

Panagiotis (Panajotis) Kondylis

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Preliminary remark/note

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P.K.

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I. Introductory remarks

The ascertainment that Montesquieu's work presents a Janus face constitutes quasi a commonplace in the pertinent research of the 20th century. The liberal constitutionalists of the 19th century saw in Montesquieu primarily and one-sidedly the theoretician of the separation of powers and the harbinger and precursor of bourgeois liberalism, however gradually the question formulations and central themes of the young (newly appearing) sociological discipline, its dilemmas and aporias (queries, doubts, contradictions or paradoxes) came to the forefront. As the search for forms and kinds of law bindedness (determinisms or law-based necessities) or regularities (stable causalities), sociology had to, already from the cradle, confront the following question: if in regard to personal acts, impersonal laws prevail, what weight and significance can then moral commands and normative principles have; what remains of the (social) Ought when the (social) Is, is subject to strict causalities? The "great Montesquieu" had already been characterised the first modern sociologist¹, and that is why it

¹ *Cours de philosophie positive*, Paris 1893-1895, IV, p. 193. The great gap in Montesquieu's thought lies, according to Comte, in the absence of a consistent philosophy or theory of progress (loc. cit., pp. 128, 130). Cf. Ch. III, Sec. 5, below.

was reasonable and plausible to draw attention now to the ceaseless fluctuating between ascertainties of facts (extra-ethical, objective assertions), and, subjective, ethically inspired positionings – especially in an epoch in which neo-Kantianism had sharpened one’s sense for the contrast, opposition and conflict between causal and normative (consideration)². But that was still not all. The clearer it became that the separation of powers and political freedom in Montesquieu meant something different than in the context of bourgeois liberalism and of modern democracy, the more noticeable was the tension and tug-of-war between the loyalty of the (French) Baron to basic aristocratic (noble) political or other social values, which were vitally essential for the continued existence and survival of the ancien régime, and his just as sincere Enlightenment and reformist cast of mind/mindset.

The general physiognomy of Montesquieu’s thought thus seems to be characterised by two fundamentally antithetical conceptual pairs (pairs of [a] concept[s]): the conceptual pair “causal – normative”, and the conceptual pair “conservatism – liberalism or reformism”. The former patently has a theoretical character, and both its limbs grow in the soil of the New Times, since the inner logic (and distinctness) of new-times rationalism, as it was shaped in its polemics against the theological world image, made the conflict between the causal and normative way of looking at things unavoidable (from within its bosom, belly or womb)³. The latter (conceptual pair of conservatism – liberalism/reformism) is political-practical, and it does not mark any longer Montesquieu’s place *inside* of the theoretical spectrum of the New Times, but it displays his midway (halfway) position and vacillation *between* the pre-modern

² Typical regarding that, and still important as to content, remain the analyses of Lanson and Brunschvicg, even though their assessments as regards the logical coherence of Montesquieu’s thought do not coincide, see III and V of the bibliography below, pp. 107-108 (Writings and studies, which are cited in the footnotes in abbreviated form or referred to with the name of the author, are fully set out in the bibliography; writings, which treat a special or specific question and in the corresponding footnote are fully cited, were not incorporated in the bibliography).

³ Regarding that in detail (*or*: I have expounded this thesis in detail in my book) Kondylis, *Die Aufklärung* [= *The Enlightenment*], esp. Ch. II and VI. Cf. Ch. III, Sec. 2, below.

(semi-feudal structuring of the ancien régime) and the bourgeois-liberal society, which, historically seen, brought to an end what [[as a social(political)-historical process]]ⁱ had begun in Europe with the Renaissance. After having ascertained and pointed out the research relatively early on into both these basic contrasts (oppositions), or at least the tensions in Montesquieu's thought, research set about clarifying whether both limbs of each of the antithetical conceptual pairs can logically or (at least) psychologically be reconciled with each other, or whether they merely exist next to each other without their contrast and opposition to each other being lifted (removed or rescinded), in fact without such contrast (opposition) becoming known once (i.e. at all). To this dual question, all possible answers have hitherto been given by various researchers. Yet the relation(ship) between both the aforementioned conceptual pairs as (two different, autonomous) closed totalities or entreties was hardly entered into or thoroughly investigated. One could say that in Montesquieu a – typical for transition periods – ambivalence can be found again or encountered: he is an Enlightener (Enlightenment thinker and philosopher) with regard to his scientific positioning, that is, mode of procedure/proceeding (= method); his political-social preferences and convictions, however, lingered and remained, left behind those of the bourgeois wing of the Enlightenment, or even contradicted them⁴. Such an interpretation or appraisal is in principle not false, nevertheless, it simplifies the facts of the case so much that ultimately it misleads and leads [[one]] into error (rather than interpreting [[Montesquieu]]). Actually: if we break up both antithetical conceptual pairs into their four limbs (constituent elements), and thereafter correlate every one of these four limbs with the remaining three, then it turns out that the relation(ship)s of both limbs (elements) of one conceptual pair with both limbs (elements) of the other conceptual pair, but also as between each other [[within each conceptual pair

⁴ Thus, for instance Althusser, *Montesquieu*, p. 64, who contradistinguishes the «savant» and the “man” and his selfish political preferences.

separately]], are neither symmetrical (identical) nor univocal (with only one meaning; clear; unambiguous), i.e. directly analogous/proportional or directly reverse. In other words: every limb (element) has a twin (double) provenance, dual (double) reference and a double function. Still more concretely: the search for causal relations and social forms/kinds of law bindedness (determinisms or law-based necessities) aims indeed at the rebuttal and refutation of the theological perception of history, however, simultaneously it serves the proof of (= in proving) the functional necessity (*or*: inner/internal logic)ⁱⁱ – and consequently also the historical justification – of existing relations of domination, whereby the later utilisation of sociology and history paved the way for the defence of conservative positions against the claims of universal-unhistorical revolutionary Reason⁵; the invocation of normative principles does not simply confirm the alliance with the ethics of the Enlightenment, but it frees up even room to move for adherents of theological interpretations of the relation(ship) between natural law(/right(/justice)) and godly/divine will; the confession of faith in the fundamental ethical values, as many as there are, of the nobility (hereditary aristocracy), and the benevolent and favourable assessment of the nobility's social-political function, is not expressed one-sidedly in a pleading for, i.e. defence of the maintenance of the nobility's privileges, but is connected, over and above that, with an ideal of constitutional equilibrium and of political freedom, which, comprehended in terms of form (*or*: if considered as a simple type), and if transferred to other historical situations, could legitimise a liberalism on a broader, and no longer aristocratic,

⁵ On this utilisation, and the manner with which this utilisation was carried out in about 1800, see basically K. Mannheim, „Das konservative Denken“, *Archiv für Sozialwissenschaft und Sozialpolitik* 57 (1927), pp. 68-142, 470-495. Also significant, R. Spaemann's dissertation, *Der Ursprung der Soziologie aus dem Geist der Restauration. Studien über L.G.A. de Bonald*, München 1959. Cf. P. Kondylis, *Konservativismus. Geschichtlicher Gehalt und Untergang*, Stuttgart 1986, Ch. III, Sec. 6. On the logical relation between sociological determinism and political conservatism in Montesquieu see H. Vyverberg, *Historical Pessimism in the French Enlightenment*, Cambridge, Mass. 1958, esp. p. 167. On the, concerning [[all of]] that, reproaches of Voltaire and Rousseau against Montesquieu see below Ch. IV, Sec. 1.

social basis⁶; and finally, the liberal and reformist stance is not harshly and one-sidedly, inflexibly and singly, set against the existing and prevailing state of affairs, but at least it just as much wants to be this state of affairs' safety valve.ⁱⁱⁱ

In this motley and non-uniform mesh and plexus (network), which becomes, through innumerable fine nuances of Montesquieu's spirit and style, still more opaque, the researcher and interpreter cannot but feel lost (*or*: awkwardness and embarrassment). His gain would only be slight and temporary if he wanted to take flight or make his escape in a forward direction, and at once schematise the plethora of the data and points of view. He would move [[walk]] on firmer ground (*or*: He would proceed methodically far more safely), if he dwelled on some leitmotifs and his own – unavoidable – reductions, as mere points of reference and of orientation, not viewing them as hermeneutic panaceas (but viewing them as measures, in relation to which coincidence with or divergence from such measures, allows and in fact commends, understanding).

Understanding is enabled, in fact constituted, only in the dual simultaneous movement of deviation from, and coming nearer to (convergence with), the thus placed boundary stones. Max Weber's great truth, that our concepts should be so much the clearer and fixed, the more fluid reality is, applies not only to and for the understanding of social phenomena, but also for the interpretation of texts. As a conceptual framework of orientation, we shall use here both antithetical conceptual pairs, of which there was talk above. However, beforehand, we want to pursue their formation in Montesquieu's transition from the classical teaching (theory, doctrine) of the state and of politics to modern sociology. Hence, a triptych will result. The following analysis will show, as I hope, the close, tight interrelation of this triptych's components with one another.

⁶ In this sense, on the whole, Montesquieu's political teaching at any rate had an effect, see VI of the bibliography below. Of course, there was no lack of attempts at a conservative interpretation and appropriation too, see e.g. Kondylis, *Konservativismus* (FN [= footnote] 5), pp. 244, 304, 352, 353.

II. From the teaching, doctrine or theory of the state and of politics to sociology

1. The scientific pioneering venture and feat

Montesquieu's pioneering venture/feat in the constitution of modern social science stretches across two levels (sectors, areas). At the level of social ontology, laws and causes are in principle and programmatically asked about and sought. Montesquieu expressly disputes or doubts (I, 1)⁷ that laws prevail only in nature, and correspondingly (he) strives for a way of looking at society and history in accordance with the example or model of looking at nature, although he knows about, and notes, the differences which man's autonomous action creates between both these spheres of the real (i.e. nature and human society). The concept of "law", which in antiquity and the Middle Ages referred

⁷ Citations in parentheses refer to *L'Esprit de Lois* (book and chapter).

exclusively to human things (affairs), and meant a social or institutional command, was transferred by new-times natural science to the realm of inorganic nature, and at the same time was drastically re-interpreted, in order to express what we today understand under or as “law bindedness (determinism or law-based necessity)”. The still young mathematical natural science (of the 17th century) drew its self-confidence from the conviction that thanks to the immanent law bindedness (determinism or law-based necessity) of its object and subject matter, it offers (kinds of) knowledge more reliable and credible than any science of man; it is known how Descartes articulated this conviction and belief. When Montesquieu, therefore, in condensing already existing but still diffuse tendencies (let us recall Vico’s large-scale undertaking), turns to the investigation and calibration of social causalities (= of the causes of social phenomena), when he comprehends society as a historical and at the same time self-contained construct governed by its own laws, then he wants to bridge the Cartesian ontological gulf between nature and society, whereby he opened up in the 18th century, a wide and fertile intellectual(-spiritual) field⁸.

Also pointing the way (i.e. pioneering) was Montesquieu’s accomplishment at the second level, the methodological and epistemological level. The apprehension of a law bindedness (determinism or law-based necessity) hangs in the air (or is without (i.e. is empty of) content), as long as the question of its methodical formulation remains unresolved; apprehension and formulation remain the two sides of the same coin, and equally depend on the fundamental judgement and evaluation in respect of the texture and composition of each and every respective law-bound (deterministic, law(rule)-based) being. Montesquieu ascertains, as we have said, a limine (= from the beginning/at the start/on the threshold) the ontological difference between inorganic nature and human society, and this suggests and imposes (on)to him, during the transition from the

⁸ Cf. Berlin, “Montesquieu”, p. 270.

former to the latter, for the apprehension and formulation of the law bindedness (determinism or law-based necessity) to be essentially differentiated. If the law bindedness (determinism, law(rule)-based necessity) of Nature is apprehended and formulated (or can be expressed) strictly mathematically, then social law bindedness, as a result of the fluidity and discontinuity of its ontological field, can be grasped in flexible types (*or*: be synthesised in elastic, yet perspicuous and steady (stable) types). This does not necessarily amount to a capitulation to, a retreating from, or slackening of, the original and initial scientific intention. Because the type has just as much as the law, the ambition, without logical contradictions and without (great or strong) empirical kinds/forms of resistance (falsifications), of enclosing a given great variety or plethora of *prima facie* heterogeneous phenomena and manifestations, by reducing this same plethora of *prima facie* heterogeneous phenomena to an ideational and nonetheless not imaginary/imagined common denominator. Montesquieu's central typology refers and relates first of all to the forms of politics ((the) constitution[s]), and the transition from the teaching (theory, doctrine) of the state and of politics to sociology is carried out to the extent that the typology of the forms of politics ((the) constitution[s]) interweaves with a theory of social and historical causality, i.e. with the tracking down, unearthing and the formulation of kinds of law bindedness (determinisms or law-based necessities)⁹.

⁹ Aron, *Les étapes*, p. 28ff.. Cassirer likewise stressed that Montesquieu uses the concept/conceptual plan/perception of the "ideal type" first, and through his offered political and sociological typology, had anticipated the social science of the 19th and 20th century in important methodological respects (*Philosophie*, pp. 281, 283).

2. *The typology of polities (constitutions)*

We reserve the analysis of the concept of law for the third chapter^{iv}, and we [[shall now]] make some prefatory remarks about the typology of the forms of polities (constitution[s]), with the special aim of locating the conceptual intersections (links, nodal points) which connect that typology with the specifically sociological question formulation and central theme. On the basis of (*or*: Feeling and searching for) such intersections or links, we could perhaps succeed in reconstructing the internal structure, or at least the latent coherence, of Montesquieu's magnum opus, which very often seems to disintegrate into short-winded fragments, to lose itself in excursus(es) and digressions, to peter out in details (*or*: which very often breaks up into short-winded fragments, loses itself in excursuses, and peters out in details). And, all the same, an almost continuous red thread, at times visible, at other times invisible, runs through the whole [[of that]]/[[the whole of Montesquieu's magnum opus]]. The first book defines the object and subject matter of the work, i.e. the concept of law, and marks out that part of the spectrum to which the ensuing comments and investigation following should be dedicated. Books II to VIII treat the examination of the problem of the teaching (theory, doctrine) of the state and of polities, first of all in the narrower (Book II: the nature of the polity (constitution; *Verfassung*)), and then in the wider sense (Books III-VIII: the fundamental principle of the polity (constitution)), through which the bridge to sociological examination of themes and topics is built (see the next section). Books IX to XXV investigate without an apparent principle of classification and of order, the multifarious material, institutional and ideological factors, which shape and form laws as the legal articulation of the texture and composition of a society. In regard to these factors, it is a matter of the defensive and aggressive waging of war (Books IX and X), political freedom in the public and in the

private realm (Books XI and XII), the taxation system (Book XIII), climate (Book XIV-XVII), the soil (Book XVIII), the customs, mores, manners and ways (modes) of living (Books XIX-XXIII), as well as religion (Books XXIV-XXV). Here the red thread begins to fray and be cut. After a general overview of the field of application of the various kinds of law (Book XXVI), two books with historical analyses of Roman and Frankish law follow, and then comes the renowned, famous Book XXIX with its exhortations to the ideal legislator (law-giver, lawmaker). Books XXX and XXXI constitute a kind of appendix, which deals with a very topical historical and at the same time political debate.

The transition from the typology of the teacher, theorist or scholar/studier of the state and of polities to the causality and the law bindedness (determinism or law-based necessity) of the sociologist, points to the fact that the starting point of the effort and endeavour at thought was the teaching (theory, doctrine) of the state and of polities, that the typology of polities (constitutions) was not therefore originally constructed in accordance with sociological criteria, but was crossed or intersected with these criteria only *ex post facto* (in retrospect), when the said teaching had already experienced a certain deepening. Whether this intersection of the teaching of the state and of polities, and sociology, with each other, is logically and empirically tenable and binding, can be doubted and disputed with good reason(s) – important for the history of ideas remains, at any rate, that such an intersection came about or was carried out in and of itself at all. Seen as such and autonomously, the classification of polities (constitutions) stems from a certain political philosophy and a certain political intent, which appears in relief if we compare Montesquieu's trisection with the trisection handed down from antiquity. Aristotle took the number of those who exercised sovereign domination (dominance, power, force, violence) in a state as the yardstick, and accordingly he distinguished between kingdom, aristocracy and "politeia" (i.e. moderate, with oligarchic elements, mixed democracy), whose

degenerate forms were called tyranny, oligarchy and (extreme) democracy¹⁰. Montesquieu, the attentive, thoughtful and careful reader of the Aristotelian *Politics*, consciously dissociates and separates himself, and differs greatly, from the yardstick of number of bearers of sovereign domination (dominance, power, etc.). His trisection – republic, monarchy, despotism – lets two Aristotelian polities (constitutions) (aristocracy and democracy) be absorbed by one single polity (the republic) (*or*: merges the Aristotelian polities (aristocracy and democracy) with one (the republic)), and at the same time splits the Aristotelian kingdom into two polities (constitutions) independent and essentially different from each other (monarchy and despotism). Of course, monarchy can degenerate into despotism – just as both forms of the republic can degenerate into a despotism of the few over the many or of the many over the few –, nonetheless, monarchy and despotism remain by definition and of their essence *toto coelo* different, even though in both cases one single person constitutes the bearer of sovereign domination (dominance, power, etc.), that is, the numerical criterion is not affected (*or*: the numerical criterion coincides in both instances).

Certainly, Aristotle likewise observed the difference between kingdom and tyranny primarily as the qualitative difference (*or*: as essentially a difference of texture) in the exercising of sovereign domination (dominance, power, etc.) by one [[person]]; i.e., tyranny, as he knew it, does not come into being as a rule from the actual historical degeneration of a kingdom, but it is regarded as degenerate on the basis of a certain political-ethical positioning or perception. Looking back at the development (evolution, unfolding) of ancient Greek society, Aristotle could ascertain and see that the royal institution withers (declines or wanes), whereas tyrants constantly pop up or arrive on the scene – not from within the bosom/womb of some kingdom, but are supported either by masses or by oligarchies¹¹. Montesquieu's historical sense and view or vision is,

¹⁰ *Politics* III, 7-8, 1279a 22ff.. Especially or in greater detail on "politeia" IV, 8, 1293b 22ff..

¹¹ Loc. cit., esp. V, 10, 1310b ff..

on the contrary, moulded and dominated on the one hand by the tangible antagonism between despotism and monarchy as essentially different and equally vital polities (constitutions), and on the other hand, by the real possibility of the degeneration of a monarchy into despotism. This historical sense and view or vision, always connected with a political belief and intent(ion) or resolution, drives and propels him in relation to that, to put a qualitative criterion in the place of the numerical criterion, namely the *manner* how sovereign domination (dominance, power, etc.) is exercised. The qualitative criterion turns the numerical criterion upside down in a double respect. Not only can the one [[ruler]] exercise sovereign domination/power in, on each and every occasion, a totally different manner, but also the one [[ruler]], the few and the many can exercise it similarly or identically; freedom remains in principle possible, irrespective of the number of bearers of sovereign domination (dominance, power, etc.). Behind Montesquieu's typology there is, therefore, the search for political freedom or – what for him amounts to the same – moderation in the exercising of sovereign domination. The centre of gravity and polemical point of his typology of polities (constitutions) is the condemnation of despotism, that is, its expelling (expulsion; casting out) from the sphere of the politically acceptable through its being set against (i.e. its opposition to) all other polities (constitutions). Montesquieu's particular insistence, when he draws the dividing line between monarchy and despotism, is not due merely to the fact that the numerical identity/concurrence of the bearer(s) (*or*: at the summit) of sovereign domination (dominance, power, etc.) renders the conceptual distinction of both polities (constitutions) vis-à-vis each other more difficult. The reason lies deeper. The immanent political character and the political potentialities of the monarchical polity (constitution) are for Montesquieu as a conscious citizen of his country at that historical moment, a pressing and burning problem, especially since precisely a vehement, fierce

debate on the historical origin and course of the French monarchy was in progress; both final books of *L'Esprit des Loix* more than bear witness to this.

Such a politically and psychically loaded and charged centring/concentration of theoretical interest on the monarchical polity (constitution) had to, nevertheless, unfavourably and negatively influence the working out and elaboration of the rest of the components of the typology as a whole. The irreconcilable contrast and opposition (*or*: The overstressing of the boundaries) between monarchy and despotism at the ideal-typical level hindered significantly, first of all, the apprehension and interpretation of those concrete historical cases in which monarchy was converted into despotism. How and why Louis XI, Richelieu and Louis XIV. – these evil (bad) spirits/daemons/omens of French history, as Montesquieu viewed it – were able to break through the regulated, rugged conceptual dams between monarchy and despotism? Does, in the course of this, personal will suffice? And if it suffices, what permanent historical meaning does ideal-typical polarisation have then? What leads (us) back from such a deliberately imposed despotism, to a monarchy of moderation and of freedom? Open remains, likewise, the following, perhaps still more difficult question to be answered: wherein does the wanted, as it were, derived despotism of Europe differ from the *primaeval* and actual, authentic despotism, which seems and is supposed to have existed since forever (i.e. the beginning of time) in Asia? Perhaps in that the former can take the politically right path, but not the latter? That is what Montesquieu hints at, if I understand him correctly (VIII, 10) – this answer, however, is based on, or has been educed from a precarious perception of the character of “oriental” despotism, which came into being either through dubious evidence and testimony, or through the dubious handling of counter-evidence and counter-testimony. Whereas Montesquieu in 1734 still did not believe in the possibility of an absolutely

unrestricted, unlimited despotic human authority as dominance¹², in his main work (*The Spirit of the Laws*), the spectre^v of despotism is painted and visualised in the darkest of colours, so that the passion with which it is exorcised can appear to be justified. Chapters exist (or are found) in which the mores, manners, customs and laws of an “oriental despotism” like China are described with sobriety, and in fact with some goodwill (see e.g. XIX, 16-20); since, however, where the general concept(ual plan) seems to be threatened or must be summoned militantly, the sources available are modified, varied or overlooked. The despotic character of the Japanese polity (constitution) cannot at all be inferred from the (pieces of) information which Montesquieu possessed, whereas in the description of Muslim states, Montesquieu proceeds deductively rather than inductively, one-sided or prejudicial/biassed/partial narratives are approved, adopted and others are ignored etc.¹³.

Differently than the type of the despotic polity (constitution), the type of the republic turns out not excessively rigid and inflexible, but on the contrary, excessively loose and inwardly heterogeneous. Inside of it, the boundaries between extreme and moderate democracy, open aristocracy and oligarchy inimical to the people/folk, are unclear and fluid. If the shortcomings, disadvantages and faults committed in the sketching and outlining of the type of despotism first and foremost had to do with (*or*: were found in the field of) its weak empirical underpinning and founding, now they thus concern primarily conceptual working out, elaboration, processing and coherence. In both cases, though, they indirectly or directly go back, i.e. are due, to Montesquieu’s deep,

¹² *Considérations sur les causes de la grandeur des Romains et de leur décadence*, XXII.

¹³ See in detail in relation to that, Dodds, *Les récits de voyages*, esp. p. 153ff.. See also P. Vernière, «Montesquieu et le Monde Musulman, d’après *L’Esprit des Lois*», *Actes du Congrès Montesquieu*, pp. 175-190, as well as F. Weil, «Montesquieu et le despotisme», loc. cit., pp. 191-215, esp. 200, 203, 208. The rich-in-content article by F. Venturi informs [[us]] of the stereotypes of the 18th century regarding “oriental despotisms”, but also of the intense calling(s) into question/doubts regarding these same “oriental despotisms”, “Oriental Despotism”, *Journal of the History of Ideas* 24 (1963), pp. 133-142. Also significant is the older study/article by S. Stelling-Michaud, «Le mythe du despotisme oriental», *Schweizer Beiträge zur Allgemeinen Geschichte* 18/19 (1960/61), pp. 328-346. On Montesquieu as a historian of French right/law/justice, see the dissertation by I. Cox, *Montesquieu historian of French civil and constitutional law*, London 1980.

innermost conviction regarding his own political ends/goals inside a given, specific, concrete place and for a given, specific, concrete period of time, that a moderate monarchy is the most useful [[polity]] in a practical respect and consequently the most interesting in a theoretical respect. To that [[i.e. the moderate monarchy]] belongs the European present, whilst despotism, which politically is realised in pure form only in Asia, stands or is found far way in space, and the republic, which blossomed and flourished in Greco-Roman antiquity in its most representative way, is found far away in time. Therefore, it may be said *cum grano salis* that the typology of polities (constitutions) has its historical and geographical parameters: (classical) antiquity – Asia – Europe (after the wandering, i.e. migration of the peoples). Montesquieu has more concrete and sufficient representations only on European development, whereas his ideas on the ancient republic and Asiatic despotism are rounded and abstract, although the abstraction, one time, serves idealisation (glossing over, euphemistic description, embellishment, sugar coating), another time, denouncement. The model of the republican – aristocratic or democratic – polity (constitution) is in practice drawn exclusively from ancient authors; newer or contemporary analogous polities (constitutions) – the Swiss and Italian communes (communities, commons) as well as the Dutch (II, 3; V, 8; XX, 4-6, 16; XXI, 6, 21; IX, 1-2; XI, 6; XVIII, 6 etc.) – are mentioned only for the confirmation of various generalisations, and by no means constitute the real starting point or spark/stimulus for topical political thoughts and deliberations, even though they, on the other hand, are not dismissed, brushed aside, or proclaimed, as politically obsolete or irrelevant¹⁴.

Already in 1734, Montesquieu expresses himself with warm words regarding the noble political mindset which inspired Rome and Sparta¹⁵, and this warmth

¹⁴ Cf. M. Masterson's comments and observations, "Montesquieu's Grand Design: The Political Sociology of "Esprit des Lois", *British Journal of Political Science* 2 (1972), pp. 283-318, esp. pp. 308, 317.

¹⁵ *Considérations*, IV, cf. VIII, IX.

is never lost, although in his main work it is somewhat mitigated and subsides. In their ideal-typical apprehension, the ancient republics seem like magnificent, glorious political utopias, they are closed and manageable (i.e. limited in magnitude and population), they appear to be plain, moderate, austere and virtuous; their favourite occupation and activity is not profitable trade and all that promotes and reinforces self-interest, selfishness and individualism, but politics and war as undertakings and ventures which nourish and strengthen the highest virtues of the citizen, i.e. readiness and willingness for self-sacrifice and love of the fatherland. This description was not inspired merely by Montesquieu's intellectual(-spiritual) gallantry and generosity, nor did it stem wholly from the mode/fashion/fad of the ancient cult, which reached its peak at the time of the French Revolution. In saying something malicious (spiteful or nasty), but not unjustified or not without foundation, we could assert here that a non-democrat fearlessly and openly praises democracy because he does not regard it as a live threat (living danger) for his own political ideal, but as irrevocably dead (at least from an overall historical perspective (*or*: on a historical scale)) – and vis-à-vis the dead, one is, as a rule, fairly and reasonably generous than vis-à-vis the living. Montesquieu does not glorify and exalt ancient democracy in order to be an accessory to the imposition or pushing through of (*or*: in order to pave the way/open the road for) a modernised form of this same ancient democracy. In actual fact, Western mass democracies of the 20th century were formed, shaped and moulded under completely different presuppositions and preconditions, i.e. the atomisation of society, consumption and hedonism. However, just like the frugal, undemanding and high-minded democracy, – that which kept and deterred Montesquieu from becoming a democrat himself, what he in comparison with democracy held to be historically viable, sustainable and capable of surviving –, also disappeared and vanished from historical reality; his moderate and liberal monarchy today seems just as

obsolete as, or even more obsolete than, the ancient democracies were in his eyes.

Wherein now does the decisive advantage of monarchy consist vis-à-vis democracy if someone believes like Montesquieu that the supreme aim is the fight against despotism, and that political freedom means nothing other than moderation in the exercising of sovereign domination (dominance, power, etc.)? (About moderation, we shall say more in Chapter IV of this introduction in relation to the separation of powers. We already referred that moderation's concept constitutes a fundamental theoretical criterion in the setting up or establishment of the typology of polities). A republic and a monarchy contain of their essence the possibility of moderation, which (this possibility) is to despotism, alien/foreign/strange from birth. From this point of view, the contrast «modéré – despotique» is and remains absolute and unbridgeable. Yet such a contrast also appears in a relative form, and form capable of being arranged in grades and a scale – i.e. no longer as the contrast between types of polity (constitution), but inside those polities (constitutions) which by definition are distinguished by the possibility of moderation, in other words, the possibility of the realisation of freedom. That is why there are two kinds of moderation: a greater or stronger, which relates to the nature of the polity (constitution), and a smaller or weaker, which has to do with the possible historical fluctuations inside of the boundaries of this nature. We can therefore imagine that a polity (constitution) at the conceptual level possesses the former kind [[of moderation]] just as much as another polity (constitution) too, that it, however, is more or less lacking [[in moderation]] at the historical-empirical level of the latter kind [[of fluctuating moderation]], i.e. – according to a certain assessment of historical experience (the experiences of history) – (the said imagined polity) is exposed to the danger of despotism more than another polity (constitution). As Montesquieu believes, his contemporary European monarchy

has more historical chances of realising the political ideal of moderation because he connects it, as we shall point out and explicate in the fourth chapter, with a differentiated, manifold social structuring which can hardly be, or with difficulty is, leveled or polarised. On the contrary, both forms of the republic – aristocracy and democracy – are perpetually threatened by the dangers of polarisation or leveling, respectively, which undermine the social preconditions of political moderation, i.e. they destroy or efface/obliterate/extinguish manifoldness and heterogeneity, even if that means disproportion or a lack of balance. If the upper stratum in an aristocratic polity is prone to the consolidation of its privileged position/status by increasing delimitation and demarcation against the rest of the citizens, then democracy leads to anarchy and consequently finally to despotism, since it strives for equality up to its ultimate political and material consequence(s) (VIII, 3-5)¹⁶. Apparently, Montesquieu thinks that the by definition republic(an) polity (constitution) (with its two hypostases) is more likely to move in the direction of democracy than in the direction of aristocracy, and indeed both in the good sense (if aristocracy opens up and consequently promotes social coherence (*or*: since aristocracy improves by approaching democracy), see II, 3), as well as in the bad sense in the event that freedom and authority as dominance are misused under ochlocratic circumstances. According to that viewpoint, democracy seems to be the end point of, and the key to, the republic; and this deeper, albeit unspoken impression Montesquieu has, is perhaps linguistically reflected in the frequently synonymous usage of the terms *république* and *démocratie*¹⁷.

¹⁶ Cf. Aristotle's analysis, *Politics*, V, 9, 1309b-1310a, which by the way Montesquieu cites in another place (XXIX, 1).

¹⁷ See the interesting comments and development [[of this synonymous usage]] by R. Duhac, «Montesquieu et la Démocratie: une espèce de la république?», *Cahiers Internationaux de Sociologie* 48 (1970), pp. 31-52, esp. 34, 38ff..

3. The principle of the polity (constitution) and its sociological determination and definition

In the typological classification of a polity (constitution), two aspects of this same polity are taken into consideration: its nature and its (fundamental) principle. The former has to do with the specific, particular structure of the polity (constitution), i.e. with the institutional framework, which distinguishes it from other polities (constitutions), whereas the latter concerns that which the 18th century, and with it Montesquieu too (III, 1), call “passions”, that is, what motivates men and shapes and moulds their social behaviour in the widest sense. As can be understood easily and without difficulty, the “principle” of the polity (constitution) builds the bridge for the transition from consideration of the teacher, theorist or scholar/studier of the state and of polities, to those of the sociologist. It goes without saying that the attempt to connect a polity (constitution) with a special, peculiar and characteristic, good or bad ethos, was certainly not new. Already Plato had done it in extenso¹⁸, whereas the further development (meta-development) of the classical teaching, doctrine or theory of the state and of polities in the political literature of the 16th and 17th century in the light of the experiences with the modern state coming into being, gave a new twist (turn) to this old question formulation or central theme. As, for instance, we see or gather from Machiavelli’s works, the form of the polity (constitution) is no longer connected merely or chiefly with a certain type of human behaviour, but rather with a certain type of political praxis (practice): one typical political praxis is characteristic of a monarchy, and another is characteristic of a democracy; one is characteristic of a hereditary monarchy or another of a usurped monarchy¹⁹. Montesquieu, now, takes the next, third step:

¹⁸ *Politeia*, 548cff.. Plato also uses the expression “ethos of the state”.

¹⁹ Meinecke, *Entstehung*, p. 126ff.. Meinecke rightly emphasises the relativistic consequences which result from the thesis that every polity (constitution) has its own maxims in respect of acting (action) (praxeological principles), that is to say, there are no such generally correct principles (loc. cit., p. 150).

he holds and deepens, keeps and intensifies, the interrelation between the form of the polity (constitution), human ethos and the political kind of acting/action, but at the same time he comprehends both latter magnitudes sociologically (i.e. he gives them a clearly sociological hue/tone/complexion) – more precisely: he seeks their interweaving with factors which later constituted the especial theoretical field of the sociological discipline [[which was]] in the meanwhile becoming autonomous (= able to stand on its own as a discipline) (*or*: the especial theoretical field of sociology as now autonomous/independent/self-contained science).

The fundamental principle of a polity (constitution), as Montesquieu understands it, fuses the socially determinative ethos and the political kind of acting/action (political praxis/practice) with each other. The constitution, founding and exercising of political authority as dominance can neither be explained by divine goals/purposes (otherworldly/supra-worldly interventions), nor by the mechanisms of naked violence. By distancing himself from Bossuet, Montesquieu, without wanting to identify with Machiavelli, goes on a search for the moral and mental factors of legitimation of polities (constitutions), in order to come via the question of the legitimation of authority as dominance, to the question of the sociology of authority as dominance²⁰. The sociological investigation of authority as dominance makes it clear (*or*: shows) that not even a despotism, whose fundamental principle is fear (angst), can be propped up or supported by the pure and incessant, unremitting exercising of violence. Violence, in the narrower physical sense of the word, is, as a rule, exercised either preventively (where the suspicion of resistance, opposition or rebellion, insurrection exists) or repressively (where resistance, opposition or rebellion, insurrection actually takes place); violence turns, in other words, as a matter of fact and in itself, against those who feel no fear (angst), and that is why they do

²⁰ S. G. Ipsen, „Montesquieu und die politische Soziologie“, *Archiv für angewandte Soziologie* 5 (1932/33), pp. 248-260, esp. p. 255.

not want to be subjugated. Fear paralyses souls, it makes, therefore, resistance impossible, and the incessant or massive exercising of violence, superfluous; it is not a matter here of the concrete fear from a concrete cause (reason, occasion), but of the diffuse and vague fear, which day and night bites at and into the heart of society, and soaks (saturates, permeates, pervades) its entire life and all its manifestations. From this perspective, the ethical problem is not at the centre of attention, but the sociological question is posed: how must a society be constituted (composed) (*or*: what is a society's texture) so that its mode of functioning, as it can be described (*or*: as we ascertain it) empirically, is based on the principle of fear? What threads do the institutions of the polity connect (link, tie, combine, associate) with the behaviour of the citizens? The same questions are posed with regard to both other main or basic types of polities (constitutions), although their fundamental principles differ essentially from fear: in a monarchy, the feeling of honour rules and dominates, in a republic, virtue rules and dominates. Montesquieu says, incidentally, expressly (III, 7, cf. V, 19), that honour and virtue function in his analysis as political-social, not as ethical magnitudes. The virtue of the republican citizen does not coincide with the following and observance of the commands of individual morality, but it develops in the sphere of the public (= in the public sphere); honour can, for its part, even be directly in contradiction with individual morality (*or*: with the ethical completion/finishing of the individual), since honour is nourished by ambition and the wish for social recognition and distinction: but precisely these (i.e. the said ambition and wish for social recognition) drive the aristocracy (nobility) (aristocrats) to resistance against the arbitrariness or the despotic proclivities of the monarch.

In the language of Marxist sociology, we could therefore say that the fundamental principle of a polity (constitution) is its "ideology", as this is crystallised in forms of social-political behaviour and in corresponding

psychical positionings and dispositions, which are important and crucial for the mode of functioning of the polity (constitution) concerned. The fact that the collapse of a polity (constitution) is due almost always to the degeneration of its fundamental principle (VIII, I), can easily be explained if we think about the most, i.e. very wide extent and range of this fundamental principle. Both the upbringing and education of the citizens²¹, as well as that sector of legislation (lawmaking/law-giving) which directly regulates social living together (co-existence), that is, civil and criminal law(s) (right, justice) (IV-VII), are under the influence of this fundamental principle. In short, the concept of the principle of the polity (constitution) theoretically enables (*or*: builds the theoretical bridge which leads us to) the apprehension of society as a coherent whole, whose parts are connected to and with one another, determine one another and depend on one another²². Of the “spirit of the laws”, there could be talk only on the basis or within the framework of this large-scale and pioneering concept(ual plan), which started from the ascertainment of a close, tight interrelation between the “nature” and “principle” of the polity (constitution), in order to subsequently encompass the sum of the material and ideological coefficients of social life. Because, as Montesquieu makes clear, the spirit of the laws is shaped and arises from the whole plexus, mesh and network: climate, religion, legislation (lawmaking/law-giving), principles of government and ruling, tradition, mores, customs, manners and modes of behaviour through their having an effect jointly, together (*or*: through their interplay) (XIX, 4). Such an enumeration/list should not of course suggest any hierarchisation. Whether and how the above-mentioned coefficients and magnitudes can be hierarchised, remains finally unclear, in fact the question is not formulated even as a theoretical problem,

²¹ The emphasis on the meaning of political education (training, edification) of course constitutes an inheritance of the classical teaching (doctrine, theory) of the state and of polities; apart from the Platonic *Politeia*, see Aristotle’s much more sober views on that, *Politics*, V, 9, 1310a 12ff..

²² Cf. Althusser’s well-aimed, pertinent observations, *Montesquieu*, p. 46ff., as well as Stark, *Montesquieu*, p. 161ff. (on the organic unity and character of the social whole).

despite the renowned-notorious expositions and analyses of the climatic influences, which sometimes give the impression of their all-pervading power and omnipotence. In reality, Montesquieu is interested at times in the establishment (tracing or attestation) of one correlation, at other times in the ascertainment of another correlation, without necessarily caring much about logical coherence and or empirical validity, reliability and tenability. But precisely the lack of a strict systematic intention (or, at any rate, working out, processing and elaboration) makes in the eyes of the reader, the in principle sticking to the idea of the spirit of the laws all the more striking, significant and remarkable – that is, to the idea of a unified system of relations, of a perceived synthetic centre in which many multifarious and heterogeneous radii (= radiuses) converge (cf. I, 3). No less important in a psychological and epistemological respect, appears to be the ascertainment that this idea in Montesquieu's thought did not come into being as the logically inevitable conclusion of empirical analyses and impeccable (hard, i.e. strict) induction, but as the immediate ingenious insight into the multi-dimensional unity of social phenomena, as much as one must take into consideration also the individual presuppositions, and presuppositions pertaining to the history of ideas, of this insight. Although Montesquieu, as we know today²³, only after 1734 began the hard work and huge effort made on his great work, i.e. magnum opus, nevertheless, already in 1725 he, in one of his texts, talks of the «caractère commun (= common character)» and of the «âme universelle (= universal or general soul)» of societies, of a supra-individual “way of thinking”, which came from “innumerable, infinite causes” and hundreds of years of developments (or: the evolution of centuries), and finally from a predominant social “tone”, to which princes, rulers and peoples, agreeing with or rejecting such a tone,

²³ The (pieces of) evidence and proof in R. Shackleton, «La genèse de l'Esprit des lois», *Revue d'histoire littéraire de la France* 52 (1952), pp. 425-428. Cf. W. Kraus, *Studien zur deutschen und französischen Aufklärung*, Berlin 1963, pp. 241-272.

equally refer²⁴. Around 1731, but perhaps even already some years earlier, the following reflection is recorded, which is worth translating in full: “states are governed and ruled by five different things: by religion; the general principles of government; individual laws; mores, manners and customs; and the modes of behaviour. All these things are mutually related to one another. If someone changes one, then the others follow only slowly; and this gives rise everywhere to a kind of disharmony.”²⁵

From the various consequences which the apprehension of society as a totality has, one of the most fertile is the formation of the earliest, still embryonic, germinal/spermatic sociology of knowledge. The importance to the history of ideas of this discovery becomes evident if we not only think about this discovery’s abundant yield and rich continuation, but also about how scant and meagre the preparatory work was. Montesquieu’s thesis on the interrelation between ideological, and institutional or material, aspects of social life, is put forward and arises against the background of a general double-sided conviction that all cultural (ideological) phenomena and manifestations are interwoven with each other, and likewise the cultural and non-cultural (e.g. institutional) and or pre-cultural (e.g. geographic) factors, are equally interwoven with one another²⁶. The determination of ideas by non-ideational/ideogenic magnitudes can be ascertained at several, i.e. a variety of levels, whether it is now a matter of determination through physiology (in accordance with the gross, primitive biological notions and representations of biology of the epoch), and or that through the natural environment and the climate (in this case, we have an ecological materialism), or finally through institutions (*or*: up to the institutional-political level). In the latter case, a theory comes into being which

²⁴ See the fragment «De la politique», *Oeuvres complètes* (ed. Masson), III, 168/169.

²⁵ *Pensées*, Nr. 542 (645), loc. cit., II, p. 184. In *Considérations*, XXII, we read: “in every nation there is a general spirit, in which governmental power (dominance, authority, control, force, violence) (governance) is also founded”.

²⁶ Stark, *Montesquieu*, p. 73ff..

is in contrast to the physiological and ecological explanations, rather than in a complementary relationship, without contradictions[[, with them]], since the second type of determination obviously differs essentially and greatly from the first, and there is no pre-established harmony between both types [[i.e. the level or case of physiology, ecology and the natural environment, and, the level or case of (political) institutions]]. It is asked, therefore, which is the ultimate factor of determination (determinative factor), and what is each and every respective degree of effect or impact of every factor²⁷. Although an answer to that is not given generally, straight away and in principle, but rather from case to case, precisely through Montesquieu's interpretative flexibility or rather logical laxity, his inclination becomes noticeable of preferring social and institutional interpretations and aetiology, to ecological materialism whenever this appears to stand to reason or is purposeful and expedient. The sociological assessment of religion, which is carried out on the basis of functional criteria, offers us a good example. Religion contributes to the consolidation or legitimization of a polity (constitution); that is why the type of polity (constitution) determines whether religion will be an instrument of oppression or will serve as means assisting political freedom. In a despotism, content(s), myths and rituals of religion favour and foster the fundamental principle of this polity (constitution), i.e. fear (angst); they promote, encourage and boost blind obedience vis-à-vis the despot, although they from time to time also help to soothe and mollify mores, manners and customs. However, in a monarchy or republic, the task of religion consists in, apart from the promotion of social coherence (also through obedience), encouraging stances and (world) views which benefit, and are favourable to, the entrenching or safeguarding of the moderate exercising of authority as dominance. Since the European monarchies are Christian, the Asiatic despotisms partly Moslem, partly heathen or pagan,

²⁷ Loc. cit., Ch. VIII-IX.

Montesquieu does not end up, or get involved, in any conflicts of the conscience or any other conflicts or dilemmas whatsoever, when he supports this sociological perception and position^{28 vi}.

4. The precedence of political philosophy

The transition from the way of looking at things of the teacher, theorist or scholar/studier of the state and of politics, to that of the sociologist, meant a shifting of interest(s) from one field, upon which political philosophy predominated, to that much more rough and bumpy field of social and historical experience (empiricism). This methodically (i.e. methodologically) implied new difficulties, puzzlement and queries, since it was a matter of harmonising, on the one hand, the typology with the empirical material, on the other hand, the normative matters of concern of the political philosopher with the ethically-politically indifferent explanations and aetiologies of the sociologist. It should equally, immediately be said that the as far as possible comprehensive knowledge of the empirically given (i.e. of what is empirically factual), represents and constitutes for Montesquieu a self-evident duty of the scientist (scholar, researcher, academic), no matter how selectively, or how much in shortened form and as a matter of debate, he himself deals with experience (the empirically given). Montesquieu's scientific instinct and conscience tell him then again just as clearly (*or*: with equal perspicuity) that experience (the empirically given = empirical reality) (*or*: the really interesting element) does not depend so much on individual facts, but on their relations towards/with one another (and, in a second step, about which we shall talk immediately below,

²⁸ In relation to that, S. Cotta, "La funzione politica della religione secondo Montesquieu", *Rivista Internazionale di Filosofia del Diritto* 43 (1966), pp. 582-603.

the relations of those relations with political and other matters, i.e., with the problems contemplated by political philosophy). The isolated data constitute in themselves not experience (= the empirically given as the first, gross concept of experience), but merely the raw material, and they have no interrelation, consistency and coherence, that is, no *meaning (sense)*, if they are not organised around fixed, steady, firm and stable ideational axes, and on the basis of theoretical principles, from which, as Montesquieu writes with virtually arrogantly sounding methodological self-confidence in the Prologue of *L'Esprit* (= *The Spirit [[of the Laws]]*), the individual historical cases seem to stem, spring and result automatically. The theoretical principles and the empirical data reciprocally overlap with, interweave with, pervade, one another, and in this to and fro, back and forth, ideal types are formed and arise. These ideal types do not, of course, contain “reality” in its unending great variety, diversity and multiformity, and eternal mobility, but they synopsis the only possible picture or image which science can make of reality – i.e., they bring out, underline and emphasise certain decisive features, and then make use of these same features as yardsticks of thought (*or*: as measures and criteria); not always convergence with these said ideal types, but possibly still more often divergence from them, indicates the scientific value, importance and status of the individual empirical data (*or*: sets the tone for reality on each and every respective occasion)²⁹.

Montesquieu knows that his types do not render, reproduce, represent reality as it is, but thus, as it ought to be (e.g. III, 11); this nevertheless does not shake his belief/faith in their cognitive necessity. (In actual fact, the typological reconstruction of every experience (piece of empirical evidence) is – for multiple, anthropological and logical, reasons – inevitable, and whoever does not understand that has not at all begun to learn the alphabet of science). It is of course another story, or a completely different matter, whether Montesquieu's

²⁹ Cf. F. Gentile, «Montesquieu philosophe et sociologue», *Archives des lettres Modernes* 158 (1975), pp. 31-48 [= «archives Montesquieu», Nr. 6].

typological work proves to be a failure or not worthwhile (*or*: The only reasonable question is whether Montesquieu's typological work met with success), i.e. whether his types are rigid, static or flexible, whether he attempts to study to a sufficient extent, and in an appropriate, suitable manner, the relation of each and every respective variable investigated with the corresponding types or with other variables inside of the same (or every other) type etc.³⁰. It is perhaps equally one-sided to contend that Montesquieu, merely on a trial basis, formulated methodological aphorisms as (*or*: and) general principles³¹, and to classify or see him as a complete, accomplished and consummate Weberian *avant la lettre*³². More apt appears to be the judgement that he as the first, posed the question of the relations between the classification of polities (constitutions), and, the classification of sociological types – and if his solution in many ways does not have a convincing, telling effect, then also no-one else since then has found a conclusive, definitive and final solution³³.

We have already spoken of Montesquieu's arbitrary procedure and method in the construction of the ideal type of oriental despotism. Similar and analogous acts of arbitrariness or contradictions, and indeed contrary to, or *vis-à-vis*, facts which he himself mentions, can also be ascertained in various other cases, thus e.g. when he attempts to correlate the type of trade activity with the type of polity (constitution)³⁴. Montesquieu could have avoided such blunders and false steps through the marked modification, loosening or widening/extension/expansion of his typology. He seems, however, in no way ready and willing to do this. Not only does he insist on the trisection of the forms of polities (constitution[s]); he does not at all have any thoughts about abandoning, for the

³⁰ Different answers to these questions are found in M. Augé, «Montesquieu, Rousseau et l'anthropologie politique», *Cahiers Internationaux de Sociologie* 41 (1966), pp. 17-42, esp. pp. 29-34, and M. Richter, "Comparative Political Analysis in Montesquieu and Tocqueville", *Comparative Politics* 1 (1969), pp. 129-160.

³¹ Thus, Berlin, "Montesquieu", p. 275.

³² Thus, J. Baum, *Montesquieu and Social Theory*, Oxford 1979, esp. Ch. 5-6.

³³ Aron, *Les étapes*, p. 38.

³⁴ In relation to that, C. de la Taille-Lolainville, *Les Idées Economiques et Financières de Montesquieu*, Thèse, Paris 1940, esp. pp. 85ff., 194ff..

time being, the path which leads from the teaching (theory and doctrine) of the state and of politics to sociology, and to go in the opposite direction (*or*: and to follow the reverse course), i.e. that his political typology be based on a multiplicity of sociological criteria – something which obviously would have yielded a very different result. Since his political typology is found not at the end, but at the beginning of this effort at thought, a sociologically most significant, major gap/hole comes into being: the historical development/formation, and genesis, of politics (constitutions) is not discussed in detail or in depth, but behind every type of polity (constitution) a legislator (lawmaker, law-giver) is placed, who however can constitute only a conventional form, figure (shape) and solution. Although Montesquieu wants to in principle illuminate not only history through laws, but just as much, laws through history (XXXI, 2), he restricts himself to the former, when it is a matter of the typology of politics (constitutions)³⁵. As much as this may be framed and founded sociologically in retrospect, it is nevertheless *stricto sensu* presupposed, in relation to which the ideal-typical handling of, and approach to, the historical material serve(s) as an epistemological pretext for remaining with the primacy of the teaching (doctrine or theory) of the state and of politics.

It is not difficult to ascertain and explain the reasons for this methodical (i.e. methodological) inconsistency and scientifically reckless and or damaging, detrimental stance. The teaching, doctrine or theory of the state and of politics constitutes the field or area in which the, for Montesquieu, crucial examination of the problem of political freedom unfolds, and the typology of politics (constitutions) should, in relation to that, serve in the handling and channeling of this examination of the said problem on the basis of the principles which stem from a certain political philosophy or positioning. Distinctions and

³⁵ Still more generally, the connection of the most differing and varied forms of right as law (justice), only with three forms or types of polity (constitution), hinders the working out, elaboration and development of a differentiated sociology of right as law (justice), see G. Gurvitch, «La sociologie juridique chez Montesquieu», *Revue de Métaphysique et de Morale* 46 (1939), pp. 611-626, esp. 624.

classifications as regards the teaching (doctrine, theory) of the state and of polities would highly likely have turned out differently (*or*: would have most probably been different), if the main concern were not the safeguarding of political freedom. Otherwise put or stated: the sociologist Montesquieu shapes and structures his ideal types on the basis of the form(s) of (the) polities/polity (constitution(s)) because he, as a political philosopher, would like precisely to prove something particular as to these forms of polities (constitutions)^{vii}. He does not select, therefore, in the least the forms of the polity (constitution) as his starting point out of the mere and sole perplexity of the sociologist, who goes to a lot of trouble precisely as regards the founding of a completely new science, and for lack of a suitable and proven conceptuality has recourse to and adopts the tried and tested framework (scaffolding) of a very old discipline or science (scientific discipline). Of course, this framework is (over-)filled retrospectively with sociological matter (stuff, material), which, however, does not mean that Montesquieu viewed this framework as to the teaching or theory of the state and of polities as only a temporary helpful construction, which he would throw away after the completion, conclusion of his sociological work. The question or problem regarding the best polity (constitution) interests him as an independent or autonomous (self-contained) problem, and, in this respect, he continues the classical tradition of political philosophy.

From this point of view, it becomes more understandable why the ideal types of polities (constitutions) themselves are two-sided or double-sided, i.e. they are built and set up or constructed on the basis of the dual criterion of the nature and the fundamental principle of every polity (constitution). Whereas the fundamental principle of the polity (constitution) has no ethically definable character, and [[easily]] enters into the sociological way of looking at things, the nature of the polity (constitution), which interrelates the closest with the manner of exercising sovereign domination (dominance, power, force, violence),

remains on the horizon of political philosophy and permits normative judgements, or presupposes them (*or*: and permits, or rather presupposes, normative judgements). Such judgements – and over and above that, in fact narrower political considerations (*or*: concrete, specific political expediencies) – directly influence not only the general presentation and description of despotism (the despotic polity), but also the choice of the magnitudes which are supposed to constitute the fundamental principle(s) of monarchy, of aristocracy and of democracy; honour, would e.g. be chosen with difficulty or not at all as the fundamental principle of monarchy, if Montesquieu did not imagine and advocate a certain notion, perception and representation of the desired role of the nobility (noblemen) within the moderate monarchical polity (constitution)³⁶. The relation(ship) between political philosophy and history in Montesquieu's thought appears and takes its shape just as ambivalently. Even though his purely historical interests are (*or*: his interest in history is) more intensive and more genuine than in regard to many of his contemporaries, nevertheless, his political philosophy does not arise from his historical studies and activities, but rather crosses over or interweaves with them and seeks therein its own clarification or confirmation. Accordingly, the tasks of political theory seem to fall apart, i.e. we distinguish two different conceptions of politics, in the sense of political theory: on the one hand, political theory sets about understanding political praxis (practice) by its (i.e. political praxis) being put in order in a social-historical framework which interrelates with each and every respective form or type of polity (constitution); on the other hand, political theory puts forward practical maxims with a universal claim (*or*: with a claim to universal validity), whether they now are maxims de prudence (= maxims of prudence/caution/wisdom) or ethical-normative maxims (*or*: have an ethical-normative character). From a number of and various points of view, perspectives, angles, it becomes

³⁶ See Struck's sharp, but well documented polemic(s), *Montesquieu*, p. 114ff..

manifest, and we consequently ascertain, that the attempted marriage of the teaching (doctrine or theory) of the state and of politics, and, sociology, with each other, generates friction(s) and tensions, ambivalence(s) and vacillations. Through and within all these stretch, run and act, again, the fundamental contrast and opposition between causal and normative consideration, a contrast and opposition whose origin and logic we shall now deal with and examine.

III. Causal and normative, natural law(/right(/justice)) and law

1. Is, Ought and universalism^{viii}

One nowadays no longer likes being reminded of the distinction or even the opposition between Is and Ought. In the present-day planetary constellation or conjuncture, there are weighty, momentous forces and powers which are interested in the universalisation of certain values and consequently in the universalisation of (their) ethical [[element, dimension]]³⁷, and the ethicists, who as a rule are less immune to the latest, topical or simply modish, stylish or fashionable trends, as they themselves want to (make) believe, have for a long time set out on a search for the corresponding “good reasons and good causes” [[to explain present-day fashionable trends and to justify their own ethical-

³⁷ See in relation to that P. Kondylis, *Planetarische Politik nach dem Kalten Krieg*, Berlin 1992, p. 105ff..

normative positions and power claims]]. The subtleties, which within their circles stimulate, stir, and excite their minds and persons, of course hardly or only indirectly penetrate the outside world, but the great commonplaces, whose political usability by third parties consoles and helps ethicists or philosophers get over their own political meaninglessness, come into being from their circles after a, for the most part, unclear and confusing, however not coincidental or chance, selection process. One can easily explain why the attempts at the universalisation of ethical values would sooner or preferably get out of the way of, and avoid, the distinction between Is and Ought. The Is of this world, that is, the social and historical Is, is obviously splintered, fragmented and contradictory, it finds itself constantly in a state of flux, however the Ought, if it wants to be universal, must be united and steady, stable, firm, fixed. In relation to that, no whim, caprice or mood, but a deeper logical necessity drives, propels the classical fusion, blending and interweaving of Is and Ought (the Platonic idea of the Good, the Christian concept of God and not least of all the Enlightenment concept of Nature), in comprehending the Is supra-historically, i.e. as the ultimate, in itself closed and immutable ontological cause or reason. How can now, after the dissolution of this cause or reason, a united and stable, fixed Is, as the foundation of a universal Ought, recover or win again? The problem amounts to the squaring of the circle, and the replacement or substitute constructions, which are summoned for the covering of the existing ideological need, often or latently get into a quandary or catch-22 situation, since they, on the one hand, depending on the command of their supposedly un-metaphysical, i.e. non-metaphysical times, must distance themselves from “metaphysics”, on the other hand, cannot help but, despite all the rejection of traditional thought content(s), tacitly make use of traditional-metaphysical structures of thought and of concepts (thought structures and structures of a concept). Under the tricky, touchy, thorny circumstances of the theoretical fragmentation and splintering of the Is during the simultaneous adherence to the universality of the

Ought, that person, who places the examination of the problem of Is and Ought anew on the order of the day (or agenda), necessarily seems like the well-known boor who spoke of rope (or knitting) in the house of the hanged man. It has not in the least been forgotten that such kinds of epistemological thoughts and considerations amount or boil down to decisionistic explanations of the nature and of the function of values and norms (Max Weber is the most prominent example for that), but also bring forth and produce scathing, devastating criticisms of natural law(/right(/justice)) (as a witness here, the grandiose scientific achievement of Hans Kelsen is cited). The answer or rather the reaction to such reminiscences is either the suppressing and silencing of the entire question formulation (i.e. posing of the question), or, attempts at refutation, rebuttal and disproof, which basically show how much the ability at sharp conceptual thought has suffered from, or under the abandoning of, such question formulations and such fundamental thought (intellectual, mental) exercises (exercises in thought). Thus, one reads of e.g. even philosophers like Hume, who wanted to distinguish between Is and Ought, yet had to derive (infer, deduce) the Ought or morals (ethics, morality) from an Is, that is, from certain anthropological and social magnitudes or factors³⁸. However, no-one would contest the trivial, trite, and banal truth that the moral notions, representations and practices, as well as the concept of Ought, in themselves spring from *such* an empirically given Is, since the said concept of Ought, in relation to that, is intended to satisfy the needs of socially living humans, and to shape, mould or legitimise relations between these same humans. Precisely the pointing out of this origin of morals (ethics, morality) and Ought has, incidentally, constantly served in relation to that, to dispute, challenge, contest and deny this Ought's universality as well as its logical deducibility (inferability, derivability) from the Is [[in general]]. One can comprehend that,

³⁸ Hence, A. MacIntyre, "Hume on 'is' and 'ought'", in: W. Hudson, *The Is-Ought Question*, London, 1969, pp. 35-50, esp. p. 39ff. (cf. FN [= footnote] 70).

without a second thought, if one bears in mind and keeps sight of the fact that both the concept of Is, as well as the concept of Ought, really have two different meanings: Is can mean either [[1]] empirically given facticity, or else, [[2]] the ultimate value-like, axiologically loaded and charged cause of (reason for) things, and under Ought, in turn, [[1]] a command (fiat, order) or imperative regardless of its content can be understood, or else, [[2]] a value-like, axiologically loaded and charged norm, which must have a certain ethically defined content, and that is why this said Ought as norm can and may be turned against (the) Ought as a mere command (fiat, order), when the latter's contingent content falls into a contradiction with the necessary content of the value-like, axiologically-ethically defined Ought (the classic conflict between legality and morality); in a similar sense, both meanings of Is can clash with each other. Accordingly, these conceptual clarifications can deduce (derive, infer) the value-like, axiologically (and not simply imperatively) understood Ought only from the likewise value-like, axiologically understood Is, and not from any social facticity whatsoever – if and when such a deduction (derivation, inference) from the ontological underpinning and consequently from the consolidation of (the) Ought, appears to be necessary with [[the use of]] the most ultimate [[of]] arguments. The epistemological separation of Is and Ought wants to say and mean that no empirically given Is can be discovered or located, from which a value-like, axiologically understood Ought could be derived (deduced, inferred), that therefore Ought and ethics are foundable and establishable not ontologically, but only otherwise (if at all); whilst at the same time, the fact that Ought and ethics in the sense of empirically ascertainable, socially functioning norms, are easily explainable on the basis of anthropological and social factors, that is, in regard to facticity, remains unchallenged, undisputed, uncontested^{ix}.

That was no digression from our actual theme or topic, but rather the anticipation of an essential or central point, to which every profound Montesquieu-analysis, sooner or later, must come. Classics are sought-after, coveted allies, and that is why it does not strike us as strange that the turn of recent decades to universal ethics has found expression and been reflected also in Montesquieu-research in various versions, as the reader of our footnotes can gather. In the course of this, it is not only a matter of a one-sided putting first or prioritisation of the undoubtedly existing natural-law aspect of Montesquieu's thought, but over and above that, [[it is also a matter]] of the attempt at demonstrating Montesquieu could have overcome the contrast and opposition between natural law(/right(/justice)) and positive law(/right(/justice)), or, between Ought and Is, with logically legitimate means. A good occasion (reason, motive, opportunity) is therefore offered or provided to draw fundamental lessons. Simultaneously, I hope for the understanding of Montesquieu's multi-layered, but not always refined thought, to contribute some new points of view.

2. Origin and structure of the contrast and opposition (conflict) between causal and normative consideration (or: the causal and normative way of looking at things)

The contrast and opposition/conflict between the causal and normative way of looking at things fatefully arose with logical necessity within the framework (womb, bosom) of new-times rationalism, which in its world-theoretical polemics against classical metaphysics and Christian theology, had to ontologically revalue inorganic nature and the sensorial world in general. This

revaluation meant that the sensorial world is not essentially and incurably inferior to the sphere of the (transcendental) spirit, that the sensorial world therefore does not represent and constitute simply something imperfect, incomplete and contingent, that it is readily subject or subjugated to a higher will, but that it has ontological autonomy (self-sufficiency, independence) at its disposal since it is steered, guided, governed by its own immanent and strict law bindedness (determinism, law(rule)-based necessity), and as such a rational structure can be apprehended by Reason, which as an equally in itself closed and autonomous magnitude likewise is supposed to free itself from the authority (custody, guardianship) of the higher will (*or*: of higher authorities). Under the aegis of this general thought (intellectual) schema (schema of thought), new-times rationalism gave, i.e. waged or had and won its first great battle, that battle in, or by way of, the field of mathematical natural science. However, when this same thought schema was transferred to the discussion of human affairs, things and matters, considerable difficulties arose, cropped up. Here the theological position was combatted by the counter-thesis that history was not shaped and moulded through Providence and its secrete plans, but is determined by causes permanently having an effect and investigatable causes, which are to be found in the manner as to which man as a sensorial natural being or creature (*or*: as a first and foremost natural being) takes root in geographic, economic and social, as well as historical factors (*or*: takes root in geography, in the economy and more generally under social-historical terms, conditions). If, however, human action as a whole is causally determined in such a way and by such means, what then becomes of the freedom of will, without which there cannot in earnest or seriously be talk of morals (ethics, morality)? And what becomes also of the vision of the conscious moral progress of the human race? New-times rationalism could not renounce and forego this vision without lapsing into relativism and nihilism, and consequently leave the representation of hope in regard to humanity and redemption to theologists. Simultaneously it

could not, however, give up and abandon the causal explanation of human affairs (things, matters), since exactly this substantiated and justified the perception of man as a natural being, and consequently the refusal and rejection of, i.e. opposition to, the spiritualistic basis of Church-ascetic ethics. In this logical ambivalence or movement back-and-forth, the contrast or opposition/conflict between causal and normative consideration, in multiple forms and interrelations, is formed³⁹.

From this broad perspective, it can easily be understood why that contrast, opposition or conflict casts a dark shadow over Montesquieu's thought. Montesquieu belongs in the first line, rank, and first generation of thinkers who do not want to accept the sharp Cartesian separation between rationally-causally structured, that is, scientifically recognisable nature, and, history or politics permeated and interspersed with irrational-contingent forces, that is, scientifically unrecognisable history or politics, and were at the point of programmatically applying, or [[actually]] programmatically applied, the concept of causality, already proved in natural science, to the field of historical-social phenomena⁴⁰. Even before he set about and tackled the writing of the work which supposedly made him immortal, Montesquieu was convinced of the fact that in the historical world, chance does not, coincidences do not, determine the course of things (*or*: chance does not govern the historical world), but general causes – be they intellectual(-spiritual)-ideological (causes morales, as it was called in the language of the epoch), be they physical-material nature – prevail, and that seemingly, coincidences (chance) or (the) partial cause(s) are outflows or simply the expression of a more general and deeper cause⁴¹. Just as important for our thoughts, considerations and deliberations as this

³⁹ In detail regarding this complex, Kondylis, *Die Aufklärung*, esp. Ch. VI.

⁴⁰ Cf. Berlin's apt remarks and observations, "Montesquieu", esp. p. 270.

⁴¹ *Considérations sur les causes de la grandeur des Romains et de leur décadence*, ch. XVIII: «Ce n'est pas la fortune que domine le monde ... Il y a des causes générales, soit morales, soit physiques ... tous les accidents sont soumis à des causes ...» [= "It's not fortune which dominates the world ... There are general causes, either moral, or physical ... all accidents are subject to causes ..."].

programmatic intent which Montesquieu had, is the ascertainment that he, as one amongst very few representatives of the Enlightenment, knew and formulated *expressis verbis* (i.e. stressed) the distinction between facts and (moral, ethical) judgements, between Is and Ought. He credits his ability, of which he is also proud, at observing, pondering and reflecting upon his observations without passing or making judgement(s) and criticisms, as an intellectual(-spiritual) advantage⁴², and holds a genuine historiography (description of history) to be impossible as long as the historian assesses the act(ion)s of men on the basis of that which they ought to have done⁴³; no less emphatic does his distinction (dilation or expansion) between explanation (aetiology) and justification turn out to be⁴⁴. The question posed now is whether Montesquieu, despite all his fundamental knowledge of this crucial distinction in its general manifestation, and despite all the invocation of such a distinction in individual cases, had in actual fact developed the strict methodological consciousness and awareness which would have required the said distinction's consistent application to the great lines (contours or trends) and themes (topics) of his thought, and put forward in the structuring of his work; whether he, at least rudimentarily, nevertheless possessed this consciousness, and as a result tormented and tortured himself spiritually-mentally-intellectually, since he at every turn saw that he could not overcome the contrast or conflict between causal and normative (consideration); whether he indeed had at his disposal adequate methodological consciousness and awareness on the whole, but at the same time gained the impression he had, nonetheless, been able to intellectually

⁴² *Pensées*, Nr. 1873 = *Oeuvres Complètes* (Masson), II, p. 558: «Je vois plus que je ne juge; je raisonne sur tout et je ne critique rien.» [= "I see more than I judge; I think and reason about everything and I do not critique/criticise anything."].

⁴³ *Esprit des Lois*, XXXI, 16: «Et il est admirable de voir un historien juger de ce que les hommes ont fait, parce qu'ils auraient dû faire! Avec cette manière de raisonner, il ne aurait plus d'histoire.» [= And it is admirable [[= ironic/sarcastic]] to see a historian judge that which men have done by what they should have done! With this manner or way of reasoning, he would have no more history." OR AS AN ALTERNATIVE RENDERING INTO ENGLISH: "And it is admirable to see a historian judge that which men have done, rather than what they should have done! With this [[latter]] manner or way of reasoning, he would not have any history."].

⁴⁴ *Ibid.*, XVI, 4: «Je ne justifie pas les usages, mais j'en rends les raisons.» [= "I do not justify the uses at all, but I give, render the reasons"].

deal with the above-mentioned contrast, opposition or conflict; whether he neither overcame the contrast or conflict, nor could he make himself entirely clearly and fully aware or conscious of it.

To these questions, all possible answers (incl. expressing probability or certainty) were given by various researchers, and since all hitherto represented typical views as a rule refer to, and disclose, an actually existing aspect of Montesquieu's many-sided thought, then it is worth recollecting them synoptically and briefly. If one excludes that Montesquieu possessed a methodologically sharpened and honed, perspicuous consciousness/awareness of the contrast, opposition and conflict between the causal and the normative (element), or Is and Ought, which directly or indirectly, more or less flows into and has some influence on his work, then one can view him basically as a continuer of a central tendency or school of thought in the philosophy of law(/right(/justice)) which flourished in the 17th century⁴⁵. The same perception of primarily the ethical and what pertains to natural law(/right(/justice)), as adapted to Montesquieu can, however, be substantiated and justified not only in terms of the history of ideas, but also immanently, and indeed through the assumption that Montesquieu summons alternately, in accordance with his each and every respective goal or end, the causal and normative way of looking at things, without in the process having the feeling or sense of the logically forbidden, unauthorised or illegal (*or*: of a logical blunder or slip), since his perception of causality is multi-dimensional; one of its^x dimensions exists in the human factor of the will, which through its singular ability, plays one causal factor against the other, by virtue of introducing into the plexus, mesh and network of the becoming (and events), its own objectives or settings of an aim⁴⁶. The, on each and every respective occasion, unequal influence and the

⁴⁵ See e.g. Richter, *The Political Theory*, esp. p. 220ff.. Cf. Waddicor, *Montesquieu and the Philosophy of Natural Law*.

⁴⁶ See e.g. Starobinski, *Montesquieu*, esp. pp. 86, 82.

asymmetrical interaction and mutual influence and interplay of the various factors, afford the free and purposeful, expedient action of the legislator (lawmaker or law-giver), considerable room to move (scope, leeway, unfolding space(s))⁴⁷. It therefore seems as if determinism is pushed, forced back, retreats or slackens (is loosened), in order to make room for personal initiative and the free decision, precisely to the extent that Montesquieu refuses to adopt, embrace or indulge in an extreme relativism, since in his eyes and view, certain values are self-evident for every civilised man, and rationality does not coincide with instrumental thought – although he, on the other hand and at the same time, keeps his distance and refrains from loudly criticising and condemning ethically questionable and irrational, but inwardly balanced and functioning social relations⁴⁸. In view of the fact that the free mixing and blending of deterministic and voluntaristic or psychological motives and interpretations characterises his writings already before 1734⁴⁹, it is difficult to talk about a thought-through, deliberate, processed and coherent theoretical stance; at best, and presupposing that the more mature Montesquieu had become fully conscious of the theoretical problem, it can be said that the deterministic interpretations and explanations do not instill in him any great fear (*or*: do not frighten/scare him), because he regards the legislator (law-giver, lawmaker) as a doctor who uses the knowledge of nature when necessary and for the defence against, and to oppose, this same nature, whereby the ascertainment of the causal interrelations and dependencies takes place from a practical-normative point of view (and in relation to which a firm recommendation to the legislator is entailed as to what circumstances he ought to take into account)⁵⁰. Here we are dealing with the self-confidence of a

⁴⁷ G. Benrekassa, *Montesquieu*, Paris 1968, p. 60.

⁴⁸ Berlin, “Montesquieu”, pp. 285ff. [= pp. 285/6], [the Greek text reads: “pp. 280/1” as well], 289ff.. Berlin of course does not believe that, through that way, Montesquieu can also logically solve the contradiction between the causal and normative concept of Reason and of Nature (p. 293ff. [= pp. 293/4]).

⁴⁹ S. D. Carrithers, “Montesquieu’s Philosophy of History”, *Journal of the History of Ideas* 47 (1986), pp. 61-80, esp. p. 77ff..

⁵⁰ Ch. Beyer opines this, «Le problème du déterminisme social dans l’Esprit des Loix», *The Romantic Review* 39 (1948), pp. 102-106.

theoretician who sees no insurmountable contradiction between natural causes and ideals, because he firmly believes in the fact that the latter are founded on and within a stratum of human existence, and are based on a higher, indissoluble, eternal stratum of human nature (i.e. the former (natural causes) cannot absorb the latter (ideals)), which cannot be overcome, defeated or conquered by any blind law bindedness (determinism or law-based necessity)⁵¹? Or is it, on the contrary, a matter of solutions of awkwardness and embarrassment of psychological rather than logical ways out, of someone who is split and feels unhappy and distressed, since he can neither evade nor get the better of ethical relativism, nor can he bid farewell once and for all to natural law(/right(/justice)), which he considers or deems to be reasonable, rational, sensible and worthy of man⁵²?

3. *Physical and moral causes*

Psychological guesses, suppositions and conjecture are in regard to such questions, unprovable and infertile. Only the logical structure of the theoretical problem has a decisive and lasting meaning. Let us approach this logical structure by first of all going into the widespread misunderstanding that the superiority (predominance, superior strength) of the normative factor and of the free will vis-à-vis the deterministic iron circle (or pillory) would be secured to the extent that the “moral” causes maintain the upper hand over the merely “physical” (causes). Montesquieu gives this misunderstanding nourishment (= Montesquieu nourishes or feeds this misunderstanding) (*or*: Montesquieu

⁵¹ According to G. Davy's view, «Sur le méthode de Montesquieu», *Revue de Métaphysique et de Morale* 46 (1939), pp. 571-586, esp. p. 576. Davy turns against and opposes the interpretations of Lanson and Brunschvicg, see FN [= footnote] 2.

⁵² Thus, Stark, *Montesquieu*, p. 186ff..

encourages this misunderstanding) such that he connects the growing, increasing effect and impact of the former (“moral” causes) with the advances and progress of civilisation and of humanity, that is, he bestows an ethical character and higher prestige in the wider sense upon such “moral” causes. Thus, he writes e.g. that whilst geographical given facts and the climate almost exclusively determine the life of wild peoples (folks), other known human societies are more likely stamped and moulded (*or*: are gradually influenced more) by mores, customs, manners and the form of government or the polity (XIX, 4). After we, from the beginning, have made clear and underlined that the term “moral”, linguistically and logically constitutes the conceptual opposite of “physical”, and not for instance of “causal”, we want to now look into and scrutinise whether the breaking of the deterministic chain exclusively with the help of “moral” causes [Greek text = “moral causes”] and without logical leaps (leaps in logic) can be managed and brought off – without any *transition to another genus/species/kind* (μετάβασιν εἰς ἄλλο γένος). The logical ambiguity of this expression becomes visible and manifest already in the possibility that either one or the other of both terms can move into the foreground, be stressed and held to be (more) decisive and determinative. If one contrasts “moral causes” to “physical causes”, then the emphasis is placed on the “moral”, in relation to which the causes appear to be the result of the purposeful, expedient and voluntary activity of a subject. However, the matter/issue changes when one subsumes “moral” and “physical” jointly under “cause” as the concept of the genus/species (or generic concept/term), whose counter-concept is called “chance or coincidence”⁵³. The “moral cause” remains then first of all a cause, which deserves this name [[of “cause”]] only if and when it can bring forth, beget, produce effects (or the results of causes) with the same necessity as “physical causes” do it (i.e. bring forth effects) too, by namely excluding, in

⁵³ As e.g. in the passage which is cited in FN [= footnote] 41.

principle, chance and coincidence. And in actual fact: why should the autonomy of the human spirit be greater when it stands or is under the influence of unquestionably/indisputably accepted traditions or modes/fashions, national or racial myths, religious or political articles of faith, than for instance in the case of its imperceptible, but all the more profound penetration, pervasion and saturation by the influence of the climate? The effect, impact and influence of “moral causes” does not imply, therefore, any loss, omission or discontinuation of causal determination, but it means merely that the determining factors are of an ideological character. The “moral causes” by no means definitely neutralise, wholly or in part, the “physical causes”, but possibly constitute their belt drive, conveyor belt, their good conduit (or their service/performance); because, as Montesquieu himself once remarks, often the physical cause requires the moral cause in order to be able to have an effect⁵⁴.

Exactly because Montesquieu knows of this mechanism, he contrasts to the physical causes, not all moral causes without exception, but primarily those which go back, i.e. are due to the well-considered and well-thought-out rational activity of the legislator (lawmaker, law-giver); thus, mores (customs, manners) and laws are distinguished from one another, so that the former (mores) are ascribed to the impersonal people’s/folk’s whole, i.e. nation or ethnos; the latter (laws), to the personal legislator (law-giver) (XIX, 12 and 14). However, through this distinction, the fundamental aporia (doubt, contradiction, paradox) is not put out of (removed from) the world, i.e. overcome (*or*: the chasm between the two fields [of moral causes and physical causes] probably becomes wider rather than being bridged). Because the legislator (lawmaker, law-giver) appears here abruptly (or unmediatedly, suddenly, immediately, directly) like a *deus ex machina*, which stands or is, in inexplicable ways, outside of the plexus, mesh and network of causal determinations, outside of the reach, range and

⁵⁴ *Pensées*, Nr. 811 = *Oeuvres Complètes* (Masson) II, 238: «Car souvent la cause physique a besoin de la cause morale pour agir.» [= “Because often the physical cause needs the moral cause to act.”].

scope of ideologies, interests and prejudices. But how can the legislator (law-giver) escape what takes possession of (or permeates) all other men so comprehensively and deeply, as Montesquieu himself as a sociologist of knowledge describes or shows this⁵⁵? To these all too human weaknesses of the legislator (lawmaker, law-giver), which Montesquieu indeed mentions fleetingly⁵⁶, but are not classified historically and sociologically –, still further aggravating circumstances join or are attached, significantly augmenting the said weaknesses, if we consider that detachment from the causal plexus (mesh and network) for the purpose of the effective formation and exercising of the technique of power as dominance/authority, ethically differs greatly from the distanced weighing up and contemplation from the outside of the causal factors for the purpose of their overcoming with normative intent, that is, with the aim of the moral (ethical) improvement of society. The technician of power as dominance/authority (in the capacity or with the quality/property of the legislator (law-giver) or of the ruler and politician in general) must take into consideration and contemplate causes and effects cold-bloodedly if he wants to attain, achieve his aims; however, neither does this calculation or weighing up annul or overturn existing causal laws, nor does it shift the area of their (these existing causal laws') application (*or*: the level of their unfolding), but rather merely reorders (i.e. rearranges) their possible combinations with regard to the results wished for; whereas an ethically inspired and directed legislative effort aims at replacing hitherto really existing causality with the causality of freedom; it attempts, that is, – to recollect a very famous saying –, the transition from the kingdom of necessity to the kingdom of freedom: because the shift (displacement) from the becoming and events of one causal determination to another (causal determination), would have no moral-normative meaning and

⁵⁵ In relation to that, Stark, *Montesquieu*.

⁵⁶ *Esprit des Lois*, XXIX, 19: «Les lois rencontrent toujours les passions et les préjugés du législateur.» [= "Laws always run into (come across, encounter, meet) the passions and the prejudices of the legislator."].

character, were it not simultaneously a progression to freedom. The invocation of, or appeal to, the free activity of the legislator (lawmaker, law-giver) is therefore not in the least sufficient in itself to guarantee the pushing and carrying through, the imposition, of the normative against the causal (element), even though it could prove the supremacy or predominance of “moral causes” over “physical causes”.

Renowned, and often notorious, was the precedence (primacy, prominent position) which Montesquieu conceded to climate under “physical causes” (*or*: to climate as “physical cause”). We shall not concern ourselves here either with the inadequacy or the rash (rushed) generalisations of his, in respect of this (topic of climate), (pieces of) information, nor with the lack of an empirical testing of his thesis on the basis of cases which he could have investigated himself⁵⁷. However, the development and evolution of his perceptions and views in this field interests us, which begins with the assumption of a narrowly physiological explanation and interpretation of climatic influences (cf. XIV, 2), and ends up in a much more complex apprehension of the interactions and mutual influences (or mutual dependencies) between climates, mores (manners, customs) and forms of government and governing (governance)⁵⁸. In the framework of this more flexible conceptual plan, Montesquieu makes in respect of (or puts to) the good legislator (law-giver, lawmaker) the demand to counteract, through his purposeful and expedient regulations, unfavourable

⁵⁷ In relation to this, P. Gourou, «Le déterminisme physique dans l'Esprit des Lois», *L'homme* 3, 3 (1963), pp. 5-11.

⁵⁸ See R. Shackleton's excellent study (article), “The Evolution of Montesquieu's Theory of Climate”, *Revue Internationale de Philosophie* 9 (1955), pp. 317-325. Shackleton connects the first of both these phases with the reading of J. Arbuthnot's treatise/book, *An Essay concerning the Effects of Air on Human Bodies*, London 1733 (French transl. 1742; the work is mentioned or referred to only indirectly in *Esprit des Lois*, XIV, 4), and the second phase with the study of the extensive/voluminous work by Fr.-I. Espiard, *Essais sur le génie et le caractère des nations*, 3 vols., Bruxelles 1743, in which also the relation(ship) between physical and moral causes is discussed too (*or*: who goes into the relationship between ethical and physical/natural causes). Regarding Arbuthnot's influence on Montesquieu cf. Dedieu, *Montesquieu et la tradition politique anglaise*, p. 212ff.. Regarding the wide dissemination of climate theories during the first half of the 18th century in France see R. Mercier, «La théorie des climats des *Réflexions Critiques à L'Esprit des Lois*», *Revue d'histoire littéraire de la France* 53 (1953), pp. 17-37, 159-174.

climatic influences, if and when they crop up (XIV, 5), but without again being able to guarantee that the success of the legislator (law-giver) during such an effort and striving would entail and signify a moral advance (*or*: ethical progress), and not merely a technical improvement. Because what of both of these (moral/ethical progress vs. technical improvement) is the case when e.g. the legislator has succeeded to make out of a lazy (lethargic, indolent, slothful,) sluggish population (populace) of a warm region, bloodthirsty warriors? If, nonetheless, the legislator can clock up some success (*or*: the legislator perhaps succeeds in something) for himself in the struggle against unfavourable climatic conditions, then he seems in advance to be powerless vis-à-vis the other fundamental geographical causal determination: the spatial (order of) magnitude (the spatial scale) (*or*: the extent of the state). If or since a large area/region (*or*: state territory) necessarily interrelates with, or necessarily entails, a despotism; a middle(-sized area or state territory), a monarchy; and a small (area or state territory) a republic (VIII, 16-19), then the universal realisation of Reason, which for its part can only be universal – [[but in reality]] it is excluded [[and not possible]] as long as the large states are not divided and split up (*or*: which for its part can only be universal, [[though]] it is excluded, except if the large states are dismembered). However, Montesquieu believes that the nature of their soil and land does not permit such a division, splitting up or dismemberment, and because of this, government and authority as dominance in Asia must be despotic for all times, ages and epochs, i.e. always and forever⁵⁹. Such statements seemed to (a great) many Enlighteners (i.e. Enlightenment thinkers, philosophers and propagandists et al.) not simply pessimistic, but (absolutely, really) cynical. And the Baron [[Montesquieu]] had to have seemed still more cynical to them when he wrote that Reason would find slavery more natural in

⁵⁹ XVII, 6: «La puissance doit donc être toujours despotique en Asie. Car, si la servitude n’y était pas extrême, il se ferait d’abord un partage que la nature du pays ne peut pas souffrir.» [= “Power must therefore always be despotic in Asia. Because, if servitude were not extreme, it/there would firstly be [[a case of]] the dividing/splitting/parcelling [[of power]] that the nature of the country could not suffer, go through”.].

warm lands and countries where men (humans, people) are not particularly willing to work (*or*: where the residents work unwillingly)⁶⁰. Of course, he immediately added that because of the natural equality of men, slavery was «contre la nature» [= “against/contrary to nature”], although in certain countries and lands it is founded and based on a «raison naturelle» [= “natural reason”] – yet the self-correction likewise contained the fatal ambiguity (dual semantic character) of his thought, since nature in his thinking was understood, the first time, as a normative principle, but the second time, in a purely causal sense (“natural reason”). The concept or term “nature” has the same double meaning when it refers to the “particular structure” (III, 1), that is, the institutional framework (scaffolding) of a form of government or polity. In a descriptive or causal respect (*or*: From a descriptive or causal point of view), despotism or a despotic government also has a “nature” (II, 1), although this, its nature directly resists, opposes and militates (face to face) against normatively meant nature, thus e.g. “human nature”, in regard to which despotism inflicts and causes terrible, dreadful evil(s), woes, trials and tribulations⁶¹. What should now a despot do in order to behave in accordance with “nature”? He is lost (i.e. doomed or done for), Montesquieu tell us, if he cannot at any time annihilate the great and mighty (*or*: the most powerful/the strongest) in his realm; without terror(ism), despotism as a form of government or as a type of polity remains (or would be) “imperfect”⁶². Should, therefore, an Asiatic despot be human(e)ly compassionate, merciful and politically liberal (generous), even though he knows that it is impossible for his country (land) to (be to able) (*or*: his country can impossibly) elude or escape the fate of despotism, or should he have organised (his) despotism as far as possible perfectly, in relation to which

⁶⁰ XV, 7: «L’esclavage y choque donc moins la raison.» [= “Slavery therefore shocks reason less.”] Cf. XVI, 4, in relation to polygamy.

⁶¹ II, 4: «Le depotisme cause à la nature humaine des maux effroyables.» [= “Despotism causes human nature frightful, horrifying, appalling ills and evils”].

⁶² III, 9 and 11: «sans quoi le gouvernement sera imparfait » [= “without which the government will be imperfect”].

perfection would have a purely technical, not a moral-normative significance (meaning or sense)? We encounter the same technically understood concept of perfection, incidentally, in the interrelation with each and every respective “fundamental principle” of the form of government or polity, since neither fear (angst) in(side) the despotism, but also not virtue in a republic, or honour in a monarchy, are understood as moral magnitudes in the religious or philosophical sense, as Montesquieu expressly affirmed and assured us (III, 5, note). And exactly because they (fear, virtue, honour) are comprehended technically-functionally, Montesquieu believes that the fundamental principle, which underlies a form of government or polity, [[and]] harms (damages) another (form of government or polity), could not be able to (*or*: could not in itself) be judged according to fixed, immobile moral-ethical and normative criteria (yardsticks or benchmarks). If, however, it is so, and if the fundamental principle of the form of government and polity is tightly connected with (or closely attached to) the laws in force, how may one then assert that these laws would represent and constitute, at least ideally, individual cases of the application of (a [[kind of]]) human Reason (I, 3)?

4. *Law of nature (Naturgesetz), natural law(/right(/justice)) (Naturrecht), positive law(/right(/justice)) (positives Recht)*

This vague, yet fundamental coupling of legislation (law-giving, lawmaking, laws; Gesetzgebung) and Reason brings us to the core or central problem of the relations between positive law(/right(/justice)) and natural law(/right(/justice)); at the same time, however, this fundamental coupling allows the contrast(ing), opposition or conflict between causal and normative (the causal element and the normative element) to emerge and stand out in a new dimension, since this

survives in different meanings of *loi* [= *law*] (*or*: this fundamental coupling brings us therefore to the opposition between causal and normative consideration, since this opposition appears (also) from within the opposing/discordant/at variance notions of (the) “law”). Just like the rest of Montesquieu’s main theoretical matters of concern (*or*: As in other central points of Montesquieu’s theoretical undertaking), that is, the search for causes and the derivation (deduction, inference) of the spirit of the laws (*or*: of the “general spirit”) from a multiplicity of causes, so too can the multi-layered connection of the concept of the cause with the concept of law (*Gesetzes*) or the concept of right(/law(/justice)) (*Rechts*) (in such concepts’ various dimensions) be tracked down and unearthed already in his older texts⁶³. Undoubtedly, Montesquieu was, to a different extent on each and every respective occasion and in/on all the different roundabout ways (paths, roads) at different times, influenced both by the representatives of natural law (above all Grotius), as well as by metaphysicians (Malebranche and Leibniz), whilst at the same time he adopted or appropriated the fundamental idea or fundamental thoughts in respect of the structural analogy between natural and moral/ethical law bindedness (determinism or law-based necessity) as ontologically autonomous (i.e. also independent from God) magnitudes⁶⁴. Likewise, it is not to be doubted that Montesquieu in alliance with this idealistic school of thought of natural law(/right(/justice)) combatted the materialistic founding of this same natural law(/right(/justice)) on the part of Hobbes. The opposition to Hobbes constituted, as it were, approximately a constant in Montesquieu’s intellectual(-spiritual) becoming and course, although the express rejection of that which Montesquieu held to be socially dangerous amoralism or immorality in Hobbes,

⁶³ See above all the *Essai touchant les lois naturelles* = *Oeuvres Complètes* (Masson), III, p. 175ff., which must have been written towards the end of the 1720s. In relation to that, P. Dimoff, «La place dans l’oeuvre de Montesquieu de l’*Essai touchant les lois naturelles*», *Revue d’histoire littéraire de la France* 57 (1957), pp. 480-493.

⁶⁴ This influencing/influence is documented and proven in detail in the works of Waddicor and Mason, but in the process, highlighted one-sidedly, without any discussion of the logical and methodological questions and issues interrelating with the said influencing/influence.

did not at all exclude tacit agreement on individual, and not always totally unimportant, points⁶⁵. Concerning this special question, just as in the general discussion and appraisal of Montesquieu's fundamental positioning towards natural law(/right(/justice)) and towards the multi-dimensional or multi-level examination of the problem of *loi* [= *law*], one must, as far as possible, cleanly (neatly) distinguish between his often expressed and emphatic sympathies, and the logical aporias (queries, doubts, contradictions or paradoxes), which result from the crossing or intersection of these sympathies with his likewise declared (testified) will to describe phenomena, and not to judge them. The contrast(/opposition/conflict) between this will and the fact that he very frequently does not nevertheless refrain from (moral) judgements, must equally be registered and examined in regard to the said contrast's logical and epistemological consequences or implications (*or*: logical and epistemological dimension), [[and]] not merely reduced to the psychological (*or*: and not simply be pointed out as a psychological phenomenon).

The analysis of the *loi*-concept (*or*: of the concept of *law*)⁶⁶ has of course to be propped (shored) up (supported, reinforced) by the much-discussed three chapters of the first book of Montesquieu's main work (*The Spirit of the Laws*). At these chapters' very beginning, *loi* (*law*) is defined as the necessary relations which ensue from the nature of things – and this definition should apply to all levels of being, of the knowable (i.e. what is knowable) and of science or scientism (τῆς ἐπιστημοσύνης). The forms and kinds of law bindedness (determinisms or law-based necessities) of all levels can, in other words, be apprehended in a united manner, and our epistemological positioning and

⁶⁵ S. Goyard-Fabre contrasts or contradistinguishes a very simplified picture of the “mechanicist” Hobbes, *Montesquieu adversaire de Hobbes* = *Archives des lettres modernes* 192 (1980) [= «archives Montesquieu», Nr. 8], to the “Humanist” Montesquieu. Cf. Cotta, *Montesquieu*, p. 139ff., as well as the final paragraph of this section.

⁶⁶ The meaning/sense of this concept cannot be rendered or represented with or by one word [[in German]]. It means at the same time the law of nature (Naturgesetz), natural law(/right(/justice)) (Naturrecht) and positive law(/right(/justice)) (positive Recht). Hereinafter, we want to explain how and what Montesquieu thinks of the interrelation of the three meanings.

equipment or equipping (of ourselves) must not in principle be changed and altered, varied in the transition from one level to another level. At all levels, the epistemologist constructs and uses, handles or deals with the same cognitive schema: he discovers relations, and to the extent he is convinced of the necessity (and not the chance, accident or coincidence) of these relations, he formulates laws and attaches (combines, links or associates) the functioning of these laws to, or with, the nature of things, or rather he deduces (derives, infers) this nature of things from those laws. However, obviously not all things have the same nature, and that is why the general validity of law (in the general epistemological sense of the word “law”) is not equal or equivalent to, or does not mean, the ontological identity (identicalness) of everything with everything; the problem lies precisely in finding out how the universal application of epistemology can be reconciled with each and every respective different ontological quality (*or*: with the difference in ontological quality and ontological character (*or*: with the difference of the ontological what)). We firmly hold onto, therefore, the distinction between law as ideal (= ideational) schema, which the relations of things determine as towards one another (*or*: which governs the relations of things), and the texture or composition of each and every respective ontological level of unfolding of this same schema, and now want to enumerate and list or record and register the rest of the meanings of law, apart from the epistemological meaning, by henceforth taking or using as [[our]] criterion or yardstick, the texture and composition of the ontological levels. Consequently, to the epistemological concept of law, three further concepts of law are added, since Montesquieu speaks of three ontological levels: [[1]] the level of the unending, i.e. infinite intelligence of God as pure (unmixed) Reason; [[2]] the level of the inorganic and, more generally, irrational (unreasonable) nature; and [[3]] the level of finite intelligences, that is, of the human world in(side) or within its material determinations. At the first level, law as *natural law*(/right (/justice)) (*Naturrecht* = *φυσικὸ δίκαιο*) inheres

or indwells, i.e. as the epitome or synopsis of the highest (supreme, uppermost, paramount) moral-normative principles; the second level constitutes the realm of the *law of nature* (*Naturlgesetz* = *φυσικοῦ νόμου*), that is, of law in the natural-scientific sense; and for the third level, *positive law* (*/right(/justice)*) (*positive Recht* = *θετικὸ δίκαιο*) is characteristic, i.e. the law as will and command of a human legislator (law-giver, lawmaker). It must now be stressed that the principal level of unfolding of every kind of law does not necessarily constitute the place and locus of its origin. At the level of unending/infinite divine (godly) intelligence not only is natural law constituted (*or*: not only does natural law sprout), but also natural law bindedness (determinism or law-based necessity), since God is the “creator and preserver” of the world; positive law is formed, shaped and moulded of course inside human society, however, in the ideal case it should, however, take root in natural law and comply or conform with this natural law. The fact that the law of nature and the law of the human world ultimately stem from divine (godly) intelligence, should indicate no ontological belittlement or downgrading of both those levels of being (of nature and of man), but rather such a fact is comprehended as the guarantee of perfection: positive law is perfected obviously to the extent it draws near(er) to, or (all the more) approaches, natural law. Regarding the role which the intervention or interpolation of the laws of nature plays in the distancing of positive law from natural law (since man simultaneously takes part in immaterial intelligence and in material nature), we shall speak later/below.

We can effortlessly make sure (*or*: It is not difficult to confirm) that, although the law of nature makes up a particular kind of law amongst other kinds of law, nonetheless, Montesquieu’s general perception of law, that is, his epistemology, is taken from the natural science of the 17th century. Law is primarily a functional concept, it does not relate to substances, but to relations, and the substances are (at least implicitly) defined as relations. However, the influence

of modern natural science makes itself noticeable, known or even obvious – as already in Grotius and other theoreticians of the 17th century – also on another further, essential point. Natural law and moral law in general are comprehended according to (*or*: on the basis of) the model of the law of nature, i.e. as strict or rigid, unswerving and unbreakable forms and kinds of law bindedness (determinisms or law-based necessities), which no divine/godly mood, whim, quirk and arbitrariness can disconcert or split, cancel and undo⁶⁷. Divine will (*or*: The will of God) is defined on the basis of the commands of natural law, not the other way around. Law (The law) in the epistemological sense of the word applies equally to all ontological levels, that is why the highest normative level, i.e. that of pure, divine Reason, shows, as a causal/law-bound space, the same structure as Nature – but also as society, since, as we know that Montesquieu made the transference and extension of the concept of causality to the level of society his programme (or goal). Nevertheless, natural law and moral law are not merely laws in the epistemological sense, they do not merely represent formal structures and formulae, but they command a certain behaviour too, they have, that is, a certain content. That is why they (natural law and moral law) can only function where it is a matter of behaviour and determinations of behaviour, where, that is, wanting (volition) and thinking (thought) are present (exist), whereas the realm of the law of nature remains alien (strange, foreign) and indifferent to them (natural law and moral law). The decisive conclusion from that reads: the form-related(formal)-structural identity (= identicalness) or coincidence of two levels, as law-bound (deterministic, law(rule)-based) levels, by no means guarantees in itself the possibility of the transference of the content of a level to another level, and still less does it guarantee the identity of the content(s) (*or*: by no means guarantees in itself the possibility of the transfer of the identity of the contents too). If that possibility exists at all, and indeed with

⁶⁷ Typically, Grotius, *De Jure belli ac Pacis* I, 1, 10 § 5.

regard to the comprehensive channeling of natural law into positive law, then the reason for this lies in the fact that in the human social world – just as at the level of unending, infinite intelligence – wanting (volition) and thinking (thought) exist and have an effect. However, causal determinations also exist, which at the (higher, further up) divine/godly level, are totally lacking; causal determinations, which are put down and due to the above-mentioned intervention or interpolation of the laws of nature. And if it is true and right that exactly these causal determinations thwart the (complete or all-out) realisation of natural law in(side)/(with)in positive law, then to the law bindedness (determinism or law-based necessity) of the normative (element), the law bindedness (determinism or law-based necessity) of the causal (element) is opposed. The structural-form-related(formal) identity (= identicalness) of both forms and kinds of law bindedness (determinisms or law-based necessities) in their epistemological apprehension and manifestation, does not in the least entail or signify a quasi automatic pushing trough or imposition of the normative (element). And Montesquieu commits a decisive logical error when he invokes or appeals to the former (structural-formal identity of both kinds of law bindedness) in order to safeguard and protect the latter (normative element).

The human world is subject to the laws of both higher ontological levels: it is subject to the laws of nature, which it cannot infringe or violate in any case, and it is subject to the moral-normative laws of divine/godly Reason, which however it transgresses, as both the everyday behaviour of humans, as well as the very often flagrant, screaming contradiction and divergence of positive law or legal praxis vis-à-vis natural law show us (make clear or make us aware). From Montesquieu's writings (expositions)⁶⁸, it can be clearly gathered or derived that this transgressing must be put down or due to three factors, namely, [[1]] to physical-material determinations, [[2]] to the finite character of human

⁶⁸ I, 1, Paragraph: «Mais il s'en faut bien ...» and following.

intelligence and [[3]] to human freedom. Both the first two factors constitute in reality two sides of the same coin, because the boundaries of human intelligence (are) narrow(ed) precisely to the extent that the bearer of this intelligence is a sensorial being, who is cognitively dependent on the fragmentary data of his senses, and is morally the prey (booty, spoils) or lap dog (stooge, puppet) of ineradicable, severe passions; the endlessness/infiniteness/infinity of intelligence at the level of God accompanies, on the contrary, its absolute purity, which is not muddied, spoiled, clouded and blurred, or cannot be muddied etc. by any presence and any influence of material-sensorial factors. We conclude therefore that the primary reason for the divergence/deviance of the act(ion)s of finite intelligences from the commands of infinite/unending intelligence is to be found in the material-causal determinations, to which the former (act(ion)s) are subject. However, this deterministic explanation or justification of error and fallacy, and of evil, stands in direct contrast to their explanation or justification by human freedom. In actual fact, Montesquieu makes no systematic use of this latter (human freedom); he mentions it, by courteously and quickly bowing towards the side of the theologians in order to immediately forget it. Incidentally, the classical theological explanation of evil through or by (way of) freedom is summoned or can be projected and promoted only where no material factors come into play, that is, at the level of the pure spirit (e.g. fallen angels), which sins out its own, not out of a sensorial drive, urge or impulse, and apart from that it (= such classical theological explanation of evil) is in itself profoundly contradictory: because sin through (or sin is explained by) freedom, that is, something in itself evil is explained by something in itself good (*or*: in order to explain sin, freedom is summoned, whereupon something evil is explained by something in itself good).

The fundamental distinction between the human world and the divine/godly as the realm of pure (unmixed) Reason consists in the fact that in the former,

causal and normative law bindness (determinism or law-based necessity) very often are and stand mutually in the way of, and are opposed to, each other, whereas they, in the latter, are simply identical. The identity (identicalness) again means two things: first, that the full and unhindered, unobstructed unfolding of natural law bindness (determinism or law-based necessity) does not in the least lessen or diminish the absolute validity and force of natural law, since God represents and constitutes simultaneously and by definition the embodiment of, and the guarantee for, both the natural as well as the moral order; secondly, and even more important, is that natural law and the universal principles of morals (morality) make up the internal law bindness (determinism or law-based necessity) or causality of (divine) Reason, which, by being able to be led and impelled by its own law bindness (determinism or law-based necessity) and by unfolding this same law bindness, (it) cannot but be good, i.e. it is causally forced to exist and to have an effect in normative perfection. Where causal and normative determination coincide, there, moral acting (or the ethical act) is determined by moral law and natural law precisely in the same manner as the behaviour of a natural body is determined by natural law bindness (determinism or law-based necessity); it suffices to know what law is and means in the epistemological sense of the word in order to be able to foresee the character and the content of the act(s) (action) being expected; between the form-related (formal) structure of law and the (good) character and content of the acts, there is an unquestionable agreement or direct coincidence and a seamless continuity. Said differently: at this level, the effect of the law does not stumble upon the texture or composure of its field of application, since pure Reason, without anything further to be added or without a second thought, coincides or co-identifies with moral law.

Is it now, however, possible at the human level, that positive law is determined in the same manner by natural law, just as the behaviour of the

natural body is governed (ruled, regulated or conditioned) by natural law bindedness (determinism or law-based necessity)? Is it possible that the normative quality of an act depends in the same manner on moral law, just as the outer, external visible course or processing of this same act depends on natural law bindedness? Should this be possible, then it would be illogical to point to or invoke causal-material determinations and the laws of nature in order to explain the great and painful chasm between the human world and divine Reason, between positive law and natural law^{xi}. The specific feature of the human world consists, in other words, in the lack of unconstrained (unforced, effortless) identity (identicalness) and continuity between law in the general epistemological sense, and the positive normative quality of the acts being carried (acted) out in a law-bound manner, i.e. deterministically. And by no means does it suffice to ascertain the structural-formal(form-related) identity (identicalness) between the causal relation at the level of divine Reason, and the causal relation at the level of positive law, in order to regard the transition from one to the other as logically legitimate⁶⁹. The structural-formal identity (identicalness) consequently becomes the smokescreen (disguise, cloak) which is supposed to cover up a flagrant μετάβασις εἰς ἄλλο γένος (= change (passing over, shifting, transition) to another genus (type, kind, species)); because the identity (as identicalness) exists at the level of the epistemological definition of law, whereas the, in practice, decisive difference emerges in the change of the ontological level at which law unfolds on each and every respective occasion. The epistemologically understood structure of the latter (law) remains the same, however, during the change of the ontological levels, the *content* changes, [[and]] the normative quality; because at *this* level of the ontological, the chasm between positive law and natural law is ascertained, and likewise at *this* level, the law-bound/deterministic-causal way of looking at things is summoned in

⁶⁹ This serious, yet most usual and common mistake is made by e.g. S. Goyard-Fabre, *La philosophie*, p. 93. Likewise, Ch. Beyer, *Nature et Valeur dans la Philosophie de Montesquieu*, Paris 1982, p. 380.

order to make understandable and to interpret that chasm. By adopting and serving at both levels the same causal consideration or way of looking at things, and by using epistemologically identical concepts of law, we derive from the internal (and) supra-historical causality of Reason, intact natural law, whereas on the basis of causality which governs and dominates human-social phenomena, we can merely understand why positive law was formed, shaped and moulded in such a way that it had to more or less deviate or desist from natural law.

The difference becomes equally obvious if we reverse the perspective by viewing and examining, namely, positive law and natural law not as the effects and results (and what has been caused) of each and every higher and superior causality, but as causes, i.e. as motives or driving forces of human activity. The normative principles of natural law, primarily (or primordially) and from the inside, drive acting man, since they, as Montesquieu believes, are immanent in his Reason; rational action constitutes, according to that, the self-acting development and expression or externalisation of original, primeval aptitudes and origins, or the direct outflow of the “nature of things” at the level of intelligence. In contrast, positive law moves human action from the outside and as a secondary factor, after having been formed, shaped and moulded previously by exactly those conditions, circumstances, relations and forces, which determine its deviance or divergence from natural law. The fact now that we considered natural law to be the primary, and positive law to be the secondary, motive or determinative factor of human action and human activity, does not mean that positive law results or emerges from natural law with the same necessity as the first element of a series follows the second, and not the third or the fifth element. Because positive law is not merely secondary because natural law permanently keeps the place or position of what is primary occupied, but it is secondary because it comes into being from a plexus, mesh or network of

inner-worldly, that is, geographical, biological, historical, economic and social causes. *As to this* plexus or network, positive law is secondary – and if it were not this, i.e. secondary as to this plexus etc., then Montesquieu's declared intention of uncovering, exposing and or finding the forms and kinds of law bindedness (determinisms or law-based necessities) of positive law's formation, would have absolutely no meaning. Were, on the contrary, positive law secondary as to natural law as what is primary [[and not as to the aforesaid plexus, etc.]], then the chasm between both of them (i.e. positive law and natural law) would also be theoretically and in practice irrelevant or negligible, just as the deviances or divergences in the degree of force and validity of a law of nature from one empirical case to another would mostly not be worth mentioning. Positive law would, in other words, behave towards natural law just as the colourful plethora or great diversity of individual creatures, individual beings and combinations behaves towards the law of nature which governs the said plethora and to which this plethora is subjugated or subject. In such a case, however, natural law not only would have to determine and direct positive law, but also be able to explain its coming into being and texture (composition), just as the law of nature renders comprehensible the behaviour of individual creatures, individual beings and the course and formation of their various relations with one another. Then, however, history and sociology as sciences which study the formation of positive law and consequently the spirit of the laws would, by and large, be superfluous.

It would be a mistake to want to bridge the chasm between positive law and natural law, or causal and normative consideration, through the assertion that every positive law simultaneously represents and constitutes a *fact* to be interpreted and explained causally, and a command of a normative character and of normative content (*or*: but also a *command* referring to the normative

sphere)⁷⁰. Because the problem lies precisely in to what extent the commands of positive law agree with the commands of natural law, to what extent, that is, the concept of the normative in both cases remains the same, and to what extent historically attested and witnessed deviance or divergence of both concepts [[of (natural and positive) law]] from the normative, or of the positive and of the natural-law commands from one another, are to be attributed or ascribed exactly to the effect of causal (“moral” and “physical”) factors. Slavery can be elevated by positive law to a norm and to a command, but may it, according to natural-law criteria, be seen as a norm and a command? The assertion just mentioned above confuses that which at the level of positive law is form, with that which at the level of natural law constitutes (a [[piece of]]) content, and it overlooks that the concept of Ought or of the Norm is understood totally differently at each of both of these levels. In the realm of positive law, Ought relates to the mere form, i.e. Ought and Norm is *everything* which is expressed in the form of a commanding or prohibiting sentence (in contrast to purely descriptive sentences), irrespective of *what* is commanded or prohibited and forbidden. But in the realm of natural law, only *certain* content(s) are allowed to take the form of commanding or prohibiting sentences. (The) Ought here, comes out of, or emerges from, one single Is defined in terms of content in advance, whereas in the realm of positive law, the contents of (the) Ought vary, since they are derived from the heterogeneous and constantly changing Is of society and of history. Naturally, one can put one’s honour as a logician – and as an ethicist – at stake, and regard all laws in force, without exception, as the direct outflow of natural law. However, in order to be allowed to do this, one must be limited or restricted to the form-related (i.e. formal) character of law as an Ought and command or prohibition, regardless of each and every respective content; but then the great paradox arises that natural law agrees with everything which

⁷⁰ Thus, Goyard-Fabre, *La philosophie*, p. 83. Cf. FN [= footnote] 38.

legally is a command or a prohibition; with (or in relation to) which natural law, when all is said and done, is traced back, put down and reduced to power and authority as dominance.

At the level of the human social world, the general epistemological definition of law is supposed, according to Montesquieu, to apply to two very different meanings: on the one hand, the law apprehends the great diversity and plethora of positive law as the sum of relations which are of necessity unified under the aegis of natural law; and on the other hand, law subsumes the abundance and profusion of relations which form, shape and mould positive laws under certain fundamental relations or principles. Both these meanings would coincide if the aforementioned principles could be identified or coincided with natural law; if that is, as already remarked, natural law could be converted into an analytical instrument and could successfully come to grips and deal with the task of a historical-sociological interpretation and explanation of the varied, manifold forms and relations of positive law. Since this is not the case, the difference in the ontological level between divine Reason and finite human beings remains crucial, and the united, therefore for both levels, definition of the law applying epistemologically, cannot eliminate such a difference. The second of the above-mentioned meanings of law (i.e. the subsumption of the abundance of relations which form positive laws under certain fundamental relations or principles), has in any case to do, and is connected, with Montesquieu's programmatic aim to not dwell on this or that positive law, but to uncover and track or trace the law bindedness (determinism or law-based necessity) which determines the formation of the "spirit of the laws" as the great resultant of varied, manifold and multiple relations⁷¹. *Also*, this law bindedness must of course be apprehended and formulated in such a manner as the epistemological definition of law demands or dictates; but whereas in the case of law bindedness

⁷¹ I, 3, paragraph: «C'est ce que j'entreprends...»

(determinism or law-based necessity) of normative Reason, the uppermost or paramount (supreme) principles (i.e. those principles pertaining to natural law) can be named, on the basis of which the relations are organised and in their necessity articulated, at the level of the law bindedness (determinism or law-based necessity) of positive law, no equally or commensurately clear organisation of the material, that is, no fixed law-bound (deterministic, law(rule)-based) hierarchisation of the basic, determining factors and of the correspondingly moulded, formed and stamped relations, can be managed or effected. Although Montesquieu highlights or even preponders, i.e. puts forward in advance, at times these, at other times those, “physical” or “moral” causes, he does not reach up to where e.g. historical materialism got to, by accepting, albeit only “in the final analysis”, the primacy of the economic factor. One could or should (to one’s benefit) in fact salute or greet this in fact as a sober theoretical stance, which mistrusts and suspects all schematisations and likes to remain constantly open vis-à-vis the innumerable forms and possibilities of concrete social-historical reality. However: the forms and kinds of law bindedness (determinisms or law(rule)-based necessities) which are ascertained and formulated in this uncertain(/tentative/hesitant)-cautious(/restrained/undemonstrative) manner, do not possess any longer the uniformity, cohesion and the firmness, tightness (*or*: closed and tight character) of the internal law bindedness (determinism or law(rule)-based necessity) of normative Reason during the giving rise to, i.e. producing of natural law and its (wished-for, desired) applications, uses or deviances and divergences (or eradications) in social life. Through that, the programmatically striven for structural identity (i.e. identicalness), or at any rate, correspondence between the various ontological levels of the (being in) force and validity of (epistemologically understood) law is proven or turns out to be pure fiction and a pure impossibility (*or*: In this way, even the programmatically sought structural correspondence between the various ontological levels of the being in force of law (in the epistemological

sense of the term) is also lost). The theoretical result of the – in itself so welcome and fertile – acceptance of a great variety of determining factors is the smuggling in of a pragmatic(al) concept of Reason and Nature next to the normative one (i.e. normative concept of Reason and Nature). The best government, that is, the government corresponding the most with “nature”, Montesquieu writes, is that which accords with or matches the relations, circumstances, situation and the state of the spirit or disposition of a nation and people⁷². Montesquieu speaks here of “nature” without any reference to a fixed, stable, firm or settled and binding normative content, which would be expressly and directly taken from natural law; “nature” is here the social equilibrium and the peace or normalcy as products and results (the yield) of the correspondence between laws and the general situation, whatever such a general situation may be, and indeed as values in themselves. The deviance or divergence of this definition from the nature of the normative [[definition]] is obvious. And the dilemma is not solved by both definitions standing or existing next to each other or in parallel; it is merely formulated.

Montesquieu’s fluctuating, vacillating positioning regarding the relations between natural law and positive law are connected with an, in him, obviously unconscious ambiguity (dual meaning) of his perception of natural law itself – an ambiguity which, for its part, can show or present in a new light his ambivalence vis-à-vis Hobbes. It has been proved in detail⁷³ that Montesquieu, as soon as Montesquieu goes from the abstract, general extolment of the principles of natural law to their concrete enumeration, mentions and includes amongst them not merely normative commands of a moral-altruistic character, but also laws which relate to the state (of affairs) or situation of man as a natural being, i.e. to the drive (urge, impulse) and the inner command of self-preservation in the wider sense of the word. Hobbes had, however,

⁷² Ibid., paragraph: «Il vaut mieux dire ...»

⁷³ Shackleton, *Montesquieu*, p. 247ff..

(consistently) done exactly this⁷⁴ by radically reinterpreting or meta-interpreting traditional natural law, under the retention and with the perpetuation of the name (“natural law”), on the basis of a naturalistic anthropology. Without wanting to carry the analogy to far, we could say that Hobbes, through the anthropological principle of self-preservation (consciously), undermined classical natural law theory just as much as Montesquieu (at least objectively) did this, through the sociological analysis of the “necessary relations” of positive law. The principle of self-preservation and a sociological analysis of such a type can, incidentally, be brought down to a common denominator: to the perception of man as a worldly natural being who or which is caught in a dense net(work) of material dependencies – although Hobbes traces and locates these dependencies already in an image or picture of the pre-social individual, whereas Montesquieu looks at these same dependencies historically and sociologically, that is, multi-dimensionally. In reference to our question formulation, posing of the question-problem or central theme, the individualistic or historical-social (social-state-related) starting point is of course irrelevant (*or*: does not have decisive significance). In a purely theoretical respect (*or*: From a purely theoretical point of view), Montesquieu does not gain much against Hobbes when he asserts and insists upon the peaceableness of man in the pre-social state of nature (*or*: insists upon the fact that man in the natural-pre-social state/situation is peaceful). Because this thesis was bought off with the dual assumption or acceptance that conflicts and wars would come into being only through the friction(s) of social living together (co-existence), and that laws would be set up and enacted exactly as dams or barriers against wars amongst and within nations⁷⁵. How can one, however, assert, as Montesquieu does it, that peace and social living together (co-existence) equally represent and constitute principles of natural law (*or*: laws of natural right(/justice)), when wars were

⁷⁴ *Leviathan*, ch. XIV-XV.

⁷⁵ I, 3, paragraph: «Ces deux sortes d'état de guerre ...»

put in the world precisely through society and in society (*or*: if precisely society constitutes the generative cause of war)?

5. *Natural law(/right(/justice)) and history*

To conclude [[this chapter]] it should be remarked that the manner which Montesquieu comprehends historical becoming reflects the difficulties which normative principles encounter when they run into causal factors. If the imposition of natural law on positive law could be carried out and occur as smoothly and unconstrainedly, effortlessly as the (schema of the) first book of his main work would like to suggest this here and there, then nothing at all would hinder Montesquieu in relation to that from imagining and comprehending historical movement linearly, and from placing at its end the definitive victory of morals/ethics/morality, peace and of freedom. Nonetheless, his writings do not in the least emit that belief in the progress of history (historical progress) of itself, which was to be announced and carried out in such triumphant tones in Turgot and Condorcet. Montesquieu's views on the overall course of history were not once expressed, but they can be deduced from his analyses of historical phenomena or processes, at most, of historical cycles. He outlines certain long-term continuities which are constituted (*or*: He delineates evolutionary schemata developing over the long run) under the influence of causes permanently having an effect (*or*: under the influence of stable causes), however, these continuities go parallelly with one another, or are suddenly broken not unlike fault lines, without them converging onto a certain point, in order to flow or to be emptied into the same aim (*or*: without them converging in order to enter the same historical river-bed and to flow into the same point)^{xiii}; to the extent the development or evolution appears or is

considered to be united, this happens with regard to the form of government and within its boundaries and limits. Thus, values and causes run into one another or intersect only sporadically and temporarily, and although here and there moral and political advances (forms and kinds of progress) are noted and recorded, general and united progress is not to be seen anywhere, just as nowhere the fear of a comprehensive and unstoppable, inexorable decadence is expressed; history remains open, fragmentary, fluctuating/vacillating and inconstant, fickle⁷⁶. In so far as Montesquieu comprehends the movement of history (historical motion or movement) as the sudden change from one form of government or type of polity to another, he remains of course at, and with, the way of looking at things of the classical teaching (theory, doctrine) of the state and of polities, just as he continued – we have already mentioned it – the classical tradition when he put forward political maxims with supra-historical claims of validity. The same persistence with and in the classical tradition becomes evident in the handling of history, which is not only regarded from the point of view or the action and reaction of causal factors, but also is very often used as the source for the creation of examples with typical value, that is, irrespective of each and every respective constellation or conjuncture or even “tier (level or stage) of history” (*or*: irrespective of the historical epoch, and able to guide the act(ion) of acting persons whenever the conjuncture is recycled)⁷⁷. The teaching or theory [[derived]] from history applies, however, only as long as history does not change, as long as, that is, the dosage of the causal and the normative (element), “good” and “evil”, remains fairly stable in the odd, strange or curious mixture and jumble of historically living mankind. However, someone who expects of the future the complete and conclusive, final victory of natural law, cannot and may not look at human affairs (human things) in this way.

⁷⁶ In relation to that, R. Hubert, «La notion du devenir historique dans la philosophie de Montesquieu», *Revue de métaphysique et de morale* 46 (1939), pp. 587-610, as well as J. Dagen, *L'histoire de l'esprit humain dans la pensée française de Fontenelle à Condorcet*, Paris 1977, esp., pp. 214, 244.

⁷⁷ Cf. the telling and nice observations of Cl.-P. Clostermeyer, *Zwei Gesichter*, pp. 173, 195.

IV. Preservation (protection) and reform, sovereign authority as dominance (sovereign domination/power/control/violence/force) and freedom

1. Sociology and conservatism

The reproach that Montesquieu suppresses or drowns the normative point of view through his causal analysis and lets the necessary command of natural law sink into and become mired by the accidents of positive law (*or*: and the deeply rooted realities of positive law swallow the ethereal commands of natural law), was made and formulated very early on. Voltaire sought to substantiate it through an elaborate, exhaustive and often pedantic refutation or disproving of

realia in Montesquieu's work⁷⁸, whereas Rousseau absolutely rejected that *L'Esprit des Lois* (performed and) achieved something more and something other than a description of positive kinds of legislation (law-giving, lawmaking) or positive law⁷⁹. The discomfort and unease of Enlightenment philosophers and thinkers (Enlighteners) was not nourished and nurtured merely by the assurances of the prologue that the work does not want in any way to call into doubt what was existing and prevailing, i.e. the status quo; such assurances were often in difficult times given for tactical reasons, and in themselves did not count for much – either in the eyes of friends or in those ((the) eyes) of foes. However, Montesquieu's scientific programme and its systematic carrying out gave rise to a deeper unrest. The social critique of the Enlightenment used as its weapons, general ethical and natural-law principles, so that the relativisation of these same principles through sociological analysis amounted to an ideological disarming of the opponents of the ancien régime⁸⁰. Incidentally, the impression was not unfounded and baseless that Montesquieu does not strive for the thorough radical changing of society through the hard-line, relentless, uncompromising application of the commands and dictates of Reason (with the slogan of fiat iustia[[, et]] pereat mundus [= let justice be done, and let the world perish]), but he rather wishes for an, as far as possible, humane shaping, formation and moulding of polities (constitutions) in the framework of pre-given (i.e. already existing) social conditions. His indubitable belief and faith in natural law is not automatically translated into a demand for the changing or alteration of social relations, circumstances and institutions, but floats, hovers, as it were, above the same social relations, circumstances and institutions in the

⁷⁸ In the so-called *Commentaire*, see *Oeuvres Complètes*, ed. L. Moland, Paris 1877ff., XXX, 404ff.. Cf. *L'A, B, C*, loc. cit., XXVII, 315ff., as well as the letter to Perret from 28.12.1771 (LXVII, 579).

⁷⁹ *Emile*, V, see *Oeuvres Complètes*, ed. B. Gagnebin et M. Raymond, Paris 1959, IV, 836. Regarding the debate which was sparked off and followed upon the publication of *L'Esprit des lois*, see Shackleton, Montesquieu, p. 356ff..

⁸⁰ Only as a curiosity can the opinion of M. Hulling, *Montesquieu and the Old Regime*, Berkeley 1976, esp. pp. 28, 47n, 171ff., be mentioned, that Montesquieu held natural law to be obsolete and devoted himself therefore to (or: used therefore) sociological analysis as an instrument of a radical critique of the ancien régime.

form of a sincere, heartfelt, even fervid wish for the betterment of things. However, this wish remains just as general and vague as natural law itself, it is seldom concretised in practice, and in that case it has an effect like a mild palliative rather than as a sword; the sincerity, fervidness and openness at the level of general confessions of faith (or statements) accompany hesitations and ambivalence, doubts in regard to individual specific, concrete points or (kinds of) position-taking. Such reservations awoke a particularly strong suspicion as soon as they became entrenched behind the causal findings or ascertainments of the sociologist. A typical case in which Montesquieu announced an ethical principle and then, instead of demanding its immediate realisation, postpones or even foils (thwarts) this ethical principle by crossing over and referring to causal explanations, is his position (taken) towards slavery⁸¹. Such virtually or roughly scandalous-like statements and positions could not be atoned for or put right and made good even by the fact that he, regarding his religious convictions, at least followed and identified with the Enlightenment mainstream, i.e., he rejected and was inimical towards atheism of course, yet he was indifferent towards theological metaphysics and dogmatics, he dismissed and condemned “superstition(s)” and clericalism, he loathed and abhorred the Inquisition and its methods etc.⁸². The detachment from traditional theology could not, nevertheless, in itself be a sufficient or primary indication of a progressive social mindset, conviction or spirit in an age in which metaphysical scepticism was not least of all to be encountered in the circles of the educated, cultivated nobility (*or*: in an epoch when the relevant scepticism had embraced a large section of the aristocracy), whereas a considerable part of the clergy or priesthood (i.e. those who lead in regard to spiritual matters; the ministry) likewise held the renewal of Christianity, in co-operation with philosophical

⁸¹ Cf. R. Jameson, *Montesquieu et l'esclavage*, Thèse, Paris 1911, esp. pp. 318ff., 328ff.. Cf. FN 60.

⁸² A comprehensive and spherical representation of Montesquieu's religious convictions are found in four studies, which make up the 5th part of the *Actes du Congrès Montesquieu*, pp. 285-336. Cf. R. Oake, “Montesquieu's Religious Ideas”, *Journal of the History of Ideas* 14 (1953), pp. 548-560.

Reason, to be possible, and also wanted to get down to or started on such a renewal.

A sufficient or primary indication of a progressive social mindset lay in the positioning vis-à-vis the social bearers of the ancien régime (*or*: Old Regime), even if criticism against this regime was formulated only indirectly, or was hidden in theories about the best polity (constitution). Here the issue was quite clear: most, and the most important of the Enlighteners assessed and comprehended the reformist possibilities of enlightened despotism not only differently than Montesquieu, but rejected especially emphatically the Baron's belief in the social-political mission of the nobility/aristocracy as an absolutely essential *pouvoir intermédiaire*⁸³. As a rule, they of course did not want to see and recognise that this belief was by no means unconditional (*or*: they of course were not prepared to note that this belief went with terms, conditions and barriers), and by no means did they all along the line identify with the political notions, content and demands of the aristocratic opposition to the centralistic monarchy. Although Montesquieu pleaded for the preservation of the hereditary privileges of the nobles/nobility, both in the wider social, as well as in the narrower economic sector, on the other hand, he stood up for and advocated a reinforcement of *parlements* and of the newer/newly formed *noblesse de robe* (= "the nobility or the aristocracy of the gown(, toga) or robe") against the old *noblesse d'épée* (= "the nobility or the aristocracy of the sword"). He accepts (or at least puts up with) as a conclusive and irrefutable fact that the monarchy had already put an end to feudal autonomy, of whose resurrection the conservative wing or hard core of the nobility/aristocracy (i.e. the *noblesse d'épée* (= "the nobility or the aristocracy of the sword")) dreamt, and tacitly or de facto rejects the restorative institutional plans and proposals of Saint-Simon and Boulainvilliers. Even the (partial) backing which Montesquieu gives and

⁸³ In relation to that, R. Derathé, «Montesquieu et Jean-Jacques Rousseau», *Revue Internationale de Philosophie* 9 (1955), pp. 366-386, esp. p. 369ff..

affords the latter in his confrontation with Dubos (XXX-XXXI), is due primarily or at least to honest scientific conviction and considerations, and in no case aims at a political and social shattering or smashing to pieces (exhausting) of the bourgeoisie⁸⁴. On the contrary: Montesquieu does not want to only concede or grant to the bourgeoisie broad room to move (a broad unfolding space) within society and in the game of the general balance/equilibrium of social-political factors, but he makes his own, appropriates and accepts essential points of the new, specifically bourgeois social ratings and evaluations – thus e.g. the renunciation of wars and of conquests (X, 3; XIII, 7), as well as the acceptance of a parallel development of trade/commerce and peacefulness (*or*: and the praising of trade as the ambassador of peace between people) (XX, 2); whilst he views the old aristocracy soberly-pragmatically, without sharing in the mysticism of blood⁸⁵.

2. *The sociological and historical meaning of the separation (distribution) of powers (Gewalten(ver)teilung)*

Montesquieu's all in all positive evaluation of the social-political function of the hereditary aristocracy/nobility can be comprehended better if we connect it with his teaching or theory about the separation of powers (Gewaltenteilung); to put first the most decisive or important aspect (*or*: in order to say it at the outset): both questions (i.e. matters pertaining to the hereditary aristocracy, and, the

⁸⁴ See Carcassone's good analysis, *Montesquieu*, pp. 80ff., 96ff..

⁸⁵ S. J. Ehrard, *Politique de Montesquieu*, Paris 1965, p. 34ff.. Althusser's essential identification (equating) of Montesquieu's political positioning with the opposition [[in the form]] of the noblesse d'épée (= "the nobility or the aristocracy of the sword"), *Montesquieu*, p. 109ff., is one-sided and gross. Let it be noted that Althusser's interpretation, in so far as it relates to questions of French social history, is based exclusively on the studies of Soviet historian B. Porschnew regarding the uprisings of the aristocracy and the peasants in the 17th and 18th century.

separation of powers) are connected so tightly with each other because for Montesquieu – contrary to the impression many jurists (legal experts) in or of the past and present (believed and believe) – the separation of powers does not constitute a constitutional matter of concern (*or*: the separation of powers is not a narrow constitutional and legal matter), but primarily has to do with the equilibrium or disequilibrium of living social-political forces. To the many paradoxes of the history of ideas belongs the invocation of Montesquieu's (supposed) teaching or theory of the separation of powers, in order to constitutionally underpin a social-political model which does not merely differ from that which Montesquieu represented and took as his more or less self-evident starting point, but which was on essential points diametrically opposed to Montesquieu's model. Before we summarise (synopsise) the decisive aspects of this contrast or opposition, in order through that to determine Montesquieu's position within the fluctuations of newer (more modern or recent) European history, we must of course visualise and make clear to ourselves which representations and notions Montesquieu himself connected with the separation of powers. In relation to that, two distinctions are a *limine* necessary, which should set aside and eliminate or take apart and dissolve two widely disseminated conceptual confusions (points of confusion). First, the distinction between three functions of state authority as dominance (state power (control, domination, violence, force); Staatsgewalt) is something entirely different to the exclusive localisation/location or detection of every one of these functions in a particular organ of the state (state organ). The distinction of the functions from one another, which is found already in Aristotle⁸⁶, means that whoever governs (rules) and howsoever he may govern (rule), of the nature of the matter/thing, must and is obliged to enact laws, execute (carry out) these laws and (try and) punish the transgressors (violators, infringers) of these same laws; the

⁸⁶ *Politik* IV, 14, 1297b41-1298a1, 2.

legislative, the executive and the judicial powers are – that is, regarded as functions –, encountered in all polities (constitutions) without exception, and their exercising does not in the least presuppose their separation/division through the binding, tying or attachment of one another to separate(d) bearers (*or*: does not presuppose their allocation to separate bearers)⁸⁷. Secondly, the limitation and restriction of sovereign authority as dominance is not identical with its separation or apportioning. Since feudal ideas in the 18th century were still effective, operative, fresh and familiar to Montesquieu, his readers should never lose sight of the fact that for political theory of the Middle Ages, monarchical authority as dominance (*or*: political authority as dominance of the monarch) was self-evidently limited/restricted, but just as self-evidently [[it]] was united; the monarch was legislator (law-giver, lawmaker) (albeit in a pre-modern sense, see below), executor of the law and (highest, supreme, paramount) judge in one⁸⁸.

With regard to Montesquieu's theory, it is thus recommended and preferable to use the general expression or term “distinction (or differentiation) of powers (Unterscheidung der Gewalten)”, which indicates (signifies) their in principle conceptual and functional difference or contradistinction, without having to imply the complete separation (Trennung) of their corresponding bearers from one another (*or*: without necessarily entailing the (full) separation of their bearers). Montesquieu himself speaks neither of “distinction/differentiation” nor – typically enough – of “separation”. One single time, does he use in the renowned and controversial 6th chapter of Book XI the participle “separated” (*separé*), and this relates again to judicial power, which Montesquieu, as we shall immediately see, by no means would like or wants to equate with an

⁸⁷ K. Kluxen, „Die Herkunft der Lehre von der Gewaltenteilung“, in: J. Engel und H. Klinkenberg (Hg.), *Aus Mittelalter und Neuzeit*, Bonn 1957, pp. 219-236, esp. p. 220ff..

⁸⁸ See in relation to that, the classic study of C.H. McIlwain, *Constitutionalism Ancient and Modern*, Ithaca, N.Y. 1940, and Fr. Kern, *Gottesgnadentum und Widerstandsrecht im frühen Mittelalter. Zur Entwicklungsgeschichte der Monarchie*, Darmstadt ²1954. Cf. Sec. 4 and FN 112, below.

autonomous and permanent organ of the state (state organ); whenever he has to use an abstract noun, he speaks of “distribution (Verteilung)” (distribution [[= French]]), whilst at the same time he makes an effort at a blunting, defusing and toning down of the term⁸⁹. Revealing and instructive, however, apart from the eloquent vagueness of the terminology, are also his vacillations in regard to the essence of the matter, since he, next to the general and abstract enumeration or naming of the three powers, offers a wider classification in which judicial power makes up one of both branches of the executive, as well as a third (power)^{xiii} which is supposed to outline or portray contemporary England’s constitutional reality (*or*: in which contemporary England’s constitutional reality is echoed or reflected)^{xiv}; that is why every coherent interpretation of Montesquieu’s text must attribute/ascribe to this text greater clarity than it actually has⁹⁰. If one oversees, i.e. surveys the sum of his existing statements on the activity of the three powers, then the conclusion appears to be compelling that none of these powers exclusively possesses a single function or has exclusively specialised in a function’s exercising. The control or the restriction (limitation), restraint (confinement, obstruction) of a power by another power already presupposes a common functional area or field, and the crossing/intersection of the functions with one another means, for its part, that the separation of powers can be carried out differently (*or*: in different ways) in different polities (constitutions), and indeed according to the historically determined texture and composition of all respective bearers of the polity (constitution). In the real or fictive English polity (constitution), which Montesquieu praises, lauds and extols, monarch and parliament jointly exercise, even though with different legal instruments, legislative power, whilst the executive power of the Crown is subject to the controls and interventions on the

⁸⁹ E.g. XII, 1: «une certaine distribution des trois pouvoirs» [= “a certain distribution of the three powers”]. Cf. M. Imboden, *Montesquieu und die Lehre der Gewaltentrennung*, Berlin 1959, p. 9.

⁹⁰ Richter, *The Political Theory*, pp. 90ff., 93.

part of the (parliamentary) legislature. Sovereign power does not belong to one united organ, but to a composite and heterogeneous organ, which consists of two houses (*or*: parliamentary bodies/chambers) and the monarch. If (*or*: And whilst) the legislature and the executive intertwine, reciprocally entwine with and balance each other exactly through this intertwining (entwining) of theirs, then judicial power just as little constitutes a fixed and lasting, permanent organ of the state (state organ) separate(d) from the rest of the state organs, but rather an appendage of the legislature: it (i.e. judicial power) is from time to time, or for a certain period of time (*or*: periodically and transiently), appointed/nominated and has the task and is mandated to apply the extant law mechanically without possessing control authority (supervisory powers, jurisdiction) regarding the general functioning of the polity (constitution). Obviously, this inwardly loose and frequently opaque plexus, mesh and network (*or*: this intended fluid schema) is not, in relation to that, determined, designated or earmarked to ensure and guarantee the functional independence and autonomy (self-sufficiency) of the three powers; rather, the said network etc. aims at their (i.e. the powers') best possible having an effect together (acting in a combination, synergy, co-operation) – i.e. their simultaneous “distribution” and intertwining or connection – with regard to securing higher political and social aims (*or*: on the basis of superior political and social criteria)⁹¹.

When Montesquieu therefore, in terms of theory, distinguishes (differentiates) the three powers from one another (*or*: When Montesquieu therefore seeks the

⁹¹ The formalistic liberal interpretation (*or*: The formalistic version of liberal constitutionalists in respect) of Montesquieu's theory was convincingly and conclusively disproved by two works, which appeared in 1933 independently of each other; we [[shall now]] follow and summarise their findings here (i.e. in this section). Eisenmann's article (see bibliography) was supplemented, or rather, varied, in a later text of the same author: «La pensée constitutionnelle de Montesquieu», in: *La pensée politique et constitutionnelle* ..., pp. 133-160. Struck's work was written even before Eisenmann's first article, but was first published posthumously (regarding the separation (*or*: regarding the topic or theme of the distribution) of powers, esp. p. 157ff.). In a confrontation with Jellinek, H. Rehm had already stressed several decades beforehand that the criteria of the distinctions (differentiations) or connections in Montesquieu's teaching or theory are political and not formal-juristic (*or*: form(type)(-related)(formal, typical)-legal, see «Eine neue Theorie über die Lehre Montesquieu's von den Staatsgewalten», *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart* 30 (1902), pp. 417-419.

separation of powers), then he does not want under any circumstances to exclude the practical interweaving and intertwining of their corresponding functions, and he also does not want to bind, tie or connect every one of these latter functions to a special, specific permanent bearer within a fixed constitutional construction (*or*: to a special bearer defined once and for all in the framework of a fixed legal construction); rather, he wants at the level of the institutions of the polity (constitution) and through their effect and impact, to protect and preserve an already existing multitude or multiplicity of social forces from a (despotic) levelling. The functions of the three powers should, in the course of this, be distributed amongst these forces in such a way that through their (i.e. the three powers') exercising it is guaranteed that no active social-political factor, or none of the active social forces, can oppress the rest of the said factors or forces. From this point of view, it can be asserted that the entanglement or intertwining of the aforementioned functions with one another would, or helps to, contribute to the preservation and maintenance of the social equilibrium considerably more than their possible strict separation, since such functions, to express ourselves in this way, would enable the reciprocal control(ing) of the three powers already from within and not merely from the outside; the more numerous the functions in whose exercising a social group (through their representatives) participates, the more secure does the social and political position/status appear to be of the persons concerned in their entirety. The "distribution" of powers consequently constitutes a negative principle, i.e. its aim consists not in the fact that every (social or institutional) bearer is to be given or takes a single particular power, but to hinder and obstruct a single particular bearer from retaining all the functions for itself (*or*: but to hinder these functions' accumulation in one and only organ), since despotism is exactly nothing other than the concentration of all functions in one single particular bearer (*or*: since such accumulation coincides with despotism). The one power takes part in the other power so that their corresponding social bearers can keep

(retain) their own independence (autonomy or self-sufficiency) and their own room to move (*or*: precisely so that their corresponding social bearers can remain separate, each one having its own unfolding space at its disposal). The “distribution” of powers follows on the basis of the existing (acquired, vested) social position or status of their bearers, and this criterion retains the upper hand in the event it comes into conflict with the general principle of equality (general equality principle); for Montesquieu it is understood e.g. of itself that only nobles try and sit in judgement of nobles. The three constitutional powers hence essentially constitute, as it has been correctly (rightly) observed⁹², the criteria (measures) or benchmarks against which the distribution (or sharing) of social power amongst society’s groups (*or*: amongst the various groups of the populace/population), and also amongst the organs of government (governmental organs), can be measured and evaluated. The distribution of the three powers does not serve as a pattern (frame, grid or mould) for the preferred or random/arbitrary modelling or schematisation of the social-political forces, but it adapts itself to the pre-given (pre-existing) social-political realities.

The in part fierce debate over the influence of English political thinkers and of the English political experience on Montesquieu’s theory has never stopped. Montesquieu could not help but share in the warm, lively interest for England’s political matters of concern, which the developments around and [[particularly]] after 1688 had given rise to in France⁹³. Through these developments, Locke’s political writings came to be the centre of attention (*or*: came to the fore(front)) and became for Montesquieu, as for many of his contemporaries, compulsory reading. However, his political thought received just as strong stimuli during his almost two-year stay in England. Which impressions now proved to be the

⁹² Granpré Molière, *La Théorie*, pp. 331, 327ff., 323. Arriving at or reaching similar results and conclusions is G. Vlachos, *La Politique de Montesquieu. Notion et méthode*, Paris 1974, esp. pp. 77ff., 83. [[The Greek text places this footnote at the end of the paragraph and not at this point]]

⁹³ Regarding this interest see (at length, in depth) Dedieu, *Montesquieu et la tradition*, Ch. II-III. See also G. Bonno, «La culture et la civilisation britanniques devant l’opinion française de la paix d’Utrecht aux *Lettres Philosophiques* (1713-1734)», *Transactions of the American Philosophical Society*, NS 38 (1948), pp. 1-184.

strongest and most dominant during the period of the working out and elaborating of the theory of the three powers (*or*: of the theory of the separation of powers)? And which, possibly heterogeneous, political concerns were mixed with the conclusions from the study of the English texts and English affairs? Researchers, who stress the kinship with, or nearness and adjacency to, Locke, point out – and rightly – that from Locke stems the first of the three existing classifications (XI, 6, beginning), i.e. that in which the executive is separated into two branches which deal with (*or*: are assigned the task of) the external and the internal affairs/matters of concern – although Montesquieu, as we must add here, over and above that, expressly refers to and connects the (third) judicial power with the second of the two branches of the executive (i.e. the internal branch), which Locke did not do. Also, rightly, do they call to mind that Locke not only spoke of the separation, but also of the co-operation (synergy, interplay, having an effect together) between the legislature and the executive, whereby he, just like Montesquieu, accorded to the Crown legislative responsibilities, powers and authority⁹⁴. Without doubt, Montesquieu necessarily got a lot of pleasure from the commonalities, common ground (*or*: coincidence of views) with someone who shared in an emotionalism and passion against despotism; on the other hand, however, this jointly shared emotionalism and passion was not sufficient to put aside or eliminate the essential theoretical differences of opinion, thus e.g. the radical divergence on the question of the social contract. With regard to our problem, let it first of all be noted that Locke spoke nowhere of *three* powers; he is interested exclusively in the relation(ship) between the legislature and the executive, whereas the judicature/judiciary pops up (*or*: is referred to) only one time in another context in which the talk is not at all about the mechanisms of the polity (constitution), but simply of the necessity of the judicial function for a smooth, i.e. normal,

⁹⁴ Dedieu, loc. cit., p. 176ff., typically represents this view.

course of social life or social co-existence⁹⁵. This difference could indeed somewhat generously be ignored by means of the indication or reminder that also in Montesquieu's eyes, the judicial function is mechanical and secondary. Another difference remains, nonetheless, central: Locke distinguishes not only between the powers (and crosses them with one another) (*or*: Locke does not distinguish (and does not connect) only the powers [= Locke distinguishes between and connects not only the powers]), but hierarchises them too, by letting the legislature be answerable only to or vis-à-vis the people, and by additionally conceding or granting the right of resistance to the legislature against the executive (*or*: by connecting indeed the legislature's domination with the right of resistance against/to the executive)⁹⁶. The in principle approved of and accepted involvement and influence of the executive (the Crown) in regard to legislative work is consequently placed under a sword of Damocles, and the point of view is altered and changed thoroughly in comparison to Montesquieu's wish to avoid exactly such hierarchisations⁹⁷.

During his English stay, Montesquieu had the opportunity to follow from up close a public debate in which Bolingbroke as an adherent and supporter of a mixed polity (constitution), called for, as an additional safeguarding of political freedom, a separation of the bearers of the three powers from one another. According to all existing indications, Montesquieu made use of all of Bolingbroke's writings (journalistic articles) at that time, and this reveals to us a further, direct source of his thought, however, it shows at the same time that in accordance with the opining and common conscience of the epoch, the theory of the mixed polity (constitution) and the calling for the separation of powers from

⁹⁵ *Second Treatise of Government*, § 87.

⁹⁶ Loc. cit., § § 149, 212.

⁹⁷ In relation to that, J. Gough, *John Locke's Political Philosophy*, Oxford 1950, p. 92ff.. More specifically regarding Locke see M. Seliger, *The Liberal Politics of John Locke*, London 1968, p. 324ff.. Shackleton's article, which is cited in the next footnote, also contains remarks and observations on Montesquieu's relation(ship) with Locke.

one another was by no means identical⁹⁸. The significance of this (contra)distinction will occupy us later, and likewise later – in the context of our remarks on the polemical character of the slogan (watchword, motto, catchphrase) of the separation of powers – it will be explained why the separation of powers was called for both by Bolingbroke’s political friends as well as by his opponents, that is, Walpole’s party; in other words, the opposing parties therefore alternated in the mutual defence and rejection of the separation of powers, depending on their position/status in each and every respective correlation of (political) forces⁹⁹. Montesquieu equally viewed the question of the separation of powers from the point of view of social-political expediencies (kinds of rational/end-goal purposefulness), though not from that point of view of the English game of party politics, but from that which was dictated in accordance with his perception by way (*or*: which was dictated by his own investigations and preferences in respect) of the past¹⁰⁰ and the present of the French monarchy. The consideration of the problem from the point of view of French relations and circumstances made for Montesquieu exactly irrelevant or even inconceivable what for Locke the English situation of 1688 commanded (*or*: what to Locke appeared (imposed as) essential in view of the English political situation of 1688): to proclaim sovereign power and the right of resistance of the legislature. There was not such a (corporate) [[legislative]] body in France, and Montesquieu did not call for – as the absolutistic opposition of the nobility, i.e. the anti-monarchical opposition of the “aristocracy (nobility) of the sword” did it –, the (re-)convocation ((re-)convening) of the Etats Généraux ruled by the nobility (aristocracy) as the replacement (substitute, surrogate) for [[the notion of]] such a (corporate) [[legislative]] body. The

⁹⁸ R. Shackleton, “Montesquieu, Bolingbroke, and the Separation of Powers”, *French Studies* 3 (1949), pp. 25-28, esp. pp. 28ff., 36ff..

⁹⁹ See in relation to that, one of the best analyses of the English political scene in the 18th century: I. Kramnik, *Bolingbroke and his Circle. The Politics of Nostalgia in the Age of Walpole*, Cambridge, Mass. 1968, esp. p. 147ff..

¹⁰⁰ In relation to Montesquieu’s investigations into the history of the French monarchy, see H. Frommer’s dissertation, *Das Ideal der französischen Monarchie bei Montesquieu*, Tübingen 1968, Ch. IV-V.

problem of the separation (distribution) of powers is posed here in the form of the search for the equilibrium in the relations between the Crown, the nobility (the aristocracy of the sword and of the gown or robe) and the bourgeoisie – not as a problem of sovereign power. In order to be able to illustrate the, desired in his mind, schema of functioning of a moderate French monarchy in one example, Montesquieu sketched a more or less fictive picture of the English polity (constitution); this was, in other words, represented in such a way as if the right of veto of the Crown continued unconditionally, i.e. fully, and as if the sovereignty of parliament – more precisely: of a party (i.e. each and every respective more dominant part/portion) in parliament – was still not reality and had not been imposed; because of that, the deeper meaning of the formation of the cabinet system escaped him too¹⁰¹. These new aspects of the development of the English polity allowed them, by the way, to be found by Montesquieu to be all the more irrelevant, the more his impression became firmer and stronger that the substantial, intense, strong presence of democratic components in the English polity (II, 4) would hinder their transplantation into France and French circumstances; that is why his country/land had to bring about, in accordance with its own traditions and its own path, what England had pulled off in its own manner, following another path¹⁰². It consequently appears as if Montesquieu's original perception of, or settled belief/faith in, the separation of powers as a component or prop of social equilibrium, and through that, freedom in the first phase, was articulated indeed by following the (real or fictive) English model (*or*: the sharing of powers as a prerequisite of social equilibrium and together of freedom, even though in one phase of freedom, freedom was articulated with the compass of the (real or imagined) English prototype), (but) later took a

¹⁰¹ Struck, *Montesquieu*, pp. 297ff., 217ff..

¹⁰² Carcassone, *Montesquieu*, pp. 72ff., 85ff.. Montesquieu's readiness and willingness to let different possibilities of the realisation of political freedom to be recognised and accepted, shows of course the liberality of his conservatism, if one may say so (or express oneself in that way), see J.-J. Chevallier, «Montesquieu ou le libéralisme aristocratique», *Revue Internationale de Philosophie* 9 (1955), pp. 330-345.

theoretical form which permitted the transference of the basic idea to all potentially moderate polities (constitutions) (*or*: to all polities, as many as are susceptible to moderation) – that is, to all polities except for despotism¹⁰³.

In regard to the description of the advantages of the English polity, Montesquieu oriented himself towards patterns, models and thought schemas, which neither in terms of theory, nor historically, belonged together, and he mixed them with one another, without clearly thinking through (*or*: without having a clear consciousness/awareness of) their differences as to one another. The mixed polity (constitution), the separation (or differentiation/distinction) of powers from one another, constitutional-political equilibrium (the balanced polity), and the “system of checks and balances”, constitute the four frameworks within which his analysis moves¹⁰⁴. The difference between the first two becomes immediately apparent when we consider that the teaching as regards the mixed polity (constitution) is a genuine product of the ancient teaching (theory, doctrine) of the state and of polities¹⁰⁵, whereas there was systematic talk of a separation of powers for the first time in the 18th century. Mixed polity (constitution) means that the sovereign power (*or*: legislature) is composed (out) of the monarch, the aristocracy and the people (folk) as the three in principle equal representatives (i.e. with equal rights) of the three principles of the polity (constitution), which indeed essentially differ from, and contrast with or oppose, one another, yet jointly converge in a constitutional resultant which represents and constitutes something qualitatively new vis-à-vis the individual part(ial) forces, i.e. if they (monarchy, aristocracy, the people and their respective principles of the polity) are regarded separately. Conversely, the separation of powers in itself implies the extensive, far-reaching isolation of the

¹⁰³ Granpré Molière, *La Théorie*, p. 341.

¹⁰⁴ S. W. Gwyn, *The Meaning of the Separation of Powers. An Analysis of the Doctrine from its Origins to the Adoption of the United States Constitution*, New Orleans 1965, p. 110ff..

¹⁰⁵ The following studies are worth mentioning: K. v. Fritz, *The Theory of the Mixed Constitution in the Antiquity*, New York 1954; G. Aalders, *Die Theorie der gemischten Verfassung im Altertum*, Amsterdam 1968; E. Graeber, *Die Lehre von der Mischverfassung bei Polybios*, Bonn 1968.

corresponding, respective functions, and their allocation into independent organs of the state (state organs); in the first case (i.e. the isolation of the functions), the organs stand, so to speak, above and are superior to the functions, in the latter case (of the functions' allocation to state organs), those functions determine the organs¹⁰⁶. The conceptual contrast did not, nevertheless, hinder the common historical effect, impact and influence of both perceptions, and Montesquieu also projected both in parallel onto his image of the English polity, since he is not indeed obstructed by some strict and consistent conception of the separation of powers. The great common denominator, or the common framework of being put in order (framework of incorporation, inclusion and classification) of both (perceptions) remains, though, a still more extensive, comprehensive notion and perception, whose world-theoretical connotations were even in those days familiar to (the) superficial knower(s) of contemporary natural science back then: it is a matter of the notion and perception of balance and of equilibrium. Montesquieu, who in 1734 characterises the balance of actions and reactions as the basis or foundation of the political unity of states, just as [[in the case]] of the universe¹⁰⁷, makes wide use of the mechanical equilibrium metaphor, and gives it simultaneously a specific, direct political (turn and) twist by describing and calling it “moderation”¹⁰⁸. Within a moderate polity, an equilibrium then comes into being and is created when the powers are regulated and combined with one another in such a way that every one of them has at its disposal a [[kind of]] support or ballast which allows every one of the said powers if need be [[to put

¹⁰⁶ See the old and forgotten, but excellent analysis by W. Hasbach, „Gewaltentrennung, Gewaltenteilung und gemischte Staatsform“, *Vierteljahresschrift für Sozial- und Wirtschaftsgeschichte* 13 (1916), pp. 564-607, esp. p. 600ff.. Hasbach already points to Bolingbroke's influence, p. 575ff. (cf. FN 98). Imboden, *loc. cit.* (footnote 89), p. 16, brings or places the separation of powers closer to the regimen *commixtum*.

¹⁰⁷ *Considérations*, IX. Montesquieu is/was obviously thinking, in relation to this, of Newton's third law (*or*: In Montesquieu's text, Newton's third law is echoed): “actioni contrariam semper et aequalem esse reactionem [= for every action, there is always a contrary and equal reaction = for every action, there is an equal and opposite reaction] ...”.

¹⁰⁸ On the usage of the equilibrium metaphor and the political pre-history of the term *modération* in the context of, or interrelation with, the effect and influence of the idea of the mixed polity (constitution) and of (or with) the ideology of *parlements*, see Kuhfuss, *Mäßigung und Politik*, pp. 34ff., 168ff..

up]] resistance against the other powers (V, 14), that is, when the government(al) power is exercised not by a simple, but by a composite organ which is formed and constituted as the resultant of several different, varying social forces. The axiom *le pouvoir arrête le pouvoir* [= *power stops (arrests, checks) power*] is not primarily meant juristically (legally), i.e. it does not relate chiefly to uninterrupted and flawless institutional processes, but to the equilibrium of active social-political forces¹⁰⁹. As a question and problem of the equilibrium of exactly such forces, does Montesquieu discuss the separation of powers in ancient Rome (XI, 14-18), after having stressed beforehand (XI, 4) that neither aristocracy nor democracy in themselves provide or constitute guarantees of freedom. Moderation, this highest virtue and this highest aim of the legislator (law-giver, lawmaker) (XXIX, 4), is hence as a political principle superior to the criteria on the basis of which the typology of polities (constitutions) are constructed. Moderation can be realised in all polities (constitutions) (as in all polities (constitutions) the separation and the equilibrium of powers can be realised too), and moderation's existence indicates the common contrast and opposition of all polities to despotism, just as a lack of moderation makes it clear that all polities (constitutions) run the risk and are exposed to the danger of despotism^{xv}.

3. *The perception of freedom*

The concepts of equilibrium and of moderation lead or bring us very close to Montesquieu's perception of freedom. In order to comprehend this, we must bear in mind that equilibrium comes about or is achieved on the basis of the

¹⁰⁹ Eisenmann, «L'Esprit des Lois ...», p. 189.

existing social forces, and aims exactly at averting the disadvantages of these existing social forces, and as far as possible at strengthening and consolidating their relations with one another – with smaller unavoidable adjustments (*or*: and aims exactly at not encroaching upon or negatively affecting any of these existing social forces, but rather at stabilising their relations by leaving the necessary room (latitude, margins) for minor readjustments). Montesquieu does not believe that this or that (a or b) regime already because of its social structure and composition (and only because of such social structure and composition), excludes (or is incompatible with) freedom; but if the criterion of social composition or stratification is not the deciding factor or is not decisive, then equilibrium and freedom can take different (various, diverse) forms from nation to nation, and from epoch to epoch, under the sole condition that social heterogeneity has not been levelled. This train of thought or syllogistic reasoning answers the question as to why Montesquieu saw no contradiction between the defence of feudal privileges and pleading or advocacy for political freedom, but on the contrary, expressly connects this with that (i.e. one (being pro feudal privileges) with the other (being pro political freedom)) (II, 4). Wherever there are already privileges, there freedom lies in their (i.e. the privileges') maintenance and preservation, whereas their violent (forced) abolition destroys freedom; wherever such privileges do not exist, there their (i.e. privileges') one-sided establishment does harm to, and violates, freedom. Since Montesquieu directs his attention to the moderate, in particular the French, monarchy, only the first case remains, in practice, relevant and significant, in relation to which it seems to be proven that freedom does not at all put aside or abolish social inequality, but precisely presupposes it; that social inequality can be legitimised and justified in fact in the name of freedom. Still more: freedom is not even connected to political equality. This political equality differs from the natural equality of men amongst one another and means that everyone (all men) should equally abide by the law, although the law may grant

unequal rights to the various classes of citizens. Thus, Montesquieu e.g. does not even discuss theoretically the possibility of the general (universal) and equal right to vote/suffrage/franchise (equal voting/electoral rights), whilst he regards the political package deal of (active and passive) suffrage and the possession of property (*or*: the connection of voting and being voted with one's status as to assets/one's property situation), even within democracy, as natural¹¹⁰. Today's reader will certainly misunderstand Montesquieu's writings if he attaches here to the concept "people/folk" the meaning which it gained in the mass-democratic age/epoch of ours. The "people/folk" does not automatically coincide with the whole of the population and with the sum of the individuals who possess (by definition, equal) political rights already and only because they from birth, and already by means of the fact of their birth, become citizens (nationals, subjects); the "people/folk" means either the politically active population in contrast to the rest of the population, or the majority which indeed does not belong to the (hereditary) aristocracy, yet is permitted to have access to the various organs of the state (state organs).

What can freedom suggest or mean if it may not of its essence and texture be accompanied by social and political freedom? For Montesquieu, there is freedom in the first place there, where safety and security and the feeling or sense of safety and security vis-à-vis imponderable, sudden and legally unjustifiable, unwarranted or uncalled-for encroachments into private space or the private area (realm), that is, into the physical[[-bodily]] integrity (inviolability) and into the property of the person, have to be unlimited and unrestricted. The definition of freedom does not necessarily encompass unimpeded and all-round political activity for the purpose of influencing public matters of concern; that is why (many) more men can have a part in freedom than those who actively form, shape and help to create the polity (constitution)

¹¹⁰ Details, particulars (and more analytically) regarding that, in M. Leroy, *Histoire des idées sociales en France*, I, Paris 1947, p. 101ff..

and the government of a land or country. Freedom has, in short, to do with civil, not with political rights, and if, as Montesquieu says, civil freedom can exist (even) without political freedom, then on the other hand, it occasionally happens that political freedom destroys civil freedom (XII, 1-2). This latter case reminds us of Montesquieu's apprehensions and intense fears as to the degeneration of democracy into tyranny, and his, along with that, well-founded^{xvi} mistrust against the political freedom of all (people), i.e. everyone (*or*: against universal and catholic political freedom). Therein surely lies the reason why political freedom is distinguished so sharply from civil freedom, and is simultaneously seen as a considerably narrower concept than civil freedom. Over and above that, it can be said that Montesquieu, despite his, in practice, non-binding praise for the ancient (active) republican mindset, prefers inconspicuous, unobtrusive personal independence to the noise, din, kerfuffle of public militancy, and has the feeling or sense that where the whole of life becomes absorbed in political commitment and exertion, it becomes intellectually more narrow-minded rather than rich, extensive, varied, full (*or*: and he feels life probably narrowing rather than widening where political participation is about to absorb life)¹¹¹. Certainly, neither Montesquieu's general ideas, nor his personal preferences help him get over the aporias (queries, doubts, contradictions, paradoxes or dilemmas) which are immanent in every discussion of the concept of freedom. If freedom is subjugation to (or under) the law, and if the law fulfils its task and mission by protecting the personal goods of everyone (XI, 3; XXVI, 15), then the distance from Hobbes is rather slight. Political freedom as an autonomous good, remains hanging (hovering) in the balance, and the hanging/hovering (being suspended) can eventually end up in very unpleasant, nasty fluctuations and shocks if it begins to affect and take its

¹¹¹ N. Keohane, "Virtuous Republics and Glorious Monarchies: Two Models in Montesquieu's Political Thought", *Political Studies* 20 (1972), pp. 383-396, esp. pp. 391ff., 395ff.. Cf. G. Cambiano, "Montesquieu e le antiche repubbliche greche", *Rivista di Filosofia* 65 (1974), pp. 93-144.

toll on what Montesquieu held to be the most evident feature or proof of freedom: the sense (feeling) of safety and security.

4. The old and new concept of sovereignty or the separation of powers as the call (demand) for sovereignty

This synopsis of Montesquieu's perception of the problem of freedom in its negative relation(ship) towards and with the coefficients or magnitudes of political and social equality, gives us a key to apprehending the difference or opposition between his and the later theory of the separation of powers, which ultimately reflects the contrasting and opposition of two very (or essentially) different types of society. Let it be highlighted once again that for Montesquieu, the social and legal inequalities, even in the extreme form of feudal privileges, constituted the components, elements and guarantees of political freedom. Contrariwise, bourgeois liberalism manufactured and established a close connection between the realisation of political freedom and the equality of all (citizens, people) (i.e. everyone) before the law (*or*: bourgeois liberalism tightly (narrowly) correlated the realisation of political freedom with the establishment of the equality of all before the law), by calling for the institution of a united legislation, which was supposed to apply to all (citizens, people) irrespective of their each and every respective social status (position, standing); social democracy went one step further and regarded political freedom as empty and illusionary in the event it is not accompanied or supplemented by social equality, that is, the equality of access to the means of production and to material or spiritual(-intellectual) goods. What therefore was undertaken and happened since 1789 in the name of political freedom, ran counter to (went

against) Montesquieu's conviction that such freedom in no case constitutes a function of the social composition of a land (country), but can be achieved in each and every respective particular form through the equilibrium of the already existing social-political forces. If feudal privileges turned out e.g. henceforth by definition to be (or [[simply]] were) incompatible with the realisation of political freedom, then they would have to, just like that, disappear, and with them also their bearers as social subjects with specific properties (attributes, characteristics). Consequently, not the preservation of the social status quo on the basis of the recognition of, and respect for, "well-earned rights (= acquired, vested rights protected by law)", but their overturning (revolution as a kind of reversal), or at least their modification in the direction of legal (or even social) equalisation, of the transformation of the complex and peculiar/particular into the simple and general – in short, in the direction of that which Montesquieu called "despotism", became the presupposition and prerequisite of political freedom. Only someone who has sufficient historical knowledge and a sufficient sense of history so as not to consider today's perceptions as self-evident and conclusive (final) articles of faith (written in stone), understands this.

The overturning or modification of the social status quo followed, for its part, as the result of two processes growing together and becoming one with each other (*or*: two interdependent processes): the separation of the state and society from each other, and, the radically new definition of the concept of sovereignty. As is known, both were pushed along, driven forward and promoted by the European absolutisms between the 15th and 18th century, and completed by the liberal or democratic revolutions. In their long and persistent endeavour, effort and attempt to bring under control and subdue centrifugal feudal forces, and under the [[circumstances of the]] putting aside or the elimination of customary rights (law) and traditional privileges, to create united, state spaces (i.e. spaces

united in terms of a state), the absolutistic monarchies were propped up and relied on a pioneering, trailblazing teaching or theory of sovereignty, which found in Bodin and Hobbes its most prominent theoreticians (*or*: which found in Bodin and Hobbes pure or clear formulations). According to that teaching or theory, sovereignty is founded on a paramount (supreme, uppermost) and auto-legitimising (i.e. legitimising itself) will, which is articulated through commands and is not subject to any external or internal restriction(s), but can recognise and put forth its own indivisible character in the unitedness and coordinated activity of the state apparatus (*or*: in the absolutely united texture of the state and the coordination of its organs). The attribute of sovereignty had an entirely different meaning, as long as (or when) it still attached or referred to the monarch of the Middle Ages (*or*: to the medieval-feudal monarch). This monarch stood at the peak (top, tip) of a pyramid of “well-earned rights (= acquired, vested rights protected by law)”, and his task or mission consisted in the protecting of these rights through his executive and judicial powers, capacities, competencies and authority; he was, nonetheless, no legislator (law-giver, lawmaker) in the newer (more modern) sense, i.e. the law (right/justice) did not flow or stem/spring from his will and volition, but it went back, was reduced, to God and to natural law, whilst the unavoidable adaptations and adjustments every time were passed off as improved interpretations of the primeval, immemorial right, i.e. law(/justice). The monarch became a “tyrant”, as he was called in the medieval language, if he put his own will (volition) above the law, i.e. if he violated existing feudal rights. The law (right(/justice)), thus, did not appear as, or was not the product of, a concrete will (volition), it simply sanctioned the plexus, mesh or network of existing social correlations (circumstances), whilst it was covered up and concealed this plexus or network of existing social correlations through a theologically coloured rhetoric pertaining to natural law. For the new-times voluntaristic concept of sovereignty, law, however, had existed not since time immemorial, but it was

created, it was set, put and enacted by a concrete will – and sovereign is that will, if it creates generally binding law. From the point of view of medieval political and legal theory (*or*: of the medieval theory of the law, right and justice), which was still alive (living) in the 17th and 18th century, the absolutistic monarch had to therefore be characterised as a “despot” or “tyrant”¹¹².

It can now be easily guessed and understood in and from which world of ideas did Montesquieu’s aversion and repugnance towards and against “despots” like Louis XI and Louis XIV, or his connection (political package deal) between political freedom and the preservation and entrenching (safeguarding, consolidating) of existing conventional and traditional privileges, take root and come – although, his path, as we must repeat and reiterate, separated from that of the *noblesse d’épée* (= “the nobility or the aristocracy of the sword”) through the point-blank recognition of the reality of the modern and unconvertible state, as well as through the sincere appropriation and adoption of Enlightenment ideals. In any event, his rejection of absolutism amounted to a renunciation of the new-times concept of sovereignty. However, the later liberal and democratic revolutions made precisely this concept their own, with the sole difference that the bearer of the sovereign will was no longer the monarch, but the people (folk) (*or*: that from the position of the bearer of sovereign volition, the monarch was displaced so that the people could move into (enter) that position). What remained and was radicalised was the fundamental perception and conception of the law(/right(/justice)) as the outcome or product of a paramount (supreme, uppermost, highest) auto-legitimising will (or volition legitimising itself), before which all other wills (volitions) retreat and all hitherto earned rights (= acquired, vested rights protected by law) fall by the wayside, weaken, waste away. Whereas (*or*: In contrast to) the medieval sovereign, who only

¹¹² The contrast and opposition between the older and newer concept of sovereignty is treated in detail in: Kondylis, *Konservativismus* (FN 5), pp. 72ff., 227ff..

executed, carried out and implemented primeval god-given law, whilst not creating such law, or – in his capacity as paramount or supreme judge (justice) – at the very most interpreted such law, by virtue of the highly important or central connection between the (making and creating of) law and the sovereign will (volition), legislative activity now moves into the centre of attention and is made dominant. If the liberals of the 18th and 19th century call for the separation of powers within monarchical polities, then they strive in concreto for a predominance of the legislature, which was elected/chosen by, and springs from, the people (folk), against the executive, which the Crown held and exercised^{xvii}. The process of the re-interpretation (or meta-interpretation) of Montesquieu (but also of Locke) in this sense starts (to deliver/bear fruit) around 1770, and it reaches its high point about 1789¹¹³. Montesquieu's aim was the distribution (or sharing) of sovereign power amongst social bearers reciprocally balancing one another out, whereas the Revolution ultimately wanted to make the legislature sovereign (*or*: whereas the aim of the revolutionaries of 1789 was the locating of sovereignty in the legislature), and to reduce the Crown to the mechanical function of the execution (carrying out) of this sovereign's (i.e. the legislature's) will (volition), i.e. to politically disempower the Crown. The distribution (or sharing) of powers meant in Montesquieu the in principle equal rights or equivalence/equality of their (= the powers') bearers, so that the attempt to hierarchise these bearers had to lend to, or confer upon, the separation of powers itself an essentially different meaning, significance and form than this very same separation [[in Montesquieu's sense]], although the corresponding political demand remained nominally the same (*or*: even if the nominal value of the slogan was not transformed). Nonetheless, the content-related shift becomes clear if we ponder that the combination of that demand of the separation of powers with the ideal of the

¹¹³ See the work of M. Vile, *Constitutionalism and the Separation of Powers*, Oxford 1967.

mixed polity (constitution), as is alluded to (*or*: as we find it) in Montesquieu, was from then on no longer possible. Because in accordance with the liberal and democratic perception: the monarchical, the aristocratic and the democratic components (or element) could in fact no longer have an effect together (co-act) inside of the legislature on equal terms. Both of the former (i.e. the monarchical and aristocratic components) had to be excluded, and indeed not merely in the sense that they were not allowed to be politically activated anymore, and were thus kept on the outside, but much more radically: the legislature was supposed to now use its sovereign will (volition) to influence the texture of society and or for the reshaping (remoulding) of society, that is, it was supposed to abolish (at least) legal and political inequalities, and through that, homogenise the social body all across the board. The internal logic of the liberal or democratic constitution (polity)^{xviii} desired and or demanded therefore a republic or a merely decorative monarchy, and the indivisible (*Or*: Within the internal logic of the liberal or democratic constitution, a republic – or at least a decorative monarchy – was (to be) found, as well as the indubitable, undivided) sovereignty of a legislature, which emerged from a legally and politically, if not in fact socially^{xix}, homogen(e)ous people (folk). It is to be supposed or guessed with a fair bit of certainty that Montesquieu, not differently to many an extreme or moderate conservative in the year 1789, would have seen and interpreted such a development as the victory of the “despotism of the many”, which in his eyes was not much better than the despotism of the one [[ruler/despot]].

We arrive at similar conclusions about the character and effect of the re-interpretation or meta-interpretation of the teaching or theory of the separation of powers when we contemplate the matter (look at/see the thing) from the perspective of the relations between (and the coming apart of) state and society. Just like the new-times or modern^{xx} concept of sovereignty, so too the (contemporary) notion of a separation between state and society was strange

(foreign, alien) to Montesquieu¹¹⁴. This separation does not only mean that the state possesses the monopoly of physical, legal violence, but just as much that it exercises the three constitutional powers exclusively through its own organs, which are supposed to act impersonally (*or*: are obliged to act on the basis of supra-personal principles), i.e. irrespective of (chance) social characteristics, properties, etc. and the narrower interests of the individuals from whom such organs are composed and put together (*or*: the chance, social interests of such organs' members)^{xxi}. This ideal schema applies – just like the new-times, i.e. contemporary, concept of sovereignty – irrespective of whether the bearer of state power and the free, of one's own accord, creator of the state power's organs is an absolutistic king or a constituted people (folk) which elects, directly or indirectly, the state power's organs. The situation in feudal society and under the ancien régime looked different in so far as local centres of authority as dominance existed, which were capable of continuing to withdraw from and evade state centralism (*or*: in so far as feudal institutions counterbalancing absolutism and the tendencies of the formation of a centralised state, flourished). The interweaving of state and society in this framework meant in practice that state power in its legislative, executive and judicial dimension was exercised through the same acts which aimed at the safeguarding of the interests and privileges of the bearers of (state) power (*or*: meant that the bearers of state power – in its legislative, executive or judicial dimension – wielded or exercised such state power by exercising eo ipso whatever the privileges and the interests of their social position commanded). For exactly this reason, Montesquieu identified (i.e. equated) the successful separation of powers with the balancing of actually (factually) existing interests and privileges, giving this separation a meaning and sense, therefore, concrete and social, not abstract and legal (juristic), depending on the constitution,

¹¹⁴ Clostermeyer, *Zwei Gesichter*, pp. 52-54.

composition and texture of the society concerned, not a meaning which was universalistic and formally, i.e. in terms of form, binding.

However, wherever the state has been separated from society, and the state contradistinguishes its own (state) organs to society, whilst the society, for its part, has become politically and legally homogen(e)ous, there, the separation of powers does not coincide with the game of the social forces within a generally accepted or tolerated framework, but it takes place exclusively inside of the autonomous, independent and self-sufficient, and, at least in theory^{xxii}, not able to be influenced or uninfluenced from the outside, organs of the state (state organs). The legislature, the executive and the judicature constitute organs and areas or sectors (realms, domains) of action, acting and facets of a united (one and only) state, which cannot recognise, tolerate or suffer competitors and rivals in any of the corresponding functions. These organs were not formed, or did not result, from the social constellation, i.e. correlation of forces, but they represent and constitute legal (juristic) fictions or construct(ion)s, which seemingly stand above social and historical given (actual) facts, so that the impression comes into being (or it stands to reason) that this model or prototype could find application all over (= everywhere), i.e. in all countries and in all societies. A one-sided juristic and legal formalism, and a naive trust in the possibilities of the panacea-like effect of constitutional regulations and constitutional technique, have thus characterised the political thought of liberalism since its inception, especially in its reference and connection to the mythology of the separation of powers. Liberal praxis (practice) has of course been far less naive.

Seen in terms of the history of ideas, the separation of powers constituted, at any rate, a construction, which the more mythological it was, the more it estranged and distanced itself from Montesquieu's sociological way of looking at things, in order to be involved and get tangled up in the (over-)subtleties, nit-picking, hair-splitting and pedantry of liberal juristic, legal formalism (*or*: In

actual fact, the separation of powers was a mythology so imaginary and fantastical, the more it distanced itself from Montesquieu's sociological consideration to approach the trisections of liberal legal formalism). However, the separation of powers existed as and constituted a mythology with enormous, and until today, a still not entirely exhausted, depleted historically dynamic and dynamism, since in its language very concrete social-political intentions were articulated (*or*: since in its language very concrete political demands could be dressed up in disguise), and could, under its banner, conduct decisive battles (the decisive battle) (in favour) of the liberal parliament against monarchies. Yet precisely this, the separation of powers' historical effect, impact, dynamism and plasticity, its constantly shifting polemical use, ought to be a warning to the observer of taking it at face value, of drawing straight lines (there) where no such lines exist (*or*: shows the scientific observer that he ought not take the separation of powers at face value, remain with (or stick to) labels and draw straight lines there where they do not exist, (whilst) deriving, for instance, from Montesquieu, bourgeois liberalism). Because from Montesquieu, liberal constitutionalism in terms of content, cannot be deduced at all. For good or ill, the lexicographical concept(ual meaning) of terms differs, almost always, from the historical (concept(ual meaning)) – and scientific analysis would be superfluous to a great extent if perchance the two coincided. All the same, the ascertainment of the historical fertility of the theory regarding the separation of powers, can be uninhibitedly reconciled with the ascertainment that such a separation has, in the true sense of the word, never and nowhere become reality, above all not (there) where a “system of checks and balances” was meant (*or*: Thus, the ascertainment of the historical fertility of the theory of the separation of powers is not at all irreconcilable with the ascertainment that such a separation, in the literal sense of the term, has never occurred and was not even able to occur, even if the purpose or goal was a system of checks and balances): such a system of checks and balances does not come about in fact through the

separation, but through the reciprocal penetrating and pervading or permeating of the various functions (*or*: the full separation in itself/per se does not create such a balance, but rather the harmonic intersection of the functions of the powers, the smooth overlapping (reciprocal covering over) of their fields creates such a balance). Corresponding to both social-political models (prototypes), which we outlined earlier on the basis of both concepts of sovereignty [[i.e. social-political models pertaining to the ideal types of feudalism/the interweaving of state and society, and, liberalism/the separation of state and society]], we may assert that there are two basic forms of the *non*-realisation of the separation of powers. Montesquieu himself describes one (*or*: We know one from Montesquieu's own theory) – and Montesquieu could have perhaps also foreshadowed or got wind of the concept of the other, had he observed the English situation and English developments more precisely, and in the course of this had registered or noted how the formation of a Cabinet (i.e. of the institution of the Council of Ministers/Ministerial Council), which was supported by the majority of the legislature and simultaneously led and headed the executive, ran counter, undermined and subverted that separation of powers, to which one referred or appealed in the later liberal sense, in order to push along, drive forward and or expedite exactly this development of the English Cabinet System^{115 xxiii}. The legislature is indeed elected and chosen by the “sovereign people (folk)” – whatever turns out to be the legislature's composition (make-up) –, and as the representative of the “people's (folk's) (or popular) will”, the legislature makes (takes) sovereign decisions. However, the legislature for its part is dominated (ruled, governed or controlled) by the strongest political party^{xxiv}, whose executive organ is *de facto* (actually) the government. The strongest party leadership dominates, therefore, in parliament,

¹¹⁵ S. A. Pollard, *The Evolution of Parliament*, London 1926, p. 238. In Ch. XII of this important work it is explained how and why the separation of powers in the British polity remained an empty word (*or* rather, an empty phrase).

it controls the executive, and it directly or indirectly determines the composition and the jurisdictions of the judiciary. The existing “checks and balances” – if they exist – are due much more to the express or tacit rules of the (political party) game, which guide the co-existence of parties, associations, organisations, unions etc. on the indispensable basis of an undisturbed reproduction of the material preconditions of the social system, than to general and abstract institutional and constitutional determinations or regulations and adjustments. Still more than in the golden age of bourgeois liberalism, the separation of powers constitutes in the epoch of mass democracy a mythologem, a point of contention and a flexible weapon. The struggle and osmosis of parties and associations etc. against the background of an atomised society are of course phenomena which can hardly be apprehended by Montesquieu’s categories. And yet reading and studying him always remains, even in this respect, instructive. Because the essential in the present-day becoming and events is inferred or revealed often only through comparison with the past (*or*: Because what our epoch is, we understand only by contradistinguishing it with the formal-typical(i.e. as to type) manifestations of the past).

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ⁱ Text between double brackets [[...]] is the translator's, inserted in P.K.'s text to assist the reader, BUT is not P.K.'s text or words. All endnotes are by the translator and have nothing whatsoever to do with P.K. [translator's endnote].

ⁱⁱ When I add (*or*: ...) to the translation, I am allowing the reader to see how P.K.'s Greek text differs (stylistically in terms of phrasing, but never in any substantive way) from P.K.'s German text [translator's endnote].

ⁱⁱⁱ "The existing and prevailing state of affairs" is of course the final phase of the late, post-Renaissance, feudal/societas civilis era [translator's endnote].

^{iv} The Greek text adds the phrase "of this introduction" [translator's endnote].

^v The Greek edition reads "spectrum" = «φάσμα», instead of "spectre" = «φάντασμα» = „Gespenst“, but I suspect it is a typographical error [translator's endnote].

^{vi} Today, we have hedonism, atomisation, consumption in the West with the religion of "equality" and "anti-racism", etc. – and the levels of social cohesion, given that demographics are altering so rapidly and values are clashing more and more violently, seem to definitely be falling [translator's endnote].

^{vii} In other words, it is the normative concerns again which play such a major role in hampering the observer of human affairs from engaging in absolutely consistent, non-normative, descriptive and explanatory science based on empirical verification and logical consistency [translator's endnote].

^{viii} This section or sub-chapter is NOT included in the Greek text. The translator forewarns the reader that the English translation may contain (minor) inaccuracies or (minor) errors not found when the translator also has the benefit of comparing Kondylis's German text to his Greek, or at least to a Greek, version of the same text. Nevertheless, it is hoped, on a fairly solid linguistic basis – given that the translator has been cultivating a reading ability in German, with a great deal of pleasure (and fun), for more than 20 years now, that no salient point made by P.K. has been misrepresented (this is my first extensive passage translated from the German without the assistance of a Greek text!) [translator's endnote].

^{ix} I.e., Is per se gives no Ought, but all forms of Ought are made up by humans as social beings/animals - who cannot live as social human beings without Ought - with man-made symbols, tools, rationality, understanding, meaning, identity, differentiated forms of ideational and or physical power (not just energy) in culture, the social and the political, etc. [translator's endnote].

^x "Its" = either "Montesquieu's perception of causality's", or, "causality's" [translator's endnote].

^{xi} Because if it were possible, there would be no chasm etc., and natural law is supposed to be perfect when we know the human world definitely is not, etc.,... [translator's endnote].

^{xii} Whereas, this is exactly what all Utopian(-like) schemas do, from economic liberalism and Marxist communism, to the present-day Phantasms of "human rights"-based "globalisation", propagandised by the Totally Retarded and or the, subjectively seen, Disgustingly Insane, power-hungry, with their headquarters in Washington, New York, Silicon Valley, London, Paris, etc., and of course, with GROSSLY DISPROPORTIONATE over-representation of members of a particular group [translator's endnote].

^{xiii} The Greek text reads: "second", which makes sense if the executive power, inclusive of judicial power, counts as one power, whereas the use of the word "third" of the German text, also makes sense if we count

executive power and judicial power as two powers, notwithstanding that the latter is a branch of the former [translator's endnote].

^{xiv} I remind readers that “constitutional” here refers more so to “polity” than “the constitution” as in the case of the U.S.A., and that England’s common law and Magna Carta, along with the prime-ministerial and Cabinet system etc., can be taken to mean “constitution as polity” in the context of Montesquieu’s thought and for the purposes of P.K.’s book [translator’s endnote].

^{xv} Despotism is a polity (constitution), but as we know from pp. 16-17 of this translation, despotism is the result of other polities’ degeneration, and hence, to be absolutely clear, P.K. should have used e.g. the following phrasing: “moderation can be realised in all polities *apart from despotism*”, except if despotism is interpreted as a polity which only theoretically, and not in practice, can feature, in a non-degenerative form, a content-filled, normatively understood moderation and or separation/equilibrium of powers in Montesquieu’s sense. Unless I’m missing something, this is one of the very few instances when I feel P.K.’s phrasing could have been clearer. On the other hand, P.K.’s phrasing as it stands, means that moderation can at least potentially be realised in all polities, including despotism, but in practice it is lacking in a despotism, and hence the polity “despotism” lacks moderation, even though potentially it could feature a kind of moderation (perhaps e.g. in a transition (back) to a monarchy?) [translator’s endnote].

^{xvi} The Greek text reads “relevant/related mistrust” («συναφή δυσπιστία»). P.K.’s German text states: „begründetes Mißtrauen“ (= “justified/substantiated/well-founded/reasonable mistrust”), which in accordance with P.K.’s strictly descriptive methodology must be interpreted to mean “well-founded” for Montesquieu. Any other interpretation is not open, given P.K.’s consistency over thousands of pages. BUT, there is always the possibility that P.K. was playing one of his “naughty” or “Satanic” games with the reader, because apparently he had a very refined and mischievous sense of humour... [translator’s endnote].

^{xvii} And we all know what happened e.g. in the USA in the 20th century with the judiciary and or “deep state” as it “just happens” becoming all the more interventionist regarding both legislature and executive so that a particular (to many, totally disgusting, sick) tiny minority at elite level can wield GROSSLY DISPROPORTIONATE forms of power [translator’s endnote].

^{xviii} This is the first and only time that P.K. renders the German „Verfassung“ in Greek as «σύνταγμα» rather than «πολίτευμα», and hence in English I choose “constitution (polity)”, rather than “polity (constitution)” as otherwise is the case throughout this short book on, or introduction to, Montesquieu [translator’s endnote].

^{xix} Nowadays, of course, “the people” are not 80+% or 90+% racially(broadly defined)-ethnologically homogenous in Western mass democracies (even though “the people” were exactly that up to the 1980s or 1990s) – incl. thanks to decades of “anti-racism” with clearly *racist* goals against the (relatively white) indigenous peoples of the West, with a particular (very small and to many, highly repugnant and DISGUSTING) group at elite level wielding GROSSLY DISPROPORTIONATE forms of power [translator’s endnote].

^{xx} Here, “new-times” is not referring to the beginnings of “new-times rationalism” in the history of ideas commencing e.g. in about the 13th century, but to liberal notions of the modern state which gained popularity from the late 18th and 19th century, i.e. during and after Montesquieu’s life (1689-1755), but as mentioned earlier by P.K., are first represented by the modern absolutist state, and thinkers such as Bodin and Hobbes from the 16th and 17th century [translator’s endnote].

^{xxi} Obviously, there is no need to spell out what happens in practice, in reality, in regard to a particular group in countries such as the USA, Australia, the UK, France, Germany, Russia, Italy, etc., from the 19th and or the 20th century, as the case may be, with respect to the accumulation of (direct and or indirect, directly or indirectly state organ-related or not) GROSSLY DISPROPORTIONATE forms of power, influence, etc.,.... [translator’s endnote].

^{xxii} There is quite a difference between theory and practice, is there not? I wonder why what happens in practice is not the subject of serious academic discussion and research? I wonder why... [translator’s endnote].

^{xxiii} I shall take the liberty to reiterate that no-one is saying that “the rule of law”, “due process”, “the separation of powers”, “habeas corpus”, etc. as practised, *grosso modo*, in the West, do not produce for the citizenry a greater degree of claimable and enforceable rights and relative freedom(s) when compared to more “despotic”

regimes – at least on the whole, in general, but not necessarily in every specific, concrete instance (on the other hand, scientific observation and science qua scientific observation and science (i.e. non-normative, logically consistent, description and explanation, verified by empirical reality) care not one iota whether a polity is: “democratic”, “despotic”, “aristocratic”, “oligarchical”, “dictatorial”, “mixed”, etc.). However, in terms of strict science, the concept of the “separation of powers” has always been used in practice *ideologically*, and does not strictly correspond to an actual state of affairs, i.e. reality [translator’s endnote].

^{xxiv} Or combination of parties, as the case may be – though in England/Great Britain/the UK, it actually usually is just the one “first past the post” party [translator’s endnote].