

Montesquieu's Significance for Contemporary Japan

—What Japanese Constitutional Scholars Have Failed to Learn from Montesquieu*—

Professor, The University of Tokyo

Yasuo HASEBE

Every textbook on constitutional law in Japan refers to Montesquieu's doctrine of the separation of powers,¹⁾ and several to the Eisenmann-Troper thesis in particular.²⁾ Yet in regard to Montesquieu, I have come to suspect that we Japanese constitutional scholars have not yet developed a sufficient understanding. Let me explain.

In his *Esprit des lois*, Montesquieu describes how the English state guarantees the political freedom of its people by organising the functional separation of the three powers, as well as the balance of the different social classes in the legislative process (XI, 6).³⁾ Since the legislative process is so arranged that a new statute is enacted only with the agreement of all of the social classes, it yields a state of law in which everyone's liberty, "the right to do ev-

erything the law permits" (XI, 3), is secure.⁴⁾ Montesquieu supplements this argument by also describing how the two-party system in the English Parliament sustains political passions and contributes to the maintenance of freedom (XIX, 27). At the same time, however, he characterizes the political freedom in England as "extreme", and he explicitly says that he does not recommend the English constitution as a model for other countries.⁵⁾

On the contrary, Montesquieu seems to support the preservation of a monarchical constitution in the French state. According to his analysis in book II, chapter 4, "intermediary powers" are essential for monarchies and the typical intermediary power is that of the nobility.⁶⁾ "No nobility, no monarch; rather, one has a despot" (II, 4), Montesquieu rea-

* This paper was read at several conferences, including those at École normale supérieure in August 2010, the University of Oslo in August 2010 and the Seoul National University in September 2010. I am grateful to participants in those occasions, in particular, Michel Troper, Eivind Smith and Cho Hong Sik.

1) The first Japanese translation of *Esprit des lois* was published in 1875-76 (GA NORIYUKI, BANPOU SEIRI (1875-76)).

2) For example, my textbook, YASUO HASEBE, KENPO [CONSTITUTIONAL LAW] (5th ed. 2011), p. 16, refers to the Eisenmann-Troper thesis.

3) This is to be read as book XI, chapter 6.

4) The "liberty" of this definition, understood literally, is compatible with highly oppressive regimes. We should presume that the said "law" cannot be the results of simple decrees of the legislator. In Montesquieu's view, arbitrary laws are not genuine laws. "It should be recognised that equitable relations precede positive laws which establish them" (I, 1). See, on this point, Céline SPECTOR, *Montesquieu: liberté, droit et histoire*, 2010, pp. 41-49.

5) See the last several paragraphs of book XI, ch. 6. Cf. SPECTOR, *supra* note 4, pp. 188-91.

6) In restating Montesquieu's argument, I draw heavily here on ANNELIEN DE DIJN, *FRENCH POLITICAL THOUGHT FROM MONTESQUIEU TO TOCQUEVILLE* (2008), pp.22-32. A similar understanding of Montesquieu's views on "intermediary powers" is expressed by YOSHIE KAWADE, KIZOKU NO TOKU, SHOGYO NO SEISHIN [ARISTOCRACY AND COMMERCE: MONTESQUIEU AND THE PROBLEM OF DESPOTISM] (1996), in particular, pp. 214-17.

sons. In the absence of intermediary powers that work as barriers to the concentration of a monarch's power, the monarch will become a despot who rules not by law, but by will and caprice (II, 1). Montesquieu points out that along with intermediary powers, a depository of laws should also be established in monarchies. He alludes here to the French *Parlements*, which reviewed whether royal decrees conformed to the fundamental laws of the kingdom.⁷⁾ In despotic states, he argues, there is no depository of fundamental laws, since there is no fundamental law in such states (II, 4).

In Montesquieu's view, the English state is not a monarchy, in which one person rules in accordance with the laws (II, 1), because of its characteristic absence of intermediary powers (II, 4).⁸⁾ Hence, the political freedom of the English should be protected by their artificially constructed constitution. Because the English do not have a nobility or a judiciary powerful enough to work as barriers against the government, infringement of their constitutional principle of separation of powers can lead to their being ruled arbitrarily. Montesquieu predicts that if the English people were to lose their liberty, they would become one of the most enslaved of the world's peoples (II, 4).

It follows that in Montesquieu's understanding, a monarchy equipped with powerful aristocrats and an independent judiciary is more effective in preserving liberties than a state equipped with an English-style constitutional mechanism with no intermediary powers.

Equality within the populace, for Montesquieu, is not in itself a good. Indeed, in view of the equality they provide, democratic states are similar to despotic states: "Men are all equal in republican government; they are equal in despotic government; in the former, it is because they are everything; in the latter, because they are nothing" (VI, 2). Moreover, while a republic demands that its citizens embrace virtues that contribute to the public welfare (III, 3),⁹⁾ a monarchy requires only that its nobility ascribe to values of respect for their own honour (III, 5 & 6), thus realising good governance more efficiently.¹⁰⁾ A monarchy is sustainable independent of "all the heroic virtues which we find in the ancients but know by just hear-say" (III, 5).¹¹⁾

If my description of Montesquieu's views thus far is accurate, the essential question that Montesquieu poses for us is less that of how to organise the three functions of the state than of how we can preserve liberty in a modern society in which people are regarded as inherently equal but are more concerned with their private affairs than with the general welfare. Such a society presents the risk of an electoral dictatorship which concentrates political legitimacy in its own hands, and which attacks intermediary bodies as "illegitimate powers". While the majority in such a society may realise general interests of the society as a whole, it is also possible that the political majority will, under the façade of general interests, direct social and economic benefits only to its supporters, polarising the political process. This risk has become reality in sever-

7) Cf. SPECTOR, *supra* note 4, pp. 102-05.

8) England is rather "a republic hiding behind a form of monarchy" (V, 9). Cf. SPECTOR, *supra* note 4, p. 176.

9) In his foreword to *Esprit des lois*, Montesquieu makes it clear that what he calls "virtue in a republic" is its citizens' "love for their fatherland, that is love for the equality".

10) "Everyone contributes to the general good, believing that he is realizing his own interests" (III, 7).

11) However, Pierre Rosanvallon points out that for the ancient Greeks, effective systems of oversight were more fundamental to realising good government than individual virtue or talent: "one might say that the Greeks did not count on benevolence and virtue to achieve the common good; they relied instead on the self-interest of individuals, since every official had a direct interest in avoiding 'reproach' for misconduct (the penalties could be quite severe)" (PIERRE ROSANVALLON, *COUNTER-DEMOCRACY* (2008), p.86).

al Asian states in recent years.

And this is the risk that Japan now faces, following the first significant change of ruling party since World War II. The successive governments of the Liberal Democratic Party (LDP) allocated the benefits of Japan's post-war economic growth not only to their natural supporters, including farmers, doctors, and rich industrialists, but also to supporters of opposition parties, including labourers, teachers, and small business owners. However, as economic growth slows and global economic competition increases, this inclusiveness has become unsustainable. Pareto-superior policy options have become increasingly rare; political competition has become polarised with regard to who should acquire what at the expense of whom. Since the electoral victory of the Democratic Party in 2009, the newly formed government has tried to concentrate political power in its own hands, attacking bureaucrats, public prosecutors, and the mass media as wielding *de facto* powers that lack political legitimacy. Moreover, the general electorate, which believes itself to have brought about the change of ruling party, has become much more confident than before, and is actively supporting the government's campaign against these "elitist others".¹²⁾ Members of the electorate may believe that they are encountering a constitutional moment in Ackerman's sense.¹³⁾ Montesquieu's question of

how to preserve liberty in a modern democratic society is thus of particular relevance in Japan today.

Let us consider three not mutually exclusive answers to Montesquieu's question. The first, which is Montesquieu's own answer, is to adopt an English-style, functional separation of powers, thereby spurring the development of a two-party system within the Parliament. However, Montesquieu's doctrine of the balance of powers in the legislative process presupposes the existence of different social classes,¹⁴⁾ the re-establishment of which our modern, levelled society would not tolerate. At least, we have to find supplemental means of securing our liberties from infringement by the central government. Instituting supervisory or preventive powers, following the model of the Lacedaemonian ephorate or the Roman tribunate, might be one option.¹⁵⁾ I suspect that the Special Division of the Tokyo Prosecutor's Office in effect has acted as such a negative power in contemporary Japan. The Cabinet Legislation Bureau, which, like the Conseil d'Etat in France, examines the constitutionality, coherence, and consistency of all legislative bills sponsored by the government, is another such institution.¹⁶⁾

The second answer to Montesquieu's question is provided by Carl Schmitt. In addition to endowing an electorate with equal rights to participate in democratic processes, a consti-

12) Since 2009, the Special Division of the Tokyo Prosecutor's Office investigated a series of financial scandals surrounding the Secretary-General of the Democratic Party, Ichiro Ozawa, who in response attacked the prosecutors as politically motivated. Ozawa and his allies have also attacked the mainstream news media as colluding with the prosecutors in propagating information damaging to the Democratic Party. In some domains of public opinion, in particular the internet, this campaign has found broad support. Such a response would have been almost inconceivable under the long reign of the LDP, during which the public trusted public prosecutors to hold politicians accountable, and believed that elections played no role in the prosecutors' performance of their duties. In contemporary France, in contrast, the trend seems to be the inverse: a judicialisation of politics has materialised there. *See id.*, ch. 10.

13) *Cf.* 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991).

14) *Cf.* Michel TROPÉ, *La séparation des pouvoirs et l'histoire constitutionnelle française*, 1980, pp. 121-25.

15) *See* ROSANVALLON, *supra* note 11, pts. 1 & 2.

16) Recently Bruce Ackerman proposed to create the "Supreme Executive Tribunal" to put the American executive branch under the rule of law. *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010), ch. 6.

tution can establish several specific institutions as intermediary powers, such as the bureaucracy, universities, and perhaps churches, each dedicated to upholding legitimate apolitical ideals such as impartiality and/or universal, rational knowledge. In the course of defending their privileges, such institutions may work as shields against the concentration of centralized political power.

However, this answer presupposes a judiciary, in particular, a constitutional court, that will effectively police the boundaries of the privileges of these institutions.¹⁷⁾ It is not certain that the courts would exert their powers of control in an atmosphere of unitary political power, since they would themselves be subject to attack as “elitist others”. Moreover, the advent of the “risk society” has eroded people’s trust in scientific, rational knowledge, and therefore, their trust in the legitimacy of privileged institutions.

The third answer is suggested by Alexis de Tocqueville. In the United States, which was the exemplary levelled society of his time, Tocqueville found various associations that he viewed as performing the same role as the nobility in a monarchy.¹⁸⁾ Tocqueville firmly believed that aristocracies cannot be re-established in the modern world. Instead, “citizens can associate with each other to constitute affluent, influential, and strong entities, that is, aristocratic moral persons”.¹⁹⁾ Such associations, in Tocqueville’s argument, work to defend their rights against the demands of the powers, in so doing, preserving liberties as common interests. Tocqueville explicitly refers to the press as the healer of most of the

evils resulting from the equality pervading a democratic society. In his view, people living in aristocracies can do without freedom of the press, but those living in democracies cannot. Neither grand political assemblies, parliamentary prerogatives, nor the proclamation of popular sovereignty can compensate for its absence (II, 4, 7).²⁰⁾ However, with the development of the internet in recent years, the power and status of the press has been severely eroded in the eyes of the general public.

Hence, there is no clear and easy answer to Montesquieu’s question. Perhaps the answer entails properly arranging constitutional powers, guaranteeing the privileges of specific apolitical institutions, and defending freedoms of association and the press at the same time. Certainly, it entails educating the public not to place too much trust in the monist principle of popular sovereignty. The political process is too complex for this principle alone to sustain the public good and the political freedom.

(Yasuo HASEBE)

17) I do not share the widely held view that the Supreme Court of Japan has been extremely passivist in exercising its power of constitutional review. See Yasuo Hasebe, *The Supreme Court of Japan*, 5(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2007), pp.296-307.

18) See DE DIJN, *supra* note 6, pp. 150-51. Yoichi Higuchi has analysed this aspect of Tocqueville’s theory, contrasting the Tocquevillian vision with the Jacobin vision of democratic monism. See YOICHI HIGUCHI, KINDAI KOKUMIN-KOKKA NO KENPO-KOZO [CONSTITUTIONAL THEORY OF THE MODERN NATION-STATE] (1994). See also Yoichi HIGUCHI, Les deux modèles de l’État-nation, *Le constitutionnalisme entre l’Occident et le Japon*, 2001.

19) Alexis DE TOCQUEVILLE, *De la démocratie en Amérique*, tome II, 1961 (1840), p. 442 (II, 4, 7).

20) In Tocqueville’s view, the judiciary performs a similar role in democracies. See *id.*, p. 443 (II, 4, 7).