THE BAILIFF'S DUAL ROLE AND THE SEPARATION OF POWERS

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It has long been argued that law, particularly modern law, is structured like a language. Unfortunately, it is now quite commonplace to use words and phrases without consideration of their real or proper meanings. For instance, the separation of powers, a key constitutional doctrine, has been used randomly to qualify systems of government or the collaboration of institutions, by referring to the work of Montesquieu without truly knowing it. Indeed, the classical sense that is often given to his ideas on the separation of powers is absurd. Any argument based on a wrong interpretation of Montesquieu is therefore also absurd. This article revisits Montesquieu's original ideas on the separation of powers and explains what they really are. By applying this framework to a debate that has been part of Jersey constitutional life for some time now, the dual role of the Bailiff, the absurd will hopefully be left on one side and some truth brought to what the separation of powers really means, when the Bailiff's functions are under consideration.

1 There has been much discussion and debate around the dual role of the Bailiff of Jersey.[1] Most comment has been quite negative, arguing that the dual role was archaic and in effect detrimental to a contemporary jurisdiction. As explained by Sir Philip Bailhache, Bailiff of Jersey from 1995 to 2009,[2] the principal functions of the Bailiff are the Presidency of the Royal Court and ancillary functions deriving from it, and the Presidency of the States, and ancillary functions deriving from that. Therefore "The Bailiff is the *Chef Magistrat* (Chief Justice) and presides over the Royal Court" but also "The Bailiff is *ex-officio* the President of the States". It was once said that he—

> "has no right to vote other than by a casting vote when the votes of elected members are equally divided. Traditionally he

[1] The Bailiff has essentially the same role in Guernsey but curiously this has not engaged the same controversy.

[2] "The cry for constitutional reform—a perspective from the office of Bailiff" (1999) 3 *Jersey Law Review* 253.

exercises his casting vote in order to preserve the status quo. Generally the Bailiff acts as a speaker, as in any democratic assembly, ensuring good order and the observance of the rules of the assembly."[3]

2 The casting vote was, however, abolished by the States of Jersey Law 2005. The question of the dual role of the Bailiff has been seen negatively by some local politicians. Most of the recent debates have been triggered by members of one of the newly constituted parties in Jersey, Reform Jersey. Its then party chairman, Senator Sam Mézec, wrote that—

"Numerous reports have been published which have *said that it is unhealthy that Jersey does not have an effective separation of powers between the courts and the States*, and legal advice provided to the government has indicated that our current system puts us at risk of human rights challenges in the future."[4]

3 In addition, the 2018 manifesto of Reform Jersey recorded—

"**An elected Speaker of the States Assembly**

The Clothier review, Carswell review and Independent Jersey Care Inquiry have all recommended that the States Assembly should elect its own Speaker to preside over parliamentary sittings, rather than have the Bailiff removed from his court duties to preside. We believe it is not compatible with the principle of the separation of powers to have our Chief Justice act as parliamentary Speaker. We will support introducing an elected

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[3] *Ibid*, p 262. See also C Fleury and H Johnson, "*Le phénomène de revitalisation culturelle à Jersey: un exemple d'accompagnement symbolique à la mondialisation*", *Annales de géographie*, 2013/2 (no 690), pp 200–219—

"*Quant au bailli, si le titre, ainsi qu'il est déclaré en préambule, doit être conservé eu égard à son ancienneté et à la charge symbolique qu'il recèle, la fonction—qui fait l'objet d'une nomination par le souverain britannique—a été fondamentalement revue. Il perd d'abord son droit de veto, ainsi d'ailleurs que le lieutenant-gouverneur. S'il demeure à la tête du pouvoir judiciaire en présidant la cour de justice et la cour d'appel, le bailli voit ses fonctions exécutives largement altérées par la création d'un poste de Premier ministre responsable devant l'assemblée des États de Jersey. Eu égard au passé de la fonction et à l'excellence—ostensiblement pointée par le rédacteur—de ses serviteurs, le bailli demeure le plus haut personnage de l'île d'un point de vue protocolaire*."

[4] http://sammezec.blogspot.com/2019/03/senator-mezec-lodges-proposition-to-end.html. Last accessed 20 April 2020.

> Speaker to preside over States sittings and to undertake outreach work to promote democracy in our Island by engaging with schools, businesses and civic groups to improve how they interact with the States Assembly. Meanwhile, the Bailiff can focus on his judicial duties and reduce the need of the courts to hire expensive English Commissioners to do the work that he is qualified to undertake. This will improve democratic accountability and provide better value for money for the public."[5]

4 My intention here is not to criticise the ideas developed by Reform Jersey or by Senator Mezec, but rather to focus on the core issue that seems to be at stake, *viz*. the question of the separation of powers and the alleged dual role of the Bailiff of Jersey. According to the above statement, the principle of the separation of powers makes it incompatible for the Bailiff to be at the same time Chief Justice and president of the States of Jersey, the local parliament. This is certainly a very topical debate because it concerns a quite important figure in the Channel Islands political and legal institutional setting. It is also very topical because it is built on a certain understanding, or assumption, of what is or should be the separation of powers and, impliedly, what is or is not democratic. The debate has the capacity to undermine many ideas about what is or should be a Constitution and a democratic government. Ultimately, the debate creates a sort of brouhaha that in effect masks, intentionally or not, the clarity and reality of the Constitution of Jersey. Indeed, the dual role of the Bailiff of Jersey has been criticised for showing the archaic nature of that Constitution.[6] No Constitution should be archaic, and an accusation of that nature creates an impression which is very negative. In consequence, it supports an argument for a "modernisation" of the Constitution and changing the dual role of the Bailiff, making the (negative) "archaic" Constitution a (positive) "modern" one because that modernised Constitution would also finally be democratic. The separation of the functions of the Bailiff would be equivalent to showing respect for what is understood and perceived to be the separation of powers, and offer a move to democracy. It would fit the concept or at least one sort of idea as to what the separation of powers is, and what a democratic Constitution should be.

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[5] https://www.reformjersey.je/manifesto. Last accessed 20 April 2020, esp p 33.

[6] J Gindill, "The Role of the Office of Bailiff: The Need for Reform", 2010, https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Gindill%201%20Submission%2020100318%20JG%20v1.pdf. Last accessed 20 April 2020.

5 The rhetoric supporting the modern versus the archaic is much the same as the good versus the bad argument. In the words of Althusser, we can understand that—

> "Law is an art of the asymmetry controlled. This asymmetry is the result of a hierarchy, a dogmatic appreciation of what is here, what the 'local' ideology voices as normal, against what is over there, that is not 'as good as', that is abnormal . . ."[7]

Often, we use this idea of "modern v archaic" to advocate changes. Changes are "good" because they show progress and they signify efficiency. And then we are of course left with an atmosphere that has often very little impact on democracy, and even sometimes has adverse effects. Let us consider here the "modernisation" of the French Fifth Republic Constitution under the presidency of Nicolas Sarkozy (2007–2012). The idea of change was brought in a bold attempt to make a 60-year-old text more "contemporary". The 1958 Constitution was considered to be old, "archaic", and in need of updating to become once more a "good" text.[8] It also relates to what can be said about normal and abnormal readings of Constitutional rules. One may consider that normal would be good and abnormal bad (let us not forget that this could be a totally subjective appreciation) and then argue for "necessary" changes in order to move from "archaic" to "modern", *i.e.* to some settings that are perceived as more "democratic".[9] We may also want to bear in mind the declaration of president Donald Trump on the US Constitution, which he described, at its 200th anniversary, as an "archaic system" because it limits the power of the president.[10] This argument is used quite often to justify changes or possible changes. So, what really is the issue with the dual functions of the Bailiff in Jersey?

6 Because the concern is around the separation of powers, the important point is to analyse which institutions are actually present in Sir Philip's account of the functions of the Bailiff. Obviously, the Bailiff sits in the superior courts of Jersey and in the local parliament, which are closely intertwined by history.

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[7] Althusser, *Essays on Ideology*, London, Verso, 1984, p 19.

[8] *La réforme de 2008 sur la modernisation des institutions*. https://www.vie-publique.fr/eclairage/268318-la-reforme-de-2008-sur-la-modernisation-des-institutions. Last accessed 20 April 2020.

[9] D Marrani, *Dynamics in the French Constitution: Decoding French republican ideas*, Routledge 2013, p 32.

[10] D Davenport, "Donald Trump's Constitution", https://www.forbes.com/sites/daviddavenport/2017/09/15/donald-trumps-constitution/#f97d0d37620 9. Last accessed 20 April 2020.

7 In France the *baillis* were instituted under King Philippe Auguste at the beginning of the 13th century. Acting alone or as delegate of the *Curia Regis* of the King, it seems that the institution of *baillis* came from the idea Philippe Auguste had to imitate the English public administration of the time and therefore it was inspired by the English sheriffs, the Norman *baillys* and the itinerant judges.[11] Then, we have the top court but with, however, a little twist. The *parlement*, creation of the *Curia Regis*, was a sovereign court that used to sit at the apex of the court system. *Parlements* had judicial functions as appeal courts from some decisions of the *baillis.*[12] But they had legislative functions in addition: they could interpret laws, record them or reject them. That is what may cause some confusion with the bailiffs and their functions, as they were first instance judicial officers.[13] The 1190 royal charters detailed the functions of the *baillis*: judicial officers, hearing appeals, recording fines at the monthly assize, and reporting on the affairs of the realm. The link between *baillis*, courts of justice and parliament is an ancient affair. But the confusion may be wider than expected. Indeed, parliaments in France were courts of justice while *Etats Generaux* were the embryo of what we understand nowadays as our parliaments. In fact, part of the confusion comes from the use of similar terminology in the two countries at that time: the *Parlement* in France was a court of justice while in England it was a consultative

[11] C Petit-Dutaillis, "*L'origine de l'institution des baillis royaux en France*", *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres, Année*, 1930, 74 (3), pp 231–232.

[12] G Valleyre, *Decisions sur chaque article de la coutume de Normandie: et observations sur les usages locaux de la même coûtume, & sur les articles placitez ou arrêtez du Parlement de Roüen; avec une explication des termes difficiles & inusitez qui se trouvent dans le texte de cette coûtume; et aussi les anciens reglemens de l'Échiquier de Normandie . . .*, esp p 5. According to Emmanuel Araguas, the bailiffs are not strictly an institution imported from the Carolingians but rather an institution that comes from Aquitaine during the reign of Louis VII, particularly after his marriage with the last duchess of Aquitaine.

[13] B Garnot, *La justice et l'histoire: sources judiciaires à l'époque moderne: XVIe, XVIIe, XVIIIe siècles*, Editions Bréal, 2006, esp p 40. According to Emmanuel Araguas, again, the judicial functions of the bailiffs are expounded rather late but quite thoroughly by art III of the *Coutume reformée de Normandie* of 1583 "de jurisdiction".

assembly.[14] What equates to the English parliament in France was the *Etats Generaux*, and that too causes some issues. "*A l'origine du Parlement, il y a la parole*."[15] *Parlements*, "places where we speak", from the French verb *parler*, became of course the generic name of bodies involved in making the law, while still carrying their original meaning of courts. It does not mean that the *baillis* had to be part of the "institution" that makes the law as well as the chief of the court that is the *parlement*, but rather that there is without doubt some linguistic if not legal reason for the bailiff's dual functions.

8 In the Channel Islands the genesis of the office of bailiff is less clear. After the loss of Normandy by King John in 1204, the defence and the judicial administration of the Islands were entrusted to an officer identifiable after the mid-thirteenth century by the title of "warden",[16] and although in early instances that term seems to have been interchangeable with that of "bailiff", the latter title came to attach to deputies of the warden, namely "the men who were in practice going to execute the king's orders".[17]

9 According to Professor Le Patourel, it seems that after 1204 the assizes were no longer held by an itinerant justice but by a local officer. It may have been a sub-warden or bailiff. It is only to 1277 in Jersey, and 1278 in Guernsey, that a bailiff with functions identifiably similar to those of his successors can be traced back.[18]

10 The question of the dual role of the Bailiff is not specific to Jersey. It arose in Guernsey, too, through a European Court of Human Rights (ECtHR) case in 2000, *McGonnell v United Kingdom*.[19] The *McGonnell* judgment raises quite interesting issues.[20] The court found

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[14] R Fawtier, "*Parlement d'Angleterre et États-Généraux de France au Moyen Âge*", *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres Année*, 1953, 97(3), pp 275–284, esp p 275.

[15] O Vallet, "*Le mot Parlement, Mots. Les langages du politique*", *Batailles de mots autour de 1900 Année* 1989, 19, pp 97–98.

[16] J. Everard and J. Holt, *Jersey 1204: The Forging of an Island Community* (London, 2004), p. 153.

[17] Everard and Holt, *Jersey 1204*, p 153, J le Patourel, *The Medieval Administration of the Channel Islands 1199-1399* (London, 1937), pp 43, 123.

[18] See generally Le Patourel, *Medieval Administration*, p36 *et seq.*

[19] *McGonnell v United Kingdom* [2000] 2 PLR 69, 8 BHRC 56, [2000] ECHR 62, (2000) 30 EHRR 289.

[20] See the comments made by Professor A le Sueur in "McGonnell and the Bailiffs of Jersey and Guernsey 11 years on" https://ukconstitutionallaw.org/

that the role of the Bailiff of Guernsey was sufficient to "cast doubt on his impartiality" when acting in a judicial capacity on appeal over a particular piece of legislation which had been adopted while the Bailiff presided over the States of Deliberation (the legislative assembly of Guernsey). It is quite important to read *McGonnell* together with *Procola*, another relevant judgment focusing on the separation of powers, but with the specific caveat that it comes from the angle of art 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and therefore appears to some extent to be focusing more on the question of fair trial than the principle of the separation of powers.[21] Dr Richard Cornes, who commented on the case, criticised the views of the court and its reasoning. He argued that the structural impartiality of an institution should not be damaged simply by a duality of roles of one of its members. Building on his traditional subjective analysis on the work of judges, Dr Cornes argued that what was at stake was the nature of the view of a judge, and how it was expressed.[22] As Dr Cornes highlighted, *Procola* clearly referred to the

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2011/09/22/mcgonnell-the-bailiffs-of-jersey-and-guernsey-11-years-on/. Last accessed 20 April 2020.

> "The curiosity of the Strasbourg ruling is that while it changed Mr McGonnell's life, played a role in reshaping the British constitution and killed off the traditional office of Seneschal in Sark, in both Guernsey and Jersey the role of Bailiff has continued largely unchanged. The Bailiffs remain presiding officers of the islands' respective parliaments and regularly sit as judges as well as continuing to have executive and ceremonial roles as chief citizens. How come? The practical legal answer is straightforward. The *McGonnell* ruling did not oblige constitutional change to be made: it required only that a judge does not sit in a case concerning a piece of legislation in respect of which the judge had a role during the legislative process. Looking at Jersey, there are a number of people who can preside over the legislature in addition to the Bailiff (the Deputy Bailiff, Greffier (clerk) or an elected member) and there are several members of the judiciary able to sit in the Royal Court instead of the Bailiff (the Deputy Bailiff and part-time Commissioners, who include people of the stature of Jonathan Sumption QC). In practice, boxing and coxing can avoid an infringement of *McGonnell*."

[21] *Procola v Luxembourg* (1996) 22 EHRR 193 (ECHR), [1995] ECHR 33.

[22] R Cornes "McGonnell v United Kingdom, The Lord Chancellor and the Law Lords", *Public Law*, Summer, 2000, pp 166–177, esp pp 168–169. See also Banner and Deane *Off with Their Wigs!: Judicial Revolution in Modern Britain*, Imprint Academic, 2003, esp pp 29–32.

"structural impartiality" of the dual role of an institution.[23] The question of separation of powers was merged here with the more subjective matter of impartiality of the institution conducting two or more functions. It should be noted that, while the impact of *McGonnell* was minimal in the Channel Islands, the outcome was very different in the UK. According to Le Sueur,

> "It seems likely that the *McGonnell* ruling was a driver in the decline of the Law Lords' participation in parliamentary debates and it was part of the constitutional backdrop to Tony Blair's intention in 2003 to abolish the office of Lord Chancellor and the subsequent debates over remodelling the post."[24]

Indeed —

> "In McGonnell v. United Kingdom, the Strasbourg court found that there was a lack of separation of powers that violated Article 6 (1) of the ECHR. This line of reasoning directly questioned the separation of powers in much of the British judiciary: The Lord Chancellor had executive, legislative, and judicial duties while the Lords of Appeal in Ordinary had judicial and legislative duties."[25]

11 The question of the dual role of the Bailiff has become a poison for the institution to the extent that Sir William Bailhache, Bailiff of Jersey from 2015 to 2019, in one of his last interviews with the *Jersey Evening Post*, declared that:

> ". . . there were three principles which caused 'sensitivity about the Bailiff expressing a point of view'—that he could influence States Members, that the Bailiff must be seen to be impartial due to presiding over debates, and that some issues may end up in the Royal Court."

12 He continued by explaining—

> "I thought I would raise the issue because the role of the Bailiff in the States continues to cause much debate. It has bedevilled my time as Bailiff, making it more difficult for me to express views

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[23] R Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, CUP 2010, esp p 83.

[24] Professor A le Sueur in "McGonnell and the Bailiffs of Jersey and Guernsey 11 years on".

[25] J Hyre, "The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998", 73 *Fordham L Rev* 423 (2004), pp 423–474, esp p 445.

> which do not breach the principles set out above, and which might have been helpful in the context of the overall administration."[26]

What is the separation of powers?

13 This brief article will revisit the doctrine which is the basis of the argument around the dual role of the Bailiff, *viz*. the separation of powers. In order to do so, reference will be made to the writing of a leading French academic, Michel Troper, who spent most of his career working on the question.[27] The nature of the separation of powers, notably the classic conception, will first be addressed; then the separation of powers and political systems of government, and the separation of powers and the constitution; and finally what the separation of powers really meant for Montesquieu and its relevance to the institution of the Bailiff of Jersey.

14 What, then, is the separation of powers? The separation of powers is without doubt one of the fundamental principles of modern constitutional law. It is said to be an ideal or a standard "to which the legal and constitutional arrangements of a modern state ought to conform."[28] The doctrine is said to originate with Montesquieu.

15 Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, one of the most influential political philosophers of the 18th century, was a lawyer from Bordeaux. He published *L'Esprit des Lois* (the Spirit of Laws) in 1748.[29] It is principally in Book XI, Chapter 6, *De*

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[26] *JEP* 18 September 2019, "Debate over dual role has bedevilled my time as Bailiff", https://jerseyeveningpost.com/news/2019/09/18/debate-over-dual-role-has-bedevilled-my-time-as-bailiff/ Last accessed 20 April 2020.

[27] M Troper, *La séparation des pouvoirs et l'histoire constitutionnelle française*, Bibliothèque constitutionnelle et de science politique, Librairie générale de droit et de jurisprudence, Paris, 1973. See the dictionary entry M Troper, "Séparation des pouvoirs", in *Dictionnaire Montesquieu* [online], C Volpilhac-Auger (ed), ENS de Lyon, 2013. http://dictionnaire-montesquieu.ens-lyon.fr/fr/article/1376427308/fr. Last accessed 20 April 2020.

[28] A Kavanagh, "The Constitutional Separation of Powers"', in D Dyzenhaus and M Thorburn, *Philosophical Foundations of Constitutional Law,* OUP 2016, pp 221–239, esp p 221.

[29] We used an electronic version of the book of Montesquieu modernised by L Versini, Paris, Éditions Gallimard, 1995. http://archives.ecole-alsacienne.org/CDI/pdf/1400/14055_MONT.pdf. Last accessed 20 April 2020. EDL will be used as an abbreviation of *L'Esprit des Lois*. I would like to thank again Emmanuel Araguas for highlighting the fact that Montesquieu is not the only author "using" English parliamentarism as a foundation for his thoughts.

La Constitution d'Angleterre, that we can find reference to the separation of powers—

> "*Il y a dans chaque État trois sortes de pouvoirs: la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.*"[30]
>
> [In each state there are three sorts of power: legislative power, executive power over things which belong to international law, and executive power over those things which belong to the civil law.]

Somehow, whenever someone mentions the separation of powers, Montesquieu always comes to mind, and when someone mentions Montesquieu, the mind turns automatically to *L'Esprit des Lois.*

16 However, this association is not without obstacles. For a start, Montesquieu never used the expression "separation of powers" in his work. A quick search through the various books and chapters of *L'Esprit des Lois* for the phrase "separation of powers" would prove the point. What we find is a reference to the question of having the power to judge separated from the legislative power and the executive power. Montesquieu wrote that

> "*Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice*."[31]
>
> [There is no longer any freedom if the power of judging is not separated from the power of the legislature and the power of the executive.]

That proposition is found quite early in Book XI. Chapter 6 may well be considered the basis for the belief that Montesquieu is indeed the creator of the doctrine that was later named the separation of powers. But we need to be very clear: Montesquieu never referred to or named this doctrine as the separation of powers. That said, he may have named this doctrine something other than the separation of powers.

17 What is then the real link between Montesquieu and the separation of powers? In order to find out, we may want to research first what we "normally" consider to be the doctrine of separation of powers, and

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Voltaire used deeply the English political system to design his anti-despotism ideas.

[30] EDL, p 112.

[31] EDL, p 112.

then to examine whether this doctrine may truly be found in *L'Esprit des Lois.*

18 The question is not simply a question of historical or philosophical interest, and it has nothing to do with whether or not Montesquieu actually invented, named or expounded the doctrine of separation of powers. The discussion around the paternity of Montesquieu and the origin of the doctrine has more to do with theoretical and practical issues. For instance, what are the political and/or legal functions of the State? How do we manage to divide and distribute the various political and/or legal functions of the State to guarantee freedoms, while keeping at the same time an efficient political power? In other words, how do we manage at the same time to split the political and/or legal functions of the State and at the same time avoid a paralysis of political power?[32] Montesquieu brings answers to those questions that are more pertinent and specific when confronted by other doctrines than the one expounded in what is referred to as the separation of powers. Let us briefly describe the classic conception of the separation of powers

The classic conception of the separation of powers

19 The classic conception of the separation of powers can be found in almost every public law text book since the middle of the 19th century. According to this conception, the separation of powers appears to be a piece of constitutional engineering designed to protect freedom/s. We could consider indeed that it has been articulated by Montesquieu, and we could generally speaking explain it *via* various extracts taken from *L'Esprit des Lois*. But we should certainly focus more on "separation" than on "powers". What is meant here by "separation" is a way of distributing the political and/or legal functions of the State between its various authorities or bodies. We may want first to consider what are those powers.

Powers

[32] See for example the tension between separation of powers and efficiency of the State in what Agamben wrote in *State of Exception* (G Agamben, *The Omnibus Homo Sacer*, Stanford UP, 2017, p 181):

> "This means that the democratic principle of the separation of powers has today collapsed and that the executive power has in fact, at least partially, absorbed the legislative power."

20 The State exercises a large variety of socio-political functions. This exercise is most of the time conducted through the law. This means that it is done through a specific process that produces general rules and commands, as the legislator creates "general, abstract, impersonal and permanent laws to be applied impartially".[33] The socio-political functions ultimately involve the exercise of various legal functions. In legal terminology, but also in ordinary language, "power" has many meanings. Sometimes powers can mean legal functions. Sometimes it can mean the powers necessary to exercise those legal functions, and sometimes it can mean the authority or body that exercises those legal functions. For example it can mean what we find as the definition of "the State" in Marxist theory: as stated by Althusser "the State (and its existence in its apparatus) has no meaning except as a function of State power."[34]

21 The legislative power, the power to make law, therefore could be either the function of making the law or the body (the institution) making the law. In a modern democracy, it can therefore be either the function of making a statute or the political institution of parliament. Therefore, the expression "separation of powers" seems to refer either to a mere distribution of functions or to a separation of bodies.

22 From there, we may be able to consider that whenever two State functions appears to be distinct, we categorise them specifically as the legislative power and the executive power. Those are defined as follows. The legislative power is that which is concerned with making laws that are defined as "general, abstract, impersonal and permanent laws to be applied impartially", while the executive power is that which applies those rules to concrete cases. Whenever there is a third function, we have what is called the judicial power or the judiciary. That said, the judiciary may be treated either as a third function or not. The first possibility is to look upon the judiciary as the power that is concerned with managing different results from the application of the law. If so, the judiciary must be considered as a part of the executive function, and not as a third one. The second possibility is to consider that different results cannot simply be arrived at by the sole application of the law, and that a third party, the judge, needs to intervene as an

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[33] I Flores, "Law, Liberty and the Rule of Law (in Constitutional Democracy)", in I Flores and K Himma, *Law, Liberty, and the Rule of Law*, Springer Science & Business Media, 2012, pp 77–103, esp p 89.

[34] L Althusser, *"Lenin and Philosophy" and Other Essays Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, https://www.marxists.org/reference/archive/althusser/1970/ideology.htm Last accessed 20 April 2020.

actor who will, in fact, have the capacity or the ability to decide what should be done.

23 On this theoretical basis, the separation of powers appears to be the combination of two distinct rules, the rule of specialisation and the rule of independence which will be described below.

Specialisation

24 The rule or concept of specialisation is quite easy to grasp. There should be an equal number of authorities or bodies in the State to mirror the number of functions. Each authority or body should then be specialised. Specialisation will mean here exercising one function and only one. In addition, it also means not participating to the exercise of other functions.

Independence

25 The rule or concept of independence signifies that each body should be protected from the influences of the others. This is quite logical, as otherwise there would be no independence. This is the result of the absence of power in one body to revoke the order of another body. Sometimes it could result, for example, from the impossibility of allowing that other body to appoint people to the first body, or to finance this other body or to sue this other body, *etc*. In fact, it becomes quickly evident that no absolute independence is possible, but that various levels between the absence of independence and full independence do exist.

26 In practice, those two rules are quite essential to understand the separation of powers. Each power can be opposed to each other so as to create a balance. That balance is supposed to prevent despotism and to preserve freedoms. This is what is attributed to Montesquieu. But this is never completely correct. Some authors would consider that the separation of powers may be used to qualify only the specialisation of bodies that are not independent, or the independence of bodies that are not specialised, or any equilibrium obtained without specialisation or independence. They estimate that the application of one of the two rules that constitute the separation of powers, does not compromise the doctrine itself. But it creates an edulcorated form of separation that allows the right balance between the powers. As a consequence, most political systems of government should qualify as regimes based on the separation of powers.

Separation of powers and political systems of government

27 The separation of powers is also used to classify constitutions. Jurists distinguish systems of government where powers are confused from systems where powers are strictly separated. We also find systems of government where the separation is rather "soft", meaning that the powers are collaborating. This classification is largely accepted in academia.

28 Systems of government with confusion of powers are those where one authority or body exercises all functions or controls the exercise of all the functions. Sometimes we object to the confusion of powers in the hands of the executive power, as in the case of a military dictatorship, or confusion in the hands of the legislative power, as seen in the period of the National Convention between 1792 to 1795 in France after the Revolution. Systems of government with absolute, or strict, separation of powers are those where authorities or bodies are at the same time specialised and independent, and where the specialisation and the independence are strictly applied, without exception. Here we can use as examples the 1791 French constitution, the Constitutional Monarchy, or the US constitution.[35] Every other system belongs to the category of "soft" separation, which is a category quite heterogenous. It comprises all representative regimes of government like the "Westminster" one which is characterised by specialisation of bodies and mutual dependency, or the "Washington" one where bodies are independent but not specialised.[36]

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[35] See the text of the 1791 Constitution, https://www.conseil-constitution nel.fr/les-constitutions-dans-l-histoire/constitution-de-1791, last accessed 20 April 2020, and of the 1787 US Constitution, https://www. archives. gov/founding-docs/constitution-transcript, last accessed 20 April 2020.

[36] If we follow the classic approach elaborated upon by Sartori, there are three prototypes of systems for government: the parliamentary regime, the presidential regime and the semi-presidential regime. According to Sartori, the prototype for a parliamentary regime is the UK's "Westminster system", although it can also be seen in France in the Constitutions of the Third and (to some extent) Fourth Republics. The system is mainly known for the way the main powers collaborate. Sartori considers the "Washington system" to be a prototype of a presidential regime, although two French examples, the 1791 Constitution and the Second Republic, could also be considered. Finally, Sartori defined the Fifth French Republic as a prototype of a semi-presidential system of government, that we will not develop here. G Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, 2nd edn, New York: New York University Press, 1997. See also D Marrani, *Dynamics in the French Constitution, Decoding French Republican Ideas*, Routledge 2013, esp pp 12–14.

29 Montesquieu has been portrayed as the father of modern constitutionalism. He was one of the first to propose the idea that powers should be organised in a way that protects freedoms, and that this organisation should be expressed in a set of rules or a document that is a Constitution. In his mind, this Constitution should put in place specialised and independent powers. He is therefore supposed to have established a strong link between the Constitution and separation of powers, to the extent that the separation of powers would become consubstantial to the term "Constitution" itself. That said, specialised bodies may only become opposed to each other and be blamed if their powers are similar. But the functions have a clear hierarchy. For instance, the execution of the law can only "exist" if the law is enacted first. It is a question of logic: the execution of the law is subordinated to the law. In other words, if the bodies are specialised, the executive power must be subordinated to the legislative function. Consequently, a hierarchy of bodies follows the hierarchy of functions while a subordinated power will never be able to stop or block a superior power.

30 According to Troper, it is the work of Eisenmann that enlightens. He helps us by analysing *L'Esprit des Lois* in a way which is quite different from the separation of powers normally portrayed as the work of Montesquieu. First, Montesquieu was conscious that there is a hierarchy of functions. When he classified the State functions, and particularly the executive function, he was not precise. He offered an account of the separation between the three powers, that is often very confusing. For instance, he wrote that the executive function was only linked to international relations (*la puissance exécutrice des choses qui dépendent du droit des gens*) but later that it was also concerned with the execution of laws.[37]

31 The legislative function may be described as the function that expresses the general will of the people while the executive function is the execution of that general will. Seeking an equilibrium between the two would be illogical, because one cannot block the execution of the general will enunciated or proclaimed by the other one. That equilibrium is only imaginable between bodies that are not specialised and that are not independent like the system of the English constitution that Montesquieu described. Here we do not find specialised bodies because the legislative power is conferred not to one but to three distinct bodies, the House of Commons, the House of Lords and the Monarch, who in addition has a right of veto. A statute can only be approved with the consent of the three bodies and only one has the

[37] EDL, p 112.

possibility to veto it. This structure is described by the well known expression "the Crown in Parliament" (Queen in Parliament; King in Parliament).[38] But each body, far from being specialised, also exercises other functions. The Monarch exercises, at least theoretically, the executive function while the House of Lords until recently exercised the judicial function, and the House of Commons, at least theoretically, can scrutinise the executive function. But what about independence? Montesquieu does not give an account of a system that shows specialisation and independence but quite the contrary. In addition, no one during the 18th and 19th centuries ever thought that *L'Esprit des Lois* was advocating specialisation and independence. Montesquieu is in fact only concerned with political freedom. It means that he is only concerned with obedience to laws or to the law. Montesquieu proposes to apply two principles that are slightly different. The first one may be called separation of powers, even though he does not use this expression at all. He does not prescribe specialisation and he does not prescribe independence. His separation of powers is a negative principle, with only one object: to indicate what should not be done. What should be avoided, according to Montesquieu's negative principle, is that all powers are in the hands of one body.

32 Montesquieu used the verb *séparer*, to separate, not as the equivalent to the verb *isoler*, to isolate, but as *distinguer*, to distinguish,[39] and as an antonym to the verb *confondre*, to confuse, or *unir*, to unite. It does not mean that Montesquieu is not in favour of the separation of powers. It simply means that the idea of separation of powers is something quite different for Montesquieu from what its 20th century interpretations might suggest. Montesquieu did not invent it, nor defend it, nor advocate it. In fact, the political philosophers of Montesquieu's time all voiced their hostility towards despotism. It became quite mainstream at that time that someone who makes the laws should not execute them. This is the negative principle that would become during the Enlightenment[40] a sort of common value. Its justification is simple and resides in a concept that is similar to political freedom. If political freedom is submission to the law, this negative principle, *i.e*. that all powers in the hands of the same body should be avoided, becomes the guarantee of freedom. Consequently,

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[38] See, for instance, that for Dicey, the Crown-in-Parliament, an element of Parliamentary sovereignty, has "the right to make or unmake any law whatever". Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, esp p 40.

[39] EDL, Book XXIX.

[40] Sometimes called the Age of Reason (1685–1815).

the body that makes the laws cannot execute them, and the body that executes them cannot make them. In doing so, we should arrive at the logical conclusion that individuals exercising executive power should be indirectly following only the law. This principle should not be confused with specialisation. It could be said to be satisfied for instance if one body exercises one function, but also if one body exercises one function "fully" and participates to the exercise of another. That would be the case for example, if the executive power were to participate in the normative function of legislating, while not being allowed to modify the law alone, and therefore not having control of all the powers. Therefore, the principle might be satisfied if various attributions are distributed between different bodies. After the question of systems of government and the separation of powers, the next crucial question is one of the Constitution and the separation of powers.

Separation of powers and the constitution

33 The separation of powers should not be confused with the Constitution. According to King—

> "A constitution is the set of rules that regulate the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country."[41]

34 Professor Bogdanor considers that a constitution is—

> "a code of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and officers of government and defines the relationship between these and the public."[42]

A constitution is the set of rules that has one aim: the repartition of the State attributions. That is found, for instance, in art 16 of the French Declaration of the Rights of Man and Citizen in 1789, which provides that "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."[43] That first

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[41] A King, *Does the United Kingdom still have a Constitution?*, Sweet & Maxwell, 2001, p 1.

[42] V Bogdanor, "Introduction", in V Bogdanor (ed), *Constitutions in Democratic Politics*, Dartmouth Publishing, Aldershot, 1988, p 4.

[43] See the official French version at www.legifrance.gouv.fr and an unofficial translation, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf. Last accessed 20 April 2020. A Kavanagh, "The

principle, solely negative as mentioned above, and generally accepted by those who are not in favour of any form of absolutism, calls for a second one. The second principle should determine how State attributions should be shared out. During the 18th century, two rival principles existed, with one only attributed to Montesquieu. The first one is specialisation because of the hierarchy of functions. It was adopted by Rousseau in his writing on the Constitution of Poland:

> "*C'est un vice dans la Constitution polonaise que la législation et l'administration n'y soient pas assez distinguées, et que la Diète exerçant le pouvoir législatif y mêle des parties d'administration, fasse indifféremment des actes de souveraineté et de gouvernement.*"[44]
>
> [It is a vice of the Polish constitution that the legislature and the executive are not sufficiently separated, and that the Diet, exercising legislative power, mixes within it parts of the executive and undertakes indiscriminately acts of sovereignty and of government.]

35 Such a vice was later found in the French Convention in 1793.[45] If the bodies are specialised, the one that exercises the legislative function will, or logically should, always dominate the body exercising the executive function. An obvious hierarchy then results, where the legislative power is superior, and the executive is subordinate. For those who are in favour of specialisation, it would seem a trivial matter. The legislative power is after all, normally or at least theoretically, the people sovereign, as stated in art 7 of the 1793 Constitution. It may in other cases be representatives of the people. It would be strange, therefore, for the executive power to be opposed to the will of the sovereign or of its representatives. Specialisation then would mean "being in a democratic system of government". Some would challenge this point on the basis of ideological or political reasons. But they may also do so for technical reasons. Specialisation is, one may say, auto-destructive. Indeed, the legislative power dominates all the others and may even absorb them. The result would be quite negative, with no specialisation or separation of powers

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Constitutional Separation of Powers", in D Dyzenhaus and M Thorburn, *Philosophical Foundations of Constitutional Law*, OUP 2016, pp 221–239, esp p 221.

[44] CE Vaughan, *The Political Writings of Jean Jacques Rosseau*, CUP, 1915, esp p 467.

[45] See the text of the Constitution of the First French Republique of 24 June 1793. https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-du-24-juin-1793. Last accessed 20 April 2020.

anymore. This is in substance what we have in the 1793 French Constitution, with a dictatorship of the French National Convention or, as Marx put it, "a revolutionary, dictatorial assembly".[46] So what Montesquieu was really describing?

The real separation of powers according to Montesquieu

36 Montesquieu considers that the system of government should be quite different. It should contain checks and balances. Far from being self-destructive, this is conceived as being more moderate, balanced and capable of self-regulation. It should run itself easily and allow for the conservation of each power through its internal organisation "automatically". For Montesquieu, seeking an automatic principle is linked to the theory of the form of government. He explains that, "there are three species of government; republican, monarchical and despotic".[47] His distinction between the three differs from that of other authors because it refuses to have only one criterion based on the number of governors (one, all or some). Adopting more complex multiple criteria, he states that each government is defined by its nature, and is characterised by its principle and object. Its nature, or its essence, is what makes one type of government what it is. The principle is what allows the system to function according to its nature. The object is what a government produces according to its nature. A republican government is a government where "the people or part of it is the sovereign. This constitutes its nature".[48] Its principle is virtue. For the monarchy, its nature is to be the government of one, but through law. It functions through honour for the glory of the prince. Despotism is the government of one by the action of the prince. It functions through fear, without virtue, and for the pleasure of the despot.

37 There is a mechanical relationship between nature and principle on the one hand and object on the other. By understanding the first two, it is easy to determine the second. This is that relationship that Montesquieu seeks to invert. If a government has political freedom as its object, what should be its nature and its principle? As it cannot be the monarchy, despotism or the republic, because their objects are

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[46] H Draper, *Karl Marx's Theory of Revolution III*, Vol 3, NY UP, 1986, pp 88–89.

[47] EDL, Chapitre I, 26. "*Il y a trois espèces de gouvernements: le RÉPUBLICAIN, le MONARCHIQUE et le DESPOTIQUE*". See also, K Lazarski, "Forms of Government and Liberty in Montesquieu's Thought", *Studia Prawnicze. Rozprawy i Materiały*, 1(12) (2013), 3, pp 3–18, esp p 10.

[48] *Ibid*, p 10.

different, this government can only be mixed. In Montesquieu's view, it does not need to be invented because it already exists: the mixed government is the government of England. He wrote—

> "*Il y a aussi une nation dans le monde qui a pour objet direct de sa constitution la liberté politique. Nous allons examiner les principes sur lesquels elle la fonde. S'ils sont bons, la liberté y paraîtra comme dans un miroir.*"
>
> [There is also a nation in the world which has political freedom as the direct object of its constitution. We are going to examine the principles upon which it is founded. If they are good, freedom will appear as in a mirror.]—

and we know that he is referring to England.[49] That is in fact not really original because, since the time of Charles I, an interpretation of the English constitution as a mixed government or mixed monarchy has existed. Charles I used the theory of mixed government "in a form that came to be known as the classical theory of the English constitution."[50] In addition, Montesquieu's theory should be linked to a tradition going back to antiquity, acknowledging the merits of mixed government, and affirming its advantages over the simple forms of governments, without the inconveniences. Indeed, "Since Plato and Aristotle, balanced government meant mixing monarchy, aristocracy and democracy."[51]

38 It is easy to present the government of England as a mixed government. The House of Commons represents an element of democracy, the House of Lords represents an element of aristocracy, and there is the Monarch, *viz*. the King or the Queen. According to Weston—

> "Charles I refused further concessions to the Long Parliament in his epoch-making Answer to the Nineteen Propositions . . . To justify his rejection, Charles used the theory of mixed government . . . After noting that the English government of

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[49] EDL, Book XI, *Chapitre* V & VI, p 112.

[50] C Weston, "Beginnings of the Classical Theory of the English Constitution", in *Proceedings of the American Philosophical Society*, 100(2) 1956, pp 133–144, esp p 133. See also C Weston, "English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: II. The Theory of Mixed Monarchy under Charles I and After", *The English Historical Review*, LXXV(296), July 1960, pp 426–443. Mixed government or mixed monarchy is often seen by Hobbes as the cause of the English Civil War.

[51] K Lazarski, "Forms of Government and Liberty in Montesquieu's Thought", see fn 41 above, esp p 16.

> King, House of Lords and House of Commons contained a mixture of monarchy, aristocracy, and democracy—the three pure forms of government that the political theorists derived from Aristotle—he explained that political power was already so well divided among members of this trinity that tyranny was impossible in England."[52]

39 But if its nature is mixed what is its principle? This is the conflict of interest. Three bodies sharing the legislative powers will benefit from being in opposition. The King will oppose the two chambers to keep his executive role; the House of Lords will oppose the House of Commons to defend privileges; and the House of Commons will defend taxpayers. As stated by Montesquieu—

> "*La liberté politique ne se trouve que dans les gouvernements modérés. Mais elle n'est pas toujours dans les États modérés; elle n'y est que lorsqu'on n'abuse pas du pouvoir; mais c'est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser; il va jusqu'à ce qu'il trouve des limites. Qui le dirait! la vertu même a besoin de limites. Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir. Une constitution peut être telle que personne ne sera contraint de faire les choses auxquelles la loi ne l'oblige pas, et à ne point faire celles que la loi lui permet.*"[53]
>
> [Political liberty can only be found in moderate governments. But it is not always found in moderate States; it is only found when power is not abused; but it is a perennial experience that every man who has power is driven to abuse it; he will continue until he finds some limits. Who would deny that! Even virtue needs limits. In order that power cannot be abused, it is necessary that, by the very order of things, powers constrains power. A constitution must be such that no one can be compelled to do things which the law does not oblige him to do, and not to do things which the law allows him to do.]

40 The principle of separation of powers, in its negative sense, is well preserved here. Those three bodies together exercise legislative powers, but only the King exercises executive power. In addition, the judiciary is separated. But they all co-operate with each other. The object should be realised in two ways. First, the principle of separation of powers should be clearly respected. In addition, the system of

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[52] C Weston, *Beginnings of the Classical Theory of the English Constitution*, p 133.
[53] EDL, Book XI, Ch IV, p 112.

balance of powers guarantees its preservation, contrarily to specialisation. Indeed, the Monarch's right of veto in the legislative function means that the legislative power will never be able to dominate totally the executive power. The Monarch will be able to execute the laws when he or she consents to them, and therefore the laws will only reflect his or her express will. To obey the King or the Queen will equate to obeying the law, and political freedom should be established. Secondly, the law will be moderate because of the opposition between various interests within the legislative power. In fact, the law will only have been adopted after compromises and through a consensual approach. Again, a balanced outcome will prevail.

41 This result does not simply come from a game of checks and balances, and through constitutional engineering. It also comes from the opposition between economic interests and social interests represented by and through the various legislative bodies. The social equilibrium will be guaranteed by the constitutional equilibrium. Socio-economic interests are well preserved if they are represented within the legislative bodies, and therefore capable of blocking laws that would menace those interests. This is why the Constitution of England as described by Montesquieu is not only the Constitution of a State but it is also, and maybe more importantly, the Constitution of a society.

42 On the technical constitutional side, the result does not come from specialisation or independence but from co-operation between the various bodies and various functions, and the independence of those bodies. This is what Montesquieu well understood, but its importance has been forgotten.[54] That said, his ideas were used in the 18th century, notably in the doctrine of checks and balances that inspired the work of the Constitutional Convention of Philadelphia, the French National Assembly in 1789, and also the various monarchies at the beginning of the 19th century. If it was later forgotten, it was because it did not seem compatible with the development of representative democracy, which triumphed over the monarchy and aristocracy, and also over the mixed system of government. For instance, it seems inadmissible from a democratic point of view to have representatives sharing legislative power, the supreme power, one might say, with non-democratic elements. Modern constitutions should have a greater balance of powers.

43 Nowadays, the doctrine of the separation of powers has different interpretations. The 18th century negative principle was never really

[54] According to Troper, we should thank Eisenmann for that.

contested. Even an authoritarian regime, in the name of unity of power of the State, would use it as a justification. But it has become a dogma for representative regimes. No bodies should act against another and/or against the law. The idea of hierarchy is truly present here. In a strange way, however, the interpretation of the principle, attributed to Montesquieu, that considers bodies of the State specialised and independent, and balanced, is still present in the doctrine today. But it has many exceptions. Sometimes, one must mention that specialisation is not necessary and affirm that various bodies can co-operate in the exercise of various functions. Independence exists in some bodies because of the absence of reciprocal powers, as in the USA, where the president cannot dissolve the legislature. Sometimes, one might consider that the specialisation and the balance come from exceptions to independence, with reciprocity, as in a parliamentary system of government, where parliament may override the executive body, and the executive body may dissolve the parliament.

44 However, this edulcorated style of separation of powers is quite wrong because of the development of democracy and various democratic political systems. If various authorities are composed of representatives of political parties, then most of the powers are concentrated in the parties or coalitions. This concentration may bring a new hierarchy. The House of Commons, as we know, has the legislative power and the cabinet has the executive power. The cabinet may ask the Queen to dissolve the elected chamber but as the Prime Minister, in the system, is the leader of the majority at the House of Commons, it seems quite difficult in fact to trigger this dissolution. What makes this regime not a despotism, according to the Montesquieu analysis, is the equilibrium of political forces within the parliamentary majority. Regular elections ensure the possibility of change and therefore a different sharing of the legal functions of the state. We may want to believe that the separation of powers has been replaced by an equilibrium majority v opposition or even an equilibrium between the various components of a parliamentary majority. But this equilibrium is not really true until a Prime Minister is removed in a general election or as the result of a revolution. That is until he exercises the power.

What about the Bailiff of Jersey and the real separation of powers?

45 The doctrine of the separation of powers is then anything but the idea described by many commentators. It is surely not a principle or a doctrine that requires the dual roles of the Bailiff to be exercised by separated authorities. What Montesquieu advocated is a balance between the various politico-legal functions of the State. It is quite easy to distinguish between the functions of the Bailiff. This is

primarily done by a "real" separation of the spaces where the Bailiff operates. When he acts as a judge he is in a court. When he acts as president of the States, he in in the States Chamber. After all, the creation of the UK Supreme Court led to a geographical move of the Appellate Committee from the Palace of Westminster to the new building of the Supreme Court, so as to give the appearance of independence.[55] Perhaps one suggestion might be to separate geographically even further the Royal Court and the States Chamber, although in such a micro-jurisdiction that does not seem to make any sense. In addition, if we use Montesquieu original version of the separation of powers, and not a modern or contemporary interpretation, we have the idea of mixed government, something moderated and balanced, and not an absolute division between the powers. But even if we had, it would be impossible for the argument of a lack of separation of powers to be valid. This has to do with a very simple point, which is the actual or "real" legislative function of the Bailiff. Presiding over the States and having no power to vote is very far from exercising legislative power.[56] In addition, a mixed government is constituted by the balance between the legislature and the executive, not with the judicial power. If the Bailiff could enact and then execute the laws enacted, then there would certainly be no separation of powers. But an institution that presides over the debates of a parliament and then steps in to be the top judge is far from infringing the principle. Particularly, if one takes into account the historical context of the Bailiff's office as described earlier, and the size of the micro-jurisdiction that is Jersey, it is finally, as Cornes wrote, about a simple idea: that a single person having two roles does not lead automatically to a lack of impartiality.

46 That said, the rule of specialisation works quite well when applied to the Bailiff's functions. We have seen that under this rule there should be an equal number of authorities, specialised, to mirror the number of functions, and that a body should not be participating in the exercise of other functions. As the Bailiff is simply presiding over the legislative debates and not truly participating in those debates, we cannot say that he does not specialise only in the judicial function. The

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[55] A Kavanagh, "From Appellate Committee to UK Supreme Court: Independence , Activism and Transparency", in J Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging*, Bloomsbury Publishing, 2011, pp 35–57, esp pp 36–37.

[56] Even before the Bailiff's casting vote was abolished by the States of Jersey Law 2005, the Bailiff would, as a matter of practice, only use his vote to ensure a continuance of the *status quo*, so that the disputed issue could be debated again.

judicial function is actually his specialisation. The rule of independence that is concerned with the absence of influence between bodies, also works here. The Bailiff does not influence the work of the legislative power, but solely polices the debates of the legislative body in order to ensure that it complies with its own rules. One might argue that that is some sort of influence, but Montesquieu made it clear that no strict independence was necessary but that various levels, ranging between the absence of independence and a full independence, could exist. Then again, in Montesquieu's words, the important point is the co-operation of the various powers. Here too we can consider that even if the Bailiff were participating in the legislative power if analysed from a very specific angle, it would mean that two bodies were exercising together the legislative power, that the Government was exercising the executive power while the judiciary was completely separated: according to the writings of Montesquieu, that does not contradict the doctrine of the separation of powers.

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