

MONTESQUIEU AND MODERN COMPARATIVE LAW, CLIMATE, GEOGRAPHY, AND THE STRUCTURE OF POLITICAL COMMUNITIES

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I. INTRODUCTION

Modern political theory revolves around a series of normative and descriptive questions about the structure of a political community.¹ Questions like: What should the basic structure of a polity be?; What are the arguments that this structure is based on?; Should the basic structure of a political community account for the material and cultural context in which its members are located? Or, rather: Should its design ignore these variables and revolve around the political values that should guide any collectivity?; What variables explain the characteristics that identify the different political communities?; What should the methodology be to specify these explanatory reasons? In this Article, I want to explore the answers that Montesquieu offers to some of these questions. In particular, I want to explore how the comparative method, geography, and climate intersect in Montesquieu to explain the basic structures of political communities.

Therefore, in this Article I am not concentrating on the most common political and legal arguments in the literature on Montesquieu, like the principle of separation of powers, the central characteristics of the typology of forms of government he offers, the relationship between natural law and positive law, or his defense of a legally-limited monarchy.² My analysis revolves around the use of comparative studies to justify the causal relationship that supposedly exists between climate and geography, on the one hand, and biology, psychology, law, and politics, on the other. Of

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¹ See generally ANNELIEN DE DIJN, *FRENCH POLITICAL THOUGHT FROM MONTESQUIEU TO TOCQUEVILLE* (2008).

² See, e.g., THOMAS PANGLE, *MONTESQUIEU'S PHILOSOPHY OF LIBERALISM: A COMMENTARY ON THE SPIRIT OF THE LAWS* (1973); see also PAUL RAHE, *MONTESQUIEU AND THE LOGIC OF LIBERTY* (2009). The main book by Montesquieu is MONTESQUIEU, *EL ESPÍRITU DE LAS LEYES* (Siro García del Mazo trans., Librería de Victoriano Suarez 1906) (1748) [hereinafter *EL ESPÍRITU*]. Three other relevant books for this Article are MONTESQUIEU, *CONSIDÉRATIONS SUR LES CAUSES DE LA GRANDEUR DES ROMAINS ET DE LEUR DÉCADENCE* (Catherine Volphilhac-Auger ed., Folio 2008) (1734) [hereinafter *CONSIDÉRATIONS*]; MONTESQUIEU, *CARTAS PERSAS* (Francisco Javier Hernadex ed., Catedra 1997) (1721) [hereinafter *CARTAS PERSAS*]; and MONTESQUIEU, *ENSAYO SOBRE EL GUSTO* (Ariel Dilon trans., Libros del Zorza 2006) (1757).

course, this argument intersects with the four previous arguments. However, my analysis only touches upon these ideas to show their link with the geographic, climatic, and biological causalism defended by Montesquieu and with the surfacing of modern comparative law. My analysis, therefore, focuses on the use that Montesquieu gives to the comparative method. It focuses, more precisely, on how Montesquieu's use of the comparative method contributes to the emergence of modern comparative law as a particular subfield within law.³ It also focuses on how the narrative constructed by Montesquieu contributes to the creation of the modern subject of law, the conceptual geographies this subject inhabits, and the types of history that it experiences. Montesquieu, therefore, is understood in this Article as the first component of the genealogy of modern comparative law: the paradigmatic representative of the first and more prominent efforts to use the comparative method in modern law and politics.⁴

The modern subject of law, I argue, is structured around the conceptual opposition between self and "other." The content of self's identity is intertwined with the content of the identity of "other." The modern subject of law constructs its identity through the construction of the "other." The "other" is not outside the modern legal self; the "other" exists within the modern legal self. The specific content of the modern legal subject and its "other" is not static, however. Their specific identities have varied historically, among others, the European and the Asian, the civilized and the savage, the metropolitan subject and the colonial subject, and the legal subject and the legal barbarian. These transformations are a consequence, in part, of the changes experienced by modern comparative law. Modern comparative law has provided some of the key conceptual components structuring the modern legal self.

In the case of Montesquieu, the object of study in this Article, comparative law's narrative is woven by means of the construction of the individual and collective identities of Europeans and non-Europeans.⁵ The Article, thus, revolves around the meanings of the oppositions (Europeans/Asians, Europe/Asia) and a dual notion of time (static and inertial and dynamic but potential).⁶ The relationship between the components of each conceptual opposition, moreover, is not one of equals. Montesquieu's causalism generates a narrative that radically distinguishes

³ See discussion *infra* Part II.

⁴ See discussion *infra* Part II.

⁵ See discussion *infra* Part II.

⁶ See discussion *infra* Part II.

and hierarchizes European and non-European political communities and individuals.⁷

The narrative that Montesquieu constructs is not a thing of the past. On the contrary, this narrative, although transmuted, remains rooted in contemporary legal and political imagination. This line of argumentation has had effects on both academia and popular culture. For example, geographic and climatic causalism had a significant influence on the geography of the nineteenth century and the beginning of the twentieth century.⁸ In Germany, Friedrich Ratzel coined the term “geographic determinism” and used and developed it in his work.⁹ The Munich school, influenced by Ratzel’s work and impelled by Karl Haushofer, concentrated its reflections on interpreting and explaining what Haushofer called geopolitical laws.¹⁰ In the United States, Ellsworth Huntington, among others, included the category “race” in causal relationships between nature and society and opened a widely-disseminated line of research in geography and anthropology during the first half of the twentieth century.¹¹

In popular culture, examples of the influence of a causalism analogous to Montesquieu’s abound. The idea that the economic and political differences that exist between the countries of northern and southern Europe are due to climatic and geographic issues is widely disseminated.¹² Also widely disseminated is the idea that the supposed exuberant sexuality of Africans and Latin Americans, their supposed laziness, and their supposed cultural poverty are due to the fact that they inhabit warm, low areas of the globe.¹³ Finally, it is worth mentioning the idea that the legal and political

⁷ See discussion *infra* Part II.

⁸ See *infra* notes 10–12 and accompanying text.

⁹ FEDERICO RATZEL & CHARLES HUSSY, *GÉOGRAPHIE POLITIQUE* (Pierre Rusch trans., Régionales Européennes 1988) (1897).

¹⁰ See KARL HAUSHOFER, *GEOPOLITIK DES PAZIFISCHEN OZEANS* (Ercheinungsort 2013) (1938).

¹¹ See ELLSWORTH HUNTINGTON, *CIVILIZATION AND CLIMATE* 11–34 (2d ed. 1922) (1915); see generally ELLSWORTH HUNTINGTON, *THE CHARACTER OF RACES AS INFLUENCED BY PHYSICAL ENVIRONMENT, NATURAL SELECTION, AND HISTORICAL DEVELOPMENT* (Literary Licensing 2013) (1924).

¹² María Alcaraz, *El Horario de Verano Solo Favorecería a los Países del Norte*, ABC: SOCIEDAD (Oct. 31, 2018, 1:11 PM), https://www.abc.es/sociedad/abci-horario-verano-solo-favoreceria-paises-norte-201809010335_noticia.html; Xavier Bru de Sala, *Europa, Italia, el Norte y el Sur*, ECONOMÍADIGITAL IDEAS (Mar. 7, 2018, 4:55 PM), https://ideas.economiadigital.es/analisis-politico-y-social/xavier-bru-de-sala-europa-italia-el-norte-y-el-sur_541628_102.html; Mohorte, *Las Fronteras Invisibles de Europa, el Continente Dividido que Esconden los Mapas*, MAGNET (Feb. 25, 2018, 3:00 PM), <https://magnet.xataka.com/en-diez-minutos/las-fronteras-invisibles-de-europa-el-continente-dividido-que-esconden-los-mapas>.

¹³ Lyimo Gervas, *Por qué África Es Pobre*, CIUDAD REDONDA (Sept. 2, 2009), <https://www.ciudadredonda.org/articulo/por-que-africa-es-pobre>; Nicolás Alonso, *Los Insultos de Trump Desatan una Condena Global*, EL PAÍS (Jan. 13, 2018, 3:12 PM),

differences between the Global North and South, and the consolidation and development of their legal and political orders, are supposedly conditioned by the climatic and geographic differences that distinguish the tropics from the temperate areas of the earth.¹⁴ Examining Montesquieu's arguments, therefore, does not respond to a theoretical and historical interest only. It responds to an interest in understanding patterns of argumentation that cut across enlightened modernity and influence how we imagine contemporary political communities.

To meet these descriptive and analytical objectives, the Article is divided into two parts. In the first, I reconstruct the arguments that form the causalism defended by Montesquieu. On the one hand, these arguments constitute the basis in which my analytical arguments will rest. On the other hand, this line of Montesquieu's argumentation is not well known outside of the circles of specialists in modern political theory. In the second part, I examine the narrative that this causalism constructs on the political and legal communities of Europe and Asia.

II. EXPLANATORY REASONS AND THE EMERGENCE OF MODERN COMPARATIVE LAW

Montesquieu is considered to be the father of modern comparative law.¹⁵ The centrality of his work within the Enlightenment and the use of the comparative method as a basis for his theses have made him the symbolic reference for the emergence of the discipline.¹⁶ In Antiquity and the Middle Ages, there were authors of great relevance who used

https://elpais.com/internacional/2018/01/12/estados_unidos/1515774630_288263.html; Rodolfo Segovia, *América Latina ¿Dependiente o Perezosa?*, DINERO (June 1, 1995), <https://www.dinero.com/columnistas/edicion-imprensa/articulo/america-latina-dependiente-o-perezosa/19180>.

¹⁴ Pablo Correa, *La Reconciliación Es Dejar a Todo el Mundo un Poco Infeliz*, EL ESPECTADOR (Mar. 31, 2018, 10:04 PM), <https://www.elespectador.com/noticias/ciencia/la-reconciliacion-es-dejar-todo-el-mundo-un-poco-infeliz-articulo-747414>; Alejandro Vélez, *Las Pócimas de Montesquieu*, DINERO (July 10, 2017, 12:24 PM), <https://www.dinero.com/opinion/columnistas/articulo/las-pocimas-de-montesquieu-alejandro-velez-munera/247428>.

¹⁵ HAROLD C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 12 (Cambridge Univ. Press 2015) (1946); Robert Launay, *Montesquieu: The Specter of Despotism and the Origins of Comparative Law*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 22–23 (Annelise Riles ed., 2001); René David & John E.C. Brierley, *Introduction*, in *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 4 (René David & John E.C. Brierley eds., Stevens & Sons 3d ed. 1985); EMILE DURKHEIM, *MONTESQUIEU AND ROUSSEAU: FORERUNNERS OF SOCIOLOGY* 149 (1960); LOUIS ALTHUSSER, *MONTESQUIEU: LA POLITIQUE ET L'HISTOIRE* (4th ed. 2003) (1959); RAYMOND ARON, *LES ETAPES DE LA PENSÉE SOCIOLOGIQUE* (1967).

¹⁶ See Launay, *supra* note 15, at 23.

comparative legal studies to justify or develop their thesis, Aristotle¹⁷ and Bartolus,¹⁸ for example. Nevertheless, Montesquieu has been interpreted as the author who makes paradigmatic use of comparison in the field of modern law and politics.¹⁹ Montesquieu uses the comparative method in various lesser-known works e.g., the *Persian Letters*²⁰ and *Considerations on the Causes of the Roman' Greatness and Their Decadence*.²¹ Nevertheless, he also uses it in *The Spirit of the Laws*,²² his most important work. In this book, Montesquieu presents his thesis on the principle of separation of powers; the strengths and weaknesses of democracy, aristocracy, and despotism; the relationship between natural law and positive law; and the links between the latter and the material and psychological characteristics of peoples.²³ It is in this book that he also uses comparative studies in the clearest, most complete, and precise manner to justify his thesis.²⁴

The line of argumentation defended by Montesquieu is structured around the following reasons. Montesquieu starts his reflection by recognizing the existence of natural laws of divine origin like the search for peace, sexual instinct, and survival instinct.²⁵ Montesquieu states that these laws are a consequence of the nature of things, apply to all members of the species, and have a high degree of generality.²⁶ The mandates of these divine laws are very vague guidelines for human actions.²⁷ They must be developed so that they can be applied in society.²⁸ The meaning of the universal divine mandates is thus not univocal.²⁹ Reason does not generate a single interpretation of natural laws.³⁰ Positive laws should give them specific meaning, and the interpretations they make of natural law will never be identical.³¹ These interpretations are a consequence of the material

¹⁷ See generally ARISTOTLE, *POLITICS* (Benjamin Jowett trans., Dover Publ'n 2000) (c. 350 B.C.E.).

¹⁸ See generally BARTOLUS, *BARTOLUS ON THE CONFLICTS OF LAW* (Joseph Henry Beale ed. & trans., Lawbook Exchange 2003) (1914).

¹⁹ See *supra* note 15 and accompanying text.

²⁰ See generally *CARTAS PERSAS*, *supra* note 2.

²¹ See generally *CONSIDÉRATIONS*, *supra* note 2.

²² See generally *EL ESPÍRITU*, *supra* note 2.

²³ See *infra* notes 25–49.

²⁴ See *infra* notes 25–49.

²⁵ *EL ESPÍRITU*, *supra* note 2, at 11.

²⁶ *Id.*

²⁷ *Id.* at 12.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 11–12.

³¹ *Id.* at 16–17.

and psychological characteristics of people.³² For Montesquieu, positive laws are (and should be) a function of the geography, climate, and temperament of societies.³³

Montesquieu also argues that there are three models of government around which peoples can organize themselves: democracy, aristocracy, and despotism.³⁴ Each of these political structures revolves around a value: equality, honor, and fear, respectively.³⁵ These values justify the forms of government and motivate subjects to act in each of them.³⁶ Democracy supposes and promotes equality among all members of the political community.³⁷ In democracy, those that govern are simultaneously the governed: citizens, or their representatives, create the polity's laws.³⁸ In aristocracy, the power is concentrated in the hands of a small group of individuals.³⁹ A few govern the majority. Aristocracy, Montesquieu adds, can be organized as an absolute monarchy, in which case its differences with despotism would not be notable, or it can be structured as a legally-limited monarchy.⁴⁰ In a legally-limited monarchy, the aristocrats are the ones who create the laws.⁴¹ Conversely, despotism is the government of a single individual who is limited only by his will and caprice.⁴² In this form of government there are no laws, only uses and customs.⁴³

Montesquieu also argues that the relationship between these forms of government and the people is not random.⁴⁴ The geographic and

³² See generally *id.*

³³ *Id.* at 18 ("Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.").

³⁴ *Id.* at 20.

³⁵ *Id.* at 37, 40, 46.

³⁶ *Id.*

³⁷ *Id.* at 55.

³⁸ See *id.* at 70–75.

³⁹ *Id.* at 40.

⁴⁰ *Id.* at 47–49.

⁴¹ *Id.* at 27–28.

⁴² *Id.* at 45–46 ("How can despotism abide with honour? The one glories in the contempt of life; and the other is founded on the power of taking it away. How can honour, on the other hand, bear with despotism? The former has its fixed rules, and peculiar caprices; but the latter is directed by no rule, and its own caprices are subversive of all others.").

⁴³ *Id.* at 47.

⁴⁴ *Id.* at 16.

psychological characteristics of peoples condition their political organization.⁴⁵ Nature generates peoples with different fundamental features.⁴⁶ In turn, these psychological characteristics condition the political structures that govern them. Europe is identified with democracy and legally-limited monarchy,⁴⁷ while Asia is identified with despotism.⁴⁸ So, Rome and Athens in ancient Europe are cities that are paradigmatically linked with the government of the people by the people.⁴⁹ England and France are linked with the legally-limited monarchy.⁵⁰ Kings and queens are the ones who govern these political communities. Lastly, Asia is identified with despotic governments.⁵¹ In the Orient, the political figures are the pasha, the vizier, and the mogul.⁵² Africa and America are analogous to Asia.⁵³ The conclusions reached regarding this continent are also applicable to the first two.⁵⁴ There are fewer specific references to Africa and America in comparison to those regarding Asia.⁵⁵

Europe has seasons, which makes its inhabitants active, predictable, and courageous.⁵⁶ The cold, the changes generated by climatic cycles in the

⁴⁵ *Id.* at 441–42 (“Mankind are influenced by various causes: by the climate, by the religion, by the laws, by the maxims of government, by precedents, morals, and customs; hence is formed a general spirit of nations.”).

⁴⁶ *Id.* at 329.

⁴⁷ *Id.* at 404 (“In Europe the natural division forms many nations of a moderate extent, in which the ruling by laws is not incompatible with the maintenance of the state: on the contrary, it is so favourable to it, that without this the state would fall into decay, and become a prey to its neighbours. It is this which has formed a genius for liberty that renders every part extremely difficult to be subdued and subjected to a foreign power, otherwise than by the laws and the advantage of commerce.”).

⁴⁸ *Id.* (“In Asia they have always had great empires; in Europe these could never subsist. Asia has larger plains; it is cut out into much more extensive divisions by mountains and seas; and as it lies more to the south, its springs are more easily dried up; the mountains are less covered with snow; and the rivers, being not so large, form more contracted barriers. Power in Asia ought, then, to be always despotic; for if their slavery was not severe they would soon make a division inconsistent with the nature of the country.”).

⁴⁹ *Id.* at 68.

⁵⁰ *Id.*

⁵¹ *Id.* at 404. See MONTESQUIEU, *Letter 131*, in 2 THE PERSIAN LETTERS 120 (John Davidson ed. & trans., London 1872) (1721) (“Nothing has interested me more since my arrival in Europe than the history and origin of republics. You know that most Asiatics have not only no notion of this form of government, but that their imagination is unable to conceive the possibility of there being any other in the world than despotism.”).

⁵² MONTESQUIEU, *supra* note 2, at 101–03.

⁵³ MONTESQUIEU, *supra* note 51, at 93; EL ESPÍRITU, *supra* note 2, at 404 (“Africa is in a climate like that of the south of Asia, and is in the same servitude. America, being lately destroyed and re-peopled by the nations of Europe and Africa, can now scarcely display its genuine spirit; but what we know of its ancient history is very conformable to our principles.”).

⁵⁴ EL ESPÍRITU, *supra* note 2, at 404.

⁵⁵ *Id.*

⁵⁶ *Id.* at 396–400.

landscape, and the difficulties of the terrain make the European a reflective, rational being that is attentive to the future.⁵⁷ Nevertheless, Europeans are not all the same. The differences in the continent's climate also generate differences in its peoples.⁵⁸ The south and the north of Europe are not the same.⁵⁹ As the heat increases, the positive characteristics in their temperament decrease.⁶⁰ For Montesquieu, this is not a coincidence.⁶¹ On the contrary, the causal relationship between climate and temperament can be explained biologically.⁶² The cold contracts the body's extremities, which in turn contributes to its elasticity, facilitates the return of blood to the heart, and makes this organ stronger.⁶³ This contraction, strength, and elasticity of the body have psychological consequences.⁶⁴ Individuals with these physical strengths will be firm, secure, honest, and reliable, and they will have a sense of superiority when they compare themselves to other individuals.⁶⁵ Montesquieu argues that differences of temperament are also related to the foods produced in different geographies; foods affect glands like the lymph nodes in different ways that cause the body tissues to have different degrees of strength.⁶⁶

The cold and the physical robustness it generates, make individuals less sensitive to pleasure and pain.⁶⁷ The nerve tissues that form the human body in cold climates are smaller than those that form the human body in warm climates.⁶⁸ As a consequence, the human beings that inhabit colder areas are less sensitive.⁶⁹ This reduced sensitivity makes people less predisposed to the satisfaction of bodily pleasures.⁷⁰ These individuals are less inclined to employ their time and energy to achieve these kinds of pleasures.⁷¹ They are also less inclined to lead a dissolute life or to lose control in searching for and materializing bodily pleasures.⁷² The strength of the tissues generated

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 330–32.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (“This superiority of strength must produce various effects; for instance, a greater boldness, that is, more courage; a greater sense of superiority, that is, less desire of revenge; a greater opinion of security, that is, more frankness, less suspicion, policy, and cunning.”).

⁶⁶ *See id.* at 330.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 331.

⁷¹ *Id.*

⁷² *Id.*

by the cold also makes individuals' structures more solid, and they are therefore damaged less.⁷³ This physical strength is communicated to the soul, which is also made less susceptible to pain.⁷⁴ This strength of the soul, as well as the lack of bodily sensitivity, also means that people from the north do not frequently violate morality.⁷⁵ The levels of criminality are thus lower in the cold regions of the world.⁷⁶ Likewise, the strength of soul and body make people from the north less impressionable, open and disposed to change.⁷⁷

In contrast, human beings who inhabit warm lands are weak, indolent, fainthearted, lacking in generosity and initiative, cowardly, and full of vices.⁷⁸ The heat makes glands dilate and the nerve tissues are both weaker and more sensitive. Heat weakens the body: it rapidly drains one's energy and strength.⁷⁹ These biological and climatic circumstances mean that the people who inhabit warm lands have a great sensitivity to pain and to pleasure that leads them to a dissolute life, inclines them to the satisfaction of bodily pleasures, and to stray from moral parameters.⁸⁰ Heat inclines them to concentrate on sex, food, and wine; it makes them forget the limits and rules that govern them.⁸¹ For this reason, Montesquieu adds, the farther south you travel, the greater the increase in levels of violence and criminality.⁸² Similarly, the indolence and impressionability of the subjects from warm lands makes them less susceptible to change.⁸³ External circumstances can easily leave an imprint on the souls of the individuals that inhabit the southern areas of the globe.⁸⁴ Given the weakness that

⁷³ *Id.* at 332.

⁷⁴ *Id.* at 330 ("The inhabitants of warm countries are, like old men, timorous; the people in cold countries are, like young men, brave.").

⁷⁵ *Id.* at 332.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 332–33 ("In northern regions a machine robust and heavy finds pleasure in whatever is apt to throw the spirits into motion, such as hunting, travelling, war, and wine. If we travel towards the north, we meet with people who have few vices, many virtues, and a great share of frankness and sincerity. If we draw near the south, we fancy ourselves entirely removed from the verge of morality; here the strongest passions are productive of all manner of crimes, each man endeavouring, let the means be what they will, to indulge his inordinate desires. In temperate climates we find the inhabitants inconstant in their manners, as well as in their vices and virtues: the climate has not a quality determinate enough to fix them.").

⁸³ *Id.*

⁸⁴ *Id.*

constitutes these subjects, this imprint tends to remain on their psyches indefinitely.⁸⁵

However, these climatic and physical differences do not only have psychological consequences; they also have political and legal consequences.⁸⁶ For Montesquieu, there is a direct relationship between laws and systems of government, and geography and climate.⁸⁷ There is a causal relationship between climate and physical characteristics of the territory and issues like political, domestic, and civil servitude.⁸⁸ In Asia, Montesquieu argues, the differences between countries in warm lands and cold lands are radical.⁸⁹ There are no intermediate zones.⁹⁰ This fact has the effect that in Asia, the strong people from cold lands conquer the weak people from warm lands.⁹¹ The former dominate the latter; the latter are the servants of the former.⁹² In contrast, in Europe the temperate areas are extensive.⁹³ Montesquieu recognizes that there are climatic differences between the north and the south of Europe.⁹⁴ Nevertheless, these differences are not very large since the two areas have seasons.⁹⁵ Consequently, in Europe, strong and valiant countries are opposed to other strong and valiant countries.⁹⁶ There is a basic equality among the political communities that

⁸⁵ *Id.* at 335 (“If to that delicacy of organs which renders the eastern nations so susceptible of every impression you add likewise a sort of indolence of mind, naturally connected with that of the body, by means of which they grow incapable of any exertion or effort, it is easy to comprehend that when once the soul has received an impression it cannot change it. This is the reason that the laws, manners, and customs, even those which seem quite indifferent, such as their mode of dress, are the same to this very day in eastern countries as they were a thousand years ago.”).

⁸⁶ *Id.* at 330 (“If it be true that the temper of the mind and the passions of the heart are extremely different in different climates, the laws ought to be in relation both to the variety of those passions and to the variety of those tempers.”).

⁸⁷ *Id.* at 18.

⁸⁸ *Id.*

⁸⁹ *Id.* at 398–99 (“Asia has properly no temperate zone, as the places situated in a very cold climate immediately touch upon those which are exceedingly hot, that is, Turkey, Persia, India, China, Korea, and Japan.”).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 330–32 (“In Europe, on the contrary, the temperate zone is very extensive, though situated in climates widely different from each other; there being no affinity between the climates of Spain and Italy and those of Norway and Sweden. But as the climate grows insensibly cold upon our advancing from south to north, nearly in proportion to the latitude of each country, it thence follows that each resembles the country joining it; that there is no very extraordinary difference between them, and that, as I have just said, the temperate zone is very extensive.”).

⁹⁴ *Id.*

⁹⁵ *Id.* at 398.

⁹⁶ *Id.* at 400–01.

disincentivizes conquests and allows for freedom.⁹⁷ Montesquieu argues that freedom is the rule in Europe, while in Asia it is slavery.⁹⁸ Political servitude does not exist in Europe, while it is an extensive phenomenon in Asia.⁹⁹

Physical and psychological differences also determine the position of countries with respect to how they should regulate matters that range from the treatment of women (domestic servitude)¹⁰⁰ to slavery (civil servitude).¹⁰¹ Montesquieu argues that in countries of the south there is an inequality between men and women that is not found in countries of the north.¹⁰² This subordination of women to men is a consequence of the identification between marriage and childhood.¹⁰³ In warm climates, women are beautiful when they are young.¹⁰⁴ However, the climate affects their body negatively and quickly.¹⁰⁵ This is why women in warm climates are married as children and is what explains the existence of polygamy in southern countries.¹⁰⁶ Women depend on men when they marry so young, and cannot obtain their independence when they grow and have use of reason.¹⁰⁷ Montesquieu argues that they can no longer obtain what beauty

⁹⁷ *Id.* at 398 (“Hence it comes that in Asia, the strong nations are opposed to the weak; the warlike, brave, and active people touch immediately upon those who are indolent, effeminate, and timorous; the one must, therefore, conquer, and the other be conquered. In Europe, on the contrary, strong nations are opposed to the strong; and those who join each other have nearly the same courage.”).

⁹⁸ *Id.* (“This is the grand reason of the weakness of Asia, and of the strength of Europe; of the liberty of Europe, and of the slavery of Asia: a cause that I do not recollect ever to have seen remarked. Hence it proceeds that liberty in Asia never increases; whilst in Europe it is enlarged or diminished, according to particular circumstances.”).

⁹⁹ *Id.* at 403–04 (“In Europe the natural division forms many nations of a moderate extent, in which the ruling by laws is not incompatible with the maintenance of the state It is this which has formed a genius for liberty that renders every part extremely difficult to be subdued and subjected to a foreign power, otherwise than by the laws and the advantage of commerce. On the contrary, there reigns in Asia a servile spirit, which they have never been able to shake off, and it is impossible to find in all the histories of that country a single passage which discovers a freedom of spirit; we shall never see anything there but the excess of slavery.”).

¹⁰⁰ *See id.* at 374–93.

¹⁰¹ *See id.* at 350–73.

¹⁰² *Id.*

¹⁰³ *Id.* at 374–76 (“Women, in hot climates, are marriageable at eight, nine, or ten years of age; thus, in those countries, infancy and marriage generally go together. They are old at twenty: their reason therefore never accompanies their beauty. When beauty demands the empire, the want of reason forbids the claim; when reason is obtained, beauty is no more. These women ought then to be in a state of dependence; for reason cannot procure in old age that empire which even youth and beauty could not give.”).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

and youth did not give them.¹⁰⁸ When they lose their charms, it is also natural that men should seek a new woman and that the family grows.¹⁰⁹

In cold climates, beauty lasts much longer; physical charms are protected with the climate.¹¹⁰ This circumstance allows women to marry as adults, to have use of reason when they marry, and, therefore, to be in relatively equal conditions with men.¹¹¹ The physical decline of women also coincides with the physical decline of men.¹¹² Similarly, the vigor and courage imprinted by the cold climate on men of northern countries makes them want to protect their freedom and fight against being enslaved.¹¹³ In contrast, the physical weakness and feminization that the warm climate imprints on them makes men of the south unable to avoid being enslaved.¹¹⁴ Among these men, freedom is not as valued a good as it is between men of the north.¹¹⁵

The geography and climate of the territories that people inhabit also have consequences on their economy.¹¹⁶ The forms of production generate different types of legal and non-legal regulations in turn. Montesquieu argues that the quality of the land determines the forms of production in societies.¹¹⁷ For Montesquieu, fertile lands do not require greater work by

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 374 (“It is therefore extremely natural that in these places a man, when no law opposes it, should leave one wife to take another, and that polygamy should be introduced.”).

¹¹⁰ *Id.*

¹¹¹ *Id.* (“In temperate climates, where the charms of women are best preserved, where they arrive later at maturity, and have children at a more advanced season of life, the old age of their husbands in some degree follows theirs; and as they have more reason and knowledge at the time of marriage, if it be only on account of their having continued longer in life, it must naturally introduce a kind of equality between the two sexes; and, in consequence of this, the law of having only one wife.”).

¹¹² *Id.*

¹¹³ *Id.* at 397 (“We ought not, then, to be astonished that the effeminacy of the people in hot climates has almost always rendered them slaves; and that the bravery of those in cold climates has enabled them to maintain their liberties. This is an effect which springs from a natural cause.”).

¹¹⁴ *Id.* at 336 (“There are countries where the excess of heat enervates the body, and renders men so slothful and dispirited that nothing but the fear of chastisement can oblige them to perform any laborious duty: slavery is there more reconcilable to reason; and the master being as lazy with respect to his sovereign as his slave is with regard to him, this adds a political to a civil slavery.”).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 330–32.

¹¹⁷ *See id.* at 406 (“The goodness of the land, in any country, naturally establishes subjection and dependence. The husbandmen, who compose the principal part of the people, are not very jealous of their liberty; they are too busy and too intent on their own private affairs. These fertile provinces are always of a level surface, where the inhabitants are unable to dispute against a stronger power; they are then obliged to submit; and when they have once submitted, the spirit of liberty cannot return; the wealth of the country is a pledge of their fidelity. But in mountainous districts, as they have but little, they may preserve what they have. The liberty they enjoy, or, in other words, the government they are under, is the only blessing worthy of their defence. It reigns, therefore, more in mountainous and rugged countries than in those which nature seems to have most favoured.”).

those who inhabit them.¹¹⁸ Their riches allow them to live with tranquility.¹¹⁹ In these lands, men are shepherds or hunters and gatherers.¹²⁰ There is no division of land in these communities: it is not divided, exchanged, leased, or inherited. These communities do not have civil law,¹²¹ which Montesquieu argues has the primary objective of regulating matters related to land.¹²²

Communities of hunters and gatherers, Montesquieu adds, are very small and are organized around clans.¹²³ These societies cannot create a political community.¹²⁴ They could not survive if they did so: the resources available do not allow for the creation of settlements or groups with a high number of individuals.¹²⁵ Montesquieu calls these communities “savages.”¹²⁶ In contrast, communities of shepherds are communities that, while they have the clan as their basic social unit, do manage to form a political unit.¹²⁷ Their societies can settle in certain territories for longer periods and can have a notable number of individuals.¹²⁸ Montesquieu calls these communities “barbarians.”¹²⁹ Money does not exist in communities of hunters and gatherers or in communities of shepherds.¹³⁰ The products that they gather and the animals that they produce are the currency of exchange.¹³¹

The last type of community analyzed by Montesquieu is that with agriculture as its primary form of production.¹³² Seasons and the fact that lands are not abundant mean that individuals have to cultivate them to make them productive.¹³³ These are solid political communities that value land both morally and politically, and that have a civil law that regulates its acquisition, use, and exchange.¹³⁴ Money, a symbol of civilization, arises in

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 414.

¹²¹ *Id.* at 415–16 (“The division of lands is what principally increases the civil code. Among nations where they have not made this division there are very few civil laws. The institutions of these people may be called manners rather than laws.”).

¹²² *Id.*

¹²³ *Id.* at 414.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (“The savages are generally hunters.”).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 337.

¹³³ *Id.*

¹³⁴ *Id.*

this type of community as a consequence of the division and exchange of land.¹³⁵

Finally, for Montesquieu, the characteristics of the land inhabited by a people determine their form of political organization.¹³⁶ Poor land makes its inhabitants, men in particular, concentrate on their private matters.¹³⁷ They have to concentrate time and energy on producing in order to survive and create riches.¹³⁸ These men are industrious, sober, resistant, valiant, and disposed to war.¹³⁹ Each of these men values his freedom and does not fear the other's freedom.¹⁴⁰ A rich and abundant land, in contrast, always fears its neighbor, fears being conquered.¹⁴¹ A fertile land produces effeminate men who tend to rest and protect life, avoiding war.¹⁴² Consequently, while communities with poor lands are inclined toward democracy, those with rich lands are inclined toward monarchies and despotism.¹⁴³ Equality, firmness, and the high value given to freedom that characterizes men from infertile (and cold) lands makes them inclined toward democracy.¹⁴⁴ The weaknesses of character that distinguish men from fertile (and warm) lands make them inclined toward despotism.¹⁴⁵ Fear of invasion makes some people from fertile lands prefer the political and military strength of the monarchy.¹⁴⁶

The richness of the soil is not the only characteristic that has political and legal effects. Its extension and the geographic accidents that form it do as well.¹⁴⁷ So, for Montesquieu, the great Asian plains have allowed for the creation of large empires that need both slaves and despotic governments to

¹³⁵ *Id.* at 415 (“Nations of herdsmen and shepherds cannot leave their cattle, which are their subsistence; neither can they separate themselves from their wives, who look after them. All this ought, then, to go together, especially as living generally in a flat open country, where there are few places of considerable strength, their wives, their children, their flocks, may become the prey of their enemies. The laws regulate the division of plunder, and give, like our Salic laws, a particular attention to theft.”).

¹³⁶ *Id.* at 406–07.

¹³⁷ *Id.* at 409–10.

¹³⁸ *Id.*

¹³⁹ *Id.* at 410–11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 410 (When discussing islands, Montesquieu says, “The inhabitants of islands have a higher relish for liberty than those of the continent. Islands are commonly of small extent; one part of the people cannot be so easily employed to oppress the other; the sea separates them from great empires; tyranny cannot so well support itself within a small compass: conquerors are stopped by the sea; and the islanders, being without the reach of their arms, more easily preserve their own laws.”).

maintain them.¹⁴⁸ There are fewer geographic divisions, mountains and rivers for example, in Asia than in Europe. Despots are necessary to prevent the division of these empires and to control the armies of slaves that maintain them.¹⁴⁹ In Europe, in contrast, multiple geographic accidents have created a large number of strong political communities created by free men who value their individual and collective autonomy.¹⁵⁰ In these countries, there is no tension between the law and the protection of the state.¹⁵¹ On the contrary, for Montesquieu, the laws protect the freedom of individuals, and individuals protect the source of these laws: the political community.¹⁵²

III. CAUSALISM, THE POLITICAL COMMUNITY, AND THE MODERN SUBJECT

A. Inductive Reasoning and Comparative Legal Studies

Montesquieu, in *The Spirit of the Laws*, justifies his conclusions by calling upon two different forms of reasoning. For the justification of his thesis on natural law, Montesquieu calls upon deductive reasoning.¹⁵³ Reason allows Montesquieu to deduce natural laws of divine origin.¹⁵⁴ The existence of peace as an objective, the survival instinct, and the sexual instinct, among other laws, can be proven without resorting to factual arguments.¹⁵⁵ Scientifically-based facts can confirm their existence, which makes Montesquieu's thesis more persuasive. Nevertheless, they are not necessary to know natural law. To justify his thesis on the relationship between positive law and the forms of government, on the one hand, and the material and psychological characteristics of the peoples, on the other, Montesquieu calls upon comparative legal studies.¹⁵⁶ Montesquieu also uses this data to support his normative political agenda: the legally-limited monarchy for France.¹⁵⁷ As a consequence, Montesquieu's reasoning also has an inductive component.¹⁵⁸

¹⁴⁸ *Id.* at 403–04.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 296.

¹⁵¹ *Id.*

¹⁵² *Id.* at 201.

¹⁵³ *Id.* at 14–16.

¹⁵⁴ *See id.* at 11–14.

¹⁵⁵ *Id.* at 19.

¹⁵⁶ *See, e.g., id.* at 20–34, 329–49.

¹⁵⁷ *See* JUDITH SHKLAR, MONTESQUIEU 20–22, 78–80 (1987).

¹⁵⁸ *See id.*

Montesquieu supports his empirical theses by calling upon sociological and anthropological information about the various societies of the globe.¹⁵⁹ The empirical information that Montesquieu uses to justify his theses comes from various sources: missionaries, travel literature, classic philosophers, and merchants.¹⁶⁰ This information describes European societies like England, France, Spain, Greece, Rome, and Holland, and non-European, primarily Asian, societies like China, Persia, and India.¹⁶¹ The comparative method is central for Montesquieu's argumentation. He needs information from a wide variety of societies in order to demonstrate the universality of his thesis. Only in this way will he be able to support the idea that geography and climate condition the psychology, politics, and law of all human beings.¹⁶² Only in this way will he be able to demonstrate that positive laws specify the contents of natural laws differently and that positive law is a function of the physical and climatic characteristics of the territories where those who create it are located.¹⁶³

Montesquieu uses this empirical information to compare the differences and similarities between societies.¹⁶⁴ All are similar in that they are subject to natural laws; they are dissimilar in that they interpret natural laws differently conditioned by material circumstances that are outside of their control.¹⁶⁵ Montesquieu also uses this empirical information to support his typology of forms of government.¹⁶⁶ While at the beginning of the book Montesquieu presents this as a consequence of speculative reasoning, throughout the book he offers empirical information that justifies the idea that societies are organized (and have been organized) around three forms of government: democracy, aristocracy, and despotism.¹⁶⁷ Montesquieu's ultimate purpose is therefore to make neutral, descriptive, and explanatory use of the best sociological and anthropological information available at

¹⁵⁹ Ran Hirschl, *Montesquieu and the Renaissance of Comparative Constitutional Law*, in *MONTESQUIEU AND HIS LEGACY* 199, 205 (Rebecca Kingston ed., 2009).

¹⁶⁰ Catherine Volpilhac-Augier, *On the Proper Use of the Stick: The Spirit of Laws and the Chinese Empire*, in *MONTESQUIEU AND HIS LEGACY* 81, 82–83 (Rebecca Kingston ed., 2009); Leo Strauss, Lecture at the University of Chicago: Montesquieu 41 (1965) (transcript available at <https://wslamp70.s3.amazonaws.com/leostrauss/s3fs-public/Montesquieu%201965.pdf>); Michael Mosher, *What Montesquieu Taught: Perfection Does Not Concern Men or Things Universally*, in *MONTESQUIEU AND HIS LEGACY* 7, 21 (Rebecca Kingston ed., 2009).

¹⁶¹ See, e.g., EL ESPÍRITU, *supra* note 2, at 259.

¹⁶² *Id.* at 18.

¹⁶³ *Id.* at 16–17.

¹⁶⁴ *Id.* at 20–35, 329–49.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See, e.g., *id.* at 99–101, 105–10, 167–70.

that time.¹⁶⁸ By comparing this information, he wants to show the world as it is; he wants to unveil human reality.

Montesquieu's explanatory arguments are ambiguous on the relationship between causalism and autonomy.¹⁶⁹ A good part of the argumentation in *The Spirit of the Laws* is determinist.¹⁷⁰ Nature seems to have a necessary relationship with society; the former conditions the latter absolutely.¹⁷¹ Human will could therefore not break or moderate the effects of these causal links.¹⁷² In some other passages of the book, on the contrary, Montesquieu opens the possibility that individual autonomy varies the causal relationship between nature, law, and politics.¹⁷³ In these passages, Montesquieu speculates that the causal relationships between geography and climate, on the one hand, and law and politics, on the other, can be modified, or at least moderated, by individuals.¹⁷⁴ The autonomy of human beings does not seem to be annulled, but strongly conditioned, by nature.¹⁷⁵ Montesquieu's argumentation therefore moves between two poles: in the first, the (natural) structure restricts freedom inevitably and radically; in the second, freedom can vary the (natural) structure, at least partially.¹⁷⁶

¹⁶⁸ See generally *id.*

¹⁶⁹ See generally *id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 333 ("If we travel towards the north, we meet with people who have few vices, many virtues, and a great share of frankness and sincerity. If we draw near the south, we fancy ourselves entirely removed from the verge of morality; here the strongest passions are productive of all manner of crimes, each man endeavouring, let the means be what they will, to indulge his inordinate desires. In temperate climates we find the inhabitants inconstant in their manners, as well as in their vices and virtues: the climate has not a quality determinate enough to fix them If to that delicacy of organs which renders the eastern nations so susceptible of every impression you add likewise a sort of indolence of mind, naturally connected with that of the body, by means of which they grow incapable of any exertion or effort, it is easy to comprehend that when once the soul has received an impression it cannot change it. This is the reason that the laws, manners, and customs, even those which seem quite indifferent, such as their mode of dress, are the same to this very day in eastern countries as they were a thousand years ago.").

¹⁷² See generally *id.*

¹⁷³ *Id.* at 449 ("We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other manners and other customs.").

¹⁷⁴ *Id.*

¹⁷⁵ ANTONIO ENRIQUE TINOCO, DE UN DETERMINISMO A OTRO: 2500 AÑOS DE PREJUCIOS SOCIALES 86–90 (2017).

¹⁷⁶ *Id.*

B. Explanations, Social Sciences, and Modern Comparative Law

The descriptive aims that Montesquieu pursues and the methodology he uses are novel for the time in which they materialized. Montesquieu seeks to explain (social) facts with (natural and social) facts. The empirical information that supports his conclusions is not original: he does not gather or organize it himself. Nevertheless, Montesquieu uses the best sources available in his historical moment for the description and explanation of the social world. These explanatory efforts, this calling upon empirical information and inductive reasoning, constitute one of the sources of modern social sciences.¹⁷⁷ Montesquieu uses qualitative information as a basis for his social theses, as contemporary anthropologists and sociologists do.

Likewise, Montesquieu's use of the comparative method contributes to the emergence of what years later would be known as comparative law.¹⁷⁸ The description and analysis of similarities and differences among societies, Montesquieu argues implicitly, is useful for describing, understanding, and cataloguing them with precision.¹⁷⁹ Montesquieu offers a taxonomy of forms of government existing in the world, and he explains their existence by calling upon information that we would classify as sociological, anthropological, and geographic today.¹⁸⁰ This intellectual enterprise is analogous in its purposes and methods to what comparative legislative studies undertook in the nineteenth century and to what comparative law undertook in the twentieth century.¹⁸¹ On the one hand, comparative legislative studies, represented paradigmatically by Henry Sumner Maine,¹⁸² are committed to a linear notion of history.¹⁸³ This linear history is formed by a series of stages that all societies must experience in order to develop.¹⁸⁴ The stage that each society is located in is partly a consequence of the relationship that exists between culture and law.¹⁸⁵ Maine argues that the history of law can be synthesized in the move from status to contract.¹⁸⁶

¹⁷⁷ See Hirschl, *supra* note 159, at 205.

¹⁷⁸ *Id.* at 199.

¹⁷⁹ *Id.* at 199–202.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See HENRY SUMNER MAINE, *ANCIENT LAW* (Routledge 2017) (1861).

¹⁸³ Alan Macfarlane, *Some Contributions of Maine to History and Anthropology*, in *THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL* 111, 139–40 (Alan Diamond ed., 2006) (1991).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 151.

This step is an effect, at least partially, of culture. In Maine, we can find echoes of the taxonomic objectives (the stages of legal development) and explanatory objectives (causal relationship between culture and law) that cut across Montesquieu's work.¹⁸⁷

On the other hand, the first international comparative law conference in Paris in 1900, the mythical beginning of the autonomous discipline of comparative law, determined the creation of taxonomies that would allow for understanding the legal orders of the world as one of the key objectives of the discipline.¹⁸⁸ This enterprise was concretized in one of the paradigmatic products of twentieth century comparative law: legal families.¹⁸⁹ According to their authors, these taxonomies are based on empirical information related to the styles, techniques, or ideology of the various legal orders that exist globally. Their creators argue that this knowledge is neutral.¹⁹⁰ Its authors' subjectivities do not condition the contents of these taxonomies. The aims of the paradigmatic comparativists of the twentieth century, René David and Zweigert and Kötz, are presented as descriptive and analytical.¹⁹¹ Nevertheless, they also pursue explanatory objectives, e.g., references to European culture to account for the richness of the European legal families, the common law family and the civil law family.¹⁹² Other contemporary perspectives within comparative law emphasize the explanatory aims of their work much more, e.g., the movement of comparative economic law that seeks to explain the relationship between economic development and legal systems belonging to the civil or common law families.¹⁹³

¹⁸⁷ See *id.* at 102–03.

¹⁸⁸ Annelise Riles, *Introduction*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 4 (Annelise Riles ed., 2001); GUTTERIDGE, *supra* note 15, at 12.

¹⁸⁹ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 *AM. J. COMP. L.* 5, 6–8 (1997); Ahmed White, *Max Weber and the Uncertainties of Categorical Comparative Law*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 55–56 (Annelise Riles ed., 2001).

¹⁹⁰ KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 34–36 (Clarendon Press 1998) (1977); Mattei, *supra* note 189; White, *supra* note 189.

¹⁹¹ See generally ZWIEGERT & KÖTZ, *supra* note 190; see generally David & Brierley, *supra* note 15.

¹⁹² See generally ZWIEGERT & KÖTZ, *supra* note 190; see generally David & Brierley, *supra* note 15.

¹⁹³ MARIANA PARGENDLER, *The Rise and Decline of Legal Families*, 60 *AM. J. OF COMP. L.* 1043, 1066 (2012).

IV. INDIVIDUAL AND COLLECTIVE IDENTITIES RANKED: EUROPEANS AND ASIANS

Montesquieu's use of empirical information to justify his theses, despite his arguments to the contrary, is really critical and normative.¹⁹⁴ By means of comparative analysis, he evaluates the different societies that exist in the world, creates a hierarchy to classify them, and orders them within the hierarchy.¹⁹⁵ The analysis of the similarities and differences among societies is in reality a tool to organize the world hierarchically and to give meaning, content, to the subjects who inhabit them. Democracy and legally-limited monarchy, Montesquieu argues, are better forms of government than despotism.¹⁹⁶ Europe and Asia are therefore not peers in political and legal matters.

The choice of these forms of political organization is also not typically a consequence of the will of individuals. It is an effect generated by external circumstances that cannot be modified, or that are difficult to modify, and that inescapably affect individuals and communities. Societies in warm lands tend inertially toward despotism; those in cold lands tend toward democracy and legally-limited monarchy.¹⁹⁷ The positive assessment of the former and negative assessment of the latter is therefore inevitable. Societies located in the warm areas will unfailingly be (or will tend to be) inferior to those located in cold areas. Neither is located on the globe in a disordered fashion. The location of democracies, monarchies, and despotism can be easily and clearly specified on a map of the earth. Democracies and monarchies are located in the north and west of the globe, despotic polities in the south and east.

The critical and normative aspects of the argumentation supported empirically and comparatively play a key role in the construction of the subject of modern law. This analysis generates a narrative about how individual and collective identities are formed, as well as the elements that constitute these identities. Montesquieu's argumentation constructs a subject that is constituted both by what it is and what it is not.¹⁹⁸ The subject of modern law that is created by using the comparative method and

¹⁹⁴ Daniel Bonilla Maldonado, *Introducción*, in *CONSTITUCIONALISMO DEL SUR GLOBAL* 30 (Daniel Bonilla Maldonado ed., Siglo del Hombre 2015).

¹⁹⁵ *Id.*

¹⁹⁶ See *EL ESPÍRITU*, *supra* note 2, at 36–45.

¹⁹⁷ See *supra* Part II.

¹⁹⁸ Daniel Bonilla Maldonado & Colin Crawford, *Academic Collaborations in the Americas: Some Reflections on the Political Economy of Legal Knowledge*, 12 *REVISTA ELECTRÔNICA DO CURSO DE DEREITO* 1, 3–4 (2017).

that supports Montesquieu's philosophical and political theses is formed in a binary manner: European and Asian, the northern man and the southern man, the civilized man and the savage, the civilized man and the barbarian.¹⁹⁹ The characteristics that define each of the components of the conceptual opposition are antithetical; the peculiarities of one contradict those of the other. The northern man is masculine, valiant, enterprising, daring, active, and not very sensitive, and he values his individual autonomy positively. The southern man is weak, effeminate, cowardly, not very enterprising, timid, lazy, and sensitive, and he does not value his individual autonomy very much.

The characteristics of the northern man are opposed to the characteristics of the southern man. Nevertheless, this opposition does not imply the separation of or distance between these two identities. Rather, it shows their interdependence. Absence defines the subject as presence does. What is outside the subject forms it as much as what is within the subject. The Asian serves as a mirror to the European. The European understands who he is by means of contrast with who he is not. However, this "other" is not out there in the world. It is within the self. Of course, this does not mean that there is no material space called Asia or that there is no set of subjects known as "Asians." This means that the materiality of these subjects is not identical to the narrative created from outside to describe them, in this case by Montesquieu. It also means that the narrative that describes the self has the "other," that this same narrative constructs, as one of its components.

The northern man is also inextricably linked with law and with the best forms of political organization, democracy and legally-limited monarchy.²⁰⁰ The northern man values equality and honor, the values that respectively support and motivate actions within each of these forms of government.²⁰¹ The northern man has law: a set of norms clearly distinguishable from secular morality or religion; a set of norms created directly by the people, or their representatives, or by a small group of men, that is considered valuable in society.²⁰² In contrast, the southern man is inescapably tied to the worst form of government available to human beings: despotism.²⁰³ As a consequence, it has no laws, only uses and customs.²⁰⁴ The norms that regulate a despotic society are identified with the will of the ruler. The value that justifies these norms and promotes their application is also one

¹⁹⁹ See generally Maldonado, *supra* note 194.

²⁰⁰ See *supra* notes 137–44 and accompanying text.

²⁰¹ See *supra* note 144 and accompanying text.

²⁰² See *supra* notes 37–38 and accompanying text.

²⁰³ See *supra* note 145 and accompanying text.

²⁰⁴ See *supra* notes 42–43 and accompanying text.

that does not seem desirable for structuring a valuable political community: fear.

The subject of law created by Montesquieu's comparative studies is a radically territorialized subject. This binary subject is what it is because it is located in a particular area of the globe. The place that is inhabited is therefore not a contingent element in the construction of the subject of law's identity. On the contrary, it is a variable that necessarily links a human being, her fundamental characteristics, with the place she inhabits. The link is not only between individual human beings, geography, and climate. There is also a link between territory and society. The culture and political organization of a community are a function of the land inhabited. The relationship between nature and society is close and not easy to modify. Human beings cannot transform macro-geographic and climatic characteristics. The effects that temperature has on the human body cannot be transformed either. Individuals cannot change their biology.

Montesquieu's geographic causalism has important consequences for law. Positive law has two direct sources: geography and culture, although culture is an effect of geography. The cold and mountains of Europe allow for the creation of law, not only of uses and customs. This law is the instrument by which countries of the north regulate their democracies and monarchies. Geography and climate, though, also create cultures that can generate law in turn. The law must have a direct relationship with what Montesquieu calls "the spirit of nations," the product of the sum of their geographic, psychological, cultural, and institutional characteristics. Given their location on the globe, the countries of the north have the potential to create rich and solid cultures that can generate law. For example, these countries create agriculture and money as a consequence of sedentarism: they need to make the land productive because of its infertility and seasons, and they need to fragment land and exchange it. These cultural products generate civil law. Societies of the north need this area of the law to regulate the cultural products that they have generated.

In contrast, the countries of the south do not have law, only uses and customs. Despotism, geographically and biologically conditioned, does not require the law to operate, only the will of the ruler. Warm lands also create culture but not one with the qualities to create legal norms in an autonomous manner. Again, Montesquieu's supposedly descriptive comparative arguments end up evaluating and classifying societies. This classification is done by means of the north/south and east/west axes. The north has law and valuable cultures; the south has uses and customs and poor cultures. The north is civilized, the south barbarian. Of course, these topics are well known in general terms. It is not very well known, however,

that one of their paradigmatic sources is Montesquieu. Neither, that this distinction is at the basis of comparative law. These same topics are reiterated, with variations, at the central moments of the genealogy of the discipline. These topics are also present in comparative legal studies²⁰⁵ and in comparative law as an autonomous discipline.²⁰⁶

A. Europe and Asia Imagined: Their Conceptual Geography and History

The spatiality created by Montesquieu's narrative is not only an imagined Europe and Asia, which we would name today as the Global North and South. This conceptual geography intersects with that which sets nature in opposition to the political community. The former is a divine creation. In addition, in macro terms it cannot be modified: human beings cannot transform climate, biology, or geographic accidents. The latter is a human creation. Human beings are the source and motor of politics and law. However, the two spaces are connected causally and normatively. Descriptively, as has been argued, the natural world explains the legal and political world. Normatively, natural law controls positive law. The legal autonomy of human beings must only be exercised within the conceptual grid created by divine law, if we want human legal creations truly to be law. The dualism Europe/Asia is linked to the dualism nature/human, so common in liberal and Enlightened modernity.²⁰⁷

Finally, Montesquieu's argumentation creates a dual concept of time: static and inertial and dynamic but potential. The former is a consequence of the geographic causalism that structures his position. The causal relationship between geography and society makes it difficult for human beings to change the elements that constitute their individual and collective identities. Since individuals cannot transform the climate and geography, they have difficulty changing who they are, they have difficulty changing their individual and collective identities. Europeans have seasons and mountains; Asians have a warm climate and plains. They both share the same biological structure. Of course, there may be variations within the general frameworks created by nature: not all countries of the north are the same, and there are differences within the countries of the south. Nevertheless, these distinctions are only variations within the same mold,

²⁰⁵ See Hirschl, *supra* note 159.

²⁰⁶ V. Kresin, *The Periodization of Comparative Law: In Search of an Acceptable Model*, 5 J. OF COMP. L. 16, 24 (2016).

²⁰⁷ See THOMAS HOBBS, *LEVIATÁN* (Antonio Escobedo trans., Editorial Losada 2003) (1651); See JOHN LOCKE, *DOS ENSAYOS SOBRE EL GOBIERNO CIVIL* (Francisco Gimenez García trans., S.L.U. Espasa Libros 1997) (1689).

nuances within the same model. From this perspective, human time is only one, that of the eternal present. There are no distinctions between the past, the present, and the future. The natural world is a divine consequence, and nature conditions the internal and external life of human beings. Their inner life and their cultural, political, and legal life tend to be structurally the same.

The dynamic concept of time exists as a potency. Human beings, in particular those who concentrate political power and the power to create law, are always capable of modifying the forms of government and legal orders. As such, it can be argued that Montesquieu is not a determinist. Nevertheless, the inertial forces of nature can only be broken by conscious acts of human will that require arduous effort. Individual autonomy can break nature. Montesquieu does not believe that (natural) structure annuls freedom. His liberalism does not allow it: autonomy and rationality characterize human beings. However, this dynamizing power of time seems to act differently in Europe and Asia. Europe has experienced despotism. Nevertheless, this despotism is a consequence of the poor decisions of some individuals who act against nature. For Montesquieu, the rule is that European countries are committed to democracy or legally-limited monarchies. Autonomy and (natural) structure coincide. For Europeans, it is not difficult for this to be so: they only allow nature to follow its course. Montesquieu, in contrast, does not offer any examples of political and legal transformations in Asia. Asians are aligned with nature; despotism reigns, is the rule, in Asia. It does not seem that in this region of the world there have been cases in which individual autonomy has broken the causal links that exist between (natural) structure and society.

V. CONCLUSIONS

One of the central objectives of Montesquieu's work is clarifying the causal links that connect nature and society. Calling upon both qualitative empirical information and the comparative method materializes this objective. Montesquieu is therefore one of the paradigmatic sources of both modern social sciences and modern comparative law. The arguments that Montesquieu offers are presented as neutral. Nevertheless, they are really critical and normative. They evaluate the political communities of the globe, classify them, and organize them hierarchically. In this process, he creates a narrative that is central for the construction of the modern subject, as well as for the construction of the political spaces this subject inhabits and the notions of history it experiences. In Montesquieu, this subject is constructed by means of the opposition between self and "other."

Montesquieu's argumentation is thus not only important for understanding how the subject of modern law is created. It is not only important for understanding how those who are part of modern culture construct, describe, and value their identity. Since its "other" constitutes this subject, the "other" is also important for understanding how those who are outside of this culture construct, describe, and value their identities and for understanding the political effects generated on this "other." The binarism that constitutes the subject of modern law gives greater value to the north-subject than to the south-subject. The European has at his disposal a scientifically-based narrative that constructs a legally and politically strong identity for him. The Asian, African, and American, in contrast, have at their disposal a narrative that constructs them as legally and politically weak beings. This is a narrative that, with nuances, modifications, and reinterpretations, keeps controlling a part of the legal and political imagination of those who are implicitly or explicitly committed to the modern and Enlightened project.

