Absolutism and Its Judges

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Jacques Krynen shows, in an excellent overview, that judicial power was not a recent invention: in the Old Régime, high court judges already claimed a share of royal power. This erudite yet accessible book thus revises the myth of absolutism. What about other magistrates and lawyers?

Reviewed: Jacques Krynen, *L'État de justice. France (XIIIe-XXe siècle*). Vol. 1: *L'idéologie de la magistrature ancienne*, Gallimard, NRF, Paris, Nov. 2009. 326 pp., 22 euros.

This book stems from Jacques Krynen's observation that the power of judges has increased in recent years. Instead of seeking a circumstantial explanation of this phenomenon, he sets out in *L'État de justice. France (XIII^{e}-XX^{e} siècle*) (*The State of Justice : France, 13th-20th Century*) to show that "the irrepressible influence of the courts on the operation of government" has been a persistent feature of the French state over a long period of time. In this first volume, he reconstructs the *ideology of the old magistracy*. How did magistrates reconcile their support for royal absolutism with their attachment to the rule of law? The author seeks to explain this tension by analyzing theoretical and professional texts written by lawyers and judges from the thirteenth century to the Revolution. The first part of this excellent overview shows how magistrates gained control over the sovereign's obligation to administer justice. The second part explains their claim to a share of royal legislative power.

The King, the Obligation of Justice, and the Magistrates

Countering the thesis according to which the administrative state supplanted the judicial state in the seventeenth century, Krynen points out that the administration of justice was a duty

incumbent on monarchs from Saint Louis to Louis XVI. They tended to have difficulty, however, with actually wielding this judicial power. In the wake of the juridical renaissance of the twelfth and thirteen centuries, justice became the business of experts. In the schooling of the sovereign, the science of the jurists – "political idiots," according to Gilles de Rome, the author of *De regimine principum,* a textbook written for the edification of Philip the Fair – seemed of little use: "The king was seldom a jurist," Krynen concludes.

The sovereign duty to administer justice no doubt persisted in the form of *justice retenue* (the king's residual proper jurisdiction), which allowed the king to suspend, interrupt, or reclaim judicial powers delegated to his courts and tribunals. By the end of the fifteenth century, however, the personal exercise of judicial powers by the king was subject to challenge. For Jean Bodin, it was to be limited to the power to pardon.

This doctrine of separation of functions did not imply any separation of powers, however. The author traces the history of the doctrine that sovereign justice and royalty were "inseparable." The *Parlement*, in issuing its decrees, was merely the king's mouthpiece. Little by little, though, the magistrates of the sovereign courts turned this "representation" of the monarch into an instrument of his replacement. The corporal unity of king and *Parlement* stood in the way of any administration of justice outside its walls. This was in contradiction with such practices as having the *Grand Conseil* and *Conseil Privé* hear appeals, take cases out of the hands of the courts by way of so-called *évocations*, and even quash judgments, which became common procedures from the late fifteenth century on. As the king's representative, the high magistracy thought of itself as the true and only seat of justice.

The judicial function could not be reduced to the legal technique that permeated it from the end of the Middle Ages on. Dissecting discourse and ritual, Krynen observes that the act of judging was never seen as a simple application of expertise. In exercising the "art of goodness and fairness" (to borrow Celsus' definition of justice), the judges of *Parlement*, "priests of justice," were performing a religious act. As representatives of the king, they were beneficiaries of the theory of divine right. The purpose of this sacralization was not merely reverential; it also served as a basis for self-criticism in circles where venality of office was on the increase and accusations of partiality were becoming common. Above all, it justified ignoring the laws of man

in order to judge on the basis of conscience. It was upon such ideas that sovereign judges rested their claim to participate in the legislative process, a claim that is explored in the second part of the volume.

The King, the Law, and the Magistrates

Krynen reminds us that the renaissance of legal science in the twelfth and thirteenth centuries turned the king into a princely lawmaker with the authority to promulgate new norms. Nevertheless, jurists were quick to produce an abundance of treatises on Roman and canon law pointing out that the law lives exclusively in the interpretations that are made of it. Although various passages of the Justinian Code reserved the power of interpretation to the emperor, commentators allowed for judicial interpretation for practical reasons: the prince might be unavailable or distant. In France, where it was easy to lay legal questions before the king, this issue quickly became a stumbling block. By the end of the fifteenth century, one heard repeated calls for strict application of the laws by the courts, including the sovereign courts, and the civil ordinance of 1667 established broad civil responsibility of judges. Krynen analyzes the subtleties of legal doctrine to show that, from the sixteenth century on, jurists favored a strict application of the law when its terms were unambiguous but granted sovereign court magistrates the power to interpret obscurities in the texts. For the law, of which magistrates regularly proclaimed themselves to be the slaves, was not simply human but above all divine.

The registration of royal ordinances compounded the misunderstanding between the king and the sovereign courts on the subject of royal absolutism. Comparing the *Parlement* to the Roman Senate, whose genealogy was minutely studied, high magistrates did not challenge the principle of a royal monopoly on the pronouncement of the law but did assert that royal edicts had to be verified, authorized, and approved before they could be considered "true law." After 1500 especially, the courts were not content merely to advise the king about potential deficiencies in the law. With "iterative remonstrances" they maintained a "legislative dialogue" with the prince. Interrupted for sixty years after the *Fronde parlementaire* (at least for the *Parlement* of Paris) and, despite the restoration of the right of remonstrance (by the declaration of September 15, 1715), restrained until the middle of the eighteenth century, the political rebellion of the high magistracy became a fixture of the political scene from 1750 on. Krynen notes that the "blind ambition" to share monarchical power was related to the anxieties of the

magistrates as a group faced with exclusion from the regime's urban renewal projects and a decline in judicial fees. Above all, he stresses, along with R. Mousnier (*Les institutions de la France sous la monarchie absolue*, Paris, 1980, vol. 2, p. 509) and F. Di Donato (*L'ideologia des "robins" nella Francia dei Lumi*, Naples and Rome, 2003), the secular character of the claims put forward in this period. By presenting themselves as "essential guardians of the laws and constitution of the monarchy," the *parlementaires* reiterated their claim to be "watchdogs of constitutionality" in a new form. To be sure, the claim to represent not only the king but the French nation marked a departure from the past. Nevertheless, High magistrates continued to think of the monarchy "as a state of law and justice, with the sovereign courts as *pillars* and *pilots*." They thus rejected Enlightenment efforts to strengthen the central government provided that it submits to the guidance of philosophical reason (enlightened despotism).

Erudite yet remarkably accessible, Krynen's book clearly demonstrates the role that the high magistracy played right up to the Revolution as the defender of an absolutism of checks and limits. He does not, however, trace the contours of the "old magistracy." In several passages he touches on the elitism of the men of *Parlement*, as can be seen in their treatment of lawyers as subordinates. Mere auxiliaries of justices, lawyers were expected to make rapid and sober pleas. They laid the groundwork for the truth of judgment but remained on the fringes of political power, of which the sovereign courts claimed a share. The same point can be made about the judges of the lower courts, which were denied the fiction of being one with the king. Nevertheless, some lawyers (such as Jean le Coq, Dumoulin, and Le Paige) and some "lesser judges" (such as Jacques d'Ableiges) also nursed the "ideology of the old magistracy" for a time before rejecting it toward the end of the eighteenth century[1]. But for a few rare points (such as the possibility of a judgment in equity), the parliamentary theses do not seem to have been sharply distinguished from those of the *robins* generally, however. In the "ideology of the old magistracy" as depicted by Krynen, it is not always clear what was associated with high magistrates in particular and what was rather part of a shared culture of men of the law in the Old Regime.

[1] F. di Donato, "Constitutionnalisme et idéologie de robe: L'évolution de la théorie juridico-politique de Murard et Le Paige à Chanlaire et Mably," *Annales ESC*, 1997, pp. 821.

The unity of the high magistracy is also somewhat ambiguous. Krynen seems to exclude the *Chambres des comptes* and especially the *Cours des aides*, which were sovereign courts specializing in financial cases and which retained jurisdiction over many fiscal issues to the end of the Old Regime. Their views nevertheless seem to have had much in common with those of the *Parlements*. Krynen depicts the *Grand Conseil*, a judicial organ over which the king retained control, as a rival of the *Parlements*, yet it was composed of men who owned their offices and who sometimes backed the claims of the *Parlements*. Indeed, the cohesiveness of the *Parlements* themselves at the end of the Old Regime is problematic[2]. One may wonder whether the parliamentary ideology in favor of "reasonable absolutism" did not also serve the function of masking internal tensions similar to those that divided other eighteenth-century corporations[3].

The full implications of this first volume emerge only from a comparison with contemporary legal theories. The "current increase in the power of the courts in France" is, in Krynen's view, the ultimate manifestation of the "empire of justice" that was gradually established under the Old Regime. At a time when disrespect for judges seems common in public discourse (in 2007, the President of the Republic compared the judges of the *Cour de Cassation* to "peas in a pod") and when "the most powerful person in France," the *juge d'instruction* (investigating magistrate), is slated for oblivion, Krynen's assertion about the power of judges is surprising. To be sure, much ink has been spilled in recent years about the "expansion of judicial power". But it has also been observed that if judicial procedures have often been extended to new spheres, the place of jurists in political life has shrunk[4]. Substantiation of the author's thesis must await publication of his second volume, *L'Emprise contemporaine des juges.*

First published in laviedesidees.fr. Translated from French by **Arthur Goldhammer**.
Published in booksandideas.net 31 December 2010.

[2] For an overview, see B. Garnot, *Histoire de la justice*, Paris, 2009, p. 298 ; and for a local illustration, see, e.g., C. Le Mao, *Parlement et Parlementaires à Bordeaux au Grand siècle*, Paris, 2007.
[3] S. Kaplan, "Idéologie, conflits et pratiques politiques dans les corporations parisiennes au XVIIIème siècle", *Revue d'histoire moderne et contemporaine*, 2002, p. 5.
[4] See esp. J. Commaille and L. Dumoulin, "Heurs et malheurs de la légalité dans les sociétés contemporaines. Une sociologie politique de la 'judiciarisation'", *L'Année sociologique*, 2009, vol. 59, n°1, p. 63.