

Va Savoir!

[Go figure!]

Part One

The adage *jura novit curia* in contemporary France

"...the central problem - the enumeration, even partial enumeration, of infinity - is irresolvable. In that unbounded moment, I saw millions of delightful and horrible acts; none amazed me so much as the fact that all occupied the same point, without superposition and without transparency. What my eyes saw was *simultaneous*; what I shall write is *successive*, because language is successive." - J.L. Borges

(*The Aleph*, trans. A. Hurley, Penguin: New York, 1998, 118 at 129)

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ABSTRACT**Va Savoir!**

[Go figure!]

Part One**The adage *jura novit curia* in contemporary France**

The Civilian adage *jura novit curia* – the court knows the law – for all that it is well recognised in France does not receive much scrutiny. This is unusual first because some claim it expresses a fundamental principle of French law and secondly because rules and practices associated with *jura novit curia* are controversial. The paper remedies the scholarly deficit, scrutinising seven definitions of *jura novit curia* to catalogue for the first time the divergent meanings associated with the adage and to analyse their status in French law and legal culture. While many meanings are attributed to *jura novit curia*, no single definition attempts to capture its diversity. The black-letter and ideological controversies that can be discerned in close readings of the adage are consistent with an enduring debate in France about the respective rights and duties of courts and parties in litigation and the role of the judge in French society. The controversies of *jura novit curia* in France moreover are framed in the technical language of the *processueliste*, while the adage itself is avoided. In this light, *jura novit curia* is not, as it might first appear, a self-justifying principle that speaks to an overarching judicial power. Rather, *jura novit curia* speaks to prerogatives and duties that both empower and constrain the French judge. An adequate account of *jura novit curia* therefore must account for the principles, rules and adages by which it is constrained.

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Va savoir! [Go figure!]

Part One: The adage *jura novit curia* in contemporary France

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Va Savoir! : jura novit curia in contemporary France¹

The three parts of *Va savoir* attempt to bring to Common Law and, hopefully, Civilian readers, an appreciation of the meaning, status and history of the adage *jura novit curia* in French law and legal culture. *Jura novit curia* is commonly translated as the 'court knows the law', and this is not inaccurate. As we will see, however, many other meanings are drawn from the three words of the adage. These meanings express presumptions and norms with distinct legal consequences and effects for parties, courts and French society. These diverse phenomena constitute the dominant characteristic of *jura novit curia*: many of the consequences and effects to which the adage is said to give rise bear little relation to the words *jura*, *novit* and *curia*.

The three parts of *Va Savoir* construct a 'doctrinal anthropology'² of *jura novit curia*, that is, an account how of its normative structure interacts with legal theory and practice. *Va Savoir* Part I, analyses seven definitions of *jura novit curia*, presenting the first comparative analysis of the different presumptions, consequences and effects scholars attribute to the adage. *Va Savoir* Part II concerns the legal status of judicial intervention *jura novit curia* (that is, *sua sponte*) in French law, including the controversial prerogative said to authorise the court to deny parties notice of the case they have to meet. *Va Savoir* Part III challenges claims *jura novit curia* originated in *ancienne jurisprudence*, arguing the adage is modern, perhaps even of 20th Century origin.

The common task of the three parts of *Va Savoir* is the identification of the essential guises and disguises of *jura novit curia* as found in their legal and cultural context in contemporary and *ancienne* France. *Jura novit curia* is a *nœud gordien*, a dense matrix of ideological presumptions and attitudes, of principle and positive law which together interact to express enduring traditions and practices that manifest in French legal culture. *Va savoir* attempts to *trancher* the *nœud gordien*, to reveal the place of the adage in a baroque and not unelegant system of contradictory adages that at once extols and deprecates the powers of the French judge. In a systemic context, the iconic force of *jura novit curia* expresses no small degree of incoherence, even superficiality. However, *Va Savoir* argues that beyond layers of superficiality and incoherence, *jura novit curia* speaks to a folk wisdom, an *esprit contradictoire* that distinguishes French process and legal culture from other Civilian legal systems.

¹ I would like to thank Professor M. Stolleis and the Max-Planck Institut für Europäische Rechtsgeschichte in Frankfurt and Professor L. Mayali and the School of Law at the University of California, Berkeley for generous fellowships that made the initial research into *jura novit curia* and pre-Revolutionary French law possible. Above all, appreciation must be extended to Dr Anton Schütz of Birkbeck College School of Law, University of London for *une certaine formation ineffable*.

² I have been using the phrase 'doctrinal anthropology' to describe a series of research projects that, on one hand, are resolutely concern black-letter law, hence the word, 'doctrinal'. On the other hand, the research has an anthropological dimension that concerns the interaction of doctrine and systemic phenomena that are of no obvious relevance to practising lawyers. Evoked here, is Mauss's 'total social fact', an aspect of the genealogy of 'doctrinal anthropology'. see [C. Levi Strauss, *Introduction to the Work of Marcel Mauss*, translated by F. Baker (Routledge & Kegan Paul: London 1987) at 26, 29.] The significance of both works for a theory of 'doctrinal anthropology' is discussed in Part III of *Va Savoir*.

Va savoir: *jura novit curia* in contemporary France

1. Introduction

The adage *jura novit curia* is certainly not unknown in French law. The simple translation, *la cour connaît le droit* ('the court knows the law'),³ is accurate enough to be the beginning and end of most discussion of the adage. However, when definitions of the adage are scrutinised and compared, they reveal a variety of inconsistent, incomplete or contradictory meanings that in France have been the subject of no small controversy. *Jura novit curia*, considered as the totality of meanings and consequences scholars impute to it, is Byzantine in its complexity. The absence of any real scholarship about the adage suggests that many of its guises and disguises are scarcely known at all.

The resulting multiplicity of inconsistent and uncontested definitions make it difficult to distinguish aspects of *jura novit curia* that are fundamental principle, artefacts of French legal culture, formal rules of law, an occasional empirical fact of legal practice or some ever-evolving configuration of an unstated 'total social fact'. Each definition, however incomplete, does contribute to a larger picture of the many guises of *jura novit curia* in its many guises.⁴ This paper argues that it is in the discordant unity of this unrecognised collective *œuvre* that we come to appreciate the functions and broader significance of *jura novit curia*.

Difficulties understanding *jura novit curia* arise because, before all else, it is an adage, a species of legal folklore. An adage, Cornu writes, is an "*expression lapidaire*"⁵ dense with meaning, which states "*une règle de droit, une sentence morale ou un fait d'expérience*."⁶ The paper attempts to penetrate the semantic pith of *jura novit curia* to identify how each of these characteristics arise through the intervention of scholars whose definitions attribute consequences that bear little direct relation to the bare words of the adage.

It should be emphasised the objective is not to prescribe an ultimately 'correct' definition of the adage. Rather the objective is to investigate and describe claims made about the presumptions, meanings, consequences and effects to which *jura novit curia* is said to give rise. The enquiry aims to establish the conceptual

³ Y. Merminod, *Expressions et proverbes latins* (Ides & Calendes: Neuchâtel, 1992) at 66. Merminod defines *jura novit curia* as an "adage essentiel de toute procédure aux termes duquel «le tribunal sait le droit» (Litt: «la Cour connaît les droits = les lois applicables»"; see also Roland & Boyer, *Adages du droit français* 4th (Litec: Paris, 1999) at 363, "La Cour connaît le droit".

⁴ The phenomena of a series of definitions, each incomplete but each contributing to an understanding of a whole that is never perceived by the authors of each definition suggests the well-know story from the 12th Century Persian poet *Rumi* about the men who, each touching one part of an elephant, defined the elephant in terms of the part they had touched. But, however real and necessary an elephant's ear, trunk or leg may be, describing each part alone cannot convey the reality of the elephant. see J. al-Din Rumi, "Elephant in the Dark" in *The Essential Rumi*, translated by Coleman Barks (Harper Collins: New York, 1995) at 252. "Each of us touches one place and understands the whole in that way."

⁵ G. Cornu, *Vocabulaire juridique*, 4th (Quadrige/PUF: Paris, 2003) at 25. [a pithy saying]. All translations are the author's unless otherwise noted.

⁶ Cornu, *ibid* at 25 [a rule of law, a moral judgement or a fact of experience].

structure of the adage grounded in both doctrine and practice, the understanding of which will better facilitate comprehension amongst Civilian and Common Law scholars of the legal and cultural phenomena which definitions of *jura novit curia* obscure.

The paper is in two sections. The first section subjects six generally brief definitions and translations of *jura novit curia* to close scrutiny, to discern the rule, judgement or experiences of legal practice to which the adage refers. The second section examines the definition of *jura novit curia* offered by the doyen of French procedure, Gérard Cornu, discovering in its laconic brevity a profound, but inspired ambiguity that connects *jura novit curia* to persistent doctrinal and traditional controversies of French legal culture.

The paper develops five themes. The first is self-evident: *jura novit curia* is rarely subject to critical scrutiny, an anomaly if the adage is, as some claim, a fundamental principle of French law. Instead, the adage *qua* adage, (distinct from the claims which attach to it), stands as an unchallenged, largely unexamined, even neglected icon that speaks to ideological conceptions of the judicial power and, as a consequence, to the respective rights, duties and obligations of courts and parties during legal process.

Secondly, as the Franco-German procedural theorist Henri Motulsky recognised, many legal and cultural assumptions, consequences and effects attributed to *jura novit curia* are misleading until understood in the context of opposing adages.⁷ The *office du juge* in French procedure has, by Motulsky's account, traditionally been delimited by a quaternary of adages which constitute a system in which competing visions of judicial power and the status of parties cohabit both at a theoretical plane and at the level of the instant case. In this system the more extreme legal consequences imputed to *jura novit curia* are constrained or even nullified by competing principles.

Thirdly, while the phrase the 'court knows the law' may be reassuring, even happy news, as news goes, it is 'embarrassing' for its very enunciation presupposes the doubts which the adage exists to dispel.⁸ The presumption of empirically verifiable judicial knowledge of the law the adage posits is systemically refuted by France's 37 courts of appeal and the national *Cour de cassation*. The existence of these institutions raises a counter presumption that recognises the legal expertise of at least lower court judges in France is chronically fallible and must be closely monitored. The counter-presumption is affirmed normatively by the doctrine of *le double degré de juridiction* which ensures everyone has a right for their case to be heard twice. Empirically, the

⁷ H.Motulsky, *Ecrits, Etudes et notes de droit international privé* (Dalloz: Paris, 1978) at 89. see text *infra* note 28.

⁸ F. A. Mann, "Fusion of the Legal Professions?" (1977) Law Q.R. 367 at 369 claimed that the "most spectacular feature of English procedure" was the absence of the rule *curia novit legem*, the twin of *jura novit curia*. Instead, Mann describes how English judges are presumed to know nothing about the case before it begins. Mann calls this the 'principle of judicial unpreparedness' which expresses a 'parties' rule' in that the judge relies on counsel for the points of law upon which the case will be decided.

counter presumption is affirmed because appeals are common in France.⁹ Every successful appeal, less than unanimous decision, or conflicting decisions of different *chambres* of a single *cour* challenge the empirical veracity of judicial knowledge *jura novit curia* presumes.

Fourthly, in the absence of a modal verb, *jura novit curia* is without explicit normative force or consequences. The bare descriptive presumption of the adage instead functions as a *Quelle*¹⁰ from which diverse propositions about the judicial power in France can be drawn. Some legal consequences said to issue from the presumption of judicial knowledge are manifestly arbitrary, controversial for their denial of parties' fundamental rights, such as the right to notice and to a full defence. Other imputed consequences are more innocuous pretensions, artefacts of French legal culture, than legal norms *in se*. These include the notion that parties, whose legal rights are the object of litigation, must avoid legal terminology when asserting these rights before the court because legal analysis, *savants* tell us, is the "monopoly" of the court. Between extremes, *jura novit curia* supports workable, uncontroversial rules and practices, such as the power of a court to dispense with the necessity a party prove the rule upon which they rely exists as a valid law.

Finally, I suggest that understanding *jura novit curia* as an artefact of French legal culture is facilitated by reference to a four part semantic structure. The structure consists first of the adage *nul n'est censé ignorer la loi* that states a presumption 'everyone knows the law' providing an *a priori* justification of *jura novit curia*. The second element comprises the words of the adage itself and its twin *curia novit legem*, Latin words rich with meaning that is unexplored and relevant to contemporary French controversies. The third element concerns the normative and cultural consequences scholars attribute to the adage, typically expressed as duties or prerogatives that inure to the concept of the *office du juge*. The fourth element of the adage's semantic structure concerns the effects, legal and otherwise, that the preceding elements cumulatively exert in legal practice and theory on courts, parties and society.

2. Six Definitions of *jura novit curia*

Six definitions of *jura novit curia* are scrutinised in this section to identify the legal principles, norms, moral judgements and experiential facts said to issue from the adage. The definitions reveal a *jura novit curia* that expresses formal rules of law and informal rules of practice or etiquette. Mirijan Damaška describes a draconian *jura novit curia*, illegal in France because it denies a party's right to a defence. Yves Merminod's innocuous rule of etiquette refers to the comportment of French advocates before the court. Roland and Boyer's *jura novit curia*, like

⁹ see E. Steiner, *French Legal Method*, (Oxford University Press: Oxford, 2002) at 29. In 1998, the French *Cour de cassation* heard some 25,000 cases. Roughly three quarters were civil cases, the remainder, criminal. Almost 20%, or some 4,000 of the civil cases were successful. The large number of appeals indicates a prevailing (and healthy) belief in the fallibility of judicial knowledge; the quantity of successful appeals, that the fallibility has an empirical basis.

¹⁰ "die Quelle" is German for 'spring' (eines Baches, eines Flusses), or 'source'; also used figuratively, as in the 'fount of wisdom', (die Quelle der Weisheit). see *The Oxford-Duden German Dictionary*, (Oxford University Press: Oxford, 2001 reissue) at 604.

Common Law judicial notice, permits a judge to relieve a party of the burden of proving the factual existence of the law on which they rely.

Fox's definition concerns the judge's prerogative to undertake 'research' a euphemism that conceals issues relating to party rights and judicial impartiality. Engelman conceives of *jura novit curia* as a party's right to rely entirely on the judge's knowledge of the law, permitting the party to invoke *jura novit curia* as grounds for appeal. Finally, Black's Law Dictionary, reveals a duality inherent in the words of the adage, translating it first as 'the court knows the law' and secondly, as 'the court recognises rights', references to a judge's power to decide in law or in equity. Each definition offers a distinct approach to the adage, and so touches different aspects of the relationship between courts and parties. Only when the multiple dimensions of *jura novit curia* are considered as a whole does it become possible to speak of the meaning of *jura novit curia*.

2.1 Mirijan Damaška, *Faces of Justice and State Authority*

Mirijan Damaška captures the most extreme black-letter consequence of the adage, writing that *jura novit curia* authorises a judge to reach a decision based on, "a legal theory that has not been subject to the arguments of counsel" for the parties.¹¹ Damaška's definition expresses the most controversial legal consequence of the adage in contemporary France: *jura novit curia* denies the parties notice of, and the right to defend against the very point of law on which the litigation is found to ultimately turn.

This technique of adjudication is uncontroversial in some Civilian jurisdictions, reflecting a distinct and authoritarian philosophy of the functions of courts, judges, parties and counsel.¹² In France, however, Damaška's *jura novit curia* has been found to violate fundamental rights expressed by *le principe de la contradiction* and *les droits de la défense*.¹³ Both principles affirm the parties'

¹¹ M. Damaška, *The Faces of Justice and State Authority*, (Yale University Press: New Haven, 1986) at 116.

¹² Mann, *supra* note 8 at 370 criticises a decision of the European Commission of Human Rights [Application 3147/67, Yearbook of Human Rights or Collection of Decisions 27, 119] which stated, "it is a generally recognised principle of law that it is for the court to know the law (*jura novit curia*)...the practice of the German courts whereby the parties are not necessarily invited to make oral submissions on all points of law which may appear significant to the courts does not constitute an infringement of 'fair hearing' within the meaning of [Article 6 of the European Convention on Human Rights]." Citing Mann's article, the European Court of Justice in *Jeroen Van Schijndel and Johannes Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1996] 1 CMLR 801 [hereinafter referred to as "Van Schijndel"] recognised national jurisdictions of the European Community diverged on this point, stating, at §34, "...in many systems, if a court does raise a new point, it will, or must, invite the parties to address argument to the point, as would an English court." The court also cites J.A. Jolowicz, "Da mihi factum dabo tibi jus: a problem of demarcation in English and French Law" in *Multum non multa: Festschrift für Lipstein* (C.F. Müller Juristischer Verlag: Heidelberg, 1980 at 79); reprinted in J.A. Jolowicz, *On Civil Procedure*, (Cambridge University Press: Cambridge, 2000) at 185.

¹³ *Le principe de la contradiction* [the principle of contradiction, or the 'adversarial principle'] roughly equates with English Natural Justice and American Due Process, protecting fundamental party rights, *inter alia*, to notice of the case to be met and an opportunity to refute it. *Les droits de la défense* [rights of defence] by many accounts incorporates *le principe de la contradiction*. A detailed analysis of *le principe de la contradiction* and *les droits de la défense* and *le principe d'égalité devant la justice* appears in *Va savoir* Part II.

right to notice and the opportunity to present argument on all points of fact and law considered by the court in its judgement. In France, both principles are considered 'of constitutional value'.¹⁴ Damaška's *jura novit curia* breaches *le principe de la contradiction* and *les droits de la défense* because the successful party receives judgement in her favour on legal grounds her opponent has been unable to challenge.

Le principe de la contradiction and *les droits de la défense* do not, however, prohibit a court from intervening so as to decide according to its own point of law. In France, intervention *jura novit curia* may be required by *le principe d'égalité devant la justice*¹⁵ which is meant to guarantee that all citizens receive equal treatment from the courts and that no one should be treated either less favourably than anyone else. *Le principe d'égalité devant la justice* may impose a duty on the court duty to intervene with its own point of law because it is the courts' duty to decide according to the 'applicable' law in all cases, regardless of the legal argument on which parties base their case.¹⁶

Damaška's definition, however, fails to distinguish between the act of intervention *jura novit curia* and the manner and form requirements to which the court is subject when it raises a point of law *propre mouvement*. A less extreme version of the adage, not associated by Damaška with *jura novit curia*, speaks simply to the bare power of intervention. This sense of *jura novit curia* relates to the court's duty arising from *le principe d'égalité* to decide on the basis of the 'applicable' law in all cases and, where necessary, to intervene, for example, to correct a party's erroneous or inadequate legal argument. *Le principe d'égalité* imposes a duty to intervene where the 'applicable' law so requires because otherwise some parties would be denied the benefit of the law that is the right of all French citizens.

¹⁴ G. Bolard, "Les principes directeurs du procès civil: Le droit positif depuis Henri Motulsky", *Le Semaine Juridique [JCP]* éd. G. n° 30, 3693, 1993, at §13 writes that main element of *les droits de la défense* is the *principe de la contradiction*, which means that "le défendeur doit être averti du procès, chaque partie a le droit d'obtenir communication des pièces adverses, le juge doit se déterminer d'après les seules débats et documents produits à l'audience." [the defendant must be given notice of the action, each party has the right to copies of adverse evidence, the judge must decide only on the basis of documents and arguments introduced during process".]

¹⁵ [the principle of equality before the courts], see Cornu, *supra* note 5 at 335; F. Eudier, *Ordre public substantial et office du juge*, (thèse, Rouen, 1994, [<http://panjuris.univ-paris1.fr/pdf/theseeudier.pdf> link verified June 2005]), 115ff and 455ff.

¹⁶ This dimension of *le principe de d'égalité* is perhaps less familiar to Common Law scholars and is not always understood by French scholars, (Eudier, *supra* at 458). Eudier explains its relevance in terms of Article 12 alinéa 1 of the *Nouveau code de procédure civile*, (Dalloz: Paris, 2001) [hereinafter referred to as "NCPC"] which requires the judge decide all cases according to the law that is 'applicable'. *Le principe d'égalité* requires all citizens receive the benefit of the applicable law in equal measure. Where a legal rule is proven to be 'applicable' it must form the basis of the court's decision. 'Equality' here means that the judge does not have a discretion to apply an applicable rule in some cases but not in others. A problem arises however where more than one rule may be applicable and at any rate determining whether the judge has breached this duty is a decision for an appellate court. The most significant effect of this use of *d'égalité* may be to permit the Cour de cassation to more readily substitute its view of the applicable law, because discretionary acts of lower courts are not normally subject to cassation so long as the discretion was exercised properly.

After the 'crisis of adversarial procedure'¹⁷ in the 1970's, it has been established that French courts contemplating a decision based on a point of law not put forward by the parties are subject to what is sometimes called the *saine* or healthy *solution*.¹⁸ The *saine solution* requires the court to 'regularise' its own point of law by bringing it within the ambit of the parties' debate. The court must notify the parties of its intention to raise its point of law and provide the parties a real opportunity to debate its merits.¹⁹ The *saine solution* thus ensures at least formal parity between the content of the court's reasons for judgement and the written and oral submissions of the parties. As a consequence, in France, Damaška's *jura novit curia* is an illegal act because by definition it refers to a decision on a point of law upon which the parties have not been heard.

Many are the decisions of the *Cour de cassation* affirming the *saine solution*, the necessity of respect for *le principe de la contradiction*, *les droits de la défense* and *le principe d'égalité devant la justice*.²⁰ Paradoxically, however, the frequency with which the national *Cour de cassation* continues to find it necessary to re-affirm formally recognised legal principles suggests that local courts of first instance and regional courts of appeal (together, *les juges du fond*) in France do not necessarily always act in accordance with the law that *jura novit curia* tells us they are presumed to know.²¹

¹⁷ "La crise du contradictoire entre juge et avocat", Gaz. Pal 1978 II Doctrine 419; see also Jolowicz, *supra* note 12 at 87 for a basic account of the controversy.

¹⁸ The leading case is *Conseil d'Etat, Assemblé*, 12 octobre 1979 req. n^{os} 1875, 1905, 1948 to 1951; Rassemblement des nouveau avocats de France et autres, in (1980) 54 Semaine juridique (JCP), Pt II n^o 19288. The decision was based on *le principe de la contradiction* and *le principe d'égalité devant la justice*. Eudier, *supra* note 15 at 115 notes that *le principe d'égalité devant la justice* has a "valeur constitutionnelle".

¹⁹ A. Benabent, "Les Moyens Relevés en secret par le juge" (1977) 51 *La Semaine juridique Part I*, n^o 2849 at §4, "...demeure la constance des principes généraux qui leur sont supérieurs et permettent de maintenir la solution saine."...[a reference to the "stability of general principles of law which by their superior status allow the healthy solution to be maintained."]. Bolard, *supra* note 14 at 333, §19 refers to the "heureuse solution" [the happy solution]

²⁰ *Cour de cassation*: generally see Dalloz annotation to *NCPC* Articles 4, 5, 12 and 16; R. Perrot, (1976) 74 *Rev Trim de Dr Civ* 825 at 826-27; lists 37 decisions of the *Cour de cassation* decided during the height of the "crise du contradictoire" of 1973-76; Benabent, *supra* cites five cases decided prior to the enactment of the *NCPC*; J. Norman, *Rev. Tr dr civ* 86(2) 390 at 392 cites 5 cases. The citations are representative only. The case law by its extent and complexity suggest a parallel with American case law. Cases also arise in the *Conseil d'Etat*. The leading case on the three principles is cited *supra* note 18; a second important decision concerns *NCPC* Article 1015: n^o 21-893, 5 juillet 1985, Gaz. Pal. 1985, 2, 742; see also 16 juin 1999, R.F.D.A. 2000 no 2 p 359, note Yves Brard, in which the *Conseil* overturned a decision of the Administrative Court of Appeal which decided on a point of law raised of its own motion without providing the parties with an opportunity to argue the point.

²¹ Perrot decried "the unfortunate tendency of certain courts to forget too easily the elementary" [*principe de la contradiction*], R. Perrot, *supra* at 827. "la fâcheuse tendance de certaines juridictions à oublier trop facilement cette règle élémentaire."

Thus is established an antinomy between the formal law relating to *jura novit curia* and the dissident practices of some French judges.²² French scholars acknowledge a strong tradition of the sovereign *juges du fond* a tradition that may support distinct regional judicial cultures.²³ In France this is reinforced by the absence of a formally binding doctrine of precedent.²⁴ The result is that instances of Damaška's *jura novit curia* continue in local and regional courts notwithstanding their illegality, even though jurisprudence indicates national courts consistently overturn such decisions. Where parties acquiesce to a decision taken *jura novit curia*, in Damaška's sense, and do not appeal, the decision stands as a valid *chose jugée* despite having been reached in breach of *le principe de la contradiction*.

Damaška's *jura novit curia* also conflicts with the traditional quasi-principle, *le dispositif* which holds that, at least in private law, the substance of litigation is for the parties to decide.²⁵ Consequently, a court in reaching its decision should normally stay within the bounds established by the pleadings and arguments of the parties. This parity is the essence of the adages *ne eat judex ultra et extra petita partium*²⁶ and *judex secundum allegata et probata partium judicare*

²² A sense of the dynamic that informs the practice of French judges is seen when the following two comments are compared. Eva Steiner, *supra* note 9 at 84, writes that "'imitation' is also forced upon judges in the lower courts in the sense that if they do not follow higher court decisions their own decisions are likely to be reversed, with the implicit stigma attached thereto that they do not 'know their law'." John Bell, *French Legal Cultures*, (Butterworths: London, 2001) at 71 writes, "[t]hat same colloquium contains a discussion about the 'legitimate resistance' of the lower courts to the rulings of the higher courts...the role of the lower court judge is to be a rebel, but not too often...until there is a much great use of information technology, most of what is decided at levels below the Cour de cassation is unknown..."

²³ Cornu, *supra* note 5 at 850, defines "souveraineté" *inter alia* with reference to the sovereignty over the appreciation of fact of first instance and appellate courts, which in theory permits lower courts to avoid the control of the national Cour de cassation whose jurisdiction is restricted to questions of law. However, R. Martin, "Retour sur la distinction du fait et du droit" (1987), *Recueil Dalloz Sirey, Cahier 39, Chronique XLVIII* at §8, quotes a former judge of the Court de cassation who observed that 'the law is that which the Cour de cassation decides to examine, everything else is fact.' As to regional variations, see P. Haegel, "L'Avènement du Nouveau Code de Procédure Civile: L'harmonisation avec le droit local alsacien-mosellan", in *Vingt ans après*, (La Documentation Française: Paris, 1998) 35; see also M. Foulon, "La mise en état" in *Vingt ans après, ibid*, 161 at 173, "Il n'est pas totalement faux d'opposer la rigueur du nord à un certain laxisme ou une certaine désinvolture du midi." [It is not completely false to contrast the more rigorous attitudes of the north (of France) with the more understanding, free spirit of the south.]

²⁴ The philosophy of precedent in France is best expressed by the adage "une fois n'est pas coutume". [a single occurrence does not a custom make] (see Roland and Boyer, *supra* note 3 at 925.) In France, precedents evolve, acquire status as objective law over a period of time, through adoption by the *corps curiae*. In this sense decisions become customary law, rather than self-standing law that acquires binding force upon pronouncement of a new rule by a superior court, such as the House of Lords or the United States Supreme Court. This account is simplistic, however, as Bell notes there are a number of distinct judicial 'cultures in France. see Bell, *supra* note 22 at 176-78 (Administrative Courts); 66-68 (Civil law). It is less clear is how precedents are used publicly in process by parties and courts. see also Steiner, *supra* note 9 describing how French civil courts are not permitted to cite their own past decisions in the judgements as providing the basis of their decision.

²⁵ Roland and Boyer, *supra* note 3 at 521; Cornu, *supra* note 5 at 308.

²⁶ [hereinafter referred to as "ultra petita"] Damaška, *supra* note 11 at 160, n.22. Damaška describes the adage as preventing a court from awarding relief that exceeds that which a party

debet,²⁷ both of which have been known in France since long before the Revolution. These adages, however, like *jura novit curia*, are not absolute. Practitioners and scholars debate when and how intervention *jura novit curia* is or ought to be permitted. This means that while Damaška's *jura novit curia* has been formally rejected in France, weaker forms, relating only to the act of intervention have not.

Motulsky recognised that four adages have traditionally delimited the role of the judge in French private law. Motulsky wrote that:²⁸

«Secundum allegata et probata judex judicare debet» - «Da mihi factum, dabo tibi jus» - «Jura novit curia» - «Audiatur et altera pars»
voilà les maximes par lesquelles on a accoutumé, aux terme d'une longue évolution, de résumer les traits dominants de l'office du juge dans la procédure civile française.

Motulsky described this quaternary of adages as "imagées et exactes" that is, 'colourful and correct', but, also "incomplètes".²⁹ Motulsky's work consisted of justifying a re-organisation of the traditional elements of party-judge jurisdiction so as to resolve the 'litigation tension' created by the interaction of the conflicting 'rules' established by the quaternary.

The tension arises because of the incompatibility of the requirement the court decide only according to that which had been "alleged and proven" (*secundum allegata et probata*) by the parties, and *jura novit curia* which may suppose the court's power to intervene to supply its own, 'unalleged and unproven' points of law, even to the extent of disregarding *le principe de la contradiction* expressed by the adage *audiatur et altera pars*. The tension is exacerbated by the adage *da mihi factum* which in its strongest formulation would absolutely prohibit parties from offering any arguments of law. The substance of each of these adages is

has demanded. (for example, awarding £1000 in damages when only £500 had been asked for.) *Ultra petita* does not appear in Roland and Boyer, Cornu or Merminod but 'ultra petita' and 'extra petita' are used as section headings in the Dalloz annotation of Articles 4 and 5 of the NCPC. see Dalloz Art 4 and annotations at §§ 15, 16, 19, 21, 30. A reference from before the Revolution is found in Pierre Jacques Brillou, *Dictionnaire des Arrêts ou jurisprudence universelles des Parlements de France, Nouvelle édition*, (Paris, 1727); at t. III, item 925, "*Le juge doit statuer une chose certaine et fixe, mais ne point aller au delà de ce qui est demandé par les parties*", and citing an *arrêt* from 1658, at item 926, "*C'est ce que l'on appelle ultra petita*."

²⁷ [hereinafter referred to as "judex secundum"] Roland & Boyer, *supra* note 3 at 351. define *judex secundum* to mean "Le juge doit statuer selon les allégations et les preuves des parties" [The court must decide according to the allegations and proofs of the parties.] or "le juge...ne dispose que sur ce que proposent les parties" [the judge disposes of the case only on the basis of that which the parties have proposed]. As for the history of *judex secundum* see, for example, B. Autonne, 1 *La Conférence du Droit François avec le Droit Romain*, 4th Edition. (Charles Chastelain: Paris, 1644) at 34, citing the ordonnance of Charles VII of 1453, art 123; see also A. Loisel, 2 *Institutes Coutumières d'Antoine Loisel*, M. Dupin, E. Laboulaye, eds. (Videcoq: Paris, 1846) at §867 p. 228

²⁸ H. Motulsky, *supra* note 8 at 89. [these are the maxims which have traditionally been used to summarise the dominant traits of judicial office in French civil procedure.]

²⁹ *Ibid*

considered below;³⁰ here the point is simply that the competing tendencies of procedure expressed by Motulsky's quaternary are well-recognised by scholars on all sides of the debate. Different accounts of the meanings of the adages give the debate substance, even though it is a debate framed largely in the technical language of *processuelistes*, rather than the language of adages.

Motulsky's views have strong support in France and are acknowledged to be enshrined, in some form, in the *NCPC*. For others, however, the *NCPC* enacted a procedural tradition that existed independent of Motulsky's efforts to give the judge a monopoly over the juridical analysis of the facts of a case. In a speech to the 1979 session of the *Conseil d'Etat* which implicitly rejected Damaška's *jura novit curia* by affirming the superior status of *le principe de la contradiction*, the *Commissaire du gouvernement*, M. Franc, stated that French civil procedure has been traditionally characterised, not by Motulsky's quaternary of adages, but by "two principles, *le principe dispositif* and *le principe de la contradiction*" both of which constrain the scope of *jura novit curia*.³¹ French tradition, like inconsistent lower court compliance with decisions of national courts, is not monolithic in its expression, rather competing accounts of the tradition seem to vie to be the dominant tendency of any era.

Typically, M. Franc avoids the use of adages, including *jura novit curia*.³² Nor is *jura novit curia* referred to in the judgement of the *Conseil* despite the central issue being the legality of Damaška's *jura novit curia*, that is, the power of a court to lawfully base a judgement on 'a legal theory that has not been subject to the arguments of counsel'. The recurring absence of the adage by name in French jurisprudence, its variable meanings and infrequent use in scholarship suggests that, whatever opinion may be about the assumptions, consequences and effects attributed to it, *jura novit curia* as an adage is of marginal significance in France. Inasmuch as the act Damaška imputes to it is illegal, this is hardly surprising.

2.2 Yves Merminod, *Expressions et Proverbs Latins*

³⁰ see Automne, *infra* note 158 and *supra* notes 26 and 27.

³¹ *supra* note 18. "Conclusions de M. Franc, Commissaire du Gouvernement" at §10. [While called the 'government commissioner' for historical reasons, the *Commissaire* is an independent advocate whose role is to analyse and challenge. see Cornu, *supra* note 5 at 172 and B. Latour, "Scientific Objects and Legal Objectivity" in *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, A. Pottage and M. Mondy, eds. (Cambridge University Press: Cambridge, 2004) at note 17. Latour writes that the *Commissaire* is, "in a sense, an airtight chamber for the avoidance of certainty, a kind of injunction to avoid agreement."

³² While he rejects the universal applicability of Damaška's absolutist *jura novit curia*, M. Franc acknowledges the necessity of an intervention power, so long as *le principe de la contradiction* is respected. However, M. Franc goes on to distinguish between the *moyen de pur droit* and *moyen d'ordre public*, suggesting that so long as the *moyen* is one a judge is duty-bound to impose on all parties alike (i.e. its application is not discretionary) respect for *le principe de la contradiction* is not necessary. The *Conseil d'Etat* agreed, although subsequent developments such as the amendment to Article 16 of the *NCPC* (Décret 81-81500, 12 May 1981) and case law mean this distinction is no longer sustainable. See Eudier, *supra* note 15 at 455ff.

Yves Merminod describes *jura novit curia* as an adage "essentiel,"³³ meaning it is very important, if not indispensable, to French law. This is reinforced by his further claim that *jura novit curia* is applicable to "all procedure".³⁴ Merminod's definition of *jura novit curia* suggests a principle of universal application, as fundamental to French procedure as *le principe de la contradiction* or *les droits de la défense*. If the definitions of Merminod and Damaška are consistent, *jura novit curia* would mean that in French criminal, civil, and administrative courts, at all levels of the judicial hierarchy, the judge has unfettered discretion to decide on the basis of a legal rule imposed on the court's own motion, without prior notice to the parties or subjecting the rule to party scrutiny.

Merminod's claims about the fundamental status of *jura novit curia* are dubious to the extent he means to express legal rules. Damaška's *jura novit curia*, as we have just discussed, has been specifically rejected in French civil law, as it has been also in administrative law.³⁵ The *saine solution* has been held to be applicable to most types of judicial intervention *propre mouvement*, that is, *sua sponte*, including the *moyen d'ordre public* and interlocutory decisions relating to points of procedure.³⁶

In criminal law Damaška's *jura novit curia* seems scarcely conceivable. In France, intervention *jura novit curia* in criminal actions by the deciding judge to formulate new charges would be an intrusion into the jurisdiction of the *procureur* and *le juge d'instruction*.³⁷ In terms of the parties to a criminal action, the court's imposition of a legal rule without notice to the accused or to the prosecutor,

³³ Y. Merminod, *supra* note 3 at 66.

³⁴ *Ibid.*

³⁵ The decision of the *Conseil d'Etat*, *supra* note 18, refers to civil law, actions within the purview of the *NCPC*. With respect to administrative law, the necessity of respect for *le principe de la contradiction* which negates Damaška's *jura novit curia* and the possibility, following Merminod's claim, the adage applies to all procedure, is affirmed in *Conseil d'Etat* No. 177075 (Lebon) 1999 which concerns the application of Article 153-1 of the *Code of Administrative Tribunals and Administrative Courts of Appeal* which requires that "lorsque la décision lui paraît susceptible d'être fondée sur un moyen relevé d'office, le président de la formation de jugement en informe les parties avant la séance de jugement et fixe le délai dans lequel elles peuvent présenter leurs observations." [when it appears as if a case might be decided on the basis of a point of law raised on the court's own motion, the president of the court will notify the parties prior to handing down the decision and fix an adjournment during which the parties can present argument thereon.]

³⁶ *NCPC*, annotation to Article 16 at §38 ("l'obligation d'inviter les parties à présenter leurs observations s'impose comme préalable au relevé d'office de toute espèce de moyen de droit. L'obligation s'impose tant au relevé des moyens d'ordre public") [the obligation to invite the parties to present their observations is required regardless of the type of point of law raised on the court's own motion. The obligation arises also with respect to *moyens d'ordre public*] and at §39 ("La même obligation s'impose aux moyens de procédure") [the same obligation applies with respect to points of procedure]

³⁷ J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, (Oxford University Press: Oxford, 1998) at 128-30, write that the investigating judge, the *juge d'instruction*, is bound by the ambit of instruction from the *procureur*. The prosecutor, the *procureur*, decides whether to proceed and the charge to be laid.

would be to simultaneously charge and convict, *ex post facto* without hearing the accused's defence.³⁸

The adage *audiatur altera pars*, a element of Motulsky's quaternary, is associated with *le principe de la contradiction* and *les droits de la défense*.³⁹ Roland and Boyer state both the adage and related principles "govern all procedure"⁴⁰ and mean that "none may be condemned without having been heard or at least having been given an opportunity to present their defence."⁴¹ In criminal matters, the necessity of affording a defendant the opportunity to present a defence to the charge formulated by the *procureur* and *juge d'instruction* precludes the court that decides the matter from intervening with its own charges.

Damaška's *jura novit curia* applied to criminal actions is draconian, evoking the inquisitorial procedures of *ancienne France*, procedures commonly thought to be extinct. However, while we might excuse the rhetorical excess of Merminod for implying *jura novit curia* may arise in French criminal procedures, we must also understand how fundamental principles which negate Damaška's *jura novit curia* are susceptible to rhetorical excess. Passing from the level of high principle to practice, French criminal practice has recently introduced American-style 'plea bargaining', which involves negotiations between the defendant, prosecutor and ultimately the court to the charge, that is the point of law, upon which the case will be decided.⁴² Plea bargaining may result in situations in which the court takes a different view of the applicable law than presented as *fait accompli* to the

³⁸ Damaška's *jura novit curia*, by definition, involves a point of law on which a party has not been heard. It's opposition with *le principe de la contradiction* and *les droits de la défense* as consequences of *audi alteram partem* arises because the adage and principles provide that 'none may have a sanction imposed on his person, liberty, rights or interests without a procedure permitting him to know with what he is charged and to prepare arguments in his *défense*.' " Luchaire, *Droits et libertés*, 395 cited in (and translated by) J. Bell, *French Constitutional Law*, (Clarendon Press: Oxford, 1992) at 193.

³⁹ In Roland and Boyer, *supra* note 3, Motulsky's *audiatur altera pars*, is cross referenced to its main entry under *audi alteram partem*. The latter adage is an accepted element of Common Law Natural Justice, see 1(1) Halsbury's Laws of England, 4th Re-issue, (Butterworths:London, 2002) §95ff, and American Due Process, see C.J. Antieau & W.J Rich, *Modern Constitutional Law* 2d, (West's:St Paul, 1997) at 301ff.

⁴⁰ Roland and Boyer *supra* note 3 at 39

⁴¹ Roland and Boyer, *supra* note 3 at 39. At 40, Roland and Boyer state that in criminal law the principle "revêt la plénitude de sa dimension". [reveals the full magnitude of its purview] Its fundamental nature is such that its mere "énoncé peut dispenser ici d'une longue démonstration." [its invocation can dispense here with lengthy supporting arguments]. They cite a series of provisions of the *Code procédure pénale* (Articles 346 al. 3, 410, 411, 114 al 3 and art 171) and also invoke the jurisprudence of the *Cour de Cassation* both of which hold that a violation of *les droits de la défense* renders a judgement null.

⁴² see "Loi Perben: le paider-coupable à l'épreuve des tribunaux", *Lemonde*, 20 May 2005, p1 (French lawyers demonstrate against legislation enacted in October 2004 introducing the 'guilty plea' into French criminal justice, claiming that the law, which some lawyers see as an infringement of *les droits de la défense*, has been introduced and applied inconsistently across France. see also *ibid*, p8 "Le paider-coupable s'installe dans une grande confusion", referring to discontent amongst judges who see the arrival of the American-style negotiated guilty plea, with an agreed penalty put to the court for confirmation (*homologation*) as an intrusion by the prosecutors (*procureurs*) into the jurisdiction of the judge.

court by the defendant and prosecutor. In these circumstances, intervention *jura novit curia* may be both possible and necessary.

The notorious inquisitions of *ancienne France* initially arose to facilitate the prosecution of *occulte* or 'secret' crimes. Damaška's *jura novit curia*, applied to criminal law, likewise evokes secret procedures introduced in some western countries in the aftermath of the attack on New York City in September 2001 to facilitate the detention and conviction of 'terrorists'.⁴³ The parallel between the *ancien* inquisition and anti-terrorist procedures suggests that however enthusiastic the rhetoric of adherence to the fundamental right to a 'fair hearing' may be, its substantive content is not immutable. The substantive requirements of the 'fair trial' and the acceptability of Damaška's *jura novit curia* may evolve in response to military, political or other challenges which condition the kind of process that a society tolerates or finds acceptable.

In France, unequivocal affirmation of *le principe de la contradiction* and *les droits de la défense* is a relatively recent phenomena. Bolard noted the thin and confused attention scholars afforded fundamental principles of procedure in the post-War years.⁴⁴ The increasing attention to both *principes* suggests how they shadowed the ascendancy of Motulsky's judge-centred theories of procedure which subordinated each *principe* to the court's monopoly over the law.⁴⁵ The interaction of the views of Motulsky's and of those according *le principe de la contradiction* and *le dispositif* primary position culminated in the legislative confusion and controversy associated with the enactment of the *NCPC*. By 1979 Motulsky's views had been rejected by the affirmation that the *le principe de la contradiction* applied to party arguments of both fact and law.

Da mihi factum, dabo tibi jus: fact - law federalism

The rejection of Damaška's *jura novit curia* in formal law does not necessarily mean Merminod's definition is completely misguided. Merminod's *jura novit curia* lacks the black-letter precision of Damaška's and, despite Merminod's enthusiastic rhetoric, it is questionable whether he really conceived of the adage as a legal norm at all. Merminod describes the consequence of *jura novit curia* more tentatively, writing that it is, "neither necessary nor useful for a party or their

⁴³ The most prominent case concerns a Mr. Moussaoui, being tried in the United States for complicity in the 11 September 2001 attack on the World Trade Centre in New York City. Mr Moussaoui was denied notice of much of the prosecution's evidence and legal argument, a denial that would be *prima facie* violation of the 'notice and defence' provisions of *le principe de la contradiction*. see E. Leser, "Etats-Unis: la Cour suprême rejette l'appel de Zacarias Moussaoui", *Le Monde*, 23 March 2005. see also *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004) (Justice Thomas, dissenting) (denying Due Process rights to "enemy combatants")

⁴⁴ G. Bolard, *supra* note 14 at 330 §§1 and 13.

⁴⁵ Motulsky stressed the fundamental nature of *le principe de la contradiction* and *les droits de la défense*, but, had a narrower view of their scope. While Motulsky would place an obligation on the court to ensure debate between parties on all party-raised issues, he did not consider that points of law raised by the court on its own motion were subject to *le principe de la contradiction*. This view has been rejected in France, and is discussed further in *Va Savoir Part II*.

counsel to spend much time on legal analysis when presenting their case to the court."⁴⁶

By this account, *jura novit curia* simply reflects attitudes, widely held, at least amongst scholars in France, that juridical analysis, the 'knowing' or appreciation of points of law, is a prerogative of the court. This approach suggests a *jura novit curia* that is less black letter rule than expression of French attitudes and beliefs about the proper behaviour of parties or their counsel when appearing before a court. While strongly suggesting a rule of courtroom etiquette, Merminod's account of *jura novit curia* also speaks to an assumption about the separation of functions or powers between judges and parties with respect to points of law that specifically permits party involvement in legal argument provided it is kept brief.

Merminod's deprecation of the value of party argument of law falls short of far stronger accounts of *jura novit curia* and *da mihi factum* that conceive of the court's power over juridical analysis to be an exclusive prerogative. This common belief amongst Civilians constitutes a kind of 'fact-law federalism' that expresses a distinct philosophy of litigation. The central catechism of 'fact-law federalism' is the exclusion of *all* party involvement in legal argument and the conferment upon the court of a monopoly with respect to juridical analysis.⁴⁷

Strict fact-law federalism elevates the adage *da mihi factum* to the level of fundamental legal principle. This theoretical proposition was Motulsky's primary technique for resolving the litigation tension expressed in a traditional reading of his quaternary of adages.⁴⁸ Motulsky was the "inspirateur" of the *NCPC*, which most agree meant to introduce stronger, even authoritarian, judicial powers, which, if interpreted as allegedly intended, would have permitted free exercise of Damaška's *jura novit curia*. Motulsky's fact-law federalism in its absolute form also denies M. Franc's conception of the French procedural tradition because it specifically excludes the application of *le principe de la contradiction* or *les droits*

⁴⁶ Merminod, *supra* note 3. Ironically, in both Roland and Boyer and Merminod, the entry for *jura novit curia* is followed by the adage "*jura vigilantibus, tarde venientibus*": [the law favours the vigilant, not those who neglect or delay in asserting their rights.] Read in the context of Merminod's view of the marginal role of the parties with respect to legal argument, the interaction of *jura novit curia* and *jura vigilantibus* catches the parties in a double bind, requiring they promptly assert their rights by promptly commencing proceedings (which presumes knowledge of relevant law). However, in the judicial forum, parties are directed by Merminod's *jura novit curia* to keep their accounts of the legal basis of their rights to a minimum or dispense with it altogether.

⁴⁷ The term 'federalism' refers to the separation of powers or jurisdiction implied by Motulsky's conception and application of the distinction between fact and law. Its 'federalism' lies in the sharing of different aspects of a common task and the degree of autonomy with which each may exercise their power. The term federalism also suggests the institutional role of the parties and their legal counsel. It is rare for parties to be considered 'constitutional actors' or to perform an institutional function as a class of legal actors. Article 1 of the *NCPC* states clearly that apart from specific exceptions, the parties confer jurisdiction upon the court to decide by commencing and defending an action. see J. Jacobs, *The Fabric of Civil Justice*, (Steven & Son: London, 1987) at 7 referring to a "division of function" between courts and parties.

⁴⁸ Martin, *supra* note 23 at §2 "Le schéma du process, d'après Motulsky, peut être dessiné de la façon suivante: [l]a partie a la charge et le monopole de l'allégation de fait"..."[l]e juge a le devoir et le monopole de la qualification juridique." [The model of procedure, following Motulsky, could be outlined in the following manner: the party is responsible for and has a monopoly over the allegation of fact. The judge has the duty of and a monopoly over juridical analysis.]

de la défense by insulating the court's own points of law from party debate, thereby authorising Damaška's *jura novit curia*.

The belief in the fact-law federalism of *da mihi factum* may be a prevailing view amongst scholars about how parties and counsel ought to behave. The *NCPC* however does not expressly enact absolute fact-law federalism, so, however much its supporters argue the doctrine is strongly implied, absolute *da mihi factum* remains a rule of etiquette.⁴⁹ There is near universal acknowledgement that in French practice parties invariably base their cases on a mixture of factual and juridical analysis.⁵⁰ This suggests that the absolute fact-law federalism advocated by Motulsky is an ideology of judicial power that owes more to the legislative force of the beliefs of *La Doctrine* and party acquiescence than to formal legal requirements or actual practice.⁵¹

Scholars and practitioners recognise legal arguments are "*fort utiles*" for a party's successful claim⁵² and that a party's reliance on the equity of the facts alone is unlikely to be successful.⁵³ Be this as it may, Jolowicz noted a tendency of some French judges to pay insufficient attention to the parties' legal arguments during process and other scholars acknowledge a tradition of deference to the court on the part of the French bar with respect to the presentation of legal argument.⁵⁴

⁴⁹ Some argue this is implicit from the section headings which appear in *NCPC*, Pt I, to apportion the 'facts' to the parties and the 'law' to the judge. see Martin *supra* note 23 §1

⁵⁰ Roland and Boyer, *supra* note 3 at 137. "*Da mihi factum...reflète bien mal la réalité procédurale engendrée par la contestation.*" [*Da mihi factum...reflects rather poorly the procedural reality engendered by adversarial process.*]

⁵¹ Roland and Boyer, *supra* note 3 at 352 and 363 refer the Decree 98-1231 of 28 December 1998 which amended the *NCPC* sections 56, 753 and 954, introducing explicit requirements that parties state "des moyens en fait et en droit" [arguments of fact and law] upon which their cases are based, in both their initiating documents and their conclusions. see J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure", (2003) 52 *International and Comparative Law Quarterly*, 281 at [note 50].

⁵² Roland and Boyer, *Adages du droit français*, 3rd (Litec: Paris) at 370. Arguments of law are "fort utiles à qui veut gagner son procès" [very useful for she who would win their case]. (in Roland and Boyer 4th ed, *supra* note 3 at 363 this becomes "ce qui ne dispense pas les plaideurs d'alléguer tous moyens de droit utile, étant tenus de les faire valoir dans l'assignation (*NCPC* art 156, al 1,2,) et dans les conclusions (*NCPC* art 753 et 954)) [this does not excuse the parties from pleading all points of law that further their cause being obliged to do so in initiating the claim...and in their concluding summaries...]

⁵³ R. David, "Supereminent Principles in French Law" in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, J. Dainow, ed., (Louisiana State University: Baton Rouge, 1974) at 121-22

⁵⁴ Jolowicz *supra* note 12 at 86 notes French judges "frequently postpone serious consideration of the law governing the case until after the 'clôture des débats'". This practice prevents the court from eliciting the parties' points of view on issues of law and also through interaction with the parties of drawing out possible issues and legal solutions. Roland and Boyer, *supra* note 3 at 363 allude to the genesis of the *jura novit curia* 'moment' illustrating a hypothetical judge signaling his lack of interest or impatience with a party's legal argument by saying, "Avocat, passez au fait, la Cour sait le droit." [Advocate, move on to the facts, the Court knows the law].

The attitude, 'let's go see what the judge says'⁵⁵ suggests this deference, reflecting one traditional view of judicial office in France, that of the 'judge-provider', a benign 'padre' who regards the parties and lawyers who plead before him as his 'enfants'. These phenomena suggest that aspects of fact-law federalism derive more from judicial attitude or professional practices of courts and lawyers than from the merits of a doctrine many criticise as incoherent or from any positive law.⁵⁶

Nor was the elevation of Motulsky's marginalisation of the parties' legal argument to high principle supported by any formal law prohibiting parties from arguing points of law.⁵⁷ Characterising this approach to *jura novit curia* as a legal rule would, therefore, be incorrect, inasmuch as it is not illegal for parties to plead law. Indeed since 1998 parties in France are generally obliged to declare the points of law on which their case is founded.⁵⁸ Even before 1998, Merminod's characterisation was also belied by French practice, in that parties invariably did argue points of law to support their claims and defences.

The truth of Merminod's definition of *jura novit curia*, then is not that it is normatively 'correct' or 'incorrect' but that it may accurately express pervasive but not necessarily universal attitudes about courts and parties held in France by the legal community. In the result, Merminod's *jura novit curia* describes a tendency of practice, a phenomenon of legal culture and behaviour rather than a formal principle or positive rule. Accordingly, confirmation of Merminod's *jura novit curia* must be found in an empirical examination of cases in courts of first instance, regional courts of appeal and in France's national courts, the *Conseil d'Etat* and the *Cour de cassation* to determine the extent to which the beliefs which Merminod associates with *jura novit curia* manifest in practice.

The association of fact-law federalism with *jura novit curia* gives rise to another problem: the doctrinal incompatibility of *jura novit curia* and *da mihi factum*. If *da*

⁵⁵ Mann, *supra* note 8 at 375 describes two hypothetical parties who say, "let us see what happens - the court will tell us."

⁵⁶ Roland and Boyer, *supra* note 3 at 141 describe "une distinction très nette" [a very fine distinction] and how it is "très délicat voire impossible de séparer le fait du droit". [very tricky, even impossible to separate matters of fact from matters of law.] Damaška, *supra* note 11 at 114 dismissed the viability of the distinction writing any "procedural system that entrusts the definition of factual issues to the parties and the formulation of legal issues to the adjudicator...invites serious trouble." see Roland and Boyer, at 137: While at the time of the Revolution the distinction was imposed in criminal law to separate the jurisdictions of the jury and the judge, it was soon recognised the system was unworkable and an informal practice of sharing jurisdiction arose until the law of 25 November 1941 formal cooperation between judge and jury with respect to matters of fact and law. The civil jury was rejected by the Revolutionary assembly because of the difficulty of distinguishing between questions of fact (for the jury) and questions of law (for the court) in civil matters. see A. Duport, *Principes et plan sur l'établissement de l'ordre judiciaire*, (Imprimerie Nationale: Paris, 1790); A. Padoa-Schippa, "Le jury d'Adrien Duport" in 2 *La Revolution et l'ordre juridique privé, rationalité ou scandale?* Actes du Colloque d'Orléans, 11.-13.9.1986 (Paris, 1988) at 609.

⁵⁷ Jolowicz *supra* note 12, in 1980 supported Motulsky's strict fact-law federalism, but would later write, "In fact, there never was, in France, an actual prohibition against the pleading of law...." see J.A. Jolowicz (2003), *supra* note 44, text at note 52.

⁵⁸ Roland and Boyer, *supra* note 51.

mihi factum precludes the parties from offering legal analysis of their facts because the law is the "monopoly"⁵⁹ of the judge, and if *jura novit curia* involves the rejection of the parties points of law and their substitution by the court's own, the two adages are mutually exclusive. *Jura novit curia* requires party arguments of law, if only to reject them, whereas *da mihi factum* precludes party arguments of law. Both adages cannot be 'correct' unless the specific circumstances in which each is 'correct' are identified. Yet it is common for the two adages to be taken to express similar rules, despite the obvious incoherence of this position when the interaction of doctrine and practice is considered.⁶⁰

Adages as a genre

The illogic of the opposition between the adages *jura novit curia* and *da mihi factum*, however, is symptomatic of the irrationality to which adages as a genre may give expression. Merminod's tentative expression of the normative dimension of *jura novit curia*, is at least consistent with the fluid quality of adagic meaning. Adages are a species of legal folklore and even where they state a legal rule, formal legal status of that rule is acquired through independent legislative or judicial pronouncement. Adages do not normally give rise, *propre mouvement*, to the kind of norm stated by Damaška. To the extent an adage may in practice achieve legal status, without support from formal law, a legal system reveals its folkloric foundations arising from usage and attitudes to which practitioners may be serenely oblivious or *savants* hesitant to acknowledge.

An adage may express, as Merminod expresses, cultural beliefs or tendencies of behaviour observable in legal practice. In this case, an adequate account of the behaviour, beliefs or tendencies would require a sociological quantification of their pervasiveness and identification of opposing beliefs and behaviour. Motulsky's quaternary is well-known to French legal culture, but discussion of it, as Motulsky himself illustrates, tends to the prescriptive in which adages are tools of argument, citations invoked to support scholarly propositions. The quaternary and other adages are infrequently analysed in terms of their systemic and doctrinal interaction.

Adages, moreover, are inconsistent with the traditional tenets of logical legalism, a distinction that might explain the infrequent use of adages in the writing of French procedural scholars.⁶¹ This tendency is recognition that the technical language of practitioners and scholars is preferred to a system in which legal folk

⁵⁹ Martin, *supra* note 48. summarises Motulsky's position stating, "Le juge a le devoir et le monopole de la qualification juridique". [The judge has an exclusive duty with respect to juridical qualification.]

⁶⁰ Jolowicz, *supra* note 12 treats both adages as identical: at 81 "the applicable rule should be for the judge, not the parties, *da mihi factum*...." and at 84, citing Mann, *supra* note 8, *curia novit legem* means that "the ultimate responsibility for the law is the court's."

⁶¹ Damaška, *supra* note 11 at 35-37 describes the Continental tradition of 'logical legalism,' the idea that law was considered to be a science. Logical legalism extolled the precision, certainty and the written Code, the application of which in adjudication was a mechanical process, a "mere 'subsumption' of facts to norm with no further elaboration (interpretation) of the part of the adjudicator" (37) being necessary. The value of legal certainty, seen as an essential Civilian value contrasts the agonistic function of the *Commissaire du Gouvernement* as described by Latour, *supra* note 31.

sayings give rise to formal law or frame scholarly debate. The result is that the significance of *jura novit curia* is diminished not only by its questionable normative claims but also by its very status as an adage.

2.3 Henri Roland and Laurent Boyer, *Adages du droit français*

Henri Roland and Laurent Boyer present three distinct approaches to understanding *jura novit curia*, two of which will be considered here. First, they identify *jura novit curia* as a presumption about judicial knowledge of the law which receives *a priori* justification and validation from the adage “nul n’est censé ignorer la loi”. Secondly, Roland and Boyer emphasise the function of *jura novit curia* as an interlocutory rule relating to the proof of the existence of a legal rule as a matter of fact, distinct from the rule’s interpretation or application to dispose of a case. The third aspect of Roland and Boyer’s definition, which will be considered in Part II of *Va Savoir*, concerns the association of *jura novit curia* with Article 12 of the *NCPC*.

Jura novit curia as emanation of adage nul n'est censé ignorer la loi

Roland and Boyer’s definition begins with an uncontroversial claim that *jura novit curia* is simply a consequence of another adage, *nul n’est censé ignorer la loi*. The latter adage expresses the rule ‘no one is supposed to ignore the law’ from which issues a presumption that everyone is deemed to know the law.⁶² The association between *jura novit curia* and *nul n’est censé ignorer la loi* arises because, as Roland and Boyer explain, the judge is duty bound to decide according to commandment of the law. As all citizens are deemed to know the law, it must be presumed the judge likewise knows what the law commands.⁶³

The adage *nul n’est censé ignorer la loi* gives rise to an empirical-normative antinomy similar to that seen in *jura novit curia*. In *jura novit curia* the antinomy turns on conflicting senses of *novit* as either a descriptive reference to empirical legal knowledge, or as a normative reference to the court’s jurisdiction to ‘take cognisance’ of a matter. As it applies to *nul n’est censé*, the issue is whether the knowledge of the law everyone is deemed to possess has any empirical basis or whether it is a legal fiction with a real normative dimension because it states a rule prohibiting a defence based on ignorance of the law. The antinomy, as it arises in interpretations of *nul n’est censé*, is different than that of *jura novit curia* because the *est censé* element of the adage imports an explicit normative element.⁶⁴ However, taking *est censé* in its sense of ‘is supposed to’ implicitly

⁶² Roland and Boyer, *supra* note 3 at 579, “Les citoyens de la République française, comme les Romains de l’Empire, doivent connaître la loi.” [citizens of the French republic just like those of the Romans during the Empire are obliged to know the law.]

⁶³ Roland and Boyer, *supra* note 3 at 363 “...ainsi que de l’objet de la mission du juge qui est de faire observer le commandement de la loi, ce qui suppose que celle-ci lui sont connue.” [Inasmuch as the mission of the judge is to ensure the observation of that which the law commands, it must be supposed that the judge knows what the law commands]. F.A.R. Bennion, *Statutory Interpretation* 2d. (Butterworths: London, 1992) at 71 says much the same, writing, “Having been sworn to apply the laws and usages of the realm, a judge is presumed to have knowledge of what he has thus bound himself to administer.”

⁶⁴ *Concise Oxford Hachette French Dictionary*, (Oxford University Press: Oxford, 1995) at 93.

suggests a divergence between that which the theory of the adage tells is supposed to happen and that which may actually arise in practice.

The presumption of perfect legal knowledge imputed to all citizens may seem the most blatant of fictions. Even if this is so, it is a fiction with real legal consequences for the adage means that ignorance of a law is not a valid defence to a claim based on the breach of that law.⁶⁵ A citizen has a duty therefore of finding out what the law demands of them. The fictional quality is also refuted by the many citizens whose legal knowledge, while very far from perfect, perhaps even 'rustic', is nonetheless sufficient to recognise a legal wrong has occurred for which they may find a remedy in court, even if the assistance of a lawyer is necessary.

The presumption 'everyone knows the law' is not a total fiction for it derives from the requirement that enacted legislation be published in the *Journal officiel* which is readily accessible for citizens to consult.⁶⁶ The presumption 'everyone knows the law' is justified and, in this sense, empirically grounded, because the law is publicly accessible and through the *Journal officiel*, all citizens are given factual notice of new law. Yet few citizens likely read the *Journal officiel* regularly or at all and it is this anthropological reality on which understanding of the fictional quality of *nul n'est censé* is based.⁶⁷

The Divergence of the court's law and the parties' law

The availability of the *Journal officiel*, however, is only one dimension of accessibility. Steiner notes that in France accessibility also refers to "comprehensibility", that is, that the law be "intelligible," or 'knowable'.⁶⁸ The measure of this arm of the requirement of accessibility is that a citizen reading a *loi* should be able to understand what it requires of her. The empirical dimension of this dimension of knowability is that the more frequently intervention *jura novit curia* occurs, the more frequently parties and counsel for both sides have got the law 'wrong'.

⁶⁵ See Recueil Dalloz Sirey, 1993, 21 Cahier - Jurisprudence, 306, note H. Vidal. This report concerns an arrêt from the *Cour d'appel de Montpellier* in which the failure of court officials to properly register a 1975 statute changing the law of divorce resulted in the law being found non-existent and a claim for a divorce was rejected as "irrecevable". [inadmissible] The Court stated that necessity of registration meant that the adage *nul n'est censé ignorer la loi* is based on a reality and not on a fiction.

⁶⁶ The *Journal Officiel* is the French government's publication announcing all formal acts of the executive and legislative branches of government.

⁶⁷ Antony Allott in *The Limits of Law* (Butterworths: London, 1980), at 294 quotes the French scholar Roger Granger who wrote, "...la majeure partie des français ignore le droit qui les regit." [the majority of French people ignore the law which governs them]. The extent to which people comply with the law is a distinct issue from their knowledge of it. Many laws will be obeyed not because people have a knowledge of them but because the law reflects (or does not) a people's habitual practices.

⁶⁸ E. Steiner *supra* note 9 at 35-36, referring to a decision of the *Conseil constitutionnel*, 99-421 DC, 16 December 1999, JO 22 December 1999 p.19041, which "ascribed constitutional value to the objective of making the law more accessible and more intelligible."

Frequent intervention *jura novit curia* suggests the degree to which the law has become incomprehensible in a very empirical sense, not just by lay citizens but also by trained professionals. Endemic intervention *jura novit curia* casts a pall in this way over the health of the legal system. A system in which courts must intervene frequently to 'correct' the flawed legal arguments of parties, advocates or lower courts faces fundamental problems with respect to knowability of its laws. As parties are ideally represented by professionals, the adequacy of the legal profession also becomes suspect.

The divergence between the law invoked by parties and court undermines the legitimacy of the system.⁶⁹ The system comes to rely on the *brut* authority of the judicial act, rather than its legitimacy as a convincing and informed solution to a dispute. As Roederer observed, the knowing of law becomes the preserve of an elite cadre with the vocation or resources to know its complexity, an elite from which even legal professionals may be excluded.⁷⁰ An implicit sense of *jura novit curia* is that the law is the 'property' of a judicial elite. The metaphor evokes earlier eras of French history in which judicial *office* was real property, a capital asset, that could be bought and sold, and which produced an income stream from the collection of *le droit* (in an *ancien* sense) from litigants who prosecuted or defended a claim before the court.

Scholarly recognition that the French citizen is subject to 'too much law' suggests the claim that an individual may know the law in any exhaustive sense is empirically implausible. Even legal professionals who develop high levels of specialist expertise must make efforts to keep abreast of all that the law commands. Continuous legal research is an important professional duty for lawyers and judges and presupposes the complexity of law, its susceptibility to contrary interpretation, to frequent change and, consequently, the difficulty of 'knowing' the law.

Roland and Boyer write that "today the law has become infinite"⁷¹ and in the context of too much law, *le droit nouveau*, the presumption of *jura novit curia* that the court knows the law may be intended to offer reassurance. Conceiving of *jura novit curia* as an expression of reassurance hints at the adage's ancillary function as an exclamatory locution. As if in response, to the challenge of '*va savoir*', *jura novit curia* responds, Coué-esque, as if to say 'someone knows the law, and that someone is the *curia*!⁷² In the context of too much law, law that is incomprehensible or ambiguous, and the frequency of appeals in France, *jura*

⁶⁹ see H. Vidal note, *supra* note 65 who writes that "le législateur français essaie de compenser son déclin par sa prolixité." [the French legislator attempts to compensate for her decline by long-windedness]

⁷⁰ Roland & Boyer, *supra* note 3 at 580. Allott, *supra* note 67, cites R. Granger's phrase, "l'inflation juridique galopante" [roughly translated, "hyper-inflation of the quantity of law"]

⁷¹ Roland and Boyer, *ibid*, at 584

⁷² Mann, *supra* note 55

novit curia may simply be a touching affirmation 'the law is knowable by someone' while a *sotto voce* chorus confesses how frequently this is not so.⁷³

Democracy

Despite these problematic aspects of the relationship between *jura novit curia* and *nul n'est censé ignorer la loi*, the association between the presumptions of the two adages is important because it expresses the fundamental connection between courts, parties and all citizens.⁷⁴ The two presumptions refer to a shared knowledge that, in litigation, supports what Cadiet describes as the *principe de la coopération*,⁷⁵ the anti-thesis of Motulsky's rigid fact-law federalism. The shared knowledge supposed by the interaction of the two presumptions speaks to the connection between courts and all citizens. The judgements of many French courts begin with the phrase 'In the name of the French people'. This locution is the judicial equivalent of a statute's enacting clause, expressing the underlying authority from which legal status is derived.

Under successive Republican constitutions the judicial power in France expressly derives from the people, the ultimate sovereign. This is not insignificant in a democratic republic, however much *la Doctrine* tends to conceive of the judicial power as a *toute puissance* modelled along the lines of the unlimited prerogatives of Divine Right. The 1956 Constitution incorporates the right of all citizens to participate in law-making, "either personally or through their representatives."⁷⁶ This is significant, at least in theory, for if the court's inchoate jurisdiction derives from a Constitution and legislation enacted by citizens' representatives, it is theoretically coherent to acknowledge a party's the right to participate in law-making directly in individual cases.⁷⁷

⁷³ Roland and Boyer, *supra* note 3 at 584 write more caustically that the obligatory force of law derives not from a knowledge of it but that it is the act of a sovereign power. [But the problem to which Motulsky responded – at start of his thesis -

⁷⁴ see *Le Nouveau stile de la court souveraine de Parlemen & forme de palider & proceder en icelle, tant és causes civiles que criminelle; Reveu, corrigé & reduict par tiltres, selon l'avis des plus ordinaires Practiciens de ladicte court.* Paris 1577 (no author or editor credited) at feuille 61 [Heading "Quelle chose est la cause, on matière de droit] Ch II "une cause dressee, ou demenable en iustice est l'acte qui se fait selõ les ordonnances de droit, par trois personnes. C'est assavoir le iuge, l'acteur, et le defendeur" [sic]

⁷⁵ Loïc Cadiet, "Le Code" in *Vingt ans après*, *supra* note 23, 45 at 64-65. "Vingt ans après, l'opinion croissante, sinon unanime est que les Articles 1er à 13 du nouveau code définissent, en vérité, un authentique *principe de coopération* du juge et des parties dans l'élaboration du jugement vers quoi est naturellement tendue la procédure civile. [Twenty years after [the code] the ascendant if not unanimous opinion is that Articles 1 through 13 of the *NCPC* truly establish a veritable principle of co-operation between the judge and the parties with respect to formulating the solution to be expressed in the judgement, a development that reflects the natural tendencies of civil procedure.]

⁷⁶ Constitution of 1958, Title 16, II *Declaration of the Rights of Man and of the Citizen*, 1789 Article 6, in Bell, *French Constitutional Law*, *supra* note 38 at 245ff.

⁷⁷ There is no general theory at common law of the democratic basis of judicial process. Indeed, one of the most persistent issues of 20th Century legal scholarship in North America, attempting to justify the judicial power in a democratic society was based on a rarely challenged assumption that courts were inherently undemocratic. There is some Civilian literature that explores the democratic nature of legal process. R Martin, "Un autre procès possible ou est-il interdit de

Parties are hardly supplicants before the court applying for favours as if to the Foundation Eva Peron. Parties *saisie* the court by the act of initiating and defending a claim, in default of which the court is without jurisdiction. The parties' conveyance of *saisine* is an election that perfects the court's inchoate jurisdiction thereby authorising the court to consider and decide the parties' case.⁷⁸ The status of parties' as autonomous grantors of jurisdiction is clearly stated in Article 1 of the *NCPC* which enacts as positive law the traditional *principe dispositif*.⁷⁹

The jurisdiction of the court is thus delimited by the jurisdiction conferred by the parties in an instant case. In this light, *judex secundum* is not merely a rule that governs the conduct of decision-making, it is a rule that delimits the judicial power. In principle and in the light of the two primary constitutional sources of the courts' jurisdiction, deciding outside of the bounds of the case established by the parties grant of jurisdiction is analogous to deciding outside the bounds of an act of *parlement*. *Judex secundum*, however, co-exists in Motulsky's quaternary of adages with a *jura novit curia* that likewise, by some accounts, establishes the court's jurisdiction and duty to decide according to law, preventing the court from acquiescing to collusive suits of parties that would be contrary to law.

The supposition a court has a duty to 'know' the law itself presupposes that where the parties have both presented legal arguments the court finds unsatisfactory, the court may or must intervene *jura novit curia* to apply the 'correct' law. This justification is sound in principle because restricting the court to deciding *only* according to the legal arguments presented by the parties could require a court to decide at times according to manifestly incorrect legal argument. On this basis, intervention by the court with its own points of law can be justified, not universally but in cases of error, omission or suspected collusion.

By this reasoning, *jura novit curia* is better seen as a rule for exceptional or anomalous cases rather than as a general principle. However, accounts of *jura novit curia* are confused about whether the adage refers to specific judicial powers, such as intervention, or whether the adage is an expression of belief in the desirability of a strong judicial power. It is one thing to approve of

rêver?", RTD-civ, (3) juill-sept.1994 at 559 quotes Calamandrei, (Process and Democracy, 1956, at 151) who wrote that "the dialectic of legal process is the dialectic of parliamentary democracy." Lon Fuller, *Forms and Limits of Adjudication*, (1978) 92 Harvard L.R. 353, at 364 wrote of how adjudication confers on the parties, "a peculiar kind of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour."

⁷⁸ see H. Kelsen, *An Introduction to the Problems of Legal Theory*, [1934], translated by S. Paulsen, (Oxford University Press: Oxford, 1992) at 46, "...even the subjective right of private law is a political right, for here, too, the right-holder participates in forming the will of the state. The will of the state is expressed no less in the individual norm of the judicial decision than in the general norm of the statute. And if both the subjective right of the private law and the political right can be subsumed under one and the same concept of legal right, it is simply because the same legal function – the law-creating function – is expressed in both; that is to say, in both cases, those subject to the law participate in creating the law."

⁷⁹ *NCPC*, Article 1, "Seules les parties introduisent l'instance, hors les cas où la loi en dispose autrement...." [Only the parties may commence an action, except where a law otherwise provides...].

intervention *jura novit curia* in individual cases as a solution to a problem a particular case poses. It is quite different to promote *jura novit curia* to status as systemic principle expressing the court's general monopoly over juridical analysis. Despite this difference, using *jura novit curia* to extol the virtues of a powerful judiciary obviates the need for *jura novit curia* to express particular norms, because such a use implies it is the court's prerogative to do whatever it likes.

Jura novit curia as an interlocutory rule of evidence: le droit

After their introduction, a single paragraph (which includes a brief reference to the association of *jura novit curia* with Article 12 of the *NCPC*), Roland and Boyer proceed, to detail, over three pages, two exceptions to their primary conception of *jura novit curia*. The discussion is a distinct departure from other definitions of the adage not only because of its length. More importantly, their definition supposes that the most relevant and controversial aspect of *jura novit curia* is as a rule of evidence, relating to the proof of law, rather than to its interpretation or application, or its relation to *le principe de la contradiction* or *les droits de la défense*.

The two exceptions to *jura novit curia* Roland and Boyer discuss are that in matters of international law and matters of French customary law, the judge's power to intervene to 'recognise' the existence of *la loi* or *le droit*, is restricted.⁸⁰ The general principle is that the existence of *la loi étrangère* and *le droit coutumier* cannot be presumed (*jura novit curia*). The judge must rely on the party invoking a rule of international law or French customary law to lead evidence proving its existence.⁸¹ This is the general principle only and Roland and Boyer describe exceptions to this exception, for example, where the pleaded customary right is 'notorious,' where it is known to the judge personally, or where the *coutume* has been established by jurisprudence.⁸²

The technical details of the exceptions do not concern us here, other than to indicate the precise normative consequences of *jura novit curia* are unsettled. The more relevant aspect of Roland and Boyer's account concerns the necessity *le droit coutumier* be alleged and proven by a party. The requirement speaks to the relationship of *la loi* and *le droit* in its various forms, a relationship that will be examined in subsequent discussions concerning the nature of that which the court 'knows'. and the nature of its 'knowing'.

⁸⁰ Roland and Boyer, *supra* note 3 at 364-367. "Le juge français – sauf exceptions, Chambres spécialisées par exemple, - ne peut pas connaître la loi étrangère...[!] la jurisprudence unanime exige que le plaideur don't la prétention repose sur une loi étrangère rapporte l'existence and la teneur de ladite loi." [the French judge, with exceptions such as specialised Chambres, cannot recognise foreign law...the case law is unanimous in requiring the party whose pleadings rely in a foreign law to account for its existence and tenor]

⁸¹ Roland and Boyer, *supra* note 3 at 366, "la preuve de la coutume incombant normalement aux plaideurs" [the burden proof of a custom normally falls on he who pleads it]. In their subsequent analysis however, the number of exceptions seems to diminish the generality of the general rule.

⁸² Roland and Boyer, *Ibid*

At issue is the meaning to be assigned to the Latin *jura*. *Jura novit curia* can mean the court knows *jura* in its sense as *la loi*, the existence of which a court may recognise without formal proof, the consequence Roland and Boyer impute to the adage. *Jura novit curia* may also mean, in some cases, the court knows *jura* in its sense as *le droit coutumier*. However, *le droit coutumier* is a “*droit populaire*”⁸³ not formally promulgated in the *Journal Officiel* and, apart from exceptions, its existence accordingly must be proven by the party relying on it.

Jura novit curia as a rule relating to the proof of the existence of law refers to *le Droit objectif* which consists of *le droit coutumier* and *la loi*.⁸⁴ *Le Droit objectif* contrasts with *le droit subjectif*, which refers to an “individual prerogative” which a party may assert as the basis of its claim.⁸⁵ *Le Droit objectif* and *le droit subjectif* are complemented, and united in *la règle de droit* which refers at once to the existence of a rule of law and its to application by a court to resolve a dispute.⁸⁶

The significance of the relation between *le Droit objectif*, *le droit coutumier*, *la loi* and *le droit subjectif* is that the ‘knowing’ of each type of *droit* by a court involves distinct burdens of proof. The existence of *le Droit objectif* is an interlocutory factual determination, an essential precursor to a successful claim, but not a guarantee of its success, for the existence of *le droit objectif* on which each party relies will typically not be contested. More importantly, a successful claimant must prove an ‘entitlement’ to the application of *le Droit objectif* to her own particular circumstances. This second burden of proof concerns the proof of *le droit subjectif*. At issue is whether and how *jura novit curia* extends beyond proof of the existence of *le Droit objectif*, as Roland and Boyer describe, to the proof of *le droit subjectif*, that is, proof a claim should succeed.

Recognition of the existence of a law is distinct from its interpretation and application. A party’s allegation, or a court’s judgement that a law confirms or denies a party’s alleged right is not a preliminary matter of proof, but of the essence of the merits of claim. Roland and Boyer refer to the sequence of evidential issues and the substantive interpretation and application of a ‘proven’

⁸³ [folk law] *Ibid*, 108, describing the adage “*Consuetudo legis habet vigorem*” (La coutume a force de loi) [custom has the force of law]

⁸⁴ Cornu, *supra* note 5 at 322-23, “Droit: 1. Droit objectif (on écrit Droit – avec une majuscule – par opposition au droit subjectif) a/ ensemble de règles de conduite socialement édictées et sanctionnées, qui s’imposent aux membres de la société.” [Right: Objective right (written Right with a capital, as opposed to subjective right) a/ that body of rules of conduct promulgated and approved by society and to which its members are subject.]

⁸⁵ Cornu, *supra* note 5 at 323. “une prérogative individuelle reconnue et sanctionnée par le Droit objectif qui permet à son titulaire de faire, d’exiger ou d’interdire quelque chose dans son propre intérêt” [an individual prerogative recognised and affirmed by Objective Right which permits its holder to do, require or prevent some act in furtherance of their own interest.] Examples of *le droit subjectif* include individual rights or interests arising under contracts or through testamentary dispositions. see generally, *Introduction au droit civil*. [web link]

⁸⁶ Cornu, *supra* note 5 at 758, “Règle 1. Règle de droit: désigne toute norme juridiquement obligatoire (normalement assortie de la contrainte étatique), quels que soient sa source....” [Rule: 1. Rule of right: refers to all norms juridically obligatory (normally a type state constraint) regardless of its source....] (note the source does not include subjective right.)

loi or *droit* to dispose of a party's claim.⁸⁷ In France, these aspects of adjudication involve the proof of the existence, entitlement and application of *le Droit*, *le droit* and *la règle de droit*, distinctions that are problematic for a Common Law translation restricted only to the words 'law' or 'right'. These matters of proof involve different types *droit* and, at least to *la mentalité* «Common law», suggest that whatever the nominalised or conceptual meanings assigned to *le droit*, its forms also function effectively as verbs describing the interaction of courts and parties.

The immediate point is that, unlike Damaška's dispositive *jura novit curia*, Roland and Boyer's is exclusively an interlocutory rule permitting a court to relieve a party of the burden of proving the existence of the rule upon which they rely. As an interlocutory rule this manifestation of *jura novit curia* permits a court to deem as proved matters so notorious as to be beyond real controversy. In this guise, the adage is not a dispositive rule at all. Where an arguable case is made out that the rule upon which a party relies does not exist, the court must refrain from recognising its existence *jura novit curia* but must insist that the issue of its existence be debated and either proved or disproved.⁸⁸ Real controversy, in these circumstances, therefore, precludes the use of *jura novit curia*.

This conception of *jura novit curia*, like Common Law judicial notice,⁸⁹ is a sound rule. It promotes the efficient unfolding of process by excluding from contention matters that are obvious and, at any rate, is a presumption which, in the face of real controversy, can be rebutted. This type of intervention *jura novit curia* will only arise where the existence of the law upon which one party relies is challenged by an adversarial party, making party proof a necessity. Intervention *jura novit curia* to deem the rule to exist is thus a judgement summarily dismissing the objecting party's allegation her opponent's case relies on a non-existent law.

The interlocutory dimension of *jura novit curia* may be arbitrary for it requires distinguishing that which is notorious from that which is sufficiently contentious so as to require party debate. Substantive issues relating to party rights must be distinguished from those that are frivolous or dilatory manoeuvres. The distinction can be difficult, however, 'liberal' process would tend to permit debate

⁸⁷ Roland and Boyer, *supra* note 3 at 363. Ce qui n'empêche pas, non plus, les avocats de discourir sur le sens ou la portée controversée d'un texte, mais alors on s'évade du domaine de la preuve pour entrer dans celui de l'interprétation."

⁸⁸ Cour d'appel de Montpellier, 8 February 1993, Recueil Dalloz Sirey, 1993 21^e Cahier, Jurisprudence 306. The judgement states, "faute d'un tel enregistrement, la preuve de mise à disposition du public peut être rapportée par tout moyen, la charge de la preuve incombant à la partie qui se prévaut du texte nouveau." [absent registration, proof of having been made available to the public may be raise, responsibility for proof of registration falls to the party who relies on the law in question]. A similar case, from the United States raised *jura novit curia*, i.e. *sua sponte* issues concerning the validity of an act of Congress: *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.* 124 L.Ed. 2d 402 (USSC, 1993); 955 F. 2d 731 (DC Cir, 1992).

⁸⁹ see 17(1) *Halsbury's Laws of England*, *supra* note 39; Evidence, title 3(4); F.A. R. Bennion, *supra* note 63 at 70, "Under the doctrine of judicial notice, a court....will in certain circumstances accept the existence of a law or a fact relevant to the interpretation of an enactment without the necessity of proof.

rather than forestall it. In these circumstances, even Roland and Boyer's interlocutory *jura novit curia* power would be a power to be used with restraint.

Today the public promulgation of legislation means the proof of the existence of a law is rarely an issue that warrants adversarial debate.⁹⁰ Historically, however, the existence of a law could not be so easily be assumed. Before the redaction of *le droit coutumier* in *ancienne* France law was an unwritten oral custom, *ordonnances* of the King were not readily accessible and the publication of the *arrêts* of *cours souveraines* was generally forbidden.⁹¹ Va Savoir Part III will argue that this aspect of *jura novit curia* originates in the power of the court to recognise without proof rules expressed in the written *coutumiers*. The adage itself, and other rules associated with the adage, however, do not appear to have emerged until well after the Revolution.

Roland and Boyer's work is the definitive compilation of French adages. It is surprising that Roland and Boyer alone amongst those defining the adage speak to its interlocutory dimension. Surprising also is the amount of space they devote to this dimension, passing over in silence the controversies in which Articles 12 and 16 of the NCPC have been engulfed and the other rules of law that form the central thrust of other definitions of *jura novit curia*.

In their brief treatment of *jura novit curia* as a dispositive rule, to which I return in Va Savoir Part II, Roland and Boyer illustrate *jura novit curia* with a lengthy quote from a provision of the NCPC. They scarcely comment on the provisions of Article 12, the meaning of which has been the subject of intense debate since first promulgated in 1975. Not only this, but one alinéa quoted by Roland and Boyer's quotation was repealed by the 1979 decision *Conseil d'Etat*, that is, over two decades ago. Roland and Boyer ignore these facts of black-letter law and the controversy in which *jura novit curia* has been embroiled. Even lengthy definitions of *jura novit curia* such as theirs, therefore, may be incomplete, suggesting all accounts of the adage should be approached critically and cautiously, for if we understand *jura novit curia* by touching only one part of the adage, it is not possible to even imagine that other parts remain unseen.

2.4 J. R. Fox, *Dictionary of International and Comparative Law*

⁹⁰ see Montpellier case, *supra* note 88 on this issue; The 1979 decision of the *Conseil d'Etat* "annulled" alinéa 3 of Article 12 of the NCPC which provided authorisation for the court to intervene *jura novit curia* with its own points of pure law. The decision does not appear to be universally accepted. see Eudier, *supra* note 15, at 101 who writes, "nombre d'auteurs considèrent qu'il conserve une "autorité officieuse" (Heron n.3) ou même une "existence vivace quoique fantomique" (H. Croze & C. Morel, n.4) peut-être à titre coutumier" Eudier at 101 note 6 cites a case from the *Cour de cassation* invoking the repealed alinéa 3. The section appears as 'alinéa 3' in the 2001 Dalloz NCPC with a footnote referring to its repeal in 1979. At least two scholars have, unofficially, renumbered the original 4th and 5th alinéa of Article 12 to fill the gap left by the repeal of alinéa 3. see Blondel, *supra* note 186, in *Vingt ans après supra* note 23 at 109 and Eudier, *supra* note 16 at 43, 99, note1.

⁹¹ see T. Sauvel, "Histoire du jugement motivé", (1955), *Revue de droit public et de la science politique en France et l'étranger*, 5; T. Sauvel, "Les demandes de motifs adressées par le Conseil du Roi aux Cours souveraines", (1957) *Revue Historique de droit français et étranger* 529.

Fox offers what in some respects is an admirably concise and accurate definition of *jura novit curia*. Fox states that the adage refers to a "presumption that the court knows the law"⁹² with the "consequence" that "the court is not restricted to the law presented by the parties, but is free to undertake its own research." For many lawyers, this is the full extent of *jura novit curia*: namely that a court is not absolutely bound by the law pleaded and argued by the parties. Fox's definition is salutary to the extent it expresses this single principle and leaves open questions about the manner and form requirements to which a court is subject when its research discloses a relevant point of law not raised by the parties.

While Fox's definition of *jura novit curia* is admirable, it is not beyond criticism. Fox, like Roland and Boyer, structures his definition as a presumption that gives rise to a consequence, correctly distinguishing between the meaning of the bare words of the adage and rules to which the presumption may give rise. Fox, however, does not justify his consequence by associating it with an *a priori* presumption such as 'everyone knows the law' by which Roland and Boyer justify *jura novit curia*.

The association, as we have discussed, is important because conceptually the presumption 'everyone knows the law' connects 'judicial knowledge', not only with the parties but with the 'everyone' who in democratic states are, in theory, the ultimate sovereign and source of law. The connection provides *jura novit curia* and by extension the court, with a legitimacy derived from the association of the judicial power both with the ultimate sovereign and the parties who *saise* the court, permitting the court to hear and decide their case.

Fox can also be criticised because he is not explicit in his description of the legal effects the judicial 'research' power has for the parties. Fox therefore does not reach issues critical to understanding the legal effects of the principle he postulates. The controversial issue is less that the court undertakes its own research, than whether and how the research is revealed to the parties during process and how it is applied to decide a matter.⁹³ These omissions have recursive effects which subvert Fox's definition.

⁹² J. R. Fox, *Dictionary of International and Comparative Law* (Oceana Publishing Inc:Dobbs Ferry, New York, 1992). "...the presumption that the court knows the law. This maxim controls the manner in which the International Court handles questions of international law. As a consequence, the court is not restricted to the law presented by the parties, but is free to undertake its own research." see also, J. Bell, "Comparing Precedent", (1997) Cornell LR 1243 at 1274. "...many civilian systems operate with the principle *curia novit legem*, the judges will conduct their own research on precedent." Bell, *ibid* at note 136 defines *curia novit legem* as "Courts become acquainted with the law." [citing J Bell, "Reflections on the Procedure of the Conseil d'Etat, in *Droit sans frontières*, G. Hand & J. McBride, eds. (Holdsworth Club: Birmingham, UK, 1991) 211 at 216-17]

⁹³ B. Miller, "Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard", (2002) 39 San Diego L.R. 1253 at 1256 describes the options of American appellate courts when the court considers an issue has not been 'framed correctly' or was 'missed' by the parties. The options are, first, ignore the issue; secondly, mention the issue but treat it as either not properly raised or as waived; thirdly, note the issue and remand it to a trial court for consideration; fourthly, ask the parties for supplemental briefing before reaching its decision; fifthly, decide the issue without briefing; and sixthly, mention the issue in the judgement but treat it as *dicta*.

An explicit definition of *jura novit curia* would clearly state the consequences of judicial research, namely, the possibility a court may:

- a) intervene
- b) on its own initiative
- c) to reject the parties' points of law, and
- d) to raise its own new points of law discovered in the course of its independent research; and
- e) base its decision on them.

These five distinct elements of intervention *jura novit curia* are concealed within the word 'research' which serves as a euphemism. Spelled out, 'research' refers to a type of *jura novit curia* that permits a court to participate in the parties' adversarial proceeding without prompting from the parties themselves. Where the intervention proceeds in the manner of Damaška's *jura novit curia*, its five elements must be supplemented by a sixth, the denial of notice to the parties, and a seventh, the denial of an opportunity to debate the rule of law on which the court bases its decision.

It follows, then, that how and when the 'research' is raised and applied or the types of cases in which this is permitted are necessary elements of any understanding of *jura novit curia*. Fox's definition does not address whether the court is required to put its own points of law to the parties for argument, that is, to comply with the *saine solution*. Even where the *saine solution* is respected, its meaningfulness relies on the extent to which it is psychologically possible for a court to impartially consider the parties' objections to the point of law the court has raised of its own motion.

The court that raises its own point of law and, invoking *jura novit curia*, tells the parties that its mind is made up: the 'court knows the law'. Yet, simultaneously, respecting the *saine solution* by putting its own point of law to the parties for debate, the court invites debate about the applicability of its own point of law. This profoundly mixed message renders party debate at best, a formality, and at worst, a sham. Authentic debate on a court's own point of law presumes a real possibility that valid objections to the court's own point of law may exist and that party debate will contribute in a meaningful way to the discovery of these objections and an evaluation of their relevance to the instant case. Intervention *jura novit curia*, however, can only be the judgement because the presumption 'the court knows the law' denies the possibility valid objections may exist.

The Nature of Judicial Research

A second criticism, not to overlook the obvious, concerns the contradiction in Fox's statement that, because the court is presumed to know the law, it is free to undertake its own research. A contradiction arises because a court that really knows the law would not have to undertake its own research. Apart from the lapse of elementary logic, the contradiction is significant because the divergent circumstances which may prompt a court to undertake independent research are not necessarily co-extent with all forms of intervention *jura novit curia*. This further suggests the way in which the word 'research' functions as a euphemism at odds with the bare words of the adage.

Judicial research will often be unnecessary to identify a patent error or omission in the parties' arguments for a court will often intervene with a spontaneous display of its knowledge of the law.⁹⁴ Most would consider judicial intervention for the purpose of remedying a patent error or omission to be an example of the type of legal consequences which properly issue from *jura novit curia*.⁹⁵ To the extent that *jura novit curia* refers only to judicial research, however, intervention not requiring research is, strictly speaking, outside the parameters of Fox's definition.

The act of judicial research need not involve or imply a complete absence of knowledge. It does however imply partial knowledge, legal uncertainty, complexity or judicial dissatisfaction with the parties' legal argument. To the extent judicial research is a response to legal uncertainty, complexity or dissatisfaction, however, party debate on the court's own point of law is more rather than less important. The function of debate is to clarify the ultimate issues which just resolution of the litigation requires. Judicial policy-making, no less than legislative or executive policy making benefits from a thorough analysis of the issues including representations from those directly affected. In addition, party debate fosters the parties' sense that justice has been done.

Apart from intervention to correct obvious errors or omissions or just to verify the adequacy of the parties' arguments⁹⁶, more complex, potentially less innocent circumstances may prompt judicial 'research'. One extreme may be illustrated by the legal 'research' for which England's Lord Denning became famous.⁹⁷ In

⁹⁴ For example, identifying an obvious limitation defence not argued. Intervention may, however, be precipitated not by the existence of an unpleaded defence but by the characteristics of the party omitting it. A court may be more inclined to raise the unpleaded defence where the omission is made by an unrepresented defendant that where represented by a skilled advocate. (but waiver of unpleaded defences issue)

⁹⁵ The principle was expressed by a maxim found under the heading, "*ut quae desunt advocatis*" in, *Codex Iustinianus in II Corpus Iuris Civilis*, P. Krueger, ed. Bertolini, 1963 at 102. The text reads, "non dubitandum est iudici, si quid a litigatoribus vel ad his qui negotiis adstant minus fuerit dictum, id supplere et proferre, quod sciat legibus et iuri publico conveniure." This was explained by English writer George Bowyers, *Commentary on the Modern Civil Law*, (V&R Stevens & GS Norton: London, 1848) at 321 as meaning "the judge must decide upon his own knowledge of the law, though it not be relied upon or alleged by the parties." A equivocal explanation is given in, J. Voet, 2 *The Selective Voet*, Percival Gane, trans. (Butterworth & Co: Durban, 1956) at 60-61. The maxim dates to the reign of Diocletian and Maximus, was known to the French jurist Merlin; but has disappeared from 20th Century scholarship. The meaning of the maxim and the significance of its disappearance is discussed in *Va Savoir Part III*.

⁹⁶ see *NCPC* annotation to Article 12 at §26, referring to the court's "...rechercher de son propre mouvement la teneur des règles invoquées par les parties." [researching on its own motion the tenor of the legal rules invoked by the parties.]

⁹⁷ see *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379. This was Denning's first judgement as a Law Lord and according to A. Paterson, *The Law Lords* (University of Toronto Press: Toronto, 1982 at 39 Denning, "spent the better part of the summer" undertaking independent research in to the law. Denning joined a unanimous court as to the outcome of the case, but based his judgement on issues and points of law that had not been considered either by counsel or by the lower courts. Denning justified his action, stating, (at 423-24)that, "the law on this subject is of great consequence and, as applied at present, it is held by a great many to be unsatisfactory. The four other Law Lords participating in the decision however unanimously rebuked Denning's independent research and dissociated themselves from his judgement specifically on the grounds

Denning's case judicial research was motivated by a desire to change the result that would have followed from the application of the law that had been pleaded by the parties or to rewrite what he consisted to be "bad" law. I don't mean to praise or criticise Denning's decisions, rather to associate the doing of equity or judicial law-making with *jura novit curia* through the rubric of 'research.' The association permits *jura novit curia* to perform a highly personalised, even idiosyncratic function, legitimising the *kadijustiz* and associating the adage with equity.⁹⁸

Judicial research, à la Lord Denning, was a radical departure from the Common Law adversarial tradition of judicial reliance on party argument, which F. A. Mann's described as the 'principle of judicial unpreparedness.'⁹⁹ Key decisions of Denning, based on his own research, were criticised or overturned on appeal because they violated the parties' rights to notice and a full defence.¹⁰⁰ These rights in England comprise Natural Justice, which is comparable to *le principe de la contradiction* and *les droits de la défense*.¹⁰¹ While Mann would claim the

that the parties had not been heard on the points that formed the basis of Denning's judgement and also that now lower had passed on them.

⁹⁸ see "Palm Tree Justice and the Lord Chancellor's Foot", in *Justice Lord Denning and the Constitution*, P. Robson, P. Watchman, eds. (Gower: Farnborough, 1981) 1 writes that, "Lord Denning combines a legendary distaste for precedent which does not accord with his intuitive and idiosyncratic sense of justice with his predilection for policy-making which at times has given the Court of Appeal the appearance of a legislative rather than a judicial body." Whether associated with a 'parties' rule', the adage *judex secundum* or *ultra petita*, with Natural Justice or Due Process, or *les droits de la défense*, restricting a court's power to decide according to points of developed in the course of its own independent research serves to reduce the likelihood of idiosyncratic decisions based on inadequate consideration of either legal or policy issues.

⁹⁹ N. Andrews, "The Passive Court and Legal Argument", (1988) *Civil Justice Quarterly*, 125 at 128-29 associates Denning with only three cases raising *jura novit curia* issues: *Rahimtoola v. Nizam of Hyderabad*, *supra*; *Lloyd's Bank v Bundy*, [1974] 3 All ER 757 at 763-66 (CA) and *Goldsmith v Speering* [1977] 2 All ER 557 (dissenting). Andrews discusses a fourth case, *The Laconia*, because in it Denning 'relents' and confesses that a passage from his judgement based on unargued points of law had been omitted at the urging of Lawton and Bridge L.JJ. I have not encountered any publications closely examining Denning's decisions in term of his research and intervention *jura novit curia*. That Denning's reputation as an innovative judge transcends issues narrowly focussed on independent research and intervention *jura novit curia* suggests a body of Denning judgements in which innovation was possible within what Andrews, at 128 describes as "the straight-jacket of party argument".

¹⁰⁰ In *Hadmore Productions v. Hamilton* [1983] A.C. 191 at 233 the House of Lords, overturned Lord Denning's judgement in the Court of Appeal, [(1981) 2 All E.R. 724] and chastised Denning because he had research and used in support of his judgement a passage from *Hansard*, a source which, at the time, both courts and parties were not allowed to use. Lord Diplock described this as a breach, "of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him this is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is." In *Goldsmith's v Speering Ltd.* Lord Bridge criticised the research that led to Denning's dissenting judgement. Bridge wrote, Denning's, "private research demonstrates the law, as stated in the leading text book, to be not only wrong, but unarguable. Such a claim is untenable." and Denning's judgement, "decides against the plaintiff on a ground on which...the plaintiff has not been heard...there is a breach of the rule audi alteram partem...[which]... in a court of inferior jurisdiction would be a ground for certiorari."

¹⁰¹ see Jolowicz (2000), *supra* note 12 at 191ff. see also A. Zuckerman, Review of Jolowicz *On Civil Procedure*, (2000) LQR 687 at 688 which illustrates an unusual reticence amongst some

absence of *curia novit legem* was the most spectacular feature of English procedure, these decisions of Denning illustrate not just the undertaking of judicial research, in Fox's sense of *jura novit curia*, but also the application of Damaška's extreme form of the adage.¹⁰²

Cases decided after Damaška's *jura novit curia* are not difficult to find in French law.¹⁰³ With some frequency the *Cour de cassation* overturns decisions of regional appellate courts decided on the basis of Damaška's illegal *jura novit curia*.¹⁰⁴ Apart from these cases, however, French judgements are not very informative about the circumstances of the intervention *jura novit curia*. The doctrine of *le secret du délibéré* and the laconic, legislative style of the French judgement prevent readers from learning much about the circumstances precipitating intervention.¹⁰⁵ Dissenting and concurring judgements, in the Common Law style, reasoned on the basis of alternative theories of the case, are largely unknown in French practice.

At Common Law dissenting and concurring judgements are an important source of information about *jura novit curia* intervention, often the only readily accessible record that the court has decided on the basis of an unpleaded argument of law and that debate on the court's own point of law has either not taken place or been inadequate.¹⁰⁶ An effect of this form of *jura novit curia* is that, unless a

English *processuelistes* to deny the content and construct of what 1(1) *Halsbury's Laws of England*, *supra* note 39 at §95ff describes as "Natural justice."

¹⁰² see *Broome v. Cassells* [1971] 2 All E.R. 187 at 202 (C.A.) where Lord Denning declined to follow a House of Lords precedent in *Rookes v. Bernard* [1964] 1 All E.R. 367, on the basis that it had been decided *per incuriam*, in that the decision in *Rookes* was, *inter alia*, based on points of law that had not been put to the parties for debate. see Paterson, *supra* note 97 at 48, to the contrary.

¹⁰³ see cases cited *supra* note 20.

¹⁰⁴ With the exception of Juge Magnaud, 'le bon juge de Château Thierry' an example of the idiosyncratic judge and a marked departure from the collegial anonymity of the French *curia*, no French judge has acquired the notoriety of Lord Denning, although Mimin, *infra*, suggests a thorough enquiry into the manifestation of judicial personality in French judgements might prove rewarding. With respect to Juge Magaud see T. Legendre, in "Graines d'histoire, la mémoire de l'Aisne", automne 1999, N°7.

¹⁰⁵ J. Bell, *French Legal Cultures*, *supra* note 22 at 70, writes "...the decision hides many of the contentious arguments which have been considered by the judges." see also Steiner, *supra* note 9 at 149-151 who confirms what are commonly seen as the most significant tendencies of the French judgement style, ("terse...cryptic...laconic...formalistic...depersonalised...") but also cites Mimin who "castigates, sometimes vehemently, [French] judges' attempts at inserting into their decisions policy arguments, personal views, alternative approaches, or what he calls, 'humanitarian nonsense.'" see P. Mimin, *Le style des jugements* (Librairie Technique: Paris, 1978); P. Mimin, "Hésitations du formalisme dans les jugements", *Sem.jur.*, 1956, I. 1447; F-M. Schroeder, *Le nouveau style judiciaire*, (Daloz: Paris, 1978).

¹⁰⁶ In *Arcadia Ohio v. Ohio Power Company*, 112 L.Ed. 2d 374 (USSC, 1990) Mr Justice Scalia, for a unanimous court, decided in the manner of Damaška's *jura novit curia* basing the decision on an interpretation of legislation that had neither been put forward by the parties nor debated prior to judgement. In a separate opinion, Mr Justice Stevens (Justice Marshall, concurring) points out that, "neither the parties, the interested agencies, nor the Court of Appeal considered the construction of §318 that the Court adopts today."

party objects to such a decision by appealing, intervention *jura novit curia* is typically a concealed, secret act, which, with the acquiescence of the parties, nevertheless results in a valid and binding judgement.

For all that Denning was controversial, his interventions *jura novit curia* and his breach of fundamental principles, were public acts. Legal process and judgement are supposed to be *fora* of open debate and public record. Common Law notions of fair process and precedent assume each party has notice of all matters of fact and law that inform the decision, prior to judgement. In the case of *jura novit curia*, however, a recurring problem is determining when such a decision has been reached. Contrary to the 'principle of publicity' there is a tendency for *jura novit curia* decisions to be secret until judgement, resulting in what lawyers term "surprise"¹⁰⁷.

Even where parties are 'surprised' by the judgement, their knowledge of a *jura novit curia* intervention derives only from their personal knowledge of the legal arguments presented. Future readers of the judgement, including courts undertaking research, will be denied access to the nature of the court's *moyen secr  t*. This may be less important in jurisdictions with a weak system of precedent, but is of concern in jurisdictions in which litigation presupposes a connection between the material pleaded by the parties and the material contained in the judgement. The testing of legal hypotheses through full adversarial debate at Common Law is one important measure by which a judicial decision acquires status as precedent.¹⁰⁸

Fox's use of the word "research" is has a strong Common Law feel to it, inasmuch as in Civilian jurisdictions such as France with a judicial process typically in two stages, "research" is an ordinary task of the *juge rapporteur* or *juge de mise en   tat* that prepares the case for presentation to the full *curia*.¹⁰⁹

¹⁰⁷ 'Surprise' is a term of art that describes the effect on the parties of an act taken by a judge without prior notice, such that they are unprepared and unable to respond. Cornu, *supra* note 5 does not define "surprise". In the introduction to the predecessor to the NCPC, the *Nouveau style de la procedure civile dans les cours d'appel, les tribunaux de premi  re instance, de commerce et dans les justices de la paix, ou Le Code judiciaire* (Hacquet: Paris, 1806), M. LePage writes at 769 that the *Code* presents a "march   fixe et qui pr  sente des garanties contre les erreurs and les surprises." [a level playing field which offers guaranties against error and surprises] Benabent, *supra* note 19 at   3 uses the term in quotation marks, "  surprise  ", the quotations suggesting a colloquial association has attached to the word since the era of LePage.

¹⁰⁸ Debate affirms that the parties have been heard, demonstrating compliance with party procedural rights. Debate also indicates that the Court's decision is informed by the 'advice' counsel provide. These policy-related factors do not impact fully on the doctrine of precedent, however. No firm rule is established, rather the absence or inadequacy of argument itself becomes an argument courts may consider in evaluating the weight to be given to a precedent. see R. C. Cross, *Precedent in English Law*, 3d (Oxford University Press: Oxford, 1979) at 148-50 (*sub silencio* decision); and A. Milani and M. Smith, "Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts" (2002) 69 Tennessee L.R. 245 at 298 n. 291 (on practice of ordering supplemental briefing) and at 308 (analogy between precedent value if *dicta* and *sua sponte* decisions).

¹⁰⁹ Bell, *supra* note 22 at 161. One possible meaning, perhaps of historical significance, is that *jura novit curia* asserts the right of the full *curia* to decide, a reference to the necessity of a decision reflecting the majority of *curia* members. see *Code de la Justice de Paix*, Quatri  me Edition, (A Bourdeaux, chez Pallandre l'a  n  , Citoyen, Place Saint-Projet, No. 3, 1791) at Book I,

In the context of Fox's publication – international and comparative law – independent judicial “research”, a less common but hardly rare event, functions to explain to Common Lawyers what Civilians take for granted: the judge is actively involved in examining all aspects of the parties case including arguments of law. This activity does not invariably involve intervention *jura novit curia* but speaks instead to the court's duty to decide correctly, a duty which may at times require intervention *jura novit curia*, particularly where party argument is not fully developed.

Duty and Discretion

Fox's statement that a court is "free" to conduct its own research touches a controversy with respect to intervention *jura novit curia* in France. By the word "free" Fox likely means that there are no restrictions on the power of the court to conduct its own research, to reject party arguments of law, to intervene and apply the fruit of the research to its decision. Fox, in this view, describes intervention *jura novit curia* as an unfettered discretion, a prerogative power, as opposed to a duty, which parties can insist be discharged.

The effects of the duty-discretion question may be significant in France because if the power is a discretion, it is less overtly amenable to review by superior courts.¹¹⁰ French courts are duty bound to *dire droit*, to decide according to the 'correct' legal rule applicable to the facts, a duty most agree includes, where necessary, the power to intervene, *jura novit curia*. A lacuna arises between intervention-as-discretion and intervention-as-duty because of the difficulty of distinguishing between cases in which the duty of the judge requires intervention *d'office* to apply the 'correct' legal rule from cases in which intervention to apply the correct legal rule is a discretion that permits, but does not require, intervention. The lacuna embraces conflicting conceptions of the nature of judicial office, referring at once to notions of the activist or passive judge and the selective application of equity.¹¹¹

Cahier 5 in which the *Justice de Paix* is instructed to keep secret decisions reached contrary to the majority of the court.

¹¹⁰ see R. Martin, "L'Article 6-1 de la Convention européenne de sauvegarde des droits de l'homme contre l'Article 12 du nouveau code de procédure civile" (1996, Recueil Dalloz Sirey, Chronique Jurisprudence) 20, at §1 writes, "...il semble que la Cour de cassation, de Chambre en Chambre, décide que l'art 12 contient une obligation quand elle veut casser, ou seulement une faculté quand elle ne veut pas casser." [... it would seem that overall the *Cour de cassation* has decided that Article 12 expresses an obligation when the court wishes to quash, and simply a discretion when the court does not want to quash]. This flexibility arising from inconsistent jurisprudence and a reluctance to definitively state whether the intervention is a duty or discretion suggests that two valid interpretations of Article 12 are co-extent in jurisprudence. Common lawyers will recognise in Martin's comments the use made by appellate courts of the distinction between question of fact (appeal not allowed) and question of law (appeal allowed). The distinction served as a justification for what essentially was a discretionary decision of the court, that does not, in the case of rejection, require the court address the merits of the case in its reasons for judgement.

¹¹¹ The distinction between duty and discretion is blurred in the case of Roland and Boyer's interlocutory *jura novit curia* to waive the necessity of proof a law exists.

The effects on *jura novit curia* are radically different when *jura novit curia* intervention is seen as a duty. If a duty, parties may challenge a decision on the grounds the judge below breached its duty by *not* intervening to apply the 'correct' but unpleaded rule the judge should be presumed to have "known". In the hands of a party, *jura novit curia* may be a plea¹¹² that the lower court did not know the law, a error the higher court should rectify by applying the correct but unpleaded rule. Where a higher court agrees, it not only affirms both the 'correct' legal rule but also acknowledges that the legal knowledge of the court below was erroneous, normatively and empirically. In effect, characterised as a duty, *jura novit curia* permits evasion of the general rule against the raising of new issues on appeal. The rule, meant to encourage parties to plead their full cases at first instance, is subverted when parties can invoke *jura novit curia*, as ground for appeal on the basis that the lower court did 'not know the law'.

In France, the 1979 *Conseil d'Etat NCPC* decision annulled Article 12 alinéa 3, (a provisions which authorised intervention) specifically because the alinéa had been famed as a discretion.¹¹³ The *Conseil* stated that alinéa 3 contravened the fundamental principle *égalité devant la justice* which guarantees the equal treatment of all citizens before the courts. Because alinéa 3 was framed as a discretion, a court was permitted to intervene or not, at its discretion, depending on its own sentiments rather than upon the basis of the law governing the case. Fox's claim the court is "free" to conduct its own research, i.e. intervene with its own points of law, does not reflect French law, notwithstanding contrary practice.

Fox's use of the word "free" may also suggest there are no important distinctions between types of cases or in which intervention *jura novit curia* is permitted. Without qualification, this 'freedom' leads to an incorrect or misleading account of the power. In French law, rules expressed by principle, positive law and tradition constrain the freedom to intervene *jura novit curia*. The French judge is generally 'free' to apply, where appropriate, a *moyen d'ordre public*, however, application of *le principe de la contradiction* which negates Damaška's *jura novit curia* is itself a *moyen d'ordre public*.

The Dalloz annotation of the *NCPC* reports many cases, particularly under Articles 4 and 5, describing situations in which French courts are not free to intervene and decide on the basis of their own 'research'.¹¹⁴ To the extent such rules derive from *la jurisprudence*, or are rules subject to the interpretations of individual judges, a weak doctrine of precedent in France means they are better understood as guidance rather than binding rules.¹¹⁵ In France, courts have a

¹¹² As was the case in *Van Schijndel*, *supra* note 12. see also the *Guerra* case, *infra* note 233.

¹¹³ see 1979 *Conseil d'Etat* decision, *supra* note 18, "en laissant au juge la faculté de relever d'office des moyens de pur droit et en le dispensant alors de respecter le caractère contradictoire de la procédure, le Gouvernement a apporté à ce principe des limites illégales." [in leaving the judge with a discretion to raise points of pure law on its own motion and in doing so dispense with adherence to the adversarial nature of procedure the Government has carried this principle to illegal limits]; see *NCPC*, text of alinéa 3.

¹¹⁴ See *NCPC*, Articles 4 and 5; and annotations thereto.

¹¹⁵ The weak but not *impuissant* doctrine of precedent in France, see *supra* note 24, is to a large degree the consequence of the values expressed by Article 5 of the *Code Civile*, see *infra* note 200. French courts may not 'legislate' insofar as the matter relates to civil law.

certain freedom to disregard precedents, which, formally, are not absolutely binding. This freedom, if precedents are law of some kind, itself suggests how *jura novit curia* may permit a court to pick and choose the law it knows, subject of course to a party challenging this knowledge on appeal.

2.5 A. Engelman, *A History of Continental Civil Procedure*

As noted earlier, *jura novit curia*, by some interpretations, is incompatible with *da mihi factum*.¹¹⁶ The incompatibility arises because, following Fox's definition, *jura novit curia* involves a court rejecting all party points of law and substituting its own. However, absolute *da mihi factum*, by which parties may plead no law whatsoever, means there is no law for the court to reject, and therefore, intervention *jura novit curia*, at least in Fox's sense of the adage, cannot arise.

The incompatibility may be resolved by non-absolute forms *da mihi factum*. Merminod's *jura novit curia*, for example, does not preclude party legal argument of law and foresees the substitution that arises with intervention *jura novit curia*. Another variant of *jura novit curia*, however, holds not that the parties are *excluded* from arguing law, but that it is not *necessary* for them to do so.

The consequence of this form of *jura novit curia* is significant because the possibility of intervention *jura novit curia* is made contingent on an election of the parties rather than the judge. Where parties elect not to plead law, complete responsibility for the law is placed with the court. While this might be seen as a form of (enforced) *jura novit curia*, in this case there are no party arguments of law to reject. Consequently, the court is entirely responsible for the identification of the applicable law and cannot be said to 'intervene'.

Engelman, in the oldest definition I've encountered, conceived of *jura novit curia* along these lines, writing that the party's "rule of law need not be expressly averred because '*jura novit curia*'".¹¹⁷ Engelman's *jura novit curia* expresses the presumption the 'court knows the law', which has the consequence of permitting parties to rely entirely on the court's legal knowledge or research. A further consequence of Engelman's definition is that it authorises the parties to elect to plead only the facts of their case, resulting in an *ad hoc* absolutist *da mihi factum* arising by party election. The result of Engelman's definition is that, where parties elect to plead no law, Fox's conception of *jura novit curia* as an expression of the judge's 'freedom' to conduct its own 'research' is negated because the court loses its freedom if obliged to identify the applicable rule without party assistance.

Engelman's definition of *jura novit curia* while perhaps expressing a principle valid in some jurisdictions is less relevant in contemporary France. Since the *Decrêt-loi* of 28 December 1998 it is obligatory for parties to explicitly state the

¹¹⁶ *supra*, section 2.2 at note 60

¹¹⁷ A. Engelman, et al, *A History of Continental Civil Procedure*, translated by R. Millar, (Little Brown: Boston, 1927)(Reprinted for Augustus M. Kelly, New York, 1969) at 547. "The rule of law [pleaded by a party] need not be expressly averred for "*jura novit curia*"..."

juridical bases of their claims and defences.¹¹⁸ As a consequence, it is no longer possible for parties to elect to plead no law. Even before these reforms, Engelman's principle was not applicable in actions before the *Cour de cassation* which necessarily involve legal argument, the court's jurisdiction being limited to issues of law.¹¹⁹ Likewise before 1998, as already mentioned, French practice was inconsistent with Engelman's principle in that parties most often would include legal argument in their submissions.¹²⁰

Regardless of its relevance in contemporary France, theoretically, Engelman's party-driven *jura novit curia* has interesting doctrinal and practical consequences. The key aspect of Engelman's phrasing of his principle – 'it is not necessary for the parties to aver their points of law', is that it hints at the reciprocal relationship between rights and obligations generally, how the exercise of a party right imposes an obligation on the court.¹²¹ A certain 'push and pull' arises between courts and parties in that both *jura novit curia* and *da mihi factum*, in addition to describing prerogatives or duties the courts, may also refer to rights or prerogatives plaintiffs and defendants can manipulate to strategic advantage.

It is difficult, perhaps, to imagine situations in which a party would elect to plead only fact unqualified by legal argument. The practice is common, even typical, in small debt claims brought by litigants in person acting without legal advice from counsel. In these circumstances, however, the absence of legal argument arises by way of imperative rather than by way of election. The practice might also arise in actions where a party, particularly a defendant, is unable or unwilling to expend considerable amounts of money to purchase legal representation.

A party may intentionally withhold legal argument where some strategic advantage is seen, for example, to reserve a particular legal argument for an anticipated appeal, or to evade an opponent's strongest defence. A party may withhold legal argument where there are potential multiple 'theories of the case' or causes of action, one of which, for example, is subject to a limitation period defence to which one party does not wish to draw the other's attention.¹²²

¹¹⁸ Roland and Boyer, *supra* note 3 at 363

¹¹⁹ The formal jurisdiction of the *Cour de cassation* is flexible to the extent that parties and the Court can characterise issues as matters of fact or matters of law. see Martin, *supra* note 23 at §8, for a Legal Realist-style account of how the *Cour de cassation* distinguishes between fact and law.

¹²⁰ Norman, *supra* note 20 at 392-3, notes the 'incontestable orthodox view', that the judge raises its own point of law *only* when applying a rule that has not been pleaded by a party. In these circumstance provisions of the *NCPC* relating to intervention *d'office* [i.e. *jura novit curia*] fall outside of provisions of the *NCPC* requiring respect for *le principe de la contradiction*. This argument could be taken further in that where parties plead no law, and the court therefore is not required to put to the parties the points of law that form the basis of its decision, Damaška's *jura novit curia*, which refers to points of law not argued by the parties, will arise.

¹²¹ for example, H. Kelsen, *An Introduction to the Problems of Legal Theory*, [1934], translated by S. Paulsen, (Oxford University Press: Oxford, 1992) at §§19ff

¹²² One difficulty discussing *jura novit curia* from a comparative perspective is that the hypothetical 'typical' case that frames scholarly discussion is different in France than at Common law. For Common lawyers educated in the 'case method', the typical case is not the continuous oral trial, one of Mann's characteristics of Common Law adjudication, but the appellate hearing,

In complex cases, in the interests of economy, counsel may advise that only one of several viable legal bases for a claim be put forward. Andrews notes that incomplete arguing of the possible legal bases of an action may be a form of self-censorship on the part of counsel, acting perhaps in the interests of client economy or in the spirit of 'case management' rules.¹²³ Fully developing and considering all possible legal argument in a case is expensive for both parties and the court and can be used strategically by a well-funded party against an opponent who is not.

The conceptual validity of Engelman's *jura novit curia* can be questioned, however, because, arguably, it is impossible for a party *not* to plead law. This argument holds that legal argument is implicit in all pleading, because claimants must ask the court to perform some legal act. In Common Law terms, this means invoking a legal remedy. French parties may ask for a *divorce*, *dommages et intérêt*, or *résolution* and each of these categories of legal right are comprised of elements that must be proven by the claimant or defendant. These 'remedies', as it were, however skeletal, nonetheless constitute the parties' legal argument.

French terminology speaks of the *cause de la demande* and *objet du litige* which arise, or at least are alleged, in every action. The *cause de la demande*, *le fondement du litige* or the more recent, *objet du litige* however may give rise to different 'theories of the case', to use the American phrase.¹²⁴ It is in this intermediate realm of litigation where the merits are reached, between facts and remedy on one hand, and the debated and declared solution, on the other, that French procedural scholars debate in technical language the extent of the power of the courts to substitute its own point of law for those put forward by the parties.

Different conceptions of the *cause de la demande* in France have turned on the degree of to which parties may engage in juridical analysis of their claim. Motulsky, an advocate of a strong *jura novit curia* and an absolutist, systemic *da mihi factum*, conceived of the *cause de la demande* as *complexe des faits*, devoid of all juridical analysis.¹²⁵ In one sense, Motulsky's *da mihi factum* and his fact-based conception of *cause* are different ways of stating the same thing: an absolute prohibition on party argument of law. Both conceptions fail,

more specifically the appellate judgement which contains extensive reference to the parties arguments of law. In France, by contrast, the typical case seems to be the case of first instance, where courts are more likely to encounter parties acting without representation and in which the issues and consequences have less collective impact than would a fully argued appellate case. Hence the emphasis on issues relating to the qualification of the parties' facts by the judge in French analysis, a largely first instance phenomena, as opposed to the appellate emphasis of Common Law scholars and the importance of legal argument.

¹²³ N. Andrews, "The Passive Court and Legal Argument", (1988), 7 Civil Justice Quarterly, 125

¹²⁴ R. Martin, "Le juge devant la prétention", (1987) Recueil Dalloz Sirey, 6^e Cahier, Chronique VIII at §6 describes a case from the Cour de cassation [14 mai 1985, com., Bull. civ IV, n° 147, p126.] in which *la Cour* refused to quash a court of appeal decision that had granted *résolution* of a sale under Article 1184 of the *Code civil* notwithstanding the party having claimed *résolution* on the basis of Article 1641.

¹²⁵ see Jolowicz, *supra* note 12 at 82 canvassing three conceptions of *cause de la demande*.

however, the moment a party characterises the facts of a dispute in terms of a legal remedy. Motulsky's definitions, or anyone else's, are not innocent descriptions of natural phenomena, but rather are prescriptive instrumentalities, serving ideological ideals.

The traditional debate in France has contrasted a judicial power that is a sovereign *toute puissance* with a power that is a *puissance nulle*.¹²⁶ Some elements of the ideology of *toute puissance*, however, do not sit well together. If pleading one's *cause* by definition is to state only fact, the imperative voice of *da mihi factum* – 'give me the facts and I'll give you the law' – is curiously redundant, for no instruction need be given to do that which must be done as a matter of course. Where party argument of law is permitted, as it always has been in France, Engelman's *jura novit curia* as party election while inconsistent with Motulsky's *da mihi factum* that precludes party argument of law altogether, is also impossible with Motulsky's strict fact-based conception of the *cause*. Once *cause de la demande* is defined to include some degree of juridical analysis, however minimal, the party takes himself out of Engelman's *jura novit curia* which supposes a party's ability to plead no law whatsoever.

In any case, assuming it is possible for a party to elect to plead no law, following Engelman's *jura novit curia*, the court must become actively involved in considering, i.e. researching, the legal arguments available for and against one or both parties. This duty, necessitated by the requirement that the court give reasons for its judgement,¹²⁷ forces the court to assume functions otherwise performed by advocates. Forced to evaluate the strongest and weakest aspects of each party's legal argument without assistance, the knowledge base of the court is attenuated and subject to less intense scrutiny. Where juridical analysis of the *cause* is an exclusive judicial prerogative a potential for bias arises, because *nemo judex in sua causa*: no one must be judge of their own cause.¹²⁸

Objections raised by intervention *jura novit curia* therefore include not only the denial of notice and the right to be heard on the dispositive point of law that are the consequence of Damaška's absolutist *jura novit curia*. Objections to *jura novit curia* also include the apprehension of judicial bias that may be shown when the court introduces a point of law that permits one party to be successful on the basis of a claim that, without the assistance of the court, would have

¹²⁶ see O. Cayla, *Office du juge: part de souveraineté ou puissance nulle?* (Librairie Générale de Droit et de Jurisprudence: Paris, 2001) "Avant-propos" 1 at 2, "la tradition judiciaire de la Monarchie française, revendique alors sa «part de souveraineté» de l'autre côté une vision hiérarchisée, qui tend à réduire la fonction du juge à celle d'exécutant, avec l'idéal ou le risque d'en faire, selon l'expression fameuse de Montesquieu, une puissance «nulle». [the judicial tradition of the French monarchy, asserts its "share of sovereign power", while on the other hand, is a hierarchic conception that reduces the judicial function to that of an executant, with the aim – or risk – according to the well-know phrase of Montesquieu – of making the judicial power a nullity.]

¹²⁷ *NCPC*, Articles 454,455. Steiner *supra* note 9 at 159

¹²⁸ Roland and Boyer, *supra* note 3 at 502, "*nemo judex in re sua*" "Nul n'est juge en sa propre cause" [No one may judge their own cause] see *The Institutes of Gaius*, translated by W. Gordon & O. Robinson, (Duckworth:London, 1988) at 443, 452 describing a case in which a judge "makes the dispute his own" (452) and associating this with decisions in which a party is granted more than asked for, that is, *ultra petita*, see also *supra* note 26.

inadequate.¹²⁹ Bias, or its apprehension, may arise even where the court, respecting *le principe de la contradiction* considers the arguments of the parties on its own point law because if *jura novit curia*, meaningful debate is not possible.¹³⁰

Writers sympathetic to an expansive view of the power of the judge to intervene with its own points of law argue that the power is necessary because otherwise a court would be required to reach a decision it considered 'incorrect' merely because a party had failed to put that point in issue.¹³¹ This is correct, but signals the inadequacy of party argument as the justification for intervention, rather than the existence of a "better" solution.¹³² Denning spent an entire summer researching one case, a level of judicial scrutiny that is difficult to justify with respect to single case and systemically impossible to sustain. Determining the appropriate level of scrutiny in any case is particularly difficult, at least doctrinally, in France because *le principe d'égalité* envisages all citizens will receive equal treatment before the courts.

Compliance with *le principe de la contradiction* may also breaks down inasmuch as the *principe* presumes informed debate amongst parties and the court. The absence of party argument of law becomes a method to evade the notice function of pleadings which forms a part of *le principe de la contradiction* and *les droits de la défense*. In all, the action proceeds with less than full and timely disclosure because parties must interpret each others' facts in order to discern the implicit legal arguments that arise therefrom.

This indicates how absolutist *da mihi factum* truncates debate, creating a pantomime in which arguments of fact, laden with implicit juridical relevance are permitted while explicit reference to law is prohibited. This vision of process is contrary to one of the central purposes of the *NCPC*, which was to forestall

¹²⁹ Martin, *supra* note 110 at 20. "En effet le moyen relevé d'office par le juge contribuera au succès de l'une des parties au détriment de l'autre..." [In effect the point of law raised by the court on its own motion contributed to the success of one party at the expense of the other.]

¹³⁰ see Martin, *supra* note 110 at §2, "Sa proposition ne peut être innocente à l'égard du résultat qui dépend de lui. Le jeu est alors biaisé, comme arbitre d'un match de football poussait le ballon dans un but." [the judge's point of law cannot be seen as innocent of the result than depends on him. The game is thus biased, as if the referee of a soccer match pushed the ball into the goal himself.] also see Damaška, *supra* note 11 at 114. There are very few reports of cases in which a court did anything but base its decision on the point of law raised of its own motion. My research to date in England, France and the United States has uncovered one case, in the United States, cited in Milani and Smith *supra*, note 108 at n. 291, *Paterson v. McLean Credit Union* 485 U.S. 617 (1988) and 491 U.S. at 171.

¹³¹ Jolowicz, *supra* note 12 at 81-82.

¹³² This point has more meaning at Common Law where it is expected a court will give reasons for rejecting the law argued by the parties as opposed to reasons only for the points of law on which the decision was reached. While the decree of 28 December 1998 requires the French judge to state the parties points of law in its judgement, (s. 753) there is no tradition of explaining why the parties points of law have been rejected. Some Common Law books on judgement writing, stress the need to address the arguments of the unsuccessful party in particular because it is she that must be convinced justice has been done. see R. Komar, *Reasons For Judgement*, (Butterworths: Toronto, 1980) at 9.

dilatory and evasive strategies by parties.¹³³ The absence of party legal argument also injects an unnecessary element of uncertainty into process because the *saine solution* requires a court to invite party debate on all points of law that have not been raised by the parties. Engleman's *jura novit curia* and the *saine solution* pull in opposite directions. The application of the *saine solution* in cases where parties' plead no law would require the court to coax, cajole or order parties to clarify their positions with respect to the applicable law, if only to facilitate the adequate formulation of their opponent's defence. Considering these problems, a healthy and co-operative conception of litigation would require each party to state the factual and legal bases of their case clearly, concisely and completely, and in this model there is little room for Engleman's *jura novit curia*.

The situation may be different where parties jointly agree to plead no law. In France this gives rise to situations in which *jura novit curia* – as 'the court knows the law' – does not apply. Article 12 alinéa (v) of the *NCPC* permits the parties to appoint the judge as an *amiable compositeur* or "honest broker". The procedure is a form of judicial arbitration and while the use of alinéa (v) does not appear to be popular in France,¹³⁴ it is nonetheless one of clear legislative authorisation permitting the judge to decide in equity. The procedure suggests a second dimension of *jura novit curia* which refers, not to 'knowing the law', but to 'recognising' parties' 'rights', that is, *les droits*. Significantly, the procedure of alinéa (v) is an election of the parties acting jointly to confer a particular jurisdiction upon the court which the court does not have the power to evade.

It is wrong to conclude, as a matter of general theory, that there are no circumstances in which a party may act on the basis of either *da mihi factum* or *jura novit curia* to his advantage. A party who acts *da mihi factum*, pleading no law at first instance acts pursuant to Engelman's *jura novit curia*. On appeal, however, the same party may elect to positively plead *jura novit curia*, pointing out the errors of law committed by the judge of first instance and going so far perhaps as suggesting the legal arguments the appellate court should adopt. In France, unlike at Common Law, a party generally has greater leeway to raise new points of law on appeal and may ask the court to recognise a theory *d'office*, that is, to intervene *jura novit curia*.¹³⁵

Jura novit curia as a party plea on appeal or in cassation is anomalous because an important rationale of the *jura novit curia*-related provisions of the *NCPC* was to promote efficiency in the administration of legal process by reducing the number of appeals.¹³⁶ This value is not promoted by broadening the scope of already generous rights of appeal in France by permitting parties to raise issues

¹³³ see G. Cornu, "L'Avènement du Nouveau Code de Procédure Civile: La codification", in *Vingt Ans Après supra* note 23, 19 at 21.

¹³⁴ Eudier, *supra* note 15 at 41 Bell, *French Legal Cultures*, *supra* note 22 at 91-92. writes that "French business people seem more willing to resort to commercial courts than businessmen in common law countries."

¹³⁵ generally see J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, (Oxford University Press:Oxford, 1998) at 103ff.

¹³⁶ Conseil d'Etat decision 1979, *supra* note 18.

that should have been raised at first instance.¹³⁷ In France, the *seriatim* process of first instance segues, it seems, into *seriatim* recourse to higher courts, weakening the force that the invocation *jura novit curia* – the court knows the law – is meant to affirm.

Party election is an important aspect of *jura novit curia* because any prerogative or legal right of the parties impute either obligations on the judge or establish constraints which limit the judge's freedom. Accounts of the *jura novit curia* provisions of the *NCPC* suggest the adage imposes an duty on the court to decide 'correctly'.¹³⁸ This implies that superior courts of review may consider with relative freedom alternative legal solutions not argued before lower courts where an appellant or respondent alleges the failure of the lower court to act on this duty, that is, to intervene with its own point of law.

The parties' right to compel the action of the court in these situations means that it is wrong to speak of *jura novit curia* systemically as an unlimited judicial prerogative. The theoretical significance of Engelman's definition is to explicitly conceive of *jura novit curia* as a party right. The responsibility for identifying the applicable law that some attribute as the systemic rule of *jura novit curia* is, by Engelman's *jura novit curia* apportioned to the court through an election of the parties. On this basis, the precise meaning of the adage as it speaks to the roles of parties and court in the identification of the governing law, is determined by the circumstances of each case, a point on which other definitions of the adage are silent.

Finally, the effect of legislation on Engelman's principle of *jura novit curia* should be emphasised. If Engelman is correct as to the meaning of *jura novit curia* it means that his *jura novit curia* ceases to be lawful when legislation, such as the decree of 28 December 1998, precludes the possibility of a party relying entirely on the court's knowledge of the law by withholding explicit legal argument. Just as Damaška's *jura novit curia* is illegal in France, Engelman's *jura novit curia*, if it has not disappeared completely from practice in France, is less far significant today than before 1998.

2.6 Black's Law Dictionary

Jura novit curia qua adage is not found in the judgements of Common Law courts, although the adage is found in scholarly writing that compares Civilian and Common Law procedural traditions.¹³⁹ Not surprisingly definitions of *jura*

¹³⁷ Jolowicz, 2003, *supra* note 51 at note 61 writes that in the 20 years since the enactment of the *NCPC* appeals have increased by over 200%.

¹³⁸ *NCPC* Article 12 alinéa: 1. Le juge tranche le litige conformément aux règles de droit qui lui sont applicables. [1. The judge decides the litigation on the basis of the legal rules that are applicable.]

¹³⁹ see J.M.J. Chorus, "Civilian Elements in European Civil Procedure" in *The Civilian Tradition and Scots Law*, D.L. Carey Miller, R. Zimmermann, (eds.), (Dunker & Humbolt: Berlin, 1997) 295 at 301. also see Bell, "Comparing Precedent", *supra* note 92, Jolowicz, *supra* note 12, Mann *supra* note 8. The Denning cases referred to above, *supra* note 99, 100, indicate that, while the adage itself is not used, cases decided according to the *jura novit curia* of Fox and Damaška's are known, confirmed by Paterson, *supra* note 97. In the United States none of the three leading articles concerning judicial intervention *jura novit curia* refers to the adage but all cite extensive

novit curia and its twin *curia novit legem* are rare in Common Law legal dictionaries. One definition, however, appears in the 6th edition of the American *Black's Law Dictionary*. The definition is of some interest because alone amongst those we consider, it associates *jura novit curia* with the distinction between law and equity.

Significantly, Black's translation suggests how the distinction between law and equity may issue from the original Latin of the adage, and how *jura novit curia*, by unstrained alternative interpretations, may refer to decisions in either law or equity. This Janus-like quality of the adage demonstrates the inherent semantic possibilities of the adage and is essential to understanding Cornu's account of *jura novit curia* discussed in section 4. Understanding how *jura novit curia* embraces both law and equity touches on the interplay between the *ius* and *legem* of *jura novit curia* and *curia novit legem* and their French counterparts law, *la loi* and various forms of *le droit*.

Black's translation of *jura novit curia* reads in full, "the court knows the law; the court recognises rights."¹⁴⁰ The first section confirms the obvious, that 'the court knows the law' is an acceptable translation, for with minor variations this is the phrase we have derived from the definitions of Merminod, Roland and Boyer and Fox. Little more need be said about this translation, for it is the second element of Black's definition, "the court recognises rights" that is of primary interest for the way it draws our attention to the very different interpretations of two key words of the adage *jura* and *novit*.

Jura, the plural form of *jus*, like the word *droit* can be translated without strain either as "laws" or as "rights".¹⁴¹ Similarly, *novit* can be translated as 'knows' or 'recognises', although, in English, the use of 'know' in the sense of 'recognise' is distinctly antiquarian. Unlike this sense of the English 'know', the French '*connaître*' as a reference to 'competence to decide' is still in use, for example, in the *NCPC*. The result is that the French *la cour connaît les droits*, following the corresponding translations, can be translated as both 'the court knows the law' and as 'the court recognises rights'.

The problem that arises for the Common Law reader is the difficulty of understanding how a single French phrase *la cour connaît le droit* may give rise to English translations that turn on the fundamental distinction is between law and equity. The key difficulty is that while *le droit* can reasonably be translated both as '*law*' and '*right*' neither English translation adequately reflects the richness of the French conception of *le droit*, let alone any connection *le droit* may have with equity.

case law involving decisions decided *jura novit curia*, that is, *sua sponte*. See A.D. Vestal, "Sua Sponte Consideration in Appellate Review" (1958-59) 27 Fordham L.R. 477; A. Milani & M. Smith, *supra* note 108; B. Miller, *supra* note 93.

¹⁴⁰ Black's Law Dictionary, 6th ed. (West Publishing: St Paul, 1991) at 852.

¹⁴¹ Cornu, *supra* note 5 at 509 defines *jus* as encompassing *le droit subjectif* and well as *le Droit objectif* with a capital "D". It is the latter which is associated with, but not exclusively referring to, *la loi*. The co-relation between *jus* and *le droit*, however was not without important ambiguities. Roland & Boyer, however, write that "Le droit est l'art du bon et de l'équitable" (373) [Right is the art of the fair and equitable]

The problem *le droit* poses for *la mentalité* «Common law» can be illustrated by looking at some consequences of Black's association of *jura novit curia* with both law and equity. The association should be apparent to all Common Law scholars because the translation "the court recognises rights" ought to spontaneously evoke the venerable maxim of Common Law Equity, "no wrong without a remedy".¹⁴² This latter maxim is generally taken to say that the absence of an applicable legal rule is not necessarily fatal to the success of a meritorious claim. A Common Law judge may, in a proper case, provide an equitable remedy to right a factual wrong, creating, as it were a 'rule of law' or legal 'right' and remedy for a plaintiff. In essence, this translation characterises *jura novit curia* as providing for situations in France that fall within the doctrine of *la silence de la loi*, but that at Common Law could be described as the application of equity.¹⁴³

This comparison between the French doctrine of *la silence de la loi* and Common Law equity is inexact, even misleading. Nonetheless, looking more closely at the imperfections of the comparison casts some light on concepts of French law that are most baffling to those with the *la mentalité* «Common law». The comparison permits some appreciation of common underlying issues that are obscured by divergent French and English concepts and terminology. The point to seise is how conventions of French legal discourse establish relatively formal accounts of the judicial task and the relation of the judge to law so as to avoid the use of terminology associating the judicial task with acts the French judge may not officially perform.

Two areas of avoidance are most relevant. The first is that French procedural terminology avoids the term 'equity' in systemic descriptions of the judicial task. Formally, French judges appear to have little scope to decide in equity: they must apply the law. Yet in practice, or by the use of other terminology, equity pervades French adjudication.¹⁴⁴ Secondly, French judges are formally

¹⁴² Bennion, *supra* note 63; Snell's Principles of Equity 29th (London: Sweet & Maxwell, 1990) at 28, "Equity will not suffer a wrong to be without a remedy'....underlies the whole jurisdiction of equity". cited in *Westdeutsche Landesbank v. Islington Council* [1996] A.C. (H.L.) 669 at 695 (Lord Goff). The translation of *jura novit curia* as 'the court recognises rights' suggests the difficulty of claims made by comparativists, such as P. Legrand, "How to compare now" (1996) 16 Legal Studies 232 at 237, that "English Common law...does not know the notion of 'right' (in the sense of individual prerogatives that can be asserted in a court of law)." It may be more accurate to state that at Common Law distinctions between 'right' and 'law' perform different functions in legal process including functions relating to permissible ways of speaking about legal process. Martin *infra* note 185 at §31 and Merminod, *supra* note 3 each equate 'right' and 'law' implying a similar absence of the distinction in France. The problem may be that which is clearly absent from Common Law and problematic for those educated in its tradition: the distinction between *le droit subjectif* and *Droit Objectif*

¹⁴³ Cornu, *supra* note 5 at 835 defines *la silence de la loi* as the "absence de règle écrite, de disposition expresse dans la loi" [an absence of a written rule or express provision in the law]

¹⁴⁴ David, *supra* note 53. Equity plays, "a role in law that is not apparent if one considers only the legislative texts.". Some insight into the operation of equity in France is provided by P. Legrand, "Judicial Revision of Contracts in French Law: A Case Study", (1988) 62 Tulane Law Review, 963 and P. Legrand, "The Case for Judicial Revision of Contracts in French Law (And Beyond)", (1989), 34 McGill Law Journal, 909.

precluded from interpreting statutes, yet statutory interpretation in practice is ubiquitous in France, as it must be under any system exalting the legislative Code. French scholars certainly write about equity and interpretation, but unlike Common Law, neither subject is considered to be a formal 'head' of law giving rise to specialist texts from which practitioners can glean legal argument to be subsequently argued before a court.

A hint of these issues is seen in how the association of *jura novit curia* with equity¹⁴⁵ severs the relationship between the adage *nul n'est censé ignorer la loi* and *jura novit curia* described by Roland and Boyer. Black's translation, 'the court recognises rights' (*la cour connaît les droits*) refutes the presumption 'everyone knows the law' because in cases of *silence de la loi* there is no law for the citizen to know. We say that 'ignorance of the law is no defence' and on this basis, in cases of *silence de la loi*, a defendant might reasonably plead that, the law being silent, there is no case to answer. *Prima facie*, a defendant in these circumstances would seem to possess a right to succeed.

The translation the 'court recognises rights' and its association with the maxim 'no wrong without a remedy,' however, invalidates a defence based on the absence of law by legitimising a decision based on a judge-created rule imposed *ex post facto* to remedy a wrong, notwithstanding no law was breached. The factual wrong alleged in this application of *jura novit curia* is found by a court nonetheless as sufficiently egregious to justify 'recognising' protection from the wrong as a 'right' leading to the provision of a remedy in equity. At Common Law it is less problematic to consider this judge-made rule 'law' but it is not *loi* in the French sense of a written legislative text.

The second strand of the Black's definition therefore challenges the logic of Roland and Boyer's claim that *jura novit curia* is simply a consequence of *nul n'est censé ignorer la loi* because distinguishing between *droit* and *loi* accentuates the asymmetry between the two adages. As *nul n'est censé* refers specifically to *loi* it follows that it would be more consistent for it to be associated not with *jura novit curia* but with *curia novit legem* which refers to the more narrow *legem* or *loi*. However, the doctrine of *le silence de la loi* tells us that French judges are not restricted to deciding according to *la loi* (*curia novit legem*) but may also decide according to *le droit* in cases either of *le silence de la loi*, or where *le droit* derives from sources other than legislative texts. (There is, however, no doctrine of *le silence du droit*.)

Alternatively, if we accept the use of *jura novit curia*, the adage from which Roland and Boyer say it issues would be better expressed as *nul n'est censé ignorer le droit*. A problem with this interpretation is that this form of the adage is unknown in Civil Law, unlike the pair *jura novit curia* and *curia novit legem*. *Le*

¹⁴⁵ It is well to keep in mind that equity has two senses at common law, only one of which is comparable to France. The type of equity found in France, England and the United States refers to the underlying fairness of a decision, the just result, even where this requires that a court ignore the applicable law or chose from amongst multiple legal solutions. However, unique to Common Law is Equity with a capital E, relating to the former system of Courts of Equity known in the United States and England. Courts of Equity were and continue to be governed by rules and principles and while the Vice-chancellor had (and still has) broad discretionary powers these were not completely unfettered. In the United States, the Delaware Court of Chancery is one of the few remaining self-standing Courts of Equity.

droit furthermore is a far more encompassing and elusive concept than *la loi*. *Le droit* is distinguished from *le Droit* and also gives rise to subordinate concepts such as *le Droit objectif* and *le droit subjectif*.¹⁴⁶ Faced with the expansive *le droit*, the hypothetical *nul n'est censé ignorer le droit*, would be better read as a plea (or warning) to respect the rights of others. Such an interpretation may set out sound moral guidance ('do unto others as thy would be done') but in a court of law seems to provide for unlimited *kadijustiz*, associated with equity at Common Law, by failing to establish the clear and certain guidance that would permit citizens to determine the behaviour expected of them.

The reference in Black's definition to equity also poses difficulty for Fox's claim that *jura novit curia* refers only to the court's power of research. The research-intervention power described by Fox implies that a court may research the law to overcome omissions or deficiencies in the parties' legal arguments by identifying and applying the 'correct' legal rule. The use of *jura novit curia* in its sense as 'the court recognises rights' takes the judicial research-intervention power beyond the bounds of law, effectively stating that the court is not necessarily bound by law at all.¹⁴⁷ In this case, the protection *nul n'est censé ignorer la loi* offers to citizens is confirmed as a perverse fiction, for a citizen may have a sanction imposed on the basis of a legal rule fashioned by the judge that was unknowable at the time the events giving rise to the litigation arose.

Paradoxically, the problem of *la silence de la loi* and decisions in equity, exists concurrently with the problem of there being 'too much law'.¹⁴⁸ The role of interpretation in Common Law legal analysis would suggest, to those of us with this *mentalité*, that *la silence de la loi* ought to be more a theoretical problem because instances of *la silence de la loi* ought to be rare in a legal system with so many Codes.¹⁴⁹ It would seem to follow that cases involving *jura novit curia*, as a form of *silence*-related equity, would be equally rare. By this assessment, *jura novit curia* as the 'recognition' of rights in equity would arise only in exceptional or anomalous cases.

This suggests the possibility that *jura novit curia*, often used to the same effect as *da mihi factum*, also shares what Roland and Boyer describe as the original meaning of *da mihi factum*, namely an adage that provides only for situations where there is no applicable law to plead.¹⁵⁰ Roland and Boyer describe this, in its Roman origins, as an *action in factum*, a fact-based exceptional action raising

¹⁴⁶ P. Legrand, *supra* note 143 at 237

¹⁴⁷ A sufficiently clever and motivated judge may also spend the summer researching the law in a particular case, as Denning did in *Rahimtoola*, *supra* note 97, to develop a train of legal argument that serves the same purpose as equity.

¹⁴⁸ see Allott, *supra* note 67

¹⁴⁹ Cases of *silence de la loi* in France do not appear to be rare. An electronic search of the jurisprudence of the *Cour de cassation* conducted on 17 June 2005 through the official government website, <http://www.Legifrance.gouv.fr>, returns 90 cases in which the phrase 'silence de la loi' occurs.' see Cour de Cassation, Chambre commerciale, 2004-12-14, 01-10780; Publié au bulletin; Chambre civile 3, 2004-04-07, 02-16283, Publié au bulletin; Chambre sociale, 2003-06-04, 02-60630, Inédit titré.

¹⁵⁰ Roland and Boyer, *supra* note 3 at 135.

a claim not envisaged by Roman *droit civil*. The action *in factum* spoke to the *silence de la loi* (*legem*) that arose in the absence of a relevant *formula* and was a device used to do equity.

As logical as this may be, there does not seem to be scholarly support for an interpretation that restricts *jura novit curia* to cases of *la silence de la loi*. The equitable dimensions of *jura novit curia* raised by Black's definition are not explicit nor easily discernible in the other five definitions considered so far. In France, however, this absence is consistent with the low-profile of equity and the orthodox assessment that descriptively and prescriptively, the judicial task concerns the application of the law. These equitable dimensions of *jura novit curia* while not explicit in Gerard Cornu's definition, that follows, as they are in Black's, nonetheless, from the perspective of *la mentalité* «Common law» seem to echo through the concept of *le droit* and its manifestations that are otherwise difficult to understand.

As for Common Law equity, if *jura novit curia* means the 'court recognises rights', the adage is not only a presumption about judicial legal expertise, or about a power that may permit a court to intervene on its own motion to reject the parties' legal arguments and decide according to its own understanding of the law. The 'court recognises rights' more clearly concerns jurisdiction, what a court does, whether considered descriptively or prescriptively. The two strands of Black's definition suggest alternatives available to Common Law courts – and parties: an action and a decision in law or in equity. As the distinction is based on how the case is framed when initiated, and, law and equity for most purposes being merged, the choice between the alternatives is the election of the parties.

3. Gérard Cornu, *Vocabulaire Juridique*

The definition of *jura novit curia* that appears in Gérard Cornu's *Vocabulaire juridique* is significant in contemporary France. This is, in part, because Cornu was the most prominent drafter of the *NCPC* – “*Le code Cornu*”¹⁵¹, with which *jura novit curia* is associated. *Vocabulaire juridique* is also an essential legal text for law students and practitioners. More substantively, Cornu's definition, despite its relative brevity is by far the most complex attempt to encapsulate the essence of *jura novit curia* in a few pithy words, and justifiably warrants extended consideration.

Cornu translates *jura novit curia* as follows:¹⁵²

Le juge est censé connaître le droit (et l'appliquer d'office) V. *NCPC art 12 & 16*.

This is probably clear and uncontroversial for most French lawyers today.¹⁵³ From the perspective of *la mentalité* «Common law», a close reading of the

¹⁵¹ J. Foyer, “Synthèse des travaux”, in *Vingt ans après*, *supra* note 23, 321 at 323

¹⁵² A workable translation is, “The judge is supposed to know the law (and apply it as a matter of course). see Articles 12 and 16 of the *NCPC*” This translation makes a number of interpretive choices in its selection of words which, as the discussion indicates, raise issues relating to the nature of judicial power in France taken to be expressed by the adage.

words of the adage and Cornu's translation, poses a number of very basic questions, the answers to which will permit the reader to better understand the diverse threads of French legal culture that converge in *jura novit curia* and Cornu's translation.

Cornu's definition is divisible into eight semantic elements. Each element raises issues relating to the meaning, justification, consequences or effects of *jura novit curia* as these relate to their doctrinal or institutional referents and their functions in legal culture. Just as the words *jura novit curia* resist a single and certain meaning, so each element of Cornu's definition is ambiguous or vague, in ways that connect the adage to issues involving the delineation of the judicial power, the court-party relationship and the meaning and functions of different types of *droit* the court is supposed to know.

3.1 *Le juge*

Cornu translates the reference in the adage to the collective *curia*¹⁵⁴ or court, as *le juge*, an apparent reference to the individual judge. This is not really a mis-translation, for in French usage *le juge* commonly is used to refer generically to judicial bodies with decision-making power. This use in one sense is preferred because *le juge* can refer to bodies with different names and status, *le tribunal*, *la cour*, *le conseil*, so translating *curia* as *la cour* could be misleading where judicial bodies not strictly "*cours*" exercise any power associated with the adage.¹⁵⁵

The use of *le juge* for "*curia*" rather than '*la cour*' is therefore a statement about the jurisdictional purview of *jura novit curia*. Cornu defines *la cour* to refer to 'courts' at the higher levels of the judicial hierarchy, for example, *la cour de*

¹⁵³ However, this may be less because of an general agreement than because, as Martin has claimed, "most French lawyers are not aware of the problem" (Martin, *supra* note 23 at §14) that arises with respect to the *jura novit curia* provisions of the *NCPC*. It is worth noting nonetheless, that in 1977 French lawyers demonstrated in the streets of Paris to protest the sudden emergence in French practice of decisions taken pursuant to Damaška's *jura novit curia*. Mann, *supra* note 8 at 369 notes that "[m]ost English lawyers are unaware of the specific effects of this principle", namely, the principle of judicial unpreparedness, which expresses the absence of *curia novit legem/jura novit curia*.

¹⁵⁴ Max Radin, *Handbook of Anglo-American Legal History* (West's: St Paul's, 1936) at 46-48, wrote, "The word *curia* in classical Latin is used in a number of ways. Apparently, it meant at first a subdivision of the people... in the early Middle Ages, '*curia*' was a common word to describe both the groups of men who generally were found in attendance on pope, emperor, king or prince, and the groups which were summoned by him to give him counsel. The *curia* in the latter sense, however, was not really a casual group of persons, summoned spasmodically to advise the king or any other person. It had come to be in Feudal Europe the ordinary Latin word for the general meeting of the lord's vassals, which itself grew out of the Germanic *mot* or *thing*.... The *Curia* of the king was in theory a larger and more important example of the same kind of assemblage."

¹⁵⁵ Cornu, *supra* note 5 at 500. Cornu's use of the word *juge*, also invites clarification of the position of officials at the lower end of the judicial hierarchy. see O. Pfersmann, "A Quoi bon un «pouvoir judiciaire»?", in O. Cayla, *Office du juge: part de souveraineté ou puissance nulle?* (Librairie Générale de Droit et de Jurisprudence: Paris, 2001) 181 at 191 n.18 on whether or not the French *procureur* [prosecutor] is a '*juge*' see also J-H Robert, "De la nécessité d'un ministère public", in Cayla, *Ibid* 227 in which the relationship of the *procureur* and the *juge d'instruction* is discussed.

cassation or *une cour d'appel*.¹⁵⁶ Translating *curia* as *la cour* would have suggested the powers and presumptions of *jura novit curia* are exercisable only by higher courts.

Contrary to Cornu, Roland and Boyer translate *curia* as "*la Cour*"¹⁵⁷ implying, perhaps, the presumptions, consequences and effects associated with the adage accrue only to higher courts. However, in their definition, Roland and Boyer also refer to *le juge*, suggesting the imprecision of the *juge-cour* distinction and a lack of attention to the jurisdictional issue. Merminod, who claims the adage applies to all jurisdictions refers in his definition to *la cour* and *le tribunal*, which is generally used to refer to courts of inferior jurisdiction. *Le tribunal*, *le juge* and *la cour*, it would seem, are not always used with great precision, an elision that fosters ambiguity with respect to the jurisdictional reach of *jura novit curia*.

Historically, the *juge-cour* elision is significant because it speaks to the way in which the meaning of an adage may change over time. The 17th Century *savant* Bernard Automne claimed that the *cours souveraines* – the *parlements* – were not bound by *judex secundum*, the adage which expresses a limitation on the power of a *judex* to decide on the basis of its own points of law.¹⁵⁸ Automne claimed that only judges of lower courts, were obliged to decide *secundum allegata et probata*. Automne wrote prior to the Revolution, but it Automne's claim was accurate, and if all 'courts' in France today may exercise *jura novit curia* powers, it follows that the contemporary French *juge* has come to know powers denied lower court judges in the *Ancien Régime*.¹⁵⁹ Because 19th Century France is considered to have been a period of judicial passivity,¹⁶⁰ inimicable to the exercise of *jura novit curia*-like powers, the origin of the adage acquires of more modern provenance. This suggests that the purview of *jura novit curia* is capable of adapting itself to reflect prevailing perceptions about the nature or extent of the judicial power.

The use of the *le juge* to refer to collegial institutions such as *la cour*, *le tribunal* or *le conseil* is co-extent with the use of *le juge* in other contexts to refer to *le*

¹⁵⁶ Cornu, *supra* note 5 at 240 "Nom donné à certaines juridictions en raison du degré élevé qu'elles occupent dans la hiérarchie judiciaire (Cour de cassation, cour d'appel)" [the name given to certain jurisdictions because of the higher degree they occupy in the judicial hierarchy.]

¹⁵⁷ Roland and Boyer, *supra* note 3 at 363

¹⁵⁸ B. Automne, *supra* note 27 at vol. 1, 34. M. Automne was Jurisconsulte & Advocate au Parlement de Bordeaux. He supports his argument citing Guy Pape, a celebrated 15th Century French jurist, and *conseiller* of the Parlement du Dauphiné.

¹⁵⁹ An accurate account may not be possible and at any rate, a nuanced historical account precludes a stark contrast between before and after the Revolution. J-L Halpérin, "La souveraineté de la Cour de cassation: une idée longtemps contestée," in Cayla, *supra* note 126, 151 at 153ff, describes the ebb and flow of conceptions of the powers of the *Cour de cassation* as a law-declaring institution and in relation to appellate and first instance judges. At 154 Halpérin writes of the revival of the word 'sovereignty' to describe the powers of judges of first instance and appeal under Napoléon. At 161, Halpérin quotes Ernest Faye, writing in 1903, that the lack of originating jurisdiction meant the *Cour de cassation* did not possess the «pouvoir souverain» [sovereign power] of a lower court judge with jurisdiction over fact.

¹⁶⁰ E. Glasson, *Les Sources de La Procédure Civile Française*, (Paris: Larose et Forcel, 1882) 82

juge unique, a single judge deciding alone. *Le juge unique* is a departure from the tradition of the collegial *curia* still maintained in France. Collegiality refers to the belief that legal decisions will be fairer and more likely “correct” when a decision is made by a panel of judges rather than a *juge unique* deciding alone.¹⁶¹ Collegiality presupposes a belief the *juge unique* is more apt to act on erroneous legal knowledge or personal bias than would a panel of judges.

The value of collegiality in French law is expressed by the adage *juge unique, juge inique*, that tells us the judge deciding alone is an iniquitous, unfair judge.¹⁶² Notwithstanding the traditional aversion to *le juge unique* in France, no definition of *jura novit curia* distinguishes between a *jura novit curia* power exercised by a collegial court or by an *juge unique*. Roland and Boyer moreover describe the diminishing force of the adage *juge unique* in the face of an increase in the types of cases in which decisions are made by a decision-maker sitting alone.¹⁶³ Its diminishing force is understandable because no legal system, faced with such change could continue to invoke an adage which would effectively declare that because more cases were being decided by *juges unique* more iniquitous decisions were being reached.

The process by which an adage loses force is obscure.¹⁶⁴ Roland and Boyer simply acknowledge the declining relevance of the adage *juge unique* as the powers of *le juge unique* expand. The decline of *juge unique* somehow mirrors a consequential ‘metamorphosis’ of the *office du juge* which Roland and Boyer explain as a response to an increase in the volume of litigation, and a tendency towards the personalisation of power and its more autocratic exercise.¹⁶⁵ This transformation illustrates the interaction between the historical and conceptual in which the dynamic of adages permits their definition to evolve to better reflect prevailing but changeable perceptions of supporting legal concepts.

The process by which *la doctrine* adapts its pronouncements to changes in legal culture is difficult to precisely map. On the basis of the authority of Roland and Boyer, however, we can suppose the result of the decline of *juge unique* is that *jura novit curia*, quite literally evoking the value of collegiality of the learned

¹⁶¹ Calamandrei, *supra* note 77 at 45 also describes how collective responsibility may, “serve for each of its members as a convenient screen, shielding his conscience from the weight of an unjust decision and permitting him to cloak with a certain anonymity his agreement to a decision for which he would be unwilling to assume full responsibility.”

¹⁶² Roland and Boyer, *supra* note 3 at 359.

¹⁶³ Chapitre III of the *NCPC* concerns the *juge unique*. see P. Pédrot, *Les juges uniques*, (Dalloz: Paris, 1996). see also, N. Guibert, “Le CSM apparaît divisé sur le dossier des juges de proximité”, *Le Monde*, 6-7 February 2005, p8 discussing the resistance of professional associations representing French judges and magistrates to the introduction of a new cadre of lay judges (*le juge de proximité*), citing, *inter alia*, problems with respect to their legal competence and impartiality.

¹⁶⁴ Some adages may disappear as a consequence of legislative initiative. For example, when the Revolution abolished all forms of feudal land tenure and deemed land to be held as free alods, the opposing adages, *nul terre sans seigneur* and *nul seigneur sans titre* became immediately obsolete. see Roland and Boyer, *supra* note 3 at 562

¹⁶⁵ Roland and Boyer, *supra* note 3, 359 at 363

judges of higher courts, extends its reach to the lower courts, to *le juge unique* jurisdictions where it may once have been excluded. The remarkable feature of these transformations and evolutions, a kind of 'adagic desuetude', is that they arise through the vague legislative force of scholars such as Roland and Boyer, Automne or Cornu whose accounts of their legal tradition effortlessly reflect institutional and cultural changes, disputes or abeyances.¹⁶⁶

3.2 *est censé*

The second element of Cornu's definition is the phrase *est censé*, ordinarily meaning 'is supposed to'¹⁶⁷ and giving rise to the translation 'the court is supposed to know the law'. The main issue arising from Cornu's use of *est censé* is that it introduces a normative element to the adage that is already implicit in *novit* and *connaître* and used to refer to the judicial power to 'recognise' *la loi* or *le droit*. *Novit* is expressed in the ordinary present indicative and unlike *judex secundum* or *ultra petita*, *jura novit curia* is without a modal verb, which means that the alternative non-normative reference to empirical knowledge remains a possible interpretation.

Cornu's gloss, *est censé*, transforms the force of the adage, both when *connaître* is read as a descriptive affirmation of judicial legal expertise and when *connaître* is read to result in the translation the 'court recognises rights'. *Jura novit curia* is made unexpectedly tentative because *est censé* imports a sense of the speculative to the adage, telling us 'the judge is *supposed* to know the law'. The manoeuvre, perhaps wisely, raises a distinction between the theory of what a court *should* know and what a court may *actually* know in practice. The result is a tacit admission that the legal knowledge *jura novit curia* presumes is not invariably present in every judgement of a court. Also tacitly admitted is the possibility that the court may recognise something other than *le droit* or *la loi* in reaching its decision.

A problem with Cornu's 'is supposed to' is that it refers first to an expectation or a belief that something will transpire (the court *will* know the law) and secondly to a sense that the court has an obligation to know the law. The problem is less the ambiguity of the implied 'should' of 'is supposed to' than the way in which *est censé* invites us to question the nature of the knowing the court will or must do and what it will or must know. It is not clear whether *est censé* refers to actual knowledge one might reasonably expect at least seasoned higher courts to *possess* (in an ideal world), or whether it refers to the *application* of the courts' knowledge, as a power to pronounce judgement on the issues put to it, that is, a reference to *connaître* as the competence and duty to decide.

Vocabulaire juridique defines the phrase *est censé* in a way that suggests the act of the *curia* or *le juge unique* in 'knowing' the law (whether empirically or

¹⁶⁶ on this theme see A. Allott, "Popular law-making in western society" in *People's Law and State Law: The Bellagio Papers*, A. Allott and G. R. Noodman, eds., (Foris Publications: Dordrecht, 1985) at 21; M. Foley, *The Silence of Constitutions*, (Routledge: London, 1989).

¹⁶⁷ *supra* note 64; *Pluri dictionnaire larousse*, (Librairie Larousse: Paris, 1977) at 243 'supposé, réputé' (syn. considéré comme) [assumed to, reputed to, synonym, 'considered as']

normatively) is conceived as a legal fiction.¹⁶⁸ Applying Cornu's definition of *est censé* to *jura novit curia* means he effectively states the court is 'presumed by law to know the law' or 'the court is considered as knowing the law by virtue of a fiction of the law'. The two accounts, particularly the latter, point to a circularity in the justification of the adage because the legal fiction appears to be self-referential: it gives birth to itself, as if an act of *auto-saisie*.

The circularity is evident from the statement, 'the court is considered as knowing the law [fiction 1, *jura novit curia*] by virtue of a fiction of the law' [fiction 2 *est censé*]. The problem is that the second fiction which gives rise to the fiction 'the court knows the law' is expressed only in the phrase *est censé*, which is Cornu's gloss. Cornu could thus be taken to state "there is a legal fiction that 'the court knows the law' because there is a legal fiction 'the court knows the law.'" There is nothing wrong with legal fictions for they often justify an act or principle considered to have merit. Here, the double fiction seems only to accentuate the element of *auto-saisie* effectively characterising Cornu's *jura novit curia* as a self-conferred prerogative power.

The manner in which Roland and Boyer impute normativity to *jura novit curia* is to be preferred to Cornu's because it avoids self-reference. Roland and Boyer derive *jura novit curia* from *nul n'est censé ignorer la loi*, which provides the justificatory fiction (if fiction it be), from which issues *jura novit curia*. While this source is absent in Cornu's definition, this is not to say that Cornu is unaware of the connection between the two adages, only that stating the connection between the two adages is important to the legitimacy of *jura novit curia*.

The association of *jura novit curia* with *nul n'est censé ignorer la loi* expresses the connection between the knowledge and power of the court, its jurisdiction, with French citizens generally, and with those citizens who, by appearing before a court confer jurisdiction on the court to decide the legal matters raised. The connection between parties and judge is essential to legal process. It is a connection that strong accounts of *jura novit curia* sever by conceiving of the *le juge* as a superior and separate actor, *jura novit curia* as a self-standing, self-regulating prerogative inherent to *office du juge*.

The effect of the double fiction arising through Cornu's use of *est censé* can be drawn from a somewhat strained translation of *jura novit curia*. One meaning of *le droit* is "prerogative", which perhaps is still more widely used in English than in French, describes a wholly discretionary power appurtenant to an institution of the state.¹⁶⁹ *Novit* (*connaître*) in this translation is taken in the slightly archaic, even Biblical sense of "knows" as meaning "possesses". The resulting translation is "the court knows prerogatives" which suggests the *toute puissance* of the judge that Motulsky or Merminod sought to associate with *jura novit curia* and *office du juge*.

¹⁶⁸ Cornu, *supra* note 5 at 135, defines the phrase 'est censé' as reference to that which is "considéré comme" en vertu d'une fiction de la loi... 'presumé par loi...". [considered as... 'y virtue of a legal fiction...presumed by law]

¹⁶⁹ The English monarch's coat of arms still bears the motto, "Dieu et mon droit", which invokes the Deity and the Royal Prerogative as the essence of the English *Office de la Reine*.

3.3 *connaître*

The third element of Cornu's definition is the word *connaître*, translation of the Latin verb *novit* (third person singular of the infinitive *noscere*). *Connaître* like the English verb 'to know' and *noscere*, has a wide range of meanings.¹⁷⁰ The essential dilemma of *jura novit curia* concerns two senses of *connaître*, which we have considered in earlier definitions and which give rise to similar ambiguities in Cornu's definition.

One sense of *connaître* is decidedly empirical. To say the court knows the law in this sense means the court has a particular expertise in the law.¹⁷¹ This sense of *connaître* speaks to the legitimacy of judicial power as a consequence of this expertise. The legitimacy of judicial power would suffer – and does suffer – when courts reach decisions based either on the application of incorrect law or unjust interpretations so as to demonstrate a level of legal knowledge inadequate to their mission.

The second meaning of *connaître* is more a legal term of art which is normative because, as found in legislation, it constitutes a grant of power. This sense of *connaître* (and *novit*) means "to have jurisdiction"¹⁷² and might best be translated into English as 'to hear,' 'to have competence to take cognisance of' or, as stated in Black's definition of *jura novit curia*, 'to recognise', a legal claim brought before the court.¹⁷³ This sense of *connaître* speaks to the power or authority of the court, rather than its legitimacy. Thus, to say *le juge connaît la loi* (or *le droit*, or *le Droit*) speaks to the judge's power to decide, issue judgements binding on parties with respect to matters the court has power to "recognise". This sense of *connaître* makes Cornu's interpolation of the phrase *est censé* otiose because normativity is inherent in this sense of *connaître*. In some circumstance it is the only possible interpretation.¹⁷⁴

¹⁷⁰ 2 Grand Larousse de la Langue Française, (Librairie Larousse: Paris, 1972) 908-909; 2 Oxford Latin Dictionary, (Oxford University Press: Oxford, 19) 1190

¹⁷¹ Merminod *supra* note 3. Merminod uses *savoir* to translate *noscere*, which, considering that *connaît* historically has been used as a term of art meaning 'jurisdiction,' means the translation of *noscere* may refer to the court's empirical knowledge or to its jurisdiction, or power. Roland and Boyer, *supra* note 54, also use *savoir* in their illustration of the impatient judge admonishing counsel for dwelling too long on the law. *Savoir* is not used to express a conveyance of jurisdiction.

¹⁷² Cornu, *supra* note 5 at 204 'connaître - synonyme de "juger" [also] "compétent pour juger". *Connaître* in this sense appears, for example in statutes enacted during the Revolution and can be interpreted as a synonym for the word 'decide'. see *Code de la Justice de Paix*, Quatrième Edition, (A Bourdeaux, chez Pallandre l'aîné, Citoyen, Place Saint-Projet, No. 3, 1791), which contains numerous examples of this use of *connaître*.

¹⁷³ Black's Law Dictionary *supra* note 141.

¹⁷⁴ *Connaître* is used in both senses in the *NCPC*. Compare Article 23, which refers to the judge's ability to understand (*connaît*) a second language used in court, with Article 38 which uses *connaître* to describe the competence of a judge to hear cases involving a certain amount of money. Art 23. "Le juge n'est pas tenu de recourir à un interprète lorsqu'il connaît la langue dans laquelle s'expriment les parties." Art 38. "...la juridiction compétente pour connaître de la demande incidente..."

The distinction between the empirical and normative senses of *connaître* is important because the two meanings are at once related but pull the adage in incompatible directions. To the extent a judicial decision is legitimate because it is decided according to 'correct' law, the power conferred on the court to decide, referred to by the normative sense of *connaître* is justified. A problem arises when judicial decisions are incorrect, because the incorrect decision represents a divergence between the empirical and normative senses of *connaître*. A court may demonstrate by its decision it did not know the 'correct' law in an empirical sense, even though its knowing of the law, that is, deciding, resulted in a formally valid judgement.

A difficult aspect of the relationship between the two senses of *connaître* is that at the time of judgement, the authority of an incorrect decision is no less than a correct decision. The divergence between an incorrect but legally valid judgement casts doubt on the legitimacy of the normative power to 'know' in the sense of 'take cognisance of' the law. Generally, only an unsuccessful party who elects to appeal an 'incorrect' decision can initiate the procedure that leads to its correction. Thus the correction of erroneous judgements relies on a subsequent *saisine* arising at the election of a party, an implicit plea that the court is supposed to know the law, but didn't.

The problem this poses in France, as was discussed earlier, is that the French legal system seems to presume the likelihood that empirical judicial knowledge will be faulty by providing generous rights of appeal.¹⁷⁵ This presumption of judicial fallibility is empirically affirmed in practice: parties exercise their rights of appeal frequently in France and their claims the court below did not know the law are frequently affirmed by superior courts.¹⁷⁶ Thus both normatively and empirically there is a systemic presumption in France that questions the legitimacy of judicial knowledge. It is in this light that the adage *jura novit curia* is something of an embarrassment, for the claims it makes are systemically impugned, suggesting, perhaps the wisdom of a system of judicial precedent far less binding than is known at Common Law.

3.4 *le droit*

The fourth element of Cornu's definition is *le droit*, the most formidable obstacle to understanding Cornu's definition. The challenge of explaining *le droit* to *la mentalité* «Common law» is as daunting as the challenge of explaining Equity to the Civilian.¹⁷⁷ As we have seen, *le droit* has senses and functions which give

¹⁷⁵ Motulsky's account of *les droits de la défense* included the obligation of the legislature to provide adequate routes of appeal. see Bolard, *supra* note 14 at 332 §16 citing "Les principes directeurs du procès civil: le droit positif depuis Henri Motulsky", La Semaine Juridique (JCP) ED. G, no 30. at 332 §16, (citing H. Motulsky, "Le droit naturel dans la pratique jurisprudentielle" in *Mélanges Roubier*, 1961 at t. 2 n.13ff note (27))

¹⁷⁶ E. Steiner, *supra* note 9. Jolowicz, (2003) *supra* note 51 at [note 60, 61] "Between 1975 and 1995, the number of cases started at first instance rose from what was an already high bases, by 122% and those taken to appeal by 208%." Increased efficiency was an important policy rationale behind the NCPC attempts to restrict party argument of law and also of the imposition of the mandatory requirement parties plead law in 1998.

¹⁷⁷ Damaška *supra* note 11 at 42 n. 51

rise to difficult, if not baffling, distinctions. Just as Common Law makes a distinction between Equity and equity, in French legal culture *le Droit* is distinguished from *le droit*. This supports the distinction between *le droit subjectif* and *le droit objectif* both of which interact in adjudication to arrive at *la règle de droit applicable*, the rule applied to decide the case.

Cornu's choice of *le droit* in his translation while unremarkable in French usage is significant because, as object of the verb *connaître*, the choice defines either that which the court is supposed to know in an empirical sense, or that which the court has a jurisdiction to 'recognise' in its decision. *Le droit* is usually considered a more expansive term than *la loi* and so suggests a jurisdiction of greater breadth.¹⁷⁸ In terms of empirical knowledge, however, it is less clear how the court acquires its knowledge of *le droit* as distinct from *le Droit*, that is, *la loi* published in the *Journal officiel* or a *droit coutumier* proven by a party.

Le Droit is distinct from *le droit*. Cornu's primary definition of *le Droit* refers to *le droit objectif*, that is, a "body of rules of conduct promulgated and approved by society and to which its members are subject."¹⁷⁹ In this use *le Droit* is a superordinate, a collective noun referring to a subordinate body of discrete norms that, being 'socially sanctioned', need not, strictly speaking, be legislative.¹⁸⁰ *Le Droit* may be equated primarily with *la loi* which by definition is legislative in nature and expressed in a text such as a code or *décret-loi* issuing from the French *parlement* or executive. *Le Droit*, that is, *le droit objectif*, also refers to *le droit coutumier* described by Roland and Boyer as 'folk law'.¹⁸¹ Paradoxically, *le Droit* may also include *la loi* that has been subject to the force of desuetude, that is, repealed by 'negative' *droit coutumier*.¹⁸²

Cornu, however, translates *jura* as *le droit* rather than *le Droit* or *la loi*. The choice invites a comparison of *jura novit curia* with its near twin, *curia novit legem*. *Curia novit legem*, considered simply as a statement about jurisdiction, on its face, would restrict the court to decisions based only on *legem*, written legislative rules, that is *la loi*. This approach to the meaning of the adage would seem to preclude decisions grounded in *le droit* as 'subjective right', in equity, unwritten *droit coutumier* law or in cases of *la silence de la loi* or desuetude.

¹⁷⁸ For example, customs or usage may give rise to *droit* which is not sanctioned by any law, such as local rights of pasturage, or the requirement the wife's use of the husband's surname. see Roland and Boyer, *supra* note 80 discussing the exception to *jura novit curia* that arises with certain types of custom and usage.

¹⁷⁹ Cornu, *supra* note 5 at 323: "droit: ensemble de règles de conduite socialement édictées et sanctionnées, qui s'imposent aux membres de la société."

¹⁸⁰ If *le droit* is translated as 'right', a problem also seems to arise in that Cornu refers to a body of rules to which members of a society "are subject", referring not to right but to obligation.

¹⁸¹ *supra* note 83

¹⁸² Cornu *supra* note 5 at 294; desuetude as 'negative customary law' is Paulson's translation of Kelsen. see Kelsen, *supra* note 78 at 63 n. 46.

The *Code civile*, however, compels the French judge to decide, specifically precluding the judge from justifying a failure to decide on the insufficiency or *la silence de la loi*. While formally phrased as a prohibition relating to acceptable reasons for judgement, the provision suggests that in the absence of *loi*, a court may nonetheless recognise and decide according to *le droit*.¹⁸³ To the extent there are meaningful distinctions in contemporary France between *le droit* and *la loi*, and between *le Droit* and *le droit*, *jura novit curia* provides greater support for decisions based in *le droit*-that-is-not-*loi*, in equity or to fill gaps arising from *la silence de la loi* than does *curia novit legem*. In this *jura novit curia* appears more consistent with French practice and indeed, it is hard to imagine any legal system in which a court could base its decision on written law alone.

Unlike Common Law, however, France is heir to the tradition of *le culte de la loi* that arose with the Revolution, which attempted with some severity to eliminate the judge's margin of manoeuvre by restricting courts solely to decisions founded in *la loi*. While observance never reflected the rhetoric of the Revolutionaries,¹⁸⁴ the Republican tradition in France still mandates terminology respectful of the values of the Revolution concerning limitations on the judicial power. The Common Law scholar, particularly those raised in the tradition of American Legal Realism, might easily overlook how language descriptive of the judicial function is less a statement about the empirical reality of judicial process than a conventional understanding about how it is permissible to describe the judicial task.

A sense of this convention might be seen in how, despite obvious tensions, few overt controversies in France today turn on the distinction between *le droit* and *la loi* or between *jura novit curia* and *curia novit legem*. Martin writes that "[d]ans notre système, *le droit, c'est la loi*"¹⁸⁵ and Merminod writes that "*le droit = les lois applicable*."¹⁸⁶ Roland and Boyer similarly treat *jura novit curia* and *curia novit*

¹⁸³ *Code Civil*, (Dalloz: Paris, 2003) Article 4, Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice. [The judge who fails to decide citing as a reason the silence, obscurity or insufficiency of the law may be found liable for this failure] Precisely, this provision means that silence, obscurity or insufficiency is not a valid reason for refusing to decide. This suggests a distinction between the bare judgement or disposition of a case – who wins what – and reasons that can, or cannot, be given to support the disposition.

¹⁸⁴ The complex relationship between the force of tradition and the force of positive law is described by A. Mater, in "L'histoire juridique de la révolution", (1919) 11 *Annales Révolutionnaires* 429. Mater's paper describes the survival of customs, usages and Roman law in France well into the 19th Century despite their formal abolition by the National Assembly. In England, the *Magna Carta* remains the sacred text of the British Constitution, notwithstanding the repeal of all but four sections. see 8(2) Halsbury's Laws of England, *supra* note 39 at §1 n.13.

¹⁸⁵ Martin (1974) "Le fait et le droit ou les parties et le juge", 48 *Semaine Juridique* Pt I §31. Martin, discussing the purview over *loi* of the Cour de cassation writes of the necessity of considering *loi* in its largest sense as including "toute les règles du droit positif, y compris les principes générales qui sont inscrits dans le contexte des lois, et qui s'expriment souvent en maximes." [all rules of positive law [droit], including general principles contained within the context of law [loi] which are often expressed as maxims]

¹⁸⁶ Merminod, *supra* note 3.

legem as identical, giving pride of place to the form of the adage more common in Europe, *jura novit curia*.¹⁸⁷

A problem with Martin's statement '*le droit, c'est la loi*', is that the verb *est* (*être*) establishes an equivalency between *la loi* and *le droit*. This means that it is equally possible, grammatically at least, to invert the structure of the phrase and say, '*la loi, c'est le droit*'. This is not implausible, but as we will see, the French judge in deciding is required to *dire le droit*, a reference to *le droit subjectif*. It is implausible to say that the French judge in deciding is required to *dire la loi* or *dire le Droit*, because each refer to declaring the law in the sense of legislating or interpreting a *loi*, powers that *le culte de la loi* did not allow the judge to exercise.

With all respect for the autochthonous authenticity of Martin's statement that '*le droit, c'est la loi*', significant differences are possible, even necessary to account for the relationship of *le juge*, *le droit* and *le Droit*. It is in the interstices of different senses of *droit*, internalised by the native French lawyer, that we might look to acquire a basic understanding of the full plenitude of the meaning of *le droit* and how this plenitude conceals ambiguity within Cornu's definition.

The parameters of the ambiguity are marked by a dichotomy between the judgement, the result of litigation and process, that is, the conduct of an action from commencement to the close of the debates. As we will see below, the *le droit* is pressed into service to apportion rights and duties in litigation between courts and parties, in much the same way that Motulsky used the distinction between fact and law. *Le droit*, in its sense of 'subjective right' seems at best a claim based on factual allegations which it is the purpose of litigation to affirm or deny. It is only at the moment of judgement that factual allegations of *le droit* put forward by the parties can be perfected by the court in its judgement in a quasi-sacerdotal ritual: the 'application of the law'. The transubstantiation of fact into law is central to the catechism of French legal process, something which defies comprehension if translations of *le droit* are restricted to 'law' and 'right' alone.

3.5 (*et l'appliquer d'office*)

The fifth element of Cornu's definition is the phrase (*et l'appliquer d'office*). Before discussing the phrases 'l'appliquer' and 'd'office', a few words are in order about the brackets because, by different interpretations of their use, they affect the relationship between the original Latin of the adage, Cornu's core translation and the significance of the bracketed phrase *l'appliquer d'office*. The issue raised by the brackets is whether the phrase they contain is meant to be a part of translation of *jura novit curia* or whether the bracketed phrase is meant to be a distinct consequence of the adage and its translation.

The significance of the distinction is that if *l'appliquer d'office* is a *consequence* of the adage, the recursive effect may require characterising the adage simply as a presumption about the judge's empirical knowledge of law. In this interpretation *connaître* = *savoir*, rather than the normative sense of *connaître* = *juger*, that is 'to recognise' or 'to have competence' to decide. If 'l'appliquer d'office' is

¹⁸⁷ My research and conversations with indicates a preference amongst Common Law scholars for the adage *curia novit legem* rather than *jura novit curia*. Neither Cornu nor Merminod make reference to *curia novit legem* in the publications cited in this paper.

considered part of the translation, it simply restates *jura novit curia* and *le juge est censé connaître le droit*. By this interpretation, Cornu translates the adage in terms of what many consider its essential meaning: the duty of the court to decide according to the correct applicable rule.

Cornu's use of brackets is not remarkable, except that in writing about *jura novit curia* it is more common for the adage to be bracketed. Roland and Boyer, for example, write, "there is no doubt that the litigant is not required to prove the rule upon which he relies (*jura novit curia*)."¹⁸⁸ As a citation, *jura novit curia*, within brackets, establishes a relation between a distinct proposition about judicial power and the authority (*jura novit curia*) invoked as support. Unlike Roland and Boyer's use of the adage as a bracketed citation, however, Cornu's use of brackets is ambiguous because they may be used either to indicate a citation for an independent proposition or as an aside meant to clarify the preceding translation of the adage.¹⁸⁹

The use of *jura novit curia* as a citation supports powers deemed self-evident, or inherent, arising *office du juge* as a consequence of the presumption *jura novit curia*. However, 'inherent powers', by definition, are implicit, without clear textual references, explaining, perhaps, the citation of an adage rather than positive law. The use of *jura novit curia* to affirm unexpressed 'inherent powers' explains the structure of a core meaning to which consequence may be imputed. It also explains the divergence between the many consequences attributed to the adage and its literal words because virtually any judicial power without a source in positive law could be attributed to *jura novit curia*.

However, the words *jura novit curia* do reasonably translate as *le juge connaît le droit*. The question arising from Cornu's use of the brackets is whether *jura novit curia* and *le juge connaît le droit* can also mean *l'appliquer d'office*. As is discussed next, (*l'appliquer d'office*) can be reasonably taken to mean the judge applies the law pursuant to his duty to decide the case. Even if this is so, attributing consequences to *jura novit curia* is not thereby precluded and the question is what, if any, consequences can be read into Cornu's *jura novit curia*.

The significance of what may appear a rather obscure point, is that if (*l'appliquer d'office*) is considered a consequence, and *d'office* is understood in its senses of 'on one's own initiative' or 'without notice', it is possible to see in Cornu's translation Damaška's strong *jura novit curia*. If (*et l'appliquer d'office*) is considered to just re-state the meaning of the adage, it states no distinct consequence and is just a general expression of the courts' jurisdiction, its duty to decide according to *le droit*.

¹⁸⁸ Roland and Boyer, *supra* note 3 at 138. "Sans doute le justiciable n'a pas à prouver la règle de droit applicable (*jura novit curia*)." A similar use is seen in P. Blondel, "Le juge et le droit" in *Vingt ans après*, *supra* note 23, 103 at 113: "Il est également acquis, la jurisprudence en la matière est abondante, que lorsqu'une partie fait état devant le juge d'une convention collective mais néglige de la produire ou la verse aux débats de façon incomplète, le juge ne peut refuser de l'appliquer sans se prononcer sur sa teneur et sur son incidence: "*jura novit curia*"." see also Mann *supra* note 8 at 370 quoting the European Commission on Human Rights.

¹⁸⁹ This could be stated as, a) *jura novit curia* = *le juge est censé connaître le droit* = (*le juge*) *appliquer le droit d'office*, or b) *jura novit curia* = *le juge est censé connaître le droit* ∴ (*le juge*) *appliquer le droit d'office*

A third plausible interpretation of Cornu is that, given the poetic density of many adages, Cornu simultaneously offers two meanings of the adage that somehow unite the diverging empirical and normative senses of *connaître*. However ambiguous this result may be, as an act of translation and legal scholarship, it is inspired for the way it captures the nuances of the Latin and French and directs us to the most controversial consequences attributed to *jura novit curia*.¹⁹⁰

However, much this explanation may satisfy linguists or anthropologists, I suspect that practitioners would agree that Cornu, an accomplished professional, intends the bracketed phrase to be a consequence of *jura novit curia* rather than an alternative translation.¹⁹¹ This interpretation means that the use of “est censé” does not duplicate the normative sense of *connaître*.¹⁹² Instead this reading clarifies that *connaître* is used in its non-normative sense, as *savoir* and as a reference to the empirical knowledge of the law the court is ‘supposed’ to possess. This reading, however, impugns the force of the adage by suggesting the knowledge the court is ‘supposed’ to possess is not always in evidence.

3.6 et l'appliquer

The sixth point scrutinises the phrase *l'appliquer*, comprised of the verb *appliquer*, and the pronoun, *l'*, which represents *le droit* in Cornu's translation and *jura* in the original Latin. The phrase, *appliquer le droit* can be translated into English as ‘to apply the law’ or ‘to apply the right’, if we follow Black's translation of *jura*. A problem for the native English speaker is determining when *le droit* is best read as ‘law’ and when it is best read as ‘right’. A further problem to consider is whether distinctions made in French law refer to a sense of *le droit* which cannot be expressed by either the word ‘law’ or ‘right’ and is therefore inaccessible to *la mentalité* «Common law»

The primary question posed by the phrase *l'appliquer* is understanding in what sense *le droit* can be ‘applied’, given the distinction between *le Droit (objectif)* and *le droit (subjectif)*. Cornu's *jura novit curia* refers to *le droit* rather than *le Droit* and this must be taken to mean the court ‘applies’ *le droit subjectif* in resolving the litigation.¹⁹³ This understanding, however, is quite inconsistent, in

¹⁹⁰ As George Steiner has recognised, a translation approaches a work of genius when it faithfully conveys the ambiguity of the original language into a second tongue. G. Steiner, *After Babel*, 2d (Oxford University Press: Oxford, 1992) at 312ff.

¹⁹¹ The word “et” could be taken in its sense of ‘therefore’ to denote a consequence and it could be taken in its sense of “and” to indicate it is a continuation of the prior phrase.

¹⁹² We have already noted that Cornu inserted a normative element (“est censé”) to his translation of *jura novit curia* which qualifies *connaître*, despite *connaître*, by one of its meanings, having intrinsic normativity, that is, ‘competency or jurisdiction to decide. A similar problem, the duplication of intrinsic normativity is posed by the bracketed phrase. ‘(et l'appliquer d'office)’ might be taken as an alternative expression of *jura novit curia*, synonymous with the phrase “...est censé connaître...” In this case, the definition contains three distinct references to the court's duty to know the law. A further issue that could be explored is the effect of ‘est censé’ if it taken to modify not only *connaître* but also *appliquer*.

¹⁹³ Cornu's distinction between *le droit* and *le Droit* may not reflect normal usage amongst *la jurisprudence* and *la doctrine*. Regardless of the extent of its actual use, the distinction is useful for illustrating the senses of *le Droit* to non-native French speakers.

different ways, with two conventional accounts of the judgement process in France, namely *dire le droit* and *le syllogism*.

appliquer: process and judgement

In defining the phrase *l'application de la loi*, Cornu describes the act of applying a legal rule - the 'applicable legal rule' - to decide an instant case.¹⁹⁴ In other words, *l'application* refers to judgement, the pronouncement of a decision after the close of process.¹⁹⁵ This is not controversial in itself, but does direct attention to the distinction between judgement and process as each bears on the meaning of *jura novit curia*, the two types of knowing envisaged by the adage and the forms of *droit* that may be object of that knowing.

The process-judgement distinction is important because if *jura novit curia* refers only to the act of deciding, to the disposition of the case, it does not speak to manner and form requirements controlling pre-judgement procedure. *L'appliquer* concerns the final act of the decision-making process, not the interactive events of process through which the court impartially considers the merits of the parties arguments and proofs. Objections to different types of *jura novit curia* primarily concern acts antecedent to judgement, relating to a breach of party rights such as *le principe de la contradiction*, the absence of impartiality, or bias.¹⁹⁶

The judgement may serve as confirmation an impugned practice has occurred during process. The judgement in this sense is factual evidence that a judicial act attributed to *jura novit curia* has breached other principles which govern judicial conduct prior to judgement.¹⁹⁷ These other principles, expressed in Motulsky's quaternary of adages, M. Franc's two principles or their counterparts in the *NCPC*, "delimit", to use Motulsky's term, the proper exercise of judicial *office*, its application of law (or right) in its judgement by subjecting the judge to procedural constraints.

No one challenges the court's responsibility for its decision, including the selection and application of the rule of 'law' on which it is based. This responsibility, however, transcends the issue of intervention *jura novit curia* because the responsibility will arise even in the relatively rare situations where a French court is absolutely bound by the law pleaded by the parties.¹⁹⁸ Even

¹⁹⁴ Cornu, *supra* note 5 at 63

¹⁹⁵ Cornu, *supra* note 5 at 63 "*l'application de la loi*" [the application of the law]. Cornu describes a court's power to apply the law even where not specifically invoked by a party and also the remedy of 'false application of the law' where a court applies the law incorrectly.

¹⁹⁶ see Martin, *supra* note 130

¹⁹⁷ This may be retroactive, for example, in that the judicial act of Damaška's *jura novit curia* arises after the close of process, but nonetheless colours the prior process with illegality.

¹⁹⁸ for example, *NCPC* Article 12 alinéa 3; annotation at §22 bis "...au contraire, pour la Chambre commerciale le juge de fond est lié par la prétention des parties et ne peut modifier l'objet du litige dont il est saisi." [to the contrary the judge of the Court's Commercial section is bound by the argument of the parties and cannot modify the remedy by which the court has been saised.]

when so bound, the judge still has a duty to reach her decision according to the terms of his *saisine*, that is, *d'office*. This suggests that while *l'appliquer la loi* may at times permit or require a court to intervene with its own point of law, even where intervention is not permitted, the duty to apply the correct law still exists because it is independent of any intervention *jura novit curia*.

Le Droit redux: what the court applies – le droit and its use (ius)

The phrase *application de la loi* encompasses not only *la loi* but also *le Droit*, inclusive of *le droit coutumier* and *la règle de droit*.¹⁹⁹ This is consistent with Cornu's primary definition of *le Droit* and *la loi*, but is not helpful understanding the meaning of the phrase *et l'appliquer d'office*. This is because Cornu's translation of *jura novit curia* is *le juge est censé connaître le droit* (i.e. *droit subjectif*) not *le juge est censé connaître le Droit* (i.e. *droit objectif*).

The distinction raises a number of interpretative problems for *la mentalité* «Common law» in the light of the possibility *connaître* may refer either to the court's empirical legal expertise, its competency to decide, or to both. Possible translations of *connaître le droit* are first, that the court empirically 'knows' the party's right as it 'knows' the *la loi* exists, following Roland and Boyer's *jura novit curia*. The second possible translation is that the court juridically 'knows' (i.e. recognises) the party's subjective right, that is, affirms it in the judgement. However plausible these are, in the light of Cornu's distinction between *le Droit* and *le droit*, they do not square with conventional accounts of adjudication.

The difficulty can be illustrated by examining two such accounts which at a minimum demonstrate the richness of meaning compressed into the phrase *l'appliquer office*. It is possible that the act of *l'appliquer* in Cornu's definition of *jura novit curia* is incoherent if we insist on a literal interpretation of Cornu's words, and that the incoherency arises primarily because *appliquer* is associated with *le droit* and not *le Droit*. It is possible that Cornu himself does not himself religiously follow this distinction, but here it taken as axiomatic.

Dire le droit

French courts are duty bound to '*dire le droit*',²⁰⁰ but we should not take this too literally. Cornu defines *dire le droit* as "dire et juger" or "décider" that is, as a euphemism for deciding, for disposing of a legal dispute by finding in favour of

¹⁹⁹ Cornu *supra* note 5 at 63.

²⁰⁰ see *Code Civil* Article 5, "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises." The official Legifrance website translates this as, "Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions". http://www.legifrance.gouv.fr/html/codes/traduits/code_civil_textA.htm (A clearer translation is, "In deciding the cases submitted to them, it is not lawful for a judge to thereby declare any rules of general application.") Article 5 dates to the Revolution and proscribes the "arrêts de règlement", that is, judgements of the *ancien parlements* that were *loi* in the modern sense of legislative regulation. Phillippe Payen in *Les arrêts de règlement du Parlement de Paris au XVIII^e siècle: Dimension et doctrine*, Presses Universitaires de France: Paris 1997) at 11, asks whether Article 5 of the *Code Civil* was a 'historic error?' and notes that the problem of the legal weight of French *jurisprudence* (i.e. case law) turns on Article 5.

one party and against another.²⁰¹ Associating *jura novit curia* closely with the power to decide limits the meaning of the adage, first to a statement about jurisdiction and secondly that the decision must be according to *le droit*. In this reading, *l'application du droit*, would simply refer to courts' duty to decide and *le droit* is taken to simply mean the law.

However, rendering Cornu's opposition between *le Droit (objectif)* and *le droit (subjectif)* into English requires the use of 'law' and 'right' respectively to translate *le Droit* and *le droit* in order to make sense of the distinction. The depth of the meaning of *le droit*, however, cannot be realised by using only the words 'law' and 'right'. If we translate *le droit* as 'the law', Martin's comment, that '*le droit, c'est la loi*' for example, while not quite incoherent, conjures up a very different meaning in English than it does in French. To say the 'law is the law' evokes a doctrine of 'strict law' when the French means 'there is no difference between law and right.' To say in English, 'the law is right' in this context verges on the nonsensical, or is an observation about the policy merits of a law.

Le droit objectif, following Roland and Boyer's *jura novit curia*, is subject to two regimes of proof, depending on whether *le droit* is expressed as a *loi* or as a *droit coutumier*. The power of the court to recognise the *le droit coutumier* is restricted, whereas there is no restriction on the courts power to recognise the existence of *la loi*. The requirement that *le droit coutumier* be proven by a party suggests the difference between the existence of valid *droit coutumier* and party entitlement to its application. Two uses of *le droit* are illustrated. The proven custom is *le Droit* and a party's entitlement to its application is *le droit*. Both touch the issue of 'existence' differently, one referring to proof of underlying *Droit*, the other to proof of entitlement.

The difficult concept for the Common lawyer is *le droit subjectif*, which Cornu defines as, "a prerogative of an individual recognized and affirmed by objective law which permits its holder to do, to demand, or to forbid the doing of some thing in his own interest."²⁰² Comparativists, such as Legrand, claim that *le droit subjectif* is unknown at Common Law, which means that any distinction in *jura novit curia* turning on the distinction cannot be translated.²⁰³ Legrand may be correct if we restrict our thoughts only to the theoretical plane where much of the debate occurs.²⁰⁴ Otherwise, the claim might be fallacious, if not literally, then when the function of *le droit subjectif* in litigation is examined in light of its relation to objective law and the court's duty to *dire le droit*.

²⁰¹ Cornu, *supra* note 5 at 301 "dire le droit...juger, décider" [to declare the right...to judge to decide]

²⁰² Cornu, *supra* note 5 at 323. "une prérogative individuelle reconnue et sanctionnée par le Droit objectif qui permet à son titulaire de faire, d'exiger ou d'interdire quelque chose dans son propre intérêt" Examples of *le droit subjectif* include individual rights or interests arising under contracts or through testamentary dispositions.

²⁰³ Legrand, *supra* note 143

²⁰⁴ see G. Samuel, "Le Droit subjectif and English Law" (1987) 46 Cambridge L.J. 264;

The French lawyer, Merlin invoked both the dilemma and the solution when he wrote that, “what does the word matter if the thing is there?”²⁰⁵ Merlin’s brocard suggests, in our circumstances, not the absence of *le droit subjectif* but only the lack of an appropriate word to describe it. Whatever the doctrinal identity of *le droit subjectif* may be, Merlin’s brocard tells us that if we can find the function of the *le droit subjectif* we may find, if not its counterpart at Common Law, at least a way to adequately translate the concept into English.

It seems plausible to argue, then, that *le droit subjectif* is simply an oblique reference to a party’s proof of entitlement. The term *le droit subjectif* is applied less because of its conceptual nature than to permit judicial process to be expressed in language that descriptively comports with Revolutionary values that require the court to *dire le droit*, but prevent it from *dire le Droit*. Merlin’s brocard thus is inverted, for this asemantical use of language declares, ‘what does it matter what happens in practice so long as what happens is acceptably described.’

Perhaps the most accurate literal translation into English of *dire le droit* is ‘to declare the right’, that is to declare in a judgement which of the parties’ allegations of right will succeed. An equally plausible English translation, ‘to declare the law’, is inappropriate in the French context, however possible grammatically. Both translations are misleading, because ‘to declare the right’ is more clearly a reference to the parties ‘subjective rights’, a concept not in ordinary use at Common Law.

The second translation, ‘to declare the law’ speaks less to the parties’ subjective rights than to the law by which claims of subjective right are measured. ‘To declare the law’ evokes the power of Common Law judges to create new Common Law rules, or binding interpretations of legislation. In France, the purview of the court’s duty to *dire le droit* can be contrasted with *Dire le Droit*, a phrase not encountered in French law. The duty of the French court to *dire le droit* does not include a power to *dire le Droit* for this refers to *le Droit objectif* and connotes judicial intrusion into the realm of the legislature and its sovereignty over the creation of new law.

The phrase *dire le droit* in the context of process assumes the interplay of senses of *le droit* that, conceptually, are distinguished. The court’s duty to *dire le droit* is to decide if *le droit subjectif* alleged by a party gives rise to a *règle de droit*, derived from *le Droit objectif*. To paraphrase Cornu’s definition of *le droit subjective*, the question for the judge is whether the individual prerogative alleged by a party is ‘recognised and sanctioned’ by *Droit objectif* so as to justify the success of party’s claim. Parity between *le Droit objectif* and *le droit subjectif* is expressed by a *règle de droit*, that is, a rule of *Droit objectif* applied to the proven *droit subjectif* of the successful party.

The judge’s duty to *dire le droit*, then, is to declare *le droit subjectif* arising amongst the litigants. Thus, the court must decide which of the *moyens de droit*, alleged by the parties is superior, by virtue of having been proven in fact to fulfil the criteria established by the *le Droit objectif*. The phrase *moyen de droit*,

²⁰⁵ A. Merlin, *8 Questions de Droit*, 4th éd., (Remoissenet: Paris, 1830) at title “Substitution fidéicommissaire” §IV, 18. “Mais qu’importe le mot, si la chose y est?”

however, is normally taken to refer to the parties arguments of *le Droit objectif* raised in support of arguments of fact, *moyen de fait*. The *moyen de fait* states the facts which give rise to *le droit subjectif* by meeting the criteria set out in *le Droit objectif* which must be proven for a court to grant judgement and thereby affirm the subjective right claimed. If, however, it is *le droit* and not *le Droit* which, as Cornu tells us, the court 'applies' the conventional understanding of the traditional judgement syllogism is inverted inasmuch as proven fact comes to rank above applicable law.

The judgement syllogism

The judgement syllogism is another paradigm commonly used to describe adjudication in France. The judgement syllogism conceives of the judicial decision in terms of the application of a major premise, *le droit* to a minor premise, the judicially determined *proven* facts that results in the judgement.²⁰⁶ Martin's account of the syllogism describes the major thesis as that which is 'formed by the rule of law (*la règle de droit*) that is "applicable".²⁰⁷ The minor thesis is constituted by "the affirmation" found in the instant facts that fulfil the conditions stated by the rule of law *applicable*.²⁰⁸ A successful claim involves the convergence of *le droit subjectif*, *le Droit objectif* through the mediation of a *règle de droit*, that is, the rule *Droit objectif* applied to the proven *droit*.²⁰⁹

The syllogism, while widely invoked by scholars, is criticised as "artificial", a "justificatory discourse,"²¹⁰ that tells us little about the "deductions préparatoires" of the judge which arise from consideration of the parties' arguments of fact and law.²¹¹ Martin's account demonstrates the exclusion of process from the

²⁰⁶ Merminod describes the syllogism thus, "comme on sait, la mission première du juge est d'appliquer à un état de fait un raisonnement de droit pour aboutir à la conclusion qui est le jugement." ["as everyone knows, the primary task of the judge is to apply a legal rule to a fact situation, the result of which is the judgement."] La mission première, c'est décider; la dernière mission, c'est décider.

²⁰⁷ G Marty, *La Distinction du fait et du droit*, Librairie du Recueil Sirey, Paris 1929) at 11-12; see also Martin, (1974), *supra* note 185 at §35

²⁰⁸ Martin, *supra* note 124

²⁰⁹ Cornu, *supra* note 5 at 759 defines *règle* in its primary sense as "règle de droit" which "désigne toute norme juridiquement obligatoire...quels que soit sa source (règle légale, coutumière)" [rule of law refers to all norms importing a legal obligation whatever their source (legal rule, customary rule)]

²¹⁰ B. Jackson, *Law, Fact and Narrative Coherence*, (Deborah Charles Publications: Merseyside, 1988), preface, writes that, "from the viewpoint of discursive semiotics, the normative syllogism is a justificatory discourse which attributes a particular status to adjudicatory discourse." This is to say, the syllogism is not an empirically accurate account of adjudication, rather it is a normative conception or idealisation about the result of adjudication, the judgement. The syllogism provides another element that reinforces fact-law federalism, notwithstanding it is empiric inaccuracy.

²¹¹ The syllogism, like the distinction between fact and law, is criticised. Marty, *supra* note 207 at 12 writes, "Il n'est pas douteux qu'il y a quelque chose d'un peu artificiel à styliser ainsi l'activité du juge et il suffit de lire un jugement relatif à une affaire quelque peu complexe pour apercevoir que l'agencement de l'argumentation qu'il contient est beaucoup plus compliqué." [There is little doubt that there is something artificial in characterising the activity of the judge in this way and it's enough to read a judgement on even a modestly complex case to see that the justifications of the

sylllogism for he refers to a rule already determined to be 'applicable' and facts that already 'proven', indicating it is an account of the conceptual structure of a decision already reached. Appreciation of the nature of *le droit subjectif* within this structure, however, requires examining events that precede the syllogism.

Droit as fait and la règle de droit

Cornu's definition, by its apparent use of *le droit* in its sense as subjective right, precipitates an enquiry into the nature of *le droit subjectif* prior to judgement. If *jura novit curia*, following Black's translation, means 'the court recognises rights', it is important to consider aspects of the act of recognition only alluded to in the phrase *dire le droit* or by the syllogism. *Jura novit curia* tells us the court 'knows' or 'recognises' *le droit* but does not speak to the nature of the knowing that the court does when that which it is knowing is not *loi* but *droit subjectif*. Some sense of this is seen in John Bell's translation of *jura novit curia* as 'the court becomes acquainted with the law',²¹² which here could be paraphrased as the 'the court becomes acquainted with *le droit*, in its sense of the subjective rights of the parties that follow from the facts which have been proven.

A *jura novit curia* centred on *le droit subjectif* directs us away from accounts of the act of judgement to the process by which it is reached. At issue is the juridical *qualification* of 'bare' facts, that is, their transubstantiation into juridically 'recognised' facts that are affirmation of *le droit subjectif*. Principles of fairness require that during process *le droit objectif* and *le droit subjectif* must be neither 'applicable' nor 'affirmed' nor 'proven'. If there is 'science' to legal process, an important element is the formal and factual suspension of belief in any particular outcome during process lest a pre-judged conclusion colour the outcome. It is only with the judgement that this state of disbelief ends. Affirmation that a *droit subjectif* has been proven cannot be declared until process has ended, and the matter has been remitted for deliberation and judgement.

Doctrines focussing on the judge and judgement such as the syllogism, *l'application de la loi*, or *dire le droit*, conceal that *le droit* as a "individual prerogative" alleged, is not self-executing in any legal sense: during process it is an allegation and at judgement it is a conclusion.²¹³ *Le droit subjectif* must be proven before the *règle de droit* can be applied. *La règle de droit* must also be found to be applicable, for it is by definition, *la règle de droit applicable*. There can be no *règle de droit in abstracto* no a *règle de droit inapplicable*.

La règle de droit

reasons for judgement reveal a much greater complexity" [than the syllogism would suggest.] Nonetheless, Marty, approved of the continued use of the syllogism.

²¹² Bell, *supra* note 92

²¹³ *Le droit* may be self-executing in an extra-legal sense where a person subject to *le droit* acquiesces to its exercise, spontaneously or otherwise. It would be incorrect to say that *le droit subjectif* that has not been recognised juridically is without legal status for this would nullify the effect of legislation conferring such rights and make a dispute the measure of legality.

In process, the distinction between fact and law is not as clear as the major-minor hierarchy of the syllogism suggests.²¹⁴ Motulsky, champion of strict fact-law federalism, recognised that “to research the applicability of a rule of law and to research the existence of a subjective right, is one and the same thing.”²¹⁵ The statement illuminates for it equates a finding that a rule of *droit objectif* is applicable to a finding that a *droit subjectif* exists. *Le droit subjectif*, Martin writes, again quoting Motulsky, is nothing other than the *effect* of a judicial decision.²¹⁶ Existence and applicability, two burdens of proof arising from examination of the parties’ *moyen* converge in the *règle de droit* as sides of a coin.

The conclusion follows: there can be no *droit subjectif* without proof and proof is a juridical decision with respect to a matter of fact. *Le droit subjectif* cannot be deemed to exist in the way that a court can deem or ‘recognise’ the existence of *la loi*. The existence and applicability of *le droit subjectif* and the identification of *la règle de droit* are different names for a single event: the decision. *Le droit subjectif* is declared by the judge as a matter of fact. Post-judgement rights of enforcement confirms this facticity.

The difficulty with Cornu’s definition, after all of this, is associating *appliquer*, that is, to ‘apply’, with *le droit subjectif*. The syllogism, it is clear, foresees the application of *le Droit objectif* to the proven facts. It is also possible for a court to declare the subjective right of a party, that is, *dire le droit*. However, to ‘apply’ subjective right’ requires the major part of the syllogism be proven fact, which is applied to a rule of *Droit objectif*, the minor. The particular rule of *Droit objectif* in any case, however, is called *la règle de droit*.

Le droit subjectif, however, cannot be merely a matter of fact, once parties ‘go to law’. *Le droit subjective* alleged, is interpreted by the parties prior to judgement: they must know what they have to prove. Facts are brought within the criteria established by *le Droit objectif*. In this sense there are no pure facts in litigation: all have been qualified by the parties, indeed as they must, because the timely unfolding of litigation requires the raising only that which is relevant to the proof on which the decision is based. Pure facts in litigation are irrelevant facts.

This conception of *le droit subjectif* is suggested by a maxim from Loisel, “*c’est le fait qui fait le droit*”²¹⁷ Martin, understanding that facts within litigation are never ‘pure’, wrote, less poetically, that, “the truth appears to lie in how facts alleged by

²¹⁴ P. Buchez, *Histoire de la Constituante* 437 refers to Thouret’s conception of the syllogism in which the major premise was fact applied to the minor premise, law.

²¹⁵ Martin, *supra* note 185 at §26 “rechercher l’applicabilité d’une règle de droit et rechercher l’existence d’un droit subjectif, c’est donc la même chose.”

²¹⁶ *Ibid*, “Le droit subjectif n’est rien d’autre que l’expression de l’effet juridique.” Motulsky’s position is that there is no *droit subjectif* without judicial recognition. see *supra* note 213.

²¹⁷ [it’s fact that makes the right] A. Loisel, *Institute coutumière*, *supra* note 27, cited in T. Grumbach, “La mise en état devant la juridiction prud’homale” in *Vingt ans après*, *supra* note 23, 183 at 184. A similar and equally poetic of the dynamic of fact-right, party proof and judicial recognition is, “la preuve double le droit comme l’ombre suit le corps.” [proof shadows a right like the shadow follows the body].

a party are not, strictly speaking, fact, which is to say not the raw events which have precipitated the litigation. Alleged facts are already qualified, or at least, pre-qualified.”²¹⁸ For this, Martin relies on Motulsky, who wrote, “it would an error to believe that the fact juridically considered is ‘of right’ [*droit*], rather it’s really a material element to which the law [*droit*] simply attaches consequences.”²¹⁹ Martin concludes that the juridically considered fact is, “not of right, but neither of fact, rather it is a *step* in the process of qualification.”²²⁰

From the perspective of *la mentalité* «Common law», the structure of these accounts of the act of judgement is curious, obfuscatory, even tortuous because they suggest that the *droit subjectif* of the parties’ claims alleged is, during process and before judgement, a matter of fact not law. As indeed they must because any suggestion to the contrary means the judge has made up his mind prior to judgement and has ceased to be impartial.

Implicit in this account of *jura novit curia*, turning on the ambiguity of *le droit*, *jura novit curia* implies the Court must ‘hear’ the parties. *Jura novit curia* means that a court cannot recognise rights without considering the parties’ facts. It must not just consider them, it must give them the proper weight demanded by the applicable rule. In this sense *le droit*, as subjective law, is argument during process, and implicitly refers to the equities of parties and means less the ‘law’ than ‘private law rights’. The issue in all litigation is whether the court will recognise the rights alleged by the parties (*jura novit curia*).

Paradoxically, it seems to follow, that within the semantic resistance thrown up to the English speaker by the word *le droit*, Black’s definition, ‘the court recognises rights’, reflects Civilian understanding of *jura novit curia* as a doctrine about process in private law.²²¹ Perhaps this is fully understood by native French lawyers. It is nonetheless curious that, apart from Black’s definition no one has yet reached the duality arising between ‘knowing the law’ and ‘recognising rights’ and its association with the distinction between law and equity.

3.7 *d’office*

The seventh element of Cornu’s definition is the adverb *d’office* which appears in the bracketed phrase ‘l’appliquer d’office’. *D’office*, as an adverb, describes the manner in which *le droit* is applied by the judge. The primary difficulty with Cornu’s use of the word *d’office* is that it is ambiguous and ambiguous on the very issues which make *jura novit curia* controversial: the power of a court to act

²¹⁸ Martin, *supra* note 124 at §9. “La vérité nous paraît résider en ce que le fait allégué par le partie n’est pas à proprement parler du fait – nous voulons dire qu’il n’est pas événement brut où se trouve le point de départ du procès. Il est déjà qualifié, tout au moins préqualifié.

²¹⁹ *Ibid*, citing Motulsky “C’est une erreur de croire que le fait juridique soit du droit: il s’agit bien d’un élément matériel auquel le droit attache simplement [sic] des conséquences.”

²²⁰ *Ibid*, “Ce n’est pas du droit, mais ce n’est pas non plus du fait; c’est une étape du mouvement de qualification.” [emphasis in original]

²²¹ Black’s Law Dictionary, *supra* note 141

and decide *propre mouvement*, that is, on its own motion as opposed to acting pursuant to a party claim or allegation.

The ambiguity arises because the core legal sense of *d'office* is complemented by other meanings that evoke controversial aspects of intervention *jura novit curia*. The core meaning of *d'office* is 'pursuant to the duties' ²²² of judicial office. In this meaning there is no inherent distinction between an act *d'office* taken at the request of a party and an act *d'office* taken independently by a court without a party request. The consequence of the problem is that *d'office* does not necessarily signal intervention *jura novit curia* but neither does it preclude it.

Different senses of *d'office* elide the distinction between process and judgement. One sense of *d'office* speaks only to the act of 'l'application du droit', to the judgement syllogism. This is the primary legal sense of *d'office* referring to the court's duty to decide cases in accordance with the applicable legal rule. In this sense '*appliquer le droit d'office* means judicial application or recognition of the 'right' in its objective sense. Other senses of *d'office*, less precisely legal, refer to acts taken on the court's own motion, acts taken without notice or consultation or to acts that are arbitrary. These senses are recursive for they may taint acts taken according to the primary legal sense of *d'office*. Non-legal senses of *d'office* are also recursive in that they speak to characteristics of legal process, distinct from the act of 'application'.

Propre initiative

D'office may refer to intervention *jura novit curia* because it can be used to describe judicial acts taken on the court's own initiative without a request from a party.²²³ In this sense *d'office* means *propre mouvement*, on its own motion, rather than at the request of a party. The ambiguity means there is not a precise term in French to distinguish the two types of acts *d'office*, notwithstanding essential issues of *jura novit curia* require this distinction.²²⁴ Cornu recognises this meaning, defining *d'office* as "*considérer sur sa propre initiative*."²²⁵

Acts taken on the court's own initiative are the primary locus of controversies precipitated by various types of intervention *jura novit curia*. The most common

²²² 5 Grand Larousse, *supra* note 170 at 3750 defines "*d'office*": "automatique, 1. en termes de droit en vertu du devoir, des obligations de sa charge. [automatically, 1. in terms of law, by virtue of the duties and obligation of one's charge responsibilities]

²²³ *Ibid* "2. sans en être requis, de sa propre initiative". [without it being requested, on its own initiative]

²²⁴ At common law the terms *sua sponte*, *ex mero motu*, *ex proprio motu* and *suo moto* describe actions taken on the court's own initiative or own motion, that is, not at the urging of a party. While the meaning of these terms is relatively clear that the intervention is *not* at the urging of the party, occasionally Common Law scholars lapse into usage that parallels the ambiguity of *d'office*. see, for example, P. Legrand, "Judicial Revision of Contracts in French Law: A Case Study", (1988) 62 Tulane Law Review, 963 at 970, where he speaks of, "judicially-initiated revisions...revisions carried out by the courts of their own motion (be they carried out *sua sponte* or at the request of one of the parties." B. Garner, *A Dictionary of Modern Legal Usage*, 2d (Oxford University Press: Oxford, 2001) at 838 also notes the problem.

²²⁵ Cornu, *supra* note 5 at 607-8

concerns situations in which the court considers the parties' points of law to provide an inadequate solution to the litigation.²²⁶ A problem with this sense of *d'office* is that to "consider" in its sense of 'reflect upon' or 'examine' is an act antecedent to the act of judgement. A court cannot simultaneously 'consider' the applicable law and 'apply' the applicable law because these are separate acts.

Thus, in Cornu's definition, '*considérer*', in its sense of 'examine,' alludes to Fox's account of *jura novit curia* in which the law applied does not *necessarily* have to derive from propositions put forward by the parties. In its preparations for the application of the 'correct' legal rule, a court may or must conduct research *d'office* for it is ultimately responsible for the rule applied. Research leading to intervention *jura novit curia* is also implicit in Damaška's definition, which refers to the rejection of party legal argument in favour of a decision based on the court's own.²²⁷

Everyone seems to agree that, unless specifically bound by the provisions of Article 12 alinéa 4,²²⁸ because the court is responsible *d'office* for the application of the legal rule, only the court can decide. The court's primary duty, the essence of *office du juge* is its duty to ensure a 'correct' decision. It is clear that *d'office*, as was used in the phrase *relever un moyen de droit d'office*, in the repealed alinéa 4 of Article 12, *may* refer to the application by a judge of its own point of law on its own initiative to dispose of a case.²²⁹ However, the ambiguity of *d'office* means the provision also envisaged intervention at the request of a party.

Without consultation

D'office has further meanings that refer to the authoritarian and arbitrary qualities for which some interventions *jura novit curia* are criticised.²³⁰ These include acting without the knowledge, advice or comment of those affected and even against their wishes. *D'office* also has a stronger sense of acting "out of hand" or

²²⁶ Martin, *supra* note 124

²²⁷ Damaška, while critical of the incipient bias of such a decision, did not colour his definition of *jura novit curia* with his own opinion. see *supra* note 11 at 114. Damaška might also refer to spontaneous intervention (if such a thing is possible in seriatim and document-based French procedure) not requiring a distinct act of research.

²²⁸ The Dalloz *NCPC* continues the original numbering of the *alinéa*. Others writers have renumbered the original alinéas 4 and 5 as 3 and 4. See for example P. Blondel, *supra* note 183 in *Vingt ans après*, *supra* note 23 at 109, or Eudier, *supra* note 15 at 43; Martin, *supra* note 74 at 560.

²²⁹ '*relever un moyen de droit d'office*' means roughly 'to raise a point of law on the court's own motion' although other meanings are possible.

²³⁰ 5 *Grande Larousse*, *supra* note 222, "3. Par voie d'autorité sans demander l'avis de intéressé et souvent contre sa volonté," [on the basis of inherent authority with asking for the advice of those concerned and often against their will] *Ibid* at 3749, intervention en faveur de quelqu'un. [intervention in someone's favour] This latter is credited to Voltaire.

peremptorily.²³¹ The *jura novit curia* of Fox or Damaška can be associated these stronger senses of *d'office* in the sense of, "without consultation",²³² suggesting parties receive no prior notice of the act taken *d'office*.

The empirical – normative ambiguity of d'office

The controversies associated with *jura novit curia* involve judicial acts taken *d'office*, on the court's own initiative, without consultation, notice or argument. On this basis it might be concluded that an act taken *jura novit curia d'office* at the request of a party is a contradiction and such a form of *jura novit curia* cannot exist. There are however circumstances that might still be considered intervention *jura novit curia* that refer to an initiative put to the judge by the party. These circumstances give rise to a distinction between intervention *jura novit curia d'office* and intervention *jura novit curia d'office propre mouvement*.

Jura novit curia d'office at the request of a party would refer to a court's judgement on a request raised by a party during process that had not been expressly averred in written or oral submissions or that was irregular in other but minor ways. For example, where a party seeks leave to introduce a legal argument on appeal that had not been argued in the court below or had not been stated in documents of which the other party had notice.²³³

It is important to distinguish between meanings of *d'office* with normative force and those which while contrary to formal law may arise in practice. Formal law is clear that the French judge may not normally to decide on the basis of a point of law applied *d'office* in Damaška's sense of *jura novit curia*. The *saine solution* proscribes the application of a point of law *d'office* without notice or an invitation to the parties to debate the point. A dispositive intervention taken *d'office propre mouvement* that does not involve notice and an opportunity for party debate is illegal, for its breach of *le principe de la contradiction* and *les droits de la défense* and, therefore, cannot be a valid act *d'office*. This is the case whether the intervention *d'office* is *propre mouvement* or whether at the request of a party.

The arbitrary senses of *d'office* provide associative meaning to *d'office* that may be encountered in practice for, as noted above, cases of Damaška's *jura novit curia* are still reported.²³⁴ In this sense, *d'office* only describes how the act was

²³¹ *The Concise Oxford-Hachette French Dictionary* (Oxford University Press: Oxford, 1995) at 408, 'd'office: (autoritairement) without consultation. 'out of hand' – 'nos propositions ont été rejetées d'office'. [our arguments were rejected out of hand]

²³² *Ibid* at 408

²³³ see *Guerra and Others v. Italy* (1998) 26 EHRR 357 (ECHR) in which the Court invoked *jura novit curia* to rule admissible certain of the applicants' points of law (articles of the *European Convention on Human Rights*) which had been only raised orally before the Court, had not formed a part of the written application and had not been argued in the courts below. This was also in issue in *Van Schijndel*, *supra* note 12. see also R. Martineau, "Considering New Issues on Appeal: The General Rule and the Gorilla Rule", (1987) *Vanderbilt L.R.* 1024; *Wilson and others v. Secretary of State for Trade and Industry* [2003] UKHL 40; and *Hoecheong Products Co. Ltd. v. Cargill Hong Kong Ltd.* [1995] 1 Lloyd's Rep. 584 (PC) and Paterson, *supra* note 97 at 45ff.

²³⁴ *supra* note 20

accomplished empirically. An act taken *d'office* without consultation because it is contrary to the requirements of the *saine solution* and a breach of *le principe de la contradiction* is neither a duty nor a valid exercise of discretion that may be exercised *d'office*. Nonetheless, some French judges do act in this way, and to the extent that this act *d'office* is not challenged by a party, such act retains the legal force of *la chose jugée*.

The controversy with respect to intervention occurs when the act *d'office* is executed with without prior notice to all parties and without providing an opportunity for parties to debate the court's own point of law. The normative question here is whether the absence of notice and opportunity for argument is expressed by Cornu's use of *d'office* in his definition of *jura novit curia*.

It might be said all acts of a court are acts taken *d'office* and that any act not made *d'office* is outside of the judge's jurisdiction. Cornu perhaps implies this because he uses *d'office* to modify the action of *appliquer*. *Appliquer*, we have seen refers to the decision, the ultimate act of judgement. A court has no alternative but to "appliquer le droit d'office", that is as a matter of course.²³⁵ This is true in the primary sense of *d'office*, that is, an act taken pursuant to a duty or power arising by virtue of an *office*. But *office du juge* is not an unlimited font of inherent jurisdiction. Legislation, including the *NCPC* stipulate specific acts that may be taken *d'office*.²³⁶ Motulsky's four adages, including *jura novit curia* also "delimit the office of the judge" meaning acts taken *d'office* are subject to the principles the adages, and formal law express.

D'office is an adverb and describes the manner in which an act was taken, but does not itself confer any jurisdiction. *D'office* merely describes the basis on which jurisdiction arising from other sources was exercised. The act taken *d'office* might best be translated as 'under colour of right', that is, with a belief or assertion by the actor that its was valid. The assertion does not confirm validity, while it might presume it. The jurisprudence is extensive that an act *d'office* may be valid or invalid and, if invalid, the decision will be overturned or revised. As seen in other aspects of *jura novit curia*, the legality of certain acts *d'office* is determined by the acquiescence of the unsuccessful party or by a party whose formal objection is upheld by a superior court. Even the judicial act taken *d'office* cannot evade the normative significance of party election or initiative.

Ex officio and auto-saisie

D'office in another sense illustrates a fundamental limitation in its association with the seven definitions of *jura novit curia* considered in this paper. Some acts taken *d'office* are delimited by Cornu's definition of *d'office* as a judicial act taken *ex officio*.²³⁷ Acting *ex officio*, Cornu writes, means the judge acting pursuant to *office du juge* to "*saisir lui-même de certaines affaires*," in other words, the judge commences an action, *ab initio*.²³⁸ The French legislator has established a few

²³⁵ see *supra* note 178 with respect to the French judge's duty to decide.

²³⁶ see *supra* note 168 concerning the dual uses of *connaître* in the *NCPC*.

²³⁷ Cornu, *supra* note 5 at 607

²³⁸ *Ibid*

exceptions to the adage *ne procedat iudex ex officio*,²³⁹ which permit a judge to commence certain types of proceedings on his own initiative. This is contrary to the general rule, expressed by *le principe dispositif* and Article 1 of the *NCPC* that only a party can commence an action before a court.

D'office, if understood in its sense of *ex officio* to refer to an act of *auto-saisie*, renders the phrase *l'appliquer le droit d'office* as it relates to *jura novit curia* incoherent, at least in a modern context. *Jura novit curia* presumes an action that has been initiated by a party. The application of the law on the court's own initiative (*l'appliquer d'office*) at the very commencement of an action initiated by the court suggests an extreme inquisitorial system in which a court identifies a breach of the law and brings the parties into court after judgement has been issued.

My research has uncovered no account of *jura novit curia* that conceives of the adage as permitting acts *d'office* in its sense of *auto-saisie*, that is, as the initiation of an action by the court itself. In the definitions of *jura novit curia* we have considered, *autosaisine* is not possible. The exceptions provided for in Article 1 of the *NCPC* moreover provide that once commenced by a court, the process is subject to the same constraints that apply to party-initiated claims. However the court is *saisied*, on its own initiative or by the parties, the court is duty bound (to) *appliquer le droit d'office*.

The ambiguity of *d'office* suggests a linguistic abeyance insofar as *jura novit curia* is concerned because the phrase does not on its face say either Fox's or Damaška's *jura novit curia* occurred; but neither does it rule it out. It is remarkable that given the many ways available in French to express the court's power to decide, the act of judgement, (*juger, dire le droit, appliquer le droit, connaître le droit*), there should be such lacunae preventing unambiguous expression of the act of intervention *jura novit curia* as seen in the definitions of Fox and Damaška.

It is equally remarkable that the phrase which describes this intervention, *propre mouvement*, is infrequently seen in French law and scholarship.²⁴⁰ The obscurity is compounded because of the traditional laconic nature of the French judgement, it being for practical purposes impossible to tell from the reading of a

²³⁹ Roland and Boyer, *supra* note 3 at 521 "Que le juge ne procède pas d'office" [the judge does not proceed on his own initiative] "Cet adage condamne l'autosaisine du juge, en ce sens que le contentieux ne s'ouvre pas à son initiative et qu'*l'officium judicis* n'est déclenché qu'à la demande du plaideur." [This adage prohibits the judge from conferring jurisdiction on himself to consider a matter, in this sense contentious litigation is not commenced on the judge's initiative and that judicial office only is activated by the initiation of a claim by a party.] see Dalloz annotation to *NCPC* Article 1 for a summary of exceptions.

²⁴⁰ See Conseil d'Etat, Section 3, 3 décembre 2003, No. 240267. "Une telle substitution relevant de l'office du juge, celui-ci peut y procéder de sa propre initiative, au vu des pièces du dossier, mais sous réserve, dans ce cas, d'avoir au préalable mis les parties à même de présenter des observations sur ce point."

judgement whether or not the court has acted *d'office* in either sense of the word. The very act of *jura novit curia* is concealed.²⁴¹

An adequate vocabulary of *jura novit curia* requires terminology that clearly describe judicial intervention. If the application of *le droit d'office* can refer to either a judicial act made at the urging of a party or an act taken on the court's own motion, *d'office* does not adequately address procedural requirements established by traditional adages, by the *NCPC*, by fundamental principle or by the *saine* solution.²⁴²

3.8 V. *NCPC* a. 12 et 16.

The eighth and final element of Cornu's definition is the annotation, "V. *NCPC* a. 12 et 16." which means 'see Articles 12 and 16 of the New Code of Civil Procedure'. Roland and Boyer, likewise associate *jura novit curia* with Article 12, but make no reference to Article 16. Both Articles are essential to understanding the meaning of *jura novit curia* in France as it relates to formal law, particularly the status of the extreme rule Damaška attributes to the adage.

Articles 12 and 16 state principles that potentially conflict. Article 12 is considered to contain legislative expression of the adage; Article 16, the antithesis of Damaška's form of the adage. Article 12 by most accounts refers to the court's duty to decide according to 'correct' law, resulting in a power to intervene with its own points of law, at a minimum to correct obvious errors or omissions in the parties' legal arguments. This is the *jura novit curia* provision. Article 12, however, consists of 5 *alinéa*, a lot of words to attribute to three words of an adage.

Article 16 refers to the necessity that points of law taken by the court *d'office* must be subject to party debate. Article 16 unambiguously reinforces the *saine solution* and expresses *le principe de la contradiction*, which, in turn is an expression of the adage *audiatur et altera pars*. Article 16, by requiring party debate on all points of law upon which the court bases its decision also expresses the adage *judex secundum*.

Thus within articles 12 and 16 we find three of the four adages of Motulsky's quaternary. Absent is the adage, *da mihi factum* which plays no part in Cornu's definition. Also absent from Cornu's annotation is reference to Articles 4 and 5, which, expressing the adage *ultra petita* or *judex secundum* preclude intervention

²⁴¹ A. Benabent, *supra* note 19 at §2, "Toutefois, et cela ne manque de surprendre, il s'est avéré que les juges méconnaissent très souvent ce devoir et étaient dangereusement portés à relever en secret des moyens d'office." [However, and there is no surprise in this, it has turned out that judges very often misconceive this duty and have been inclined to raise points of law on their own motion in secret.] Benabent wrote in 1977 before the primacy of *le principe de la contradiction* was declared by the 1979 *Conseil d'Etat* decision, *supra* note 18.

²⁴² One solution would be to use *d'office* to refer to decisions taken at the urging of a party, perhaps the most common understanding of the term. The phrase *d'office propre mouvement*, or simply *propre mouvement* could be used to refer to decisions taken on the basis of the courts' points of law raised on its own initiative.

jura novit curia, by requiring the court to decide within the frame of the fact and law pleaded and argued by the parties.²⁴³

All of this Cornu, *doyen* of French procedure, certainly recognises.²⁴⁴ This final annotation consequently refers the reader not only to the provisions of the two Articles, but also to competing interpretations to which the *jura novit curia*-specific provisions of the NCPC have been subject since their promulgation in the 1970's. Cornu must also be taken to incorporate by reference into definition of *jura novit curia*, the extensive scholarship that evidences the controversies in which *jura novit curia*-like power have been subsumed. The result is that today an adequate understanding of *jura novit curia* requires reference to French positive law, *la jurisprudence* and *la doctrine* which collectively constitute the larger part of the 'total social fact' of *jura novit curia* in France and give it a life independent of that which scholars tell us the adage means.²⁴⁵

It is possible to find in Cornu's definition obfuscation or imprecision that parallel those of the *jura novit curia* provisions of the NCPC, *la jurisprudence* and *la doctrine*. Part II of *Va savoir* examines the NCPC in detail, but I will conclude here with a telling snapshot of *jura novit curia* in contemporary France. Alinéa 3 of Article 12 when first enacted was taken to empower the French judge to decide in the manner of Damaška's *jura novit curia*, that is, according to the courts own point of law without notice and without hearing the parties.²⁴⁶ Alinéa 3, annulled by the 1979 decision of the *Conseil d'Etat* was, however, unlike Article 16, neither withdrawn nor replaced.

The status of alinéa 3 today is confused, like the status of the *jura novit curia* it meant to affirm. Some scholars, legislatively, have in their writing, re-numbered the remaining alinéa of Article 12.²⁴⁷ Eudier notes, however, not only the dissatisfaction of some sectors of *la doctrine* with the 1979 decision of the *Conseil d'Etat*, but also notes that the *Cour de cassation* itself, has invoked the annulled provision in at least two cases.²⁴⁸ The resurrection of alinéa 3 is clearly miraculous and supported by devotees while mainstream positivist jurisprudence rightly challenges the ability of a rule to be applied after its formal repeal. The

²⁴³ Cornu does not include *ultra petita* in his compendium of adages. It is also absent from Roland and Boyers *Adages*, *supra* note 3, but is found in Roland and Boyers companion work *Locutions latines du droit français* 4th (Litec:Paris, 1998).

²⁴⁴ see G. Cornu, *supra* note 133

²⁴⁵ see Levi-Strauss and Mauss, *supra* note 2

²⁴⁶ The text of alinéa 3 reads. "Il [le juge] peut relever d'office les moyens de pur droit quel que soit le fondement juridique invoqué par les parties. [The judge may as a matter of course raise points of pure law regardless of the legal bases invoked by the parties.]

²⁴⁷ *supra* note 228

²⁴⁸ Eudier, *supra* note 15 at 101 note 6, citing *Cour d'appel de Paris*, 25 avril 1986, *Cour de cassation* 26 janvier 1982 (Bull. civ. IV n° 31 p24), 26 avril 1984 (Bull. civ. II, n° 71 p51). Eudier, *ibid*, writes, "nombre d'auteurs considèrent qu'il conserve une "autorité officieuse" (Heron n.3) ou même une "existence vivace quoique fantomique" (H. Croze & C. Morel, n.4) peut-être à titre coutumier".

ritualistic ambiguity then of *jura novit curia* is a phenomena that tells us, if nothing else, *va savoir*.

5. Conclusion

This paper has presented the first critical examination of definitions of the adage *jura novit curia*. I will not enter into a lengthy recitation of the characteristics close scrutiny reveals in the definitions and translations offered by Damaška, Merminod, Roland and Boyer, Fox, Engleman, Black's and Cornu. Their accounts of the adage, its consequences and effects are remarkable for the diversity of rules, consequences and effects each derives from the words *jura*, *novit* and *curia*. The diversity supports a claim that *jura novit curia* scholarship must clearly distinguish between the meaning of the words of the adage and the separate consequences and effects this meaning is capable of sustaining in a given legal system at a particular time.

Three further conclusions, surprising perhaps because they are anti-intuitive, warrant emphasis. The first is the association of *jura novit curia* with law and equity, seen in Black's alternate translations, 'the court knows the law' and 'the court recognises rights'. Black's is the only source I have found that makes this association, surprising because on an unstrained literal reading of the original Latin, the translation is perfectly correct. The *jura novit curia* that can simultaneously evoke the court's duty to apply the law and the court's discretion to ignore the law to decide in equity refers to a conception of the judiciary that is omnipotent indeed.

Black's translation 'the court recognises rights' is also important because, discussing the French definitions, it leads us to a consideration of the forms of *jura* which the court may or must 'know'. The trinity of *le droit*, *droit la loi*, *droit la règle*, *droit la prérogative* assists *la mentalité* «Common law» in seeing that beyond the usual conceptual translations of *le droit* as 'law' or 'right,' *le droit* may function as *le verbe* of French process that performs the transubstantiation of proven fact into proven right. It is possible further research take this association further to reveal how *le droit* as *le verbe* might permit us to reconcile the trinity of *le droit* with Black's equity to understand how the breath of equity, despite its bad name in France, manifests in *le droit* as an invisible spirit of French law.

The third unexpected conclusion is the recurring role party election and acquiescence perform in the determination of the meaning of *jura novit curia* in particular procedural circumstances. When a party elects to plead no law, *jura novit curia* becomes an enforced obligation place upon the court. When *jura novit curia* means the court is duty bound to decide according to 'correct' law, a party may elect to plead *jura novit curia* on appeal in order to impugn an 'incorrect' lower court decision. Party acquiescence may be most significant with respect to Damaška's *jura novit curia* which has been found to breach *le principe de la contradiction*, as French courts make clear. This type of decision still occurs in France, and when a party acquiesces and declines to appeal, such a decision stands as a valid judgement despite its illegality. This dimension of *jura novit curia* is important because the stereotypic conception of *jura novit curia* is of an adage that refers to the judicial power alone.

It is perplexing, given these conclusions, that, apart from the generally brief definitions we have considered, there is little literature about *jura novit curia* in France. The silence of scholarship suggests that, notwithstanding Merminod's claim, there is really nothing *essentiel* about the adage in France, and even if there were, it would still be of no interest to legal scholars. This seems to be confirmed by the universal practice amongst French scholars to debate controversies associated with *jura novit curia* in the language of black-letter law. The abundance this type of literature further confirms the marginal status of *jura novit curia* in France.

Yet the adage is not utterly unknown. It is accepted that *jura novit curia* is part of a larger system of adages in France, be it Motulsky's quaternary, or some other configuration, perhaps inclusive of *ultra petita* or *ut quae desunt*. These adages juxtapose opposing principles and values, long standing tensions of French procedure and legal theory, values that are imperfectly reconciled by superior principles of French law. *Le principe de la contradiction* does not in itself preclude the intervention *jura novit curia* may require but establishes the *saine solution* that formally neutralises Damaška's *jura novit curia*. Enigmatically, however, cases in which the *saine* solution is breached occur in France, suggesting that the dynamic of legal practice is an independent measure of the meaning and force of the adage.

Jura novit curia in France is marked by a profound ambiguity. The adage literally proclaims a doctrine of judicial infallibility, yet it does so in a legal system where generous rights of appeal subvert this conception of the adage by establishing a counter presumption of fallibility. Appeals are not rare in France, a phenomena that precludes uninhibited affirmation of *jura novit curia* as an expression of judicial omnipotence. Chronic intervention *jura novit curia* moreover speaks to a divergence between the legal knowledge of parties and judges that challenges the very knowability of law. No legal system could extol such a result without admitting that its law cannot be understood by the people who are commanded to obey the law and who in a democracy are its ultimate authors.

It might be argued that, despite these difficulties, a common denominator can be found amongst the diversity and inconsistency of definitions of *jura novit curia*. The normative essence of the adage might be acceptably taken to say that, inasmuch as the court is charged with a duty to know the law, in so deciding a court is *not necessarily* bound by party argument. The key phrase, 'not necessarily,' however, supports only a negative claim, that such intervention is not, as a general rule, prohibited. The negative conception of *jura novit curia* must be ever contingent, for it invites rather than answers the questions that precipitate controversy in France: first, as to when and why a court's intervention with its own point of law is permitted, necessary, or desirable and secondly, what rules – be they rules of law – customs or etiquette, ought to govern the manner and form of intervention. These are the issues which this paper has attempted to raise and to which I return in Part II of *Va savoir*.