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Montesquieu

Catherine Larrère

The Spirit of the Laws

Book XI, Chapter 3 What liberty is

It is true that in democracies the people seem to do what they want, but political liberty in no way consists in doing what one wants. In a state, that is, in a society where there are laws, liberty can consist only in having the power to do what one should want to do and in no way, being forced to do what one should not want to do.

One must put oneself in mind of what independence is and what liberty is. Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have this same power.

Chapter 4 Continuation of the same subject

Democracy and aristocracy are not free states by their nature. Political liberty is found only in moderate governments. But it is not always in moderate states. It is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits. Who would think it! Even virtue has need of limits.

So that one cannot abuse power, power must check power by the arrangement of things. A constitution can be such that no one will be constrained to do the things the law does not oblige him to do or be kept from doing the things the law permits him to do.¹

From the *Persian Letters* (1721), Montesquieu's first work, to his magnum opus, *The Spirit of the Laws* (1748), Montesquieu's commitments did not change. He criticized slavery, condemned the horror and senselessness of torture and denounced religious intolerance. At the same time, he studied guaranties for freedom, whether it was a matter of the constitutional distribution of powers, or the development of commerce, whose 'natural effect ... is to lead to peace' (XX: 2, 338). At the centre of this defence of human rights and civil liberties is his admiration for England, the 'one nation in the world whose constitution has political liberty for its direct purpose' (XI: 5, 156).

Montesquieu, without any doubt, was a theorist of political freedom. Does that make him a liberal? To speak of Montesquieu's liberalism is certainly an anachronism, since the term did not appear until the nineteenth century to describe many political and economic ideas unknown to Montesquieu. To what extent does Montesquieu's conception of political freedom inform what we understand today by liberalism? To respond to this question one must carefully examine Montesquieu's presentation of political liberty at the beginning of the first of the three books of *The Spirit of the Laws* (XI, XII, XIII) devoted to it.

To define political freedom, Montesquieu begins by specifying what it is not: the exercise of power. To be free is not to participate in power, it is to be protected against its excesses. This leads Montesquieu to define freedom by security: 'Political liberty is that tranquillity of spirit which comes from the opinion each one has of his security' (XI: 6, 157).

If one holds to this opposition between the exercise of power and security, Montesquieu's conception of political freedom cannot be distinguished from that presented by Benjamin Constant in his famous 1819 lecture, 'The Liberty of the Ancients Compared to That of the Moderns', where he opposed political participation, which the ancients defined as freedom, and private enjoyment which represented freedom for the moderns. Following Montesquieu, Constant judged that this change in the conception of freedom was linked to the development of commerce and the accompanying increase in the importance of satisfying individual interests.

However, Montesquieu's position cannot be reduced to the putative and purely European opposition of ancients and moderns and their forms of government. As Montesquieu understands it, political freedom does not exclude participation in power and is not based on the opposition between republic and monarchy, but on that between moderate and despotic governments, a distinction which is proper to Montesquieu and which allows him to broaden his view to a truly global perception of the political situation.

At the beginning of the first of the two chapters which he devotes to the definition of liberty, Montesquieu warns against confusing political freedom with the power of the people. This was a rejection of the ancient Greek idea that identified democracy with freedom. Montesquieu was not the first to criticize this republican definition of political freedom. Hobbes, in *Leviathan*, denounced the confusion between freedom as an individual right and political power, which is the right of the city or the state. He makes the ancients, and especially Aristotle, responsible for this mistake, which led people to believe that they would be more free in certain forms of government (republican or democratic) than in others (like monarchy), whereas the freedom which an individual enjoys should not be confused with the power of which the state disposes.² Montesquieu, like Hobbes, insists on making freedom an individual question. Hobbes defined the purposes of the state in relation to individuals: it is a question of shelter from foreign attack and of being capable of sustaining oneself. Montesquieu, defining freedom as security, determines it on an individual basis. It also has a subjective dimension: he characterizes it as 'tranquility of mind' and thus bases it on opinion. 'Political liberty', he insists, when he repeats the definition at the beginning of Book XII, 'consists in security or, at least, in the opinion one has of one's security' (XII: 2, 188).

But if they agree on the importance they give to the individual, Montesquieu and Hobbes divide on the relationship that they establish between freedom, as an individual right, and the law. According to Hobbes, 'Law and liberty differ as much as obligation and liberty.'³ Since the political condition of an individual is defined by submission or obedience, civil liberties 'depend on the silence of the law' and consist in the lack of obligation established by law.⁴ Montesquieu, on the contrary, links liberty and law: people are not free outside the law, or against the law. One is free with the law.

In Chapter 3, Montesquieu introduces this idea philosophically, through an opposition between power and duty: people are not free when doing what they want or what they can, but when doing what they should. Montesquieu redefines this opposition in a more political fashion as that between independence (when one is not subject to any authority) and freedom, in its relation to law: 'Liberty is the right to do everything the laws permit.' In order to establish this definition, Montesquieu shows that the proposition according to which one is free when acting against or despite the law cannot be generalized without contradiction: if everyone had the same freedom, no one would be free. This linked equality and freedom: freedom, as an individual right or power, belongs to everyone equally. It remains for the law to organize the coexistences of freedoms. Unlike Hobbes,

who insists on the repressive and prescriptive character of law, Montesquieu proposes a positive conception of law, which is permissive: it makes individual action possible. Security can thus be defined as the confidence everyone possesses that he or she can perform licit activities without hostile interference. Freedom, therefore, has political conditions and requires a description of the kind of state in which it can exist, from which comes the definition of state: 'That is ... a society in which there are laws.'

In declaring in Chapter 4 that 'democracy and aristocracy are not free states by their nature', Montesquieu affirms against Aristotle and the Greek tradition that freedom is not part of the essence or 'nature' of republican government, in the sense of that 'which makes it what it is' (III: 1, 21). However, he does not turn Aristotle's judgement upside down and claim that political freedom is an attribute of monarchies. He develops a different typology of governments, which contrasts moderate governments with despotic ones.

This opposition progressively emerges from the study of governments, from Book II onwards, based on the traditional classification borrowed from the Greek historians and political thinkers. Like the traditional typology, it distinguished three kinds of government, according to the number of people who shared power: the many – democracy; the few – aristocracy; and the government of an individual – monarchy. Yet Montesquieu folds democracy and aristocracy under the category of republic, and distinguishes, in government by an individual, between those where law rules – monarchies – and those where one governs without laws, solely by the whim of the person who holds power – despotisms. He then studies the three governments separately for the most part, but nevertheless makes comparisons between governments which are based on the difference between republics and monarchies, on the one hand, and between monarchy and despotism, on the other. These two kinds of comparison, at first made in parallel, later converge.

The difference between republics and monarchies is virtue, which Montesquieu defines as love of the government and of equality. Virtue is the principle (in the sense of the motive force) of republics, and especially of democracies, while it is not necessary in monarchies whose principle is honour, which is based on social distinctions, that is, on inequality. Virtue, extolled by the ancients, is in difficulty in modernity, especially because of the growing importance of commerce. Montesquieu explains the failure of the English republic after the English Civil War by referring to the opposition between virtue and commerce, which he borrows from the republican tradition: 'The political men of Greece who lived

under popular government recognized no other force to sustain it than virtue. Those of today speak to us only of manufacturing, commerce, finance, wealth, and even luxury' (III: 3, 22–3). Virtue, in effect, is love of equality that presumes the sacrifice of personal interests to the common good, while commerce promotes inequality and leads people to put their own interests first.

Between monarchy and despotism, Montesquieu emphasizes the importance of recourse to law; that is where the real difference lies between the two governments. As Montesquieu's argument unfolds, the point that both are governed by a single individual is reduced to a formal characteristic which allows comparison in order to better understand their difference. Montesquieu introduces the expression 'moderate governments' in Book III to distinguish despotism from monarchy (III: 10, 29). But in the following books the expression 'moderate governments' designates not only monarchies but all governments where the law reigns, including republics. Thus, gradually, the opposition between moderate and despotic governments, through which Montesquieu will define political freedom, is put in place.

By grouping republics and monarchies in the common category of moderate governments, the number of those who exercise power ceases to be a determining criterion, and at the same time, the opposition between antiquity and modernity is erased. Despotism ends up being situated not in time but in space, in a geographical elsewhere, the Orient. It is from China, Japan and Turkey that Montesquieu takes most of his despotic examples. But if he tends to find his examples outside of Europe, he makes it clear that despotism is not limited to Asia. It threatens European governments, the absolutist governments of his time (absolutism represents the despotic deviation of the French monarchy), as much as it did those of antiquity. The introduction of despotism into his typology globalizes Montesquieu's political thought by freeing it from imprisonment in the confrontation between ancients and moderns, meaningful only in a European context.

Despotism or arbitrary rule, whose principle is fear, is the face of evil in politics. One is almost astonished that it exists: 'It seems that human nature would rise up incessantly against despotic governments.' And yet, 'Most peoples are subjected to this type of government' (V: 14, 63). If its rule is so widespread, it is because it is the default form of government, a sort of ground-level politics: 'Only passions are needed to establish it.' We thus understand that 'liberty is found only in moderate governments', but while moderate government is a necessary condition for freedom, it is not sufficient, since, as stated in Chapter

4, freedom is 'not always [found] in moderate states'. If despotism, so to speak, creates itself, moderate government is a 'masterpiece of legislation' (V: 14, 63).

Political freedom therefore has a universal antagonist: power. For 'it has eternally been observed that any man who has power is led to abuse it'. Its positive mechanism, by contrast, – the possibility of limiting the universal tendency to abuse power – can only exist in accord with circumstances proper to each country. Thus the importance of the chapter devoted to the English constitution (XI: 6). There, Montesquieu describes the political techniques of balancing power that secure the rule of law, and under which 'no one will be constrained to do the things the law does not oblige him to do or be kept from doing the things the law permits him to do' (XI: 3, 155).

For power to check power, there must be several powers. Montesquieu distinguishes three kinds, legislative, executive and judicial, a distinction which he did not invent, for it owes its distant origins to Aristotle and is also found in Locke. Montesquieu's originality lies in his thought about the mechanisms which realize this distinction. The conception he develops is more a theory of how power is distributed than of how the powers are separated from one another. The only really separate power is the judiciary, which is essentially assigned to institutions independent of the other powers (judges and juries). The two other powers (legislative and executive) are exercised by different institutions or organs (upper chamber, lower chamber, king), which are vested in distinct social groups (the nobility, the people and the king, royalty itself being simultaneously an institution and a social power). The objective is that the participation of these social powers in each of these institutions, particularly in the legislative power, prevents the monopolization of a power by one organ or class which would lead to the confusion of powers and despotism. Thus, three institutions participate in the legislative power: the people and the lower chamber propose and vote the laws, while the upper chamber and the king participate through their power to block (or their veto).

The English constitution can be understood as a technical apparatus whose function needs explanation: 'The form of these three powers should be rest or inaction. But as they are constrained to move by the necessary motion of things, they will be forced to move in concert' (XI: 6, 164). Montesquieu thus shows that the constitution functions like a machine to correct the constant imbalances represented by the attempts of the different powers to encroach on each other. No one is obliged to desire the common good, but the common good is produced as a result: it is the universality of the law, which assures freedom. Those who

‘are subject only to the power of the law’, Montesquieu explains, ‘are really free’ (XI: 6, 159).

If the characteristic of modern politics is that, unlike ancient democracies, it does not depend on virtue, defined as the love of the public good and the citizens’ capacity to sacrifice their own interest to it, the political freedom made possible by the English constitution is indeed a specifically modern liberty. Nevertheless, this does not lead Montesquieu to see freedom as only a private concern for individual security, a search for personal comfort separate from the public dimension of politics. What Montesquieu defines is the freedom of the citizen, not that of the private individual, of the ‘particular’, as it was then called. The modern vision of freedom in no way excludes participation in power. For Montesquieu, there is no break between ancient democracy, uniting the people in a body on the public square, and modern representative government, but rather a continuity, which he expresses by the typically republican analogy between the government of one’s self and that of the state: ‘As, in a free state, every man, considered to have a free soul, should be governed by himself, the people as a body should have legislative power; but, as this is impossible in large states and is subject to many drawbacks in small ones, the people must have their representatives do all that they cannot themselves do’ (XI: 6, 159).

There is, therefore, no reason to oppose a liberty of the ancients, republican, based on the power of the people, to a liberty of the moderns, separate from power, reduced to individual security. What Montesquieu reproaches the ancient republics with is that they were never really the power of all, and thus were more about domination than freedom: ‘A popular state [democracy] means the liberty of poor and weak people and the servitude of rich and powerful people; and monarchy is the liberty of the great and the servitude of the little’, he writes in a fragment on political freedom.⁵ The conception of moderate government and the political liberty which the institutions of such a government make possible allow us to envisage a political freedom which is that of all citizens, not that of one part of the population to the detriment of another part. This freedom, under the shelter of the law, does not exclude some forms of participation in power. Doubtless, the fact that power is no longer derived from virtue allows everyone to satisfy their individual aspirations and, notably, to devote themselves unreservedly to commerce, which is, for Montesquieu, both an essentially private activity and a distinguishing aspect of modern society. This is one way in which Montesquieu is a liberal. But Montesquieu’s chief contribution to the

history of liberalism is to be sought in his conception of political freedom and in the institutions which can make it a reality.

One of Montesquieu's great originalities is his theory of despotism: he makes it into a separate form of government which, as such, ranks equally with the other forms of government in the neutral typology (its sole criterion is numeric) at the beginning of *The Spirit of the Laws*. But as the theory of governments advances, a normative opposition between moderate and despotic governments, between political freedom and public slavery, becomes clear. Political freedom is thus first defined through its opposite, the universal evil of the abuse of power. But if, in politics, evil is one, 'there are several goods' (XXVI: 2, 495). Political freedom depends on institutions – it is not the result of a spontaneous order based on practice, and its forms are multiple. England, as Montesquieu studies it, is doubtless closest to what we would today describe as a liberal regime. That Montesquieu identifies it as the locus of political freedom in his time is one of the reasons for the contemporary relevance of his political thought. But in no way does he make England a universal model. Montesquieu, whose purpose was to examine 'the infinite diversity of law and mores', did not think there were any universally valid models. His comparative method led him to judge that governments are good only in relation to the particular situation in which they find themselves. If Montesquieu belongs to the liberal tradition, his liberalism is a liberalism of plurality: of men, of institutions, of solutions; and in this respect, as in many others, Tocqueville can be considered his successor.

Translated by Alan S. Kahan.