1 Introduction

Although cross-border influences of constitutional ideas have not been focused so far they nevertheless reveal important aspects of European legal culture.¹

John Locke’s (1632-1704) *Two Treatises of Government* is a master piece of cross-border influences into revolutionary France.² The citations from Locke in Barbeyrac’s comments on his Pufendorf-translation³ were read in the North-American colonies and were only discovered by revolutionary France via a detour across the Atlantic.⁴ This “cheap and nasty little book” – as Locke himself is quoted by Peter Laslett⁵ – was published anonymously in 1689, as was its second edition of 1694.

Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1689-1755)⁶ is generally⁷ cited as the progenitor of the concept of separation of powers allegedly stated in his work *De l’Esprit des Lois* (1748).⁸ It was first published anonymously in December 1748 in Geneva by Barrillot & Sons.⁹ Via
frontier crossing of constitutional ideas Article 16 of the Declaration of the Rights of Man of 1789 is derived from Montesquieu’s wording in his sixth chapter of book 11.

2 Locke’s work and reception

(i) Due to Locke’s sympathies for the Whigs, he treated the Glorious Revolution of 1689 as no more than a restoration of the old common-law tradition.10 The central issue of the two treatises of government is the supreme legislative power11 of the Legislature. Locke may therefore be regarded as one of the precursors of the idea of parliamentary sovereignty, though he does not attribute legislative power to Parliament, monarch or people.12 Locke’s king-in-parliament remains within the traditional common-law regimen regale et politicum, as it was known by Fortescue.13 It was only after the concept of Parliament as the Highest Court of Justice had won recognition that post-1689 English constitutionalism began.14 The treatises are far removed from this concept of Parliament as a court, as Locke describes the judicature as part of the executive, being effected by royal judges.

The novelty of his natural-law theory is rather found in the deviation from the Hobbesian bellum omnium contra omnes,15 by explaining natural law as the supreme law embodied in the common-law concept of the seventeenth century. This is in line with his philanthropic epistemological theories which deeply influenced Christian Wolff. It is of interest that two letters dated 4 April 170516 and 15 October 170517 addressed by Christian Wolff to Leibniz are commonly cited in support of the German reception of Locke. However, they do not deal with the two treatises, but discuss the epistemology of the contemporaneous letter concerning toleration (1689).18 Previous research on the cross-border

14 Hollandt’s disserta ion De iure in Aemulum Regni Vulgu Praetendentem (Marburg 1747, supervised by Gottfried Achenwall) ch 1 at 6: “Sed apprime his respondent Ioannes Locke dans son II. traité du gouvernement civil, ch VII § 101 et sequentibus: l’ Etablissement des sociétés civiles est toûjôur anterieur aux registeres: et les lettres ne sont gueres cultivées dans un pais, avant qu’ une longue continuation du gouvernement ait pourvû par d’autres arts plus necessaires à la santé, aux besoins et aux commodités de la vie.”
16 Idem (n 16) 36-42.
Influences of legal literature has concentrated on the big names, largely ignoring the details. The aim of this paper is to rectify this omission.

Locke finds the origin of the body politic in a freely entered, individual, trustful and implicit contract. Thereby, the natural-law contract theories are relativised by trust. Political power becomes a fiduciary power with the consequence that a residual power (un droit de le reprendre) remains with the people. In the case of the dissolution of government the supreme power is vested in the people. This idea is absorbed by Gottfried Achenwall in his Elementa Iuris Naturae (1750).

From this social contractual point of view, the conflict between the common law protecting liberty and prerogative granting discretion becomes fundamental to Locke’s distinction between legislative and executive power:

Where the Legislative and Executive Power are in distinct hands, (as they are in all moderated Monarchies, and well-framed Governments) there the good of the society requires that several things should be left to the discretion of him that has the Executive Power.

Matters not provided for in the law are left to the monarch who has the executive power to decide upon them at his discretion. This is consistent with the royal prerogative. The discretion has to focus on the public good (publick good; common wealth). The welfare of the state is the result of a supreme, supra-legal natural law: “[A] Law antecedent and paramount to all positive Laws of men; [A] Fundamental Law of Nature and Government.” It binds all governmental power to respect the liberty of every individual as well as his

19 Locke Second Treatise ch 14 (Of Prerogative) pars 149, 156 at 384, 389.
20 Locke Second Treatise ch 14 (Of Prerogative) par 149 at 385f: “The legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.” Also Schulze Staat und Nation in der europäischen Geschichte (2004) 93.
22 This “supreme power” of the people shall only become operative in the case of “Dissolution of Government”: see Locke Second Treatise ch 19 (Of the Dissolution of Government) pars 211ff at 444ff.
23 At 3 2 3 par 799: “Wenn aber der Fürst offenbar vorsätzlich und durch aktives willentliches Handeln seine Herrschaft nicht zum gemeinen Wohl gebraucht, sondern zum Verderben mißbraucht, d.h. als Tyrann handelt, ohne dass dies durch die Grundgesetze gerechtfertigt ist, dann übt das Volk seine natürliches Recht gegen den Feind aus und darf auf jede Weise versuchen, seine Sicherheit gegen den Tyrann zu behaupten.”
24 Idem par 159 at 392: “Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in hands, to be ordered by him, ... .”
25 Idem pars 159 and 160 at 393: “This power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative.”
26 Idem par 166 at 396.
27 Idem par 168 at 397f.
28 Idem par 159 at 392.
possessions. If the monarch was free to decide upon the public good alone, any restraints the law placed on the execution of prerogative rights would be useless – the monarch would be an absolute sovereign.

To Coke Parliament represented ultimate reason:

> [A]s in the natural body when all the sinews being joined in the head do join their forces together for the strengthening of the body there is *ultimum potentiae*, so in the politque body when the king and the Lords spiritual and temporal, knights, citizens and burgesses are all by the king’s command assembled and joined together under the head in consultation for the common good of the realm, there is *ultimum sapientiae*.

According to Coke Parliament’s wisdom is ensured by its representative role:

> And as it is said in Plowden[34] the parliament is a court of the greatest honour and justice, of which none ought to imagine a dishonourable thing, and [according to] the Doctor and student[35] it cannot not be thought, that a statute that is made by authority of the whole realm, as well of the King, and of the Lords

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30 *Idem* par 168 at 397: “Yet they have, by a Law antecedent and paramount to all positive Laws of men, reserv’d that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, viz. to judges whether they have just Cause to make their Appeal to Heaven.”

31 *Idem* par 168 at 397f: “The old Question will be asked in this matter of Prerogative. But who shall be Judge when this Power is made a right use of?” “I answer: Between an Executive in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no Judge on Earth ... the people have no other remedy in this, as in all other cases where have no judge on Earth, but to appeal to heaven ... And therefore, tho’ the People cannot be Judge, so as to have by the Constitution of that Society any Superiour power, to determine and give effective Sentence in the case; yet they have, by a Law antecedent and paramount to all positive Laws of men, reserv’d that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, viz. to judges whether they have just Cause to make their Appeal to Heaven.”


33 E Brooke & R Brooke Coke: The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of Courts (1797) 3. The English Reports (1900-1932) referred to in the following notes are the standard edition of the Coke Reports (1600-1615).


temporal and spiritual, as of all the Commons, will do a thing against the truth.36

Attributing the executive power to the crown in the treatises has another consequence: The monarchy becomes separated from the monarch’s person and seems reduced to functioning for the body politic (Gemeinwesen), the office (Staatsamt).37 Thereby the English monarchy becomes immortal: “The king never dies”, as Blackstone (1723-1780), the jurist and contempory of Montesquieu, states in his Commentaries (1765-1769). This abstraction of the monarchy into an office is widely received by the *ius publicum universale* of German enlightened absolutism. The self-imposed obligation of the enlightened monarchs to rule by law in accordance with the general welfare of society and with the rational ratio legis, separates the monarchical government from the person of the monarch. An example of the enlightened ruler’s ethos is the statement of the Prussian King Frederick that he was the first servant of the state.

ii Most law teachers of the eighteenth century refute the idea of the divisibility of supreme power. The ruler combines all supreme power (*plenitudo potestatis*) in his person, namely the royal rights of legislation, jurisdiction and government. Neither the well-known Aristotelian trisection of advisory (legislative), executive and judicial functions nor the exercise of these functions by various civil servants signify a separation of the three independent powers. This was explicitly stated by Gottfried Achenwall and Johannes Stephan Pütter in Volume 3 of their *Elementa Iuris Naturae* (1750).38 The same statement may be found in Reichardt.39 Therefore we find very few citations of Locke’s treatises in Gottlieb Samuel Treuer’s reaction against the *Disquisitio Politica* (1719) of Wilhelm FreyHerrn von Schrödern. The same is true of Jakob Hollandt’s dissertation *De iure in Aemulum Regni Vulgu Praetendentem* of

36 *Priddle and Napper’s Case* (1613) 11 Coke 14a, 77 ER 1164. Authors like Thomas Smith and William Lambarde emphasised the assent of the represented subjects to the Parliamentary bill, whereas Coke focused on the represented subjects’ knowledge about any bill: “[T]he law intends that every person hath knowledge thereof, for the parliament represents the body of the whole realm.” See Coke (n 33) 26. This is not an original idea: the only novelty is that Coke reduces the notion of representation, from one of consent to one of awareness of the measure in question. Cf Crompton L’Authoritie et Jurisdiction des Courts de la Majeste de la Roigne (1637) fol 16r.

37 Reinhard Geschichte der Staatsgewalt (1999) 73 states that neither Bodin nor Hobbes knows the state as an abstract notion, but only associates power to monarchs

38 Achenwall and Pütter differentiate between executive and legislative power, but hold that both are vested in the absolute monarch (“Oberherrscher”). Gottfried Achenwall & Johannes Stephan Pütter *Elementa Iuris Naturae in Usum Auditorum Adornata* Book 3 ch 2 (Allgemeines öffnen liches Recht) Vol 1 (Über die Rechte und Verbindlichkeiten im Zusammenhang der bürgerlichen Herrschaft im allgemeinen) (1750) pars 68ff.

39 Reichardt *Selecta de iure Statuum Provinciaticum Concurrente circa Legislatoriam Potestatem* (Jena 1769) at 15: “Neque ipsi [principes] legislatoriam potestatem antiques temporibus sa is cognoverunt nec a potestate judiciali illam sat distinxerunt.”
1747 supervised by Gottfried Achenwall.\textsuperscript{40} Only the Thomasius-disciple Nicolaus Gundling refers – in his \textit{Discourse on the Law of Nature and Nations} (\textit{Discours übers die Natur- und Völkerrecht} (1747)) – to Locke’s treatises in general terms as “a matchless book of good value for politics”.\textsuperscript{41} In other natural-law compendiums no references to Locke are found: Christian Thomasius does not refer to Locke’s treatises, neither in his \textit{Fundamenta Juris Naturae et Gentium} (1705)\textsuperscript{42} nor in his \textit{Historia Juris Naturalis} (1719).\textsuperscript{43} He furthermore does not deal with the treatises in his above-mentioned letters to Leibniz, in his \textit{Jus Naturae MethodoScientifico Pertractum} (1740-1748)\textsuperscript{44} or in the \textit{Institutiones Juris Naturae et Gentium} (1750).\textsuperscript{45} The same is true for Heineccius’ \textit{Foundations of the Law of Nature and Nations} (1737),\textsuperscript{46} Darjes’ \textit{Institutiones Iurisprudentiae Universalis} (1748),\textsuperscript{47} Hufeland’s \textit{Doctrines of the Law of Nature} (1790)\textsuperscript{48} and Martini’s \textit{Theorems of the Law of Nature} (1799). None have any reference to Locke.\textsuperscript{49}

There is only one exception from this non-observance of Locke by German writers: The \textit{Delineatio Iuris Naturalis sive Prinzipii Iusti Libri Tres} (1712) of the Thomasius-disciple Ephraim Gerhard refers to a French edition of the two treatises.\textsuperscript{50} His reference to the mutual obligation and rights deriving from the social contract seems to incorporate Locke’s ideas of a free and trustful and implicit contract.\textsuperscript{51} Consequently, Gerhard writes about \textit{regna limitata},\textsuperscript{52} defining a catalogue of twelve rights with explicit echoes of Locke’s \textit{a priori}

\begin{itemize}
\item \textsuperscript{40} There is only one Locke-citation, namely in Jakob Hollandt’s dissertation \textit{De iure in Aemulum Regni Vulgo Prætendentem} (Marburg 1747, supervised by Gottfried Achenwall) ch 1 at 6 compared to several references to Grotius, Pufendorf and Barbeyrac.
\item \textsuperscript{41} Gundling \textit{Discours übers das Natur- und Völkerrecht} (1734) bound with \textit{Discours über die Politic} (1733) ch 7 pars. 12, 13, 105; ch 27 pars. 1-15 (385 FN).
\item \textsuperscript{42} Thomasius \textit{Fundamenta Juris Naturae et Gentium} (1718 repr 1963) Book 3 ch 5 pars. 10-11 at 276 refers to Grotius, Pufendorf and Huber, but not to Locke.
\item \textsuperscript{43} Thomasius \textit{Historia Juris Naturalis} (1719) ch 6 pars. 9-11 at 80-84 quotes only Hobbes, Aubry and Cumberland, but not Locke. See also Bernhard Weißenborn “Die Bibliothek des Thomasius” in Fleischmann (ed) \textit{Christian Thomasius, Leben und Lebenswerk} (1931 repr 1979) 428-452.
\item \textsuperscript{44} Wolff \textit{Jus Naturae Thomannus} (ed) (1748 repr 1968) part 8 par. 66 at 41; pars. 69f at 43f; par. 102 at 70; pars. 10, 13 at 8, 10 refers to Hobbes, Grotius, Huber and Aristoteles.
\item \textsuperscript{45} Wolff \textit{Institutiones Juris Naturae et Gentium} (1750 reprint 1969) part 3 s 2 pars. 972-1087 at 597-679.
\item \textsuperscript{46} Heineccius \textit{Grundlagen des Natur- und Völkerrechts} (tr by Mortzfeld) (1994) ch 1 par. 15 at 32 discusses only Locke’s epistemological theories.
\item \textsuperscript{47} Darjes \textit{Institutiones Iurisprudentiae Universalis} in quibus Omnia Iuris Naturae Socialis et Gentium Capita in Usum Auditorii sui MethodoScientifica Explanatur (Jena 1757). This 5th edition has been consulted as earlier editions were not available on inter-library loans. The Praefatio ad editorem et iam (at 3) refers to Grotius, Hobbes, Pufendorf, Coccej and Wolff, but not to Locke. Ch 3 par. 98 and par. 119 (Grotius); Sect 2 ch 1 par. 315 (Heineccius); Sect 2 ch 2 par. 447 (Grotius); par. 469 (Gundling); par. 505 (Heineccius).
\item \textsuperscript{48} Hufeland \textit{Lehrsätzte des Naturrechts} (1790 repr 1973).
\item \textsuperscript{49} Von Martini \textit{Lehrbegriff des Naturrechts zum Gebrauch in den öffentlichen Vorlesungen in den k.u.k. Staaten} (1799 repr 1970).
\item \textsuperscript{50} Ch 10 (\textit{De Remedios Laesionum in Republica}) at 325. For information on Ephraim see Stintzing & Landsberg Vol 3/1 at 141.
\item \textsuperscript{51} Ch 8 (\textit{iure Civium in Relatione ad Superiorem}) at 311 n 5: “Ergo mutuus consensus producit mutuum obligationem & mutua iura.”
\item \textsuperscript{52} Idem at 314 n 27.
\end{itemize}
ownership.\textsuperscript{53} Inexplicably, Gerhard’s \textit{Delineatio} also deals with the absolute monarchy deriving the subjects’ rights from the monarch’s duty to rule according to the public good.\textsuperscript{54}

3 Montesquieu’s work and reception

3.1 The mixed monarchy model

Montesquieu’s analysis of \textit{The Spirit of Laws (De l’Esprit des Lois)} covers the entire span of relations included in man-made positive law.\textsuperscript{55} The relation to nature (Book 2: nature of the constitution) and to forms of government (Books 3-8: principles of government); the relation to defensive and aggressive strategies of war (Books 9-10); the relation to political liberty in public and private (Books 11-12); the relation to the tax system (Book 13); the relation to the climate (Books 14-17); the relation to terrain (Book 18); the relation to customs and social behaviour (Books 19-23); and the relation to religion (Books 24-25).\textsuperscript{56} In Book 11 Montesquieu analyses the relation between positive law and political liberty in the sovereign realm. The English constitution aims for political liberty, as indicated in the original draft of the title to Book 11 6: “Des principes de la liberté politique, comment on les trouve dans la constitution d’Angleterre.”\textsuperscript{57}

\textsuperscript{53} \textit{Idem} at 315-317 nn 34-40, nn 48-51 and n 54. Under the twelve rights are found: “ius faciendi id, quod Rem publicam non turbat, nec lege speciali prohibetur; libera matrimoniorum coniunctio quae Reipublicae statutis est conveniens; libera ... proflis educatio ad fines domesticos Reipublicae usibus non repugnantes; Iberia ... rei domesticae cura, quae Reipublicae regimini, ob varietatem circumstantiarum, subiici haud potest; Iberi sunt sermones, qui Reipublicae nec prosunt, nec obstant; libera ... sunt pacta omnesque contractus quatenus iisdem communis salus haud impeditur; Iberi domini.”


\textsuperscript{55} \textit{Book 1} ch 3 at 238: “J’examinerai tous ces rapports: ils forment tous ensemble ce que l’on appelle l’\textit{ESPRIT DES LOIS}.” \textit{Book 19} ch 4 at 558: “Plusieurs choses gouvernent les hommes: le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les moeurs, les manières; d’où il se forme un esprit général qui en résulte.”

\textsuperscript{56} The overview of the fields of application of the different types of laws (Book 26), the historical analysis of Roman and Frankish laws (Books 27-28); the reminder to the model legislator (Book 29) and the discussion on the historical genesis of the French monarchy (Books 30-31) will not be discussed in this context.

\textsuperscript{57} Dossiers de l’\textit{Esprit des Lois} Book 11 ch 6 at 1036.
For Montesquieu, political liberty is to be found within balanced governments,\(^{58}\) referring not to the number of rulers, but to the form of government. The contrast between balanced monarchy-despotism\(^{59}\) and balanced republic-despotism\(^{60}\) inspired Montesquieu’s classification of the republican, the monarchical and the despotic forms of government, as opposed to Aristotle’s categories of monocracy, aristocracy and democracy, differing according to the number of rulers.\(^{61}\) As Montesquieu’s main interest lies with balanced monarchy,\(^{62}\) it will also be at the core of the following reflections.

In Montesquieu’s real or imaginary English monarchy, as described in Book 11, chapter 6, legislative power (\textit{puissance législative}) is vested in Parliament, the executive power (\textit{puissance exécutrice}) in the monarch,\(^{63}\) while the judicial powers (\textit{puissance de juger}) are not held by any particular and separate political body\(^{64}\) and are only occasionally exercised by the Upper House of Parliament.\(^{65}\) This differentiation of the three functions of political power (\textit{puissance législative}; \textit{puissance exécutrice}; and \textit{puissance de juger}) does not separate governmental authority but maintains the unity of sovereign power. This follows from the fact that the limitation of monarchical power is as natural to the feudal political theories of the Middle Ages as its indivisibility.\(^{66}\)

### 3.2 Separation of Montesquieu from Locke

From Montesquieu’s citing of Locke, one should not infer an intention to adopt Locke’s separation of legislative and executive powers. The reference to

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\(^{58}\) Book 11 ch 4 at 395: “La liberté politique ne se trouve que dans les gouvernements modérés.” Reference to the number of rulers leads to the classification monocracy (one), aristocracy (few) and democracy (all), reference to the form of government inspires the classification of the republican, the monarchical and the despotic forms of government.

\(^{59}\) Book 2 ch 4 at 247: “Le pouvoir intermédiaire subordonné le plus naturel est celui de la noblesse. Elle entre en quelque façon dans l’essence de la monarchie, dont la maxime fondamentale est: point de monarque, point de noblesse; point de noblesse, point de monarque. Mais on a un despote.”

\(^{60}\) Book 2 ch 3 at 245: “Une autorité exorbitante ... dans une république, forme une monarchie, ou plus qu’une monarchie” (namely despotism).

\(^{61}\) Aristotle \textit{Politics} 3 7-8, 1279a 22f. In distinguishing republic, monarchy and despotism Montesquieu combines the two Aristotelian forms of government aristocracy and democracy in his republic (Book 2 ch 1 at 239), while he divides Aristotelian monarchy into monarchy and despotism. The Penguin Classics edition of Aristotle’s \textit{Politics} (1981) trl by Sinclair and rev by Saunders has been used.


\(^{63}\) Regarding the question of distribution of powers in the balanced constitution, the right of veto can be ignored.

\(^{64}\) Book 11 ch 6 at 398: “La puissance de juger ne doit pas être donnée à un sénat permanent, mais exercée par des personnes tirées du corps du peuple, dans certans temps de l’année, de la manière prescrite par la loi, pour former un tribunal qui ne dure qu’autant que la nécessité le requiert ...”

\(^{65}\) Namely in lawsuits in which one party belonged to the aristocracy and in cases of issuing a bill of attainder. See Book 11 ch 6 at 404.

chapter 12 of Locke’s *The Second Treatise of Government* should also not induce an overestimation of the reception of Locke in Montesquieu’s main work. Montesquieu’s ideal of a distribution of powers and Locke’s call for a separation of powers are distinct. Montesquieu’s distribution of powers as characterised in Book 11, chapter 6 contains neither the superiority of the legislative over the executive nor the deriving of sovereign power from the Social Contract.

The distinction between the terms “mixed constitution” (unity of governmental authority) and “separation of powers” (separation of governmental authority) is revealed only by a thorough linguistic examination of how balance of power is described. Analysing Montesquieu’s terminology in Book 11, chapter 6, one finds a predominance of the verbs “arrêter”, “empêcher”, “enchaîner”, “tempérer”, “lier”, “dépendre” and “modérer” “droit d’arrêter,” “faculté d’arrêter,” “faculté d’empêcher”, “i’une enchaînera l’autre par sa faculté mutuelle d’empêcher”, “besoin d’une puissance régante pour les tempérer”, “Toutes les deux seront liées par la puissance exécutive”, “la puissance exécutive ne dépendra plus d’elle” and “gouvernement est modéré.” The verb “borner” of chapter 11 of the *Considérations sur les Causes de la Grandeur des Romains et de leur Décadence* should also be mentioned. Only once in Book 11, chapter 6 does Montesquieu use the verb “separer.” The verbs referred to above, setting the tone of Book 11, chapter 6, are synonyms for moderation and restriction of a uniform sovereign authority, consisting of the monarch, the aristocracy and the people as equal representatives of the three principles of governmental form in a mixed constitution.

68 *Locke Second Treatise* ch 12 (Of the Legislative, Executive, and Federative Power of the Commonwealth) par 143 at 382f.
69 *Idem* ch 12 par 150 at 385f.
70 *Idem* ch 8 (Of the Beginning of Political Societies) par 95 at 348f.
71 *Idem* at 401, 403.
72 *Idem* at 401, 405.
73 *Idem* at 405.
74 *Idem* at 401.
75 *Idem* at 405.
76 Ibid.
77 *Idem* at 397.
78 Montesquieu praises the prudent distribution of official powers in Rome, where a large number of magistrates supported (se soutenir), held back (s’arrêter) and tempered each other (se tempérer) and where each magistrate only had restricted power (pouvoir borné). Montesquieu (n.7) ch 11 at 124f: “Les lois de Rome avoient sagement divisé la puissance publique en un grand nombre de magistratures, qui se soutenoient, s’arrêtéoient, et se tempéreoient l’une l’autre: et, comme elles n’avoient toutes qu’un pouvoir borné.”
79 *Ch 11 ch 6 at 397*: “Il n’y a point encore de liberté si la puissance de juger n’est pas séparée de la puissance législative et de l’exécutive.”
In Locke’s *The Second Treatise of Government*, however, the separation of powers with its far-reaching isolation of governmental functions and their assignment to independent governmental bodies is expressed by the frequent use of the adjectives “separated” and “distinct”. The call for separation of power is directed at achieving political equilibrium. Any “exorbitance” disturbs the balance of power. In paragraph 107 of *The Second Treatise of Government* Locke articulates his call for separation of power as protest against the impairment of the equilibrium through the parliamentary absolutism of the Long Parliament and the Whigs: “It was not at all strange that they should not much trouble themselves to think of methods of restraining any exorbitancies of those to whom they had given the authority over them.” The aim of reaching a balance of power is the basis of any call for a separation of power. The latter cannot imply an absolute opposition of separation of power and combination of power in the sense of mutual dependency for “balance” is based on a correlation of the separation of powers and the combination of powers in that the participating powers communicate with each other and exert a mutual influence. Only in this way does the separation of power reach equilibrium of checks and balances.

3 3 The pre-eminence of the aristocracy in Montesquieu’s concept

Montesquieu’s mixed constitution compounds characteristics deriving from all three forms of government and principles of legitimation: the authority of a monocratic ruler, the superior knowledge of an aristocratic elite and the sense of solidarity, common bond and *esprit de corps* of a democratic community. In a mixed constitution sovereign power is vested in the monarch, the aristocracy and the people as equal representatives of the three constitutional principles which differ but stand for undivided and uniform sovereign power. In contrast, separation of powers signifies the considerable isolation of governmental functions and their allocation to separate governmental bodies. Due to the

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81 Locke *Second Treatise* ch 12 (Of the Legislative, Executive, and Federative Power of the Commonwealth) pars 143, 145, 147, 148, 159 at 382f, 392.
82 *Idem* ch 8 (Of the Beginning of Political Societies) par 107 at 356.
83 The demand for separation of powers is a reaction to the concept of balance and to disturbances of the balance of powers due to specific political circumstances. See Hasbach *Gewaltentrennung, Gewaltenteilung und gemischte Staatsform* in 1916 (13) Vierteljahresschrift für Sozial- und Wirtschaftsgeschichte 574f, 586.
84 Cited in Bolingbroke Remarks on the History of England (1730-1731) Letter 7 at 653 n 47: “The power which the several parts of our government have of controlling and checking one another, may be called a dependency on one another ... but this mutual dependency cannot be opposed to the independency pleaded for. On the contrary, this mutual dependency cannot subsist without such an independency. The independency consists in this, that the resolutions of each part ... be taken independently.” *Cf* also Blackstone *Commentaries on the Laws of England* (repr 1979) Book 1 ch 7 at 234: “... the whole is prevented from separation, and artificially connected together by the mixed nature of the crown which is a part of the legislative, and the sole executive magistrate.”
85 *Cf*, eg, Bolingbroke (*n* 84) Letter 1 at 300.
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indivisibility of sovereign power in a mixed constitution the question of the distribution of power is not a question of the limitation of sovereign power but a question of social balance in the relationship of crown, nobility and citizens. Those powers are distributed according to social rank.86 This shows that Montesquieu’s ideal of a distribution of powers in a mixed constitution is rooted in social and legal inequalities. According to Montesquieu, the privileges of the nobility guarantee political liberty. This suggests that Montesquieu’s aristocratic conviction is contrary to the concept of the sovereignty of the people87 which implies equality. Furthermore, it is impossible that Montesquieu should have studied the concept of sovereignty of the people – which in 1789 becomes a synonym for political liberty – on the basis of the constitutional reality in England. In the conflict between the Stuarts and Parliament from 1642 onwards, the latter never claimed to posses the authority to overrule the royal veto in the law-making process and thus to introduce some sort of sovereignty of the people (and separation of power) that would equal the notion of Rousseau’s “volonté générale”. Parliament rather asserted – as the highest common-law court – its ultimate authority to interpret the “fundamental laws” of which Parliament’s interpretation of its right to self-defence is a good example.88

In accordance with the social pre-eminence of the aristocracy in Montesquieu’s concept,89 his ideal mixed constitution focuses on balancing crown and nobility.90 The function assigned to the aristocracy as a balancing power cannot at first glance be detected in the English mixed constitution. This is due first to the fact that an intermediary position of the nobility (pouvoirs intermédiaires)91 had been abolished, and secondly because of the existence of a strong democratic element. This becomes even more apparent in Montesquieu’s description of his idealised French monarchy (Book 2, ch 4), in which the

87 According to Hasbach (n 83) 596 the notion of sovereignty of the people is a precondition to the separation of independent powers.
88 Declaration of the Houses in Defence of the Militia Ordinance of 6 Jun 1642: “... but ought to be obeyed by the fundamental laws of this kingdom ... so the ques ion is ... whether there is not a power in the two Houses to provide for the safety of the Parliament and peace of the kingdom, which is the end for which the Ordinance concerning the militia was made”, cited from Gardiner (ed) The Constitutional Documents of the Puritan Revolution 1625-1660 (1906) Nr 54 at 254. Cf also The Votes of the Houses for Raising an Army of 12 Jul 1642, cited from Gardiner Nr 56 at 261.
89 Book 2 ch 4 at 247: “Le pouvoir intermédiaire subordonné le plus naturel est celui de la noblesse.”
90 The balancing function of the bourgeoisie may be ignored in this context. Cf also Carcassone Montesquieu et le Problème de la Constitution Française au XVIIIe Siècle (1970) 80ff.
91 Book 2 ch 4 at 248: “Les Anglais, pour favoriser la liberté, ont ôté toutes les puissances intermédiaires qui formoient leur monarchie.” The House of Lords as second chamber of Parliament represents the aristocracy.
existence of a nobility positioned as intermediary is a fundamental principle. The balance between the French crown and the nobility as described by Montesquieu is more obvious than his description of a balance between the English crown and nobility and shows more clearly the unity of governmental authority in the French monarchy: uniform governmental authority is transmitted by those intermediary authorities.

According to Montesquieu, those intermediary ranks (pouvoirs intermédiaires, rangs intermédiaires) are an essential characteristic of a monarchical government conforming to the fundamental laws, namely of the moderation of governmental power: "Les pouvoirs intermédiaires, subordonnés et dépendants, constituent la nature du gouvernement monarchique, c’est-à-dire de celui où un seul gouverne par des lois fondamentales." This is how Montesquieu commences chapter 4 of Book 2 of De l’Esprit des Lois (Chapter title: Des lois dans leur rapport avec la nature du gouvernement monarchique).

These fundamental laws require channels of transmission through which flows governmental authority, in order to protect the subject from the momentarily prevailing will of the ruler as expressed in the Prince’s council. This is so because if there is only the momentary and arbitrary will of a single person in a state, then nothing is definite and, consequently, there are no fundamental laws. The nobility is the natural intermediary check of monarchical omnipotence: "Le pouvoir intermédiaire subordonné le plus naturel est celui de la noblesse." With these "pouvoirs intermédiaires" Montesquieu means and describes the "parlements". This interpretation is based on the following

92 Idem at 247: “Les pouvoirs intermédiaires, subordonnés et dépendants, constituent la nature du gouvernement monarchique, c’est-à-dire de celui où un seul gouverne par des lois fondamentales.” The aristocratic principle is incorporated in the concept of aristocratic intermediary powers.

93 Idem at 247: “Ces lois fondamentales supposent nécessairement des canaux moyens par où coule la puissance.”

94 Ibid.

95 Idem at 249.

96 Idem at 247.

97 Ibid: “Ces lois fondamentales supposent nécessairement des canaux moyens par où coule la puissance.”

98 Idem at 249: “Le Conseil du prince ... est, par sa nature, le dépôt de la volonté momentanée du prince qui exécute, et non pas le dépôt des lois fondamentales. De plus, le Conseil du monarque change sans cesse; il n’est point permanent; ... il n’a point à un assez haut degré la confiance du peuple.” In the same way the Essay Historique Concernant les Droits et Prérérogatives de la Cour des Pairs de France qui est le Parlement Seant à Paris describes the Prince’s Council ch 10 fol 210v: “ce que l’on nomme couramment conseil d’État n’est que le conseil privé et variable du Prince.”

99 Idem at 247: “Car, s’il n’y a dans l’État que la volonté momentanée et capricieuse d’un seul, rien ne peut être fixe, et par conséquent aucune loi fondamentale.”

100 As to the position of pre-eminence of the nobility in Montesquieu’s concept of a monarchy cf critically Struck Montesquieu als Politiker. Eine Erläuterung zu den Büchern II-VII und XI-XII des Geistes der Gesetze (1933) 114f.

101 Book 2 ch 4 at 247.

102 This also was the interpretation of his contemporaries. Cf Du Buat-Nançay Éléments de la Politique, ou Recherche des Vrais Principes de l’Économie Sociale (1773) Vol 3 Book 6 ch 19 at 169f: “Si je conçois bien ce qu’on doit entendre par un corps intermédiaire, c’est une classe d’hommes, qui exerce, sous l’autorité du Souverain, une portion de son pouvoir, qui lui
thoughts: Montesquieu defines the aristocracy’s balancing function in Book 2 chapter 4 as transmitting the monarchical will and procuring established law (dépôt des lois): “Il ne suffit pas qu’il y ait, dans une monarchie, des rangs intermédiaires; il faut encore un dépôt des lois.”103 This “dépôt” of laws can only be those political bodies that proclaim the laws, once they are made, and bring them to mind should they be forgotten:104 the parlements, especially the parlement de Paris.105 This interpretation is in keeping with the designation of the parlement de Paris as “médiateur” in the Essay Historique Concernant les Droits et Prérogatives de la Cour des Paris de France qui est le Parlement Seant à Paris (1721): “Médiateur entre le monarque et le peuple, il constitue le premier corps de l’État.”106 As the convocation of the Estates General fully depends upon the monarch’s will, the nobility cannot effectively succeed in balancing:

Ses États généraux ont une autorité imposante, mais en fait peu d’efficacité: leur convocation dépend du roi, et une foule d’intrigues faussent élections et délibérations. C’est donc au Parlement que revient le dépôt de la liberté publique; c’est grâce à lui que la monarchie française se distingue de la tyrannie, et l’obéissance des sujets, de la soumission des esclaves.107

The balancing or tempering of sovereign power by combining monarchical, aristocratic and democratic principles in the right measure will only be the guarantor of political liberty if a social balance between crown, nobility and bourgeoisie can be achieved:108

La liberté politique ne se trouve que dans les gouvernements modérés ... Mais elle ne pas toujours dans les États modérés; elle n’y est que lorsqu’on n’abuse pas du pouvoir, mais c’est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser ... Pour qu’on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.109

This is in Montesquieu’s own words in Book 11 chapter 4 the necessity of a balance of power in a balanced (mixed) constitution. The concrete historical background of Montesquieu’s call for balance is the aristocratic opposition against the centralism of the French monarchy.

103 Book 2 ch 4 at 249.
104 Ibid: “Ce dépôt ne peut être que dans les corps politiques, qui annoncent les lois lorsqu’elles sont faites et les rappellent lorsqu’on les oublie.”
105 Cf the right to register and to record grievances of the parlement de Paris in the law-making process.
106 Essay Historique (n 98) ch 6 fol 205v.
107 Idem ch 13 fol 215r.
108 Crown, aristocracy and bourgeoisie form the monarchical, aristocratic and democratic principle of government in a mixed constitution. In case of a predominance of one the balance is in danger.
109 Book 11 ch 4 at 395.
The notion of balance is not new. In Book 11 chapters 14 to 18 Montesquieu describes the equilibrium of the socio-political powers in the Roman constitution. Balance is possible wherever governmental authority is undivided and thus had also been discussed by the apologists of undivided monarchical authority.\textsuperscript{110} Montesquieu combines the ancient notion of balance with his model of a mixed constitution. Balance of power cannot therefore be regarded as invented by or resulting from the various calls for separation of powers.\textsuperscript{111}

Montesquieu’s call for equilibrium of the socio-political powers, namely crown, nobility and bourgeoisie (representing the monarchical, aristocratic and democratic principles), aims at neither a republican nor a democratic governmental structure. He expressly and exclusively applies the doctrine of balance of the socio-political powers to the monarchy: “De quelque côté que le monarque se tourne, il emporte et précipite la balance.”\textsuperscript{112} The greatest virtue and aspiration of the legislature should be the moderation of governmental power in a well-tempered mixed constitution (Book 29 ch 1). This striving then is superior to the criteria of the different types of constitutions and indeed characterises any non-despotic form of government.

The affinity of Montesquieu’s De l’Esprit des Lois to the nobility is evidence enough that Montesquieu has erroneously been regarded as the author of the modern constitutional principle of functional separation of powers. The aristocratic bias of Montesquieu’s model of a mixed monarchical constitution marks the difference between Montesquieu’s concept of distribution of powers and the modern constitutional principle of separation of powers, for which the doctrine of sovereignty of the people, implying their equality before the law, is an absolute prerequisite. The notion of a balance between the socio-political powers (crown, nobility and bourgeoisie) in a mixed constitution has to be clearly distinguished from a balance of powers in the sense of a concept of “checks and balances”: While the concept of a mixed constitution is directed towards achieving an equilibrium between the socio-political powers, the concept of separation of powers aims to establish the institutional balance of governmental bodies.

\textsuperscript{110} Cf Francis Bacon: “The King’s Sovereignty and the Liberty of Parliament do not cross or destroy the one the other, but they strengthen and maintain the one the other” (cited from Spedding (ed) Letters and Life of Bacon Vol 4 (1869) at 177.

\textsuperscript{111} McIlwain (n 66) 141f: “Political balances have no institutional background whatever except in the imaginations of philosophers like Montesquieu. When in modern times representative assemblies took over the rights and duties of earlier kings, they assumed a power and a responsibility that had always been concentrated and undivided. There is no medieval doctrine of the separation of powers, though there is a very definite doctrine of limitation of powers.”

\textsuperscript{112} Book 3 ch 10 at 261.
3 4 Montesquieu’s reception

3 4 1 The time of pre-revolutionary remontrances or cahiers

In pre-revolutionary literature the principle of separation of powers had not yet been clarified. Rousseau deduces the indivisibility of the supreme authority from the indivisibility of the people’s sovereignty in his *Contrat Social* (1762).113 Describing the exercise of supreme power in the *Lettres Écrites de la Montagne* (1764), Rousseau deems it necessary that justice and government be separated,114 though not legislative and executive power.115 Sieyès’ *Préliminaire de la Constitution 1789*116 is also based on Rousseau’s indivisible volonté general unitaire.117

3 4 2 Reception of Montesquieu by the French parliamentary nobility (noblesse de robe)

In Montesquieu’s model of a French mixed constitution (Book 2 ch 4) the parlements – as pouvoirs intermédiaires and dépôt des lois – represent the balancing function of the aristocratic principle. Montesquieu himself is a member of the parlement de Bordeaux and accordingly a member of the parliamentary nobility (noblesse de robe).118 Hence the ready and unsurprising acceptance of his *De l’Esprit des Lois* among the parliamentary nobility as the work of a member of their own ranks.

113 Rousseau *Du Contrat Social ou Principe du Droit Politique* Book 2 ch 2: “Par la même raison que la souveraineté est inaliénable, elle est indivisible. Car la volonté est générale, ou elle ne l’est pas; elle est celle du corps du peuple, ou seulement d’une partie.” The Pleiad edition of Rousseau’s *Oeuvres Complètes* (Paris 1964) has been used. Inconsistently Book 3 ch 7: “Le Government simple is the better in soi, par cela seul qu’il est simple. Mais quand la Puissance exécutive ne dépend pas assez de la législative, c’est-à-dire, quand il y a plus de rapport du Prince au Souverain que du Peuple au Prince, il faut remédier à ce dédaut de proportion en divisant le Gouvernement; car alors toutes ses parties n’ont pas moins d’autorité sur les sujets, et leur division les rend toutes ensemble moins fortes contre le Souverain.”

114 Ibid: “D’abord la puissance Législative et la puissance exécutive qui constituent la souveraineté n’en sont pas distinctes” (at 815). Rousseau knew Locke’s treatises and claims to agree with him in his sixth letter of the Lettres Écrites de la Montagne that is dedicated to the support of the Contract Social (at 812).


118 Having substituted the principle of elec ion for the hereditary principle in the Ordonnance ou Établissements pour la réformation de la justice, Montils-les-Tours, April 1453 (cited in Jourdan, Décruey & Isambert (eds) *Recueil Général des Anciennes Lois Françaises depuis l’An 420 jusqu’à la Révolution de 1789* Vol 9 (1483-1461) (1827) 202-255) a certain parliamentary class (gens du parlement; noblesse de robe) with extensive privileges, fixed career description, uniform way of life and close social interaction evolved.
3 4 2 1 Montesquieu’s example in pro-nobility literature

Montesquieu’s plea for the role of the *parlement* as an intermediary force and lawkeeper becomes the shining example in pro-nobility literature. Apart from Pierre Augustin Baron de Beaumarchais (1713-1788), Victor Riqueti, Marquis de Mirabeau (1715-1789) and the Comte du Buat-Nançay (1705-1780) must be singled out. According to Mirabeau in *Mémoire Concernant l’Utilité des États Provinciaux, Relativement à l’Autorité Royale, aux Finances, au Bonheur et à l’Avantage des Peuples* (1750), the difference between monarchy and despotism lies in the maintenance of the aristocracy as the eternal upholders of fundamental law (*loi fondamental*). The praise of the aristocracy as an intermediary force is also the underlying theme in Mirabeau’s *Doubts Concerning the Free Navigation of the Scheld* (1785) and in his work *Aux Bataves sur le Stathoudérat* (1788). Mirabeau’s main work *L’ami des Hommes* (1757) borrows almost verbatim from Montesquieu’s *De l’Esprit des Lois*: “Les pouvoirs intermédiaires, subordonnés et dépendants constituent la nature du gouvernement monarchique.” Although in *Les Origines, ou l’Ancien Gouvernement, de la France, de l’Allemagne, et de l’Italie* by Comte du Buat-Nançay, published in 1757, Montesquieu’s influence cannot be plainly established, he discusses Montesquieu’s aristocratic intermediary bodies (“la doctrine lumineuse des corps intermédiaires”) in the *Éléments de la Politique, ou Recherche des Vrais Principes de l’Économie Sociale* (1773). The main subject herein is the parliamentary judiciary (“corps intermédiaire dans l’ordre de la justice et des lois”). Although he criticises the participation of the *parlement de Paris* in the law-making process, du Buat-Nançay praises the intermediary function of the *parlement* which is close enough to the people to

119 De Beaumarchais Réponse Ingénue de Pierre Augustin Caron de Beaumarchais à la Consultation Injurious de le Comte Joseph Alexandre Falcoz de la Blache a Répandue dans Aix 1st part 6 in Recueil de Factums de la Bibliothèque Nationale in 4 F m 2079.
121 Doubts Concerning the Free Navigation of the Scheld Claimed by the Emperor, and the Probable Causes and Consequences of that Claim, in which the Views of his Imperial Majesty, and of the Empress of Russia are Clearly Pointed out, and the Characters of Those Great Potentates are Exhibited in a New, and Interesting Light (London 1785) Letter 4 (How the Navigation of the Scheld may be opened without any danger to Holland, or to Europe) 155f; Aux Bataves sur le Stathoudérat (Paris 1788) at 14.
124 Du Buat-Nançay (n 102) Book 6 ch 19 166.
hear it and close enough to the monarch to be heard, so that it can defend the nation’s interest by remonstrating (remontrances) and lending its voice to the nation.\textsuperscript{126} Du Buat-Nançay repeats Montesquieu’s praise for parlement’s authority as depository of the law (dépôt des lois).\textsuperscript{127} The nobility’s traditional primacy is described by du Buat-Nançay in Montesquieu’s words\textsuperscript{128} as a necessary precondition for the maintenance of equilibrium in the state. However, in Les Maximes du Gouvernement Monarchique, pour Servir de Suite aux Éléments de la Politique (1778) the concept of sovereignty of the people\textsuperscript{129} ousts the balancing function of the aristocratic principle: du Buat-Nançay rejects the aristocratic intermediary bodies as “artifices dangereux”\textsuperscript{130} and disparages the parlement as “un polype dont les racines ont pénétré toutes les parties de la société.”\textsuperscript{131}

With his work Abrégé de la République de Bodin (1755) de Lavie (1699-1765) stands out from the applauding parliamentary circles.\textsuperscript{132} De Lavie develops Montesquieu’s idea of balance and moderation of governmental power (“tempérament des pouvoirs”\textsuperscript{133}) in mixed constitutions.\textsuperscript{134} According to his theory in Monarchie Considérée comme une République Mixte,\textsuperscript{135} the various pure forms of government are – each individually – corrupted by lack of, excess of or mis-distribution of liberty; only a mixture of the different forms of government is able to concentrate the advantages and neutralise the disadvantages.\textsuperscript{136} De Lavie’s mixed monarchy is not based on a restriction of monarchical power by a rivalling power but on its prudent combination with subaltern powers (corps).\textsuperscript{137} De Lavie’s grands corps correspond to

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\item[125] Idem Book 9 ch 6 209.
\item[126] Du Buat-Nançay (n 123) Book 9 ch 5 179; Book 9 ch 6 216f.
\item[127] Idem Book 9 ch 5 181: “J’use le regarderai comme un des corps les plus utiles et les plus respectables qui puissent être formés pour le bonheur d’une nation.”
\item[128] Du Buat-Nançay (n 102) Book 7 ch 9 412.
\item[129] Du Buat-Nançay Les Maximes du Gouvernement Monarchique, Pour Servir de Suite aux Éléments de la Politique (1778) Book 3 ch 4 and 6 78.
\item[130] Idem Book 4 ch 4 1442.
\item[131] Idem Book 4 ch 12 377.
\item[132] Cf, eg, Ripert de Monclar “Fragments d’un commentaire sur l’Esprit des Lois” in Sclopis (ed) Memorie della Reale Accademia di Torino Vol 17 (1858) 184f: “Je n’entends pas bien cet axiome, que sans monarque point de noblesse, sans noblesse point de monarque … Mais je pense avec l’auteur … que la distinction des ordres et des rangs intermédiaires convient admirablement bien à la Monarchie; qu’un corps de noblesse sert merveilleusement à tempérer les excès du gouvernement, non point comme une barrière élevée par les lois contre le despotsisme, mais comme un rempart de moeurs, de préjugés, de sentiments, de principes d’honneur et d’élevation.” Ripert de Monclar, the attorney general at the Parlement de Provence calls for the preservation of aristocratic hierarchy in accord with Montesquieu.
\item[133] De Lavie Abrégé de la République de Bodin (1755) Vol 1 Book 2 ch 3 73.
\item[134] Idem Vol 1 Book 2 ch 12 175.
\item[135] Idem Vol 2 Book 2 ch 12 ch 6 657.
\item[136] Idem Vol 2 Book 6 ch 10 and 11 193.
\item[137] Idem Vol 2 Book 6 ch 12 393f: “L’unanimité d’un grand corps ne sera jamais le mensonge; le témoignage le plus nombreux est celui de la vérité. Ce gouvernement des corps intermédiaires laissera subsister la monarchie; il donnera au monarque une autorité effective, parce qu’il décidera en connaissant le vrai. Cette constitution participera de l’Aristocratie en ce qu’elle sera en quelque manière un gouvernement de corps distingués; elle tiendra du populaire par le
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Montesquieu’s *pouvoirs intermédiaires* (the *parlements*). Without sharing Montesquieu’s aristocratic view, de Lavie emphasises the balancing function of the democratic principle as follows: “[I]ntroduire dans la Monarchie le bonheur des Républiques, et placer au milieu des Républiques la force de la Monarchie.” The lawyers in the *parlement* draw on Montesquieu’s plea for the role of *parlement* as an intermediary and keeper of law. In his *Lettres Historiques sur les Fonctions Essentielles du Parlement; sur le Droit des Pairs, et sur les Loix Fondamentales du Royaume* (1753/1754) Le Paige exalts the aristocratic principle: *Parlement* (as) *corps intermédiaire subordonné et dépendant* in Book 2 chapter 4 of *De l’Esprit des Lois* is turned into a *sénat suprême*. This aristocratic tendency of *Lettres Historiques sur les Fonctions Essentielles du Parlement; sur le Droit des Pairs, et sur les Loix Fondamentales du Royaume* by Le Paige can also be found in his *Dissertation sur l’Origine et les Fonctions Essentielles du Parlement; sur la Pairie, et le Droit des Pairs; et sur les Loix Fondamentales de la Monarchie Françoise*, published in 1764 by Michel de Cantalauze de La Garde, “conseiller” in Toulouse. While the former do not cite *De l’Esprit des Lois*, the latter borrow from Montesquieu’s work: “Peut-on concevoir une Monarchie sans des Loix fondamentales, et des Loix fondamentales sans un dépôt fixe où elles reposent avec sûreté?”

3 4 2 2 Transfer of political and philosophical ideas from Montesquieu to the *parlements*

There is a strong transfer of political and philosophical ideas from Montesquieu to the *parlements*. On the one hand, demands expressed by the *parlements* which articulated their vital function for the state before 1748, are clearly

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138 Idem Vol 2 Book 6 ch 12 396: “L’autorité intermédiaire ne peut être que celle qui est chargée de maintenir l’ordre; l’ordre n’est que l’exécution des lois; c’est donc où réside le dépôt des loix et la jurisdiction que l’on doit trouver les pouvoirs intermédiaires.”

139 De Lavie cannot understand the vital role the nobility plays in the state according to Montesquieu. See Vol 2 Book 6 ch 12 at 395: “Je ne sais comment on a pu dire que le corps intermédiaire le plus naturel est la noblesse. La noblesse, comme telle, n’a aucune fonction; ce qui n’a pas les fonctions ne peut exercer les pouvoirs.” There is no room for the aristocratic spirit, so essential to Montesquieu’s concept, in de Lavie’s framework. His acknowledgement of *justices* and *fiefs* as necessary elements of a monarchic form of government is rather brief. Vol 1 Book 1 ch 14 125: “Si l’on réfléchit que la constitution est monarchique, on doit sentir la nécessité des justices et des fiefs.”

140 Idem Vol 2 Book 6 ch 12 398f.


142 De Cantalauze de La Garde *Dissertation sur l’Origine et les Fonctions Essentielles du Parlement; sur la Pairie, et le Droit des Pairs; et sur les Loix Fondamentales de la Monarchie Françoise* (1764) 66f, 106. The basis and essence of the works of Le Paige and Michel de Cantalauze de La Garde is the right of the parlements to take part in the law-making process.

143 De Cantalauze de La Garde (n 142) 31.
recognisable in Montesquieu’s discourse (linguistic expression). Those demands are documented in the Remontrances sur les Évocations des Parlement de Paris of 9 January 1731: “Nos rois ont regardé dans tous les temps leur parlement comme le dépositaire perpétuel et immédiat de leur justice souveraine.” However, the remontrances written after 1748 contain reminders of De L’Esprit des Lois: On 27 September 1751 Claude Adrien Helvétius (1715-1771) wrote to Montesquieu: “Avez-vous lu toutes les remontrances du Parlement de Paris et n’y avez-vous point remarqué comme nous que c’est dans l’Esprit des lois qu’on a puisé toutes ces belles maximes sur l’autorité?” La Beaumelle describes one draft of the Remontrances of 6 February 1753 as follows: “C´est un traité admirable sur notre constitution, et tout tiré de l’Esprit des lois.” The Grandes Remontrances sur les Refus de Sacrement of 9 April 1753, imploring the gradation de pouvoirs intermédiaires and the dépôts sacrés, as well as the Séance Royale, dite de la Flagellation of 3 March 1766 praising the authority of the Parlements as “tribunaux dépositaires par état des lois inviolables qui forment le droit sacré de la Nation” and as “gardien respectif” and the Remontrances sur l’Évocation du Procès Criminel de MM. de la Chalotais et Consorts of 5-8 December 1766 arguing with the lois fondamentales and the lois, nées avec la Monarchie are based on Montesquieu’s wording relating to the balancing function of the aristocracy. The parlements of the provinces also draw heavily from De l’Esprit des Lois as the Marquis d’Argenson observes: “Le président de Montesquieu

144 Cf the restrictions to the royal plenitud potestatis by way of ordonnances as repeatedly stressed in earlier remontrances. See Flammermont Remontrances du Parlement de Paris au XVIIIe Siècle Vol 1 (1715-1753) (1888) lxxix.
145 Flammermont (n 144) 232, 234 Remontrances sur les Évocations des Parlement de Paris of 9 Jan 1731.
147 Le Sueur (ed) Maupertius et ses Correspondants (1897) 209. The cited passage can be found in a letter by La Beaumelle sent to Pierre Louis Moreau de Maupertuis (1698-1759), who was – as French physicist and mathematician – a member of the Académie des Sciences from 1723 and who was, at Voltaire’s instigation, appointed President of the Prussian Academy of Sciences in 1746.
148 Flammermont (n 144) 506, 568, 569.
149 Flammermont & Tourneux Remontrances du Parlement de Paris au XVIIIe Siècle Vol 2 (1755-1768) (1895) 554, 557.
150 Flammermont & Tourneux (n 149) 417 Remontrance du Parlement de Paris of 26 Dec 1763.
151 Flammermont (n 144) 506, 522.
152 Flammermont & Tourneux (n 149) 663f.
153 Cf the Declaration of the Parlement of Bordeaux of 21 Mar 1759 in Recueil d’ Arrestés, Articles et Remontrances de Différentes Classes du Parlement sine loco (1759) 75 (B N Lb38 807); Declaration of the parlement de Grenoble of 25 Mar 1759 sine loco (1759) 77 (B N Lb38 810); Remontrances du Parlement de Toulouse au Roi du 9 Aug. 1760 sine loco (no date) (B N Lb38 851); Declaration of the parlement de Grenoble of 10 Apr 1759 sine loco (1759) 5f (B N Lb38 807); Declaration of the parlement of Aix of 5 Nov 1756 in Remontrances du Parlement de Provence au Roi, sur le second vingtième, et autres droits (Date of the 5 novembre 1756, jointes aux Remontrances du même Parlement, de juin 1749 sine loco (no date) 55 (B N Lb38 709). “Les principaux ressorts de l’administration étant soustraits, ceux qui restent n’ont plus de justesse, ni de mouvement réglé. Les pouvoirs ne sont point combinés; il n’y a plus d’équilibre depuis que le corps qui tenoit en respect tous les pouvoirs subalternes est sans action et sans existence.”
The extensive reception of Montesquieu’s *De L’Esprit des Lois* in pro-aristocratic literature, amongst the parliamentary nobility (*noblesse de robe*) and in the *remonstrances* of the *parlements* confirms the interpretation that the notion of balance inherent in the mixed constitution (*le pouvoir arrête le pouvoir*) is directed towards a balance of the socio-political powers. Balance of powers as envisaged by the supporters of the mixed constitution does not refer to the institutional balance of governmental bodies but describes the balance of the socio-political powers. It is in this sense that Montesquieu discusses the distribution of powers in ancient Rome (Book 11 ch 14-18). The balance of powers in the mixed constitution does not call for an institutional control of the monarchical executive through the legislative, but rather equilibrium within the governmental body constituted by the different social powers.

3.4.3 The German Montesquieu-reception

The appearance of Montesquieu’s *The Spirit of the Laws* in 1748 coincided with the enlightened absolutist criticism of the *dicta* of power (the so-called *Machtsprüche*) beginning in 1750. The literary success of *The Spirit of the Laws* may explain the interest of contemporary thinkers such as Jacob Gottlieb Siebers and Karl Friedrich Häberlin in the issue of the diversity of governmental and judicial matters. Though David Georg Struben paraphrases Montesquieu’s Book 6 chapter 6 and Book 11 chapter 6 in his treatise of...
governmental and judicial matters (Abhandlung von Regierungs- und Justizsachen), he dissociates himself expressly from any restriction of the monarchical judicial prerogative: "[I]n Germany, in former as well as in more recent times, it has never derogated from freedom that courts were variously composed of rulers or princes or their governmental advisors."  

Likewise, Johann Jacob Moser explicitly describes the relevance of Montesquieu’s ideas of mediating sovereignty in order to prohibit dicta of power as “null and void”.  

The devolution of judicial powers to learned judges as “assistants of government” (“Gehülfen der Regierung”) or “delegates of the executive” (“mit einem Theile der vollziehenden Gewalt bekleidet”) does not mean that the monarch delegates his judicial prerogatives to independent constitutional bodies. Sovereign rights may be exercised by various government employees, but this does not mean that sovereign rights are separate from the highest authority. 

Sovereignty entitles the monarch to overrule ordinary judges and to pronounce a dictum of power whenever the public welfare so requires (“so oft es das öffentliche Wohl erheischt”). According to Jacob Gottlieb Siebers the differentiation of governmental and judicial matters explicitly leaves the authority of the sovereign untouched to decide a judicial matter by dicta of power. Correspondingly, representatives of German idealism such as Fichte and Hegel also plead for a unitary supreme power. Montesquieu’s ideas are known to the German political philosophers but they are not popular. In the twelfth part of his New Truths (1758) the political

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160 Struben Nebenstunden (Hannover 1761) Part 3: Von Regierungs- und Justizsachen at 44: “In Deutschland hat jedoch weder zu älteren noch zu neueren Zeiten es der Freyheit Abbruch ge han, daß mit den Fürsten, und denjenigen, welche sie in Regierungs-Sachen zu Rath zogen, die Gerichts-Höfe vielfäI Ig besetzt worden.”

161 “Null und richtig” See Moser Abhandlung von Kayserlichen Macht-Sprüchen In Rechts- Staats- und Gemischten Sachen (Franckfurth am Mayn 1750) par 9 at 15.

162 Von Gönner Commentar über das Königliche bayerische Gesetz vom 22 Juli 1819 (1820) at lv.

163 Puchta Über die Grenzen des Richteramtes in bürgerlichen Rechtssachen (1819) at 10.

164 Scheidemantel Das Staatsrecht nach der Vernunft und den Sitten der vornehmsten Völker betrachtet Vol 1 (1770) at 157.

165 Maurenbrecher Grundsätze des heutigen deutschen Staatsrechts (1837) par 189 (Besondere Anwendungen der vollziehenden Gewalt) A. Von der richterlichen Gewalt der deutschen Regenten at 337.

166 See Siebers (n 158) at 27.

167 According to Fichte Grundlagen des Naturrechts nach Prinzipien der Wissenschaftslehre (1796 2nd edition 1960) at 159 the executive power covers the judicial as well as the executive power in the narrow sense of the word. Thus the distinction between legislative and executive power is inappropriate ("untunlich") idem at 16.

economist Johann Heinrich Gottlob von Justi refers implicitly to Locke and explicitly to Montesquieu. Von Justi describes only the executive and the legislative power to which the judiciary is subordinate. He paraphrases Montesquieu’s expressed desire for political freedom that was the foundation of article 16 of the French Declaration of the Rights of Man. In his treatise On the Nature of States as Resource of Political Science (Natur und Wesen der Staaten als die Quelle aller Regierungswissenschaften und Gesetz (1760)) he remarks that it is safer not to entrust supreme power to a single person, but to establish a fair balance of powers. In the mentioned paper von Justi takes over Montesquieu’s fundamental laws that are the core of the limited monarchy according to Book 2 chapter 4 of Lois de l’Esprit. In the same year the Swiss physiocrat Isaak Iselin pleads for the distribution and moderation of power in his Essay on Legislation (Versuch über die Gesetzgebung) (1760). Both publications express a political economic background which later can be found

169 Von Justi Neue Wahrheiten zum Vortheile der Naturkunde und des gesellschaftlichen Lebens der Menschen Part 12 (1765) 4 (Betrachtungen über das enge Band zwischen dem Regenten und den Unterthanen) at 689, 690, 691. The references are implicit.


171 Idem 708: “Es gibt nur zwei Haupteinrichtungen der obersten Gewalt, die gesetzgebende Macht und die vollziehende Macht.”

172 Ibid: “Allein, niemals ist die Macht Rechtssprüche zu thun eine souveraine Gewalt. Diese Macht ist, was die Annehmung der Gesetze betrifft, allemand der gesetzgebenden Gewalt, und was die Ausübung oder Vollstreckung der bürgerlichen Gesetze anbelanget, der vollziehenden Macht unterworfen.”

173 Idem 710: “Wenn die gesetzgebende und vollziehende Macht, und die subordinirte richterliche Gewalt in den Händen einer einzigen Person, einer einzigen Gesellschaft, oder eines gewissen Körpers im Staate, miteinander vereinigt sind; so steht die Freyheit der Bürger allemand in der höchsten Gefahr.”

174 Von Justi Die Natur und das Wesen der Staaten, als die Grundwissenschaft der Staatskunst, der Policy, und aller Regierungswissenschaften, desgleichen als die Quelle aller Gesetze (1760) at 97: “[A]llemal rathsamer und sicherer ist, wenn sie Niemand eine uneingeschränkte oberste Gewalt anvertrauen, das ist, wenn sie nicht alle Zweige und Theile der obersten Gewalt in einerley Hände geben.” For Justi it is no longer the state in the form of the monarch which embodies the political community, but the manifold layers of society which form the state. See also Pahlow Justiz und Verwaltung, Zur Theorie der Gewaltenteilung im 18. und 19. Jahrhundert (2000) at 58.

175 Von Justi (n 174) 154: Vielmehr sollten “die verschiedenen Theile der obersten Gewalt in ein gerechtes Verhältniß und Gleichgewicht mit einander gesetzt werden”.


177 Iselin Versuch über die Gesetzgebung (1760 repr 1978) 25f: “die Gewalt ... so viel möglich ... zu verhehlen und zu täuschen, daß auch der Wille dieselbe zu mißbrauchen, von dem Vermögen dazu entblößt sey.”
in the works of Josef von Sonnenfels. For Johann Heinrich Gottlob von Justi and Isaak Iselin the social affiliation, not the state, is essential for fortune and prosperity.

It is only since 1790 that public lawyers have abandoned the concept of unlimited supreme authority by indicating the danger of abuse of power: “The rule of a single person will carry the most danger, if that rule is absolute” – so warned August Ludwig Schlözer in his General Public Law and Constitutional Doctrine (Allgemeines StatsRecht und StatsVerfassungsLere) published in 1793.

The theoretical basis for limiting governmental power was provided by Immanuel Kant. Following Kant’s central idea of self-motivation of human beings, endowed with intelligence and free will, human rights are considered inalienable and essential. Their a priori structure allows only limited supreme authority. Absolute sovereignty is inconsistent with rational human rights and is therefore “despotism”. The civil constitutional state, named “Republicanism”, is based on “the secession of the executive (government) from legislative power”. Legislative power is entrusted to the people as sovereign. Executive power remains with the ruler. Executive power is subordinate to legislative power because, as Kant expressly states, “despotism is the state’s arbitrary execution of laws that it has enacted itself, and is therefore the public will insofar as it is treated as his private will by the regent”. Kant separates judicial power from executive and legislative powers.
This Kantian doctrine of the separation of powers influenced numerous authors of the later school of natural rights.\textsuperscript{187} The Kantian categories of "despotism" for unitary powers and of "republicanism" for the separation of powers become a popular pattern of thought within general constitutional doctrine after 1793.\textsuperscript{188} The acceptance of the idea of the separation of powers in general public law of the nineteenth century was favoured by changes in the role of the state. The enlightened-absolutist doctrine of general welfare was substituted by the liberal objective of the state, civil liberty. This cannot be achieved without separation of powers.\textsuperscript{189} The natural freedom of man, following from the self-motivation of the individual, cannot be bestowed, but can merely be recognised by the supreme authority. This places an absolute limit on the supreme authority by a right protecting the domain of personal freedom. The role of the state is restricted to the protection of personal freedom.

\section{Conclusion}

Looking behind the big names, there was hardly any cross-border influences of Locke and Montesquieu. Both writers had a very specific historical background, the first justifying the Glorious Revolution with old common-law categories, the latter ventilating the aristocratic opposition against the centralism of the French monarchy. Perhaps it was the detour via the American War of Independence (1776-1783) that influenced the legal literature in eighteenth century France and German territories. If poor old bumbling Georg III was a tyrant, how should one classify the European monarchs? If the Americans could rebel against a tax on tea, what possible justification could there be for the massive taxes under which most Europeans groaned? If the United States of America had to be created because Americans had no representation in the British Parliament, what should all those Europeans think whose own countries did not even possess a Parliament?

\textsuperscript{187} Stang Darstellung der reinen Rechtslehre von Kant zur Berichtigung der vorzüglichsten Mißverständnisse derselben (Frankfurt/Leipzig 1798) at 99.
\textsuperscript{188} Mellin Grundlegung zur Metaphysik der Rechte und der positiven Gesetzgebung, Ein Versuch über die ersten Gründe des Naturrechts (1796 repr 1969) at 111; Erhard Prüfung der Alleinherrschaft nach moralischen Prinzipien (cited in Der neue Teutsche Merkur (1793) Vol 3 at 363f, 366); Bergk Die Theorie der Gesetzgebung (Meissen 1802) at 165, 170; Pölitz Die Staatslehre für denkende Geschäftsmänner, Kammeralisten und gebildete Leser Vol 1 (Leipzig 1808) at 95; Ancillon Ueber Souveränität und Staats-Verfassungen, Ein Versuch zur Berichtigung einiger politischer Grundbegriffe (Berlin 1815) at 32.
\textsuperscript{189} Pölitz (n 188) at 96: "Trennung [ist] das sicherste Prinzip des Rechts im Staat:"