

# NATURE AS “GRUNDNORM” OF GLOBAL CONSTITUTIONALISM: CONTRIBUTIONS FROM THE GLOBAL SOUTH

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## ABSTRACT

Unrelenting consumption and excessive exploitation of natural resources and their interconnection with the intensification of global inequalities seem to be leading contemporary civilization to an imminent collapse. How does constitutionalism address these ecology related issues? The purpose of this paper is two-fold: Firstly, it aims at uncovering the semantics of “constitution and nature” within constitutional law. The authors argue that mainstream dialogue-based approach (trans-national judicial dialogue) to global constitutionalism is actually based on a eurocentric and anthropocentric *logos* that excludes nature and reduces her to a simple object. Secondly, it discusses two original alternative proposals emerged from the global South: the *constitutionalism for biodiversity* of the Andean Latin American countries and the African Union’s project to establish an International Constitutional Court. While the Andean constitutions prioritize the discussion on the “ecological deficit” and place nature as their “Grundnorm”, the African proposal suggests the creation of a universal judicial mechanism for the protection of the “right to democracy”. Given the centrality of nature within the innovative Andean constitutional design and the universalistic potential of democratic forms of public deliberation, these two propositions advance a novel approach to constitutionalism with a truly global scope, capable of both facing up impending ecological threats as well as pursuing dignity, justice and equality at global level.

**Keywords:** Judicial Dialogue. Global Constitutionalism. Rights of Nature. Right to Democracy.

## 1 INTRODUCTION

Despite the current political efforts and legal initiatives that seek to protect the environment at an international level, current economic systems of production seem to extract natural resources beyond what nature itself is able to provide in the long-term. This “ecological deficit” threatens

the sustainability of societies worldwide. Western political and legal institutions have endorsed, encouraged and legitimated this trend of short-sighted, irresponsible and excessive consumption and exploitation of natural resources, which not only has generated pervasive global social inequalities but could eventually, according to some scientist, lead to an imminent “crisis of civilization” (MOTESHARREI et al., 2014).

Given these disturbing predictions about the planet’s future, two unavoidable legal questions arise: (a) what concepts of constitutional comparison are being spread in today’s discourses about global constitutionalism? and (b) what is the relationship between these notions of global constitutionalism and the ecosystem of Planet Earth? Or in other words: What is the relationship between the “semantics” of constitutionalism and the ecosystem of nature?

In light of the predictions of ecologists and scientists it seems that the historical constitutional models legitimizing the primacy of the individual over nature have put the ecological stability of the planet in danger.

Fundamentally, the relationship between human-centered constitutionalism, with its demands and claims of freedom, justice and inter-generational equality, on the one hand, and nature as geo-system of human survival, on the other, demonstrate the great paradox of our civilization: How is it possible to think of a more just, more dignified (with respect of rights and freedoms) and more equal world society, when those States, whose national constitutions pursue such values, do little or nothing to prevent the self-destruction of our planet? Do legal scholars who advocate the emergence of a “global constitutionalism” deal with these issues and questions? In most cases, they ignore them.

Today, the most widespread notion of global constitutionalism is one that understands it as judicial dialogue, an allegedly transparent judicial communication, which primarily seeks the protection of individual fundamental rights. Despite encouraging communication between the plurality of rights, this approach does not necessarily favor the exchange of real information about the complexity of legal pluralism itself nor does it embrace the plurality of conceptions that envision and articulate *other* cosmovisions and distinct “ways of living” found in non-western worldviews (QUIJANO, 2013).

As a consequence such a communication-based constitutional design facilitates the maintenance of the economic and social status quo that favors indifference within the international community, towards other alternative non-predatory models capable of promoting global equality and guarantee human survival (NUSSBAUM, 2010, 2011).

## 2 THE RETURN TO THE LOGOS

But what is the cause of such indifference? The answer lies in the *logos* of constitutional law.

Although issues relating to nature are not new to constitutional law, these have been addressed only and exclusively in anthropocentric terms. Nature has always been understood as an object: as an “anthropic principle” (CARTER, 1974; REBAGLIA, 1996) and sustainable environment at the service of the needs, enjoyment and exploitation of human beings. This philosophical conception of nature has created a historical *lacunae* within constitutionalism and this *lacunae* is indeed the progeny of constitutionalism’s primary “genetic code”: a binary code based on the idea that human society is determined solely by the dialectics between freedom and authority.

Introduced by Rousseau’s famous “stag hunt” dilemma in his *Discourse on the Origin of Inequality* (1745), the freedom/authority dialectics works as an “anthropic principle” that provides the foundation for all political and methodological proposals dealing with human coexistence on planet earth, so far (SKYRMS, 2004). Yet, if the “genetic code” of the secular condition is binary (freedom/authority) the tension of conflict will inevitably arise, between individuals seeking their own interests and the immediate benefits of freedom on one hand, and the authority pursuing the larger collective common interests and their -not so immediate- benefits on the other hand. Complementarily, harmonic coexistence on planet earth can only be ensured by creating a balance between these conflicting benefits/interests. Since social cooperation feeds on the hunt stag dilemma, such dialectics reemerges and reproduces itself indefinitely and pervasively. There will be no exceptions to this pattern, for this eurocentric and anthropocentric version of “good life” that results from the combination of immediate individual benefits with benefits guaranteed by the authority and common to all individuals exists only between people, and not between humans and nature (it is for this reason that Rousseau specifically spoke of “benefits”) (CARDUCCI, 2016, p. 152).

During the medieval period of Christianity in Europe these *common benefits* corresponded with religious *salvation* -granted by the authority of the Church- and *peace* -guaranteed by the protection of the Sovereign. However, the discovery of the New World brought about the loss of Christian unity and hence salvation and peace needed to be

then experienced in earthly dimensions: in terms of reciprocal *trust* (FERRARESE, 2002, p. 17) and in the shape of agreements between individuals and between states. In order to strip it from its former divine origin, trust should be experienced as a construct of reality built upon social consensus. As Carducci has already stated elsewhere (2016, p. 152), modern constitutions are examples of some of these consensus-based constructs of reality produced by Europe. They are the *founding* documents that established the conditions for mutual trust and cooperation -in replacement of salvation and peace granted by the “Divinity”- and provided legitimization and guarantees for the *Hobbesian public goods* (HARGREAVES-HEAP, et al., 1992, p. 193) i.e. the common “benefits” to which Rousseau had referred.

Many supporters of global constitutionalism claim that the current crisis of constitutional law is the result of the decline of the nation-state, nevertheless, we argue that it is instead the result of the binary structure of its own “genetic code”. This primary “genetic code” of the rules of social cooperation (and therefore *in primis* of constitutionalism) has evolved outside and apart from the “natural eco-system” and is now in crisis. By remaining within the limits of the “stag hunt” dilemma, denying nature’s subjectivity and ignoring her link to the development of human life, constitutionalism has rendered itself structurally weak, vulnerable and almost incapable of dealing with environmental challenges and other social-ecological transnational problems. Moreover, through this objectivization of nature constitutionalism continues to legitimize and justify the reasons of *eco-nomy* over the reasons of *eco-logy* (CARDUCCI, 2016, p. 153).

The fact is that constitutionalism has never really directly addressed questions about the survival of humankind (CARDUCCI, 2014b). Constitutions may sometimes tackle economic, social and environmentally related issues and thus include provisions such as those seeking the protection of inter-generational rights, those advancing social sustainability and development, or even provisions about distributive justice. But when it comes to survival, constitutions have only considered *war* as the only means of destruction of humankind and *peace* as the only guarantee for its survival. Strongly influenced by Carl Schmitt, this approach to constitutionalism obscures and even neglects the historical connection among war and the accumulation of natural resources, peace and the participation in the benefits drawn

out of natural resources, and constitutional rules and the ownership of natural resources (CARDUCCI, 2016, p. 145).

The historical-anthropological developments previously described allow us to explain: (a) why questions about human survival are not considered within any western constitution; and (b) why, even today and despite the seemingly destruction of the planet, most theories about global constitutionalism remain within the logic of Rousseau’s binary code.

Since the current debates and approaches to global constitutionalism omit the discussion on the “ecological deficit” and address the future of humanity exclusively in terms of the “stag hunt” dilemma (individual freedom versus global authority) these can’t help but to reproduce the limitations of the latter.

Firstly, debates continue to revolve around the “rights and duties of man” and to preach the absolute value of the self-determination of individual freedom, thus ignoring the urgent need to discuss the future, not only of individuals, but of humanity as one of the many living beings on planet earth. Secondly, most approaches disregard the ecological paradox of the human condition: that the human being is, in fact, the only animal that has experienced democracy in the form of “authority” and accordingly decides about his own survival through consensus. Together these two limitations lead us to a third and more important limitation: since current approaches ignore the problem of the “ecological deficit” of the planet, these end up concealing the true challenge of global constitutionalism, which is the construction of a global authority and a global *eco-compatible* democracy, rather than the continuous conquest of new individual freedoms at global level.

Let us now consider, is there really any democratic way to save the planet? How can we set up a stable consensus that accommodates the democratic imperative of saving the planet’s ecosystem? These should be the proposed central and unavoidable questions<sup>1</sup> of global constitutionalism. However, it is doubtful that these questions can be answered if “individual freedoms approach” continues to be the only parameter or *tertium comparationis* among the different possible options available to constitutionalism.

<sup>1</sup> Some of these questions have been posed by several reports issued by the Transnational Institute since 2013 to date. See: *Transnational Institute’s collection reports on State of Power*. The 2016 report that can be found in: <<https://www.tni.org/en/collection/state-of-power>>.

### 3 NEO-LIBERAL CONSTITUTIONALISM AND TRANS-JUDICIAL COMMUNICATION

Besides being a constitutive element of the “anthropic principle” that governs constitutional law, individual freedom is also the cornerstone of one of the most widespread and hegemonic ideologies of our recent times: neoliberalism (TURNER, 2008; STREECK, 2013). The far-reaching influence of neoliberalism is reflected in various approaches preaching the fragmentation of *societal constitutional systems* (TEUBNER, 2012, 2011a, 2011b) or in those seeking the standardization/neutralization of legal models for social conflict management (such as the Public Choice Theory), as well as in some comparative methods based on the historical de-contextualization of constitutional experiences (such as the Legal Origins Theory).

Compatible with this methodological individualism is also the idea that by means of a judicial dialogue (FRISHMAN, 2013) or transnational communication among courts (SLAUGHTER, 2004) global constitutionalism should protect the pluralistic individual freedoms and rights against a new sort of globalized economic authority. In other words, dialogue-based proposals basically stretch out the stag hunt dilemma to a global scale. This particular theoretical and methodological choice introduces several grounding premises affecting the role of constitutions, the judiciary, as well as, the functional role of constitutionalism itself at a global level. As Carducci has already stated elsewhere (2016, p. 147), constitutions cease to be understood in their particular uniqueness and are now considered as mere fragments of a pluralistic global society (ROSENFELD, 2010) that are analyzed as constituent parts or “knots” (KEMMERER, 2009) of a global transnational network of constitutions that express rules, cultures and different experiences (THORNHILL, 2010). However, while the role of constitutions diminishes the role of the judiciary is substantially enhanced. Judicial networks become the forerunners of the process of internationalization of domestic constitutions and the lead actors responsible for the circulation of constitutional ideas within the global society. Hence, the judge’s primary role is no longer that of interpreting national/domestic law, but the constant legitimization of the global transnational network of constitutions (JACKSON, 2010).

The previously described changes are also closely linked to the modification of the foundations of constitutional theory in favor of pluralism. The pluralistic choice legitimates and prioritizes the role of subjects and diverse forms of interpersonal communication within global society (ZUMBANSEN, 2012), yet renders traditionally nation-based constitutional concepts (LOUGHLIN, 2004, p. 72) practically unuseful. Accordingly, constitutional comparison would then be reduced to the study of these forms of judicial dialogue and pluralistic global communication (PERJU, 2012) itself turning into an argumentative and dialogue-based discipline (BAER, 2004) serving only two functions: (1) the constitutionalization of international law (HABERMAS, 2008; KLABBERS, et al., 2009; DUNOFF; TRACHTMAN, 2009; SCHWÖBEL, 2011; MAMLYUK; MATTEI, 2011; ROBERTS, 2011) through the internationalization of constitutional law; and (2) the constitutionalization of all social orders, including the economic realm, present in global society (GILL; CUTLER, 2014; AMATO, 2014). For some, this transformation of constitutional comparison into judicial dialogue would then be a symptom of the end of comparative law (SIEMS, 2007; REIMANN, 1996; MUIR-WATT, 2012) traditionally based on the Westphalian imperatives and the primacy of national constitutional law.

Despite the widespread influence of this dialogue-based approach, a deeper analysis of these basic tenets reveals two important shortcomings. On the one hand, they reduce the concept of constitutionalization to a sort of judicially operated “graft” of constitutional elements onto any social order (DIGGELMANN; ALTWICKER, 2008) whether local or international, public or private, as if it was not originally a process of constitutional morphogenesis (i.e. a process of determination of specific legal forms concentered from the historical evolution and development of social and legal transformations (LOUGHLIN, 2010). On the other hand, they basically consider the notion of constitutionalization as a mere interpretative tool for the protection of human rights, and not as the result of “decisions” about ways to rationalize power and to exercise democracy (BETTI, 1953). In this manner, they emphasize the legal, judicial and even cultural dimensions of constitutionalism, instead of its political (BELLAMY, 2007; WALDRON 1993; GOLDONI, 2010) and general features (a “general constitutional law”<sup>2</sup>).

2 The term “general constitutional law” was coined by Boris Mirkine-Guetzévitch, in his oeuvre: *Les nouvelles tendances du droit constitutionnel*, Paris: Giard, 1931.

From all of the above it is possible to infer that the strategic *focus* of this dialogue-based comparison is related to the erosion of the traditional state's monopoly on fundamental rights' protection mechanisms (HIRSCHL, 2004; LADEUR; VIELLECHNER, 2008). Its focus is certainly directed towards protection of the legal status of individuals, their privacy and self-determination, rather than the regulation of economic and social spheres of human coexistence (WEJNERT, 2014); nevertheless, this is done at the expense of a more complex notion of pluralism that could consider the different sociopolitical and material conditions of diverse human groups within a global society.

Although biased towards the primacy of individual interests/benefits and the protection of human rights over any other transnational issue the trans-judicial communicative approach to global constitutionalism provides sufficient grounds for the development of a "generic constitutional law" (LAW, 2005); yet is unable to build a global legal order by which the "authorities" at the world stage can effectively ensure common transnational benefits (ESCOBAR, 2011). This reductionism weakens the political strength of constitutionalism to meet the new challenges faced by the geo-human system. Moreover, as some expert observers of global society have pointed out (BAUMANN, 2000), in spite of promoting a real limitation to the powers of the "authority", which has been the historical role of constitutionalism within the binary freedom/authority dilemma, this persistent exaltation of the individual self-determination eventually destroys the idea of global authority itself (WHITEMAN, 2010) as it also encourages a methodological anarchism in constitutional law (MONGARDINI, 2011).

#### 4 NATURE AS "GRUNDNORM" OF GLOBAL CONSTITUTIONALISM AND GLOBAL DEMOCRACY

Does the current international scenario offer any alternatives to this anarchist propensity?

There are indeed, two constitutional proposals that deserve to be explored with seriousness: (a) the *new constitutionalism for biodiversity* (CARDUCCI; CASTILLO, 2016) of the Andean constitutions (Ecuador and Bolivia) and (b) the jurisdictional protection system of "the right to democracy" proposed by of the African Union.

The first proposal emerges as part of the so called "New Latin American Constitutionalism" (VIZIANO; MARTÍNEZ, 2011) that refers to a group of constitutions promulgated in several Latin American countries in the nineties. Most of the constitutions associated with this regional trend share some post-neoliberal approaches to constitutional design, which include novel developmental paradigms of indigenous inspiration, the plurinational state organization and innovative communitarian models of democratic participation in decision making processes, among others. (CARDUCCI; CASTILLO, 2016).

However, the constitutions of Ecuador (2009) and Bolivia (2007) offer what could be considered a *novel* constitutional framework distinguishable from the other constitutions in the region, in that they grant essential rights to *nature* thus turn it into a true constitutional subject (ECUADOR, 2013). In this sense, the constitutional provisions, especially those of the constitution of Ecuador, seek the protection of the anthropic (geo-human) system by placing *nature* as the primary and single parameter of legitimization for all constitutional considerations (CARDUCCI, 2013). The Andean constitutional framework also builds up an inclusive and non-exploitative type of welfare state responsible for human survival -in all its economic, social and biological dimensions- which departs from the classic individual centered neoliberal notions of welfare state (BAGNI, 2013).

Besides acknowledging human cultural diversity, the Andean constitutions assert the unity of the humanity and nature through the founding principle of "*good life/living well*" known as Buen Vivir/Vivir Bien (in Spanish), Sumak Kawsay (in Kichwa) or Suma Qamaña (in Aymara). These constitutions turn this principle into a benefit/interest "common" to all individuals that takes precedence over any other previous social dilemma.

In short, this nature-centered *constitutionalism for biodiversity* has updated the "stag hunt dilemma", which now includes the entire ecosystem and not just its anthropic component. Only through such new nature-centered dynamics, as opposed to a mere balance among the plurality of individual benefits and interests, will global constitutionalism be capable of meaningfully promoting real global participatory democracy, in terms of active information and broad deliberation on priority issues affecting humanity's common survival.

Following this same line of development and understanding of democracy -as informed

participation and not as representative delegation- the XX Summit of the African Union proposed in early 2013<sup>3</sup> (AFRICAN UNION, 2013; FROSINI; BIAGI, 2014, p. 142) the creation of an International Constitutional Court (ICConstC) for the protection of the “right to democracy”. The initiative shows significant originality, since it aims at connecting the idea of a single international jurisdictional organization (the ICConstC) not with the classic notion of human rights protection (based on individual expectations) but with the idea of democracy as a distinctive and universally recognized form of government, fundamental for human survival and consequently as such, worthy of international global protection by means of a mechanism of “plural access” (CARDUCCI, 2014a).

Of African origin and inspiration, and precisely for this reason is considered noteworthy, the proposal is unprecedented, because it focuses on the development of a unified and universal mechanism for both the justiciability and accountability of governments and national justice systems and the protection of democratic practices of deliberative participation and social inclusion. Contrary to the individualistic approach to rights protection, which still plays a politically marginal role within the context of particular states, the African proposal seeks to build up a uniform “access to justice” model for the enforcement and effective realization of human rights in connection with political and social issues.

Though approached in this innovative way by the African Union, discussions about the “right to democracy” are not new to the legal theoretical debates. In fact, it has been discussed from at least four diverse perspectives: a) the first dates back to the philosophical and moral debate (BUCHANAN, 2014; BERNSTEIN, 2016) raised around John Rawls’ thesis (RAWLS, 1999), b) the second classifies of the “right to democracy” as a justiciable individual (but also collective) human right (COHEN, 2006; NICKEL, 2007; MANDLE, 2006), c) the third explores its link with the “democraticness” of international institutions (MILLER, 2007; FRANCK, 1995), and d) the fourth considers it as a constitutive element of the general principle of non-discrimination (MIKETIAK, 2011) to distinguish it from the right to self-determination.

Considering all these theoretical elaborations, which could then be the role of an Inter-

<sup>3</sup> The proposal was originally made by Tunisian president Marzouki in his speech to the UN General Assembly on 2012.

national Constitutional Court? According to the proposal of the African Union the ICConstC would function as a single, unified system of access to constitutional justice primarily aimed at protecting practices of participation and social inclusion; and enforcing rights and mechanisms surrounding democratic deliberation processes, such as the protection of minorities and opposition groups, the right to information, to transparency and disclosure of funding sources, the right to lobby at national and international level, etc.

In fact, the widespread understanding and acknowledgment of particular democratic practices as well as the seemingly homogeneity of standards for political participation and democratic citizen deliberation, all raise questions about the plausibility of an “international constitutionality” based exclusively on individual rights and standards. Are individual rights truly homogeneously and universally enforced? According to the actual judicial international practice it is unlikely.

Not only national constitutional courts, but also the three conventional Courts regarding human rights protection, such as the European Court of Human Rights (ECtHR) in Strasbourg, the San Jose Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples’ Rights (AfCHPR), sometimes limit the effects of their decisions over the constitutional provisions of national States through the use of contextualization techniques. Some examples are: (a) The margin of appreciation doctrine (GREER, 2010) developed by the case law of the ECtHR; (b) the explicitly formalized decision affirming the conventionality control over democratic procedures of deliberation ruled by the IACtHR in the 2011 case *Gelman vrs. Uruguay* (MOROCOA, 2014); (c) the 2013 case *Tanganyika Law Society et al vrs. Tanzania* ruled by the AfCHPR (PIERGIGLI, 2014) on the basis of the particular context of each country; and (d) the ruling No 82/2001 of the Supreme Court of Mexico (GONZALEZ, 2003) rejecting the participation of indigenous communities in constitutional amendment procedures. Those examples show how the use of these contextualizing methods results into an asymmetrical application of human rights standards and provisions that obscure the purported cosmopolitan nature of the rights based approach on global judicial dialogue (CARDUCCI, 2016, p. 143).

Unlike the judicial dialogue approach to global constitutionalism, the African proposal

lives up to the global challenge in a radically innovative way, superseding the landmark 1986 ruling of International Court of Justice on the case Nicaragua vrs. USA, which declared both nullity and illegitimacy of any action of interstate interference in internal (national) constitutional affairs. Despite opening the way to the development of a universal principle of “free choice” of political, economic and social systems by recognizing *constitutional autonomy* (KANTO, 2000) unfortunately the pioneer decision, nor the international judicial mechanism that enforced it, were capable of producing the necessary homogeneity of rules and principles to achieve an effective universalizing process of the content and procedures of a true “right to democracy”. The African proposal instead fosters the socialization of the democratic principle by means of the creation of a judicial mechanism with wide-spread effects: a *universal judge* of democracy.

The idea of a global political participation through a shared -and even global- democratic praxis could advance Franz Fanon’s idea of *sovereignty of everyday life* and even also strengthen some instances of “*societal constitutionalism*” against the oligarchic and authoritarian tendencies of global and economic powers and their influence on the formally democratic decisions of state powers (CARDUCCI, 2016, p. 144).

## 5 THE CONSTITUTION IN “NATURAL SENSE”

The “genetic code” of constitutionalism has forced us to discuss human society in terms of dialectical relationship of freedom/authority, thus constitutions have been traditionally analyzed and classified exclusively in terms of the anthropocentric dynamics framed by this dialectics. Some examples are: Karl Lowenstein’s (1976) ontological distinctions of normative, nominal and semantic constitutions, Constantino Mortati’s (1940) category of the “constitution in a material sense” and the concepts of “symbolic constitutionalization” (NEVES, 2007) and “simulacrum constitutions” (MOREIRA, 2007).

But, how to address the imperative questions on how to democratically save the planet and ensure the survival of humanity and of living beings? If we are to set up a stable relationship between the democratic consensus and the imperious rescue of the terrestrial ecosystem, the classic ontology

of the Constitutions can not remain unchanged. The implications of nature as “Grundnorm” of global constitutionalism -today and tomorrow- is certainly a complex process, but precisely because of this requires constant discussion.

The issue is in fact not new to constitutional philosophy. In *The Concept of the Political*, Carl Schmitt (1972) had already pointed out that *legal technique* represents the culmination of a process that began with “faith in God and ended with “faith in the unlimited dominion of man over nature”; and is of the many factors of the Heideggerian *Gestell* (HEIDEGGER, 1954): a manifestation of humanity itself. It is therefore, no coincidence that Emanuele Severino (1979) stated that: “if theology is the primary form of technique, then technique is the last form of theology”.

Should we then fight for a constitutionalism free of the last of his “political theologies” based on the faith in limitless rule of man over nature? And, if so, how?

In fact, there are some relevant studies that seek to guarantee human survival that would be able to promote and facilitate the gradual restoration of ecological balance, such as those linking the holistic approach of Eugene Odum (1971) with that of Hans Jonas (1992), Herman Daly (1977) and Vandana Shiva (2006) through the overall construction of a condition of “steady-state economy” (DALY, 1977), which would eliminate the inequalities produced by neo-liberal capitalism.

In these sense, measures such as regulation of international trade, establishment of price-ceilings for basic resources, implementation of a universal ecological tax reform, establishment of minimum and maximum limits for income and wealth distribution to reduce inequality gap, etc., are all issues that require broad debate and discussion around the idea of the Constitution “*in the natural sense*” that is, beyond the binary code of the stag hunt dilemma.

## 6 CONCLUDING REMARKS

The current mainstream dialogue-based approaches to global constitutionalism essentially recycle the binary genetic code underlying the classic anthropocentric and eurocentric *logos* of constitutional law, which is represented by Rousseau’s “stag hunt” dialectics. By remaining within the limits of the “stag hunt”, denying nature’s subjectivity and ignoring her link to the development of human life,

constitutionalism has rendered itself structurally weak, vulnerable and almost incapable of dealing with environmental challenges and other social-ecological transnational problems. Moreover, theories on trans-national judicial dialogue are biased towards the primacy of individual interests/benefits and the protection of human rights and underrate political democratic questions, such as for instance, how to build a global legal order by which the “authorities” at the world stage can effectively ensure common transnational benefits. This reductionism also weakens the political strength of constitutionalism to meet the new challenges faced by the geo-human system.

We need to return to the “autochthonous” legal traditions, which consider nature as a principle of life and movement and therefore as necessary balanced order. We believe it is time to discuss an ontology of constitutions in “natural sense”, i.e. related to the challenge of survival of the geo-human ecosystem, moving beyond the metaphysical options offered by mainstream constitutionalism. We hence propose to define nature as “*tertium comparationis*” of global constitutionalism: an inescapable element of assessment and evaluation of present and future constitutional policies.

The two above discussed constitutional proposals drawn from the Global South, the Andean constitutionalism for biodiversity and the African Union project to establish an International Constitutional Court, tell us not dwell immobile in the “stag hunt dilemma”. They break free from the traditional methodological individualism of constitutionalism and make up a new structure for this dialects. No longer limited to the dynamics between individuals and their permanent quest for either individual benefits/interests or common benefits, the dilemma would now include nature and humanity as a whole: a geo-human system for the protection of biodiversity. Within this new arrangement the survival of all human and other living beings becomes the *common non-negotiable benefit*. This new nature-centered dilemma can not be separated from democracy, since only democratic forms of state government and democratic decision-making by state authorities can jointly and effectively face up the problem of survival of the geo-human system.

Therefore, both proposals converge on the importance of a constitutionalism committed to the discussion of the democratic legitimacy of social life rather than to *trans-judicial communication*. Nature -and not freedom or authority-

would then become “Grundnorm” of the options of “good life” (“buen vivir”) for all humankind, while democracy would become the daily practice of participatory discussions and broad debates about the future of humanity.

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## *La naturaleza como grundnorm del constitucionalismo global: contribuciones desde el sur global*

### RESUMEN

El incesante consumo y la explotación excesiva de los recursos naturales y su interconexión con la intensificación de la desigualdades a nivel mundial parecen estar llevando a nuestra civilización contemporánea hacia su colapso inminente. Cómo enfrenta el constitucionalismo actual estos problemas ecológicos? Este trabajo tiene una doble finalidad. Primero, pretende descubrir cuáles semánticas de “constitución y naturaleza” se encuentran en el derecho constitucional actual. Los autores argumentan que la visión dominante del constitucionalismo global, en su perspectiva dialógica (diálogo transnacional entre Cortes), está basada en un *logos* eurocéntrico y antropocéntrico que excluye a la naturaleza y la convierte en un simple objeto. Segundo, busca discutir dos originales propuestas alternativas surgidas en el Sur global: por un lado, del *constitucionalismo de la biodiversidad* de los países andinos latinoamericanos, y por otro, la propuesta de la Unión Africana de crear de una Corte Constitucional Internacional. Mientras que las constituciones andinas priorizan la discusión sobre del “déficit ecológico” y colocan a la naturaleza como su “Grundnorm”, la propuesta africana considera la creación de un mecanismo judicial universal de protección del “derecho a la democracia”. Dada la centralidad que el innovador diseño constitucional andino da a la naturaleza y el potencial universalista de las formas democráticas de deliberación pública, estas propuestas promueven una nueva perspectiva para el constitucionalismo con alcance realmente global y capaz de enfrentar las amenazas ecológicas inminentes, así como perseguir la dignidad, la justicia y la igualdad a nivel global.

**Palabras Llave:** Constitucionalismo global. Diálogo Judicial. Derechos de la naturaleza. Derecho a la democracia.

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