

THE UNKNOWN MONTESQUIEU

An essay on Montesquieu's intellectual background

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I. Introduction – Montesquieu's place in the legal history

It is a commonplace in legal history that Montesquieu is among the most influential personalities of the eighteenth century. His oeuvre, especially *The Spirit of Laws*, fertilized the entire legal thinking of modernity by providing numerous impetuses for it.

It has already been widely known that Montesquieu's ideas profoundly influenced the Western legal development in the eighteenth and nineteenth century. On the field of constitutional law his conception on the separation of governmental powers – executive, legislative and judicial – fundamentally inspired the spirit as well as the details of modern constitutions. The Founding Fathers of the Constitution of the United States; Alexander Hamilton, James Madison, and John Jay, the authors of the *Federalist Papers* (1787–88) explicitly referred to Montesquieu when they analyzed the institutional opportunities of division of powers.¹ Moreover, in the discussion of the different forms of federative governmental structures the *Federalist Papers* also refers and quotes Montesquieu's analysis.² Additionally, it is also worthwhile mentioning that for Thomas Jefferson, the third president of the United States, *The Spirit of Laws* was the most authoritative work on politics. Jefferson compiled certain books of it, Book XXV and XXXI, in order to enlist crucial guiding axioms for the political practice.³

¹ PACZOLAY PÉTER: Montesquieu hatása az amerikai föderalizmus kialakulására [Montesquieu's impact on the formation of the American federalism]. In H. SZILÁGYI ISTVÁN–PAKSY MÁTÉ (eds.): *Ius unum, lex multiplex. Liber amicorum studia Z. Péteri dedicata*. Budapest: Szent István Társulat, 2005, 379.

² PACZOLAY op. cit. 380.

³ DAVID W. CARRITHERS: An Appreciation of The Spirit of Laws. In DAVID W. CARRITHERS–MICHAEL A. MOSHER–PAUL A. RAHE (eds.): *Montesquieu's Science of Politics. Essays on The Spirit of Laws*. Lanham–Boulder–New York–London: Rowman & Littlefield, 2001, 4.

The modern development of penal law been had also considerably touched upon by Montesquieu's legacy. As a judge in the Parlement of Bordeaux, where he worked more than ten years in its criminal section, Montesquieu was well positioned to see the disadvantages of the actual French criminal system. He proposed the transformation of this system to a new establishment founded on fair and proportionate punishment to the accused.⁴ Furthermore, *The Spirit of Laws* substantially inspired Cesare Beccaria in the writing of *On Crimes and Punishments* (1764) thereby it significantly contributed to the gradual liberal reformation of the Western material and procedural penal law. Additionally, Montesquieu strongly argued for the prohibition of offenses against religion being judged criminal by which he influenced the paragraphs of the *Universal Declaration of the Rights of Man and of the Citizen* (1789).⁵

Lastly, it should be mentioned that comparative law also recognizes Montesquieu as one of its most important predecessors.⁶ Although Montesquieu did not create a coherent comparative theory, he made use comparative method revolutionary. In *The Spirit of Laws* he examined foreign laws and legal materials, not as mere illustrations but as a source of legislative experience which inspired legal science by providing a more comprehensive outlook.⁷ Additionally, he applied comparative method in order to support legislative reforms. In the words of Walter Hug, a commentator of the history of comparative law, Montesquieu can be regarded as 'the foremost precursor of modern comparative law'.⁸

II. Less well-known elements in Montesquieu's oeuvre

It is unambiguous from the earlier that Montesquieu's effect on the modern legal development is widely recognized. Scholars' opinions more-or-less converge on his role concerning the birth of modern constitutionalism, the liberal reform of criminal law and the evolution of comparative law. However, Montesquieu's intellectual background including his method and premises seems to be relatively less known, especially if one compares it with the aforementioned researches. Therefore, this essay intends to scrutinize Montesquieu's intellectual background, by which it may contribute to the better comprehension of *The Spirit of Laws*. It might be proper to say that the deeper knowledge of this fundamental work, the better understanding of the eighteenth and nineteenth century's legal history.

⁴ CARRITHERS op. cit. 25.

⁵ *Ibid.*

⁶ MARC ANCEL: Cent ans de droit comparé en France. In *Livre centenaire de Société de législation comparée*. Paris: LGDJ, 1969, 3.; KONRAD ZWEIGERT–HEIN KÖTZ: *An Introduction to Comparative Law*. Oxford: OUP, 1998, 50.; CARRITHERS op. cit. 11.

⁷ WALTER HUG: The History of Comparative Law. In KONRAD ZWEIGERT–HANS JÜRGEN PUTTFARKEN (Hrsg.) *Rechtsvergleichung*. Darmstadt: Wissenschaftliche Buchgesellschaft, 1978, 121.

⁸ *Ibid.*

1. Reevaluation of Montesquieu's place in the legal modernity?

Legal modernity, that is, the post-medieval period of legal history, is characterized by various distinct features. It means *inter alia* both the gradual secularization of legal thinking, so to say, the transformation of Christian natural law theory to a new form of modern natural law interpretation⁹ and the birth of a secular positivist approach of law.¹⁰ Additionally the achievements of modern legal history, as for instance the system of constitutional guarantees, the detailed conception of property, universal human rights and the humanization of penal law, are significantly associated to the emergence of liberalism. Liberalism, as a political ideology, denied medieval authorities, such as *sacerdotium* and *regnum*, as well proposed a new value hierarchy in which centre one can find liberty, individuality and uniformity.

Professors of legal history frequently evoke Montesquieu as one of the greatest personalities of modern legal history. However, according to recent studies this picture needs a further elaboration and shading. In Michael Oakeshott's view Montesquieu should be regarded as one of the reference points of modern politics. An enquiry around Montesquieu's main work can make visible the 'character' of modern politics, that is to say, it reveals such dispositions which determines the ordinary functioning of modern politics.¹¹ Oakeshott argues that the central theme of *The Spirit of Laws* is the presentation of those possibilities which are implied in the political character of modern Europe.¹² Through discussing different governmental regimes; despotism, monarchy, aristocratic republicanism and democracy, Montesquieu discovered the 'aptitudes of the modern European political character.'¹³ So, Montesquieu pointed out those governmental forms which are inherent in modern European politics characterized by 'the recognition of a single governing authority', that is, a sovereign, and a concentration of governmental power considerably exceeding the competences of the prior medieval authorities.¹⁴

However, as Oakeshott put a serious emphasis on this fact, it must be borne in mind that Montesquieu's thinking was largely influenced by the Aristotelian heritage. Upon assessing the features of each governmental system Montesquieu found monarchy and aristocratic republic as the best ways since he applied the classical Aristotelian principle that the best is a mean between extremes.¹⁵ Despite relying on pure rationalism, as other liberal philosophers for instance Locke would have done it, Montesquieu thus used a value-oriented Aristotelian approach in order to evaluate the advantages

⁹ The following works should be mentioned at this point: Fernando Vasquez *Controversiae illustres* (1559); Johannes Althusius *Politica methodice digesta et exemplis sacris et profanis illustrata* (1603); and Hugo Grotius *De iure belli ac pacis* (1625).

¹⁰ Hobbes' *Leviathan* (1648) symbolized this approach.

¹¹ MICHAEL OAKESHOTT: The Investigation of the 'Character' of Modern Politics: Montesquieu. In MICHAEL OAKESHOTT: *Morality and Politics in Modern Europe*. The Harvard Lectures. (ed. by Shirley Robin Letwin). New Haven–London: Yale University Press, 1993, 30–32.

¹² OAKESHOTT op. cit. 36.

¹³ OAKESHOTT op. cit. 41.

¹⁴ OAKESHOTT op. cit. 32–34.

¹⁵ OAKESHOTT op. cit. 42.

and disadvantages of modern governments. So, Montesquieu's thinking seems to deviate from the general spirit of Enlightenment, which advocated a new approach of social sciences. This new line of scientific thinking started by Sir Francis Bacon and realized by Auguste Comte, promoted positivism, that is, the use of the inductive method and the claim of pure description instead of the theological or metaphysical 'medieval speculations'.

A contemporary author, Simone Goyard-Fabre also stresses the importance of the Aristotelian framework of Montesquieu's thinking. However, whereas Oakeshott only warns this Aristotelian legacy and its partial incompatibility with modernity, she tries to evaluate it, too. Her very surprising statement is that Montesquieu is an 'Ancient' lost in the world of 'Moderns'.¹⁶ Montesquieu's thinking thus profoundly differs from that of the modern political philosophers since he did not favor the systematical and logical approach of social questions, rather he preferred study axiological and ontological problems. So, Montesquieu was interested in such central questions as the fundamental principles of Nature or the proper relationship between Man and Nature.¹⁷

In sum, Montesquieu in order to understand those basic questions considered politics as a peculiar art not a doctrinal science.¹⁸ Furthermore, as Goyard Fabre emphasizes it, he refused the idealistic anthropocentrism of his age regarding Man as an isolated *individuum* and placed him into the superior cosmic order. This cosmic order encompassing both Man and Nature should be determined by a higher harmony emanating from the 'nature of things'.¹⁹ Consequently, in the light of Goyard-Fabre's insights, Montesquieu cannot be treated as a modern political thinker, it is more suitable to regard him as a late follower of the classical Greek political legacy.

This conclusion may be striking and questionable. Could it be true that Montesquieu, who is widely recognized as a champion of modern legal history, is not a modern thinker in the accurate sense of expression? In order to give a possible answer to this question Montesquieu's premises, that is, his scientific method, his relation to values and his vision on history should be further scrutinized.

2. Montesquieu's method

It has already been mentioned that Montesquieu's thinking is deeply rooted in the legacy of Greek and Roman Antiquity,²⁰ especially that of Aristotelian philosophy. Antiquity inspired and influenced Montesquieu from numerous aspects. Perhaps, the

¹⁶ At this point Simone Goyard-Fabre refers to Leo Strauss and the terminology of Benjamin Constant. SIMONE GOYARD-FABRE: *Montesquieu la nature, les lois, la liberté*. Paris: Presses Universitaires de France, 1993, viii-ix. and 348.

¹⁷ GOYARD-FABRE op. cit. 344–345., 347.

¹⁸ GOYARD-FABRE op. cit. 346.

¹⁹ GOYARD-FABRE op. cit. 347.

²⁰ For a detailed analysis of the influence of Roman history see Goyard-Fabre's analysis on the *Considerations sur les causes de la grandeur des Romains et de leur décadence*. GOYARD FABRE op. cit. 24–55.

most fundamental of these inspirations was a methodological influence. In the focal point of his scientific interest those principles stood which can be derived from the 'nature of things'.²¹ That is to say Montesquieu, as Aristotle had already tried to realize it, intended to find the final causes underlying the diversity of the empirical reality, which are inherent in the intelligible order of things.²² So, Montesquieu believed that behind the richness of reality, or from another perspective: the flow of history, there are basic causes or principles. Furthermore, Aristotle's empirical method, Aristotle collected 158 constitutions of the Greek city-states to study, also inspired Montesquieu to carry out an almost comprehensive empirical enquiry during the writing of *The Spirit of Laws*.²³

Besides this methodological inspiration Antiquity influenced Montesquieu from other directions, too. Both the age of Greek Antiquity as well as Aristotle's *Politics* offered for Montesquieu numerous issues to take into account.²⁴ On the one hand he made use many conceptions of Aristotle's political philosophy; *inter alia* the typology of governments, the idea of constitution and the differentiation between proper or good and improper forms of governments.²⁵ On the other hand he incorporated into his work many elements from the history of Greek Antiquity as illustrations or reference points. Such for example for Montesquieu Lycurgus and Solon was the model of the best legislator or he often referred to the moral or the laws of the ancient Greek world.²⁶ Hence, for Montesquieu the idealized picture of Antiquity was a source of both facts and inspiration at the same time.

However, as Goyard-Fabre points out, not only the Aristotelian legacy could be regarded as a source of methodological inspirations. Montesquieu's research method is revolutionary because, beside that it acquired inspiration from Aristotle's 'nature of things' philosophy and empirical approach, it applied Newton's very progressive considerations.²⁷ Newton's approach elaborated in his *Principia mathematica philosophiae naturalis* (1687) opposed the Cartesian hypothetical-deductive conception of scientific research coined by Descartes and his followers. On the contrary, Newton advocated facts as starting point for comprehending natural phenomena instead of deducing peculiar insights from abstract and general principles.²⁸ Montesquieu did exactly the same in social sciences; according to a clear-cut remark of Goyard-Fabre he may be called the Newton of human world. To understand the reasons of differences among the laws of various nations Montesquieu based his work on a comprehensive research of facts.²⁹ He tried to scrutinize as much laws, institutions and historical data as it was possible within the circumstances in his age.

²¹ GOYARD-FABRE op. cit. 10.

²² GOYARD-FABRE op. cit. 33–34.

²³ GOYARD-FABRE op. cit. 5.

²⁴ GOYARD-FABRE op. cit. 6. and 14.

²⁵ GOYARD-FABRE op. cit. 6–10.

²⁶ GOYARD-FABRE op. cit. 13–24.

²⁷ GOYARD-FABRE op. cit. 55.

²⁸ GOYARD-FABRE op. cit. 57–58.

²⁹ GOYARD-FABRE op. cit. 58–59.

This Newtonian approach of social sciences could be regarded as revolutionary in Montesquieu's age. Both its intention and its scope were an absolute novelty in the first half of the eighteenth century. Concerning its scope it should also be recalled that Montesquieu displayed intense interest toward the laws and customs of non-European countries, that is, he tried broadening the quite Europe-centric vision of the age. In *The Spirit of Laws* he analyzed some Asian, African, American or even more exotic, for example Fromosan or Bantamian laws and habits to find common features beyond the surface of diversity.³⁰

Montesquieu's research method thus was really extraordinary due to a lot of factors. It implied an ontological claim meaning the knowledge of the final reasons, as it is reflected by the innovative use of the Aristotelian concept of the 'nature of things'. Furthermore inspired by Aristotle empirical method and boosted by Newton's revolutionary nature philosophy Montesquieu put a very serious emphasis on the collection and study of facts. Additionally, he endeavored to broaden the traditional Europe-centric scope of the eighteenth century public thinking by making use a huge number of non-European examples in *The Spirit of Laws*.³¹

3. The place of natural law in Montesquieu's ideas

The *Spirit of Laws* is fundamentally related to Montesquieu's natural law conception. Natural law gives for it a comprehensive framework and determines the internal logical relationship among the so diverse arguments. Every part of the book is in a closer or a farther relation to natural law.

In Montesquieu's age natural law could be regarded as a 'hot' issue of discussion. Hobbes and Spinoza considerably questioned the authority of natural law, whilst Grotius, Pufendorf and Barbeyrac made severe intellectual efforts to defend it.³² Modern natural law authors emphasized the rational structure of the universe from which they deducted natural principles.³³ Montesquieu however, due to his methodological premises, radically changed this point of view. He endeavored to reconstruct the principles of natural law on the basis of a systematical study of positive laws.³⁴ So, he tried to do something very new concerning natural law in his age, which had never been done before him.

The very basis of Montesquieu's natural law approach was considerably inspired by Jean Domat's *Les lois civiles dans leur ordre naturel* (1689–94). Even though their approaches substantially differed on some points, as for instance Domat regarded monarchy as the best, the most natural form of government³⁵ while Montesquieu

³⁰ CARRITHERS op. cit. 10.

³¹ This intention was seriously attacked and criticized by Voltaire. CARRITHERS op. cit. 10.

³² C. P. COURTNEY: Montesquieu and Natural Law. In DAVID W. CARRITHERS–MICHAEL A. MOSHER–PAUL A. RAHE (eds.): *Montesquieu's Science of Politics*. Essays on The Spirit of Laws. Lanham–Boulder–New York–London: Rowman & Littlefield, 2001, 42–46.

³³ COURTNEY op. cit. 43.

³⁴ COURTNEY op. cit. 46.

³⁵ GOYARD-FABRE op. cit. 81.

selected good governments on the basis whether they respect the 'nature of things' independent of their current form.³⁶ According to Goyard-Fabre their natural law approach has three common points: (i) both authors believed that a divine order appears in the world, (ii) they were convinced that societies need rules which regulate the behavior of the peculiar citizen as well as the functioning of the whole society, and (iii) they argued that law cannot find its justification in the human decision, it needs a superior authority, the Ideal of Justice.³⁷

So, world is under a universal legality flowing from the very 'nature of things', in the words of Montesquieu 'Laws, in their most general signification, are the necessary relations arising from the nature of things'.³⁸ Hence this universal legality appears in laws of physical world, and it also governs the world of intelligent beings. However, as intelligent beings people do not always obey to the superior rules, the so-called 'relations of justice antecedent to the positive law', since they are endowed with free will or they often made irrational choices. Therefore, legislators have to remind people to his duty by political and civil laws.³⁹ So, the main function of positive law is to regulate the life of society in harmony with the superior justice.

Montesquieu should therefore be regarded as a natural law thinker, even if he changed the point of view of this approach. He placed natural law into the cosmic order of the universe which is organized by the 'nature of things', as one of the basic principles. Additionally, since people may deviate from it, natural law needs the support of positive laws, that is, the role of positive laws is to help the realization of natural law. Due to this relationship between positive and natural law, natural law is a standard for positive law, which must be respected if the legislator wants to act in harmony with the 'nature of things'.

4. Decadence and liberty

On the basis of the earlier presented premises Montesquieu developed a new approach of politics including the interpretation of constitutional questions. Following the analysis of the Roman history, he was convinced that the main law of history is the law of necessary decadence. If a nation reaches the higher point of development in accordance with her 'nature', it shall immediately begin to decline, as the example of Roman history teaches us. The only way to avoid this necessary decline is to return to the fundamental principles flowing from the 'nature of things'.⁴⁰ And since decline is characterized by a general abuse of powers, that is, by tyranny, only the protection of the people from despotism can impede this process.⁴¹

That is the main reason why liberty and law have a chief role in the constitutional theory of Montesquieu. For Montesquieu, contrary to Hobbes who conceived of

³⁶ GOYARD-FABRE op. cit. 85.

³⁷ GOYARD-FABRE op. cit. 72–77.

³⁸ COURTNEY op. cit. 49.

³⁹ COURTNEY op. cit. 51.

⁴⁰ GOYARD-FABRE op. cit. 111.

⁴¹ GOYARD-FABRE op. cit. 123.

liberty a situation free from any external oppression in the natural state,⁴² liberty means a political and legal problem.⁴³ In Montesquieu's approach liberty is determined by law and defined by the constitutions, and it means a 'right to do what the laws permit'.⁴⁴ Civil law regulates the affairs of people, while constitutional law rules the governmental relations. So, positive law protects people's liberty from two aspects, it regulates the relations of peculiar citizens with each other as well as defines the structure of government thereby it determines the exercise of governmental power. So, in order to be in harmony with the 'nature of things' governments must be moderated, so to say, powers must control power.

III. Montesquieu; an alternative vision of legal modernity? – critical remarks

Montesquieu thus developed his insights on the basis of these premises. Starting from a revolutionary method based on Aristotelian and Newtonian principles, relying on a natural law concept inherent in the intelligible universal order, and taking into account the law of history meaning the inevitable decadence, Montesquieu posed liberty into the centre of his work. He believed that law can be eligible of safeguarding liberty for citizens, and he was also convinced that a well-developed constitutional system, which is in harmony with the 'nature of things', can impede the concentration of power. That is to say a governmental system respecting both the 'nature of things' – physical and environmental factors; climate, terrain, topography and the nature of the given people – and natural law can successfully hinder the emergence of tyranny. So, in modern age only positive law being in harmony with natural law and the 'nature of things' can preserve liberty for citizens. Each of Montesquieu's particular constitutional insights *inter alia* separation of powers, the independence of judiciary are only consequences of these premises.

The last question is whether Goyard-Fabre is right when she treated Montesquieu as an 'Ancient' in the world of modernity. The earlier discussion suggests that Goyard-Fabre is only partial right. In fact, Montesquieu significantly relied on the legacy of the Antiquity. He applied numerous concepts of the Aristotelian political philosophy, and relied on Antiquity as a narrative context, as his work on the Roman history shows it. However he discussed fundamentally modern problems starting from this 'Ancient' background. Moderation of governments, that is, limitation of governmental powers via their separation in order to protect the liberty of citizens is a problem which can be only interpreted in the context of modernity. Antiquity, as Benjamin Constant analyzed it, preferred community on behalf of individual, therefore 'Ancient thinkers' focused on different topics; as for instance common good, or the duties of citizens toward the community. Additionally, the conditions of the modern politics differ profoundly from those of the Antiquity, as Oakeshott proved it. Modern European politics is characterized by the concept of sovereignty and concentrated

⁴² GOYARD-FABRE op. cit. 100.

⁴³ *Ibid.* and CARRITHERS op. cit. 24.

⁴⁴ GOYARD-FABRE op. cit. 101.

power, which had existed neither in the world of Greek city-states, nor in medieval Europe.

So, it might be better to say, that Montesquieu is a symbol of an alternative approach in modern legal history. Montesquieu knew well the political problems of his age and their socio-economic background: he was obviously modern in this sense. However, he chose an alternative way in order to understand these problems and to propose possible solutions. He approached them with a special alloy of the heritage of Antiquity and the achievements of Newton, and he analyzed them in the light of these experiences. That is to say Montesquieu also applied the Ancients' tools, as a source of both methodological and substantive considerations, to find plausible solutions to contemporary problems. By doing it he avoided a lot of troubles – such for instance loosing the connection with the factual reality, or reaching utopian and extreme results on the basis of the pure reason – which seduced some of the most brilliant intellectuals of modernity. And, this partly 'Ancient' approach can be the key to understand the influence and popularity of Montesquieu's constitutional ideas since it made possible to learn fruitfully from the experiences of the past conceived of as a common heritage of humankind. Therefore Montesquieu's idea on the division of powers and its consequences are not only a product of pure rational speculation but that of historical wisdom which can even be irrational by nature.

