

Krzysztof Łazarski
Uczelnia Łazarskiego, Warszawa

Law, Forms of Government and Liberty in Montesquieu's Thought

It is difficult to imagine a work more famous and admired by its contemporaries, one which had a more significant impact on the eighteenth century political thought than Montesquieu's *The Spirit of the Laws*. The book, first published in 1748, became instantly a classic, comparable to the greatest works of the ancients, a required reading not only for political thinkers and statesmen, but also for the educated public in general. *The Spirit* seemed as if it had realized one of the basic aims of the Enlightenment: it was to be "the science of government" whose level of certitude equaled that of natural sciences. At last the society and its institutions could be studied with the same exactness as stars. The enlightened circles were thrilled and universally applauded Montesquieu's work. They treated him as a political sage and "an oracle" in political theory and practice. The framers of the American Constitution, who first put into practice his idea on the division of powers, had really terrible time with another tenet of his teaching, namely that republican government is suitable only for small, city-like polities. In the opinion of the Framers Montesquieu could not have been mistaken, and yet the nascent American Union was not a city-state.

Was Montesquieu's fame justified? Did he really elevate political theory to a new, substantially higher stage? What was his real message? In other words, did he really deserve to be put on the pedestal? And what remains of his teaching, now, about 250 years after his death.

Charles-Louis de Montesquieu (1689–1755) was born at La Brède, in the vine-growing region of Bordeaux of southwestern France.¹ His true family name was de Secondat. On his mother side, he descended from the nobility of the robe, i.e., from those who had gained noble status due to the service in state administration. In 1708 he graduated from the University of Bordeaux with the degree in law and, subsequently, he continued his legal education in Paris. He returned to his family estates in 1713 and, soon afterwards (1716), he inherited from his childless uncle the estates and title of Baron de La Brède et de Montesquieu. As of that time he habitually used the name Baron de Montesquieu.

His uncle passed on to him something else in addition to the title and estate – his high office in the *parlement* of Bordeaux (the highest judicial and administrative body in the province). As the closest relative, the younger Montesquieu had the right to purchase the office as the first buyer and for a substantially smaller fee than any other candidate, provided that he was qualified. And Montesquieu was qualified as a lawyer. France was the fatherland of venality of offices, and his case shows well how this worked in practice.

In subsequent years, Montesquieu quietly pursued his legal career in Bordeaux but at the same time he developed scholarly interest in matters ranging from social to natural phenomena. As a member of the Academy of Bordeaux, he wrote papers on a wide variety of topics. A fundamental change in his life came with the publication of his novel, titled *Persian Letters* (1721). The novel became a success while his author a celebrity in the Parisian salons. As a result Montesquieu spent more time in the capital than in Bordeaux, and finally, after selling his office, he moved to Paris altogether. A provincial lawyer turned into a *philosophe* of fame, therefore he had to live as such.

Between 1728 and 1731 he traveled extensively throughout Europe, visiting Austria, Hungary, Italy, Germany, the Netherland, and finally England where he lived for two years and joined Freemasonry. Upon his return to France, he moved back to his estates, because failing eyesight no longer allowed him to shine in Paris. In spite of the disease he continued writing on various topics, the most prominent of which was Roman ancient history. Increasingly however, he was focusing on what would become his *opus magnum*, *The Spirit of the Laws* (*Esprit des Lois*). In time his sight deteriorated so much that Montesquieu was forced to dictate his thoughts rather than

¹ This brief biographical sketch is mainly based on D. W. Carrithers's *Introduction*, [in:] Montesquieu, *The Spirit of Laws*, ed. D. W. Carrithers, Berkeley 1977, p. 3–88; I. Berlin, *Against the Current: Essays in the History of Ideas*, Princeton 2001, p. 132–133; D. Boucher, P. Kelly, *Myśliciele polityczni. Od Sokratesa do współczesności*, Kraków 2008, p. 290–296.

write them. He completed the book nearly seventeen years later in 1748.² As mentioned, it became an instant success, being on the *Index librorum prohibitorum* (1751), notwithstanding. Montesquieu died in 1755 in Paris, suffering from a sudden attack of fever.

The admiration that *The Spirit of the Laws* (SL) aroused in the past and continues to arouse in the present is somewhat puzzling.³ It is a lengthy work, with over a thousand pages, that hardly anyone is able to digest in its entirety.⁴ Its structure is also not helpful – six parts subdivided into thirty-one books with no apparent guiding principle. This can confuse any reader, as it did Voltaire who had complained about it. Furthermore, the book is filled with inconsistencies and outright contradictions that are typical for any work written over a period of many years.⁵ However, perhaps it was d'Alembert who was right by claiming that obscurity in Montesquieu's work was premeditated: "What would be obscure for vulgar readers is not for those whom the author has had in view [...]. Having to present [...] important truths, the [...] direct statement of which would have been able to injure without advantage, [...] Montesquieu has had the prudence to envelop them; and, by this innocent artifice, has hidden them from those to whom they would be harmful, without their being lost for the wise."⁶

If we are to put d'Alembert suggestion aside, and judge *The Spirit of the Laws* for what they are, we are inclined to think that the book owes initial success to its allegedly scientific nature and to its educational usefulness. For the

² Carrithers states that in fact Montesquieu began his work over *The Spirit of Laws* in 1734, thus he would devote thirteen years, not seventeen, as most of his biographers claim (*Introduction...*, p. 13).

³ For a brief summary of Montesquieu's impact on his contemporaries and the future generation, see: D. L. Williams, *Political Ontology and Institutional Design in Montesquieu and Rousseau*, "American Journal of Political Science" 2010, Vol. 54, No. 2, p. 526. Isaiah Berlin is a little less enthusiastic (*Against the Current...*, p. 130–132).

⁴ A relatively recent article by a Scottish university professor M. P. Masterson opens with a story of a good student paper on Montesquieu that nearly convinced his professor to read *The Spirit of the Laws* (*Montesquieu's Grand Design: The Political Sociology of Esprit des Lois*, "British Journal of Political Science" 1972, Vol. 2, No. 3, p. 283).

⁵ This had been already noticed by Montesquieu's contemporaries. Cf. for example D. Lowenthal, *Book I of Montesquieu's The Spirit of the Laws*, "American Political Science Review" 1959, Vol. 53, No. 2, p. 485–486; or more recent: A. J. Samuel, *The Design of Montesquieu's The Spirit of the Laws: The Triumph of Freedom over Determinism*, "American Political Science Review" 2009, Vol. 103, No. 2, p. 305–306.

⁶ D'Alembert's eulogy of Montesquieu quoted by D. Lowenthal, *Book I of Montesquieu...*, p. 486, 498.

purpose of *The Spirit* was two-fold: first and utmost, scholarly and, second, pedagogical. That second aim is usually overlooked, outshined by the first, yet Montesquieu does not hide that he includes it among his goals. In the Preface he writes: "It is not a matter of indifference, that the minds of the people be enlightened. The prejudices of the magistrate have arisen from national prejudice. In a time of ignorance they have committed even the greatest evils without the least scruple." He then goes on, expressing hope that he succeeds in persuading "those who command, to increase their knowledge," and that he contributes in general to making "mankind recover from their prejudices."⁷ In this he is like other enlightened French thinkers whose first thought was to combat and ridicule the old order, and second to win over the rulers and the elites. One should not lose sight of this when analyzing *The Spirit*. As in many other works of the Enlightenment, behind the detached style and alleged objectivity lie a burning desire to destroy the old and to build a new world.

If pedagogic and propaganda were important for our *philosophe*, his "scientific" purposes figure at the forefront. As John Hallowell, the author of an American classic on history of liberal thought, observed, Montesquieu was "born in an age that was captivated by the success of Newtonian physics."⁸ Mysteries of the universe seemed finally dispelled; heaven is not just a matter in motion, as previous thinkers claimed (Galileo, Descartes, Hobbes), but obeys the law of gravitation. How incomplex and how convincing! Now, if one only discovered a law of politics and society, parallel to that of gravity, how simple and reformable would human world become. And Montesquieu seemed to have achieved it.

Book I presents his teaching on law that extends to every corner of the universe, from natural order to human affairs. "Laws [...] are the necessary relations derived from the nature of things. In this sense all beings have their laws, the Deity has his laws, the material world its laws, the intelligences superior to man have their laws, the beasts their laws, man his laws." On the surface this concept is not far from St. Thomas's eternal, natural and human laws. They also extend from stars to men. The similarity is even more striking if we keep in mind that Montesquieu connects law with reason, not will.⁹ Yet

⁷ Montesquieu, *The Spirit of Laws*, ed. by D. W. Carrithers, Berkeley 1977, Preface, p. 10, 12–13, hereafter referred to as SL. References from the SL include book number (Roman numerals), followed by chapter number and then paragraph number.

⁸ J. H. Hallowell, *Main Currents in Modern Political Thought*, Lanham 1984, p. 141. Cf. *The Oxford Illustrated History of Western Philosophy*, ed. A. Kenny, Oxford 1997, p. 328.

⁹ SL, book i, chap. 1:1 and chap 1:11. Montesquieu links law with human rather than divine reason.

these similarities are deceptive. St. Thomas's law originates in God, resides in His reason and governs all being for their own good, while Montesquieu's law is a "blind fatality" that extends from "the Deity" to all things, even if he denies its fatalist nature.¹⁰ The Deity itself seems under the power of law. It is active but through invariable laws, not miracles. By implication, the first and greatest miracle – creation – could also be a result of blind necessity, dictated by law.¹¹

Laws "are a fixt and invariable relation" continues Montesquieu. In fact, they are so fixed and so constant, that in material nature "each diversity is uniformity, each change is constancy."¹² Natural world acts perfectly according to these laws. Exceptions concern intelligent beings, who although are also under invariable laws, yet they do not "conform to them *so exactly* as the physical world" (italics KL). The reason for it is that we are finite creatures, "liable to error" and endowed with free will.¹³ If we were not partially exempt from invariable laws, then all laws relating humanity would have been the same. In subsequent books he also adds geography, climate, soil, etc to justify differences in human law.

Montesquieu downplays terms like state of nature and law of nature both so prominent in Hobbes's and Locke's thought. In his copious book he only briefly describes the conditions before the establishment of society. He endows individuals with some sense of primordial justice. They exchange benefits and injuries, in other words, they are kind toward those who are kind and retaliate if attacked.¹⁴ We can deduce that this is a part of our nature belonging to the category of "invariable laws" which we can hardly challenge. Furthermore, before founding civil society, individuals feel weak and timid, and fear each others. Their fear, however, does not lead them to war, as Hobbes wanted, but to peace, because they feel, first of all, inferior, not equal. Living in peace in pre-societal conditions makes, according to Montesquieu, the first law of nature. The need of nourishment is the second natural law, while attraction we feel for each other, in main part derived from sex, is the third law.¹⁵ The three first laws of nature, resulting from sentiment – as stresses an American specialist in Montesquieu's thought David Lowenthal – lead to

¹⁰ Cf. SL i, chap. 1:2 and chap. 1:6. Hallowell reads it as the law of cause and effects that rules in the universe (*Main Currents...*, p. 142). See also: D. Lowenthal, *Montesquieu*, [in:] L. Strauss, J. Cropsey, *History of Political Philosophy*, 3rd ed., Chicago 1987, p. 514.

¹¹ D. Lowenthal, *Book I of Montesquieu...*, p. 487.

¹² SL i, chap. 1:7.

¹³ SL i, chap. 1:10 and 14.

¹⁴ SL i, chap. 1:9.

¹⁵ SL i, chap. 2:2, 3, 7. See also SL i, chap. 1:12.

the forth, resulting from reason. Individuals endowed with reason, however brute and primitive in original state, gradually acquire knowledge, and this animates in them “the desire of living in society.”¹⁶ Yet, as soon as they found society, “they lose the sense of their weakness, the equality ceases, and then commences the state of war.”¹⁷

Montesquieu’s concept of state of nature and its laws beg a few comments. It is first of all an odd vision. Only by implication we can deduce that state of nature provides conditions of liberty and equality. Principles so prominent in other similar concepts, for some reason, are only implied, not stated. Self-preservation is similarly downplayed.¹⁸ The exchange of benefits and injuries seems to serve only as a means to avoid Hobbesian *homo homini lupus* principle, because this would open a state of war and, indirectly, justify arbitrary power. At the same time, benefit-injury exchanges do not lead individuals to kindness and charity towards each other, probably to avoid Locke’s perspective on state of nature. Nourishment is placed in the category of law of nature, while it fits more to “invariable laws,” where he puts benefit-injury exchanges. And, finally, the establishment of society immediately brings state of war, which, in fact implies that war existed even in state of nature. Montesquieu’s inconsistencies are thus truly striking, particularly that they occurred in one of his “foundation” chapters, one which serves him as the cornerstone for his theory.

The state of war that ends the state of nature and coincides with the emergence of society, is not explained but just mentioned. It seems the notion of state of war serves Montesquieu only as a pretext to move to the topic of human law that according to him arises from war. Human law consists of “the law of nations,” laws on political regime and the civil law. The first category, the law of nations, regulates the relations between “a variety of nations” that inhabit “so great planet.”¹⁹ War is a means to conquest which in turn aims at preservation, and the law of nations is to regulate this process. Each nation sets rules relating to it, thus the law of nations seems to differ in each case.²⁰ The second category of law is “a politic law.” It regulates the relations between “the governors and the governed.” Since “no society can subsist without a [...] government,” each must have such a law. Dismissing authority of a few,

¹⁶ SL i, chap. 2:8; D. Lowenthal, *Book I of Montesquieu...*, p. 492.

¹⁷ SL i, chap. 3:1.

¹⁸ SL i, chap. 1:13. „They have not our hopes, but they are without our fears [...]; even most of them are more attentive than we to self-preservation, and do not make so bad a use of their passions.”

¹⁹ SL i, chap. 3:3.

²⁰ SL i, chap. 3:3, 5.

Montesquieu claims flatly that government is either of a rule of one or of many.²¹ Finally, the third category – the civil law – concerns “communication of citizens among themselves.” As individual will is insufficient to enforce its wishes in relations to others, civil law expresses a common will, i.e., “a conjunction of all their wills.”²²

At the end of chapter three of book I Montesquieu finally touches that which has become a mark of his work, the spirit of laws. Four paragraphs earlier he states that law “is human reason, inasmuch as it governs all the inhabitants of the earth.” Strangely overlooking the law of nations, he continues that the political and civil laws of each nation are “only the particular cases in which this human reason is applied.”²³ Their diversity originates in a peculiar “humor and disposition” of each nation, the mode of its government and institutions.²⁴ And then comes a famous paragraph that makes geography, climate, soil, weather as well as the character of human habitat (sedentary or nomadic; engaging in husbandry, hunting or agriculture) responsible for the spirit of laws. That spirit also depends on liberty, religion, commerce, wealth and manners of the people. Only taken together all these features shape “the *Spirit of Laws*” of a particular nation.²⁵

Lord Acton sarcastically suggested that the idea of explaining laws – and by extension, political regime – “by the barometer and the latitude” was to make Montesquieu's praise of England “less injurious to French patriotism.” More seriously, he claimed that it served the thinker as a means to reconcile himself with monarchy in France, however odious it was in his time.²⁶ Lowenthal suggests far more serious motivations. According to him, Montesquieu rejects the quest of ancient and medieval thinkers for the best theoretical as well practical regime. There is no such thing as the best order. All depends on particular conditions. Ultimately, this leads to relativism, even if on the surface this concept opposes subjectivity and appears in a flair of objectivism.²⁷

²¹ SL i, chap. 3:3, 7, 8. Montesquieu seems to disagree with Aristotle by treating a union of several families as a polity, not village. He also has a vague remark about paternal authority that sounds like an echo of Locke's view on this topic (SL i, chap. 3:8).

²² SL i, chap. 3:3, 10.

²³ SL i, chap. 3:11.

²⁴ SL i, chap. 3:12–13; cf. 9.

²⁵ SL i, chap. 3:14–15. In book XIX, chap. 4:1 Montesquieu was briefer but straighter to the point: “Man are influenced by various causes, by the climate, the religion, the laws, the maxims of government; by precedents, morals and customs, from whence is formed a general spirit that takes its rise from these.”

²⁶ J. E. D. Acton, *Lectures on the French Revolution*, ed. N. Figgis, R. V. Laurence, London 1910, p. 7.

²⁷ D. Lowenthal, *Montesquieu...*, p. 516.

In subsequent books of *The Spirit* (between II through X), Montesquieu compares various forms of government. Yet, he does not engage himself merely in comparative politics. He attempts to do far more: he searches for the nature and principle of each government, i.e., for hidden springs that move it. Since in parallel, he also analyzes peoples and their natures, he attempts not only at erecting a scientific political philosophy but also political sociology (or sociology of politics) and political psychology.²⁸ Furthermore, in line with Enlightenment's penchant for geometry and pedantry, he claims that his teaching is universal, applicable to any society and any political regime anytime in history. Quite possibly, however, this claim is only to distract "the vulgar reader," not to instruct the wise, for in fact his observations concern mainly France of his time, supplemented by customary Greek and Roman examples, and few others.

According to Montesquieu, "there are three species of government; "republican, monarchical and despotic."²⁹ Let's review each of them, one by one, i.e., without following Montesquieu's confusing order.

Republic

Democracy

Republican government is when the people or part of it is the sovereign. This constitutes its nature. A republic becomes democracy if all people are the sovereign in some respects and the subject in others. Since not all people know how to govern, especially how to prepare legislation and direct foreign affairs, they select a council or senate. The people have no difficulty whom to chose for office because they know each other. However, a customary method of choosing the senators, court members and lower magistrates is not an election – which leads to envy – but a selection by lot. Only military commanders and higher magistrates are elected. Offices and participation in popular assembly are not paid, probably to exclude, or at least make harder for the poor to hold office. Montesquieu points to Rome and Athens as examples of a republican regime, but in fact he copies mainly of Solon's rules on limited democracy.³⁰

²⁸ Cf. *The Oxford Illustrated History...*, p. 328; M. P. Masterson, *Montesquieu's Grand Design...*, p. 283–284; G. H. Sabine, *A History of Political Theory*, 4th ed., Hinsdale 1973, p. 507.

²⁹ SL ii, 1,1.

³⁰ SL ii, chap. 2.

The principle (Montesquieu likens it to the mainspring of a watch) of democracy is virtue, especially love of the republic, equality, frugality, courage and sacrifice of private interest for the public good.³¹ Unlike in monarchy and despotism in which law or force substitute for virtue, democracy cannot survive without virtuous people, especially if they hold office. Without virtue democracy is a short-lived, terrible regime torn by partisanship and corruption. Citizens behave like fugitive slaves, frugality is a vice and pleasure passes for liberty.³² Thus is why education aimed at cultivating virtues is all important in a republican form of government, much more than in any other form of authority. Additionally, the senate is in charge of public mores playing the role of a censor. Paternal and marital authority also ought to be strong to maintain morality.³³

Montesquieu underlines that democracy requires equality but must avoid extreme equality. Extreme equality does not tolerate any authority and distinction, even the most natural such as parental and marital. It is therefore self-destructive and cannot subsist. Although we are born equal in the state of nature, we cannot continue it in society and some inequality seems natural.³⁴

Aristocracy

Aristocracy is also a republican form of government. It arises when sovereign power rests only in some part of the people – the nobility – while the rest of the people is regarded as subjects. If aristocracy is numerous, it forms a noble democracy and needs a senate to prepare others for a decision making process. Aristocracy holds elections, not a selection by lot to choose the government. The best aristocracy is that which only has a small number of people who do not share power. Consequently “the more aristocracy borders on democracy, the near it approaches perfection: and, in proportion as it draw towards monarchy, the more is it imperfect.” In this context Montesquieu also adds the remark that aristocracy in Poland is the most imperfect because it enslaves the peasants.³⁵

The virtue of aristocracy is moderation, for the nobles ought to restrain themselves from oppressing the people and from seeking preeminence among themselves. Still, however moderate, aristocratic government displays a vigor

³¹ SL iii, chap. 3:1; v, chap. 2–6; cf. iii, chap. 5:2. For Montesquieu's use of the term principle, see M. P. Masterson, *Montesquieu's Grand Design...*, p. 286.

³² SL iii, chap. 3. Cf. vii, chap. 2:1.

³³ SL iv, chap. 5; v, chap. 7:10; chap. 19:14–15.

³⁴ SL viii, chap. 2–3, chap. 4:1.

³⁵ SL ii, chap. 2:18 and chap. 3.

unknown to democracy. In a direct contradiction to Aristotle, Montesquieu claims that since equality is removed from aristocracy, virtues are not as common in it as in democracy (he also does not see a distinction between aristocracy and oligarchy). Consequently, laws must substitute for virtues, and enforce moderation. The principal sources of disorder in aristocracy is excessive inequality among the nobles, and between the nobles and the people. While largess is pernicious to democracy, it is beneficial in aristocracy. In the former, wealth makes the people forget virtue (citizenship), in the latter, it gives the people some sense of citizenship.³⁶ Corruption of aristocracy occurs when the power of the nobles are arbitrary, in particular if it is hereditary. To maintain moderation, aristocracy should have law against luxury.³⁷

Republics both democratic and aristocratic are beyond rescue once they fall into corruption and spoil their virtues.³⁸ Republican regime is also appropriate for “a small territory; otherwise it cannot long subsist.” It ends either in loss of liberty or disintegration.³⁹ It was these passages that gave awful headaches to the framers of the American Constitutions. However, his further remarks on confederate republics perhaps served them as an inspiration to move from a confederation to a federation.

Monarchy

The nature of government is monarchical if one person is the sovereign and governs “by fixt and established laws.” Since all power originates in the ruler, there must be “intermediate, subordinate and dependent powers” through which authority acts. The nobility is “the most natural intermediate and subordinate” body, in fact, so natural that there can be no monarch without nobility and no nobility without monarch. As Montesquieu stresses, monarchy would slip into despotism without it. The clergy plays a similar role – a statement striking for a freemason. Montesquieu also puts emphases on the role of “a depositary power” in monarchy. Such a body would promulgate new laws or revive old ones. Although he does not say it openly, he in fact points to the existing institutions in pre-revolutionary France – *parlements* – that played exactly this role, and in doing so, turned into the last line of defense against royal despotism.⁴⁰

³⁶ SL iii, chap. 4; v, chap. 8.

³⁷ SL vii, chap. 3; viii, chap. 5; vii, chap. 2:1.

³⁸ SL viii, chap. 12:2.

³⁹ SL viii, chap 16:1; chap. 20.

⁴⁰ SL ii, chap. 2:1–2 and chap. 4. Cf. Lord Acton, *The History of Freedom in Antiquity*, [in:] *Selected Writings of Lord Acton*, ed. J. R. Fears, 3 vols., Indianapolis 1985–1988, p. I:7.

In monarchy the state can subsist independent of virtues; laws substitute for them. Furthermore, the royal court is full of the most corrupted and dishonorable men. Still honor is the virtue of monarchy. Monarchy requires “preeminences, ranks, and [...] noble descent,” as well as some luxury because, as said before, without the nobility and other intermediate bodies it would lapse into despotism.⁴¹ Ambition, which is a vice in a republic, serves well in monarchy, because “honor sets all the parts of the body politic in motion.” In a statement strikingly resembling Adam Smith's later remark about “the indivisible hand,” Montesquieu says that in king's service “each individual advanced the public good, while he only thinks of promoting his own particular interest.”⁴²

Monarchy requires good education of the privileged elite. Good manners, politeness and virtues, especially of honor are particularly appreciated. In general, education in monarchy “tend to raise and ennoble the mind,” consequently such a mind does not need censorship, as it has “the whole universe for a censor.”⁴³

Monarchy has a great advantage over a republic because of its unity of power. But since too hasty decisions could be damaging, laws and legal magistrates should show slow the process down. Monarchy enjoys even greater advantages over despotism – the state is more fixed and steady, and avoid excess, and caprice typical for despotic authority.⁴⁴ Monarchy is best suitable for medium sized states.⁴⁵

Despotism

The government has despotic nature if one ruler directs “everything by his own will and caprice.” In such a regime ruler's will usually substitute for law – laws are few and can be changed at any moment. Since this makes rulers “lazy, voluptuous, and ignorant” they often appoint a vizier who rule in their names, while they themselves surrender to “the most brutal passions, pursuing, in the middle of a prostituted court, the most capricious extravagancies.” Corruption is the “very nature” of that government. Montesquieu illustrates this regime by examples from the Near East and far east Asia.⁴⁶

⁴¹ SL iii, chap. 5:2–3, 8–9; chap. 6, chap. 7:1. Also laws should support the nobility, helping it to become hereditary (SL v, chap. 9:1–3. On luxury cf. vii, chap. 4:2.

⁴² SL iii, chap. 7:3.

⁴³ SL iv, chap. 2; chap. 3:1; v, chap. 19:17.

⁴⁴ SL v, chap. 9; v, chap. 11.

⁴⁵ SL viii, chap. 17; 20.

⁴⁶ SL ii, chap. 2:1–2 and chap. 5; v, chap. 14:1; viii, chap. 10.

Despotism has no virtue as its principle. Honor for example is unknown at all in this order. Republican virtues would be dangerous for the regime. Instead fear is its principle, while tranquility is its end. That tranquility is not peace but silence in face of invading enemy. It is particularly useful among the great, for otherwise they would oppress the masses. Power in despotism depends on ruler's caprice who can raise and destroy even the greatest of his servants. There is, however, one limitation of his power: religion. Although his subjects are ready to "abandon a parent, nay they will kill him if the prince so commands," yet, he cannot order them to drink wine. "The laws of religion are of a superior nature."⁴⁷

Education in this form of government seems superfluous. Learning and knowledge are dangerous. Excessive obedience that is required presupposes ignorance. The people under despotism are thus timid, ignorant and spiritless. Yet, it is a fitting regime for a large empires.⁴⁸

Montesquieu so far has not mentioned a form of government whose principle is liberty. This changes in the celebrated book XI that focuses on political liberty in general and on England in particular.

Political liberty is understood in many ways, Montesquieu reminds us. For some it is the right to depose a tyrannical authority; to others it is the power to elect their ruler; still to others it is the right to bear arms, etc. People usually apply the term freedom to their preferred form of government, to monarchies if they are monarchists, or republics, if they are republicans. In democracy, which more than any other government allows the people to do what they please, liberty is confounded with the power of the people.⁴⁹ His own definition is that liberty does not mean unregulated freedom. In society living under law, liberty is "the power of doing what we ought to will," and of "not being constrained to do what we ought not to will." In the next sentence he does not elaborate on what we ought or not ought to will, i.e. on moral issues. He skips it probably because he takes Judeo-Christian morality for granted, i.e., he treats it as self-evident. Instead he offers a concise but disappointing definition that "liberty is a right of doing whatever the laws permit."⁵⁰

⁴⁷ SL iii, chap. 8–9; v, chap. 14:12.

⁴⁸ SL iv, chap. 3; viii, chap. 20.

⁴⁹ SL xi, chap. 2.

⁵⁰ SL ix, chap. 3. Cf. D. Spitz, *Some Animadversions on Montesquieu's Theory of Freedom*, "Ethics" 1953, Vol. 63, No. 3, part 1, p. 207–213.

Montesquieu's next observation is that republics are not free by nature. Political liberty depends on moderate government rather than its form, thus moderate monarchy can also secure liberty. Further, since "every man invested with power is apt to abuse it," liberty depends on checking one power by another.⁵¹ And finally, listing different ends of government (dominion for Rome, religion for the Jews, war for Sparta, individual freedom for Poland), he points out to one nation in the world who has political liberty as the direct end of its constitution – England.⁵²

On the basis of the English fundamental law, Montesquieu generalizes: "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil laws." He then elaborates that legislative authority is the power of making laws, the first executive authority covers foreign affairs and domestic security, while the second executive is in fact judicial because it settles disputes between individuals and punishes crime.⁵³ Finally he adds that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."⁵⁴ In this clumsy way Montesquieu completes his concept of the division of powers, which he mistakenly believed was already in place in England (at that time England had not yet separated the executive from the judicial branch leaving both in king's hands).

Subsequently, Montesquieu specifies that the executive power should belong to the king because the government of one is more efficient than of many. He should enjoy a veto power over the acts of legislature, for otherwise, the latter "might arrogate to itself what[ever] authority it pleased."⁵⁵ Legislative branch cannot meet too rarely, on the other hand, there is no need to debate continuously. As it has no will when is not assembled, it the executive branch which calls it into session. Two chamber legislature is better than one chamber because in the first case two chambers are a check on each other.⁵⁶ The judicial power is an awesome power, therefore it must not be "annexed to any particular state or profession." That is why Montesquieu postulates the trial by jury of peers that judges in "manners prescribed by law."⁵⁷ Finally, the

⁵¹ SL ix, chap. 4.

⁵² SL ix, chap. 5. By the English constitution we naturally understand not one document but a serious of laws and statutes that goes back to the *Magna Carta* and form fundamental law of England. Reference to Poland is negative because he ends he claims individual liberty lead to oppression of the whole by the means of *liberum veto*.

⁵³ SL xi, chap. 6:1–2.

⁵⁴ SL xi, chap. 6:5.

⁵⁵ SL ix, chap. 6:36, 42, 52.

⁵⁶ SL ix, chap. 6: 38–41, 55.

⁵⁷ SL ix, chap. 6:13–15.

three branches must be separated and independent from each other and so equal in power as to be a check on each other.⁵⁸

In the next book Montesquieu focuses on liberty and laws in relations to individuals. He mentions four categories of crimes: against religion, morals, public tranquility and security of subjects. In general, he postulate prudence and mild punishments, and refuses to treat as crimes anything that is said or written. Specifically, religious sacrilege should be left to God to avenge rather than punish by law.⁵⁹ Although he does not use terms such as freedom of speech and publication, he in fact demands it.⁶⁰ His strong condemnation of slavery adds to his liberal credentials.⁶¹

Montesquieu's title to greatness rests not on his alleged elevation of political theory to the level of "science of government," but on his discovery of the division of powers, and the need for balancing one power by another. Although political thinkers knew from antiquity that undivided authority degenerates, the division that they commonly had in mind was that of the ruling principle: either of the rule of one, or of a few or of the many. Since Plato and Aristotle, balanced government meant mixing monarchy, aristocracy and democracy. Montesquieu proposed a different principle of division, i.e., of power itself and that proposition quickly became a canon of liberal politics.

If the idea of division of power became instantly a success in political theory and practice, one cannot ascribe to Montesquieu all the merit for its triumph. First, Locke made the original step on this road by dividing power between the executive (including judicial) and legislative powers. Second, Montesquieu probably thought that England already had the full division of powers and that he merely described it, not uncover a new principle. And third, the American Framers were bold enough to implement his theory in

⁵⁸ In book ix, chapter 6, Montesquieu mentions several times these principles.

⁵⁹ SL xii, chap. 4:2–12; chap. 5; chap. 12.

⁶⁰ SL xii, chap. 12:1–2.

⁶¹ SL x, chap. 3:8; cf. xv, xvi entirely devoted to the issue of slavery. The remaining books of *The Spirit* have scattered remarks on specific issues, which today can be treated as a curiosity rather than anything creative in political thought. For the order's sake, let me list their topics. Book xiii is on taxation; books xiv–xviii are on effect of climate and soil on the nature of government and industry, including that on slavery; book xix is on morals and customs; books xx–xxii includes observations on commerce and money; book xxiii is on population; books xxiv–xxvi are on religion and various laws; books xxvii–xxxi include loose remarks on the history of Roman and feudal laws.

practice. The success of the US Constitution, based not only on the division of powers, but also on federalism and on classical *forma mixta*, contributed to Montesquieu's fame as well.

With Montesquieu's theory of the division and balancing government as well as the demand for freedom of speech and print, coupled by the support for representative government and the opposition to slavery, liberal theory was nearly complete. That is also his ticket to greatness. However, one cannot overlook his odd claims of universality, serious weaknesses of his theory as well as curious structure, and unbearably verbose character of *The Spirit*. Book I on laws is particularly weak. Broad generalizations and the deification of law, perhaps fitting for his epoch, are really strange today. His idea of the state of nature and law of nature is undeveloped and sketchy, if compared to Locke's. Finally, his teaching on forms of government that was to compete and replace Aristotle's classical division is simply not a rival: in this, he is simply not in the same league as Aristotle. Still, this is liberal thought at its best.

Abstrakt

Prawo, formy władzy i wolność w myśli Monteskiusza

O duchu praw Monteskiusza przyniosło autorowi sławę, czyniąc z niego politycznego mędrca okresu oświecenia, nicomal wyrocznie w kwestiach myśli politycznej. Artykuł dokonuje krótkiego przeglądu tego dzieła Monteskiusza, próbując znaleźć inne powody do jego chwały, poza samym trójpodziałem władz. Rezultat tego przeglądu, skupionego zwłaszcza na naturze prawa, formach władzy oraz kwestii wolności, jest w dużej mierze negatywny. Choć Monteskiusz wzbogacił myśl liberalną o nowe idee, daleko mu do klasyków myśli politycznej starożytności.

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