

Giovanni Sartori: “Constitutionalism: A Preliminary Discussion”

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1 Citation

Sartori, Giovanni. 1962. “Constitutionalism: A Preliminary Discussion.” *The American Political Science Review*, 56 (4): 853-864.

2 Abstract

Sartori’s objective is to unearth the 19th century consensus understanding of constitutionalism, whose spirit he believes is shared by both the American/French model as well as the British model, in order to both critique the British reverence for their supposedly “unwritten” constitution and to shed light upon the 20th century dissensus vis-a-vis the meaning of the term “constitution.” The 19th century the concept of “constitutionalism” was widely understood to mean a fundamental set of laws/principles corresponding to an institutional arrangement to limit arbitrary government power. Post WWII, this consensus collapsed, and now constitutions can be grouped into three categories: *garantise constitutions*, corresponding to the 19th century understanding; *nominal constitutions*, which are enforced but merely codify and enable the existing constellation of power; and *facade constitutions*, whose *de jure* substance corresponds to the 19th century understanding but *de facto* are never enforced. In the face of such dissensus we cannot hope to remain normatively neutral and, one presumes, a codified constitution channeling the 19th century understanding should be preferred to the emergent alternatives.

3 Details

Sartori begins by arguing against British exceptionalism - the notion that British constitutionalism is fundamentally *sui generis*. “There is an element of polemic coquetry,” Sartori writes, “in the emphasis [the British] lay on the principle of the supremacy of Parliament. . . in the somewhat provocative and bold statement that, according to the American and French meaning of the term, the United Kingdom does not have a constitution, in the point that the British system is based not on the division but the fusion of powers. . .” (Sartori 1962: 853). While all of these facts are literally true, the true spirit of the British constitution lies elsewhere. First, the traditional usage of “parliament” in England was synonymous with the king, lords, and commons acting together, and hence the doctrine of Parliamentary sovereignty historically meant nothing more than the “sovereignty of the State” (ibid: 854). Second, the British constitution is not really “unwritten,” but merely uncodified: While its fundamental or “supreme laws” (such as the Habeas Corpus Act of 1679 or the Act of Settlement) “are not collected in a single document,” these documents are written (ibid: 855). Finally, the spirit of British constitutionalism is exactly the same as the continental or American understanding: “During the 1848 revolutions, it was very clear on both sides of the Channel what the people were asking for when they claimed a constitution. If, in England, “constitution” meant the system of British liberties, *mutatis mutandis* the Europeans wanted exactly the same thing: a system of protected freedom for the individual, which, according to the American usage of the English vocabulary - they called a “constitutional system”” (ibid: 854). In fact, from Bracton onwards, the British advocated “an “unlimited government” just as much, or rather, just as little as the Americans” (ibid: 860). What matters above all else, Sartori concludes, is the *telos*, or purpose, of constitutional understandings, and for English, American, and French constitutionalism the *telos* was identical: “a fundamental law, or a fundamental set

of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government" (ibid: 855).

Sartori then dismisses the notion that to focus on the 19th century constitutional consensus is unwise because a more ancient understanding can be traced back to classical Greece or to the Roman Republic. With regards to the former, Sartori argues that many have "mistranslated" Aristotle and his concept of *politeia* to mean the equivalent to "constitution." Yet "*politeia* only conveys the idea of the way in which a polity is patterned. To us constitution means a frame of political society organized through and by the law for the purpose of restraining arbitrary power. And surely nothing resembling this concept was in the mind of Aristotle" (ibid: 860). With regards to Roman understanding, "the Latin term *constitutio* meant the very opposite of what is now understood by "constitution." A *constitutio* was an enactment; later, after the 2nd century, the plural form *constitutiones* came to mean a collection of laws enacted by the Sovereign; and subsequently the Church, too, adopted the term for canonical law" (ibid: 853). In short, a consensus, modern conception of constitutionalism only emerged following the close of the 18th century.

Sartori then transitions to an analysis of the 20th century, post-WWII state of affairs. He is particularly concerned that many authoritarian systems have been appropriating the term "constitution," and he fears that the misleading British exceptionalism vis-a-vis their constitution may be aggravating this pernicious state of affairs: "One must be very careful about importing the British constitutional textbooks. They have not been written for export. They have been written for a happy people whose constitutional system is liable to work nicely anyhow... the case might be very different elsewhere" (ibid: 857). In fact, the danger of not codifying a system of checks on government power have become so serious "that only the British can afford the luxury of not formalizing their constitution" (ibid: 862). In essence, post-WWII the term "constitution" has come to mean both something strictly substantive as well as something formal and cosmetic (ibid: 858). To emphasize this distinction, Sartori posits that post-WWII constitutions can be classified into three categories:

- *garantiste constitutions*: These are constitutions proper, congruent with the 19th century consensus, which limit arbitrary government power and ensure limited government (ibid: 861).
- *nominal constitutions*: These constitutions are "fully applied and activated," but they perform no limiting function vis-a-vis the government because they merely formalize "the existing location of political power for the exclusive benefit of the actual power holders" (ibid).
- *facade constitutions*: These take on the appearance of a true constitution, but "what makes them untrue is that they are disregarded" (ibid).

Sartori concludes by noting that in the face of such diversity in types of constitutions, and given the collapse of the 19th century consensus concerning the fundamental spirit of "constitution," it is impossible to stay neutral vis-a-vis the definition of constitutionalism. For "when the time of trial comes, one discovers that what the "pure" jurists have really been doing - under the shield of their juridical indifference to meta-juridical matters - was to pave the way for allowing unscrupulous politicians to make a discretionary use of power under the camouflage of a good word. Politics cannot be taken out of politics, so to speak" (ibid: 864).