

**Comparative Constitutional Law:
A Window into the Fundamental Requirements of a Just Legal Order**

M.N.S. Sellers
Regents' Professor
University of Baltimore
United States

Polite society has always rested on the principle that “comparisons are odious.”¹ This observation is true, of course, in many circumstances, but has tended to inhibit the work of comparative legal scholars, who often seek to explain or excuse, rather than to evaluate, the differences between the legal systems that they study. Montesquieu rightly observed that laws should be adapted to the people they are meant to rule,² but did not shrink from advancing his opinion concerning which legal systems were “les plus conformes à la raison.”³ This raises the question whether there are any universals in constitutional law. What does reason require of a just constitution? Or should we accept, with Thomas Hobbes, that is no justice or injustice at all, until a civil power asserts itself to tell us what justice *will* be, from now on.⁴

The proper purpose of constitutionalism has been, from the beginning, to advance the common good through law.⁵ Partisans of constitutional justice must struggle to discern “what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance.”⁶ The architects of law and government have divided naturally into two parties, the partisans of

¹ See e.g. John Lydgate, *Debate between the Horse, Goose and Sheep* (ca. 1440).

² Charles de Secondat, baron de la Brède et de Montesquieu, *De l'Esprit des Lois* (1748) at l.iii.

³ *Ibid.* at XXIX.ix.

⁴ Thomas Hobbes, *Leviathan: or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill* (1651) at ch. XV. 72.

⁵ Plato, *Politeia*, I.xv. 342 E; *Nomoi*, IV. 715 B. cf. Aristotle, *Politica* III.iv.7; VII.ii.IO.

⁶ John Adams, *A Defence of the Constitutions of Government of the United States of America* (1787) at I. 128.

constitutionalism or government “*de jure*” on the one hand, and the partisans of arbitrary power, or government “*de facto*” on the other.⁷ The whole enterprise of constitutional government rests on the premise that some legal institutions are better (more just) than others, and that legal institutions should be constantly improved to achieve fuller justice.⁸

Modern constitutionalism saw its greatest successes and most rapid advancement beginning in the eighteenth century with the French and American revolutions, but the constitutionalists of that period considered themselves to be part of a much longer historical continuum, going back through the English, Dutch and Italian resistance against arbitrary power to the political controversies of Greece and Rome.⁹ The Renaissance and Reformation in Europe, the English Civil War, and the “Glorious” Revolution of 1688 all encouraged closer study of the principles of good government,¹⁰ but the basic elements of constitutional design (as understood by the advocates of constitutionalism) remained remarkably consistent for two thousand years. As John Adams memorably expressed it, the advantages and inconveniences of the different forms and combinations of government were as well known “at the neighing of the horse of Darius” as they are today.¹¹

The eighteenth-century pioneers of practical constitutionalism saw themselves as participants in the regular course of the progressive improvement of the arts and sciences, seeking the general advancement of “civilization” and “humanity.”¹² Their study of the theory and practice of government led to a growing consensus in Europe and America that even well-established autocracies found hard to resist.¹³ The introduction of “checks and balances” into government, the maintenance of an independent judiciary, the protection of property, of

⁷ See M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (2003) at 13-14. The insight is usually attributed to Donato Gianotti or to Livy, who wrote of an “*imperia legum*,” and to Aristotle. Cf. Brian Z. Tamantaha, *On the Rule of Law: History, Politics, Theory* (2004).

⁸ See, e.g., the *Constitution of the United States of America*, which seeks to “establish Justice,” to “insure domestic Tranquillity,” to “promote the general welfare” and to “secure the Blessings of Liberty” for those who are subject to its rule. (Preamble).

⁹ See, e.g., M.N.S. Sellers, *The Sacred Fire of Liberty* (1998).

¹⁰ See Adams, *Defence* at III.210-211.

¹¹ Adams, *Defence* at I.ii.

¹² *Ibid.* at I.i.

¹³ *Ibid.*

personal liberty, of freedom of speech, of religion, and of the press, all reflected growing “knowledge” of “the principles and constructions of free governments” on which the “virtue” and the “happiness of life” depend.¹⁴ These “checks and balances of a free government” include representation in the legislature, periodic elections, and broad suffrage.¹⁵ Proponents of constitutional government have sought to realise justice by founding laws and institutions “on the simple principles of nature,”¹⁶ discovered “by use of reason and the senses.”¹⁷

What place, then, for comparisons? Documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights have established certain transcendent standards of law and justice that apply to all societies, such as the duty to “act towards one another in a spirit of brotherhood,” not to discriminate on the basis of race or color, the guarantee of personal liberty, the ban on slavery, the prohibition of torture, the right to equality before the law, the right to effective legal remedies, to impartial tribunals, to privacy, to own property, to periodic and genuine elections, to universal and equal suffrage, and so forth. These standards were clarified by cross-cultural consensus, but do not depend on culture for their validity. They are necessary corollaries to human nature, once we accept the “inherent dignity” of our fellow human beings.

The purpose and value of comparative constitutional law arises, then, not from *identifying* these fundamental requirements of a just legal order, which will be clear whenever human beings are free to consider and openly to discuss the requisites of justice, without coercion. The value of comparative constitutional law arises rather from comparing the efficacy with which the many various constitutional orders in the world *realize* and advance a just legal order, in the very different political, cultural, regional, historical and other circumstances in which they find themselves. Different societies face differing situations, but

¹⁴ *Ibid.* at I.ii.

¹⁵ *Ibid.* at I.iii.

¹⁶ *Ibid.* at I.xiii.

¹⁷ *Ibid.* at I.xiii-xiv.

the human needs and capabilities with which they work do not differ very much. The benefit of comparisons is that they clarify the similarities (and dissimilarities) of the surrounding circumstances, and provide those making constitutional comparisons with inspiration to improve the institutions of their own legal order, in the light of the experience of others.

The study of comparative constitutional law, like all legal study, is (or ought to be) a *normative* enterprise. The purpose of law is to establish justice and to advance the common good of the people. Many of the fundamental requirements of justice are well known everywhere. Most of the institutional structures that will advance and protect justice best have been well known for thousands of years. Legal science is intimately connected with human nature, which does not change, and is well understood by all human beings. The comparative study of constitutional law provides those who undertake it with better insights into where their own existing legal institutions fall short in realizing universal goals, and how to improve them. Lawyers and legal scholars should take the side of justice in the battle between *de jure* and *de facto* government. This means challenging the *status quo*, when it fails to meet well-established standards of substantive and procedural justice. Comparativists and constitutional scholars should be the partisans of the public welfare. When, for reasons of politeness, fashion (or self-interest) they refuse this role, they betray the sense and purpose of their craft.