

2019 Casad Comparative Law Lecture±

Comparing Constitutions in the Global Era: Opportunities, Purposes, Challenges

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Editor's Note: The following essay is drawn from the Casad Comparative Law Lecture presented in February 2019 by Professor Roberto Toniatti. The Casad Lecture, held regularly at the University of Kansas School of Law as a component of the School's multi-faceted International and Comparative Law Program, is named after Robert C. Casad and Sarah Casad in recognition of the special contributions that both of them have made to the Law School over many years, particularly in the area of comparative law.

In keeping with common practice followed by the *Kansas Law Review* in publishing lectures of this sort, and consistent with the character of this Casad Comparative Law Lecture in particular, this article is structured more in the form of an essay than of a traditional law journal article.

I. INTRODUCTORY REMARKS

I would like to express my sincere feelings of gratitude for the honor

± The Casad Lecture is named in honor of Professor Robert Casad, one of KU Law faculty's brightest stars in the area of comparative law. Professor Casad became a college freshman at age sixteen, and by the age of twenty-one he had earned his undergraduate degree and a master's degree from the University of Kansas. He then went on to earn a JD degree from the University of Michigan and an advanced law degree from Harvard. Before Professor and Mrs. Casad moved to Lawrence in 1959, they lived for a short time in Winona, Minnesota where Professor Casad practiced law at the practice of Streater and Murphy. During their long association with KU, Professor and Mrs. Casad worked and lived overseas several times, including forays to Spain, Vienna, London, Japan, Costa Rica, Guatemala, Munich, Augsburg, Frankfurt, and many other places. In connection with some of those visits abroad, Professor Casad became fluent in Spanish and has undertaken extensive research and writing in that language—a sign of a true legal comparativist. Among Professor Casad's most well-known scholarly works in English are *Res Judicata in a Nutshell* (1976) and *Jurisdiction in Civil Actions* (1998). Professor Casad took emeritus status at the Law School in 1997 and has remained active in scholarship and faculty matters since that time.

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and the privilege that I am given by the invitation to deliver the 2019 Robert Casad Lecture. Indeed, I view the invitation partly as a manifestation of my highest esteem for the scholarly figure of Professor Robert Casad and his steady engagement in cultivating comparative law. I myself have been engaged in doing the same work since my graduation at the University of Bologna in 1975 where my JD dissertation has been the first dissertation ever in the area of comparative constitutional law in that University. Professor Casad, an authentic pioneer in comparative law, must have experienced the wide lack of acknowledgement by the legal scientific community of the potential that the comparative method has for advancing both knowledge and understanding of the substance of legal phenomena going beyond the form of national legal systems.

Secondly, I would like to share the honor of this invitation with my own Trento Law School, which was founded in 1984 with the specific purpose of focusing on the comparative method in teaching as well as in research. In the last years (2001–2010, and again in 2012, 2017, and 2018) Trento Law School has been ranked as the best Law Faculty in Italy out of forty-four law schools. Obviously, we like to think that this high ranking reflects in large part our scientific identity based on comparative law.

It is thanks to this constant commitment, for instance, that more than twenty years ago we have received the only Fulbright Chair in Law in Italy. It is thanks to the Fulbright Chair that we have had the pleasure of having Professor John Head as our Fulbright Scholar, followed by other visits of his for the purpose of teaching, of participation in conferences, and for research. We also had the honor and the pleasure of having Professor Rick Levy serve as a visiting professor within my own course of comparative constitutional law, and also interact with the whole community of comparative lawyers in Trento. So, I thank both of them, along with Stephen Mazza, Virginia Harper Ho, and Michele Rutledge for organizing this third visit of mine to KU Law School.

I will begin my Casad Comparative Law Lecture with some observations on the Global Era and on what I like to call the “global constitutional space” as the general context within which to approach a new generation of scientific research in comparative constitutional law. I speak with an implicit assumption that what I elaborate here with regard to constitutional law may be applicable to other areas, if not all other areas, of law. Later, in the form of an ideal dialogue with Bruce Ackerman based on an article of his published in 1997, I’ll try to introduce and explain the concept of world constitutional phenomenon. Lastly, I’ll take into consideration the impact of cultural diversity on the world constitutional phenomenon.

II. THE GLOBAL ERA AND COMPARATIVE CONSTITUTIONAL LAW

In times of globalization, there is hardly any substantive area of individual life and social intercourse that can avoid the impact of a worldwide network of interactive processes that project even modest and unassuming realities into a much larger and magnified scenario. The qualities of deliberate insulation from the rest of the world and of introversion within one's own small and beautiful frame of mind appear more and more difficult to practice and cultivate. Invasiveness and mutual influence—for the better or the worse—have asserted themselves not only as effective intrusive forces but also as leading normative imperatives. Globalization catches everything and everybody. Constitutionalism and constitutional law too have been caught. And global constitutionalism and global constitutional law—although far from having matured into a widely shared understanding and a secure definition of either—have become a recurrent framework of analysis of constitutional legal phenomena.

The very nature of constitutional law might have been thought of as providing a strong wall of protection from influences coming from outside, because of its being dogmatically referred to as the dimension of nation-statehood, (domestic and international) sovereignty, and ideological self-determination and, furthermore, because of its being normally qualified as the fundamental, basic, supreme, primary source of a hierarchical legal system. A constitution is ideally meant to reflect the history of a people and of the land on which it has traditionally settled, as well as to express a political will of institutional self-establishment consistent with the motivation of an independent nation to assert itself among other equally independent nations. Each constitution is theoretically expected to bear a potential of differentiation of its specific identity from other constitutions as it is instrumental to the free choice by the constituent power of its own set of fundamental values, basic rules, institutions, and public policies. Constitution-making has been traditionally qualified as the free exercise of public power intrinsically exempt from any prior legally binding constraints that would be regarded as incompatible with an authentic constituent and constitutional sovereignty.

The alleged stronger attitude to self-defense of constitutional law vis-à-vis globalization is misread, though: the traditional picture sketched above fits well its *raison d'être* in the past, when the constitution properly and faithfully reflected social patterns, economic dynamics, cultural orientations, environmental quality, international relations, and legal theories prevailing in that context in time and space. Today, a constitutional law that is to remain immune from reflecting the contemporary context and its global features would indeed give evidence

to its own lack of capacity to live up to current needs and expectations. If everybody and everything else go global, constitutional law cannot help going global itself.

Accordingly, in our present time—the global era—constitutionalism, constitutions, and constitutional law are more and more thought of as components of a *world constitutional phenomenon* and present an attitude to be assessed not only with regard to the relationship with their own domestic sphere but also in connection to the global dimension. Such a necessary new wider focus demands that the meaning originally and traditionally attributed to the concepts be inevitably revisited in order to suggest for each one of them an understanding more proper and compatible with the current scenario. In other words, what happens to (all) other branches of the law—experiencing varying degrees of interaction, influence, impact, and eventually adaptation to globalizing trends—also takes place in the sphere of concepts turning around the constitutional phenomenon, with features of its own.

It is to be borne in mind, though, that globalization is a major trend, a wider consensus in the making, an ongoing process leading to an increase in uniformity or compatibility or non-incompatibility among separate and distinct normative settings, worldwide or in regional contexts. Globalization is not a static condition or the final stage of a rationally led evolutionary plan. It would be hard to suggest a formal satisfactory definition of global constitutionalism or global constitutional law. There are areas whereby symptoms of globalization appeared quite a long time ago—for instance, with regard to circulation of models, a dynamic well known to scholars of comparative law—and areas of still and meaningful strong resistance, such as the fierce opposition to comparative references by national judges to rules, legal principles, and judicial precedents from foreign jurisdictions. Economics and trade encourage coordination and shared solutions, whereas ethics and religion preserve their diversity reflected in and on the law. As a manifestation of judicial self-restraint, the European Court of Human Rights has elaborated a doctrine of the “national margin of appreciation” in implementing the provisions of the Convention that introduces a shield of protection of member states’ national identities from the enforcement of such binding international jurisdiction especially with regard to moral and religious issues. Worldwide, there are periods of militant globalization, as in what concerns the assertion of the universality of human rights over nation-states’ control of their domestic affairs. There are also times of opposition to globalization and support of other priorities, as it happened in the name of economic, social, and cultural rights, or of communitarian “Asian values” as against Western conceptions of individual rights, or, again, when the

right to development provided a justification for requiring unity of public policies to the detriment of any political opposition.

There have been and there are structural limits also to globalization. And, consequently, global constitutionalism and constitutional law constantly experience tensions and contradictions; a situation of uncertainty which confirms the open and dynamic nature of the process. Globalization cannot and should not be ignored in its interaction with the law but at the same time it ought not be over-emphasized.

There is no coherent and all-embracing global constitutionalism or constitutional law and even less a global constitution. What does seem to be in place as a useful frame of reference of analysis is just *a global constitutional space*: an ideal area of interaction, mutual influence, circulation of models, legal transplants, and elaboration of original solutions that are but a functional equivalent with regard to previous analogous solutions born in other jurisdictions, and borrowing between and among sources of law—inclusive of constitutional law. Institutional authorities acknowledge this informal global constitutional space as well as its formal effects, and yet such effects could hardly be said to emanate from one or another of the traditionally established legal orders, whether domestic or international in nature. The global constitutional space—a dynamic combination of formal and informal substantive legal matter—may prove to be a useful ideal framework for analyzing the world constitutional phenomenon.

III. THE WORLD CONSTITUTIONAL PHENOMENON

In 1997, internationally known Yale scholar Bruce Ackerman published an article on the Virginia Law Review entitled “The Rise of World Constitutionalism.”¹ The article was meant to give an answer to two main questions: (1) What were the prospects for constitutionalism as they might have appeared in the late 1930s? (2) What was the potential for judicial review?² Ackerman’s own answers were grim in potential and perspective. Both questions received the same pessimistic answer.³

But his reasoning continued by observing: “[s]ixty years later, and how the world has turned . . . The Enlightenment hope in written constitutions is sweeping the world. Constitutional courts are powerful forces in Germany and France, Spain and Italy, Israel and Hungary,

1. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

2. *Id.*

3. *Id.*

Canada and South Africa, the European Union, and India.”⁴

Presumably Bruce Ackerman had two purposes in mind. The first, waking up and somehow shaking American scholars with the exception, most notably, of Professor Robert Casad. He wrote: “American constitutional lawyers have treated the matter with *astounding indifference*.”⁵ Thirty years later from the article, I am convinced that much progress has been achieved and that much of the effort has come from the American Society for Comparative Law.⁶ The second purpose of the article was to prepare the ground for Bruce Ackerman to develop some scenarios in which he deals with the interaction between the U.S. constitutional system and the ones indicated, thus offering insights and much food for thought within those scenarios.

Nevertheless, in my opinion, Bruce Ackerman’s approach does raise some problems and it is precisely because of the undisputed high quality of the scholar that I try to elaborate a different vision, in the global era, as the title of this Lecture suggests. I will present a set of three critical remarks. First, in Ackerman’s approach, constitutionalism and its state of health are analyzed with judicial review as the only benchmark. Judicial review is of course crucial but constitutionalism is a puzzle with many components. Over-emphasizing one of them may entail adopting a short-sighted approach, which is not justified on any ground once you adopt a planetary perspective of research.

Let me offer an illustration. An expert writer on Confucian constitutionalism claims that judicial review does not have a role in Confucian constitutionalism because, among other things, it focuses on individual rights only.⁷ Are we to deny that there is something like Confucian constitutionalism? At least we should first suggest a definition of constitutionalism.

But let’s leave Confucian constitutionalism aside and make another reference. Article 120 of the 2008 Dutch constitution explicitly states that “The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.”⁸ Denmark, Finland, Iceland, Norway, and Sweden also do not have judicial review of legislation.⁹ Are we to deny

4. *Id.* at 772.

5. *Id.* (emphasis added).

6. I like to recall that Trento Law School has been an institutional member of American Society for Comparative Law for the last twenty years.

7. *See, e.g.*; BUI NGOC SON, CONFUCIAN CONSTITUTIONALISM IN EAST ASIA (Randall Peerenboom & Pip Nicholson eds., 2016).

8. GW. [Constitution] art. 120.

9. For a more detailed discussion of judicial review in Nordic countries, *see* Ran Hirschl, *The Nordic Counternarrative: Democracy, human development, and judicial review*, 9 INT’L J. CONST. L. 449, 450–51 (2011).

them the entitlement to be part of the Western constitutional tradition or of constitutionalism itself?

Second, the number of countries involved in Ackerman's scenarios is very limited indeed. And in spite of the inclusion of India and South Africa, such limits may be just another (non-voluntary) confirmation that constitutions are to be regarded as a matter concerning an exclusive club with just a few members. In the preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it is stated that those rules are meant to be binding on "like-minded states."¹⁰ More in general, are we to limit comparative analysis to countries that are "like-minded" only? Does not the comparative method offer an instrument that, while not certainly ignoring that group of states, purports to go beyond consolidated areas of research, to accept the challenge of comparing also "unlike-minded states," and to reach eventually new and relevant scientific results out of such innovative enquiries?

Just to make it clear: comparative research should have a field of investigation focused on the organizational and functional features of judicial review within countries that do have judicial review. Such research is very relevant, important and needed, especially as the reality of judicial review continues to develop in many countries and scholarship continues to develop in this specific field. But the point here is whether in constitutionalism there is something more than judicial review. My suggestion is that the global constitutional space includes also the latter category of states and that those states must be included into a new generation of comparative studies.

It is also noteworthy to say that this is already taking place, that research on Asian constitutional law has already produced excellent results—both in quantity and quality—followed by Latin America and then by Africa. I have two remarks on this research. First, mostly with Asian constitutionalism, much of the work is due to U.S. scholars or to Asian scholars after their scientific initiation in law mostly in the U.S. or in Canada, much less in Europe. The second, as a reaction to indifference by Western scholars, there has been a relevant development of research whose focus is on non-Western constitutional experiences—that means Africa, Asia, and Latin America—within a smaller scientific community proudly named The Global South.

My third critical remark to Bruce Ackerman's article concerns the very phrase of "world constitutionalism" that in my understanding is fairly

10. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5, https://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/9XJJ-FJ9L>].

ambiguous. One meaning is that constitutionalism has moved from the spheres of nation states to a unified unitary exclusive sphere establishing a constitution for the world. This is not what Ackerman means but it seems to me that such interpretation is possible in the words “world constitutionalism.” A second meaning could be that constitutionalism rooted in nation states—that is, the same constitutionalism—is effectively regulating the institutions and political life of all nation states in the world. Even this second explanation is not historically viable. The rule of law is not prevailing in the world today, nor is it prevailing in a majority of nation-states, even in those that do pay lip-service to it.

In order to possibly avoid misunderstanding, I prefer to approach my reasoning in the field using an alternative phrase, the *world constitutional phenomenon*. By *world constitutional phenomenon*, I refer to the worldwide expansion of the practice of adopting a constitution and I assume that, consequently, the meaning of the words and concepts (constitution and constitutionalism) cannot continue to be selectively referred to by their original understanding, necessarily related to the early European and North-American experiences since the late 18th century. We must be prepared to accept that.

The deliberate choice of the phrase *world constitutional phenomenon* (instead of others, such as “world constitutionalism,” that may be misleading), in fact, means employing a neutral, objective, value free acknowledgement that most countries in the world have adopted 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. The non-critical implicit reference to Western liberal constitutionalism as the would-be world uniform constitutional paradigm does not prevent scholars from falling into the traps of a manifest oxymoron. One example is “illiberal (or authoritarian) constitutions.” In fact, a good attitude for a scholar in front of the use of the words “constitution and constitutionalism” would be one of diffidence, or at least of curiosity that would lead to double check, case by case, what is their proper meaning with regard to each polity that chooses to make use of those words.

Within such adapted general and generic understanding, the *world constitutional phenomenon* turns out to be expressive of the evident historical development of a cultural reality, namely that words and concepts (such as constitution and constitutionalism) have gradually lost their original meaning (the same could be said for “democracy,” could it not?) and do not match with the typical features of early constitutionalism, as reflected (as far as continental constitutionalism is concerned) by article

XVI of the 1789 French *Déclaration des Droits de l'Homme et du Citoyen*: “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”¹¹ Inevitably, therefore, the use of the words “constitution” and “constitutionalism” requires a specification and a qualification that may be ideological, historical, geopolitical, or cultural, depending on the context and the purposes of each research.

Such an aseptic description of the phenomenon may accommodate the framing of constitutions that draw their inspiration from the original liberal ideology of Western constitutionalism as well as the world practice of adopting constitutions that are to be related to different ideological inspirations that are coherently rooted in radically different founding principles, such as the unity of state power, the priority of one set of (proletarian) interests that deny the very legitimacy of other interests and therefore of their conflict (to be regulated by the law) as in the case of Marxism-Leninism also in its Asian epiphanies (China, Laos, and Vietnam); or such as illiberal and authoritarian constitutions; or constitutions whose table of values and institutional arrangements are strictly reflective of a religious faith, once again rejecting the Western liberal secular rationalist and relativist worldview.

In other words, the world constitutional phenomenon has given evidence to the radical evolution of the very understanding of what a constitution is: from the typical original Euro-Atlantic liberal ideological notion of a sovereign act of a *normative* will limiting an absolute government through fundamental rights to the current non-typical concept of a sovereign act of a *political* will, compatible with all and any ideological foundations, directed to establishing a government, giving it the proper powers for managing life and development of its population.

Adopting the world as the proper setting for the comparative analysis of the constitutional phenomenon, therefore, highlights a twofold reality. The first, space-wise, is that the concept of a written constitution establishing a polity and its government has widely circulated around the globe. The second, time-wise, is that a written constitution is a modern functional equivalent of the normative and political ordering principle through which polities and their government have always been established and managed.

In fact, it is such an ordering principle that inspires the framework of

11. Déclaration des Droits de l'Homme et du Citoyen de 1789 [Declaration of the Rights of Man and of the Citizen of 1789], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], <https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> [<https://perma.cc/F7MD-GD6X>] (last visited Mar. 31, 2019).

substantive preconditions for the legitimacy of a written constitution. The written constitution is indeed a rationalization of the normative foundation of a social and political order.

That the word and concept of “constitution” and “constitutionalism” have gained a new non-typical (non Euro-Atlantic-centric) meaning and that such new meaning is non-ideological, non-universal, non-bound to philosophical origins and historical achievements, non-exclusive of any specific geo-cultural area opens the way to a new generation of empirical and quantitative research, based on the mere existence of a constitution—as we have been witnessing in recent times—without any further qualification and nevertheless makes traditional evaluative and qualitative methodology more complex (and welcome).

One of the inevitable consequences of such an approach is that it entails giving up any practice of using the words “constitutions” and “constitutionalism” without at the same time specifying what are the constitutions and constitutionalisms to which we are referring. According to the context, we may be adopting a geographical paradigm and be talking of European, Asian, or North-American constitutions; or an ideological one (liberal, socialist, or authoritarian constitutions); or a religious one (Christian, Islamic, or Buddhist constitutions); or a historical one (1700, 1800, 1900, or 2000 constitutions) or a combination of all of them. There is a need to qualify and be “precise”—for the sake of clarity and academic accountability—as to the specific constitutional text to which we are referring. This research aimed at establishing new qualified groupings of constitutions organized according to a wider set of their respective connotative paradigms would be a very important first step in the science of comparative constitutional law in the global era.

IV. THE IMPACT OF CULTURAL DIVERSITY ON THE WORLD CONSTITUTIONAL PHENOMENON

Cultural diversity is a typical feature of human kind, due to the intrinsic attitude of individuals, as social beings, to elaborate and share patterns of behavior, traditions, languages, and instruments of rational and artistic communication, sets of values and beliefs within the social groups they live in, with each group mainly expressing its own original mono-culture. Additionally, cultural diversity may become and does become a typical feature of a society whereby a plurality of mono-cultures coexists, such a society therefore experiences a condition of multiculturalism and, possibly, of interculturalism. Culture, and its diversity, is at the very core of identity and is therefore crucial for the self-determination of communities and peoples just as of individuals. The preservation of one’s

own identity (whether individual or collective) has grown as a priority issue in the current era of globalization.¹²

Cultural diversity within a multicultural (or intercultural) society as a sociological condition originates its own legal dimension in a given polity. It gives rise to two interests, the *law of cultural diversity* as the set of objective rules meant to regulate multiculturalism, and the *right to cultural diversity* as the legally protected and justiciable claim of members of one of the cultures concerned to live by their own distinct standards and rules, as far as the law of the polity so establishes. Widening or reducing the scope of such legal protection is the purpose of the *politics of cultural diversity* and a trend of *policies* of a multicultural polity. Such scope may depend also on the adoption of a system of *legal monism* or *centralism* (mostly within the Western tradition) or of one of *legal pluralism* (mainly in Asia and Africa, and, at least with regard to chthonic law,¹³ in Latin America as well).

The hypothesis of reconstruction of the current world legal and constitutional phenomena that is proposed here is centered on the discrete and yet robust image of a global constitutional space whose first and most striking feature is its intrinsic and inherent pluralism:

- i. Pluralism in the disaggregation of the meanings of basic concepts—constitutionalism, constitution, constitutional law both as living law (distinct from the formal text) and as a specialized branch of the legal sciences that accepts to deal with such developments—as well as in the elaboration of more accurate and updated planetary classifications and typologies;
- ii. Pluralism in the challenge to the exclusivity of the political method of law-making and to the claim by nation-states' authorities to control the validity of all rules, with the consequence of achieving a wider scope of recognition of legal pluralism in the systemological sense and allowing for the coexistence of a plurality of distinct and conflicting legal traditions, such as customary law, religious law, and chthonic

12. See, e.g., Culture for Sustainable Development, UNESCO (last visited Mar. 21, 2019) (“Balancing the benefits of integrating into a globalized world against protecting the uniqueness of local culture requires a careful approach”), <http://www.unesco.org/new/en/culture/themes/culture-and-development/the-future-we-want-the-role-of-culture/globalization-and-culture/> [https://perma.cc/TNZ5-S9LL].

13. A brilliant and insightful description of the richness of chthonic law, I refer to H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 60–97 (Oxford U. Press, 5th ed. 2014). Professor Glenn delivered the Robert Casad Lecture in 2012.

- law within the same jurisdiction;
- iii. Pluralism in the 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 or shared criteria of resolution of conflicts of laws, thus shaping another instance of legal pluralism within the same political method of law-making that would be better indicated as normative pluralism (such instance is best given evidence by the coexistence of domestic, international,¹⁴ and supranational¹⁵ law and jurisdictions for the protection of fundamental rights).

Pluralism is, according to this interpretation, the factor of qualification of the global constitutional space. It results from this approach that such pluralism is not yet rationalized and that, therefore, at least in the present stage it cannot be said to constitute more than just a paradigm of a systemic (dis)order. It is a (dis)order inasmuch as the global constitutional space cannot yet be elaborated by more and better systematic tools than through reference to the practice, no rationalized legal theory offering a secure explanation of the current phenomena.

But the global constitutional space may just as well be considered (at least virtually or temporarily) a prospective new order, not based on symmetries and hierarchies and theories—the traditional categories that generations of scholars have been trained to develop and work with (and cherish)—but on thoroughly different criteria and principles headed at managing conflicts of laws occasionally rather than at preventing or giving them a systematic solution. As long as its alternative does not make itself visible, with all the nuances, limits, and contradictions that are to be constantly kept in mind, the *global constitutional space* may prove to be able to be systemic and to consolidate its uncertainties.

Culture is a polysemic word and, especially when applied in the field of law, it ought to be contextualized. Furthermore, the need for a definition of its content is significantly increased because—as far as a right to cultural diversity is attributed judicial protection from a public power denying or unduly restricting it—such definition will also allow drawing the rationale of some limits and conditions to it. Such definition may be

14. I refer to specialized international courts such as the European Court of Human Rights (established in 1950), the Interamerican Court of Human Rights (1979), the African Court on Human and Peoples' Rights (2004).

15. I refer to the Court of Justice of the European Union (established in 1952), whose jurisdiction includes also the field of human rights.

the combination of a research based on international law and of a comparative analysis of sources of domestic constitutional law.

A qualified support for reaching an appropriate understanding of its conceptual scope is provided by the definition of culture elaborated in a few documents—mostly sources of soft law and yet founded on an assumption of worldwide consensus—adopted by international organizations and in particular by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”).

The preamble of the UNESCO Declaration on Cultural Policies (Mexico City, 1982) states that

in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs; that it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.¹⁶

The definition of *cultural heritage* is also noteworthy:

The cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people’s spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries.¹⁷

Still another document, the preamble of the 2001 UNESCO Universal Declaration on Cultural Diversity, states that “culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”¹⁸

16. UNESCO, MEXICO CITY DECLARATION ON CULTURAL POLICIES, pmbi. (1982), <https://unesdoc.unesco.org/ark:/48223/pf0000052505> [<https://perma.cc/2FY6-VCDC?type=image>] [hereinafter DECLARATION ON CULTURAL POLICIES].

17. *Id.* art. 23.

18. UNESCO, UNIVERSAL DECLARATION ON CULTURAL DIVERSITY, pmbi. (2001),

Thus, in distinct sources and in its own words, UNESCO proposes a concept of culture “in its widest sense,” going well beyond visual arts, music, and humanities in general and including those dimensions of human and social behaviors and beliefs that are the proper object of study by social sciences, such as anthropology, economics and development studies, education, political science and international relations, sociology, and—what is our main concern—the law.¹⁹

UNESCO also provides the context that justifies its adoption of the *widest view* on culture. UNESCO’s own Constitution, at its very birth, recalls:

That since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed; That ignorance of each other’s ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war; That the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races; That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern; That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.²⁰

“Education, science and culture,” according to the Article 1 of UNESCO Constitution, are therefore instrumental to

contribut[ing] to peace and security by promoting collaboration among the nations . . . in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.²¹

The context in which culture and cultural diversity are defined and

http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html [<https://perma.cc/SXZ2-N2C6>] [hereinafter UNIVERSAL DECLARATION].

19. See DECLARATION ON CULTURAL POLICIES, *supra* note 16.

20. Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 61 STAT. 2495, pmb1., http://www.unesco.org/education/pdf/UNESCO_E.PDF [<https://perma.cc/R8K4-ZN39>] [hereinafter UNESCO Const.].

21. *Id.* art. 1.

assumed as fundamental values by the international community is thus inextricably connected to the mainstream axiological setting of international constitutional law, based on the rule of law, human rights and pluralist democracy.

Cultural diversity, based on the principle of equality and non-discrimination, cannot even indirectly imply *cultural hierarchies*, leading to colonialism, apartheid, as well as to tribalism or plans for ethnic cleansing. Cultural diversity is instead expected to develop an *intercultural space* that provides a forum for *intercultural dialogue*. In fact, as the UNESCO Constitution explains:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.²²

Cultural pluralism and cultural diversity shape a healthy international setting of *cultural relativism*—which is the opposite of cultural absolutism—that is meant to make effective that “cultural rights are an integral part of human rights, which are universal, indivisible and interdependent,”²³ so that “the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity.”²⁴ The defense of cultural diversity “implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”²⁵

A much more specific focus is adopted by the 2007 United Nations Declaration on the Rights of Indigenous Peoples.²⁶ The perspective adopted by UNESCO is inevitably planetary and the cultural diversity dealt with is consequently perceived as a world phenomenon.

In regional sources of international law in the field of human rights,

22. UNIVERSAL DECLARATION, *supra* note 18, at pmb1.

23. *Id.* art. 5.

24. *Id.* art. 4.

25. *Id.*

26. G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf [<https://perma.cc/A5H7-YLGY>].

although a clear and express definition of culture cannot be found, the foundation of protection of human rights is framed within a humanist cultural worldview, irrespective of any sovereign state's citizenship. For instance, in the preamble of the American Convention on Human Rights (1969), there is an explicit recognition "that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."²⁷ Similarly, the African Charter on Human and Peoples' Rights (1981) acknowledges that "fundamental human rights stem from the attributes of human beings which justifies their national and international protection."²⁸

Furthermore, respect for cultural diversity is to be implicitly read not only through general references to minority rights and the prohibition of discrimination on the ground of cultural diversity, but also in the contextualization of human rights protection in conformity with a distinct cultural conception of their meaning prevailing within their respective area of jurisdiction. For example, the preamble of the African Charter expressly states that it takes "into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights," preparing the ground for connecting individual rights and duties as a consequence of the consideration that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."²⁹

Another example is provided by the ASEAN Human Rights Declaration (2012), which—rather than assuming an abstract and universal basic concept of human rights *per se*—emphasizes that "the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds."³⁰ Although the distinction between the concept of human rights and their realization is not always easy to appreciate, it is clear that the emphasis is on cultural diversity between and among ASEAN member states.

The distinction between the concept of human rights and their

27. American Convention on Human Rights, July 18, 1987, O.A.S.T.S. 36, 1144 U.N.T.S. 123, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm [https://perma.cc/TF3Z-TKQE].

28. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, pmb1., <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AU.aspx> [https://perma.cc/2FDB-ZXXX].

29. *Id.* The African Charter in fact contains a fairly long and detailed list of duties. *See id.*

30. Ass'n of Se. Asian Nations, ASEAN HUMAN RIGHTS DECLARATION (Nov. 19, 2012), <https://asean.org/asean-human-rights-declaration/> [https://perma.cc/S83M-FRAQ].

realization is also found in the preamble of the Charter of Fundamental Rights in the European Union, which emphasizes the need of balancing “the preservation and . . . the development of these common [European] values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.”³¹ Nevertheless, Article 22 expressly states that “the Union shall respect cultural, religious and linguistic diversity.”³² Article 21.1 also includes a very detailed list of distinct grounds for discrimination (“sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation) to strengthen the principle of equality in a way that is sensitive to diversities.³³

A strong conceptual linkage, as evidenced by historical circumstances, between respect of cultural diversity—through protection of national minorities—and “stability, democratic security and peace in this continent” is assumed by the Council of Europe’s Framework Convention for National Minorities (1980),³⁴ one of whose main purposes is “the creation of a climate of tolerance and dialogue . . . necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society,”³⁵ as proclaimed in its preamble. Cultural diversity is consequently qualified as a requirement for “a pluralistic and genuinely democratic society,” such society having not only the duty “[to] respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority”³⁶ but also the positive obligation “to create appropriate conditions enabling them to express, preserve and develop this identity.”³⁷

V. THE IMPACT OF CULTURAL DIVERSITY ON THE WORLD CONSTITUTIONAL PHENOMENON

Constitutionalism is not indifferent (how could it be?) to the Global Era just as the Global Era cannot but show concern for constitutionalism.

31. Charter of Fundamental Rights of the European Union, Feb. 21, 2012, O.J. C 326/391, pmb1., <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [<https://perma.cc/9MBS-NPAK>].

32. *Id.* art. 22.

33. *Id.* art. 21.

34. See COUNCIL OF EUROPE PORTAL, <https://www.coe.int/en/web/minorities> [<https://perma.cc/C6C9-DL33>] (last visited Apr. 24, 2019).

35. *Id.*

36. *Id.*

37. *Id.*

Scholarship ought to work on the consequences of their mutual impact, possibly without too much either subjective cynicism or enthusiasm. The evolution of the law is constant and the current consequences of our time are related to globalization today just as they were related to other historical milestones in the past. Therefore, speaking of “global constitutionalism,” without any specific substantive scientific meaning, as a mere descriptive synonym of “the constitutionalism of our time” ought not to be objected.

Global constitutionalism has not caused the establishment of a uniform world rule—as perhaps other areas of law have been experiencing—nor has it thoroughly annulled the attitude of constitutional texts to reflect, in various degrees, the “legal soul” of a polity.³⁸ Indeed, there is a wider circulation of models and more frequent practices of legal transplants, there is a dynamic “migration of constitutional ideas”³⁹ and a growing establishment of regional international and supranational aggregations of nation-states. Such interactive and associational realities facilitate mutual communication and adaptations affecting member-states’ respective constitutional arrangements. Nevertheless, in my opinion, the main consequence of globalization has been the emergence of a world constitutional phenomenon, e.g., the mere practice of having a supposedly normative text bearing the name “constitution” irrespective of any further qualification.

Another connotative feature of the “constitutionalism of our time” is the pressure to accommodate “culture” and “cultural diversity” within the categories of constitutional law to an extent that is not comparable to experiences in the past. It is an imperative that commits both domestic and international law. The acknowledgement and protection of cultural diversity—leading to a wider scope of relevance also to all forms of legal pluralism—marks the dynamic affecting the rule of cultural (religious, linguistic, political) uniformity which has originally justified the origins of nation-states and is intimately connected, in my view, to the re-shaping of their individual identity.

Within this framework, the development of the concept of *cosmopolitan constitutionalism* may be considered as representative of the current (best) evolution of the world constitutional phenomenon. As Mattias Kumm describes it, the new and growing general concept of

38. I borrow the expression from JOHN W. HEAD, *CHINA’S LEGAL SOUL* (Carolina Acad. Press, 2009).

39. See SUJIT CHOUDHRY ET AL., *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006).

cosmopolitan constitutionalism results from a “revised understanding of constitutionalism . . . [that] is both cosmopolitan and postpositivist,” whereby “sovereign states and positive law retain an important role, but have to fulfil their role as part of a cosmopolitan and post-positivist conception of constitutionalism.”⁴⁰ Kumm suggests that, according to the interpretation of current constitutionalism offered by the vision of *cosmopolitan constitutionalism*, “constituent power is vested not only in the ‘We the People,’ but also in ‘the international community.’”⁴¹ Kumm further explains:

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. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national/international divide.⁴²

Other scholars—such as Vlad Perju⁴³ and Alexander Somek⁴⁴—have also elaborated their understanding of cosmopolitan constitutionalism. 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”.

VI. CONCLUSION

Finally, 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 that may be the foundation of further developments (such as encouraging the phenomenon of regional protection of fundamental rights). Furthermore, comparing constitutions is a *challenge*, as, inevitably, through the constitution you are bound to get to the legal system and legal culture underlying a constitutional text so as to ensure that classifications are properly built. One of the main *purposes* of such intellectual commitment is also, hopefully, the establishment of further scientific international cooperation and networking in research as well as in training a new generation of lawyers.

40. Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 INT’L J. CONST. L. 697, 698 (2016).

41. *Id.* at 698.

42. *Id.* at 704.

43. See Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 Cardozo L. Rev. 711 (2013).

44. ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* (Martin Loughlin, John P. McCormick, & Neil Walker eds., 2014).