ARCHÉ AND MONTESQUIEU'S PRINCIPLES

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E principio oriuntur omnia (Cicero, *De re publica*).

1.

In the *Esprit des lois* Montesquieu wrote "Having examined what are the laws of every government, let us now see those which are relative to its principle. Between the nature of government and its principle there is this difference: that it is its nature that makes it so, and its principle that makes it act. The one is its particular structure, the other the human passions that make it move." The importance that the *President à mortier* attached to the "principle of government" was anticipated in Book I, when in illustrating the foundations of the laws of each people he writes, "They must be in harmony with the nature and principle of the government established, or intended to be established, whether forming it, as political laws do; or maintaining it, as civil laws do."

To find the principle of each government, Montesquieu starts from the nature of it, and in particular who "exercises supreme power, and, secondly, how he can accomplish it," and concludes the chapter thus, "I need nothing more to find the three principles of the above governments; they flow naturally from them. I will begin with the republican government and first speak of the democratic" of which he points to virtue as the principle. Immediately afterwards he explains why "A monarchical government or a despotic one does not need much probity to maintain or sustain itself. The force of the laws in the one, the arm of the prince always raised in the other, regulate or govern everything. But in a popular state an extra spring is needed, which is none other than virtue… for in a monarchy, where he who enforces the laws judges himself above them, virtue is needed to a lesser extent than in a popular government, where he who enforces the laws feels that he himself is subject to them, and will bear the burden of them."

And, in the republics themselves, democracies need far more of it than aristocratic governments: "Greek politicians who lived in a popular government recognized virtue as the only force capable of sustaining it;" while "virtue is also necessary in aristocratic government, although it is not required there as absolutely… By nature of the constitution, it is therefore necessary for that body (the aristocracy, ed.) to possess virtue." And this lesser virtue (because it is limited to the governing body) is moderation: "Moderation is therefore the soul of these governments; but that… which is founded on virtue, not on cowardice or laziness of mind."

By contrast, in monarchy "the state lives independently of love of country, of the desire for true glory… of all those heroic virtues we find among the ancients… Laws take the place of these virtues, which are now useless… I am not at all unaware that virtuous princes are not rare, but I do say that it is very difficult that in a monarchy the people are so." Thus, in monarchies the principle, the "gear" that makes the state work, is honor, because "ambition is dangerous, in a republic, but it has good effects in a monarchy: it gives it life, and it has the advantage of not being dangerous." Finally, in a despotic government, "As in a republic, virtue is needed, and in a monarchy honor, so in despotic government fear is needed: virtue is not needed there, and honor would be dangerous. The prince's immense power passes entirely into the hands of those in whom he confides… when in a despotic government the prince forgets for a moment to raise his hand, when he cannot annihilate in the twinkling of an eye those who hold the first places, all is lost… It is necessary therefore that the people be judged by the laws, and the great by the whim of the prince; that the head of the last among the subjects be secure, and that of the pashas always in danger."

2.

In conclusion according to Montesquieu:

The principle (of the “form”) of government is the driving force that makes it act.

This principle is, to varying degrees, virtue; this must be possessed by those who govern: in democracies, by all citizens, in aristocracies by the optimates, in monarchies by the king. He does not write it, but even in despotic states the despot must have a glimmer of virtue (perhaps different). Honor and fear are feelings that belong to the subjects. In particular to the collaborators of the sovereigns.

The principle is necessary, because a body politic is composed of men, is a vital institution and cannot disregard what is likely to make men act and thus the institution. Laws are necessary, but not sufficient for the existence and vitality of the whole.
The principle is what "unifies" rulers and ruled: it affects the command/obedience relationship, and is at once a factor of integration and legitimacy.

Like the "classical" political thinkers, Montesquieu sees institutions made up of men, where some command and others obey: it is far from the French thinker to believe that a beautiful constitution,

complete with moving enunciations of principles, and myriad implementing laws (equally moving) are enough to make a viable state. Laws are not enough: to constitute and preserve it requires the gear that makes them live. Indeed, between the laws and the principle (the gear), there must be consistency: it would be clueless to constitute a democratic government without a modicum of virtue, and even more so a despotic government without fear.
Virtue plays an extremely important role in this context, primarily because it recurs—even if not equally necessary for all—in the three non-despotic forms of government; and in this, Montesquieu harks back to ancient political thought, for which it was natural to link the fate and fortune of the *polis* to the virtue of the citizens; and not to the mere "goodness" of the laws. If, as Montesquieu writes in the opening of the *Esprit des lois*, "Laws… are the necessary relations arising from the nature of things; and, in this sense, all beings have their own laws: the gods, the animals, man," from the very beginning of the work he fixes—so to speak—the relationship between existent and normative: in which the former determines the latter far more than the latter can do on the former.

In this sense, the principles of government are the indispensable gear for the community: which, not living by rules alone, even the best possible ones, must be based on a (general) principle that determines it to act. Because on the historical level—and not only—to exist means to act: and acting calls for mobilizing the human will(s); the Thomist rule, omne agens agit propter finem, applies, which, more than a century after Montesquieu, a great jurist like Jhering would identify in the connection between purpose and interest.

3.

Shortly after Montesquieu's death, the figure of the *legislateur*, of the one (those) who gives (give) certain rules to the community, began to be emphasized; and of the same rules—fixed in laws—which, rather than being discovered by studying the "nature of things," are the product (prevalent or exclusive) of the human will. It is this that gives laws to things, and not vice versa. The relationship between the existing and the normative begins to tilt in favor of the latter. Modern constitutions that are the fruit of human reason (of equity, justice, but in effect of will) are the most obvious fruit of this. That constitution which is not such if, as Thomas Paine wrote, you cannot put it in your pocket, written, the result of public deliberation, following (mostly) free and rational discussion. For a long time, however, the main links that anchored the normative to the existent, particularly to will and virtue in citizens, were not lost. Indeed, the French Revolution, and the Jacobins in particular, made virtue a necessary and primary element of the new political regime: a sign that the links to the real were still robust.

Later, as Ernst Forsthoff writes, "the doctrine of the state took a path that distanced it from human qualities, and consequently also from virtue. In Georg Jellinek's work, which well represents the period at the turn of the century, this is no longer mentioned."

Hence the later one "became a doctrine of the state without virtue." Probably, indeed to follow Forsthoff surely, the whole thing was a consequence of legal positivism (broadly understood), whereby the doctrine of the state is the doctrine of its institutional and functional system, and prescinds from human qualities. In this we can also see a prevalence of "technical," and, in particular "technical-normative" aspects; Carl Schmitt wrote that already clear in Machiavelli's thought was the technical aspect of conquering and preserving power; but this technique did not prescind from either human qualities or human relations. Whereas contemporary normativistic "technique" implies doing without—or reducing to the minimum—the one and the other.

However, as Forsthoff writes, the success of positivism was such "that German law, neither before nor since, has ever again reached or maintained, in jurisdiction and administration, such a high level;" and this was possible in good part, thanks to the qualities (to the "virtues") of the German professional bureaucracy, the result, in particular, of the alliance "between a historically based Enlightenment and the legacy of the Reformation," whereby "this legal system, apparently stripped of all ethical reference and stuck to the purely technical plane, still had its own ethics, in that it was based on specific human virtues, without which it could not be understood." Thus, to think that a state can stand on the strength of the goodness of laws alone is to make a partially true (and therefore partially false) statement. No "good constitution" can function well if it is not adapted to the objective situation and the existing real forces, in which the moral qualities (virtues) of those who govern, or rather exercise public functions (starting with voting), are included to a decisive extent.

4.

Forsthoff's findings should also be updated according to what is thought—mostly—about in these years, in the late postwar period, which has become a (third) postwar (cold) period.

Nowadays, anyone who speaks of virtue would move to laughter (or a smile), and not only because of the unedifying spectacle offered by the ruling elites, but, even more, because no one thinks of virtue as a factor in sustaining the community, and democracy in the first place, anymore. He would be answered that good laws are enough, and he would be considered an oddball. But to the writer, and

given the consideration accorded by Western thought to the necessary relationship between virtue and good institution, it seems bizarre to argue otherwise; and the first retort that comes to mind is the Tacitian *corruptissima res publica, plurimae leges*, on the other hand amply confirmed in Italy over the last half century. Secondly, if so many thinkers, from Plato to Aristotle, from Cicero to Machiavelli, from Montesquieu to Mably (to name a tiny fraction) have held the contrary, it is not clear why one would share the idea that a state needs only good laws and, above all, does not need a certain amount of virtue (and especially what experience of what political unity corroborates it).

To a large extent this is the outcome of the extreme phase of the functionalization and technicalization of law, the most coherent conception of which is legal neopositivism. A prerequisite (and general condition) of which is to conceive of the world as a universe of norms, where there are no persons (or subjects of law), but centers of imputation of legal relations; there are no hierarchies of men, but gradations of norms; not subjective rights, but norms to be applied; not the sovereign, but the Grundnorm, and so on in a consistent de-humanization (and de-concretization) of the worldview. The only human element remains the "knowledge of the jurist;" in which this conception is revealed as the ideology of a particular social group, of the officials of the decadent phase of the bourgeois rule of law.

In such a conception, everything that is "extra-normative" is not legal (and therefore irrelevant): at most it comes down to the appeal to "constitutional values."

This seems to have the function of satisfying (at a minimum) the need to ground collective existence on something that is nonnormative anyway, and thus to "gain the ground of a recognized legitimacy" by going beyond mere legality. That is, it constitutes the exception to the mostly shared view (by jurists).

5.

In fact, the "classical" conception (within which to place Montesquieu's theory of principles) was the answer to the question: when is order vital (in the first place) and just?

The answer—given more than two millennia of political reflection—combines "existential" and "factual" factors with others of a more properly "normative" and legal nature, with the former prevailing over the latter. Personal qualities, beliefs, legitimacy, authority constitute (but do not exhaust) its essential cornerstones.

If, on the other hand, one asks for an answer to the question of how one should correctly (validly) interpret a legal norm, and more generally how the jurist's knowledge is to be attuned to the normative system—that is, a different question—and one with reduced content, the answer normativists give, by expunging from the horizon of the (practical) jurist any "factual" element, has its correctness. For which, however, as noted, particularly because of the formal character of such a theory of law (and the like), there exists (and does occur) the risk that "by reducing law to logical propositions disregarding their content, some piece of it too important to be neglected, or bracketed, is lost along the way, so to speak, just as a physical theory is exposed to the risk of neglecting some aspect of reality too important not to need to be explained. On the other hand, who can assure me that my model of knowledge of reality is truly coextensive with the reality I want to explain? In other words, who can assure me that my reasoning really explains everything I need to explain? Science risks being a set of propositions that, paradoxically, does not photograph the world, but itself; that is, the scientist risks seeing nothing but his own reasoning, and not the reality he wants to explain. "Truth" thus means only consistency to the starting assumptions, which, moreover, are unproven, and dissolves reference to reality, to explain which the "pure" scientist began to do science. We are facing a real implosion of the system."

And this is precisely the point: by narrowing the problem of the order to that of the proper application of norms, one expunges from the legal horizon the main and determining elements, and in any case much of what is necessarily part of it. That is, both the aspect of the unity, action and cohesion of the social group, and that of the application of law (through organized coercion and legitimate violence); so normativism has been regarded by many as a legal gnoseology, and it is, because, consistently, it eliminates from the legal horizon everything that is "factual."

Conversely, and in the line of classical political thought, we find (among others) the institutionalist jurists, who obviously take into consideration (maximally) the order and all those existential factors that condition and determine its form and action, with particular regard to the concrete situation.

Hauriou, who in *Précis de droit* constitutionnel repeatedly criticizes Kelsen, beginning with the error, which he stigmatizes, of assimilating "objective order to static order" and subordinating "strictly the dynamic to the static." Whereas "what men call stability is not stillness, but the coordinated (*d'ensemble*) slow and uniform movement that lets a certain general form of things subsist." To make sense of and understand it, Kelsen's essentially static system, in which there is no place for human freedom, is wholly unsuitable.

Santi Romano with the constant attention he gave from his youth until shortly before his death to the problems of change, legitimation and crisis of the legal systems is, likewise, exemplary of a dynamic and vitalistic conception of law. Going back to Montequieu, he was very clear that a human community lives in history, in space and (also) in time: the same can be said of Hauriou and Romano, who have a sense of "two-dimensional" law.

Instead, a static system is, as it were, to paraphrase Marcuse, a one-dimensional right, since it takes no account of time—and consequently of history (as of so many other things).

In this sense Hauriou's critique of "static" systems that convert into a contemplation of rules is penetrating.

6.

That being said, it is necessary to see what the concept of virtue was for Montesquieu and whether it is still necessary today:

"Virtue in a republic is a very simple thing. It is the love of the republic: it is a feeling and not a series of notions."

However, given the equivocity of the term, Montesquieu since the *avertissement* to the *Esprit des lois* has been keen to define it, outlining its public and political and not private (i.e. "non-political") character by specifying:

"What I call virtue in the republic is love of country... It is neither a moral nor a Christian virtue; it is political virtue; it is the gear that makes republican government act (*mouvoir*)."

Consistent with what Plato (Callicles' thesis in the *Gorgias*) and Aristotle already held, political virtue is connoted by the citizen (civis), i.e., the public man, not the *bonus paterfamilias*, i.e., the private man: an essential distinction, maintained by philosophical thought and particularly Christian theology, from Luther to Bellarmine. And which, consistent with the general confusion of public and private, nowadays is often no longer understood, to the point that, to hear some crude demagogue, any good man (as

long as privately honest) would suffice to lead a state. Which (not new, but often repeated) aroused Croce's sarcasm, as of "the ideal that sings in the soul of all imbeciles." Surely there is no need for that kind of private virtue: not that it spoils; but surely the state can exist and act even if sexual mores are relaxed and business mores not exactly adamantine.

Instead of the other, what Montesquieu called political virtue is felt to be needed, in proportion to how much it has been reduced for over fifty years.

How one feels the need for Montesquieu's lesson on the principles of government as sentiments and as gears to make the state institution act. The contrary, much-repeated thesis that good rules (laws) are sufficient is flawed by (at least) three errors:

The first of which is the reduction of law to legal gnoseology, as a technique of applying norms to the concrete case. Appropriate to this conception is the criticism above that "some too important piece of it" is thus lost. Whereas law is essentially a system for regulating action. It is the orientation that gives human actions the decisive aspect for understanding the essence of law.

Second, and consequently, that rules are not enough: these can regulate, permit, command actions, but without ever neglecting that the "object" of them is human action.

And above all, finally, that in order to sustain the original legal phenomenon, that is, the institution, it is necessary to leverage (also) the feeling that makes "government act."

A state that does not act, that does not leverage sentiment (i.e., principle) is a gangrenous institution: to exist, in history, means to act. Acting does not mean (only) enforcing rules, but above all having what in different terms of similar concepts has been called virtue, love of country, sense of state. Without which—or lacking which—the state falls or decays.

Of course, one can reply like Don Abbondio that virtue is like courage: if one does not have it, one cannot give it. But one must reply that a first step to (attempt to) have it is to think that it is necessary. That is, the opposite of current idols.

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Featured: *Allegory of Virtue and Vice*, by Veronese; painted ca. 1581.
