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Montesquieu

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Montesquieu (Céline Spector, Sorbonne University, SND)

Leading figure of the Enlightenment, Montesquieu was a major influence for Rousseau, Adam Smith and the Founding Fathers of the Constitution of the United States such as Madison. Already a celebrity thanks to the *Persian Letters* and to the *Considerations on the Causes of the Greatness of the Romans and of their Decline*, Montesquieu took twenty years to complete the *Spirit of the Laws*, published in 1748, which was immediately a tremendous success all over Europe. Yet the controversy around his work was intense: the *SL* was put on trial by the theologians of the Sorbonne and on the Index of forbidden books in 1751.

Montesquieu's intention is first to explain how laws and customs come about. His goal in the *Spirit of the Laws* is to understand the social and political institutions all over the world, referring to both natural and social causes. Book I opens with a famous and paradoxical definition of laws: "Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of things" (I, 1). Law is not a pure act of the will. Rather, it must be understood in relation to a set of factors (natural, political, social, economic, religious). Searching for the spirit of laws, Montesquieu seeks to understand the laws in terms of nonlegal phenomena, political as well as nonpolitical. The laws must first relate to the nature and the principle of government (Books II to VIII). But the *Spirit of the Laws* also considers more specific relations: laws must relate to the size of the state (end of book VIII, books IX and X), to liberty (Books XI to XIII), to climate (Books XIV to XVII), to the nature of the terrain and the different ways of life (Book XVIII), to customs, manners and the "general spirit" of peoples (Book XIX), to economics and demography (Books XX to XXIII), to religion (Books XXIV and XXV). Finally, laws must have relations between themselves, with their origin, and with the purpose of the legislator (Books XXVI, XXIX). This is the true meaning of the "spirit" of the laws: laws

must be proper to the people for which they are framed; they should differ in different places and times according to the differences of climate, commerce, religion, and so on. But Montesquieu is not only a sociologist. His intention is normative: he is concerned with *good* laws and teaches the importance of political freedom considered as a rare good, to be preserved against many perils. Powers ought to be limited – even in Europe and foremost in France.

Forms of Government

Laws are primarily related to the form of the state. The *Spirit of the laws* breaks with modern ideas on sovereignty. Political science must be comparative: instead of highlighting the universal conditions of political legitimacy (like Hobbes or Locke), it should specify why laws and customs are what they are in each regime.

According to Montesquieu, there are three archetypes of governments: republican governments, either democratic or aristocratic, monarchies and despotisms. Whereas the nature of a regime is its institutional structure ("what makes it what it is"), its principle resides in the human passions or political emotions that sustain it ("that which makes it act", III, 1). To ensure that a government be preserved against its natural tendency to corruption, its spring should sustain its laws, and its laws support its spring.

First, the republican government is the one where the people, or only part of the people, exercise the sovereign power. Democracy is not characterized by the advantage granted to the "immediate participation of the people" or the fierce dispute over common affairs; it is not even defined by self-government. According to Montesquieu, it is up to the Senate to elaborate the laws before to have them ratified by the people. Democracy, like all the other regimes, also has to fear corruption, due to the abuse of power of the people who holds the sovereign power. In

a democracy, the attribution and the communication of the power are governed according to certain fixed rules, as well as in the monarchy: the fundamental laws fix the extension and the organization of the right of suffrage. If the people are unable to govern by themselves, they are able to choose their magistrates depending on their reputation. In order to safeguard democracy, it is thus necessary to introduce selection procedures which break up with strict equality: the prosperity of the democratic system depends on its ability to correct, through aristocratic procedures, the pure exercise of democracy.

Popular governments are mostly Greek or Roman. Montesquieu refers to ancient philosophers and historians: Plato and Aristotle, Thucydides, Polybius, Livy, Tacitus, Cicero... To be sure, the modern dimension of the republic is not absent – references are made to the United Provinces, Switzerland, Germany or to the republican episode in England. But democracy suits better Antiquity, because heroic virtue was stronger then: "One can define this virtue as love of the laws and the homeland. This love, requiring a continual preference of the public interest over one's own, produces all the individual virtues; they are only that preference" (IV, 5). Even if political virtue is not Christian nor moral virtue, civic devotion is very demanding. Self-government requires self-restraint. As complete dedication to the common good, patriotism has to supersede personal ambition and greed. This is why virtue and commerce usually cannot stand together: "The political men of Greece who lived under popular government recognized no other force to sustain it than virtue. Those of today only speak to us only of manufacturing, commerce, finance, wealth, and even luxury" (III, 3). Republics seem to belong to classical Antiquity. This antinomy will be repeated by Rousseau in the *Discourse on the Sciences and the Arts*: in the modern world where the preoccupation of men is wealth, luxury undermines the foundations of the love of the country. But republics are not totally excluded from modern times: besides the system of confederations, which allows the modern republics to ally

themselves and ensure their defense, *The Spirit of the Laws* considers the case of trading republics, like the Low Countries or Switzerland. In these republics where men are dedicated to trade and not to war, a strict policy allows commerce not to corrupt virtue. By compelling citizens to live off their work, and by preventing them from accumulating too much wealth, the lawgiver may use the spirit of commerce to nourish sobriety and thrift (V, 6). In any case, the spring of democracy works to preserve the political structure, and all of the laws must support this spring : equality, frugality and good mores should be preserved thanks to different institutions of social control (Roman censors for instance) which preclude virtue from corruption and check the vitality of public zeal.

Aristocracies (like in Venice) provide a second model of republic. In aristocracies, the sovereign power is in the hands of the noble, who make the laws and execute them. Just as democracy must counter the tendency of the people to abuse their power and to oppress the great, aristocracy must constantly fight against the tendency to restrict its ruling caste, against the will of the nobles to oppress the people. Therefore, its preservation requires conditions quite unlike those required by democracy. While in a democracy it is necessary to strengthen the aristocratic election procedures, an aristocracy must, in order to maintain itself, move closer to democracy. Moderation, the principle of the aristocracy, is a softer version of political virtue: nobles have to restrict themselves in order to prevent their domineering inclinations.

In monarchies, the King rules by fixed and established laws. Monarchies, where the prince is "source of the military and civil power" are preserved against the risks of abuse of power by integrating "intermediary, subordinate and dependent powers", namely political and legal bodies (Parliaments, cities, feudal and ecclesiastical jurisdictions) or social orders (nobility, clergy). Their role is key: because these bodies exist by their own right and not merely by

delegation of power on the part of the king, they avoid the despotic shift. As links between the king and the people, intermediary powers are supposed to check that obedience goes only to a monarch who is respectful of the "fundamental laws" of the kingdom. The modern danger is indeed absolutism. Primarily concerned with the French regime, Montesquieu deems intermediary bodies to be necessary to avoid concentration of power in the hand of the King: thanks to Parliaments and townships in particular, the risk of arbitrary power is contained. Monarchy properly understood is a regime with "a depository of laws", essentially an independent judiciary.

Yet this regime also has its own principle. Honor, defined as "the prejudice of each person and each condition" (III, 6), is the soul of monarchy. In this case, there is no need for virtue to animate the state machine: "In monarchies, politics accomplishes great things with as little virtue as it can, just as, in the finest machines art employs as few motions, forces, and wheels as possible. The state continues to exist independently of love of the homeland, desire for true glory, self-renunciation, sacrifice of one's dearest interests, and all those heroic virtues which we find in the ancients and know only by hearsay" (III, 5). Honor is the dominant passion of these regimes: this aristocratic *ethos* is associated with a desire for reputation, yet it is useful for the common good (III, 7; IV, 2). The laws of honor triumph over all other laws (religious, moral or civil). Publicly defending their status and living up to their rank, noblemen tend to oppose their resistance to arbitrary acts and abuses of power.

Finally, despotism is for Montesquieu a political regime in its own right: it is not a simple corruption of the monarchy, but the regime where one single individual "draws everything along by his will and his caprices" (II, 1). Oriental despotism, which flourishes in the large empires of Asia (Turkey, Persia, China) and the warm countries where climate affects customs,

cannot be considered only as a specific form of government: it is the perpetual threat to all forms of government, even in Europe and moderate climates. Despotic states present a minimal organization of power, where stable institutions are non-existent (II, 5). The "fundamental law" in these regimes is that of the communication of power from one to one, so that the despot may indulge in idleness and voluptuousness. In despotic states, there is no fixed institution nor constitutional law: religion serves as the only check on political power. The fundamental law of this regime without laws is therefore that the despot delegates all his power to another man (the "grand vizier"); the despot is inclined to make use of all the pleasures, especially in the seraglio, which distracts him from the state government. In the despotic regime, power remains personal, non-institutionalized, undistributed between different political and social forces (V, 16). Montesquieu draws on a paradox: absolute power is never exercised. At the same time, in despotic regimes, fear (the principle of this regime) reduces man to pure animality, and necessarily regulates his conduct, as the laws of motion govern bodies. Men governed by fear are like animals. Not only does terror prevent disobedience, it removes the very possibility of reasoning and deliberation. In these regimes without public space, the individual is dispossessed of his own temporality: "There, men's portion, like beasts', is instinct, obedience, and chastisement" (III, 10). Montesquieu may not have a "best regime" in mind; yet he certainly holds despotism as the worst one. To prevent oppression of the people, institutional design has to be done.

Moderation and political freedom

If Montesquieu uses the concept of despotism as a powerful foil, his philosophy is directed to another concept, namely moderation: "I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation must be that of the legislator; the political good, like the moral good, is always found between two limits" (XXIX, 1). The concept of moderation

has several different meanings: it refers to the virtue of the legislator but above all to the common character to all regimes other than despotism, where power is distributed and authority, balanced. Moderate governments are complex machines: "In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another; this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce" (V, 14).

Consequently, the conditions of freedom are first and foremost conditions of moderation. Books IX and X deal with the conditions of external security related to the size of the State, before books XI and XII examine internal security. Later, Montesquieu will also highlight the natural conditions of freedom: the southern nations (in Asia for instance, but also in the south of Europe) are not considered as fit for freedom as the northern ones. **The northern climate is the best climate for development of courage and energy, best fit for defending liberty. Instead, a warm climate makes people more lazy.** For sure, moral causes may assume the ascendancy over physical causes. The wise lawgiver can rely on his understanding of physical causes to win over certain vices (such as laziness). This means that civil slavery may have natural roots. In Book XV, Montesquieu starts with a general condemnation of absolute mastery over another's life and goods as "contrary to the fundamental principle of all societies", harmful to both master and slave (XV, 2). But a distinction should be made: in excessively hot countries and under despotism, where slave and subject are alike, slavery is not as intolerable; it "runs less contrary to reason" (XV, 7). In the same way, political freedom may be the privilege of certain peoples: in spite of man's love for liberty, in the largest part of the globe despotism is unavoidable.

Even in Europe, political freedom is constantly threatened by the "eternal experience" of abuse of power. Without relying on political or moral virtue, Montesquieu thus advocates checks and balances. Power versus power: the distribution of the three powers of the state is the condition that allows moderate governments, where at least two of the powers of the state are distributed, to be free. Political freedom is first associated with the absence of constraint external to that of the laws. Freedom is not defined as independence, but as freedom under the law: "Liberty is the right to do everything the laws permit" (XI, 3); citizens are truly free when they are subject only to the power of the law. Such a definition is opposed to the republican tradition which founds political freedom in self-government: in the *Spirit of the Laws*, the power of the people is not the freedom of the people. No doubt Montesquieu occasionally invokes this freedom conceived as obedience to the law that we have given ourselves, not in reference to the ancient popular regimes or the Italian cities of the Renaissance, but rather of contemporary England: "As, in a free state, every man, considered to have a free soul, should be governed by himself, the people as a body should have legislative power" (XI, 6). However, political participation is now a means and not an end; it is the instrument of security. Liberty depends on the protection of the individual against the arbitrary power of the State: "Political liberty in a citizen is that tranquility of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen" (XI, 6; see XII, 2).

Montesquieu seeks the principles of political freedom in the English Constitution. If each Constitution has a specific purpose that directs its institutions and laws in addition to conservation (war, trade, religion ...), "there is also one nation in the world whose constitution has political liberty for its direct purpose. We are going to examine the principles on which this nation founds political liberty. If these principles are good, liberty will appear there as in a

mirror" (XI, 5). In this chapter, Montesquieu highlights the principles of political freedom while describing the main institutions of England after the Glorious Revolution. Eighteenth Century England is a peculiar regime: not a feudal monarchy any more, but rather a kind of modern Republic with a king, which does not fit in the previous classification of governments. Montesquieu considers the representative republic as by far superior to the ancient direct democracy. Moreover, he makes the case that fragmentation of power is instrumental to freedom.

Yet a strict separation of powers is untenable: for instance, Montesquieu does not hand over the legislative power to Parliament alone, but to Parliament and the monarch. If Parliament formulates and votes the laws of which its members have taken the initiative, these laws come into force only if the monarch agrees. The monarch takes part in the legislation by his faculty of vetoing; the executing power, from this point of view, it "must take part in legislation". Consequently, the idea of separation of powers is a myth. Montesquieu says so explicitly: in the monarchies he knew (like in France), "the three powers are not distributed and cast on the model of the constitution which we have mentioned", namely the Constitution of England (XI, 7). For the safety of the citizen to be preserved, a single power must in general be "separated" from the other two, namely the judicial power attributed, in England, to temporary juries rather than a corps of magistrates. So that the feeling of freedom is preserved and the citizen does not experience the fear of the magistrates that characterizes the despotic states, it is necessary to somehow neutralize the power to judge: it must become, "in some fashion, null" - the judge being in a way only the "mouth that pronounces the words of the law". A decent penal law, establishing proportion between crime and punishment, is also required: "The knowledge already acquired in some countries and yet to be acquired in others, concerning the surest rules

one can observe in criminal judgments, is of more concern to mankind than anything else in the world" (XII, 1).

In England, political freedom is not moderate, but extreme: "I do not claim hereby to disparage other governments, or to say that this extreme political liberty should humble those who have only a moderate one. How could I say that, I who believe that the excess even of reason is not always desirable, and that men almost always accommodate themselves better to middles than to extremities?" (XI, 6) Before being corrupted, the French monarchy could appear as a happy medium between the concentration of the powers of despotism and the extreme distribution of powers in England: the executive and the legislative in the hands of the monarch, the power to judge in the subjects. In France, the aim of the state is not freedom, but glory; now "this glory results in a spirit of liberty that can, in these states, produce equally great things, and can perhaps contribute as much to happiness as liberty itself" (XI, 7). The English Constitution thus serves as a yardstick against which to judge the liberty of other constitutions, and more specifically of the French Constitution; it does not constitute a political regime to universalize.

Commerce and Religion

More than any other nation, England embodies the principles of *doux commerce*: "That nation, made comfortable by peace and liberty, freed from destructive prejudices, would be inclined to become commercial" (XIX, 27). The finest praise in book XX goes to it: "this is the people in the world who have best known how to advantage of each of these three great things at the same time: religion, commerce, and liberty" (XX, 7). As a commercial society, England was able to discover the true relationship that binds wealth and power among modern nations: commerce is no longer merely the instrument of its power, but its very substance. Nevertheless, Montesquieu is far from neglecting English commercial jealousy, and its aspiration to Empire.

If commerce – replacing conquest – leads to peace and has beneficial effects on government (giving incentives for a good policy), commercial empire may still be fed by slave trade (XXI, 21).

Montesquieu conceives of reciprocal relations between religions and laws: the legislator must ensure that the civil laws "correct" religions if necessary, as well as the laws of religion can correct the disadvantages of the political Constitution and have the effect of civil laws (XXIV, 25-28). Montesquieu underscores the social utility of religion, when used by a wise legislator. He dares to maintain that it is less the truth or the falsity of a dogma that makes it useful or pernicious to men in the civil state, than the use or the abuse that one makes of it. Deprived of any normative privilege, religion is useful not to enforce obedience from the subjects but rather moderation of the kings. The praise of Christianity is based on its softening power, moderating the desire for domination and the risks of abuse of power in conquest. Its function, as such, is analogous to that of commerce; but where commerce softens manners and contributes to political liberty by virtue of its mobility, the utility of religion lies in its fixity (XXVI, 2).

Finally, the legislator has to be aware of the general spirit of the nation, and impulse legal change within a given natural and social framework: "Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners; a general spirit is formed as a result" (XIX,4). When the general spirit is not harmful to the principle of government, the prince or the lawgiver must preserve it as part of the liberty of the people. According to Montesquieu, this is the case in France, a sociable nation which does not need any religious or ascetic reform.

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