

Montesquieu, Methodological Pluralism and Comparative Constitutional Law

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Montesquieu's lessons for modern comparative constitutional law – *The Spirit of the Laws* – The textual bias of normative constitutionalism – The utility of other disciplines to comparative constitutional law – Constitutions as more than mere texts

INTRODUCTION

Modern comparative constitutional law begins in Esfahan, the old capital of Iran, in a majestic seraglio, where some of the most beautiful women are held captive. Uzbek, an Iranian prince, set out for a trip to Europe. He travels to Qom, the holy city, then to Tabriz. He stops for a while in Turkey and embarks in Smyrna on the way to Livorno. Then he quickly arrives in Paris, the centre of modern Europe. From there, Uzbek and Rica, a close friend, report back on European laws, habits and culture from the perspective of two Persian observers. There are two important, albeit conflicting, insights in Montesquieu's *Persian Letters*. First, we can improve the understanding of our society by adopting an external viewpoint. In this case, Montesquieu wears the clothes of two Persian visitors, Uzbek and Rica. Through this fiction, he can critically report on a number of interesting aspects of contemporary France. Montesquieu stresses a second point: self-understanding through comparison is limited, as we always tend to excuse our own habits more than we criticise them. Uzbek, for example, sees many weaknesses in the French political and cultural system, but tends to justify his position of slave owner and incarcerator of women back home.

Montesquieu's political world view is not ideal. His methodology is staunchly empirical, even if

'almost all the instruments we require for exploring the nature of societies were lacking in [his] time. Historical science was in its infancy and just beginning to develop; travelers' tales about faraway peoples were few and untrustworthy; statistics, which enable us to classify the various events of life (deaths, marriages,

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crimes, etc.) according to a definite method, was not yet in use. Furthermore, since society is a large living organism with a characteristic mind comparable to our own, knowledge of the human mind and its laws helps us to perceive the laws of society more accurately.¹

Montesquieu nevertheless lays the foundations for a study of constitutions and political systems. He aims at educating people by showing them the principles behind their laws ('the spirit of the laws'). His aim is not openly critical: he does not want to overhaul any regime or system of laws. Nor does he aim at technological transplants from one system to another in order to foster constitutional improvement. Instead, his goal is mainly cognitive: he positions himself as an external observer of past and present legal systems and attempts to understand them in their cultural, social, historical and political context.

This paper argues that the best methodology for comparative constitutional law (CCL) is plural: CCL will thrive if it embraces multidisciplinary insights from history, political science and sociology as well as from moral psychology and evolutionary biology. To embrace methodological pluralism is difficult, however, at least for two reasons. First, contemporary CCL is unnecessarily biased towards constitutional texts. As a result, all the efforts are concentrated on how best to interpret highly abstract documents. Second, CCL is too dependent on too thin, yet too strong, normative assumptions of constitutionalism. They are thin in that they are not supported by any evidence. They are strong in that they are the only foundation of constitutionalism and guide the understanding of social and political practices; this leads inevitably to the overlooking of political diversity and hence to the abandonment of the possibility of truly understanding normative phenomena across various legal and political systems. Montesquieu provides a fuller picture. On the one hand, he believes that human laws respected a deep political order. By that, he means that they are characterised by a set of principles that explain any possible human laws in relation to their political regime. This requires that we distance ourselves further from the object of study in order to achieve a general picture as opposed to a picture constituted by few discrete snapshots as in the *Persian Letters*. To expound a political order, on the other hand, does not preclude the explanation of local differences. Just as Montesquieu completes his general picture with a set of variables that explain how national regimes organise themselves in an infinite number of combinations, so we can provide a picture of constitutions that account for a common framework, along with a set of differences. In this way, Montesquieu is able to account for both unity and difference.

CCL today has two main strands. The first attempts to show a degree of convergence worldwide along the lines of universal principles such as human rights.²

¹ E. Durkheim, *Montesquieu and Rousseau – Forerunners of sociology*, The University of Michigan Press-Ann Arbor Paperbacks (1970) p. 2.

² N. Dorsen, M. Rosenfeld, A. Sajo, and S. Baer, *Comparative Constitutionalism* (Eagan (Minn.), West Publishing Company 2003).

The second stresses more divergence and difference at the level of constitutional structures (institutions and procedures, for example).³ These two strands have something in common: they both lack a sound methodology.⁴ Instead, their starting point is normative through and through. The former defends a strong normative ideal, i.e., there is a heaven of rights out there, and that is eminently desirable. We should simply strive to make it feasible. The latter has a thinner normative ideal: if we understand our differences, we will be able to tolerate each other more easily. Convergence and harmony are not desirable in themselves. But mutual understanding can bridge the gap. Of the two ideals, the latter is more modest. For one thing, it does not impose, top-down, a model of how to live. The former model is more ambitious, so much so that it is hard to understand whether it has any grip at all.

Both efforts should be distinguished from Montesquieu's natural comparative constitutional law. At a broader level, Montesquieu's project can be distinguished from competing mainstream positions which aim to reduce CCL to normative political philosophy, on the one hand, by equating it to the requirements of liberal constitutionalism, or to a social science on the other.⁵ Montesquieu's great achievement lies in the complexity of his vision. He perceives a great tension between ideal and real world, between the world of norms and that of facts. Equally, as already pointed out, he experiences the tension between the human necessity for order and the natural tendency to chaos. His grand picture does not solve the tensions, but highlights them and nurtures them in order to improve on our understanding of the human laws that regulate all societies.

There are a few obstacles to this project, however. To begin with, Montesquieu's methodology is not set out explicitly in a clear and straightforward manner. Indeed, part of this article attempts to unravel what may be deemed his methodology for the purpose of contemporary CCL. Secondly, Montesquieu writes in an age prior to written constitutions. Constitutional rules enhance the impression of a certain order within societies. Contrary to conventional wisdom, however, written constitutions beg the very question of what really constitutes political authority. Finally, Montesquieu's empirical-comparative tools are modest and limited. Wherever possible, I will highlight the need for complementing Montesquieu's vision with more up-to-date methods of analysis. In particular, contemporary studies of moral and social psychology, as well as evolutionary biology, confirm many of Montesquieu's insights and bring them further.⁶

³ M. Tushnet, 'Comparative Constitutional Law', in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford, OUP 2006).

⁴ O. Pfersmann, 'Le Droit Comparé' comme interprétation et comme théorie du droit', in Oxford University Comparative Law Forum, <<http://ouclf.iuscomp.org/articles/pfersmann.shtml>>.

⁵ See Durkheim, *supra* n. 1.

⁶ See for example, F. De Waal, *Primates and Philosophers – How Morality Evolved* (Princeton, PUP 2006).

Comparative constitutional law should draw inspiration from Montesquieu in an effort to gain a deeper understanding of constitutions. We can improve our knowledge of constitutions only if we strive to go beyond mere contingent textual differences. Comparative constitutional law nowadays works in a vacuum. Some studies start from a rooted national perspective and then ‘tentatively’ attempt to analyse similar institutions in one or another country with the meagre hope to find some similarities or differences. Others posit principles that are deemed universal, but are in fact the mere product of a precise western ideology. The surprise is great when these supposedly universal principles are not freely accepted by some people. Montesquieu’s more ambitious project should guide comparative works in their quest of understanding. It will help us to unravel two major drawbacks of contemporary CCL: textual and normative reductionism. Each will be treated separately: first I will present the paradox of writtenness and in the following section I will argue that normative understanding of constitutionalism should be kept separate from CCL. Moving on from the more critical analysis, I will then sketch the basic ideas that animate Montesquieu’s project. Finally, in the last section I will draw some lessons for comparative constitutional law today.

THE PARADOX OF WRITTENNESS

Montesquieu’s viewpoint is a useful foil to the most evident problem of contemporary comparative constitutional law: the study of constitutions is reduced to a sterile textual analysis. The paradox of ‘writtenness’ lies in the fact that constitutions have been drafted virtually everywhere and they are now readily available in their English translation. They are only a click away and yet a full grasp of constitutional laws require far more than a simple textual analysis.⁷ CCL is a very demanding and ambitious endeavour. It requires a number of different skills, such as linguistic competence and philosophical insights coupled with a thorough knowledge of legal systems and societies, to say the least. It should also require careful empirical evidence to support, and control, the general claims one makes.⁸ To reduce CCL to a study of a foreign constitutional texts coupled with a small selection of cases is totally simplistic and useless. Montesquieu pushes us to engage in a deeper analysis and, by doing so in his time, highlights the drawbacks of contemporary CCL.

The first, obvious, consideration is apparent from the very title of the book: Montesquieu wants to go beyond the text of the laws to understand their spirit.

⁷ For an example, see G. Frankenberg, ‘Comparing Constitutions: Ideas, Ideals, and Ideology – toward a layered narrative’, *ICON*, Vol. 4, No. 3 (2006) pp. 439-459. His article begins thus: ‘In the beginning of all comparative studies one reads. To be more precise one *constructs a reading* of texts.’

⁸ For an example of a more empirically oriented scholarship, see R. Hirschl, *Towards Juristocracy – The origins and consequences of the new constitutionalism* (Cambridge (Mass.), Harvard UP 2004).

The choice of the word spirit is perhaps misleading as some may be led to think that Montesquieu intends to embark on a metaphysical enquiry into human laws. But in reality it is the absolute contrary: Montesquieu's project is in essence empirical (Berlin).⁹ By spirit he means two things: at the more general level, he means the underlying principles of human laws. At a more specific level, he means those variables that make laws different from one another in different context. So, in other words, *The Spirit of the Laws* has a static and a dynamic element. The static element is what unites all human laws, whereas the dynamic element is what makes them different from country to country.

The Spirit of the Laws may be misleading from another viewpoint. The spirit only refers to one part of the whole picture. To understand this we can use the analogy between the constitution of a society and the constitution of an individual. Each of us is characterised by an apparent tension between mind and body; however, to understand the constitution of a person it is necessary to explain how mind and body work separately and how they interact. Similarly, the constitution of a society displays an apparent tension between its spirit and its body. However, by delving into the spirit of human laws, Montesquieu attempts to illuminate the working of its body politic as well as its spirit and the interaction between them.

Another important point to bear in mind is that Montesquieu gives an account of *The Spirit of the Laws* and not of the spirit of the law. The plurality of laws displays a strong comparative commitment. In order to avoid misunderstanding, however, we have to add that the plurality of the laws does not simply refer to Montesquieu's interest in many political regimes. The plurality also refers to the fact that each country has many different types of laws that are better kept separate. So, for instance, each country will have to distinguish between the law of nations, political law, civil law and criminal law. These laws are contingent and local and do not form part of the general spirit of the laws. The plurality of laws, moreover, is not simply synchronic, that is, it does not refer only to the laws of a certain moment in time, but it has also a diachronic dimension, in that Montesquieu attempts to explain laws of past, present and future political regimes.

Montesquieu's focus on the spirit of the laws explicitly denies the centrality of the text of the laws. For Montesquieu there are good laws (legal texts) everywhere. What matters is whether they match the society to which they apply. To test that, one has to observe whether or not those laws are followed. Compliance will be high if the law fits the goals of a community. It will be low if it does not relate well to the community, even if the text is in principle very solid. Imagine for example that the original American constitution was transposed to Iraq: it is very unlikely that it would produce the same results. The reasons are manifold but we can men-

⁹ I. Berlin, 'Montesquieu', in *Against the Current. Essays in the History of Ideas*, ed. by H. Hardy, (London, Hogarth 1997) p. 130-161.

tion a few. First, any top-down imposition of rules is likely to be perceived as authoritarian no matter how liberal the rules actually are. Secondly, there is a strong assumption regarding the values underpinning that foundational text. Even if the set of values were exactly the same (which is unlikely in itself), there is no chance that the ranking of those values would amount to the same end result.

To write good constitutional laws means to be able to fashion the best possible principles for a given society. To illustrate this idea, Montesquieu says the following: ‘Solon being asked if the laws he had given to the Athenians were the best, he replied, “I have given them the best, they were able to bear.” A fine expression, that ought to be perfectly understood by all legislators (XIX, 21, 2).’ What matters, then, is not the constitutional text, but the relation between the text and the society to which it applies. Montesquieu, however, knew very little about constitutional conventions and constitutional drafting and ‘might well have been surprised had he been told that they would soon make fundamental laws that would prove very enduring.’¹⁰

The growing success of written constitutions after the American and the French experiences may explain why the interest moved from the spirit to the text of constitutional laws. This is particularly the case when the text lasts for a long period of time. It then becomes an object of veneration and, at times, fetishism. This would no doubt be alien to Montesquieu’s understanding of political laws, which is closer to constitutions as living trees rather than constitutions as holy relics.¹¹ Societies, albeit preferably slowly, evolve; good laws would have to take account of that constant evolution. Montesquieu would not be worried so much about the content of the text; rather he would fear that the mutual relations between law and society would be compromised by imposing a unilateral voice, embedded in a single sweeping text. Written constitutions began to appear few years after the publication of *The Spirit of the Laws* (1748); we could argue that written constitutions killed the spirit of the laws in that the interest since then has shifted from the study of the socio-political framework to the interpretation of the written text, and this interpretative bias has continued up until our time to take the lion’s share in constitutional theory. Some scholars insist on the original meaning of the text;¹² some on the underlying moral principles beyond the text.¹³

¹⁰ Judith Shklar, *Montesquieu* (Oxford, OUP 1987) p. 111.

¹¹ These two metaphors can still be understood in fully normative terms, which are alien to Montesquieu’s empirical endeavour. For an example, of a fully normative constitutional theory pursuing the idea of living trees see Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, CUP 2007).

¹² Jeffrey Goldsworthy (ed.), *Interpreting Constitutions* (Oxford, OUP 2006).

¹³ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American constitution* (Oxford, OUP 1996), ‘Introduction: The Moral reading and the Majoritarian Premise’.

Others insist that the text is just a pretext for judicial politics.¹⁴ In the end, however, it boils down to a matter of interpretation.¹⁵

Comparative constitutional law within this narrow understanding of constitutions is helpful only if it assists interpretation. In particular, judges who do not want to bind themselves to an interpretive methodology will appeal to comparative constitutional law to support their case-by-case analysis. Each time, it will be possible to choose whether or not to look outside the constitutional box, if this suits the purpose of the deciding judge.¹⁶ We end up with many contrasting positions where the constitutional text is everything and/or nothing. Comparative constitutional law, however, does not have to start with a text.¹⁷ Montesquieu's moderation would probably lead him to take constitutional texts with a pinch of salt. We can certainly learn some things about a society by looking at its constitutional text, but we certainly cannot reduce the whole of social and political life to the study of that text. Montesquieu's more empirical approach can help us go beyond the superficial issues embedded in a text. It may also help in understanding why some debates have become so entrenched and monopolise the field. Finally, it is possible to understand why starting with a sweeping text of constitutional magnitude is just a pretext for indulging in free style normative philosophy.

THE BIAS OF NORMATIVE CONSTITUTIONALISM

CCL is characterised by a second major drawback partly related to the first: constitutional texts couched in sweeping moral language opened the door to free standing normative philosophies and to strong assumptions about the goodness of some local constitutional practices. The American constitutional experience thus became an exemplary model of virtuous politics that should be transplanted everywhere else. Indeed, many constitutional texts around the world bear a striking resemblance to the American one, even if their constitutional life is very different. In any case, the existence of such a text made it possible to impose top-down a very local and parochial worldview.

The constitutional text therefore becomes a mere pretext for introducing one's preferred version of constitutionalism. In today's scholarship, constitution and constitutionalism are treated as synonyms. It is very difficult to tell them apart, as the great majority of constitutional lawyers and scholars aspire to offer the best

¹⁴ M. Troper, *Le Gouvernement des juges, mode d'emploi* (Laval, PU Laval 2007).

¹⁵ A. Scalia, *A Matter of Interpretation, Federal Courts and the Law* (Princeton, PUP 1998).

¹⁶ See Kennedy's leading opinion in *Lawrence v. Texas*

¹⁷ For the opposite view see Frankenberg, *supra* n. 7. At the very beginning of his article, Frankenberg states: 'In the beginning of all comparative studies one reads. To be more precise one constructs a reading of texts.'

model of constitutionalism. Thus, their account of constitutional law tends toward an ideal that always fails to materialise fully. A line should, however, be drawn and it is all the best for a proper understanding of comparative constitutional law, which would otherwise boil down to an exercise of what is best for the world, courtesy of scholars interested in constitutionalism. Constitutions are customarily understood as written documents that set out some general rules and principles on how to organise and divide political powers. Montesquieu's conception of the constitution is much broader than that. It not only deals with rules and principles of political importance, but it attempts to unravel the deeper relation between rules/principles and the community to which they apply. 'Writtenness' is not a central criterion, nor is the focus on institutions and institutional procedures. Hence, unwritten constitutions fit particularly well in Montesquieu's analysis.

Constitutionalism is at the same time broader and narrower than constitutional law. It is broader in its ambition as it aspires to offer some basic values that would cure the ills of the world. It is narrower in its perspective as it regards the world of political powers from a precise perspective, commonly acknowledged as liberal-democratic. An illustration of the bias of liberal constitutionalism lies in the assumption that many make regarding the superiority of the judicial review of legislation model. The success of the American constitutional experience shows only that judicial review of legislation can be an option to secure some fundamental values. But, crucially, it does not establish that judicial review is the only such model or the best. A constitutional dilemma that constantly crops up concerns the relationship between democracy and judicial review. This debate is largely sterile as it has reached a stand-off. Everyone can see the benefits of judicial review; everyone can see the benefits of democracy. Both have limits, however, and in some instances democracy and judicial review are at odds. Instead of explaining why we are here, and what the deeper origins of this deadlock are, most actors involved in this debate try to find a normative way out, through either the legal or the political backdoor. Legal constitutionalism defends the overarching importance of judicial review.¹⁸ Political constitutionalism instead wishes to bring back democracy to its centre stage and with it a series of deliberative procedures.¹⁹

As a consequence, the debate on the tension between judicial review and democracy is destined to be biased and fundamentally irresolvable as we do not have relevant experience of non-judicial review-based protection of constitutional values. That is, we cannot test empirically those strong normative assumptions. The lack of empirical control also means that judicial review of legislation develops in directions that are not always desirable. So much so that Ran Hirschl suggested

¹⁸ See Dworkin, *supra* n. 13.

¹⁹ Richard Bellamy, *Political Constitutionalism – A republican Defence of the Constitutionality of Democracy* (Cambridge, CUP 2007).

that we are moving towards Juristocracy, a regime whereby small elites of justices decide on the most fundamental issues of our societies.²⁰ The problem lies in the normative side of the equation, not on the institutional one. We agree by default on a certain brand of constitutionalism and assume that that brand needs to be exported as such. By so doing we ride roughshod over the most interesting questions of what kind of constitutional inputs a discrete community needs in order to improve. To equate the study of constitutions with constitutionalism presents a risk of reductionism: the written text becomes a mere pretext for the expression of one's own normative political philosophy.

EXPERIMENTAL PHILOSOPHY

The remarkable success of freestanding normative philosophies stands in clear opposition to an equally important tradition of philosophical thinking in political matters represented by Aristotle and Montesquieu, among many others. This tradition is usefully reconstructed by Appiah in a recent book which maps the genealogy of strong empirical tradition in the philosophical study of moral and social phenomena.²¹ To paraphrase him slightly: 'Experimental philosophy in politics raises many questions that funnel into one: can legal and political philosophy be naturalised?'²² That is the gist of Montesquieu's ambitious project which will be examined from different perspectives in what follows.

Typologies

Book I of *The Spirit of the Laws* begins by distinguishing between divine laws, material laws, animal laws and human laws. There are different types of laws because those laws relate to different objects. Divine laws relate to the deity; material laws relate to the material world and so on. Each of these laws has an internal logic which can be studied scientifically through empirical observation. Human laws are not different in this regard. In his effort to know and explain human laws, Montesquieu embarks in further classificatory exercises. After explaining laws in general (Chapter 1), and laws of nature (Chapter 2) he moves on to the core of his interest in the book, positive laws (Chapter 3). Montesquieu's starting point is the exact opposite to Hobbes': as men naturally and wilfully enter society, they start feeling more confident and empowered. They now believe that they are able to wage wars and expand the domain of their society. It is to respond to this human feeling that the law of nations is put in place. The law of nations, according to

²⁰ See Hirschl, *supra* n. 8.

²¹ K.A. Appiah, *Experiments in Ethics* (Cambridge (Mass.), Harvard UP 2008).

²² *Ibid.*

Montesquieu, is based on the principle that men want to maximise the good for the society in times of peace and minimise the harm to the society in times of war (Chapter 3, para. 4). The law of nations is the most general type of positive laws and regulates relations among nations. Of course, the existence of nations presupposes an organisation of rulers and rules; thus, political laws are those positive laws that regulate the relations between rulers and ruled, what we today call constitutional (and administrative) laws. Finally, positive law has to regulate the relations of citizens among themselves and this will be the realm of civil laws. For the purpose of this paper, what interests us chiefly is the realm of political laws, which occupies the great majority of Book II of *The Spirit of the Laws*. It is undeniable that political laws occupy a very central place in the architecture of Montesquieu's book. Indeed, Montesquieu is interested in the relation between authority and society and regards human laws as double edged swords. On one hand, political laws have to bind men to their duties towards society; on the other, political laws have to carve out a sphere of liberty for each citizen which is compatible with his own duties.

Book II is devoted to political laws in their relation with the three forms of government: republican, monarchical and despotic. Once again, the starting point of Montesquieu is understanding through classification. No value judgment is expressed at the outset, although it is clear that Montesquieu deeply fears the possibility of a slippery slope towards despotism. The aim and ambition, however, are much higher than mere condemnation of despotic governments around the world.

Human laws

Montesquieu gives at the very beginning of his book a puzzling definition of his concept of laws in general: 'Laws in their most general signification are the necessary relations derived from the nature of things.' Superficially, one may argue that Montesquieu's definition is overtly deterministic and in line with the dictum of Catholic doctrine that believes in a certain natural order of things. In reality, Montesquieu is much more interested in his debate with Hobbes on two important points. First, Montesquieu wants to resist the definition of laws as commands of the sovereign. Instead, he believes that laws establish relations between the ruler and society. These relations are not only unilateral but mutual. Man empowers the ruler and the ruler enacts laws that should be aimed at improving man's condition in society. Laws come from the top but they must strive to conform to the nature of the relevant society. If they fail to do so, then laws will lose their grip on society. Second, Montesquieu rejects Hobbes' idea that vices and virtues of the society are strictly dependent on the quality of the laws enacted by the sovereign. Laws may improve a society or ruin it. But the starting point is never a blank sheet.

Before laws there is a society which has gradually been formed in relation to external factors and to cultural practices stratified throughout the years. Thus laws can only intervene on this pre-existing entity which has its own vices and virtues. Laws have to acknowledge this instead of plainly imposing from the top down a vision of the world that pleases the sovereign, as Hobbes would want us to believe.

This crucial difference of outlook between Hobbes and Montesquieu is very clear in the following passage: ‘The natural impulse or desire which Hobbes attributes to mankind of subduing one another, is far from being well founded. The idea of empire and dominion is so complex, and depends on so many other notions, that it could never be the first that would occur to human understandings’ (Book I). Montesquieu believes that man is by nature a sociable being who enters society in an entirely wilful manner, contrary to what Hobbes believes. This very intuition makes of Montesquieu a much more modern thinker. Recent studies in animal behaviour and evolutionary biology shows the extent to which Hobbes got it wrong:

Homo homini lupus – ‘man is wolf to man’ is an ancient Roman proverb popularized by Thomas Hobbes. Even though its basic tenet permeates large parts of law, economics, and political science, the proverb contains two major flaws. First, it fails to do justice to canids, which are among the most gregarious and cooperative animals on the planet. But even worse, the saying denies the inherently social nature of our own species.²³

Montesquieu has a much more positive image of human sociability. He believes that each society formed itself naturally and developed in a certain direction, guided by the external and internal variables to which he attaches much importance in the second part of *The Spirit of the Laws*. In this book, as opposed to *Persian letters*, Montesquieu also displays a greater optimism on the possible improvement of society. As it is possible to know the main features of societal development, even so it is possible to explain the way in which society responds to external stimuli. The legislator needs to be aware of the natural shape of society, which should not be bent or coerced but simply stimulated to make the most out of its own capacities.

Man, Montesquieu reminds us, is both a physical and an intelligent being. As a physical being he is ruled by invariable laws as is any other animal; so, for instance, he feels heat and cold, he needs nourishment, and has to abide by a certain set of rules. However, as an intelligent being, man is always tempted to transgress some of the given laws in order to find other solutions. But his intelligence is limited and he therefore makes mistakes. For Montesquieu, man’s limits are a reason for

²³ See De Waal, *supra* n. 6, p. 1.

imposing three major sets of rules. God imposes on man his religious laws; philosophy imposes on man the rules of morality; and the legislator imposes on man political and civil laws so that he will not forget his duties toward society (Book I, Chapter 1, 14).

Constitutions and constitutionalism

Montesquieu wrote on comparative constitutional law and constitutionalism. His distinctive contribution lies with the former, as he is by no means the only liberal who thought about constitutions in his time. Moreover, the values he associated with constitutional laws were very popular in his century, at least on paper. His contribution at the level of constitutionalism might have seemed to be a product of his time:

Montesquieu advocated constitutionalism, the preservation of civil liberties, the abolition of slavery, gradualism, moderation, peace, internationalism, social and economic progress with due respect to national and local tradition. He believed in justice and the rule of law; defended freedom of opinion and association; detested all forms of extremism and fanaticism; put his faith in the balance of power and the division of authority as a weapon against despotic rule by individuals of groups or majorities; and approved of social equality, but not to the point at which it threatened individual liberty; and of liberty, but not to the point where it threatened to disrupt orderly government. A century after his death most of these ideals were, at least in theory, shared by the civilised governments and peoples of Europe.²⁴

There is a lot to this list, and it is striking to see that what were Montesquieu's ideals are still very much the ideals of liberal regimes. His brand of liberalism was successful and addictive. Montesquieu was not only a liberal in his ideals, but also in his tone and style.²⁵ Bentham infamously condemned it to oblivion: 'Montesquieu – rapid, brilliant, glorious, enchanting, will not outlive his century.'²⁶ What frustrated Bentham was Montesquieu's moderate tone accompanied by his soothing style. Montesquieu, moreover, did not believe in sudden changes and radical reforms of society, much to the distaste of Bentham. Montesquieu's philosophy was a liberalism of fear;²⁷ his major fear lay in the possibility of a slippery slope toward despotism from the starting point of either monarchy or republic. For there are no regimes that are not susceptible of corruption and deterioration.

²⁴ See Berlin, *supra* n. 9, p. 130.

²⁵ See Shklar, *supra* n. 10.

²⁶ As cited in Berlin, p. 130. *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh, 1843), Vol. 10, p. 143.

²⁷ See Shklar, *supra* n. 10.

His famous recipe against those evils was the separation of powers, which became the trademark of Montesquieu's thought. Often misinterpreted (Stewart),²⁸ the doctrine was meant to capture the essence of the English constitution.²⁹ Many took it as institutional advice: separate the branches of power and you will maintain a political system free from corruption. The reality is probably more subtly pragmatic. Montesquieu was well aware of the corruption of the English administration and reports it in his diaries (Stewart).³⁰ Given this premise, the separation of powers takes on a different coloration: to avoid a total deterioration of the political system, let the corrupt administrators check each other. For even a corrupt politician will never allow someone else to succeed fully in his despotic plans.

Montesquieu's liberalism, with the famous doctrine of the separation of powers, is world famous. Yet, the unique feature of Montesquieu, and partly what led him to become so popular, are the nature of his project and his methodology. Montesquieu is first and foremost interested in understanding the basic principles that societies give to themselves. He never ceases to question basic assumptions and when he makes hypotheses he is well aware that they are there to be evidenced or disproved. His comparative constitutional approach runs counter to the two widespread beliefs that we highlighted at the beginning: the first is that CCL is about comparing texts. The second is that CCL should be closely guided by constitutionalism.

Montesquieu's project had a strong empiricist component. For the first time, laws were scrutinised in a detached way without setting any assumption that could not be tested. In other words, Montesquieu was not interested in an ideal constitution but in the hard reality of human laws. His experience as a magistrate, his extensive journeys abroad, his readings and writings all insisted on the possibility of bringing some light on to the messy field of human laws. As anticipated, his finding can be presented as a universal political order, which suggests that every society tends to a form of organisation according to some basic principles. Modern scholarship in comparative constitutional law tends to disregard Montesquieu's empiricist attitude in favour of a much blunter normative perspective derived from constitutionalism. Very often comparative constitutional law coincides almost exactly with constitutionalism coupled with a study of human rights standards across the world (Dorsen, Rosenfeld, Sajo and Baer).³¹ Others focus more extensively on constitutions and governmental structures (Tushnet, Jackson).³² For both, the

²⁸ I. Stewart, 'Montesquieu in England,' Oxford U Comparative L Forum 6 (2002) at <ouclfius comp.org>.

²⁹ See L. Claus, 'Montesquieu's Mistakes and the True Meaning of Separation', 25 *OJLS* (2005).

³⁰ See Stewart, *supra* n. 28.

³¹ See Dorsen, Rosenfeld, Sajo, and Baer, *supra* n. 2.

³² V.C. Jackson and M.Tushnet, *Jackson & Tushnet's Comparative Constitutional Law*, 2nd. edn. (Eagan (Minn.), West 2003).

acquis coming from Montesquieu is taken for granted; yet his methodology and scientific project is not an issue with which it is worth dealing.

The shift toward a purely normative interest in comparative constitutional law becomes grotesque when supreme courts attempt to draw conclusions from their scant knowledge of foreign legal systems. Thus Justice Kennedy of the United States Supreme Court, when deciding *Lawrence v. Texas* – a case on anti-sodomy laws, mentioned a case of the European Court of Human Rights as part of his argument for the invalidation of those statutes.³³ He argued that certain cases commanded the interpretation of ‘values shared with a wider civilisation’. This would imply on the one hand that comparative constitutional law can produce useful insights concerning the right interpretation of values, which is a very controversial proposition. On the other, it would also imply that comparative constitutional law is impossible as we are striving to make a wider community of values possible. This perspective is unable to explain why, despite our common values, there is a persistent disagreement on almost every important case, not only across the Atlantic but also within each discrete society. It then becomes obvious that the insistence on the normative power of comparative constitutional perspectives diminishes their explanatory power.

Reason and experiments

A different methodological starting point entails a completely different perspective on how to understand the basic elements of law and society. Montesquieu rejects Hobbes’ methods in philosophy, which defend the ‘intrinsic superiority of demonstrative findings over experimental findings.’³⁴ As a consequence, Montesquieu has to find an alternative starting point from the social contract. Experimental philosophy in politics is committed to formulating basic hypotheses in order to test them against empirical findings.

Montesquieu’s late optimism and self-confidence come from the discovery of the principles that lay behind human laws. His quest – lasting over twenty years – is finally ripe and, once he has found the key for explaining human laws, all the material he has gathered fits in one place. But what really lies behind human laws? What is the key of understanding? Montesquieu simply realises after so many years that human reason is not as frail as sceptics pretend it is. Human reason, when appropriately trained and enlightened by scientific methods, can achieve a great deal. Human reason for the first time opens up the possibility of knowledge of human laws and behaviours. Ultimately, for Montesquieu, reason characterises the best laws. In other words, human laws are the expression of human reason.

³³ *Lawrence v. Texas*, 539 U.S. 558 (2003) 41 S. W. 3d 349.

³⁴ See Appiah, *supra* n. 21, p. 9.

Montesquieu gives a place of honour to human reason and its ability to understand patterns and sift from them basic principles. Human reason makes knowledge possible. Reason helps in unravelling the fundamental order of things and, as a consequence, the first task of the attentive observer is to develop a static picture of human laws. This explains why classifications and distinctions feature so prominently in *The Spirit of the Laws*. Understanding begins with the description of the human order as it is.

For Montesquieu, however, understanding does not stop there. Beside the static description of what there is, Montesquieu engages with the dynamic relation between laws and their objects. These relations are never unilateral but always mutual. So, to understand human laws, we have to engage in a study of human behaviour. To understand human behaviour, Montesquieu develops his social psychology in opposition to Hobbes. While, in Hobbes, the psychological insight is only a thin intuition to justify his use of the social contract, Montesquieu articulates his intuition of a naturally sociable human being all along *The Spirit of the Laws*.

In order to understand human laws, Montesquieu has to explain two things: their order and their diversity. The first element is that of the fundamental order of political laws. The existence of an order is a pre-condition to the possibility of knowledge of human laws. Montesquieu begins his enquiry by positing the idea of order of human laws as a hypothesis to his research in opposition to the common belief widespread at his time that human laws were absolutely chaotic. At the end of his long research, Montesquieu believes that his hypothesis is correct and that human laws are indeed orderly and can be described with a set of principles:

Often have I begun, and as often have I laid aside this undertaking. I have a thousand times given the leaves I have written to the winds: I every day felt my paternal hands fall. I have followed my object without any fixed plan: I have known neither rules nor exceptions; I have found the truth, only to lose it again. But when I had once discovered my first principles, every thing I sought for appeared; and in the course of twenty years, I have seen my work begun, grown up, advanced, and finished.³⁵

The second element of a political order is the explanation of the diversity of human laws. If there is a set of common principles, how do we explain that laws are different as we move from nation to nation? Book III of *The Spirit of the Laws* is entirely dedicated to the explanation of diversity. Montesquieu achieves this by explaining that the life of each society is shaped by a set of variables which he classifies as *causes physiques* and *causes morales*. *Causes physiques* account for the impact

³⁵ Preface, para. 15.

of external factors such as the climate and the nature of the soil. Montesquieu devotes four books to the way in which climate affects human behaviour, insisting in particular in the dichotomy between hot and cold climates.

Causes morales are the cultural and psychological factors that constitute the general make-up of a society. These evolve over time but there is also a process of sedimentation, which Montesquieu attempts to understand. Naturally, he says, we can distinguish between laws, manners and customs. By manners he, broadly, means individual attitudes towards authority or other people; in short, he is thinking about a psychological outlook. By customs, in contrast, he means the cultural practices of society; basically, its habits and social conventions. Montesquieu believes that the three spheres of laws, manners, and customs are and should be kept separate. A good legislator, like Solon, is someone who understands them separately as much as he understands their relationship. In the light of that, he crafts laws that suit people's customs and manners. At times, however, governments conflate the three, so much so that the realm of laws coincides with that of customs and manners. For example, China clearly conflates the three, as historically they have been deeply intertwined.

What is then the relationship between *causes physiques* and *causes morales*? Montesquieu believes that together they constitute the general spirit of a nation. Of course, in every nation the internal relationship between those various causes is very different. It may well be that in each nation one of these factors will play the most important role and will be considered as definitional in terms of the spirit of a nation. So, for example, customs govern China and simplicity of manners used to prevail in ancient Rome. In each case, one of the factors becomes the trademark for the nation.

Justice

One last issue needs to be clarified: what is the place of justice in Montesquieu's theory? To the careless reader, Montesquieu may sound deeply committed to a conception of justice that precedes and informs the production of human laws. Indeed, his own words might encourage a distorted interpretation: 'We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as for instance, that if human societies existed, it would be right to conform to their laws; [...]' Isaiah Berlin thought that the way in which Montesquieu formulates his conception of justice 'is a piece of medieval theology translated into secular terms.'³⁶ This interpretation, however, misses the point Montesquieu wants to make. In an ideal world, the idea of justice corresponds to a perfect relation between laws and their objects. For if those relationships were intrinsi-

³⁶ I. Berlin, 'Montesquieu', in I. Berlin, *Against the Current* (Princeton, PUP 2001) p. 153.

cally uneven or biased, then laws would be bad laws and they would ultimately lead to evil results. For the same reason, Montesquieu believes that if God exists He must be just, otherwise He would be a demon. But even if god did not exist, we should still believe that the necessary goal of human laws must be justice, otherwise we could do away with laws altogether. In this sense, justice precedes human laws. We must postulate justice as a hypothetical condition for the existence of order in human laws.

Of course, it will be difficult to prove such an intimate relation of precedence between justice and human laws. The main reason is that man, by virtue of his being an animal as well as an intelligent being, is pulled in many different directions by his passions, his taste for independence and his duties toward society. As these forces do not always point in the same direction, man will have to choose and often his choice will lead him away from the ideal path of justice and order. But the fact that man is fallible is no reason for falsifying the hypothesis that there is an order behind human laws and this order is intimately related to the ultimate goal of justice.

The hypothesis of justice is necessary for Montesquieu to embark upon his studies of human laws, but he does not venture upon any further metaphysical exploration. That hypothesis needs to be proved (or falsified). Montesquieu's project is ultimately about it. He claims that he has discovered at last an order to human laws that follows some fundamental principles and variables. Montesquieu's hypothesis is open to verification and criticism in the best scientific tradition. In the end, even Berlin acknowledges that 'despite his archaic classifications of political institutions, his a priori conceptions of the inner principles of social growth and of absolute justice as an eternal relationship in nature, Montesquieu emerges as a far purer empiricist both with regard to means and with regard to ends than Hollbach or Helvetius or even Bentham, not to speak of Rousseau or Marx.'³⁷

THE LESSONS FOR COMPARATIVE CONSTITUTIONAL LAW TODAY – METHODOLOGICAL PLURALISM

The best methodology for CCL is plural. The very concept of laws presupposes an intimate knowledge of the system to which they apply. Moral and social psychology, as well as political science and history, are helpful sources of information which we can use to test some of the most ambitious hypotheses. Those hypotheses can only be the fruit of an extensive study of various constitutional regimes which requires both linguistic and observational abilities. For all these reasons, comparative constitutional law will always be limited, but this does not mean that

³⁷ *Ibid.*, p. 161.

it should be void of ambitions. Its main realm is that of elucidation as much as of legal theory. In fact, comparative constitutional law is the best way of formulating a flexible concept of human laws that gives an account of general principles as well as of local arrangements. Montesquieu still provides the most original insights into constitutions, human laws and human nature. To produce better CCL, we have to live up to his standards.

Here it is important to stress that the existence of a political order of laws does not imply at all the idea of a wider community of values, to borrow the expression used by Justice Kennedy to justify a greater role for CCL in constitutional adjudication. For this idea to be true in Montesquieu's terms would require the existence of a homogeneous society whose spirit has been moulded through years of shared experience and in relation to common customs, standards and laws. Methodological Pluralism works with hypotheses such as the sociability thesis, according to which men naturally tend to aggregate. Among other hypotheses, we also have to acknowledge the liberty hypothesis and its corollary, the despotism hypothesis. The liberty hypothesis holds that men are naturally drawn towards the preservation of their liberty. However, Montesquieu complements that hypothesis with the despotism thesis which holds that any society could go down the slippery slope of despotism if it does not maintain a healthy balance of power and an open relation between rulers and ruled. The idea of a political order is flexible. First it leaves the door open to the possibility that societies organise themselves in an orderly manner following some processes, a hidden political order, that can be studied scientifically. Second, it also points to the fact that each society changes, depending on different blends of law, religion and customs. Thirdly, it confirms that moral and social dilemmas cannot be solved by appeal to ultimate values but that we are much better off if we try to understand what makes them so different in each society.

Today, CCL must complement and complete some of the deeper intuitions with which Montesquieu toyed but never actually held for lack of empirical evidence. In particular, Montesquieu lacked any expertise in individual psychology and never attempted to explain why individual behaviour diverged from social expectations: 'Montesquieu simply did not have a coherent theory of psychological development or of education to explain how the enormous differences between individual members of a society could be compatible with the notion of a discernible, single, politically meaningful, collective spirit.'³⁸ Here, I am claiming that it may be worth insisting on those insights and on a more explicitly scientific methodology to produce better comparative constitutional law. In addition, we should be more sceptical of overhasty normative assumptions such as those that

³⁸ See Shklar, *supra* n. 10, p. 97.

would use comparative constitutional law as a method for resolving actual cases. CCL is about understanding before anything else.

Montesquieu paved the way to follow in comparative constitutional matters. The advent of written constitutions combined with a strong constitutionalism diverted many people's interest from the right path. It is time to go back to Montesquieu in order to go forward with CCL. To do so, we have to ask the right questions and seek the correct answers. Right questions require a deeper understanding of the functions of CCL. Right answers presuppose the adequacy of the relationship between questions and tools for answering them.

In order to bring some order, comparative constitutional law should formulate a taxonomy of possible political regimes. This would correspond to the static element in Montesquieu's *The Spirit of the Laws*. Comparative constitutional law should also classify the possible teleologies of political regimes; put differently, it should explain what are the objectives that a political regime sets itself and what are the means best adapted to those objectives. This part would correspond to the dynamic element in Montesquieu's work. To be sure, Montesquieu is not always accurate when he presents his typology of political regimes. To do so, he updates Aristotle's conventional understanding of archetypes. Thus, for Montesquieu, the possible political regimes are only three: republic, monarchy and despotism. This seems of limited explanatory power since the differences within each possible regime are overlooked, or at best oversimplified. But those archetypes are just one aspect of the description, a sort of thin anatomy of political regimes. What interests Montesquieu, however, is not so much the anatomy but the life of those systems, that is, the way in which law shapes society and in return, it is shaped by the constant evolution of the social practices.

The second function of comparative constitutional law is critical. Montesquieu, whose chief scientific interest is medicine, is concerned with the political health of societies and deeply troubled by their political death when they end up in a despotic form. Montesquieu nowhere raises his voice to condemn despotism, but his message is as clear as possible. Despotism is the negation of individual liberty, as the two are clearly opposed to each other. The aim of despotism, as of any other political regime, is self-preservation through the stimulation of fear: 'The principle of despotic government is fear; but a timid, ignorant, and faint-spirited people have no occasion for a great number of laws (Book V, Chapter 13, Para. 1).'

The third, most limited, function is normative. It is only when we understand the complexity of the interrelationship between law and society and the impact of internal as well as external factors to the development of each individual community, that we may tentatively suggest a few technical improvements to steer the boat away from danger. One of the first principles of action, according to

Montesquieu, would probably be: do no harm. The unstable equilibrium of social forces is very easily upset. Any unilateral intervention, such as for example a radical reform, would unsettle a political regime in a way that is largely unpredictable. Another way to put it is: if it works, why fix it? Of course, if it does not work, i.e., if the government is despotic or if it seems to go down a despotic route, than the moral ground for intervention becomes stronger in theory. But the cure is far from being easy. If a society is slipping towards despotic rule, it means that it is internally corrupt and has lost the taste for virtue. How could we possibly bring it back to life? Montesquieu would no doubt insist on a liberal and broadminded education. Once again, however, education serves to prevent rather than to heal.

Some years ago I travelled to Esfahan, one of the most marvellous places in the world. My expectations of Iran were completely overturned by my experience. An examination of its written constitution would help very little in understanding its political system. Far from justifying its more coercive aspects, I am suggesting that in order to understand it comparatively one should embark on a study driven by methodological pluralism. Whether or not it is possible to reform it from within is a separate question. It is clear, however, that any revolution does not bring about real change if it is not able to capture the spirit of the people. In this case, even more poignantly than others, the written constitution will reflect only a very blurred image of the values of a society.



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