

Montesquieu “On the Spirit of Laws”

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“The law is not a mere act of power;
things in their own nature indifferent are not within its province.”

Abstract

Charles-Louis Montesquieu’s outlook on justice is based on the idea of separation of powers, a fundamental idea that founded modern constitutionalism. The work that we focus on in this article, *De l'esprit des lois*, highlights the importance of knowing the essence of laws and how their action manifests in different forms of government, as the law constitutes a social, historical and cultural phenomenon. The law corrects and the punishment represents the price paid for maintaining freedom.

Keywords: law, freedom, justice, forms of government, punishment.

Why Charles-Louis de Secondat, Baron de la Brède et de Montesquieu?

The answer is found in his concern for deciphering the meaning of the laws and the treatment of justice as a social, cultural phenomenon, influenced by a number of “climatic” factors acting on human behavior, bringing together the material and emotional state of people. Montesquieu was the one to formulate the theory of separation of powers, a fundamental idea that brings to a close the abuse of power, despotic regimes. He is also the one who states that the idea of law, a concept essential to justice, is subject to reason and influenced by the spiritual particularities of the people for whom it is applied. However, given the universality of the laws, there are exceptional cases in which the laws also match another people. This idea has anticipated the union of states and constitutional bases that regulate them. The abuse of power can be fought only with the help an organization able to stop such a phenomenon, and this regulation means a legislated guarantee to end all forms of law violations. The division of powers represents the guarantee for the rule of law and the freedom of all citizens. Any violation of law attracts penalty, which is the right price paid for the severity of the deed. The thinker has in mind the principle of fair proportion between punishment and the seriousness of the offense to society; the one who “harms” society the most should receive a punishment for their act.

Charles de Secondat Montesquieu (1689-1755) is considered “the father of constitutionalism” due to the emphasis placed on the principle of division of powers on which modern and current constitutions have been based. The work presenting an ample analysis of the theory of the separation of powers in a state is *De l'esprit des lois* (1748), a thorough analysis of the science of law distinguishing the following levels of analysis: on justice, on judges, on the separation of powers and on punishments. We shall analyze them by going through the structure of the work, arguing with the ideas of the liberal spirit manifested by Montesquieu.

One must not forget that the interest for a constitutional foundation, on which the governing science can be built, belongs to the Antiquity, Aristotle considering the Politics of the organization of a state “a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good.” [1]. Such a political edifice, constituted in the form of a cantonal republic with free and equal citizens (proportional equality) was based on the “Constitution” which is “the life of the State itself”[2]. And the “Constitution is solid only where the middle class outnumbers the two extreme classes, or at least each of them.” [3] The division of the powers in a state is treated through the levelled organization of powers: “The government is the constitution itself”. In democracies “the people is the sovereign.” [4] All “Constitutions that seek the common good are pure, as they are in conformity with the absolute law; on the contrary, those who consider only the benefit of their government are faulty and only mere corrupt forms of the good Constitutions, for they are despotic (i.e. they treat the government as slaves), whereas, the citadel is an association of free men.” [5]

These Aristotelian premises help us gain a better grasp of “the spirit of the laws” researched by Montesquieu.

People are governed by different laws belonging to distinct branches of justice but the supreme law on which all legal principles depend on is “LE SALUT DU PEUPLE”, the salute of the people which assumes the concept of justice. This represents the starting point of people’s trust in the legal act and in the power of the law to punish and correct deviations committed in the detriment of society. But when the political law tries to destroy the structure of the political body that constituted it, it can only confirm the

existing order. In any legal action the magistrate punishes or corrects: “Il y a des criminels que le magistrat punit, il y en a d'autres qu'il corrige.” [6]

Law and Liberty

The first part of the work *On the Spirit of the Laws* brings clarification to the concept of law in relation to the concept of freedom. This relationship is natural because one can not analyze the law beyond or against freedom; the law represents the frame to implement freedom.

“Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses; et, dans ce sens, tous les êtres ont leurs lois, la divinité a ses lois, le monde matériel a ses lois, les intelligences supérieures à l'homme ont leurs lois, les bêtes ont leurs lois, l'homme a ses lois.” [7]

As a result, each domain of our existence has its own necessary rapports stemming from the structure of things, regulating their way of being. Divinity has its own laws, the material world has its own necessary rapports, and a human being's rapports, those of the spiritual intelligence, are different than those of animals. Understanding such an organization demonstrates that laws are not arbitrary products and they cannot be the result of a decider situated outside the historic and cultural environment.

Unlike other beings, the human being has an affective life subject to various passions, which differentiates their behaviour and reactions in various situations. But the whole human unpredictability can be regulated within the social context through the respect for the law. All the social tasks are inscribed in political and civil laws. “Fait pour vivre dans la société, il y pouvait oublier les autres; les législateurs l'ont rendu à ses devoirs par les lois politiques et civiles.” [8] To a similar extent, there are the natural rights, inscribed in the existential condition of our being, before the social organization. In a natural state, there is no issue of duties, but only of rights, which are not authorized by any human authority to legitimate them. These are the positive rights: the right to survival, the right to self-defense, the right to freedom, the right to property. Regarding property, John Locke (*Second Treatise of Government*) situated the natural right above the political one: “Every man has a *property* in his own *person*. This nobody has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are

properly his. Whatsoever then he removes out of the state that nature has provided, and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his *property*.” [9] Also among Montesquieu’s predecessors, Thomas Hobbes believed that the only true law is the civil law applied by the sovereign, while the natural law has no moral principles, being based on human nature. Regarding human nature, human beings are equal by nature both in terms of physical and intellectual strength. Equality leads to a general rivalry, *bellum omnium contra omnia*. Everyone seeks their own good and sees a possible rival in their fellow being. Thus arises a state of rivalry, man is wolf to man, *homo homini lupus*. From this standpoint, people transfer all natural laws to the sovereign, conferring him/her absolute power.

“The natural law, that the authors commonly name *jus naturale*, represents the freedom that each person has to employ their own power, according to their will, to preserve their own nature, meaning their own life; hence, to do all that they consider, according to their own judgment and reason, that represents the most suitable means for this.” [10]

Hobbes’ position on the “state of war” in which the human being permanently resides is reminded by Montesquieu:

“Hobbes demande *pourquoi, si les hommes ne sont pas naturellement en état de guerre, ils vont toujours armés, et pourquoi ils ont des clefs pour fermer leurs maisons*. Mais on ne sent pas que l’on attribue aux hommes avant l’établissement des sociétés, ce qui ne peut leur arriver qu’après cet établissement, qui leur fait trouver des motifs pour s’attaquer et pour se défendre.”

Such a state of war extends to the nation and will be reflected in the content of the laws:

“Chaque société particulière vient à sentir sa force; ce qui produit un état de guerre de nation à nation. Les particuliers, dans chaque société, commencent à sentir leur force; ils cherchent à tourner en leur faveur les principaux avantages de cette société; ce qui fait entre eux un état de guerre.

Ces deux sortes d’état de guerre font établir les lois parmi les hommes. Considérés comme habitants d’une si grande planète, qu’il est nécessaire qu’il y ait

différents peuples, ils ont des lois dans le rapport que ces peuples ont entre eux; et c'est le DROIT.” [11]

What the Law Represents

“La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette raison humaine.(...)

Il faut qu'elles se rapportent à la nature et au principe du gouvernement qui est établi, ou qu'on veut établir; soit qu'elles le forment, comme font les lois politiques; soit qu'elles le maintiennent, comme font les lois civiles.” [12]

This acceptance of the law supports the idea of its rational grounding for all peoples and that civil and political laws are particular cases of nations, distinguishing the nature and principles governing them. Consequently “trois espèces de gouvernements: le RÉPUBLICAIN, le MONARCHIQUE et le DESPOTIQUE.(...) Je suppose trois définitions, ou plutôt trois faits: l'un que *le gouvernement républicain est celui où le peuple en corps, ou seulement une partie du peuple, a la souveraine puissance; le monarchique, celui où un seul gouverne, mais par des lois fixes et établies; au lieu que, dans le despotique, un seul, sans loi et sans règle, entraîne tout par sa volonté et par ses caprices.*” [13]

Moral strength, honour activates the parts of the political body and each of them acts towards the common good, pursuing particular interests. It is a false honour, but one that is useful to the public space, better accepted than a truth that would address a small number of individuals.

The Status of Education

The laws of education are the most important in social life, as they prepare each and every individual member of a large family for what society represents. “Les lois de l'éducation sont les premières que nous recevons. Et, comme elles nous préparent à être citoyens, chaque famille particulière doit être gouvernée sur le plan de la grande famille qui les comprend toutes.” [14]

Any democratic government needs the power of education which means “love of law and homeland”. “Cet amour est singulièrement affecté aux démocraties. Dans elles seules, le gouvernement est confié à chaque citoyen. Or, le gouvernement est comme toutes les choses du monde; pour le conserver, il faut l'aimer.” [15]

The love of country is expressed by the conduct of every citizen, if the people is made up of honest persons. “Quand le peuple a une fois de bonnes maximes, il s'y tient plus longtemps que ce qu'on appelle les honnêtes gens. Il est rare que la corruption commence par lui. Souvent il a tiré de la médiocrité de ses lumières un attachement plus fort pour ce qui est établi.” [16]

As for the formation of the legislature, Montesquieu reaches the following general sentence: “dans un sénat fait pour être la règle, et, pour ainsi dire, le dépôt des moeurs, les sénateurs doivent être élus pour la vie; dans un sénat fait pour préparer les affaires, les sénateurs peuvent changer.” [17]

The Role of Punishment

Remembering Niccolo Machiavelli, Montesquieu considers that the role of the laws resembles a sense of orientation; one cannot see if one does not have eyes. “Les lois sont les yeux du prince; il voit par elles ce qu'il ne pourrait pas voir sans elles.” [18] The Prince “must make himself feared, in order to avoid the hatred of his subjects, if he does not win their love” [19] and corruption appears where there is an excess of force, power, money; “*peu sont corrompus par peu.*” Fixing corruption happens more through prevention than through punishment.

The severity of punishments is specific to despotic regimes and does not bring any change in the harm caused by the deeds. “La sévérité des peines convient mieux au gouvernement despotique, dont le principe est la terreur, qu'à la monarchie et à la république, qui ont pour ressort l'honneur et la vertu.

Dans les États modérés, l'amour de la patrie, la honte et la crainte du blâme, sont des motifs réprimants, qui peuvent arrêter bien des crimes. La plus grande peine d'une mauvaise action sera d'en être convaincu. Les lois civiles y corrigeront donc plus aisément, et n'auront pas besoin de tant de force.” [20]

To prevent crime, “un législateur sage aurait cherché à ramener les esprits par un juste tempérament des peines et des récompenses; par des maximes de philosophie, de morale et de religion, assorties à ces caractères; par la juste application des règles de l'honneur; par le supplice de la honte; par la jouissance d'un bonheur constant et d'une douce tranquillité(...).” [21]

Corruption occurs in the case of democratic principles as well, not only due to the spirit of equality, but especially in the case in which equality is manifested as extreme and each person seeks to order another one. It refers to the destruction of the systems of values and of the valuing criteria through which the social hierarchy is organized. The glorious is not worthy, the awarding action being randomly assigned. “La corruption augmentera pan-ni les corrupteurs, et elle augmentera parmi ceux qui sont déjà corrompus. Le peuple se distribuera tous les deniers publics; et, comme il aura joint à sa paresse la gestion des affaires, il voudra joindre à sa pauvreté les amusements du luxe. Mais, avec sa paresse et son luxe, il n'y aura que le trésor public qui puisse être un objet pour lui.” [22]

And, anticipating Rousseau, Montesquieu concludes that man is good from nature, born in a state of equality with the other fellow beings, an equality that will be kept or lost by the social organization. “Dans l'état de nature, les hommes naissent bien dans l'égalité; mais ils n'y sauraient rester. La société la leur fait perdre, et ils ne redeviennent égaux que par les lois.

Telle est la différence entre la démocratie réglée et celle qui ne l'est pas, que, dans la première, on n'est égal que comme citoyen, et que, dans l'autre, on est encore égal comme magistrat, comme sénateur, comme juge, comme père, comme mari, comme maître.” [23]

We end the analysis of the first part of Montesquieu's treaty, *De l'esprit des lois*, with the acceptation of freedom, as it is treated in chapter “**Ce que c'est que la liberté**”, the second part of the treaty:

“La liberté est le droit de faire tout ce que les lois permettent; et si un citoyen pouvait faire ce qu'elles défendent, il n'aurait plus de liberté, parce que les autres auraient tout de même ce pouvoir.” [24]

References:

- [1] Aristotle, *Politics*, Semne, Bucharest, 2008
- [2] Idem., 233
- [3] Ibidem., 238
- [4] Aristotle, op. cit., 107
- [5] Aristotle, op. cit., 109
- [6] Montesquieu, *De l'esprit des lois*,
http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/de_esprit_des_lois_tdm.html, p.78
- [7] Montesquieu, op. cit., 28
- [8] Montesquieu, op. cit., 30
- [9] Locke, J., *Second Treatise of Government*, Nemira, Bucharest, 1999, 20
- [10] Hobbes, Th., *on man and society*, All, Bucharest, 2011, 18
- [11] Montesquieu, op.cit.,31
- [12] Montesquieu, op. cit., 32
- [13] Montesquieu, op. cit., 34
- [14] Montesquieu, op. cit., 53
- [15] Montesquieu, op. cit., 58
- [16] Montesquieu, op. cit, 64
- [17] Montesquieu, op. cit., 70
- [18] Montesquieu, op. cit., 97
- [19] Machiavelli, N., *The Prince*, Mondero, Bucharest, 2008, 61
- [20] Montesquieu, op. cit., 99
- [21] Montesquieu, op. cit., 103
- [22] Montesquieu, op, cit., 129
- [23] Montesquieu, op. cit., 130
- [24] Montesquieu, op. cit., Deuxieme partie, 45.