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# SPRINGS

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## ECOLOGICAL CONSTITUTIONALISM: A NECESSITY

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## Jens Kersten

It is no longer a new idea to state that we are living in the Anthropocene—an era in which humanity has become a force of nature.<sup>1</sup> But when we look more closely, it is not humanity as a whole, but primarily the Global North that is responsible for the negative developments of the Anthropocene, such as species extinctions, the climate crisis, and the pollution of the planet. To be able to mitigate these ecological problems, we must radically change our daily living habits as well as our economic system. The states of the Global North must therefore transform their legal systems in accordance with ecological constitutionalism, for law is the tool by which we can shape our society and economy, and, ultimately, make them ecological.



On 24 March 2021, Germany's Federal Constitutional Court officially demanded that the German government take much more effective measures against climate change by considering the impacts also on the younger and future generations. © picture alliance/dpa | Uli Deck. All rights reserved.

Importantly, such transformation is essential because it was the constitutional developments of the Global North that encouraged the catastrophic events of the Anthropocene in the first place.<sup>2</sup> The liberal constitutions of so-called Western countries emerged in the wake of the late eighteenth-century bourgeois revolutions. They guaranteed individual freedoms, the protection of property, and the freedom of economic activity—fundamental rights that formed the constitutional foundation for the colonial exploitation of people, cultures, and the nonhuman world. The Industrial Revolution of the nineteenth century, moreover, gave additional impetus to this development. In response to the “social question” of industrialization, the liberal constitutions were transformed into welfare-oriented constitutional orders. Thus, the welfare states of the Global North—with their capitalist economies,

their high energy and resource usage, and their industrial food production—came into existence, which further accelerated the global destruction of the environment. As a result of this “Great Acceleration” of the Anthropocene, the “ecological question” we are facing today is of relevance on a global scale.<sup>3</sup>

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Due to their enormous responsibility for the developments of the Anthropocene, it is the states of the Global North that must answer this “ecological question.” Such an undertaking can only be successful if a *third* revolution follows the bourgeois revolution of the eighteenth century and the social revolution of the nineteenth and twentieth centuries: an ecological transformation of the liberal and welfare-oriented constitutional orders.

In the face of the challenges of the Anthropocene, it is insufficient for the states of the Global North to merely adopt constitutional provisions that are intended to protect the environment. Rather, what we need is ecological transformation on a larger scale—a transformation of the entire social and constitutional orders of the states of the Global North, which is at the heart of ecological constitutionalism.<sup>4</sup> Ecological constitutionalism calls for changes to each of the four parts that make up the classic constitutional orders of these states: the preamble, the declaration of fundamental rights, the constitutional principles, and the structure and organization of the state. Each of these parts must develop an ecological profile.

## Ecological Preambles

In their preambles, the constitutions of the Global North should expressly recognize their responsibility for the health of the planet.<sup>5</sup> Preambles lay out the intentions and purpose of the constitutional order. Ecological responsibility must become a central element of the promise enacted by a constitution. This might, for example, take the form of preambles that not only promise to safeguard individual freedom, social prosperity, and global peace, but also declare responsibility for planetary health to be an equally important goal that is to be realized through the democratic shaping of the state, the economy, and society.

## Ecological Fundamental Rights

To fulfill the ecological promise of the preambles, the constitutions of the Global North will need to make three key changes in their declarations of fundamental rights.<sup>6</sup>

First, it is necessary to recognize new ecological fundamental rights. An example of this is the introduction of a right to ecological integrity. To achieve this, the right to life and health that is guaranteed in virtually all constitutions of the Global North is to be extended to include an ecological dimension. Citizens would have a right to an intact environment and the preservation of the natural basis for their lives and livelihoods.

In addition to this right to ecological integrity, a right to ecological information must be formally recognized at a constitutional level. This right means that states must inform the public about ecological developments in a transparent and systematic manner. It would be implemented not only through the educational system, but especially by scientific agencies and institutes, via the internet and social media, and, above all, by disclosure requirements for commerce and industry. To meet this constitutional obligation, laws could be passed that, for example, require companies to provide public reports about the sustainability (or lack thereof) of their structures and management. The

goal of this is an ecological-structural transformation of the public sphere that would prevent active and passive ignorance in regard to the challenges of the Anthropocene.

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Second, it will be necessary to modify some existing guarantees of fundamental rights by imposing effective ecological limitations on freedom. There is no alternative. This applies in particular to economic freedom and the right to property, which play a central role in the capitalist societies of the Global North. While it is already possible to restrict economic freedom and right to property for the protection of nature and the environment, developments like species extinction, the climate crisis, and global pollution make clear: such measures are not effective enough! For this reason, an “ecological obligation” must be added to the social obligation<sup>7</sup>—particularly to the right to property—in the constitution. For it is only by linking the “social question” and the “ecological question” that it will be possible to transform our social order into a “social eco-state.”<sup>8</sup>

This seems all the more urgent in light of the way that the social and ecological question are played off against one another today. Particularly in the states of the Global North, the social question had long been suppressed in the context of neoliberal structural transformations. Now, defensive political strategies have “rediscovered” the social question but as a means to fend off the ecological question rather than to wholeheartedly adopt the cause of social well-being: citizens—so it is claimed—cannot afford an ecological lifestyle. When looked at more carefully, however, this argument does not hold water.<sup>9</sup> Rather, it shows that an ecological transformation of our social order cannot be successful without a fundamental social transformation: ecological politics are social politics—and vice versa!

Third, the constitutional orders of the Global North must recognize the rights of nature.<sup>10</sup> Here the states of the Global North could learn from pioneers in other parts of the world—for example, the constitution of Ecuador, which in 2008 recognized nature as a legal subject and granted it specific rights (Article 10 § 2 in conjunction with Articles 71-74 of the Constitution of Ecuador). Here, the provisions of Article 71 programmatically proclaim: “Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.” And it continues, “All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”<sup>11</sup> The states of the Global North could draw inspiration from these highly innovative provisions and incorporate rights of nature into their own constitutions.



In 2018, ten years after Ecuador incorporated the rights of nature in its constitution, the International Rights of Nature Symposium took place in Quito. © 2018 Global Alliance for the Rights of Nature. All rights reserved.

The introduction of rights of nature extends beyond the possibility of giving ecosystems rights. In addition, individual ecological persons—such as animals or charismatic (e.g., endangered) plants—might be recognized as having rights that can be enforced through legal claims: for example, the right to personal integrity and shelter (ecosystems) or even the right to property. In this way, the body of legal persons is expanded, simultaneously giving more momentum to the development of ecological rights. For possessing subjective rights means setting the legal order into motion in one’s own interest or on behalf of others.<sup>12</sup> Thus, nature—just like people or corporations—can start legal disputes: not only to protect its own ecological rights but also to spur on the further development of the legal order as a whole. This dynamic activation of ecological law is at the heart of ecological constitutionalism: ecological rights lead to ecological legal disputes, which in turn result in developments in ecological law.

## Ecological Sustainability as a Constitutional Principle

Similarly, in the formulation of their constitutional principles, the states of the Global North will need to make two changes in order to fulfill the ecological promise made in the preambles.<sup>13</sup> First, ecological sustainability is long overdue to be recognized alongside principles such as democracy, rule of law, welfare, and federalism as one of the foundations of a constitutional state. In this way, ecological sustainability—coupled with other constitutional principles—would fundamentally shape the state structures and the social politics of the Global North. Second, the principle of ecological sustainability should be embedded in the constitution in the form of concrete state goals. Such state goals in constitutions guide the decisions and measures that are to be enacted by the legislative, executive, and judicial branches.

Accordingly, ecological state goals can declare that animals, and nature more generally, are to be respected and protected, that biodiversity is to be preserved, and that the oceans and climate are to be safeguarded. Additionally, ecological state goals should have a programmatic function, codifying the need to ensure environmentally sound living conditions for both present and future generations. This allows the integration of the environmental justice principle into constitutional orders and its implementation at local and national levels.<sup>14</sup> Furthermore, the principle of

environmental justice gains a transnational dimension: by anchoring it in their national constitutions, the states of the Global North commit themselves to acting in accordance with their ecological responsibility vis-à-vis the Global South.

## Ecological State Structures

In their provisions laying out the structure and organization of the state, the constitutions of the Global North must assign ecological duties and functions to all organs of the state.<sup>15</sup> This is necessary because the ecological transformation of the social order will be managed by governments and parliaments using democratic laws. By shaping society through legislation, these bodies hold a wide scope for decision-making and discretion. However, to ensure that governments and parliaments do not dismiss ecological concerns as being of less weight than social and economic interests, the structures of these bodies must themselves be ecologized.

*Scientific experts should be involved much more closely in parliamentary work to ensure that ecological policies and legislation are based on professional advice and expertise.*

Such an ecological reconfiguration of state-organization law can be implemented, for example, by requiring parliaments to debate their annual budget not merely in terms of financial policy but ecological policy as well. This way, the government must justify its current and future ecological policies before parliament and thus before the political community. In addition, scientific experts should be involved much more closely in parliamentary work to ensure that ecological policies and legislation are based on professional advice and expertise. Another measure to serve this goal is the appointment of independent ecological parliamentary commissioners who are granted broad investigative authority and rights to information. Finally, an innovative measure would be to endow already established forms of digital rights to petition with an ecological dimension: not only citizens but also ecological subjects of rights would be able to sign digital petitions in order to introduce ecological issues to the parliamentary agenda. In this way, ecological actors can speak with their own legal voice, to represent their interests in the political process.

In addition to parliaments, the executive branches of government must also develop an ecological profile. Thus, it would be desirable for ecological constitutions to require governments to explicitly formulate ecological guidelines that their policies must follow. Furthermore, the minister of the environment may be given a veto right for all government decisions that are of ecological significance. Finally, the heads of state of the Global North, whether ceremonial or elected, should be assigned an explicit responsibility for the ecological well-being of society as part of their constitutional duties. This can translate into a requirement, for example, that the heads of state create a council for sustainable development. Within these councils, both independent scientific experts and environmental activists should be represented, with the purpose of making recommendations about the continuing ecological transformation of society.

## Taking Future Rights Seriously

The suggestions outlined here form a constitutional-law framework for shaping an ecological transformation of the social orders of the Global North. From a constitutional-law standpoint, one key concern is developing ecological “right[s] to a future.”<sup>16</sup> A glimpse of what this could look like can be found in a revolutionary decision by Germany’s Federal Constitutional Court on 24 March 2021.<sup>17</sup> Based on the fundamental right to a future consistent with human dignity guaranteed in the German constitution (Article 2 § 1 in conjunction with Article 20a), the judges recognized an

obligation to the intertemporal guarantee of freedom with respect to climate-protection measures. In other words: in the face of the climate crisis, the state is obliged to distribute the restrictions on freedom resulting from climate-change mitigation measures equitably across generations, rather than shifting this to the (near) future to the detriment of future generations. With this decision, the Constitutional Court opened up a future-oriented perspective in constitutional law that can also be applied to ecological questions in other areas of life—for example, by recognizing the right to the intertemporal equity of current and future generations with respect to available natural resources or by recognizing the right to intertemporal access to biodiversity.

As this final example makes clear, ecological constitutionalism involves a far-reaching transformation of the social and legal orders of the states of the Global North. But it is a task that we must embark on if we are to take on responsibility for the ecological consequences of our past and current actions while fulfilling our obligations to the future.

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## Notes

- <sup>1</sup> Paul J. Crutzen, "Geology of Mankind: The Anthropocene," *Nature* 415 (2002): 23.
- <sup>2</sup> Jens Kersten, "Die dritte Revolution: Für ein ökologisches Grundgesetz," *Blätter für deutsche und internationale Politik* 6 (2022): 91-102, pp. 92-93. On the Great Acceleration, see J. R. McNeill and Peter Engelke, *The Great Acceleration: An Environmental History of the Anthropocene since 1945* (Cambridge, MA: The Belknap Press, 2014).
- <sup>3</sup> Will Steffen, Jacques Grinevald, Paul Crutzen, and John McNeill, "The Anthropocene: Conceptual and Historical Perspectives," *Philosophical Transactions of the Royal Society* 369 (2011): 842-67, p. 849.
- <sup>4</sup> James R. May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2015); Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Oxford and Portland, Oregon: Hart, 2016).
- <sup>5</sup> Jens Kersten, *Das ökologische Grundgesetz* (Munich: C. H. Beck, 2022), 59-91.
- <sup>6</sup> Kersten, *Das ökologische Grundgesetz*, 72-109.
- <sup>7</sup> Jörg Leimbacher, *Die Rechte der Natur* (Basel, Frankfurt: Helbing & Lichtenhahn, 1988), 268.
- <sup>8</sup> Ulrich Becker, "The Social Eco-State," in *Liber Amicorum Danny Pieters: Durven out of the box denken*, edited by Paul Schoukens, Bert Demarsin, Eleni de Becker, and Thijs Keersmaekers, 70-76 (Gent: Owl Press, 2022).
- <sup>9</sup> See Kersten, *Das ökologische Grundgesetz*, 6.
- <sup>10</sup> Andreas Gutmann, *Hybride Rechtssubjekte: Die Rechte der "Natur oder Pacha Mama" in der ecuadorianischen Verfassung von 2008* (Baden-Baden: Nomos, 2021).
- <sup>11</sup> Constitution of the Republic of Ecuador, chap. 7, art. 71.  
<https://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html>.
- <sup>12</sup> Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed. (Tübingen: Mohr Siebeck, 1905), 51, 56-7.
- <sup>13</sup> Kersten, *Das ökologische Grundgesetz*, 111-18.
- <sup>14</sup> Eva-Maria Isabell Ehemann, *Umweltgerechtigkeit: Ein Leitkonzept sozio-ökologisch gerechter Entscheidungsfindung* (Tübingen: Mohr Siebeck, 2020).
- <sup>15</sup> Kersten, *Das ökologische Grundgesetz*, 133-67.
- <sup>16</sup> Constanze Janda, "Sozialstaat for Future: Der Klima-Beschluss des BVerfG und seine Bedeutung für die Sozialgesetzgebung," *Zeitschrift für Rechtspolitik* 54 (2021): 149-53, p. 149. See also Jens Kersten and Elisabeth Kaupp, "Die Verfassung einer prospektiven Gesellschaft: Wie zukunfts offen ist das Grundgesetz?," *Juristische Schulung* 62 (2022): 473-82, pp. 478-9.
- <sup>17</sup> Bundesverfassungsgericht, "Beschluss vom 24.3.2021 - BVR 2656/18, 78, 96, 288/20," in *BVerfGE* 157, 30-177.





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