Law and Philosophy Library 94

C.W. Maris • F.C.L.M. Jacobs *Editors*

Law, Order and Freedom

A Historical Introduction to Legal Philosophy

Translated by J.R. de Ville

Springer

Chapter 5
Eighteenth-Century French Enlightenment

5.1 Enlightenment, Freedom, Equality and Fraternity

5.1.1 Enlightenment Through Science

The Enlightenment has provided the spiritual foundation of the modern constitutional state. The motto of the Enlightenment could have been: *theory and practice go hand in hand* (*theoria cum praxi*).[1] Or, stated differently, scientific knowledge of nature, man and society leads to Enlightenment because its practical application would make an end to unhappiness caused by ignorance.

The views of Hobbes, Locke and their kindred spirits had a great influence on the philosophers of the 18th-century French Enlightenment. The confidence in modern science of thinkers such as Montesquieu, Diderot, Voltaire and Beccaria,[2] was moreover inspired by the unprecedented success of modern physics, specifically the mechanics of Newton. Theology had to give up its place of honour to philosophy, and even more so to the exact sciences. The factual, empirical reality of man and society became prominent. Reality was no longer interpreted teleologically (as having an ultimate purpose and as valuable in itself). The Aristotelian 'organic' portrayal of man and world which had an influence reaching into the Renaissance, made way for neutral, 'value-free', and mechanical notions of man, society and reality in general. Realistic knowledge would lead to emancipation.

This belief in progress appeared from the immense undertaking which led to the *Encyclopédie, ou dictionaire raisonné des sciences, des arts et des métiers, par une société de gens de lettres* ... (Paris, 1751–1780, seventeen volumes text, eleven volumes illustration, five supplements and a two-volume register, a monument of 18th-century learning and printing). Under the guidance of Diderot, many Enlightenment philosophers contributed to the *Encyclopédie*.[3] The *Encyclopédistes*

[1] This was stated by Leibniz, who prepared the way for the Enlightenment, but whose thinking will not be dealt with here.

[2] An Italian, but who became famous by virtue of the French Enlightenment.

[3] Montesquieu and Rousseau were also contributors, although Montesquieu refused to write about democracy and despotism. He restricted his contribution to a section on taste. Rousseau wrote the section on music, and thus kept a similar distance from his regular subjects, politics and law.

C.W. Maris, F.C.L.M. Jacobs (eds.), *Law, Order and Freedom*, Law and Philosophy Library 94, DOI 10.1007/978-94-007-1457-1_5, © Springer Science+Business Media B.V. 2011

attempted to interpret and unify the science of the day. In the *Prospectus* for the *Encyclopédie* (1750), Diderot wrote:

> The purpose of the encyclopaedic summary of everything that belongs to the fields of science, art and craft, is to show their mutual connections, to determine more accurately, with the assistance of these connections, the underlying principles and bring to light their consequences more clearly; to show the distant and closer connections of the things which nature consists of and which have occupied man. . .and to provide a general examination of the efforts of the human spirit in all fields through the ages.

Our understanding of the Enlightenment is not made easier by the self-imposed, as well as enforced, censure of 18th-century France and Europe. The *Encyclopédie* was, for example, repeatedly banned, also under pressure from the Jesuits (until they were in turn banned in 1765), and the text was badly battered by the conservative printer. Only a small part of Diderot's original texts survived. As for Montesquieu and Rousseau, it can likewise no longer be determined to what extent they restrained themselves out of fear for the authorities. It was, however, precisely against this lack of freedom that the project of the Enlightenment was aimed.

The Enlightenment expected that modern science would free human reason from traditional and religious superstition. It was believed that, on the basis of scientific knowledge, society could be 'modernised'. Scientific insight could, more specifically, lead to emancipation by unmasking suppressive ideologies, such as the belief that state authority is willed by God. Free from prejudices and irrational fears, political, legal, and personal decisions could in future be taken on purely reasonable and empirical grounds. Teleological worldviews made way for the 'causal' worldview of modern science. Man and society had to become just as transparent in the long term as the scientifically explained processes in inanimate nature. More science would equally mean more power over reality, particularly more possibilities to change social reality for the good.

The academic optimism of the *lumières* (the 'lights' of the Enlightenment) stood out in stark contrast to social reality. Differing from England, in France an absolute monarchy ruled, which was supported by feudal relationships reminiscent of the division of estates of the Middle Ages. The largest section of the population lived in appalling circumstances. Around the middle of the 18th century everywhere in France dying people could be found on the roads. Ever since the 30 Years War the peasant population of France was the poorest in Europe. This was, among other things, because of exploitation by an aristocratic and clerical elite who made little contribution to the economy. From this situation the population could now be emancipated, thanks to the new ideas of the Enlighteners.

The scientific orientation of the Enlightenment, however, has a dark side, too. The *facts* of science after all do not lead straightforwardly to *norms* of humanity. The science of human phenomena can be used against people as well. This occurs with Sade and others: sadism as inversion of enlightened humanity (Section 5.4).

5.1.2 Legal Philosophy of the Enlightenment

At the time of the Enlightenment the spiritual and material foundations of the modern constitutional state were established. Of central importance was the rejection of

divine authority, both in respect of the truth of science and the authority of politics and law. In its place came the ideal of human autonomy: every person is equally responsible for his own life. With this, monarchy lost its traditional ground of justification. In terms of the new view, government should serve the people, not the other way around. The Enlightenment philosophers thus arrived at a radical critical stance vis-à-vis existing political and social relationships: the French absolute monarchy and feudal division of estates with their inequality and lack of freedom were in blatant conflict with human dignity. The political and legal philosophy of the French Enlightenment showed two different responses to this social exploitation: a liberal response, with Montesquieu (Section 5.2) and his kindred spirits, and a perfectionist response, with Rousseau (Section 5.5). Both would become prominent in philosophy and science, and in addition acquire a significant historical influence.

The liberal Enlightenment philosophers articulated the ideals of freedom and equality in association with rights and separation of powers. The estate-based society had to be replaced by a democracy in which everyone could participate in equal freedom. The freedom of citizens had to be protected by a threefold division of state power. The legislative power belongs to the people, who, as the highest authority, establish a legislative assembly. Thus, laws are an expression of the general interest, or at least of the will of the majority. The (preparation and) execution of laws had to be left to the administrative power. The judge decides in disputes concerning the implementation of general laws.

This constitution implies a distinction between personal and public morality or first and second-order morality. Morality of the first order determines the private lives of individual people. Morality of the second order is provided by the principles, rules and laws of the constitution: these must create an order in which everyone can live equally in accordance with his personal, moral views of the first order. The fundamental rights thus protect the personal domain of life, particularly against the highest authority of the state, whether or not this is the people themselves. The public, second-order morality stands in a neutral relation to individual, 'private' views of first-order morality. Individuals are precisely for this reason the highest legislators, because their lives and their (diverse) first-order moralities constitute the final value.

The question remains, how the second-order morality should be enforced. Even if the monopoly of power of the state is legitimate, this does not as yet validate the establishment of criminal law. Beccaria was the first to sketch a criminal law of which not vengeance and retaliation, but the prevention of criminal acts, is the central rationale; and in which criminal procedure does not only serve to detect and punish, but also to protect the fundamental rights of citizens and suspects against the prosecuting authority (Section 5.3).

In contrast to the 'scientific' optimism of Montesquieu, Beccaria and other *lumières*, stands the social criticism of Rousseau. Modern science, for him, entails alienation rather than liberation. Rousseau made an in-depth enquiry into the alienating interplay between people and their cultures: made by people, but at the same time by far transcending individuals, alienating and threatening them. In his view, individual negative freedom to live according to a first-order morality is illusory, as

long as the 'authenticity' of individual life plans is destroyed by the sham civilizations of the Modern Age which have deviated from 'true nature'. In this Rousseau saw nothing more than palpable wealth for some, grinding poverty for others, and spiritual poverty for everyone. The ideals of the liberal constitutional state, too, were for him nothing more than products of degeneration, far removed from the authentic human being: individual negative freedom leads to egoism. In its place Rousseau posits the ideal of human development in a community which is based on the ideals of equality and fraternity.

With this, Rousseau is the first great critic of the liberal separation of first- and second-order morality, the distinction to which his contemporary Montesquieu, with his view of the separation of powers, contributed so much. In his criticism of liberal individual freedom he moreover posits a 'broad' morality of the good life of the natural person as against the 'narrow' morality of liberal conceptions. For him, therefore, *essential freedom* is at stake. For this reason Rousseau could make the paradoxical statement that people can be forced to be free.

5.2 The Liberal Enlightenment: Montesquieu's Separation of Powers

5.2.1 Montesquieu

Charles-Louis de Secondat (1689–1755) (only later known as the *baron de la Brède et de Montesquieu*) was an aristocrat and president of the Parliament of Bordeaux. His wealth, titles and positions were acquired by inheritance from an uncle and with the money of his wife. In other respects, too, Montesquieu was no stranger to ambition and a certain opportunism. He deserted his wife and left his castle to make his name in the world (and, in addition, to gather material for his books). His entry into the *Académie Française* in 1728 was not without difficulty. He was regarded as a niggard: guests complained about the bad receptions at the castle; he was without mercy towards the smallest debtors, slack in relation to creditors; even for the wedding feast of his daughter he appears to have been skimpy. (Psychologists would suggest that Montesquieu remained caught in an early phase of his childhood, where 'having' was more important than living, and a lack of self-respect had to be compensated for by means of possessions and vanity. Montesquieu's childhood and character would have been as formative of his moderate liberal-bourgeois views as those of Rousseau were of his social criticism; see Section 5.5.1.)

Montesquieu published an anonymous erotic satire of Louis XV, as well as the work for which he became famous: *De l'esprit des lois* (The Spirit of Laws, 1748). He worked on this book for 17 years. It is a treasure-chest of historical and sociological material: perhaps not in all respects equally meticulous, but often entertaining and highly original. Revolutionary it is not. For the same reason it was fashionable at a time when the moderate, but no less aristocratic, class-state model of England served as an example not only for Montesquieu.

Montesquieu nonetheless expressed himself very critically regarding the irrational, feudal and superstitious morality and customs of his time. In his *Lettres persanes* (Persian Letters, published anonymously in 1721) he masqueraded as two Persian nobles, who as surprised foreigners describe what happens in France and Europe. The King of France was presented as an unfathomable magician, with a minister who was 12 years old, a mistress of 80 and endowed with the remarkable ability of making people kill each other without having a quarrel.[4] The pope is presented as an idol who is customarily fumigated, and who succeeds in making people believe that three is actually *one*. Not without reason does Montesquieu make others speak, while his criticism is not overt: freedom of expression did not exist.

5.2.2 The Spirit of Laws

In *De l'esprit des lois*, the most important work of Montesquieu, the emphasis is not placed on an ideal political and juridical order, valid for all times and places. The subtitle of the book consequently reads: *Du rapport que les lois doivent avoir avec la constitution de chaque gouvernement, les mœrs, le climat, la religion, le commerce, etc.*: concerning the relation which laws must have with the legal orders of all states, with morality and customs, the weather, faith, trade, etc. That is why the original edition of *De l'esprit des lois* contained a map of Europe and Asia Minor.

Montesquieu attempted to investigate the origin and meaning of laws in different states by means of a historical enquiry. He followed a very different approach to that of Plato and his followers. The latter assumed abstract, metaphysical and/or normative-ethical concepts and ideal laws, as a standard for existing legal orders and states. (The social contract doctrines of Hobbes and Locke, which are in other respects so different, have a similar abstract character). In contrast to these, Montesquieu used empirical-scientific methods that take environmental, cultural and historical differences into account. He stated that the rules which apply to politics and the law must not be approached like principles of reason, but like the laws of natural science. The laws of the legal order can be understood only in the light of political reality. Reality is dependent on time, nation, culture and natural conditions, and thus always different.

Montesquieu gave the most varied examples of this important insight, even though these appear at times quite far-fetched. Especially the climate and the unfavourable influence of heat caught his attention. In a chapter entitled: 'That in the Countries of the South there is a Natural Inequality between the Two Sexes' he

[4] An allusion to the massive wars and their unwilling victims among both serfs and citizens which troubled the 18th century. Later Voltaire would expose the madness thereof, likewise satirically, in *Candide ou l'optimisme* and in his story *Micromegas*, in which the insanity of warmongering humanity is assessed from the point of view of a giant, with reference to the death of millions for the sake of a piece of ground as large as a stamp.

describes how in northern regions the equality of the sexes is a result of the cold, in which womanly beauty is better preserved and because of which women, at a later age, marry men of the same age. But in warm countries, women already marry on their eighth or ninth birthday, and they are discarded by the time that they are 20. By then the heat has destroyed their beauty and their husband looks for another wife. In this way polygamy (or, more precisely, 'polygyny') is explained. Great heat likewise has an unfavourable influence on men. *En passant* the domination of China by the Manchurian emperors from the north is explained by the simple fact that great heat destroys the strength and courage of people, and that it is simply colder in the north of China. A related and constantly recurring theme is the connection between slavery and the tropics. Only people in the milder to cold climates have the strength and the courage to fight for their freedom. The condition of the soil is of great importance for the political and social order, too. Asia is always dominated by large-scale despotism, because the land is flat, the rivers are easily navigable, and the mountains are not too high or too cold. In such regions only the slavery of the whole population is appropriate, whereas in Europe the condition of the soil allows for no central authority, so that the spirit of independence and freedom could be established.

Good legislation is, therefore, in Montesquieu's view, not a product of philosophical thinking about universal state ideals, but a practical and harmonious solution to diverse social and political problems. Laws never apply unconditionally, but only in a specific society at a specific time. So as to not lose himself completely in an infinite variation of place and time, Montesquieu arrives at three foundational political principles. A despotically governed state is ruled by fear, a republic is supported by virtue, and a monarchy is based on honour. Stability is only possible when laws reflect social conditions. Montesquieu opts for a republic, because it furthers such reflection. He rightly connects the republican constitution with virtue: to be sure, the welfare of the republic not only depends on the reasonableness of the government, but also on the virtue of citizens. If the citizens do not have a warm heart for the republic (the public good), it is doomed to failure.

5.2.3 Separation of Powers

Montesquieu contends that in every state model, legislation should be the highest authority. He became famous for the notion of separation of powers.[5] Legislative, executive and judicial power must each be exercised by independent organs to counteract the danger of absolutism. The executive power must be bound by the laws of parliament, as guarantee of the freedom and property of citizens against the arbitrary

[5]Montesquieu was undoubtedly influenced by the parliamentary system in England, and possibly, in addition, by the separation of legislative and executive powers which is found in Locke's *Two Treatises of Government* (Section 4.2).

exercise of power by the state. As a result of the corrupt and class-based judicial decisions of pre-revolutionary France, Montesquieu granted an independent, but nonetheless very limited role to the judicial power. Here, too, the legislative authority thus has the final say. The right of the individual to freedom and personal development is guaranteed only when a constitutional order and separation of powers discourage the monopolisation and abuse of power. The separation and restriction of the powers of the state, as proposed by Montesquieu, have been adopted in all modern democracies.

Montesquieu did not systematically work out the separation of powers in *De l'esprit des lois*. Was this out of fear of the authorities? His preface does not without reason start with a song of praise to the political order of the then existing France. The 'separation of powers according to Montesquieu' nonetheless became one of the most influential ideas of the Enlightenment.

A truly democratic or republican separation of powers implies the following: the highest authority belongs to the people. The people can govern only by way of elected legislators. The legislative assembly, therefore, has no other task than promoting the interests of citizens. For this purpose general laws applicable to all are enacted.

The execution (and preparation) of laws is the task of the executive power, the administration. The latter is thus subject to the legislative power; the state branch has no other task but to ensure that laws are actualised and remain as such. Differing from the legislature, the administration makes no other contribution than a purely administrative one: it should select the measures which are most suitable to achieve the purpose of the law.

Like the administration, the judge is bound by the law, but in a different way. The judge decides in disputes concerning the application of law between citizens, and in criminal law between citizens and the state. Citizens can submit disputes to a judge about rights *in rem*, contracts, torts, and other matters which are regulated by law. The judge does not adjudicate on the basis of the general interest or the will of the majority in the legislature, but on the basis of the equal application of the given law to all citizens.

In this classical view of the separation of powers, the role of the judge is limited. He does nothing but apply the given law. As such, he acts as the guarantor of the equal application of laws, and thus protects the citizens against arbitrariness. The judge in criminal matters assesses the legality of sanctions and other measures that the administration wants to impose on disobedient citizens. Other forms of judicial protection against the government did not as yet exist in the 18th century. The contemporary judge has a much greater power in relation to the legislature and the administration. In some countries he tests laws against (unwritten) legal principles, and in others against the explicit provisions of a Constitution or international treaties such as the European Convention on Human Rights. In legal systems that allow for judicial review, the judiciary protects the citizen's individual rights against infringements by the democratic majority or policies pertaining to general well-being. Criticism in certain countries of contemporary practices is well-known: the democratic legitimacy of (complex and excessive) legislation is questioned, the

administration (officialdom) is reproached for their factual omnipotence, and judges are accused of fulfilling a quasi-legislative role. But irrespective of how much has changed, until today 'the spirit of Montesquieu' has persisted.

The principle of the separation of powers illustrates the substantially different tasks of the three state powers. The sovereignty of the people as legislature is unlimited here, as long as the legislature adheres to the rules of separation of powers. The administration is completely subordinate, and the judge makes no other contribution but applying the words of the legislature to the facts of the case. But Montesquieu would have been no pioneering sociologist and psychologist if he did not emphasise the importance of the separation of powers as factual guarantee against state absolutism. Even if the legislature in principle has the final word, only the factual existence of a distribution of powers across many people in different social positions can prevent abuse of powers. In the United States and in other legal orders the importance of the balancing and control of state powers has acquired more or less official status as the doctrine of *checks and balances*.

This can be ensured also by means of a spreading of powers: different organs have powers within the same state function. Hence, legislation is the task of government *and* the representatives of the people, which is different from a strict *separation* of powers (one organ for each separate state function). Because of the blurring of the distribution of state functions in many contemporary legal orders (for example, the judiciary which exercises a quasi-legislative function), this variant of the separation of powers becomes more prominent.

5.2.4 Montesquieu as Moderate Liberal

Montesquieu was a liberal, but not because of his adherence to absolute principles. 'Freedom has its roots in the soil', he wrote in *De l'esprit des lois*. According to him, freedom is more likely in mountainous areas and on islands (the Switzerland and England of his time), than on fertile plains. Islands and mountainous regions can more easily be defended against foreign oppressors, and require more diligence, thrift and independence from the individual. Peace and order, furthermore, contribute to individual freedom. These are better guaranteed by a constitutional state and separation of powers (at the time of Montesquieu only to be found in England and Switzerland) than by a monarchy or despotism.

Freedom is, according to Montesquieu, nothing more than the right to do what laws permit. This is a much more restricted view of freedom than that of Locke (as well as of Mill in the 19th century), who described freedom as the absence of interference by others. In accordance with Locke's concept of freedom, laws always amount to restrictions of personal liberty, because laws are interferences by the state in the life of citizens. Such a limitation is only permissible in the name of the very same freedom, specifically to combat an infringement of the equal freedom of others. In the 19th century, Mill formulated in this spirit the *harm principle*: the

state may interfere with someone's freedom only to prevent that another is harmed (Chapter 7). With this formulation the liberal imposes a fundamental limit on the legislature. With Montesquieu, the scope of the private domain is more a question of chance: people are free within the scope which the state grants them in its discretion. His view concerning (negative) freedom is rather an expression of the principle of the formal constitutional state: the state may not arbitrarily, without preceding law, interfere in someone's life.

To be sure, Montesquieu in general subscribed to moderate views. He was certainly no revolutionary. In *De l'esprit des lois* he even writes:

> It is a capital maxim that the manners and customs of a despotic empire ought never to be changed; for nothing would more speedily produce a revolution. The reason is that in these states there are no laws, that is, none that can be properly called so; there are only manners and customs; and if you overturn these you overturn all (Montesquieu 2005, p. 368).

Montesquieu seemingly regards facts about human beings and society, as well as existing morals and customs, as alterable, but not as givens which can be changed at will by human interference. For this reason, too, he wants legislation to be based on empirical scientific enquiry into human and social circumstances.

Differing from Rousseau, Montesquieu did not engage in fundamental human and societal criticism. His narrow morality had a conservative character. (After the French Revolution, Robespierre apparently said about Montesquieu that he was nothing more than a weak-hearted, dogmatic and prejudiced *parlementaire*, and definitely no *bon républicain*, and that he, as a good revolutionary, would certainly have made Montesquieu a head shorter.)

5.2.5 Commentary

The most well-known criticism of Montesquieu concerns the conservative character of his views about law and the state. Good legislation is, according to Montesquieu, not based on metaphysical or normative-ethical principles, but on factually given circumstances. This view rather leads to the adjustment of the law to these circumstances, than to radical change. This adjustment fits in with Montesquieu's aristocratic position and perhaps also with his character. Conservatism, however, seems not to have been the most appropriate response to the wrongs of 18th-century Europe.

The question, moreover, is: how can laws which *prescribe* what people should do, be derived from empirical-scientific descriptions and explanations of the *existence* of human and societal conditions? Hume, a contemporary of Montesquieu, denied that this is possible: from an 'is', no 'ought' can be derived (Section 6.2). The laws of a legal order differ in kind from the laws of science (as John Stuart Mill repeated in the 19th century). Scientific laws are descriptions and explanations of reality as it is, the laws of a legal order prescribe what people must do, and aim precisely at *changing* reality.

Natural law, which claims to be an expression of the true law that prescribes what should be contained in any positive legal order, is, therefore, usually not based on empirical facts. Plato grounds natural law in a metaphysical realm of Ideas. Aristotle assumed a metaphysical unity of descriptive natural laws and normative principles: natural laws would give expression to the immanent development which is to the benefit of reality. Others sought the foundations of natural law in the will of God. Empirical facts, on the other hand, cannot be the source of legal morality. Montesquieu, as one of the pioneers of the empirical science of legal sociology, can provide no firm foundation for natural law with this empirical enquiry. A part of his work consists of descriptions and explanations of the connection between law and existing morals and customs. His normative standpoint, such as the prescription of a separation of powers, cannot be based on these descriptions.

Yet, empirical facts such as those propounded by Montesquieu may be useful as a realistic framework for normative deliberation. *Ought implies can*: refrain from implementing values that cannot possibly work in the actual world. Moreover, Montesquieu's sociological descriptions of the diverse legal systems may be read as an attempt to evade censorship of explicit political statements. His picture of the English constitution may conceal an implicit criticism of French royal absolutism. After all, the French climate is more akin to that of its neighbour Britain than to Eastern sultriness. So, why despotism? Would a liberal constitution not better match the French environment? Facts, then, can still be relevant to norms, although they cannot justify them.

The next question is whether Montesquieu's descriptions are accurate. *De l'esprit des lois* pours out onto the reader a real shipload of exotic facts and suggestions. Some of these are treasures, whereas others appear more like small mirrors and beads. The old Romans did everything better; principles of Turkish criminal law should be imported into Europe; in Japan everything is subject to the death penalty, which prevents criminal law there from functioning; and in China people are only robbed and not murdered because the Chinese authorities are clever enough to cut up into small pieces only those who rob *and* murder. *Épater le bourgeois* (to shock the people) is something in which Montesquieu found delight. In fact, very little of his description of the English legal system was accurate, but English contemporaries were full of praise for the clarity of his arguments, and remarked that Montesquieu had a better conception of them than they themselves had.

5.3 Enlightenment of Criminal Law

5.3.1 Monopoly of Power and Criminal Law

The European administration of criminal justice in the 18th century was, in terms of contemporary standards, cruel and inhuman. Without a codified criminal law, legal certainty was, even on paper, difficult to find. 'Confessions' were obtained by means of not particularly gentle bodily coercion. Presumptions of innocence did not apply, and in the secret criminal procedures that were followed they would have made little

sense. The most diverse earthly and spiritual 'authorities' had extensive powers of sanction. The catalogue of executed punishments offered a true cabinet of horrors.

During the old times of absolute state power, abuses, such as the *lettres de cachet* (blank orders of the French king to detain people, which could be bought with money, and which could be arbitrarily filled in), could still be explained on the basis of the omnipotence of the king, subject to no control. Both Montesquieu's separation of powers and the doctrine of the social contract, however, stand in tension with treating citizens in an arbitrary manner in criminal matters.

The separation of powers entails that the administration responsible for criminal justice is bound by the word of the legislature, the law. In terms of the law the judge in criminal matters must ensure that the rights of citizens are not violated. Fundamental in this respect are the boundaries of the social contract. The power monopoly of the state should protect citizens' rights against murder and manslaughter. This does not fit in well with a right of the state to revert to murder, manslaughter, and abuse in the form of an unrestricted criminal law.

However, with these outlines of the social contract and the separation of powers, the institution of criminal law is not as yet completely established. Beccaria became famous for his elaboration of enlightened principles of criminal law. He was the first to plead for a purely preventative administration of criminal justice. Punishment for him serves no other purpose than the confirmation of the social contract and the general welfare. 'The greatest happiness for the greatest number' as the goal of society and the state was expressed for the first time by Beccaria. Later this principle would become famous through Bentham (see Section 7.2).

5.3.2 Cesare Beccaria

Cesare Bonesana Beccaria (1738–1794) was not only a criminal law scholar, but also an economist. As aristocratic descendant he had a university education and joined a Milanese circle which was known as 'the academy of fists': a society devoted to far-reaching social transformation. Partly because of this he was influenced by Montesquieu, Diderot and Hume. As professor and civil servant, Beccaria concerned himself primarily with economics, in relation to which he advocated moderate liberal views. The book on account of which he instantly became famous (*Dei delitti e delle pene*, or On Crimes and Punishments, published anonymously in 1764) is probably partly the work of the brothers Ferri (the life and soul of the society of fists), who brought him into contact with criminal law. His societal position could have contributed to the fact that his extremely cutting criticism of the then existing administration of criminal justice was not banned, and quickly became generally accepted, more particularly in the circles of the French Enlightenment. Voltaire wrote a eulogising preface to one of the six reprints which appeared in one and a half years, and it was quickly translated into all European languages. The 18th-century codifications of criminal law, and with that the contemporary administration of criminal justice are unimaginable without his work.

5.3.3 Criminal Law According to Beccaria

The last chapter of *Dei delitti e delle pene* consists of nothing more than the following recommendation:

> From what I have written results the following general theorem, of considerable utility, though not conformable to custom, the common legislator of nations:
>
> That a punishment may not be an act of violence, of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws (Beccaria 2004, p. 64).

Nowadays this is so self-evident that one can easily forget how revolutionary it was in the 18th century. Beccaria's book can be read as a contemporary exposition of the principles of criminal law. Many of the wrongs against which he objected have disappeared in modern constitutional states. Torture to coerce 'confessions', no longer exists in civilised criminal law systems. However, other wrongs criticised by him, such as the long lapse of time between the commission of the crime and the imposition of punishment, abuse of detention to serve as punishment, criminal law judges creating law, as well as arbitrariness in sentences, still characterise the contemporary administration of criminal justice. He specifically criticised the privileges which certain classes enjoy in criminal matters. Officially these privileges have been abolished, but even in modern constitutional states it is still a striking phenomenon that more poor than rich people are in jail, whereas nothing indicates that poor people commit more crimes.

The principle of Beccaria's criminal law is prevention. Punishment may, according to him, serve no other purpose than the protection of the general welfare. In his interpretation of the social contract, criminal law is founded on the endorsement of citizens. They have given up as much of their freedom as is necessary to give all others sufficient reason to defend this freedom. This is connected to Beccaria's standard of 'the greatest happiness for the greatest number'. In the first chapter of his *Dei delitti e delle pene* he emphasises this point as follows:

> If we look into history we shall find that laws, which are, or ought to be, conventions between men in a state of freedom, have been, for the most part, the work of the passions of a few, or the consequences of a fortuitous or temporary necessity; not dictated by a cool examiner of human nature, who knew how to collect in one point the actions of a multitude, and had this only end in view, the greatest happiness of the greatest number (Beccaria 2004, p. 3).

In Chapter 2, however, an exposition follows of the social contract as basis of state authority and criminal law. How are these two points of departure to be reconciled? In other words, how does the greatest benefit for the greatest number fit in with the protection of fundamental rights as the central idea of the social contract? Beccaria attempted to resolve this problem by making the greatest happiness of the greatest number into the essence of the contract. Here his 'calculating' view of man and society already comes to the fore. The contracting parties would also be aiming to organise society in such a way that makes everyone as happy as possible, which would include individual freedom rights. They give up a component of their personal

freedom for the sake of the general welfare, Beccaria states. Hence, society had to become an oiled machine, in which the strengths of individual interest merge as well as possible with the general interest. Beccaria appeals to Rousseau (Section 5.5), but his views actually fit in better with those of Hobbes and Locke. Rousseau makes use of the social contract as an allegory for the social nature of man and clearly not as justification for a communal state based on the rational endorsement of calculating individuals. The latter was Beccaria's view.

Criminal law is, therefore, interpreted 'instrumentally' by Beccaria, both in terms of the social contract and the general welfare. The contract does not justify measures which are more painful than are necessary for the protection of everybody's freedom. Stated differently, punishment as deterrence is based on the calculation of the benefit to the general interest. Serious crimes do not as such justify severe punishments, but only if these severe punishments would be necessary to sufficiently prevent those crimes. Beccaria writes in Chapter 6 of his *Dei delitti e delle pene*:

> It is not only the common interest of mankind that crimes should not be committed, but that crimes of every kind should be less frequent, in proportion to the evil they produce to society. Therefore the means made use of by the legislature to prevent crimes should be more powerful in proportion as they are destructive of the public safety and happiness, and as the inducements to commit them are stronger. Therefore there ought to be a fixed proportion between crimes and punishments.
>
> . . .
>
> That force which continually impels us to our own private interest, like gravity, acts incessantly, unless it meets with an obstacle to oppose it. The effects of this force are the confused series of human actions. Punishments, which I would call political obstacles, prevent the fatal effects of private interest, without destroying the impelling cause, which is that sensibility inseparable from man. The legislator acts, in this case, like a skilful architect, who endeavours to counteract the force of gravity by combining the circumstances which may contribute to the strength of his edifice (Beccaria 2004, pp. 9–10).

Beccaria (2004, p. 9) regarded this as 'one of those palpable truths which though evident to the meanest capacity, yet by a combination of circumstances, are only known to a few thinking men in every nation, and in every age'. The quasi-mechanistic, almost scientific, approach to criminal law as *social engineering* cannot be better and more beautifully expressed. In this respect Beccaria is a typical representative of the optimism of the scientific Enlightenment.

The application of punishments as 'obstacles of social-political nature' is, according to Beccaria, not to be determined on the basis of intent and fault. The deterrent effect would, after all, disappear if punishment is, because of the absence of fault, not imposed on facts which, because of their external characteristics, are punishable. Moreover, good intentions can have evil consequences, and 'wicked intent can, viewed socially, bring about the happiest consequences'.

Beccaria was, moreover, the first to publicly turn against the death penalty. Whatever else citizens may have transferred to the state with the social contract, the right over life and death was not included. Otherwise the social contract would have no meaning at all. It after all serves to safeguard the quality of life of citizens.

Beccaria ruled out torture as a means to coerce 'confessions', just as corporal punishment. Imprisonment is sufficient, and minor transgressions must be threatened only with a fine.

According to Beccaria, all of this must be laid down in clear laws. Codification is a necessary condition for the reasonable administration of criminal justice. Citizens must be able to know what is punishable and what not, if there is to be legal certainty, and if punishment is to have a deterrent effect as a well-known prospect. Codification is at any rate the only way by which to exclude arbitrariness in criminal law. The task of the criminal law judge does not go beyond establishing whether or not the accused has contravened the law.

Beccaria is, similarly, the pioneer of the modern law of criminal procedure. Criminal proceedings, according to him, not only serve the purpose of punishment as deterrent, but also the protection of the accused, and with that the interests of all citizens. In criminal procedure Beccaria does not, therefore, deviate from the notion of utility on which his whole criminal law is based. Moreover, the ratio of prohibitions, such as that against torture to force the making of desired statements, is not only legal protection of the suspects, but also the rationality of criminal law as deterrent for the purpose of prevention. Punishment of criminal acts which are not established in a way that is acceptable to all does not work, but simply sows unrest and fear.

In criminal procedure Beccaria turns specifically against the abuse of coercive measures. The prosecuting authorities may not detain any suspect unless there are sufficient grounds for the suspicion of such person. If there are reasons to arrest someone, then coercive measures, such as detention, may serve no other purposes than procedural ones. Coercive measures are not punishments, because the latter can be declared only by a judge after the impartial investigation of the case. The separation of powers is here of great importance: see Section 5.3.5.

5.3.4 Instrumental Criminal Law and Individual Justice

Beccaria's founding of criminal law on the consent of citizens is not very convincing. In the first place, the same arguments apply here which are generally raised against the social contract: such a contract was never actually concluded, and a hypothetical contract cannot be binding. Such objections apply even more so to criminal law, because of its far-reaching consequences for citizens. The consent can, in the second place, just as little be said to have been implicitly given by the offender, in the fashion of 'volenti non fit iniuria' ('whoever willed it himself is not done any injustice'). A person who knows that punishment is a consequence of crime and still commits a crime, would in terms of this reasoning himself have taken the punishment to boot as an 'impediment of a socio-political nature'. However, on the basis of this principle, the death penalty in the event of damage to property can similarly be justified. Even if the state provides citizens with a free choice, the quality of such choice is co-determined by the options from which the choice can be made. A third interpretation, in terms of which the consent of citizens about criminal law is obtained by way of democratic legislation, is the least implausible. However, even

democracy can trample underfoot the rights of suspects and citizens in a criminal law system which, apart from democratic legitimacy, has no other reasonable foundation. The only way that the social contract may still work as a hypothesis is by viewing it as a metaphor for reciprocity: each citizen has good reasons to agree with its conditions, provided all others do the same. But the utilitarian reasons proposed by Beccaria are not good enough.

Beccaria's endorsement of prevention as the only goal of criminal justice runs into problems as well. Small violations can occur so often that they amount to a serious wrong. Severe punishment could make an end to this, but is this just? Beccaria states that the seriousness of the punishable fact is determined by the harm to society, and that the harm is determinative for the punishment. In this hides an unexpected ambiguity. For example: a single act of tax evasion does not cause serious harm, and does not, therefore, legitimate a severe punishment. For the concrete consequences of such a singular fact it does not matter much whether or not others evade tax as well. However, if many people evade tax, the social harm is certainly serious, and it does appear legitimate to impose severe punishments: light sentences seemingly do not work well enough. Severe punishment of serious wrongs committed by means of many recurrent small violations can, taken as a whole, be effective, but are for this reason still not just in a retributive sense. The individual perpetrator does not have to take the blame for the consequences of the crimes of (many) others. Even if Beccaria did not intend such a result, his criminal law theory does not exclude this possibility.

Fair punishment, moreover, needs to correspond not only with the seriousness of the delict, but also with the degree of fault. Beccaria attaches no importance to intent and fault for punishability. From a preventative, deterrent viewpoint this is understandable, but here, too, calculated rationality stands in opposition to justice. Beccaria stated that telescopes and quadrants are not necessary to see the enlightening quality of his model of criminal law. This shows that the quasi-mechanistic balancing of social interests stands at a loss in relation to the conflicting notion of justice which in this context requires the legal protection of individuals *against* the general interest.

Many scholars of criminal law since Beccaria have resisted a purely preventative system of criminal justice, with an appeal to the notion of justice as retaliation. Then punishment does not amount to *social engineering*, that is, deterrence as a calculated expression of social welfare, but to retribution. This retribution is irrational, in the sense that it cannot be justified on the basis of any calculation of welfare. Retribution nevertheless amounts to justice if understood in a certain sense: it is 'making good again' of what went wrong, by making the perpetrator suffer in a similar manner the wrong of his crime. This can detract from 'the greatest happiness for the greatest number'. From Hegel (Section 7.3) originates the seeming contradiction that offenders are precisely because of the punishment viewed as full human beings (they are held personally responsible for their acts), whereas in a preventative system of criminal justice they are nothing but instruments of the public good.

Moreover, to this very day, it is contended that punishment as a preventive measure is irrational because the administration of criminal justice is not effective. Even

if no objection could be raised against the prevention of punishable facts to promote the general welfare as a general principle of criminal law, then the question remains whether criminal justice fulfils this purpose. Not only abolitionists (advocates of the replacement of criminal justice by alternative measures against crime, such as mediation), but others, too, state that the sum total of all the consequences of criminal justice probably adds up to a negative balance. Stated differently, the prevention of the suffering caused by crimes by means of the preventative system of criminal justice does not weigh up against the suffering caused by punishment, specifically imprisonment.

Should retribution then be the foundation? But how does one justify the reproduction of suffering that has already occurred? Moreover, modern criminal procedure since the 18th century contains elements which do not fit well with the idea of punishment as retribution. The principle of expediency provides that those suspected of punishable facts can escape prosecution if this is required by the general interest. This is an instrumental principle, falling within the scope of the idea of the administration of criminal justice as prevention in the promotion of the general interest. The principle of retribution requires that every guilty perpetrator has to be punished. This likewise applies to the possibility (existing in practically all modern constitutional states) of suspended sentences, which makes sense from a preventative perspective, but which is not reconcilable with the notion of retribution.

Unified theories are attempts to make prevention and retribution coincide. The successes of the two approaches would be able to solve the individual problems of each theory *and* bring about more unity in the domain of criminal law. Hence, punishability could be determined with reference to standards of retribution, whereas sentencing could depend on social benefit. Such attempts at reconciliation disregard the fact that important problems in each of the two approaches cannot be resolved in this way. For example, sentences which are based on the social benefit of deterrence remain disproportionate to the seriousness of the individual punishable fact; and retribution can appear obligatory for punishable facts where no danger at all exists of repetition. This problem may be solved by a further fusion of retribution and prevention in the assessment of the penalty. On the one hand, the sanction should not be more severe than is required for prevention; on the other hand, it should not exceed what is proportionate to the seriousness of the crime, as retributive justice demands. Beccaria also has been regarded as one of these unifiers. His book must, however, be placed unread on the rack to force it to have such an import.

5.3.5 Separation of Powers and Codification

Criminal law is a textbook example of the importance of the principle of separation of powers. The legislature determines in general terms which facts are punishable and which punishments are appropriate (substantive criminal law), as well as the way in which criminal law may, and must, be maintained (criminal procedure). The executive power prosecutes and punishes crimes, the judge sees to it that the law is complied with in this regard.

Punishment is the worst thing that can happen to the citizen through the agency of the state. Even if corporal punishment and the death penalty are prohibited, the consequences of imprisonment and arrest are in general serious and irreversible. Arrested citizens run the risk of stigmatisation for life. Judicial supervision of the prosecuting authorities is therefore important. For this reason, already since the 18th century the principle applies that lengthy limitations of freedom, for example through temporary detention, must be approved by an (examining) judge or magistrate. The restriction of freedom may, furthermore, not amount to punishment. Coercive measures during the procedure may serve only to promote the administration of justice, for example, to prevent the suspect from fleeing or interference with the obtaining of evidence. Punishment may be imposed only when a judge or magistrate has decided about the legality of the claim of the prosecuting authorities. The petition to punish is partly determined by appropriateness. It is after all the task of the prosecuting authorities to represent the public interest.

For the protection of the accused and, as a consequence, of all citizens against the state, the judge or magistrate (in some countries a jury fulfils certain of these functions) has at least three tasks. He must evaluate the evidence; determine whether the proven facts amount to an offence in terms of legislation or the common law; and determine an appropriate punishment. The independent judge stands above the (unequal) dispute between the prosecuting authorities and the accused. He can, however, be impartial only if he can appeal to the law as guarantee against arbitrariness. The codification of criminal law and criminal procedure, already pleaded for by Beccaria, is, therefore, closely connected with the important notion of separation of powers.

This applies equally to other domains of law. The great codifications in Continental Europe in the 18th century were not only intended to provide legal certainty to well-intentioned citizens. Statutory law has to ensure that disputes between citizens and the state in criminal law, and amongst citizens themselves in private law, are resolved on the basis of a law knowable by all, and not by virtue of the political preferences of the judge. Nevertheless, codification in criminal law is much more important than codification in other legal domains, on account of the principle ‘no punishment without preceding law’. In order to protect the individual citizens against the overwhelming power of the state, criminal law requires a strict application of the principle of legality.

5.4 Natural Law, Enlightened Science and Cruel Arbitrariness

We said before that the laws of the legal order and of morality cannot be equated with the laws of nature. The equation is an Aristotelian inheritance, in respect of which some philosophers of the Enlightenment are less modern than it appears. This plays a role with Beccaria as well. The Enlightenment in general deals poorly with the relation between value-free empirical science and normative views of political and personal life, including, specifically, fundamental rights. The Enlightenment

philosophers expected that progress in scientific knowledge would similarly bring about social and moral progress. However, science and normative views are categorically separated. Empirical science can at most show which means lead to the achievement of specific goals, so that man can improve his control over the world. Natural science summarises causes and effects in general laws: in the event of cause a, then always consequence b. The causes can be utilised as means: a person who aims at b, must do a. Technology is 'reverse' natural science. Viewed thus, the industrial revolution which started at the end of the 18th century is not conceivable without the physics of Newton.

The *Encyclopédie* is permeated by optimism about the application of the new science. It is the first major work in which science and technology, theoretical knowledge and practical crafts and arts, were brought together in a unity. The optimism was partly justified. Never before had people succeeded in having such complete control over nature. All the same, empirical science can determine only the means for a predetermined goal. The goals as such must have other grounds. Scientific knowledge can, moreover, be utilised for very diverse purposes, both good and bad. Medical knowledge makes it possible to heal people, but also to wage bacterial war. In so far as the Enlightenment philosophers invoke empirical scientific ideals, the underpinning of their emancipation ethics remains at risk.

This also appears from the ease with which some 18th-century philosophers could overturn existing moral views by applying the materialistic worldview of natural science to human beings. De La Mettrie, for example, contested in *L'homme machine* (Man, the Machine, 1747) the traditional dualism of body and soul. He denied that apart from matter, that is, the object of natural science, an incorporeal reason exists. The spiritual side of human beings is not something independent, separate from the body. Human thinking is, according to him, a natural physical process: man is nothing more than a machine. On account of this materialistic portrayal of mankind he viewed religion as meaningless, just like the moral feelings of guilt and remorse that would belong to the same category. De La Mettrie developed an ethics of unlimited pursuit of individual pleasure. This can, from the point of view of traditional ethics, have immoral consequences: I sacrifice you for my pleasure – this radical conclusion was, in as many words, drawn by Sade. However, on closer inspection, even this alternative ethics cannot be founded on an empirical view of man, irrespective of how materialistic it is: from the fact that man pursues pleasure it does not follow that he should do it.

The same applies to the theory of the infamous Marquis de Sade. Sade took the materialistic view of man and world to its logical conclusion, with the intention of overturning all traditional Christian values. In his arrogance man believes unfairly that with his reason he stands above matter, maintained Sade. Nature, including man, is, in his view, simply a meaningless coming into existence and demise of matter. Constructive activities are, therefore, as 'natural' as destructive ones. To murder someone, for nature simply means that its matter is being rearranged. Why then not give nature a helping hand? Because of this, Sade recommends an ethics which has since then become known as *sadism*: torturing, burning, killing, as long as the perpetrator experiences enjoyment in doing so. Empirical nature, after all, shows

that the strong utilise the weak for their own pleasure. For sadism, however, the same applies as for the pleasure morality of De La Mettrie: it is as much founded on a one-sided selection from a totality of natural phenomena as its converse, the neighbourly love of Christians and the equality ideal of the Enlightenment philosophers.

In this modern amoral view nature includes everything that is observable. Therefore, it does not provide any standard with which to choose one observable phenomenon rather than another. From an ethical perspective, out of nature everything and, therefore, nothing can be derived. This affects the foundations of the Enlightenment belief in progress, as progress in science does not entail moral progress. This tension between emancipation and nihilism likewise dominates the contemporary discussion concerning *postmodernism*, which raises the question whether the project of progress of the Enlightenment still has a chance of success (modernism), or whether it is ultimately doomed to fail (postmodernism, see Section 9.1.4).

5.5 Rousseau: Nostalgia for Natural Security

5.5.1 Rousseau's Life and Work

Criticism of the Enlightenment with a less nihilistic import was developed by Rousseau. Rousseau, too, firmly contested the belief that reason and science bring about progress for humanity. Rousseau was a highly original thinker. He cannot really be compared with his predecessors and contemporaries. He led a restless and adventurous life, continually fleeing from real or supposed enemies. His life and many of his (often autobiographical) writings create the impression that he felt nowhere at home. His criticism of society partly stems from this, even though the plausibility of the critique cannot be evaluated in terms of his character. Rousseau was not an academic philosopher. By virtue of birth and character he did not belong to the *beau monde* (fashionable society) that he hated so much. The concept of 'alienation', which is so important for modern political and moral philosophy, Rousseau experienced personally.

Jean-Jacques Rousseau (1712–1778) lost his mother a few days after his birth in Geneva. He was brought up by an aunt and by his volatile father. He never had the benefit of much formal education. After a series of unpleasant dealings with employers and other unhappy adventures, Rousseau fled from Geneva. The protection and friendship of Madame de Warens had a great influence on his life, but he continued to lead a nomadic and restless life. He, nonetheless, in 1743 became the secretary of the French ambassador in Venice. This, too, did not last long, because, after a quarrel with his employer, he had to leave. Ending up in Paris, he started a relationship with the illiterate Thérèse Levasseur, with whom he appears to have conceived five children. They all ended up in an orphanage. In the meantime Rousseau met important *lumières*, such as Diderot and d'Alembert, who ensured that Rousseau could write for the *Encyclopédie* about music.

Rousseau's literary career started in 1750, with the award-winning *Discours sur les sciences et les arts*. His opera, *Le devin du village* (the fortune-teller of the town), was performed in the presence of Louis XV. Rousseau, however, did not want to be introduced to the king, and consequently forfeited his chances of money and honour at court. After various meanderings he settled down, from 1756, in a country house of another rich French female friend. Until 1762 he wrote there his most important books, including *Emile* and *Du contrat social*.

Rousseau increasingly started to have quarrels, even with the *Encyclopédistes*. His books were banned, and eventually he ended up in England as guest of the philosopher David Hume. Again, Rousseau did not bear it for long, and this was definitely not the fault of his kind-hearted host. He fled once more and eventually arrived in Paris. At the end of his life his work became increasingly autobiographical. In his attempts at self-analysis, the tragic gift for paranoia reappears. A feeling of security was never set aside for Rousseau. This plays an important role in his political work as well. The life and work of Rousseau were determined by a desire for natural security. (Perhaps Rousseau would have written nothing of importance if his mother had been there for him.)

5.5.2 Feeling Versus Reason: The 'Natural' and the 'Civilized' Person

Rousseau disliked rationalism and the individualistic liberties of the Enlightenment. Nonetheless, he was a passionate advocate of the freedom of man, freedom from the frequently inhumane power structures of the society of his time. His conception of freedom is, however, different from that of the liberal Enlightenment. In his two most important books, *Du contrat social* (The Social Contract, 1754/1762) and *Emile ou de l'éducation* (Emile, or On Education, 1762), he states that freedom does not entail *not being obstructed by others* (an individualistic, egoistic view), but *living in natural conditions, together with other people, in a world which is suitable for human beings*. In other words, Rousseau advocates man's *essential freedom*, rather than the negative liberty of liberalism.

Rousseau's thinking is strongly influenced by the idea that culture and civilization are not merely good for human beings. Cultural products, such as science and art, can after all be employed for bad purposes as well. In Rousseau's view, man has increasingly strayed from his natural existence, as his social environment is increasingly determined by culture. In a society in which one can become rich at the expense of others, the natural inclinations of man have degenerated into unrestrained greed and desire. By contrast, in Rousseau's view man has a good nature. Man in his natural state finds the suffering of others abhorrent. He, moreover, has *amour de soi*, self-love, which according to Rousseau constitutes the essence of human existence. However, in 'civilized' societies the *amour de soi* has degenerated into *amour propre*, empty vanity. In their natural state people are free and equal. This comes to an end as soon as, together with society, private property comes into existence. This

results in economic and social inequality. Legislation is introduced to maintain discrepancies in property ownership. Jealousy and an egotistical drive for possessions are the consequences.

Rousseau did not contend that his natural man ever really existed. His criticism of the society of his time was not of a historical nature. His idea of the natural man is a reconstruction: who is the man who hides behind this illusory culture, the crass differences in income and power, the abuse of reason, and the fine arts of modern times? According to Rousseau, man is not by nature the way Hobbes had sketched him: in the first place a rational individual who is in search of his own advantage, if necessary at the cost of others. Egoism is not the most natural tendency of man, but an invention of the modern, rationalistic science which dissects everything into individual and other elementary particles. By nature man is not primarily a rational being, but a being with feelings, with real self-love, self-respect and natural sympathy for others. This self-respect is destroyed by a culture of ostentatious display of money and power of the few that contrasts with the poverty and suffering of the many. The rich suffer because of this as well: they think they are better off, but their supposed self-respect is just as inauthentic as their relations with their subordinates. In his satirical narrative *Candide ou l'optimisme* (Candide, or, Optimism, 1759) Rousseau's contemporary, Voltaire, expressed this as follows:

> [I]n the cities, where people appear to live in peace, and the arts flourish, men are devoured by more envy, worry, and dissatisfaction than all the scourges of a city under siege. Secret sorrows are more cruel even than public tribulations (Voltaire 2006, p. 53).

Rousseau thought that the education of young people could give rise to a more natural, authentic society. Indeed, one of his well-known books deals with education: *Emile ou de l'éducation*. According to Rousseau, education should serve as a counterweight to the alienating elements of modern society. Children should not be exposed to the wisdom of books, but must through personal experience learn to know their place and their abilities in natural reality. Rousseau is one of the first scholars of modern times who emphasised the fundamental importance of childhood. If children are given the opportunity to find their place in the world on the basis of their personal experience, they will develop a natural feeling of compassion for, and unity with, other people. Education must recreate the conditions of natural man in the 'civilized', and in many respects degenerate, modern society. Against the rationalistic fashion of his time, Rousseau made it clear that children are much more than beings with an inborn reason. His insight that the circumstances of early childhood have a substantial influence on later life, was revolutionary as well. The social and political importance of education became increasingly clear in subsequent centuries, for example in the psychology of Freud (Section 8.2).

5.5.3 Politics, Law and State

The title of Rousseau's most well-known work, *Du contrat social*, makes one suspect that he was an adherent of the doctrine of the social contract such as one finds

with Hobbes and Locke. His view on law and the state is, however, quite different from classical contract theory, which seeks to explain why citizens must obey governments, as well as what justifies the existence of governments and of state coercion. In Rousseau's view, Hobbes explains this as follows: Life in an unorganised 'society' of individuals is 'nasty, brutish and short'. The natural egoism of the individual drives him to serve his own interests at the cost of others. He can, however, in turn become the victim of still stronger individuals. People, therefore, out of personal interest reach an agreement, leading to the establishment of a power monopoly, a state. Hobbes thus bases his contract theory (according to Rousseau) on a modern, individualistic portrayal of mankind. The individual is by nature free, and is primarily led by rational self-interest. By nature he is not bound by social obligations. For this reason he can only by virtue of agreement be obliged to obey the state.

Rousseau's views of the state are far removed from this individualistic and egoistic point of view. According to him, egoism is not a natural inclination of man, but a product of 'civilization'. His view of the state is the opposite of that of Hobbes and his kindred spirits. According to Rousseau, it is precisely modern society which corresponds to the nasty, brutish and short life that Hobbes wrongly ascribes to the state of nature, degenerate as it is because of extreme inequalities in power, status and wealth. Classical contract theory reversed the order of things. According to Rousseau, man's natural way of life, not as yet degenerated by culture, is his ideal state. Modern societies and states are not legal institutions called into being by means of agreement to promote individual interests, but the means of power of the few at the cost of the many which are not consciously willed by anyone.

Rousseau specifically turns against the atomism and individualism of his predecessors. Philosophers like Hobbes and Locke assume that societies and states do not add or subtract anything substantially to or from individuals. In their views of the social contract, states are nothing more than external and accidental means for the protection of individual interests. Viewed historically, different states have arisen from the most diverse causes and backgrounds which may be illegitimate from the perspective of the social contract. Yet the justification for states, according to contract theory, is based exclusively on the shared self-interest of all individuals.

Rousseau contends that man is essentially a communal being. By nature, man lives in his family, in a secure environment, without any fundamental differences in views and goals. By virtue of the recognition of his fellow human beings, man can be himself. Rousseau extends this image of the happy family to society as a whole. A society is not an arbitrary gathering of (more or less) reasonable individuals, but an authentic community with shared backgrounds in language and other forms of culture. People find their identity in their life with other human beings.

Here again Rousseau's distaste for narrow rationalism with its emphasis on rational self-interest shows itself. People are primarily beings of feeling, aimed at, derived from, and shared with, their fellow human beings. They derive *amour de soi*, positive self-love and self-respect, from the natural sympathy of others. One can only have self-respect if one is respected by others. Modern individualism, then, does not portray the true nature of man, but, conversely, shows his alienation from

natural society. In the ideal community no distinction between society and the state exists.

This distinction was essential for Rousseau's rationalistic and contractualist predecessors. In their view, society (the totality of human and social relations) is legally and politically of no relevance, and the state (the juridical-political organisation of social life) is nothing more than an arbitrary means to guarantee individual interests. Rousseau, however, maintained that, in a good society, state authority must merge with the natural authority of the community. This is what he meant by his 'social contract': by virtue of proper deliberation between all members of society the common will comes to light, the *volonté générale* of the community. 'Each of us puts in common his person and all his powers under the supreme direction of the general will; and in our corporate capacity we receive each member as indivisible part of the whole', he writes (Rousseau 1986, p. 16). The social contract is thus for Rousseau a metaphor. In the first place, it is not a contract in the sense of a consensus *ad idem* between individuals, but an expression of the *volonté générale*. In the second place, actually existing states are not in fact based on the sovereignty of the people.

Rousseau draws a strict distinction between the *volonté générale* (general will), the will which everyone forms from the general, societal point of view, with an eye to the general welfare, and the *volonté de tous* (will of all), the highest common factor of conflicting individual interests. The individualistic contract theory is based upon the *volonté de tous*. According to Rousseau, people would adopt the viewpoint of the *volonté générale* when they had an equal voice in the state. State and community merge in the ideal society. Actually there is then no real state, for the people themselves are the sovereign. (Rousseau was probably influenced by his experiences in Geneva, then a city-state with a direct democracy.)

Rousseau had a different view of democracy than rationalistic and individualistic political thinkers. Democracy is for him not a mechanism to determine the interests of the majority (*volonté de tous*) as a kind of sum total and compromise of arbitrary individual interests. It is a fundamental form of human relationship. Through proper deliberation the true interests of the individual and of society must be expressed and realised: the *volonté générale*. Everyone will be in agreement with this, because everyone forms part of the community, and likewise of the general will. When the condition is fulfilled that everyone votes from the shared point of view, then, in the event of a lack of unanimity, the majority can decide. Then the minority will recognise that they have been mistaken.

Rousseau uses his idea of the ideal society to evaluate actual states. Obviously, in large societies a direct democracy is not possible. The distaste of Rousseau for modern civilization is related to his misgivings about large states. Such states he distinguished from societies. Actually, the distinction should not exist, but modern states do not have much success with the *volonté générale* so that it would be misleading to equate them with societies, and even less so with the true society of people. Nonetheless, they should as much as possible approximate the spirit of the *volonté générale*.

Rousseau, however, does not attach any revolutionary consequences to the deviation of most actual states from his ideal of community. He rather emphasises the

importance of education, which would lead to a better man, and thus to a better society and state. Rousseau expects that after a revolution the same wrongs would occur again sooner or later. Attempts to transform society on the basis of scientific rationality, moreover, would result in an even greater suppression of spontaneous, instinctive human nature.

Rousseau's communal theory stresses the dependence of individuals on societal bonds. This is of course not to say that Rousseau agreed with the societies of his time, because these were based on oppressive inequality instead of brotherly equality. Revolutions, however, often lead to the temporary destruction of social institutions. People are much more dependent on these institutions than they think. An example: corn traders and other exploiters were during the French revolution violently removed from the scene. This, however, meant that storage, transport, and the sale of corn and other means of life, also came to a standstill. As a result an inestimable number of people died of starvation. By wiping out the exploiters the people unconsciously signed their own death warrants.

5.5.4 Commentary

In the individualistic liberal tradition the freedom of the individual means the absence of coercion by others. Individuals are free to do what they want, as long as they do not harm other people. They themselves must decide what they do with their own freedom. The liberal theory of the social contract is closely related to this 'negative' view of freedom. Individuals conclude an agreement so as to ensure that they can do and leave what they want, without being obstructed by other people. The state must then guarantee that citizens respect the freedom of their co-citizens. The social criticism of Rousseau is in direct opposition to this view of freedom. In his view, people mistakenly think that they are free when they choose to do hard and exhausting work to accumulate material riches. Actually this makes them slaves of their culture, where material riches serve as the criterion for the respect accorded to others in light of the absence of authentic foundations of self-respect. In this 'development' of culture people have acquired all kinds of unnatural and selfish desires and inclinations that destroy their natural freedom.

Freedom is not only externally directed, but has an internal aspect as well. People cannot be free as long as they have arbitrary goals, desires and inclinations. In Rousseau's view, true freedom means having proper, human goals, in harmony with the social nature of man. The true, essential freedom of man entails living in accordance with the *volonté générale*, free from unnatural selfish inclinations. People are free when they are in agreement with each other, and when they have found true harmony with nature.

This view of freedom as living in accordance with one's true nature appears convincing at first sight. Is an appeal to the 'true nature' or 'essence' of human beings not, however, based on a subjective, normatively tainted selection from the totality of human nature? This may explain how it is possible that Rousseau and Hobbes

can propound such completely opposing views of human nature. Is the *volonté générale*, the 'general welfare', indeed something objective? Rousseau does not make it clear what the 'true will' of human beings entails. Neither does he escape from the difficulty of modern thinking: from the facts of man and society, such as man's natural state, norms and ideals cannot be derived. The *volonté générale,* then, entails something arbitrary.

Anarchists have just as convincingly appealed to Rousseau as have adherents of totalitarian regimes. Anarchists often allege that suspension of the state would bring to light the authentic human being. In Rousseau's footsteps they assume that man is good by nature. If only people were freed from suppression by state and society, they would act in a humane way, thereby exposing the superfluity of government. In *Du contrat social* Rousseau, however, tends towards a moderate totalitarian view, rather than to anarchism. He fears that, should the state disappear, the right of the strongest will fill the vacuum, so that the consequences of human egoism will be far worse in anarchy than in the state. Rousseau does not expect people to suddenly reacquire their natural goodness as soon as the state vanishes.

By means of his ideal state, Rousseau wants to steer society and culture in the right direction, back towards natural harmony. He holds the paradoxical view that people can be forced to be free. 'True freedom' requires a way of life based upon authentic aspirations that strongly diverge from the preferences that most people hold on to in their actual lives, such as their desire for personal enrichment at the cost of others. The state, as expression of the *volonté générale*, must, if necessary by force, ensure that people return to their natural existence and rediscover their true freedom. Rousseau's essentialist ideal of freedom, then, runs the risk of turning into totalitarianism.

5.6 French Revolution: The Declaration of the Rights of Man and of the Citizen

Montesquieu's and Rousseau's opposition to revolutionary change did not prevent the occurrence of violent upheaval at the end of the 18th century. Unlike the situation in England, French political life had not gradually adapted itself to the new circumstances. The middle class had acquired great economic power, but this was not translated into political and social rights. Because of maladministration by the king, the national debt had grown enormously. Attempts to convince the nobility and the priests to pay taxes were rejected as a violation of ancient privileges. The middle class was disgruntled because now they were saddled with all the taxes. In the end, in 1789, the Estates General was convened for the first time in a long while. Half of the representatives supported the Third Estate, but because voting took place per estate, they nonetheless were in a minority. For this reason the Third Estate separated from the rest. They named themselves the National Assembly, and swore not to adjourn until France had a constitution. When the king prepared to

take action against them, a popular revolt broke out on 14 July, which spilled over to the rural areas where peasants killed many of the nobility. In the same year the liberal *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and of the Citizen) was promulgated. In 1791 the Constitution was adopted, and in 1792 the First French Republic was instituted. The king lost his head on the guillotine.[6]

That philosophy can influence social reality was shown when the privileges of the monarchy and the nobility were replaced by the *Déclaration*: the Enlightenment ideals were now actually incorporated in the French Constitution. Although both Rousseau and Montesquieu had rejected the right to revolt, the revolutionaries adopted many of their other ideas. Indeed, the *Déclaration* consisted of a mixture of a liberal constitutional state (à la Montesquieu) and democracy (à la Rousseau).

According to article 1 all men are free and equal in rights (social distinctions are allowed, but exclusively for the sake of the general welfare). According to article 2, the goal of the state is to maintain the natural rights of man, that is, freedom and property. Article 4 gives a liberal definition of freedom: the ability to do everything which does not harm others. Article 5 implies limited government based on the rule of law: the state may only infringe someone's freedom on the basis of a law; and such a law may be enacted only to prevent social harm. Article 16 requires separation of powers as the guarantee of fundamental rights. The protection of natural rights is proclaimed in article 10 (freedom of opinion), article 11 (freedom of expression) and article 17 (protection of property). These articles imply a liberal constitutional state in the sense of Locke and Montesquieu. Beccaria, too, could have been the author of a part of the *Déclaration*. Article 7 prohibits criminal prosecution, arrest, and detention outside of the law. In terms of article 8, the law provides for no other punishments than those that are strictly and clearly necessary. In the same article the principle of legality is laid down: no punishment without a preceding and properly promulgated law. Article 9 prescribes the presumption of innocence, and prohibits coercive measures that are not strictly necessary for the trial of the suspect. These articles replaced the arbitrariness of the criminal law of the pre-revolutionary absolutist state with the rule of law of the constitutional state, at least on paper.

Democracy à la Rousseau is prescribed by article 3 (sovereignty belongs to the people) and article 6 (legislation is the expression of the general will; all citizens have the right to participate personally or by means of their legislators in the enactment of legislation; and have an equal right of access to official positions). Differing from what one finds in Rousseau, the sovereignty of the people is limited by the rule of law: articles 3 and 6 are contextualised by articles 2 and 16, which define the purpose of state and law as the protection of the inalienable human rights of article 1. The same is expressly stipulated in the Preamble to the *Déclaration*:

[6] A recently invented, very effective mechanism, which replaced the imperfect handiwork of the former executioner. The guillotine had humane intentions because the executioner sometimes chopped inaccurately. The effectiveness of this new execution mechanism, however, also encouraged an increase in death penalties, as the next few years would illustrate.

> The Representatives of the French people, organized in the National Assembly, considering that ignorance, forgetfulness, or contempt of the rights of man are the sole causes of public miseries and the corruption of governments, have resolved to set forth in a solemn declaration the natural, inalienable, and sacred rights of man, so that. . .the acts of the legislative power and those of the executive power, may at each moment be compared with the aim of every political institution.

Irrespective of its grand name, the *Déclaration des Droits de l'Homme et du Citoyen* in fact had a limited import. It was primarily a declaration of the freedom rights of the well-off male middle class in opposition to monarchical despotism and the privileges of the traditional estates. Equal rights for women were brushed aside. Social fundamental rights were absent. The draft of the *Déclaration Jacobine* of 1793, which included socio-economic rights, such as the right to work, to payment in the case of labour incapacity, and to education, never came into effect.

Moreover, of the freedom rights of the middle class, little soon remained in revolutionary practice. The reality of the French revolution was far removed from the spirit of the Enlightenment. The horrors that the Parisian revolutionaries indulged in, in the name of the good cause, against real and supposed opponents from reactionary *and* revolutionary circles, are well-known. Less well-known are other brutalities which the anti-revolutionary arguments of Montesquieu and Rousseau had warned against.[7] In Vendée and other parts of France (catholic) revolts against the (secular) revolution were suppressed without mercy.[8] In the name of the revolution and against the exploiters, traditional trading structures in rural areas were destroyed, as a consequence of which countless numbers of people died of starvation. The poor became the victims of the complete devaluation of the *assignat*, the paper money of the Revolution.

The contradictions of the Enlightenment came to the fore most clearly during the rule of Robespierre and his kindred spirits in the reign of terror of 1793. The sadistic side of the Enlightenment was confirmed in a horrific and absurd way. In the name of the good cause Robespierre protected the people by playing rival parties off against each other in order to destroy them. In the meantime, upper limits were laid down for prices and salaries, the decimal system and the Republican calendar were introduced, starting with the year one, as well as a Religion of the Supreme Being (which replaced a Religion of Reason which had been introduced earlier).[9] The ideals of the

---

[7] The famous conservative Burke wrote in *Reflections on the Revolution in France* (1790): The French revolution is a 'strange chaos of levity and ferocity' (1982, p. 92), and amounts to a disregard of the value of the historically grown, extremely complex interaction of forces on which the institutions of society are based.

[8] Around the time of the celebration of the bicentenary of the French revolution in 1989, public conflicts broke out concerning the disappearance from official historiography of what has been termed the first genocide in modern European history. In Vendée, for example, the populations of whole regions were eradicated by drowning them in tightly sealed river boats. According to current estimates, more than a million people met their deaths in these cleansings, which matches the deaths due to famine.

[9] This was based on the pragmatic consideration that the people require religious rituals, even if these do not have any truth value.

Enlightenment had acquired a violent relentlessness. The idea of social engineering of a pliable society was promoted at any cost, as if, with the revolutionary calendar, human history likewise made a new start. Rousseau's ideal of the *volonté générale* degenerated into the exoneration of arbitrary violence against anything which did not seem to fit. In the *Déclaration* the general interest and fundamental rights were still posited on an equal footing, but in practice a still more utopian 'general interest' was implemented at the cost of the fundamental rights of 'opponents of progress': the revolutionary elite set themselves up as the true representatives of the general will of the people, who should not be hindered by constitutional limitations.[10] With the removal and death of Robespierre in 1794, the French revolution had actually run its course. Soon it was time again for monarchical despotism. After a coup d'état in 1799, Napoleon crowned himself Emperor in 1804, and when he was defeated in 1815, a restoration of the pre-revolutionary monarchism took place.

The *Déclaration* nonetheless continued to exercise a great influence as the model of an ideal constitution. Later in the 19th century the liberal fundamental rights and constitutional bodies were taken up anew in the French Constitution, and positivised in the constitutions of most other Western European countries. In the United States of America, after a war of independence against the colonial motherland England, a liberal constitution had been introduced as early as 1787.

5.7 Continuation of the Enlightenment

Napoleon is reported to have said about Rousseau and other intellectuals of the Enlightenment, that the Bourbons (the French kings) should have looked better after their inkpots had they wanted to stay in power. The historical influence of the Enlightenment is indeed significant. Not only the French *Déclaration* and the *Declaration of Independence* of the United States embraced the ideas of the Enlightenment. All modern constitutional states rest on a separation of powers à la Montesquieu. Other characteristics of modern constitutions likewise found their first expression in the Enlightenment. Human rights and fundamental rights were extensively discussed in the *Encyclopédie*. The idea of the social contract has been interpreted differently, but always from the basic idea that a government can derive its authority solely from the consent of the citizens. Only in a democracy is this consensus guaranteed.

The dark side of the French revolution, on the other hand, was inspired by the 'horrible simplifications' of radical Enlightenment philosophers. Think, for example, of Robespierre's elimination of supposed opponents of progress. Around the middle of the 18th century two camps had emerged in the French Enlightenment. Some thinkers were imbued with the statement of Francis Bacon that reality is much

[10]The Cambodia of Pol Pot's *Khmer Rouge* is the most recent in a long chain of repetitions of the deadly utopianism of the Reign of Terror, as well as of the violent paranoia of the defenders of the revolution against the countless enemies and traitors in their own ranks of the 'true society'.

more complex than the human mind can ever grasp. Therefore they had moderate views about the pliability of society. Montesquieu and Rousseau consequently rejected revolution. The moderates were opposed by 'horrible simplifiers' such as De La Mettrie and Holbach. De La Mettrie's idea that everything could be reduced to plain empirical science incited the revolutionaries to radical social engineering. The revolutionary zeal at the end of the 18th century was infused with the idea that, once ancient superstition and ancient morals and customs had been eradicated by science, the 'enlightened' life could be established by means of a radical methodical approach. Robespierre's terror was thus inspired by the radical revolutionary logic that the emancipation of humanity requires the elimination of all human individuals who stand in its way (in the view of the revolutionary vanguard): a physical version of *Ockham's razor*. Political radicalism cost many human lives, also in later revolutions. In reaction, Kant, as Montesquieu before him, would caution that revolutions may induce the beginning of the end of everything (Section 6.4.1). A century later Popper pleaded in the same vein for gradual social evolution rather than radical revolution (Section 8.4).

Modern science did not make politics, law and personal life easier. To be sure, it did provide a new technology that would bring about the industrial revolution and greatly increased man's control of nature. However, as said earlier, technology cannot set its own goals. As a consequence, modern Enlightenment philosophy exhibits a split nature, the progress of amoral science having a dynamic different to the liberal ethics of emancipation. The progress of science cannot underpin apparently reasonable political and moral ideas, such as the ideal of individual autonomy. Montesquieu attempted to reform law on a scientific basis, but was not sufficiently aware of the fact that his normative recommendations could not have empirical foundations.

The narrow morality of political liberalism seems to fit in best with this dilemma, as some Enlightenment philosophers endorsed in the footsteps of Locke. Since a comprehensive ideal of the good life cannot be derived from empirical science, everyone must be free to choose his own norms and values. The enlightened person is aware of the scientific facts of life, and will be able to obtain happiness by the selection of the appropriate means for the achievement of his goals. The liberal Enlightenment, for this reason, draws a principled distinction between the public domain ruled by the state, and the private domain of individual citizens.

Rousseau advocated different views, which had a significant influence on 19th-century philosophers such as Hegel and Marx (Sections 7.3 and 7.4). Both deny that human existence is determined merely by reason. Like Rousseau, they do not draw a rigorous distinction between man, society and state. Both assume that individuals are in continuous interaction with their culture, society and state. The individual must be understood in terms of his social, cultural and political environment, which in turn is determined by individual actions. The interaction, or dialectic, of parts and wholes in the case of Marx clearly ties in with the ideas of Rousseau: Marx similarly states that modern man is the victim of his social circumstances. Only a 'return' to a natural way of life can bring true man to light. Differing from Rousseau, Marx saw a revolutionary end to capitalist society as the only solution. In Rousseau's times

there was yet no industrial revolution, no proletariat, and no modern large-scale capitalism, as one finds in the 19th century. This also explains the differences in view between Rousseau and Marx.

Rousseau had a major impact on contemporary *communitarianism* (Section 9.1.2). The communitarian critique of the liberal state emphasises the importance of communities and the supporting role of traditions. Many modern communitarians give the impression of being conservative, by agreeing with Rousseau that man and society cannot be fashioned in accordance with rational prescriptions. More so than Rousseau, they emphasise the importance of tradition, and thus of history, as decisive for individuals and their communities. On the other hand, they share Rousseau's criticism of the liberal separation between society and state. This separation characterises the ahistorical construction of the liberal state in terms of a (hypothetical) contract, in which government and state are viewed as a 'service centre'. At any rate, like Rousseau, contemporary communitarians reject the instrumental view of man and society. Man is more than a compilation of goals and means, which can, in keeping with enlightened rules, be joined together and realised. The state is more than a means for the realisation of the goals of an individual. This is too narrow a view of rationality. True citizenship presupposes identification with society, both for Rousseau and for contemporary communitarians. In other words, 'essential freedom', in the sense of human fulfilment within a community, is more important than liberal 'negative freedom'.

With Beccaria the revolution in criminal law commenced, even though it is not as yet completed. Criminal law, although greatly improved by virtue of the Enlightenment, remains controversial. None of the usual justifications of the administration of criminal justice appears acceptable without reservation. The limits of the rational Enlightenment appear most clearly in this indispensable coping stone of the legal order – the stopgap of criminal law. Rational deterrent theories, such as that of Beccaria, appear insufficiently just and insufficiently implementable. Not only from a philosophical perspective is it unsatisfactory to simply claim that the modern constitutional state cannot maintain itself without criminal law.[11]

Undeniably the Enlightenment has, at least on paper, brought about the victory of freedom, equality and fraternity. Without the concepts and the theories whence it derives, modern constitutional democracy is inconceivable. However, the optimism of the Enlightenment concerning liberation by means of science has in the meantime been dashed. 'Theory and practice go hand in hand' has lost its original sparkle. Hamann, a great critic of the Enlightenment, wrote: 'Think less and live more'.[12]

[11] A radical critique of the Enlightenment reforms under the influence of Beccaria and kindred spirits like Bentham was voiced in the 20th century by Michel Foucault in *Surveiller et punir: Naissance de la prison* (Discipline and Punish: The Birth of the Prison, 1975). According to Foucault, these reforms were simply the result of contingent changes in society in the 18th century which called for a different form of economic calculation from that which had preceded it.

[12] In a letter to Herder, 18 May 1765; see Berlin (2000, p. 255).