it to the surgeon, who opened the vein of a person who fell down in the street with a fit (l.60). Equity, *equitas*, is the equivalent of the Aristotelian επιεικεια. See Aristotle (Rackham's ed., 1975, p. 1137b, line 1, Book 5), "Justice and equity are therefore the same thing, and both are good, though equity is the better"; Aristotle (Rackham's ed., 1975, p. 1137b, line 1, Book 5), "The source of the difficulty is that equity, though just, is not legal justice, but a *rectification of legal justice*"; Aristotle, *Rhetoric* (section 1374a), "For that which is equitable seems to be just, and equity is *justice that goes beyond the written law*"; Aristotle, *Rhetoric* (section 1374a), "If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms; so that, if a man wearing a ring lifts up his hand to strike or actually strikes, according to the written law he is guilty of wrongdoing, but in reality he is not; and this is a case for equity"; Aristotle, *Rhetoric* (section 1374b), "Actions which should be leniently treated are cases for equity; errors, wrong acts, and misfortunes, must not be thought deserving of the same penalty"; Aristotle, *Rhetoric* (section 1374b), "And it is equitable to pardon human weaknesses, and to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator; not to the action itself, but to the moral purpose; not to the part, but to the whole; not to what a man is now, but to what he has been, always or generally; to remember good rather than ill treatment, and benefits received rather than those conferred; to bear injury with patience; to be willing to appeal to the judgment of reason rather than to violence; to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast looks only to the law, and the reason why arbitrators were appointed was that equity might prevail."

[32] *Oxford English Dictionary*: "acception of persons or faces (A Hebrew phrase *masso phanim*, 'accepting of the face', verbally rendered in Gr. προσωπολημψία, L. acceptio personæ, -arum, the latter simply adapted in Fr. and Eng.). The receiving of the personal advances of any one with favour; hence, corrupt acceptance, or favouritism, due to a person's rank, relationship, influence, power to bribe, etc. (The earliest sense in Eng.)." Liddell-Scott translated the Greek term with "respect of person"; a quite unclear translation.

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Submetido em: 16/07/2010
Aceito em: 04/11/2010