

Constitutionalism in the Anthropocene

Research Focus and Questions

Catastrophic environmental degradation is the most urgent global challenge for humanity today, and facing it demands major societal transformations at all levels. It is no longer enough to respond merely with some new or augmented global environmental agenda and legal framework. Gone is the era of the Holocene, where the world and its resources awaited unlimited human exploitation, and where global constitutionalism meant figuring out how to divide the spoils. Ours is the era of the Anthropocene, a geological period wherein humans have altered atmospheric, geologic, hydrologic, biospheric and other Earth system processes to such a degree that our Holocenetic legal frameworks have proven demonstrably inadequate to address the risks that it entails. Indeed, the scale of the changes posed by the Anthropocene are so great that they are destabilizing how we distinguish nature from culture, global from local, public from private, distinctions that have ordered western human societies until now. Distressingly little thought has been given to the legal implications of the transformations that the Anthropocene is demanding of us. The purpose of this project is to do just this, to explore how living in the Anthropocene could be constitutionalized. It will reimagine law's conceptual foundations in the Anthropocene, articulate them in regulatory modalities that can be legitimate and effectively address risk, and propose institutional architectures that are capable of dealing with and altering the complexities of human interactions with Earth system processes.

The Project

Our point of departure is that the challenge posed by environmental degradation is not merely existential for law as we know it today; it also has profound conceptual, normative, and institutional dimensions. Acknowledging the human role in the alteration of the Earth system unsettles the very core of our values and social institutions. Our key hypothesis is that it is inadequate to simply and uncritically "globalize" our current understandings of law and governance to face this challenge, and that genuinely addressing catastrophic environmental degradation requires passing from a law of the Holocene to a *law of the Anthropocene*.

Key to our passing to a law of the Anthropocene will be our ability to *constitutionalize living in the Anthropocene* in the sense helpfully defined by Neil Walker: "if practical reasoning in general is about deciding how to act in a context of practical choice, the special kind of practical reason associated with constitutionalism is concerned with the deepest and most collectively implicated question of 'how to decide how to decide' how to act [collectively]."¹ At issue here are foundational values and principles that ought to govern collective-decision making, but also foundational presuppositions and assumptions about the preconditions for and the stakeholders of decision-making. This will involve reconfiguring the conceptual, normative, and institutional foundations of collective decision-making in light of the disruption of three key dichotomies that governed constitutionalism in the Holocene: the culture/Nature, public/private, and global/local divides. In so doing, "constitutionalism" itself is transformed in the scholarly inquiry into the publicness of the public domain in the Anthropocene.

In short, constitutionalism in the Anthropocene will critically transform three key presuppositions of constitutionalism that characterized living in the Holocene. First, it is necessary to reconsider the concept and dimensions of a decision-making collective that *includes nature and future generations*. Doing so will require reimagining the public/private

¹ Neil Walker, 'Taking Constitutionalism Beyond the State', in *Political Studies* 56 (2008) 539-543, 524.

divide in a way that accepts nature and future generations as subjects, and not only objects, of decision-making about the public good. Second, we will need to reconfigure our Holocene notions of *territorial jurisdiction* in ways that overcome the simple division between the global and the local by instead positing distinctions in terms of the sustainability of Earth system processes. Constitutionalism in the Anthropocene, thus, is to imagine the political and social conditions under which jurisdictions become *terrae-dictions*.

The project will consist of three interlocking strands of scholarly work: A. Concepts and Foundations; B. Regulatory Modalities; and C. Institutional Architectures and Complexity. Each of these strands are necessarily interdisciplinary. It is only by bringing together experts in law, public governance, and philosophy that the concepts, institutions, and structures of law in the Anthropocene can be fully realized.

Strand A: Transformations - Concepts and Foundations

Strand A reconceptualizes law in the Anthropocene through three tasks. A1) Conceptually, it reconsiders Holocene-era democratic decision-making by critically examining how the aforementioned dichotomies have contributed to prevailing notions of collectivity and reflexivity implied in our contemporary understanding of global constitutionalism. It explores the conditions under which the “we” in democratic decision-making can include nature and future generations in a “terrae-diction” framework. Courts in Colombia and New Zealand have already invoked notions of legal personhood that grant rights to nature and future generations. Such mechanisms are indicative of the reimagining that is required of the conceptual foundations of representational practices within an enlarged democratic decision-making collective, and they will be critically assessed as preliminary attempts to reconfigure membership in collective decision-making. A2) Normatively, it explores how nature and future generations as subjects of law in the Anthropocene can engage our collective responsibility, and what values could underpin an enlarged collectivity and collective decision-making. In the Anthropocene, human dignity becomes a dimension of the more general concept of *vulnerability* that forms the normative core shared by human, animal, and non-animal rights, while *recognition* and *care* become drivers of a responsive ethics that can orientate decision-making. A3) Epistemologically, it explores interactions between scientific and political modes of representation, in particular the representation of Earth system processes vis-a-vis the imagined enlarged collective. Successfully constitutionalizing living in the Anthropocene will require a new political epistemology that will permit the articulation of the bases upon which the effectiveness and legitimacy of Anthropocenic regulatory practices will be built, along with Strand B, as well as a conceptual vocabulary to construct the institutional architecture of Anthropocenic constitutionalism, as per Strand C.

Strand B: Transformations – Regulatory Modalities

Constitutionalism in the Anthropocene will profoundly affect our understanding of regulation and regulatory mechanisms directing behaviour within the expanded collective. Doing so presages a thorough transformation of current Holocene era regulatory instruments, objects, and relations. Accountability and territoriality will take on new meanings when nature and future generations are embraced as subjects of regulation, which will require a re-evaluation of both the structure and effectiveness of our regulatory architectures. This will also require accounting for ongoing technological advances in new fields like genetic and climate engineering that, for better or for worse, harness nature itself as an agent of regulatory intervention, presenting startling regulatory opportunities as well as risks that transcend

nature/culture distinctions. The narrow preoccupation of current Holocene-era regulatory and governance mechanisms with behavioral change and human agency limits our capacity to deal with a world that is rapidly transforming in manifold ecological, social, economic, and other ways.

This poses two groups of pressing questions that this strand addresses. B1) Firstly, it explores regulatory problems of accountability and territoriality in the Anthropocene. This will include asking what accountability frameworks are necessary for addressing effective and potentially destructive emergent technologies, and how to best deal with their potential disregard of territorial boundaries as inconsequential normative geographic delineations. B2) Secondly, it will investigate what constitutes legitimate instruments of regulatory intervention in the Anthropocene, especially when emergent technologies challenge how we currently distinguish public goods from objects of private ownership and trade.

Strand C: Transformations – Institutional Architectures & Complexity

The final strand of this project turns towards the institutional character of law in the Anthropocene. It is quite clear that the mere transfer of greater authority to global organizations is unlikely to be adequate to address the uniquely massive challenges of the Anthropocene. However, it is far from obvious what kinds and degrees of change will be required of our institutional frameworks for governance for us to face them. The Anthropocene's transcendence of human/nature, public/private, and global/local distinctions foreshadows worrisome consequences for our current Holocene-era institutions of law and governance, which were conceived and structured around precisely those dichotomies. It poses profound constitutional and structural questions about what the subjects and objects of governance should be, how they should inter-relate, and how and from where they will derive their legitimacy and accountability to the expanded Anthropocenic collective.

The work of this strand will have three dimensions. C1) First, it explores the various forms through which the Anthropocenic collective's new subjects, nature and future generations, can secure representation in governance institutions. This includes a descriptive and normative analysis of how new regulatory instruments distribute and institutionalize legal and political authority in the Anthropocene. C2) Second, it will investigate institutional structures of governance in the Anthropocene, ranging from centralized hierarchies to dispersed networks, or novel structural hybrids like 'global cities', in terms of how they facilitate reflexively responsive governance amid the simultaneously local and transboundary consequences of climate change. C3) Finally, by drawing on historic and contemporary analyses, it will examine how institutions can overcome obfuscating sectoral distinctions (such as: trade, environment, labor, health, among others) that hamper our understanding of the complex intersections between nature and culture. Without a grasp of the dynamics and complexities of these intersections, effective and legitimate forums of authority and governance will continue to elude us in the Anthropocene.