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Montesquieu, "Of the Constitution of England" (1748)
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"There is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."

Charles Louis de Secondat, Baron de Montesquieu (1689-1755)

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[June, 2013]

Editor's Introduction

Charles Louis de Secondat, Baron de Montesquieu (1689-1755) was one of the most influential legal theorists and political philosophers of the 18th century. His ideas about the separation of powers and checks on the power of the executive had a profound impact on the architects of the American constitution. His admiration for the English form of liberty was also very influential within Europe during the Enlightenment. Montesquieu is best known for his satire of French society, the *Lettres persanes* (Persian Letters) (1721), in which his criticism of French institutions and customs was cloaked by the clever observations made by his fictional "Persian" visitors; the *Considérations sur les causes de la grandeur des Romains et de leur décadence* (Considerations on the Causes of the Grandeur and Decadence of the Romans) (1734); and his anonymously published master piece *De l'Esprit des Lois* (The Spirit of the Laws) (1748). *The Spirit of the Laws* was banned by the Catholic Church and it was placed on the Index of Prohibited Books in 1751.

Although this influential chapter is entitled "Of the Constitution of England" it really has little to do with the way the English government worked in the mid-18th century. Montesquieu admits this when he states at the end that it was rather the "spirit" of English law which gave the English "this liberty." Nevertheless, it is a very good example of Montesquieu's comparative approach to the study of political and legal institutions where he ranges broadly over ancient Greek and Roman, Germanic, modern Italian, Dutch, and even English history.

Montesquieu reduces the problem of political liberty to the fear people have for their own safety which results from the actions of others. Governments need to be structured in such a way as to minimize an individual's fear for their own safety, and this can only be done when its essential functions are divided (he identifies these as legislative, executive, and judicial powers) and where no one individual or group controls more than one of these powers. In the course of this discussion he deals with the problems of election, representation, veto powers, the role of the hereditary nobility, the value of a citizen versus a standing army, and so on. In reading this list one can see immediately the influence this had on similar discussions made during the making of the American republic.

"The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another. When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive… There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Of the Constitution of England (1748)[1]

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 matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.

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Most kingdoms in Europe enjoy a moderate government, because the prince, who is invested with the two first powers, leaves the third to his subjects.

In Turkey, where these three powers are united in the sultan's person, the subjects groan under the most dreadful oppression.

In the republics of Italy, where these three powers are united, there is less liberty than in our monarchies. Hence their government is obliged to have recourse to as violent methods, for its support, as even that of the Turks; witness the state-inquisitors,[1] and the lion's mouth into which every informer may at all hours throw his written accusations.

In what a situation must the poor subject be, under those republics! The same body of magistrates are possessed, as executors of the laws, of the whole power they have given themselves in quality of legislators. They may plunder the state by their general determinations; and, as they have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions.

The whole power is here united in one body; and, though there is no external pomp that indicates a despotic sway, yet the people feel the effects of it every moment.

Hence it is that many of the princes of Europe, whose aim has been levelled at arbitrary power, have constantly set out with uniting, in their own persons, all the branches of magistracy, and all the great offices of state.

I allow, indeed, that the mere hereditary aristocracy of the Italian republics does not exactly answer to the despotic power of the Eastern princes. The number of magistrates sometimes moderates the power of the magistracy; the whole body of the nobles do not always concur in the same design; and different tribunals are erected, that temper each other. Thus, at Venice, the legislative power is in the *council*, the executive in the *pregadi*, and the judiciary in the

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[1] Charles Louis de Secondat, Baron de Montesquieu, *The Complete Works of M. de Montesquieu* (London: T. Evans, 1777), 4 vols. Vol. 1, *The Spirit of Laws*, Book XI, Chapter VI, "Of the Constitution of England." <http://oll.libertyfund.org/title/837/71392>.

quarantia. But the mischief is, that these different tribunals are composed of magistrates all belonging to the same body; which constitutes almost one and the same power.

The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people,[2] at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.

By this method, the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.

In accusations of a deep and criminal nature, it is proper the person accused should have the privilege of choosing, in some measure, his judges, in concurrence with the law; or, at least, he should have a right to except against so great a number, that the remaining part may be deemed his own choice.

The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will.

But, though the tribunals ought not to be fixt, the judgements ought; and to such a degree, as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society without exactly knowing the nature of their obligations.

The judges ought likewise to be of the same rank as the accused, or, in other words, his peers; to the end, that he may not imagine he is fallen into the hands of persons inclined to treat him with rigour.

If the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behaviour, there is an end of liberty; unless they are taken up in order to answer, without delay, to a capital crime; in which case they are really free, being subject only to the power of the law.

But, should the legislature think itself in danger, by some secret conspiracy against the state, or by a correspondence with a foreign enemy, it might authorize the executive power, for a short and limited time, to imprison suspected persons, who, in that case, would lose their liberty only for a while, to preserve it for ever.

And this is the only reasonable method that can be substituted to the tyrannical magistracy of the *Ephori*, and to the *state inquisitors* of Venice, who are also despotical.

As, in a country of liberty, every man who is supposed a free agent ought to be his own governor, the legislative power should reside in the whole body of the people. But, since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

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The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbours than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper, that, in every considerable place, a representative should be elected by the inhabitants.

The great advantage of representatives is, their capacity of discussing public affairs. For this, the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.

It is not at all necessary that the representatives, who have received a general instruction from their constituents, should wait to be directed on each particular affair, as is practised in the diets of Germany. True it is, that, by this way of proceeding, the speeches

of the deputies might, with greater propriety, be called the voice of the nation; but, on the other hand, this would occasion infinite delays; would give each deputy a power of controlling the assembly; and, on the most urgent and pressing occasions, the wheels of government might be stopped by the caprice of a single person.

When the deputies, as Mr. Sidney well observes, represent a body of people, as in Holland, they ought to be accountable to their constituents; but it is a different thing in England, where they are deputed by boroughs.

All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own.

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One great fault there was in most of the ancient republics, that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach. For, though few can tell the exact degree of men's capacities, yet there are none but are capable of knowing, in general, whether the person they choose is better qualified than most of his neighbours.

Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed; a thing suited to their abilities, and which none indeed but themselves can properly perform.

In such a state, there are always persons distinguished by their birth, riches, or honours: but, were they to be confounded with the common people, and to have only the weight of a single vote, like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs.

The legislative power is, therefore, committed to the body of the nobles, and to that which represents the people; each having their assemblies and deliberations apart, each their separate views and interests.

Of the three powers abovementioned, the judiciary is, in some measure, next to nothing: there remain, therefore, only two: and, as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility is extremely proper for this purpose.

The body of the nobility ought to be hereditary. In the first place, it is so in its own nature; and, in the next, there must be a considerable interest to preserve its privileges: privileges, that, in themselves, are obnoxious to popular envy, and of course, in a free state, are always in danger.

But, as an hereditary power might be tempted to pursue its own particular interests, and forget those of the people, it is proper, that, where a singular advantage may be gained by corrupting the nobility, as in the laws relating to the supplies, they should have no other share in the legislation than the power of rejecting, and not that of resolving.

By the *power of resolving*, I mean, the right of ordaining by their own authority, or of amending what has been ordained by others. By the *power of rejecting*, I would be understood to mean, the right of annulling a resolution taken by another; which was the power of the tribunes at Rome. And, though the person possessed of the privilege of rejecting may likewise have the right of approving, yet this approbation passes for no more than a declaration that he intends to make no use of his privilege of rejecting, and is derived from that very privilege.

The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person.

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But, if there were no monarch, and the executive power should be committed to a certain number of persons, selected from the legislative body, there would be an end of liberty, by reason the two powers would be united; as the same persons would sometimes possess, and would be always able to possess, a share in both.

Were the legislative body to be a considerable time without meeting, this would likewise put an end to liberty. For, of two things, one would naturally follow; either that there would be no longer any legislative resolutions, and then the state would fall into anarchy; or that these resolutions would be taken by the executive power, which would render it absolute.

It would be needless for the legislative body to continue always assembled. This would be troublesome to the representative, and moreover would cut out too much work for the executive power, so as to take off its attention to its office, and oblige it to think only of defending its own prerogatives and the right it has to execute.

Again, were the legislative body to be always assembled, it might happen to be kept up only by filling the places of the deceased members with new representatives; and, in that case, if the legislative body were once corrupted, the evil would be past all remedy. When different legislative bodies succeed one another, the people, who have a bad opinion of that which is actually sitting, may reasonably entertain some hopes of the next: but, were it to be always the same body, the people, upon seeing it once corrupted, would no longer expect any good from its laws; and, of course, they would either become desperate or fall into a state of indolence.

The legislative body should not meet of itself. For a body is supposed to have no will but when it is met: and besides, were it not to meet unanimously, it would be impossible to determine which was really the legislative body, the part assembled, or the other. And, if it had a right to prorogue itself, it might happen never to be prorogued; which would be extremely dangerous, in case it should ever attempt to encroach on the executive power. Besides, there are seasons (some more proper than others) for assembling the legislative body: it is fit, therefore, that the executive power should regulate the time of meeting, as well as the duration, of those assemblies, according to the circumstances and exigences of a state, known to itself.

Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic: for, as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers.

But it is not proper, on the other hand, that the legislative power should have a right to stay the executive. For, as the execution has its natural limits, it is useless to confine it: besides, the executive power is generally employed in momentary operations. The power, therefore, of the Roman tribunes was faulty, as it put a stop not only to the legislation, but likewise to the executive part of government; which was attended with infinite mischiefs.

But, if the legislative power, in a free state, has no right to stay the executive, it has a right, and ought to have the means, of examining in what manner its laws have been executed; an advantage which this government has over that of Crete and Sparta, where the Cosmi and the Ephori gave no account of their administration.

But, whatever may be the issue of that examination, the legislative body ought not to have a power of arraigning the person, nor, of course, the conduct, of him who is entrusted with the executive power. His person should be sacred, because, as it is necessary, for the good of the state, to prevent the legislative body from rendering themselves arbitrary, the moment he is accused or tried there is an end of liberty.

In this case, the state would be no longer a monarchy, but a kind of republic, though not a free government. But, as the person, intrusted with the executive power, cannot abuse it without bad counsellors, and such as hate the laws as ministers, though the laws protect them, as subjects these men may be examined and punished: an advantage which this government has over that of *Gnidus*, where the law allowed of no such thing as calling the *Amymones*[3] to an account, even after their administration[4]; and

therefore the people could never obtain any satisfaction for the injuries done them.

Though, in general, the judiciary power ought not to be united with any part of the legislative, yet this is liable to three exceptions, founded on the particular interest of the party accused.

The great are always obnoxious to popular envy; and, were they to be judged by the people, they might be in danger from their judges, and would moreover be deprived of the privilege, which the meanest subject is possessed of in a free state, of being tried by his peers. The nobility, for this reason, ought not to be cited before the ordinary courts of judicature, but before that part of the legislature which is composed of their own body.

It is possible that the law, which is clear-sighted in one sense, and blind in another, might, in some cases, be too severe. But, as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour. That part, therefore, of the legislative body, which we have just now observed to be a necessary tribunal on another occasion, is also a necessary tribunal in this: it belongs to its supreme authority to moderate the law in favour of the law itself, by mitigating the sentence.

It might also happen, that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of crimes which the ordinary magistrates either could not, or would not, punish. But, in general, the legislative power cannot try causes; and much less can it try this particular case, where it represents the party aggrieved, which is the people. It can only, therefore, impeach. But before what court shall it bring its impeachment? Must it go and demean itself before the ordinary tribunals, which are its inferiors, and, being composed moreover of men who are chosen from the people as well as itself, will naturally be swayed by the authority of so powerful an accuser? No: in order to preserve the dignity of the people and the security of the subject, the legislative part which represents the people must bring in its charge before the legislative part which represents the nobility, who have neither the same interests nor the same passions.

Here is an advantage which this government has over most of the ancient republics where this abuse prevailed, that the people were at the same time both judge and accuser.

The executive power, pursuant to what has been already said, ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative. But, should the legislative power usurp a share of the executive, the latter would be equally undone.

If the prince were to have a part in the legislature by the power of resolving, liberty would be lost. But, as it is necessary he should have a share in the legislature for the support of his own prerogative, this share must consist in the power of rejecting.

The change of government at Rome was owing to this, that neither the senate, who had one part of the executive power, nor the magistrates, who were entrusted with the other, had the right of rejecting, which was entirely lodged in the people.

Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

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These three powers should naturally form a state of repose or inaction: but, as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.

As the executive power has no other part in the legislative than the privilege of rejecting, it can have no share in the public debates. It is not even necessary that it should propose; because, as it may always disapprove of the resolutions that shall be taken, it may likewise reject the decisions on those proposals which were made against its will.

In some ancient commonwealths, where public debates were carried on by the people in a body, it was natural for the executive power to propose and debate in conjunction with the people; otherwise their resolutions must have been attended with a strange confusion.

Were the executive power to determine the raising of public money otherwise than by giving its confent, liberty would be at an end; because it would become legislative in the most important point of legislation.

If the legislative power were to settle the subsidies, not from year to year, but for ever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and, when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another. The same may be said if it should come to a resolution of intrusting, not an annual, but a perpetual, command of the fleets and armies to the executive power.

To prevent the executive power from being able to oppress, it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit as the people, as was the case at Rome till the time of *Marius.* To obtain this end, there are only two ways; either that the persons employed in the army should have sufficient property to answer for their conduct to their fellow-subjects, and be enlisted only for a year, as was customary at Rome; or, if there should be a standing-army composed chiefly of the most despicable part of the nation, the legislative power should have a right to disband them as soon as it pleased; the soldiers should live in common with the rest of the people; and no separate camp, barracks, or fortress, should be suffered.

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When once an army is established, it ought not to depend immediately on the legislative, but on the executive, power; and this from the very nature of the thing, its business consisting more in action than deliberation.

It is natural for mankind to set a higher value upon courage than timidity, on activity than prudence, on strength than counsel. Hence the army will ever despise a senate, and respect their own officers: they will naturally slight the orders sent them by a body of men whom they look upon as cowards, and therefore unworthy to command them: so that, as soon as the troops depend entirely on the legislative body, it becomes a military government; and, if the contrary has ever happened, it has been owing to some extraordinary circumstances. It is because the army was always kept divided; it is because it was composed of several bodies, that depended each on a particular province; it is because the capital towns were strong places, defended by their natural situation, and not garrisoned with regular troops. Holland, for instance, is still safer than Venice; she might drown or starve the revolted troops; for, as they are not quartered in towns capable of furnishing them with necessary subsistence, this subsistence is of course precarious.

In perusing the admirable treatise of Tacitus on the manners of the Germans,[5] we find it is from that nation the English have borrowed the idea of their political government. This beautiful system was invented first in the woods.

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As all human things have an end, the state we are speaking of will lose its liberty, will perish. Have not Rome, Sparta, and Carthage, perished? It will perish when the legislative power shall be more corrupt than the executive.

It is not my business to examine whether the English actually enjoy this liberty, or not. Sufficient it is

for my purpose to observe, that it is established by their laws; and I inquire no farther.

Neither do I pretend by this to undervalue other governments, nor to say that this extreme political liberty ought to give uneasiness to those who have only a moderate share of it. How should I have any such design; I who think that even the highest refinement of reason is not always desirable, and that mankind generally find their account better in mediums than in extremes?

Harrington, in his *Oceana*, has also enquired into the utmost degree of liberty to which the constitution of a state may be carried. But, of him, indeed, it may be said, that, for want of knowing the nature of real liberty, he busied himself in pursuit of an imaginary one; and that he built a Chalcedon, though he had a Byzantium before his eyes.

Notes

[1] At Venice.

[2] As at Athens.

[3] These were magistrates chosen annually by the people. See Stephen of Byzantium.

[4] It was lawful to accuse the Roman magistrates after the expiration of their several offices. See, in Dionys. Halicarn. l. 9. the affair of *Genutius*, the tribune.

[5] De minoribus rebus principes consultant, de majoribus omnes; ita tamen ut ea quoque, quorum penes plebem arbitrium est, apud principes pertractentur.

Further Information

Source

The edition used for this extract: Charles Louis de Secondat, Baron de Montesquieu, *The Complete Works of M. de Montesquieu* (London: T. Evans, 1777), 4 vols. Vol. 1, The Spirit of Laws, Book XI, Chapter VI, "Of the Constitution of England." <oll.libertyfund.org/title/837/71392>.

Further Reading

Other works by Montesquieu (1689-1755): <oll.libertyfund.org/person/3869>.

School of Thought: The French Enlightenment <oll.libertyfund.org/collection/21>.

"The distinctive principle of Western social philosophy is individualism. It aims at the creation of a sphere in which the individual is free to think, to choose, and to act without being restrained by the interference of the social apparatus of coercion and oppression, the State."
[Ludwig von Mises, "Liberty and Property" (1958)]

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