

Chapter 4

Montesquieu on Despotism, Moderation, and Liberty

Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (1689-1755) was a member of the provincial French nobility, a jurist, a celebrated novelist, and arguably the decisive figure in inaugurating the key decades of the Enlightenment in the study of society. Earlier thinkers, including Spinoza, had drawn on new scientific ways of thinking to try to understand the human mind, the nature of reality, and the relationship between man and God. But the flourishing of political, social, and economic thought that we associate with the Enlightenment, with thinkers as varied as Rousseau, Smith, Hume, Kant, Beccaria, Ferguson, Madison, Jefferson, Paine, Wollstonecraft, and Condorcet, only got fully underway with the publication of Montesquieu's *The Spirit of the Laws* (1748).

That revolutionary book offered the second half of the eighteenth century new ways of thinking about not only government itself, but about the relationship among government, society, and economy, that went beyond traditional analyses of the citizen and the state to generate a whole social science of modernity and freedom. And it decisively shaped the emerging strain of political thought that came to be known as *liberalism* with its defenses of religious liberty and commerce, its analysis of politics in terms of the avoidance of despotism, its development of the idea of the separation of powers, and its firm devotion to the rule of law and due process of law as defenses of individual liberty. Its influence can be seen in liberal thought for the rest of the century, from the Scottish Enlightenment thinkers such as Adam Smith who studied the effects of commerce and trade to the American founders who drew on his thought about the separation of powers and federalism; and

well into the next century, particularly in the work of French liberals such as Benjamin Constant and Alexis de Tocqueville.

The Spirit of the Laws is both a very long book and a notoriously complicated one; Voltaire criticized it as a “labyrinth without a clue.” This is at least in part because Montesquieu sought to show connections among themes and fields of study that had previously been kept distinct. Of the book’s six parts, the first two addressed questions about forms of government, law, and military power: politics, as it was traditionally understood. Parts III and IV spoke to ways in which political life was shaped and constrained by forces outside the scope of simple political decision-making: climate and geography, commerce and trade. And parts V and VI studied the relationships among various coexisting legal systems and traditions: the positive law of the modern state, the laws given by various religions, and the complex layered systems of law—urban, provincial, feudal, and so on—that characterized France and other early modern European countries. Although Montesquieu constantly explored interactions among all of these, we will treat them separately, with this chapter and the next two roughly following that division of *The Spirit of the Laws* into three, though with the orders of the second and third divisions reversed.

Political philosophers from Aristotle onward had divided forms of government into six: rule by one, the few, and the many, with each of these having a good, lawful version, and a bad, lawless one. This yielded a typology of monarchy, aristocracy, polity (the lawful variants) and tyranny, oligarchy, democracy (the lawless ones), along with mixed constitutions that combined two or three of these, most famously the Roman republic. Some thinkers had challenged parts of this organization—the 17th-century English philosopher Thomas Hobbes, for example, denied that there was any difference between the lawful and lawless versions of each kind of government, with “tyranny” merely being a name people called monarchies they “misliked.” But Montesquieu argued that the old categories should be rethought altogether. In place of Aristotle’s six-fold typology, Montesquieu offered just three: monarchies, republics, and despotisms, with republics further subdivided into democratic and aristocratic types. Lawless rule by the few or rule by the many ceased to mark out different regimes. Rather, Montesquieu suggested that republics of both kinds might protect liberty more or less well (for reasons we’ll get to in a moment) but that they didn’t fundamentally change regime

types when they became worse at protecting liberty. Things are different with respect to rule by one man: the lawful rule of a constitutional monarch differed in kind from the despotism of a ruler like the Czar of Russia or the Sultan of the Ottoman Empire. Monarchies and republics alike were *moderate* governments—and “moderation” is one of the great terms of praise in Montesquieu’s work—to be contrasted with the absolute power found in despotism. The political science Montesquieu developed over the first two parts of *The Spirit of the Laws* was animated by a commitment to moderate government, a horror at despotism, and a barely-concealed worry that France under Louis XVI and his heirs was falling into despotic rule.

This part of the book analyzes a number of important distinctions among the forms of government and their good functioning. Each was animated by a different overall principle that had to be preserved and encouraged in order to maintain the system: for democratic republics, patriotic *virtue* in the citizenry; for aristocratic republics, *moderation* in the aristocratic class and its ambitions; for monarchies, *honour* both in the sense of competition for public recognition (“honours,” as we would say) and in the sense of an insistence on acting honourably in one’s own conduct; and, for despotisms, fear. Despotisms rule by fear, and it is by keeping their subjects in a state of fear that they are able to persist. A related famous distinction was about size: republics were small states, like the city-states of Italy or Switzerland; monarchies were of medium size, like western European kingdoms; and despotisms were characteristically so large that they could only be held together with military force, leaving the ruler who commanded that force able to overawe or destroy any other centers of authority in society.

Each of the moderate forms of government faces challenges and problems: republics are too small to defend themselves; democratic republics depend on a level of equality and patriotic self-sacrifice that is anachronistic amidst the wealth of commercial modernity; aristocratic republics are prone to corruption; monarchies risk collapse into despotism. But Montesquieu never clearly ranks the three moderate governments. His is not the kind of political theory that is concerned with identifying the best constitution, and he offers a variety of reasons to think that different forms of government will suit different countries and peoples in different circumstances. He is very concerned, however, with the worst, and with how to avoid it. Despotism rules by fear, particularly the fear inspired by uncertainty: never knowing whether

one's possessions, freedom, or very body will be seized by the ruler. The opposite condition, one all the moderate governments can and should provide, is secure liberty, guaranteed by the rule of law and the separation of powers.

The moderate kingdoms of western Europe separated powers to at least some degree, typically keeping the judicial power distinct from the other two, even when they were held together by the king. But one country had, in Montesquieu's account, fully implemented a separation of powers, and in so doing had developed the constitution most compatible with liberty: England.

Montesquieu's description of the English constitution, while tremendously influential, was idiosyncratic and to some degree misleading. It was familiar enough to think of England (Britain, by the time *The Spirit of the Laws* was published, but Montesquieu calls it "England," and so shall we) as having a *mixed government* in the sense mentioned above as dating to Aristotle. The one (the monarch) ruled in conjunction with the few (the nobility in the House of Lords) and the many (the people represented in the House of Commons). "The King [or Queen] in Parliament" was and remains the name of the combined actor that has supreme power; but that mixed government understanding is one that *unifies* different actors, not *separates* them. Montesquieu redescribed their relationship, construing the House of Commons as holding legislative authority (increasingly true *de facto* after the Glorious Revolution of 1688), the monarch as holding executive authority (decreasingly true in Montesquieu's time, as ministerial government developed), and the House of Lords as holding constitutionally important parts of the judicial power (the right to try nobles and to impeach officials). The balance of the judicial power he alluded to vesting in juries and grand juries drawn from the people, and so more or less invisible.

Whatever the truth of the account of England, the account of the separation of powers Montesquieu developed in his chapter on England's constitution became the definitive account of that idea. By contrast, John Locke's distinctions among legislative, executive, and federative (foreign policy and war) powers in his *Second Treatise*, while clear enough and genuinely intellectually valuable in some important ways, had little long-term impact. From *The Spirit of the Laws* onward, the idea of a separation of powers has been all but identical with his list: legislative, executive, and judicial. It was particularly influential in the framing of the state constitutions and the federal constitution in the post-Revolutionary United States, but the US case was important

enough for subsequent constitution-writing and constitutional debate around the world that Montesquieu's influence on this point can still be felt nearly everywhere. Indeed, in 2005 the British Constitution was reformed precisely so as to come into closer correspondence with that principle when the centuries-old office of the Lord Chancellor, which straddled all three powers, was stripped of its judicial authority for separation of powers reasons.

Montesquieu famously and awkwardly defines liberty as a "right to do everything the laws permit" (SL 2.11.14.155) and elsewhere as "security, or at least the opinion one has of one's own security" (SL 2.12.2.188). The second definition, and its placement in the context of a discussion of criminal laws, helps us understand the first. Putting them together we can say: I am free to the extent that I am safe, and know that I am safe, from the system of criminal punishment when I have not broken any laws. I am free if I know that I can go about my lawful business without fear of being seized and imprisoned: by the infamous *lettres de cachet*, for example, whereby the King of France could order someone imprisoned ("hidden," *cachet*) without charge in a prison such as the Bastille. In England, over many centuries courts had gradually strengthened the writ of *habeas corpus*, the so-called Great Writ, as a tool with which to prevent such abuses; in the late 1600s it had finally been codified by Parliament. But in a despotic regime, there is no law I can safely remain on the right side of; the despot may seize and punish me at will.

Many modern readers misunderstand both the definition of liberty as security, thinking of modern debates about tradeoffs between civil liberties and security against crime or terrorism; and the definition of liberty as the right to act within the laws, seeing it as a kind of "liberty is obedience" paradox. But Montesquieu had in mind the contrast between systems in which complying with the law keeps you safe from arrest and those in which it does not—or in which *you don't know* whether it does or not, and so you don't have the "opinion" of your security, and you live under the fear that characterizes despotism.

This is the liberty that the separation of powers protects. The executive may not order my arrest or punishment if I have not violated a law that was duly passed by a legislature, and if I am arrested, my case will be heard by a judicial court. The legislature must pass general laws that are possible to follow, and for people to know they are following them, not laws singling out particular people (called "bills of attainder" in the British system and nearly

extinct there by Montesquieu's time; they were specifically prohibited in the US Constitution of 1789). A court may not convict me without the existence of a valid law I have violated, and so on. This is neither the mixture of the mixed government tradition, with the different classes acting in harmony or unity, nor a simple idea of "checks and balances" in which different parts of the government limit each other just by their competition. It is a specific kind of division of authority that also divides the *process* whereby people's liberty is threatened: the holders of state power who make the rules must not be the ones who enforce the rules or the ones who judge cases under the rules. Montesquieu notes elsewhere in *The Spirit of the Laws* that prosecutions are brought in the name of the monarch (in Commonwealth countries today, a prosecution is *The Crown v. the defendant*), so for the monarch to judge would make him both a party to the case and the judge over it. In the many prosecutions that end in fines or confiscations of property, this is doubly true: the Crown stands to financially benefit from a conviction. "No one may be judge in their own case" is an old and fundamental principle of law; Montesquieu maintained that the principle demanded a separation of powers.

The separation of powers was not the end of Montesquieu's concern with the criminal law; the topics of procedural protections, the authority to judge, and the severity of punishments recur throughout the book and make up the primary themes of Part I, Book VI. Against the admiration that some eighteenth century thinkers expressed for the simplicity of law and the speed of trials in absolutist states such as the Ottoman Empire, Montesquieu defended the systems of precedent and procedure that characterized the moderate European states. This was a lawyerly defense, and Montesquieu's critics such as Voltaire were happy to point out that that suited his professional past as a judge. But it was driven by his emphasis on avoiding despotism and rule by fear. Quick trials that dispensed with precedent and complicated procedures went along with trials in which the absolute ruler could dictate the result—and impose extreme punishments.

Montesquieu often refrained from explicit normative judgments of existing institutions and expressed a general view that each country tends to have the laws that suit it. In three major cases he made his criticisms clear; in every case influentially siding with liberty and moderation against despotism, fear, and cruelty. He defended religious toleration against policies of persecution. He opposed and bitterly mocked slavery, particularly the European

practice of enslaving Africans. And he denounced the systems of criminal law that gave despotisms their power to rule by fear. To the degree that states that thought of themselves as moderate and lawful monarchies tended in the direction of despotic systems of lawless justice—using torture, engaging in (literal) witch hunts, manipulating trials for political advantage, or arresting and punishing their subjects without charge—they gradually transformed themselves into despotisms, too.