

Supercomplex Systems and Constitutional (dis)Order: The Consequences of the Anthropocene in the Law

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Constitution, Certainty and the Mastery of Nature

Modern law is based in the existence of a constitutional order. When currently we refer to the idea of constitution, we use to understand it as the ordination and organization of the political life of the state (Böckenförde 2006: 29). Thus, the constitution is conceived as a set of written legal rules that organize coexistence in a certain political community and order the exercise of power, while recognizing rights to members of the community and acting as a limit for to political power. Consequently, it exists a single legal order, defined by the constitution, contrasting with the pluralist conception of medieval law, where there are different legal situations established in an ambiguous set of legal documents of different scope (García-Pelayo 1984:144). In this context, the forms of domination are resolved in private rights, projected in interpersonal relationships and in the control of the land (Burdeau 1970: 26). This situation is radically different of the modern constitutions, conceived as “the fundamental and paramount law of the nation” (Marbury v. Madison, 5 U.S. 137 (1803)), a coherent and homogeneous legal space different from the “*irregulare aliquod et (tantum non) monstro simile*” medieval law, as defined by Pufendorf (Llanque 2008: 206)

The constitution is therefore a political code defining a legal order guaranteeing the predictability of law, i.e., legal certainty, which is the central feature of the modern conception law, as far as it is this feature allows the deployment of the new social relations in the context of emerging capitalist economy (Jaria-Manzano 2020a: 85). The production of law is linked to the creation of a homogenous space of social reproduction that facilitates the expansion of capitalism (Jaria-Manzano 2011: 92ff), in a cultural context defined by the emergence of the reign of instrumental reason, which operates with a legalistic approach looking for regularity and predictability (Wulf 2016: 39). The technoscience as hegemonic politics of truth in modern societies is committed to the generation of universal propositions covering all phenomena as particular cases of general laws (Delanda 2002: 149-151).

Accordingly, the social structures that emerge in the context of the capitalist economy are dependent on the establishment of predictable regularities, which allow the establishment of regulations, also predictable. This ultimately guarantee their reproduction, assigning responsibilities and evaluating risks, for example, regarding public health (Gruszczynski 2010, 22ff). This quest of regularity is also an attempt to escape from history, as far as it is the realm of the particular. Indeed, utopian thought is fundamental in the construction of the modern legal order, which is finally envisaged as a regular and permanent social arrangement allowing the individual search of self-determination (Jaria-Manzano 2022: 453ff). This conception is linked

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Modern law has tried to cancel the future by establishing a constitutional order where the permanent updating of free will (of individual people and political to an objectification of nature, a mere repository of resources for the free development of human individuals (Gear 2015, 233-234).

Modernity advocates a model of relations between the human being and his environment under the paradigm of domination (Touraine 1992: 349). In fact, there is an awareness of the transformation of the environment operated by human agency since the Industrial Revolution (Bonneuil & Fressoz 2017: 76), although this process of transformation was seen as something positive, based on the consolidated idea that society exerted a civilizing force that dominated the wild and extracted its hitherto hidden utility (Dunlap 2001: 14). In any case, the combination of regularity, predictability and repetition, in the context of technocapitalism, is the intellectual fuel for an invigorated impulse of the process of aggressive adaptation of human species, which acquires a new scale (Fischer-Kowalski & Haberl 1998, 581).

With the passage of time, these new social arrangements sustaining technocapitalism produce such an impact in the environment that gives way to the social awareness about ecological degradation. In fact, the impact of anthropic agency on the biophysical basis of social structures has been growing in the last decades, giving way to the idea of the Great Acceleration, with a soaring social metabolism influencing and altering a progressively greater part of planetary processes (Steffen et al. 2017). This is the context in which the initial social awareness of human impact in local environmental conditions is transformed into a global ecological crisis.

Anthropocene Narrative and Faustic Expectations

Since the awakening of a public concern about environmental degradation during the 60s until today, many interpretations have been intended to understand what is happening in the interface between nature and society. Among all those explanations, one has emerged as a comprehensive and persuasive view, drawing attention of the academic community and reaching a certain impact among the public. It is the Anthropocene narrative, which builds on a coupling of human history and geological time, proposing that the impact of anthropic action in the Planet is so huge that is giving way to a new geological era (Povinelli 2017, 55).

The proposal about a new geological era, resulting of the process of aggressive adaptation of human species, took a wide attraction around the beginning of the new millennium (Crutzen & Stoermer 2000, p. 17-18). Rapidly, this idea of anthropogenic planetary change was received with enthusiasm by ecomodernists, envisaging the possibility of manipulating and monitoring the Earth System to achieve human aspirations—or, maybe more exactly, to consolidate indefinitely the technocapitalist system, in a sort of end of history, as Francis Fukuyama has proposed some years before (Fukuyama 1992).

According to the hegemonic conceptions, the Anthropocene implies not only the humankind acting as a geological force (Steffen, Crutzen & McNeill 2007: 618), or rather the hegemonic groups within the capitalist world system acting as such. It is also assumed that humankind is able to control the processes of the Earth System and manipulate them to transform the planet into a safe and stable playground for human beings. It is significant that the main disseminator of the Anthropocene narrative, Paul J. Crutzen (particularly, 2002) has made as well serious proposals about the use of

geoengineering (Crutzen 2007). From this perspective, the global ecological crisis can be confronted through managerial strategies without abandoning the current hegemonic model of social reproduction. The planet can change, but capitalism seems to be here to stay.

This point of view is encapsulated in the notion of sustainable development, whether through radical neoliberal approaches, based on the free market (Dryzek 2005: 57), either through the establishment of an environmental technocracy that “organizes scientific and technical expertise into bureaucratic hierarchy in the service of the state” (Dryzek 2005: 87). In any case, both ultraliberal Prometheanism and administrative rationalism rely on the capacity of human knowledge to provide tools to dominate the Earth System. The difference is that, for the former, knowledge is scattered and fragmentary; and, for the latter, capable of being centralized and systematized. In both cases, however, whether market-centered or state-centered, there is a solutionist perspective that is based on the use of technology to manipulate the planet, denying politics to leave decisions to the market or to experts (Fremaux & Barry 2019: 181).

Sustainable development as the overarching idea of international environmental law show how the managerial perspective is becoming dominant in the conceptualization of the global environmental crisis, being a “largely technical response to environmental problems and the inclusion of the environment in economic decision making” (Connelly & Smith 1999: 201). As far as, sustainability implies the stabilization of planetary conditions through some kind of technological fixing of the global environmental crisis (Hamilton 2016: 99ff). However, the possibility of manipulating the planet to guarantee certain living conditions for human beings indefinitely, in accordance with the objective derived from sustainable development, is doubtful according to some insights within the Anthropocene narrative.

The Faustic expectations of control of the Earth System implied in the ecomodernist interpretation of the Anthropocene should be cooled down for at least two reasons. First of all, any attempt to freeze the conditions of the Earth System in a cycle of sustainable reproduction seems clearly at odds with the second law and thermodynamics and the course of geological time (Schneider & Sagan: 36). In fact, the Anthropocene is mostly a coupling of human history and deep time in a critical tipping point induced by the Great Acceleration (Steffen et al. 2017) and visible through the parameters identified as planetary boundaries (Rockström al. 2009). From this point of view, the global environmental crisis should be interpreted as an entanglement of social practices and the dynamics of the Earth System resulting in a supercomplex system, a new ecosocial network open to non-linear events. In this view, being the cause (of planetary change) does not imply being in control (of it). This view has crucial consequences in the hegemonic understanding of law and politics.

Supercomplexity: The (Useless) Quest for (Constitutional) Order

The anthropic transformation of the planet generates a new scenario of complexity to the extent that human action operates at a systemic level, which far exceeds traditional local interactions in the process of aggressive adaptation (Steffen, Crutzen & McNeill 2007: 618). The expansion of technocapitalism leads to an increase in social metabolism of such a dimension that the separation between society and nature no longer makes sense (Arias Maldonado 1988: 63ff). The result is a planetary ecosocial network that can be described as a supercomplex system.

The supercomplexity of the ecosocial system gives rise to uncertainty, as result of a conception of the reality based in interdependence, a new conception of the world, which discusses the essentially individualistic and atomistic worldview of the Modernity (Gómez Pin 2019: 360). The idea of uncertainty linked to interdependence is developed in the context of supercomplexity with the Chaos Theory, which is precisely generated in the field of climate research (Taleb 2010: 179). This approach establishes the plausibility of non-linear causality in the evolution of supercomplex systems. This is precisely what the ecosocial network resulting of the Anthropocene narrative is. According to this, uncertainty is the outcome of the supercomplexity of the entangled ecosocial network of the Anthropocene (Reid et al. 2010: 917).

As Gillings and Hagan-Lawson (2014) point out, to the extent that human activities have begun to alter the planet's climate and biochemistry, this opens the way for an “era of unpredictability in all Earth systems”. Consequently, we are faced with a situation in which the available knowledge cannot provide certainty regarding the future evolution of the Earth System and, therefore, cannot inform conclusively, in decision-making processes, about the course of suitable action. As Vaclav Smil (2008: 380) points out, “[t]his global environmental challenge [climate change] has no clear and ready technical fix”. There is not, so to speak, a horizon of normality in which the domestication of the planet by the human subject occurs. In the words of David Chandler (2018: 202), “there is no world ‘for us’, no separate subject and no happy ending”.

The quest for regularities and therefore for order is seriously compromised in a socioecological network vulnerable to non-linear disruptive events (Szerszynski 2017, 254). “[C]hange, surprise and multiple interactions between human-environmental systems” are to be expected in the context of global change (Galaz 2014, viii). The recent COVID-19 pandemic is an example of this (Jaria-Manzano 2020b: 26ff). In this situation, the establishing of global constitutional order around a conceptual core defined by legal certainty is not a plausible goal. Therefore, there is a pressing need to design new conceptual tools beyond the Faustic expectations of indefinitely reproducing the social practices of techno-capitalism, while taming the planet (Manemann 2014: 58). The Anthropocene would imply in this view a collapse of the constitutional (and thus the political) order as we know it.

Disorder, Dissent and Dialog

Law should move from a conception based on social order towards a conception based on conflict. Law and particularly constitution become in this context a space where social groups collide to give way to provisional solutions in an uncertain context (De Cabo Martín 2014: 59). Accordingly, law transforms itself into a protean and dynamic space as opposed to the homogeneous, pyramidal and fixed constitutional order advocated by legal Modernity (Jaria-Manzano 2021: 829). This is an opportunity for counter-hegemonic positions, as the shift from regulation to litigation in significant fields of law, as climate change law, proves (Allen & Lord 2004). The conflict must be assumed as something intrinsically open, not as the path towards a definitive solution that allows the construction of a permanent framework of social reproduction in the (unstable) context of the Anthropocene. Law becomes here a ritualization of the conflict of narratives, allowing provisional and unstable consensuses to be reached between positions that are inherently incompatible in many cases.

The traditional (and hegemonic) positivist conception of law, where the recognizability of norms as such is derived from its insertion in a legal order would be progressively

unsustainable, as far as concrete conflicts, partial and provisional solutions, and singular arrangements gain momentum. Accordingly, legal norms would be identified only in a particular and controversial context, and in a provisional way (Zumbasen 2012: 96). Thus, the constitution opens itself to a continuous elaboration, as a space for dialogue rather than the expression of a sovereign will and foundation of a legal order, an evolving texture rather than the apex of a legal pyramid (Häberle 2011: 204ff). The constitution is then a space for evolutionary controversy, not an immutable legal order.

The historical evolution of the constitution is in fact something assumed in some systems, as in Switzerland (Domeisen 1978: 21ff). Moreover, current case-law tends to turn towards an argumentative space centred on hermeneutics, building a tradition that links a familiar understanding of law (and, in particular, of the constitution) with an openness towards the future that ultimately allows the adaptation to disruptive events in the context of the geological transition (Koskenniemi 2007: 22). In this context, openness and plurality are dominant in the design of the law, giving particular relevance to the role of the constitution as an evolving texture. There, social conflicts can appear as generators of legal responses beyond institutional channels, thus promoting the continuous reconstruction of the constitution in the face of the challenges posed by planetary change (Bonfigli, Schwartz & Pontin 2020).

As climate litigation has shown in the last decade, bringing the conflict before the courts allows counter-hegemonic movements to influence public debate and counteract the inertias of institutional structures (Peel & Osofsky 2015: 221). In fact, climate litigation has revealed itself as a promising development of the possibilities of deploying a new, flexible and open constitutional discourse for the control of power in the context of the geological transition. From the idea of conflict as a centre of the law discourse, it can be developed a new legality integrating multiple experiences and interests in the context of a complex society, under internal strong tension, probably growing in the context of the process of planetary transformation. In this context, a myriad of local conflicts can provide legal tools to deal with complexity and uncertainty in the way to build resilient societies. As a conclusion, we are experiencing the transition from a conception of law as a regulation to conception of law as an event, based in the particular solutions provided by different actors in the uncertain scenario generated within the supercomplexity of the global ecosocial network.

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