

Cosmopolitan Constitutionalism in an Age of Global Crises: A commentary on Professor Roberto Toniatti's 2019 "Comparing Constitutions in the Global Age"

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Introduction. Professor Toniatti, Comparative Constitutionalism, and the Global Age

The editors of this festschrift honoring my friend Roberto Toniatti have kindly invited me to make a contribution to this rich collection of essays and comments. I am quite pleased to do so, partly because of the professional respect and personal affection I have for Professor Toniatti and partly because doing so provides an opportunity to reflect on an intriguing thesis he developed recently about comparative constitutional law in a "global era". Professor Toniatti presented the Casad Comparative Law Lecture at the University of Kansas in early 2019, and from that presentation came an excellent law-journal article.

That particular article from 2019, of course, is but one of a great many works that Professor Toniatti has written, but it addresses an especially timely topic that intersects with my own research of recent years. In my festschrift contribution, therefore, I offer some reflections on Professor Toniatti's 2019 work titled *Comparing Constitutions in the Global Era*.¹ In doing so, I draw liberally on some of my own recent publications highlighting two particular global crises of the global era – the climate crisis and the agricultural crisis – and how global governance systems might be reformed to

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¹ Roberto Toniatti, *Comparing Constitutions in the Global Era: Opportunities, Purposes, Challenges*, 67 *KANSAS LAW REVIEW* 693 (2019), <https://kuscholarworks.ku.edu/bitstream/handle/1808/28083/Toniatti-2019-KansasLawReview.pdf;jsessionid=9FA77125FED8E5735A168B9F47785CC4?sequence=5>.

address them effectively.² With the kind permission of the festschrift editors, I have fashioned this paper largely in the form of a brief essay that is relatively light on footnote citations, since interested readers can find citations to numerous sources in my earlier works.

In his *Comparing Constitutions* article, Professor Toniatti hails a "new generation of scientific research in comparative constitutional law", and he introduces the concept of a "world constitutional phenomenon" that reflects the "global era" in which we live.³ "Globalization catches everything and everybody", he notes,⁴ and even though "[t]here is no coherent and all-embracing global constitutionalism or constitutional law and even less a global constitution",⁵ there is something he calls "a global constitutional space" which is "a dynamic combination of formal and informal substantive legal matter" involving influence, transplantation, and analogies among many countries' constitutions. He draws attention to "the worldwide practice of adopting a constitution" – that is, "a document which roughly describes the polity, lists the institutions that act on behalf of its government, and spells out a number of expectations that citizens supposedly have on what those institutions of government are to do or not to do that will affect their freedom and welfare".⁶

By looking broadly at this "world constitutional phenomenon", Professor Toniatti says, we can see "the radical evolution of the very understanding of what a constitution is" – an evolution away from a "typical Euro-Atlantic" type of constitution intent on limiting government powers and toward a much broader array of constitutions.⁷ He

² For citations to several of these recent publications, see note 12, *infra*.

³ Toniatti, *supra* note 1, at 694.

⁴ *Id.* at 695.

⁵ *Id.* at 697.

⁶ *Id.* at 700.

⁷ *Id.* at 701.

focuses closely on the diversity of constitutions in the global era and on the "intrinsic and inherent pluralism" we can find today among the world's constitutions.⁸

Professor Toniatti also discusses the concept of "cosmopolitan constitutionalism," under which "constituent power is vested not only in 'We the people' [of a particular political entity, such as a nation-state] but also in 'the international community.'"⁹ In this respect, he quotes from Mattias Kumm in asserting that "the constitutional legitimacy of national law depends in part on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends in part on states having an adequate constitutional structure."¹⁰ Building on these ideas, Professor Toniatti then writes this: "In my opinion, reference to cultural diversity is a component of both the 'We the people' segment of a constitution as well as of the 'international community'".¹¹

It is against that backdrop – and particularly that last point about cultural diversity and "cosmopolitan constitutionalism" – that I wish to make three main observations. I list them first, and then I explain each of them.

- 1) Constitutionalism is at risk, in all its forms.
- 2) Global crises greatly increase the risk of constitutional degradation.
- 3) Fortunately, global crises open the door to radical cosmopolitan constitutional reform.

⁸ Id. at 703-704. Professor Toniatti distinguishes three types of pluralism: (i) pluralism in the meanings of such basic concepts as constitutionalism, constitution, constitutional law, etc.; (ii) a challenge to the notion that all law comes from political sources (and a corresponding recognition of other sources of law within a single legal jurisdiction); (iii) a "competition of different sets of rules in the regulation of the same substantive fields – such as, for example, human rights – without a clearly established hierarchical order." Id.

⁹ Id. at 711.

¹⁰ Id., citing Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 697, 702 (2016) (emphasis added).

¹¹ Toniatti, *supra* note 1, at 711 (emphasis added).

In the following pages, I explain these three points in only a "nutshell" form. However, I have given (or am in the process of giving) further elaboration to them elsewhere.¹²

Constitutionalism is at risk, in all its forms.

I agree with Professor Toniatti that cultural diversity should play a prominent role in modern constitutions and modern constitutional law. Likewise, he is right to highlight the importance of recognizing, and even celebrating, the pluralism that we find among the various constitutions in today's world. However, what I see in many countries today is a breakdown in constitutional law, suggesting that constitutionalism itself is at risk.

Looking to my own home country (the USA), I see the high price that a country pays for giving too little attention to cultural diversity. My country has an especially disturbing, perhaps even dysfunctional, failure to address issues of racial and ethnic unfairness. Many Americans (myself included) see encouraging signs today that these unfairnesses might be addressed and corrected: public demonstrations have reached a fever pitch in some US cities to demand a systemic attack on racism and a recognition that "black lives matter"; the "me too" movement has brought women's rights (and the violation of them) into sharper prominence than I have seen since the 1970s; Native American rights and interests have likewise gained prominence. All of these have legal and constitutional manifestations, as for instance in recent voting-rights legislation,¹³ in

¹² For ease of reference, I cite here the existing publications that I draw on the most in making my three overall observations below: (i) John W. Head, *INTERNATIONAL LAW AND AGROECOLOGICAL HUSBANDRY: BUILDING LEGAL FOUNDATIONS FOR A NEW AGRICULTURE* (2017) [hereinafter Head-2017]; (ii) John W. Head, *A GLOBAL CORPORATE TRUST FOR AGROECOLOGICAL INTEGRITY: NEW AGRICULTURE IN A WORLD OF LEGITIMATE ECOSTATES* (2019); [hereinafter Head-2019]; (iii) John W. Head, *GLOBAL LEGAL REGIMES TO PROTECT THE WORLD'S GRASSLANDS* (2012) [hereinafter Head-2012]; (iv) John W. Head, *CHINA'S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT* (2009) [hereinafter Head-2009]. In addition to these existing works, I hope soon to launch a website for the Global Restoration Project – www.globalrestorationproject.org – where I will explore further some of the points made below.

¹³ See, e.g., Sheryl Gay Stolberg and Emily Cochrane, *House Passes Voting Rights Bill Despite Near Unanimous Republic Opposition*, *THE NEW YORK TIMES*, Dec. 6, 2019, <https://www.nytimes.com/2019/12/06/us/politics/house-voting-rights.html>.

the re-emergence of the Equal Rights Amendment (to the US Constitution),¹⁴ and in recent constitutional-law and treaty-law decisions by the US Supreme Court.¹⁵

However, this country now has a President who, along with his circle of close advisors and enablers, seems intent on undercutting constitutionality and the rule of law. The unlawful and unconstitutional actions taken in recent months by President Trump and the US Department of Justice have been widely documented. For instance, a brief Google search for "unlawful and unconstitutional acts by the US government under President Trump" yields a trove of articles and analyses from respected sources documenting the attacks on First Amendment rights, on Congressional oversight authority, on judicial independence, and much more.¹⁶ I believe most scholars of US constitutional law – including Professor Toniatti himself – would agree with the proposition that Mr. Trump has created a constitutional crisis by inviting (and practicing) profound disregard for long-standing constitutional norms and principles.

Several years ago, in a book entitled *China's Legal Soul*, I studied what the notion of "rule of law" means in China.¹⁷ In drawing contrasts between that notion as found in Chinese constitutional law (mainly in a 1999 amendment to that country's 1982 constitution), and the notion of "rule of law" in the USA, I suggested that the "legal soul" of the USA can be found in an overwhelming support among Americans for the US Constitution. Americans disagree on just what the Constitution means – not

¹⁴ See, e.g., Tom Spiggle, *Did Virginia Just Make the Equal Rights Amendment Part of the Constitution?*, FORBES, Feb. 7, 2020, <https://www.forbes.com/sites/tomspiggle/2020/02/07/did-virginia-just-make-the-equal-rights-amendment-part-of-the-constitution/#2b6d0bac393c>.

¹⁵ For the last of these, see *McGirt v. Oklahoma*, No. 18-9526, 591 U.S. ____ (2020), https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf.

¹⁶ See, e.g., Garrett Epps, *Trump's Grotesque Violation of the First Amendment*, THE ATLANTIC, Jun. 2, 2020, <https://www.theatlantic.com/ideas/archive/2020/06/trumps-grotesque-violation-first-amendment/612532/>; Richard Wolf, *Article II of the Constitution: Trump's 'right to do whatever I want?' Or a road map for impeachment?*, USA TODAY, Oct. 24, 2019, <https://www.usatoday.com/story/news/politics/2019/10/24/impeachment-donald-trump-constitution-violation-emoluments/4056323002/>; Fred Barbash et al., *Federal courts have ruled against Trump administration policies at least 70 times*, THE WASHINGTON POST, Apr. 26, 2019, <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/>; Russ Feingold, *Trump's Unconstitutional View of Presidential Power*, EXPERT FORUM (of the American Constitution Society), Apr. 16, 2020, <https://www.acslaw.org/expertforum/trumps-unconstitutional-view-presidential-power/>.

¹⁷ See Head-2009, *supra* note 12, at Chapter 3.

surprisingly, given its economy of words and intentional vagueness in many passages – but the idea of constitutionalism provides a “glue” for the US legal system and for US society more generally.¹⁸ I see that glue dissolving now in my own country because the rising demands for legitimate and overdue constitutional reform are being voiced during a US administration that seems completely willing (indeed, eager) to eviscerate the country’s faithfulness to constitutionalism.

I see similar developments in other countries. China is but one example: in a law-journal article I wrote at the time of Britain’s handover of Hong Kong to China, I pointed out that the right of self-determination (of the Hong Kong people) had been entirely excluded from the negotiations and debate over Hong Kong’s future. I observed in the closing line of that article that because of this, “the chill is there to stay” for the people of Hong Kong.¹⁹ Recent actions by the Beijing authorities confirm that they do not give a damn about honoring the constitutional arrangements established in the Basic Law.²⁰

If I were writing a longer contribution to this festschrift, I would cite other countries as well in which constitutionalism is at risk. These could include Hungary and the Philippines and other legal systems operating under a variety of constitutions.²¹ At

¹⁸ See Head-2009, *supra* note 12, at 189-192.

¹⁹ See John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination?*, 46 UNIVERSITY OF KANSAS LAW REVIEW 283, 304 (1998).

²⁰ For an explanation of how the July 2020 actions by the Beijing authorities simply solidify the control China had guaranteed to itself in negotiating with the UK authorities many years ago, see Yi-Zheng Lian, *How China Scammed Hong Kong*, THE NEW YORK TIMES, July 1, 2020, <https://www.nytimes.com/2020/07/01/opinion/hong-kong-security-law-china.html?smid=nytcore-ios-share> (describing the new “draconian national security law that will forever harm Hong Kong’s political freedoms and hobble its economic relations with the rest of the world”).

²¹ For an account of constitutional developments (and departures) in Hungary, whose parliament recently granted Prime Minister Orban sweeping emergency powers, see ‘Hungary is no longer a democracy,’ says Hungarian legal scholar, DW [Deutsch Welle], May 14, 2020, <https://www.dw.com/en/hungary-is-no-longer-a-democracy-says-hungarian-legal-scholar/a-53442394>. For an account of President Duterte’s “hijacking” of democratic mechanisms in the Philippines in recent years, see Miguel Syjuco, *Rodrigo Duterte is leading a new kind of dictatorship*, THE GLOBE AND MAIL, Dec. 7, 2018, <https://www.theglobeandmail.com/opinion/article-rodrigo-duterte-is-leading-a-new-kind-of-dictatorship/>. In May 2020, in an “echo of the Marcos dictatorship” of earlier decades, President Duterte ordered the closure of the country’s major mainstream news platform. *Philippines: Rodrigo Duterte’s dictatorship sinks to new depths with closure of main broadcaster*, THE CONVERSATION, May 7, 2020, <https://theconversation.com/philippines-rodrigo-dutertes-dictatorship-sinks-to-new-depths-with-closure-of-main-broadcaster-138025>.

the very time, therefore, that Professor Toniatti correctly highlights and celebrates the growing diversity and pluralism of national constitutions in today's world, I see an attack – quite successful, unfortunately – on constitutionalism itself.

This attack is reflected also at the international level – that is, in international law. The hollowing-out of the UN Charter's central rule prohibiting unilateral aggressive use of force (that is, Article 2(4)) started many decades ago but has accelerated in recent years, especially by US and Russian actions. I refer here to the "Bush Doctrine" of the early 2000s and Russia's 2014 takeover of Crimea, respectively. The gradual shift away from what we might consider international constitutionalism has taken several forms, including the shift away from multilateral trade solutions to more bilateral trade agreements – and, most recently, the neutralization of the WTO by withdrawing support from the Appellate Body.²²

My overriding concern in this respect might be phrased in this way. (1) Disregard of constitutional norms amounts to saying "who cares what the constitutional instrument says (however carefully and fairly it might have been drafted and adopted)? Let's just do what seems best now to the persons with the loudest voices; let's just 'wing it!'". And (2) taking that attitude amounts to an abandonment of the rule of law. As a lawyer with formal training in two different legal systems and with at least some familiarity with many more, and as a citizen old enough to know a lot about the dangers of unchecked power, I shudder at this prospect.

Global crises greatly increase the risk of constitutional degradation.

Now my views become darker still. I regard the current age – what Professor Toniatti accurately calls the "global age" – as one characterized by multiple global crises of existential dimension. Much of my research and writing in recent years has revolved around two crises in particular – the climate crisis and the agricultural crisis. The latter of these, less prominent in the popular mind than the former, relates to the profound ecological damage brought about by modern agriculture. The damage is especially

²² For an account of the WTO crisis, see Ana Swanson, Trump Cripples W.T.O. as Trade War Rages, THE NEW YORK TIMES, Dec. 8, 2019, <https://www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html>.

severe to soil (the pedosphere or lithosphere), but also to rivers, streams, and oceans (the hydrosphere), to the atmosphere (especially through air pollution and emissions of methane and nitrous oxide), and to the biosphere (by converting natural habitats to largely sterile agricultural landscapes). I have explored both of these crisis – of climate and of agriculture – in several books and articles.

In recent months another global crisis has emerged. The corona-virus (COVID-19) global pandemic presents a worldwide threat that seems on the surface to be more immediate in character. Under current projections, this pandemic might kill millions of humans. On the other hand, the lasting damage to the rest of the Earth – that is, damage to the complex network of natural processes and relationships that make ours a living planet – surely will be much less extensive with the COVID-19 crisis than the climate crisis and the agriculture crisis.

In my view, all three of these global crises point out the importance of global constitutionalism. What do I mean by this? I mean that just as after the Second World War a system of multilateral solutions emerged to deal with the global crises (especially economic and social crises) of that era, likewise, some system of multilateral solutions seems necessary today. To me, that system must have law at its center. Yes, such a system also requires scientific initiatives (to move to a post-carbon future, for instance, and to reform agriculture in ways I have explored elsewhere²³), and it requires monetary transfers (from wealthy economies to struggling economies) on a scale similar to those appearing in the post-WWII experience. But in "the global era", collaborative arrangements for multilateral action – these usually take the form of (i) international institutions and (ii) broadly-adopted treaties – rise to a position of paramount importance.

²³ For an explanation of the scientific initiatives that I think hold the most promise, see Head-2012, supra note 12, at 209-225; Head-2017, supra note 12, at chapters 4 and 5; Head-2019, supra note 12, at 33-63. Central to these scientific initiatives is a shift from (i) producing grains and legumes (which account for about two-thirds of global human caloric intake) in annual plants grown in monocultures (that is, a single species per field) to (ii) producing grains and legumes in perennial plants grown in polycultures (that is, mixtures of species in a field) so that agricultural landscapes mimic the natural landscapes of grasslands that have almost completely been destroyed around the world to make room for agricultural production.

If, as I have argued above, we have entered an era of "constitutionalism at risk" both in national systems and the international system, then the global crises I refer to above – of climate, of agriculture, of COVID-19 – will pose even greater challenges than they otherwise would. Expressed differently: I worry about a vicious cycle in which (i) a denigration or disregard of constitutionalism (previously-agreed-upon collective political arrangements based on the sanctity of the rule of law) will promote an "anything goes" attitude, leading to (ii) a resort to force rather than law just at the time when global crises cry out for solutions that are efficient, effective, legitimate, and equitable in character, with full respect given to what Professor Toniatti properly emphasizes as the values of diversity and pluralism. This vicious cycle might, I fear, take control of the international community.

It is with this view in mind that I am especially drawn to the form of "cosmopolitan constitutionalism" that Professor Toniatti's 2019 article highlights. Recall from my summary above that "cosmopolitan constitutionalism" calls for "constitutional power [to be] vested not only in 'We the People' [of a particular political entity, such as a nation-state] but also in 'the international community'".²⁴ Especially in an era of global crises, constitutional legitimacy and constitutional fidelity are required both in national constitutions and in the international legal order. But especially in an era of global crises, this constitutional legitimacy and fidelity is particularly difficult to achieve.

Fortunately, global crises open the door to radical cosmopolitan constitutional reform.

Now my views become somewhat brighter, inspired partly by the closing paragraph in Professor Toniatti's Comparing Constitutions article. He writes this in that passage:

I would like to emphasize how comparing constitutions in the Global Era is an opportunity for enlarging our knowledge, and is directed to new worldwide classifications of constitutional documents according to a plurality of criteria

²⁴ See text accompanying notes 9 and 10, supra.

that may be the foundation of further developments (such as encouraging the phenomenon of regional protection of fundamental rights).²⁵

I agree with this rationale for studying comparative constitutional law, and I would offer three observations that build from what Professor Toniatti has written. First, where Professor Toniatti has emphasized fundamental human rights, I would expand the scope of protection to include also the rights and interests of other components of the natural world that we belong to and that we depend on for our own existence. In some of my writings, I have focused on both inter-generational and inter-species rights and interests. In particular, I have proposed legal and constitutional reforms to safeguard the bioregional protection of ecosystems – parallel in construction to Professor Toniatti's reference (at the end of the passage quoted above) to the "regional protection of fundamental rights". In my view, such protections of ecosystems and their future should be prioritized over the protections offered solely to human beings that happen to be alive today.²⁶

Second, our comparative studies should focus not only on what Professor Toniatti calls "new worldwide classifications of constitutional documents according to a plurality of criteria", but also on a broader goal. In some of my recent writings, I have called for a new worldwide classification of sovereignty itself. In general, constitutional documents at the national and international level reflect the ages-old notions of state sovereignty, based on what some observers (myself included) consider the mirage of a "nation-state" system that existed only in seventeenth- and eighteenth-century Europe . . . and perhaps not even then.²⁷ I urge the development of a form of "pluralistic sovereignty", building on several precedents found in nascent transnational legal regimes for various purposes (including, by the way, some precedents found in the

²⁵ Toniatti, *supra* note 1, at 711.

²⁶ For explanations of my views on these topics, see Head-2017, *supra* note 12, at chapter 7; Head-2019, *supra* note 12, at 77-95. See also the soon-to-be-launched website for the Global Restoration Project – www.globalrestorationproject.org.

²⁷ For an extensive review of the legal and political dimensions of the concept of state sovereignty, see John W. Head, *Addressing Global Challenges through Pluralistic Sovereignty: A critique of state sovereignty as a centerpiece of international law*, 67 *KANSAS LAW REVIEW* 727 (2019).

Trentino-Alto Adige region where Professor Toniatti has spent most of his professional career). In particular, I urge the creation of "eco-states" that would possess international legal personality and that would have authority and responsibility to manage an urgent process of agricultural reform and ecological restoration.²⁸ Moreover, I urge the preparation of a global constitutional instrument, along with a novel international institution to implement it, that would coordinate the work of the various "eco-states" in facilitating reforms designed to address the agricultural crisis and the climate crisis.²⁹

My specific analyses and proposals regarding "cosmopolitan constitutionalism" need not occupy any more space in this short essay. I recognize that many people would disagree with my views at the outset, perhaps because my proposals would involve radical change. I would, in turn, defend my views for that same reason – that is, because they are radical, in an age crying out for radical reform. The core reason I see such radical change as essential is this: all three of the crises I have touched on above – the crisis of climate, the crisis of agriculture, the COVID-19 crisis – reflect a new human-society reality and global-ecological reality that Professor Toniatti captured in the term "globalization". Recall his assertion that "[g]lobalization catches everything and everybody."³⁰ With over seven billion humans on the planet (up from slightly under two billion just a century ago), with per-capita consumption increasing quickly in that human population, with global temperatures rising and global soil quality falling, with the technological and transportation revolutions allowing for nearly instantaneous transmission of information, misinformation, and diseases among the members of our species . . . with all these developments, surely a reorientation of our global systems of governance is overdue.

²⁸ For explanations of my views on these topics, see Head-2019, *supra* note 12, chapters 3 and 4.

²⁹ In my formulation, the global constitutional instrument would be a Global Convention on Agroecology, and the new international institution would be the Global Corporate Trust for Agroecological Integrity. For detailed explanations of these proposals, including draft provisions and voting-power allocations, see Head-2017, *supra* note 12, at chapter 7, and Head-2019, *supra* note 12, at chapter 6, respectively.

³⁰ Toniatti, *supra* note 1, at 695.

I see tremendous value in Professor Toniatti's contributions to comparative constitutionalism. In this essay I have highlighted some points of inspiration I draw from just one contribution to this life-work. We all benefit – the world benefits – from these efforts. I feel great urgency in continuing the sorts of study and thought that Professor Toniatti has helped us undertake, and especially in directing intense effort toward establishing what I refer to in the title to this essay: cosmopolitan constitutionalism in an age of global crises.