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### Ecospace and constitutionalism as a way to counter the threat of hegemony and securitization

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KNOWLEDGE, POWER AND LAW  
BEYOND THE STATE

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# **Knowledge, Power and Law**

## **Beyond the State**



**Edited by Maria Bartl and Eljalill Tauschinsky**

# CONTENTS

- Introduction: Slicing through the Gordian Knot..... 4**
  
- PERFORMATIVITY..... 6**

  - 1. Performativity ..... 7**  
By Eljalil Tauschinsky..... 7
  - 2. The Power of Numbers: Disembedding through Indicators ..... 8**  
By Emiliós Christodoulidis..... 8
  - 3. Trading Information for Influence: Forms of Knowledge and the Power of Legitimacy..... 10**  
By Benjamin Farrand..... 10
  - 4. Technocratic Certainties ..... 12**  
By Michelle Everson..... 12

  
- DE-LOCALISATION..... 17**

  - 5. De-localisation of Knowledge ..... 18**  
By Marija Bartl ..... 18
  - 6. Performativity, (De-)Localisation Knowledge and the Political Process in International Heritage Law ..... 19**  
By Lucas Lixinski\* ..... 19
  - 7. When method is dangerous: political stakes of methodology as knowledge within the post-national legal paradigm..... 21**  
by Horatia Muir Watt..... 21

  
- TRANSFORMATION OF LAW ..... 25**

  - 8. The disembedding of law beyond the nation state..... 26**  
By Hans-W. Micklitz ..... 26
  - 9. Statecraft, Legitimacy and the Evolving State..... 28**  
By Dennis Patterson and Ari Afilalo ..... 28
  - 10. Ecospace and constitutionalism as a way to counter the threat of hegemony and securitization ..... 29**  
By Joyeeta Gupta ..... 29
  - 11. Resisting the Hierarchical Reality..... 32**  
By Damjan Kukovec ..... 32

  
- CRITIQUE AND CONCLUSION ..... 35**

  - 12. Re-localizing law ..... 36**  
By Geoff Gordon ..... 36

  
- Response and Conclusion ..... 38**

~~The post-World War II regulation of commerce and livelihood in the European Statecraft model came hand in hand with the protection of personal rights. The modern liberal democratic State derived legitimacy from its management of a social and political structure that bettered the material lot of its nationals. The State protected personal autonomy in numerous forms.~~

~~The European model has been a failure. The failure is the result of its insistence on treating constitutional systems of Statecraft as timeless and universal, instead of recognizing that they are rooted in a specific historical epoch that has a certain shelf expiration date. European-born Statecraft treats a system that rejects the right to vote, the separation of religion and State, or a commitment to some form of redistributive justice, as heresy.~~

~~Endless protest movements, coupled with gut wrenching anxiety over the decline of State financial welfare commitment, have created a negative image of freedom of economic activities associating the unprecedented liberalization and expansion of commerce through social strata and groups with inequalities and oppression. The imagery and arguments used in the European marketplace of ideas are the same as last century. The Left wants more entitlements. The Right wants more free markets. Both deconstruct and reconstruct each other and, in the end, they make the same mistake of searching for a single and timeless truth that would transcend time and subject matter to provide the ideal mode of government. The "single truth habit," traceable to the Church's and the Kings' appropriation of legitimacy from a single heavenly voice, led Europe to retain obsolete systems, impose them as others by force or persuasion, and change only after great damage has been wrought. This happened in the 20th century, in the entre-guerre age of darkness after euphoria, and it is happening now.~~

~~It was no less difficult for the Statesmen and Stateswomen of the 20th century to reject the notion that the "business of America is business," that isolationism was the true protector of American values, or that commerce was a game to win by selling more than the neighbour rather than specializing. We have reified the system that followed the mercantilist, consolidating world with a timeless understanding of comparative advantage, non-discrimination against foreigners' economic interest, voting for one's own government, and the Provider State. It will be difficult to reject those principles, in part because of how lofty and constitutionally sound they have been for so long. However, this choice must be made and, unless we do so proactively now, we will be thinking again about the issues in 5 or 10 years, at the end of the first globalized conflict of the age when fractured democracies will learn in blood the lessons that they could already draw from our past with experience and common sense.~~

## 10. ECOSPACE AND CONSTITUTIONALISM AS A WAY TO COUNTER THE THREAT OF HEGEMONY AND SECURITIZATION

**By Joyeeta Gupta**

This two page essay argues that (a) in the context of the Anthropocene, there is a real threat that countries and actors will try to monopolize access to resources. (b) Although international law provides a way to generate treaties that can manage these resources, it is more than likely that only fragmented and issue-by-issue governance may emerge. (c) Such fragmented governance will inevitably (i) marginalize and exclude those who are more vulnerable in the system as well as (ii) postpone decision-making on environmental issues with high political and economic

stakes. (d) Hence there is need for some kind of global constitutionalism that will try to set some ecological limits to our behaviour as well as protect the most vulnerable.

In the context of the Anthropocene, human society faces the challenges of, real or policy induced, reduced per capita availability of resources and sinks; real in terms of for example actual physical shortages of clean fresh water in spatially defined locations and policy induced when efforts to control greenhouse gas emissions lead to policies to reduce and/ or ban the extraction of the available oil and gas resources. This reduced access to resources and sinks is referred to as 'ecospace'. This 'ecospace' is vital for the economic wealth of a nation state as these are the raw ingredients used for all aspects of life ranging from food, shelter, to the technologies we have come to depend upon. The need for conventional 'growth' in the Anthropocene will lead actors and nations to either maximize their own access to ecospace by privatization of the resources and sinks (e.g. through land and water grabbing); demanding hegemonic control of these resources and sinks (e.g. through demanding expansion of the political and economic borders into the oceans); and/or through polycentric governance approaches where more proactive governance actors gain control over these resources. This is likely to both marginalize the most vulnerable and weak actors in the system whether they are least developed countries, small island developing states or vulnerable peoples – such as indigenous peoples as well as those dwelling in informal settlements; and externalization of ecological impacts for as long as possible – such as climate change.

While the international legal system is trying to address the issues concerning the vulnerable, legally binding treaties to help developing countries have been reduced to soft law commitments, many of which have never been implemented, such as the instruments of the New International Economic Order and the Right to Development. Instruments to help indigenous peoples are fragmented in nature and their ratification is so spatially diverse that it is unclear to what extent their rights have actually been recognized in a legally binding manner. The Climate Convention does make some provision for adaptation, but the funds are far below what is required for adaptation to the impacts of climate change.

At the same time, the legal system has scarcely been able to deal with the manifold fresh and ocean water challenges, air pollution and climate change or with land-based challenges such as deforestation, the impacts of mining and the use of pesticides and fertilizers for agriculture. Instruments are being developed in a highly fragmented manner, with complex implications for policy-makers, building on the few areas where there is political agreement. This occurs despite the overwhelming scientific (and social science) evidence regarding the challenges facing both ecological issues as well as those facing the poor and under-privileged.

Given that fragmentation is thus inevitable, especially in the context of governance in the Anthropocene, I argue that we have reached a constitutional moment! It is time for global constitutionalism because (a) we have reached the era of the Anthropocene and this is going to have serious impacts on countries and peoples such that those who cause the problem should be held responsible, even if they are the most powerful on earth; otherwise the Earth may become uninhabitable for animals and humans alike – there is already evidence that we have entered the 6th extinction event on Earth since its creation. (b) We need to find ways to reach out to the vulnerable and weak and empower them to both live in dignity but also to participate in the process of defining our politics. (c) We have also reached a point of changing geo-politics; as

economic and market power slowly moves to Asia and political power to the BRIC countries. There is a window of opportunity for old and new powers to pursue this new constitutionalism!

We can already see some elements of global constitutionalism emerging. The Charter of the UN perhaps gave this process a kick-start. The Rio Declaration on Environment and Development provides key principles that could be critical for such a constitution. The human rights declarations also provide other key elements. Finally, the Paris Declaration on Aid Effectiveness and its follow-up declarations provide key elements as to how global cooperation can take shape in terms of the principles that such a global constitution could embrace. In terms of goals, the Millennium Development Goals and their follow-up Sustainable Development Goals, despite their inherent shortcomings, provide a story line for the goals that the global community could embrace. The global constitutional project is beginning; but needs support.

Clearly, constitutionalism poses a threat to the most powerful actors and states by suggesting that their powers are not unlimited and that they can be held accountable for their actions in relation to collective action problems, externalized impacts and the provision of (global) public and merit goods. However, the European Union appears to be committed to this approach; China and the G77 have long asked for global rule of law where they mean both procedural and substantive rule of law and constitutionalism is only an additional step. The question is whether the US and Russia would support global constitutionalism. While there is staunch support for constitutionalism within the US, there is skepticism about constitutionalism globally. However, in the context of changing geo-politics, there may be a window of opportunity here.

Constitutionalism is also arguably a threat to pluralism which makes space for multiple visions of how society should be constructed. In particular, the question is often raised as to whether constitutionalism at global level could be a threat to, for example, indigenous peoples who are guided by very different value systems. In other words, if some values are institutionalized in a global constitution, these may impose values on others; i.e. there is a certain threat of hegemony in globalized constitutionalism. I think the threat of hegemony in constitutionalism in the Anthropocene should be visualized more as a threat to the powerful, rather than to the powerless. Constitutionalism should aim at both conserving our ecospace capital and allowing the functioning of ecospace services which is, for example, critical to the beliefs of not only indigenous peoples world-wide but also small farmers, craftsmen and micro enterprises that are so directly dependent on the locally available natural resources. Constitutionalism should also aim at ensuring responsibility and liability for externalized harm; thereby aiming at protecting the most vulnerable to global change. In fact, many national constitutions make very specific provisions to allow for and recognize the diverse values of specific indigenous peoples within their territory. But it is not our intention that the global constitution prescribes detailed rules – it should allow for flexibility in implementation. One could argue that the anthropocentric nature of the Rio Principles as well as the ecosystem service concept goes against the holistic understandings of indigenous peoples; on the other hand, I would argue that the anthropocentric nature of those principles are a first step towards moving to a more holistic understanding of our place within the ecosystem. They are not necessarily incompatible, and the new constitutionalism should emphasize that. What should be clear is that the new constitutionalism should make space for multiple knowledge systems and approaches, but should not itself make the rules.



The biggest threat to the constitutionalization project is that it gets captured by vested interests and, thus, leads to an institutionalization of values that protect the rich at the cost of the poor – values such as the privatization and concentration of resources and sinks; and that actors promoting development processes which are not per se illegal cannot be held accountable afterwards for the damage they have caused to others. This implies that the constitutionalization project needs both statesmanship at global level, constitutional entrepreneurs at multiple levels of governance and global social movements to make this a reality.

## ~~11. RESISTING THE HIERARCHICAL REALITY~~

~~By Damjan Kukovec~~

~~Relationship between power, law and knowledge is fundamental for thinking about the transformative possibilities in the present moment. How do we think about law, governance and social transformation, reproduction of hierarchies and resistance to it? I argue that analytical clarity and vision of social transformation are needed for social change.~~

~~Despite the crucial role of analytical clarity for social change, contemporary legal argument still too often relies on theories and on conceptual thinking. Alternatives are sought in contradiction and in conceptual oppositions. Alternatives are presented as anti-neoliberal, anti-capitalist, anti-efficiency, anti-free movement, anti-autonomy, anti-economics, and anti-law.~~

~~In the Laval and Viking discussion and arguing for the interests of the European periphery, my work has often been described as neoliberal or as a testament to overpowering capitalism. Similarly, it has been argued that the dividing line between normalcy and abnormalcy in the international trade regime is along the lines of the neoliberal economic policies (private) and their opposite (public). The private is said to be perceived as normal and the public as abnormal. However, our reality and normalcy cannot be described by a theory or by a distinction between private and public regimes.~~

~~Economic theories, neoliberalism and capitalism are mere signifiers for the (hierarchical) reality that needs to be constantly constructed and reconstructed. Theories are not mirror images of reality. Theories are timeless abstractions, rationalizations that can never adequately describe reality but as a partial ex post facto rationalization. The danger of challenging reality with a theory is that it is challenged within the existing ideology. Theories are tools, bricks for a change of reality, not authorities to be merely applied. Their usage is selective and tied to existing ideology of a particular time. Mere application of a different theory of causation cannot promise to destabilize the existing ideology.~~

~~Reliance on false distinctions is too often a part of scholarly endeavour. Several scholars make a mistake of relying on Karl Polanyi's distinction between politics and economics and on a search for the political. Karl Polanyi's followers are looking for a separation of political freedom from the brutality of our daily lives and our own daily actions – in their understanding, a separation from economics. In other words, they are looking for a liberal ideal of political freedom outside power, coercion, and struggle. The focus on either “the economic” or on “the political” aspect of our society is a typical example of conceptualism of Contemporary legal thought that distinguishes between social/altruist/protectionist and autonomy/individualist/laissez-faire claims, considerations, doctrines, and theories.~~