

THE RENAISSANCE OF COMPARATIVE CONSTITUTIONALISM

A. E. DICK HOWARD
White Burkett Miller Professor of Law and Public Affairs
University of Virginia
United States

Comparative constitutional law is at least as old as Aristotle. Eager to explore the best forms of government and the conditions of the good life, Aristotle studied the constitutions of 158 Greek cities and tribes, although only one fragment, his study of Athens' Constitution, survives. Herodotus, wishing to assess Greek ethics and politics, traveled throughout the known world, recording the customs and values of Persia, Egypt, and elsewhere.

Down through the centuries, comparisons have engaged many of the best minds, Montesquieu being one obvious example. At the dawn of the age of modern constitutions, the American founders probed the lessons to be drawn from antiquity and from more recent practice. James Madison, tutored at Princeton by John Witherspoon, imbibed the teaching of the Scottish Enlightenment. On the eve of the Philadelphia convention, Madison read deeply into the experience of ancient and modern confederacies, the better to underpin his Virginia Plan, which became the basis for the convention's deliberations.

Across the Atlantic, French intellectuals and reformers were fascinated by the unfolding American experience. George Mason's Declaration of Rights for Virginia (1776) directly influenced France's Declaration of Rights of Man and the Citizen. After the Virginia legislature enacted Thomas Jefferson's Bill for Religious Freedom into law, Jefferson, then in Paris, saw it included in Dèmeunier's Encyclopedia. When the National Assembly debated France's first Constitution, competing factions used American state constitutions as exemplars. The more moderate faction pointed to the Massachusetts Constitution of 1780, with its checks and balances, while the more radical faction invoked Pennsylvania's 1776 Constitution, emphasizing popular control of government (the radical faction carried the day, looking to the National Assembly to reflect a Rousseau-like general will).

The ensuing years have seen a lively international traffic in constitutional ideas. When the revolutions of 1848 broke out in Europe, the delegates who gathered at the Paulskirche in Frankfurt showed their intimate knowledge of American federalism and judicial review as they shaped a constitution for Germany. Although their draft, opposed by Germany's conservative powers, was ultimately not adopted, it remained an important feature of German constitutional culture and ultimately influenced today's German Basic Law.

This constitutional traffic has taken many forms. Sometimes revolutionaries look abroad for examples, as in the revolutions of 1848. Other times a departing colonial power leaves

behind a legal and constitutional legacy, as when Great Britain bequeathed the common law and constitutions modeled after Westminster in its former colonies in Africa (these constitutions proved short-lived in those countries where one-party rule or autocrats took control). Yet other transfers of constitutional ideas have followed military defeat, as when MacArthur's military government largely wrote the constitution which remains in force in Japan today.

In light of this transnational activity, one would expect academic interest to follow -- that comparative constitutionalism would flourish in the classrooms of American law schools and that American law professors would turn their pens to comparative constitutional law topics. Thinking back to my days as a law student, I cannot recall my constitutional law professor's having referred to another country's constitution (I hasten to add that his journey through American constitutionalism was rich and rewarding). International law was taught at the University of Virginia Law School, of course, but I doubt that any member of the faculty entertained the notion of teaching comparative constitutional law.

In 1884 William W. Crane and Bernard Moses published *Politics: Comparative Constitutional Law*. These authors, influenced perhaps by Aristotle, took an organic approach to their subject, seeing a constitution as the expression of national will. When, in 1890, John W. Burgess published his *Political Science and Constitutional Law*, he admitted the novelty of his study -- drawing on the teachings of the natural sciences to undertake a comparative study of constitutions. In the scholarship of that era, the emerging study of comparative constitutional law was simply an extension of comparative politics.

In the years since World War II, comparative constitutional law has come into its own, both in the journals and in the classroom. In an informal survey of 50 of the top American law schools, I find at least 40 to have a course in comparative constitutional law, comparative constitutionalism, or the like. There are major textbooks and casebooks by such respected scholars as Mark Tushnet and Vicki Jackson.

What has spurred this growth of interest? A number of factors are in play. To begin with, since World War II, the sheer number of countries has vastly increased, especially with decolonization. Being a sovereign nation calls, almost reflexively, for a constitution, as much as it does for a flag and a national anthem. There are fewer than a half dozen countries which do not have written constitutions, the United Kingdom being the best known example.

Having a constitution does not mean that a country has constitutionalism in the sense of having a liberal constitutional democracy. The Soviet Union's Constitution of 1936 glowed with promises to its people, but everyone knew that the document was a Potemkin village, its provisions meaning whatever the Party chose for them to mean. The spread of democracy has brought, in general, more authentic constitutions. Examples include post-Franco Spain's Constitution of 1978, the constitutions adopted in Central and Eastern Europe after the collapse of communism in 1989, and the charter drafted in South Africa after apartheid's demise.

The drafting of such constitutions has brought a greater diversity of constitutional arrangements. No longer does one study just the constitutions of the Anglo-American and Western European world. Countries like India and South Africa, while influenced by western ideas, also draw upon their own distinctive historical and cultural traditions. Moreover, the advent of democracy in a country does not necessarily bring liberal democracy; elections can be a parochializing exercise, as commonly happens in the former Yugoslavia.

The years since World War II have brought a heightened interest in rights -- how they are defined, how they are enforced. Hoping not to see the horrors and ravages of the Second World War era repeated, international leaders created the United Nations. The adoption of such documents as the Universal Declaration of Human Rights, UN covenants (such as that on civil and political rights), and regional treaties such as the European Convention on Human Rights have had a profound influence on the drafting of bills of rights in national constitutions. The debate in international law circles over the meaning and reach of human rights -- are they universal, or are they contingent upon a country's culture and traditions -- has inevitably influenced how drafters of constitutions think about rights.

The earliest bills of rights, such as those of the first American state constitutions and the Federal Bill of Rights (1791), proclaimed negative rights -- rights against the state. Developments in the 20th century saw the rise of positive rights -- claims of entitlement, such as education, jobs, and other aspects of human welfare, sometimes called "second generation" rights. Early examples were the Mexican Constitution of 1917 and Germany's Weimar Constitution of 1919. In constitutions drafted since World War II, it has been a commonplace to include positive rights.

The spread of federalism or other arrangements for measuring central and local competence has also fueled comparisons. Federalism as it is known in the United States was shaped in the compromises struck at Philadelphia, but federalism and its cousins have proved remarkably popular in other countries. The arrangements go by many names -- federalism, devolution, and subsidiary among them -- but some means of accommodating the claims for central control with the centrifugal forces of regionalism, nationality, ethnicity, religion, or other cultural ties has been one of the central concerns of constitution-makers in many countries. Through such means, Spain attempts to placate Catalonia and the Basque country. Even the United Kingdom, three centuries after the Act of Union, has Scottish devolution (although the UK still has no written constitution, the enactment of the Human Rights Bill of 1998, the creation of a supreme court, and other measures may be bringing it closer to the day of having such a document).

Finally, among the factors fueling an interest in comparative constitutionalism, one must count the spread of judicial review. The importance of *Marbury v. Madison* is not limited to the United States. While John Marshall had to gloss the Supremacy Clause to announce the Supreme Court's power to strike down an act of Congress as being unconstitutional, such a power in a country's high court is commonly spelled out in that country's constitution. The

advent of constitutional courts has been especially important. First devised by Hans Kelsen for Austria's 1920 Constitution, constitutional courts are central to the fundamental arrangements in such countries as Germany, Hungary, and South Africa. These courts often have powers beyond those familiar to the American tribunal; constitutional courts typically are not bound by a case or controversy requirement and thus have the power of abstract review.

Given such developments, it is small wonder that comparative constitutional law has been a growth industry in American law schools. Comparativism in constitutional law serves many purposes. It enriches one's study of American constitutional law by adding another dimension to our critique of what the Supreme Court does. It heightens our sense of the world beyond our national boundaries, useful to lawyers whose firms and clients operate on the international scene, but also to lawyers as world citizens. Comparative studies can also nourish our search for principles of ordered liberty and for theories of a just society.

Will comparative constitutional law contribute to the growth of American constitutional law? We watch with fascination as justices of the Supreme Court debate whether comparative data are legitimate and relevant in defining such concepts of due process of law and cruel and unusual punishment. Justice Scalia reminds us that it is an American Constitution which the justices are interpreting, while others, such as Justices Breyer and Ginsburg, find more room for practices of other countries. What will tomorrow's justices do? That may depend in part on what is taught in today's law school classrooms.