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The Ecological Constitution: Reframing Environmental Law by Lynda Collins

Dayna Nadine Scott*

In *The Ecological Constitution*, Lynda Collins offers a concise and compelling case for a fundamental overhaul of the principles that underlie the Canadian Constitution. In fact, she sets out the necessary components of any constitution that could be considered “ecological” in nature—and therefore fit for guiding us through the Anthropocene era and beyond. The aim is to stimulate the transformation that will “align the highest form of domestic law with the non-negotiable laws of nature.”¹ Professor Collins makes the case eloquently, dodging tempting theoretical distractions and outright refusing any moral ambivalence. The book should be celebrated not only for its clear vision, but also its view from above; its birds-eye, broad perspective. It is as if we, as readers, are perched on a high ridge surveying the legal landscape below, where the various new strands of thinking that are influencing environmental law—*ecological law*, *rights of nature*, and *environmental rights*—are seen as tributaries of a single river. Collins surveys the landscape from this high perch, asking: where do the strands converge and diverge? Which are dominant in which places, and why? Where and how do they gain or lose strength and force?

Drawing insights from environmental constitutionalism and the amorphous field of “ecological law,” the book makes an elegant argument. An ecological constitution is one that codifies the following key principles: the principle of sustainability; intergenerational equity and the public trust

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1 Lynda Collins, *The Ecological Constitution: Reframing Environmental Law*, 4th ed (Abingdon, UK: Routledge, 2021) at 2.

doctrine; environmental human rights; rights of nature; the precautionary principle and non-regression; and climate protection through the recognition of planetary boundaries. The rationale for each of these six principles is presented as a generous, concise synthesis of current thinking; each chapter includes comparative examples from various national constitutions and a brief global survey of applicable caselaw. The analysis of the six principles feeds into Collins' main argument that we must constitutionalize environmental rights. And to make it, she stays at the high level of perspective, re-assuring us that the details can be worked out down on the ground. *We must constitutionalize*, according to Collins, by whatever means necessary: by amendment, by judicial interpretation, by enactment—by any and all of these means. As a vision, it is both bold and pragmatic.

The global perspective is a major strength of this work. It helps Collins to put emphasis on the point: our current constitutional arrangements are failing us. This is undeniably true. That constitutions *should* preserve the ecological foundations of society, is again, undeniably true. On these points the book makes a very compelling case; on the knottier dilemmas of what we should do to achieve the ecological constitution, or *how* we should constitutionalize, however, I come away from the book still puzzling over many of the same worries and questions that I had going into it. I am much better informed, and I am further convinced of the direction in which we must move, but I am still unsure about the exact route to take. In the best spirit of academic exchange, I unpack some of these worries here, aiming to contribute to the larger project I have in common with Professor Collins: achieving a radical transformation of environmental law.

WHAT IS NOT ALREADY *ECOLOGICAL* ABOUT ENVIRONMENTAL LAW?

Collins begins by emphasizing that “the ecological inadequacy of environmental law is written in its DNA.”² Environmental law is embedded in “unsustainable, ‘growth-insistent’ economic systems that undermine its potential at every turn.”³ It is anthropocentric, fragmented, “aimed at facilitating the exploitation of commodified natural resources, rather than preserving the stability and resilience of natural systems.”⁴ As an example, Collins says that an ecological legal order would “regulate ecological *realities*

2 *Ibid* at 3.

3 *Ibid.*

4 *Ibid.*

rather than *legal fictions*,” giving the example of pollution control.⁵ Ecological pollution regulation, she goes on, requires “binding ambient standards” or legislated limits on the contaminant levels for air and water that account for the actual burden of emissions from all sources. In other words, we need to replace point source limits with binding ambient standards. We need attention to cumulative effects rather than one-off approvals.

I think we can agree on this, and technically speaking, we can do it by simple statute. Ecological pollution regulation, in other words, does not require constitutionalization of environmental rights to achieve. In Ontario, we could simply amend the *Environmental Protection Act* and the regulations (especially the odious O Reg 419/05 on “Local Air Quality”), or better yet, we could toss them to the dustbin and start anew.⁶ Or rather, the Ontario Legislature could. So, why don’t we (they) do it?

After all, the province has known for over a decade that the regime for regulating air pollution in Ontario is hopelessly flawed.⁷ Air pollution levels in Sarnia and Hamilton routinely exceed basic health-protective thresholds, sometimes by orders of magnitude.⁸ Members of Aamjiwnaang First Nation, disproportionately burdened with the crushing effect of this chronic pollution, have been pointing out the glaring deficiencies in regulating “point sources” of pollution as if they existed in isolation, rather than in the cluster of sources known as Chemical Valley, for more than a decade.⁹ Their fight for cumulative effects assessment, for actual airshed limits on known air poisons, has been long-running without much in terms of tangible policy progress. There have been some discrete wins and incremental gains, of course, but “meaningful and durable improvements in air quality cannot yet be ascribed to the resistance actions” of the residents in Aamjiwnaang.¹⁰ As I have argued elsewhere about the struggle,

5 *Ibid* at 7 [emphasis added].

6 RSO 1990, c E.19; O Reg 419/05.

7 See e.g. Elaine MacDonald & Sarah Rang, “Exposing Canada’s Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area” (October 2007), online (pdf): *Ecojustice* <ecojustice.ca/wp-content/uploads/2015/09/2007-Exposing-Canadas-Chemical-Valley.pdf>; Dayna Nadine Scott “Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution” (2008) 46 *Osgoode Hall LJ* 293.

8 See Ontario, Ministry of the Environment and Climate Change, *Discussion Paper: Cumulative Effects Assessment in Air Approval*, Standards Development Branch (Toronto: Ministry of Environment, Conservation and Parks, 26 April 2018) at 10.

9 See Dayna Nadine Scott, “We Are the Monitors Now’: Experiential Knowledge, Transcorporeality and Environmental Justice” (2016) 25:3 *Soc & Leg Stud* 261.

10 *Ibid* at 280.

this is “not to diminish the significance of their efforts but to underscore the entrenched nature of the regimes they wish to challenge.”¹¹

The “Chemical Valley Charter Challenge,” launched in 2011 and abandoned in 2016, can itself be seen as an admission that advocates judged it as more likely that they could achieve “constitutionalization” of environmental rights, and ecological pollution regulation, *through the courts*—via *Canadian Charter of Rights and Freedoms* litigation—than through law reform efforts aimed at the Ontario Legislature.¹² Why? It is arguably because of the power of entrenched economic interests over elected officials. Whistleblowers from inside the Ministry of the Environment, Conservation, and Parks have confirmed that the lack of adequate standards for petroleum refineries and petrochemical producers in Sarnia is maintained through heavy lobbying by the industry.¹³ They, and others, have documented how the Ontario government repeatedly caves to industry pressure by delaying new standards, defending inadequate rules, and routinely issuing unwarranted exemptions.¹⁴

HOW DO WE GET THERE?

So, to return to my question: Why don’t we have binding ambient standards instead of point source limits? We don’t do it because our political and electoral systems are systematically biased against those kinds of protections; because entrenched economic interests use their considerable

11 *Ibid.*

12 The judicial review application, which was explicitly oriented against the environmental racism that perpetuates the chronic releases of toxic air pollution in the region, had promised to provide Canada’s courts with an opportunity to declare that all Canadians have a “right to a healthy environment,” despite one not being provided for in the *Canadian Charter of Rights and Freedoms* or elsewhere in the Canada’s Constitution. See Ecojustice, “Defending the Rights of Chemical Valley Residents—Charter Challenge” (last visited 17 February 2022), online: <www.ecojustice.ca/case/defending-the-rights-of-chemical-valley-residents-charter-challenge>; Margot Venton et al, “Changing Course in Chemical Valley” (26 April 2016), online: *Ecojustice* <www.ecojustice.ca/changing-course-chemical-valley>.

13 See Mary Ormsby, “Whistleblower Alleges Province Failing to Protect First Nations Community in ‘Chemical Valley’ from ‘Dangerous’ Air Pollutants”, *Toronto Star* (9 October 2019), online: <www.thestar.com/news/canada/2019/10/09/whistleblower-alleges-province-failing-to-protect-first-nations-community-in-chemical-valley-from-dangerous-air-pollutants.html>.

14 See e.g. Ramani Nadarajah, “Re: Canadian Environmental Law Association’s Comments on Cumulative Effects Assessment in Air Approvals, ERB Registry Number 013-1680” (7 February 2018), online (pdf): *Canadian Environmental Law Association* <cela.ca/wp-content/uploads/2019/07/1174-CumulativeEffectsAssessmentinAirApprovals.pdf>.

influence over regulators to resist, delay, and deny the need for these measures. When we sometimes finally organize, find the coalitions, and the right moment for new laws, we can make gains.¹⁵ In other words, we are engaged in a power struggle—and so, while I agree with Professor Collins that the interesting questions going forward include by *which means* we can achieve an ecological constitution, my strong inclination is that we need a structural, materialist analysis of how to win these gains. When I say, “but how are we going to do this?” I don’t mean just the mechanics of how, but more profoundly, how are we going to overcome this power differential?

Are we going to win the day with science and reason? Ethics? Are we going to codify and constitutionalize before industry clues in? Or, are we going to gain numbers, critical mass: are we going to stimulate the widespread political mobilization necessary to demand ecological laws? And here is where Collins’ hope comes in, and the overriding optimism of the book, which deserves great respect. Collins is joining other scholars and practitioners—most notably David Boyd and Collins’ colleagues at the University of Ottawa’s Faculty of Law, who are patiently and professionally preparing for the coming political revolution.¹⁶ As Collins’ says, this book calls for revolution; it is not a reform project.

WHAT IS AT STAKE?

According to the authors of *Climate Leviathan*, Geoff Mann and Joel Wainwright, the most likely political future, without this kind of broad-based political mobilization, is a “doubling down” on liberal legalism in which the most privileged people of the global north build for themselves a “ship” to survive the coming climate storm.¹⁷ *Climate Leviathan*, in this conception, consists of “adaptation projects to allow capitalist elites to stabilize their position amidst planetary crises.”¹⁸ The prediction, in other words, is that climate crises will serve to deepen and exacerbate the growing inequality in our world. The sped-up sense of declining and deteriorating systems of mutual aid that the COVID-19 pandemic has wrought, of course, has made

15 Ontario’s *Cosmetic Pesticides Ban Act*, 2008 is an apt example here. See Bill 64, *An Act to amend the Pesticides Act to prohibit the use and sale of pesticides that may be used for cosmetic purposes*, 1st Sess, 39th Leg, Ontario, 2008 (assented to 18 June 2008), SO 2008, c 11.

16 See David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions Human Rights, and the Environment* (Vancouver: UBC Press, 2012).

17 Geoff Mann & Joel Wainwright, *Climate Leviathan: A Political Theory of Our Planetary Future* (New York: Verso Books, 2020).

18 *Ibid* at 15.

the prediction seem less alarmist and more likely. But Collins' ecological constitutional vision resists these trends—she gives examples of places in the world where regimes of ecological law or rights of nature have been brought into being in a way that reverses rather than reinforces existing disparities.

Take legal personhood and rights of nature as an example. Collins rightly recognizes that Indigenous legal systems around the world already contain many of the principles, norms, and logics we need to adopt to align our constitutions with ecological imperatives. These include: long-termism over short-termism; reciprocity with the non-human world; a focus on “responsibilities” rather than “rights”; and a priority on collective interests over individual interests. She cites, rightly, that ecological law, in particular, must not “favour humans over nature and individual rights over collective responsibilities.”¹⁹

But again, knowing this does not inevitably point to one specific way forward. As an example, instead of trying to bring settler or colonial legal systems, such as Canada's, “into line” with Indigenous legal orders, what if we focused on building the land base and subject-matters over which Indigenous Peoples could exercise their own jurisdiction? What if we focused on returning the governing authority over lands and waters to the peoples and communities whose inherent authority is grounded in knowledge of those lands and waters?

What is the practical difference? Rather than trying to build these principles into Canadian constitutionalism or settler colonial law, we make them operable on lands and waters through exercises of Indigenous Peoples' governing authority. It is a radical project of imagination on an even more significant scale. It can be pursued incrementally, or in broad strokes. It is a project of constitutional change for sure, but with a different orientation. Land Back is a surging political movement; according to Cherokee scholar Jeff Corntassel, it is a movement for the “regeneration of Indigenous laws on Indigenous lands and waters,” and it is a challenge to the “legitimacy of state jurisdictional authority.”²⁰ Whether “Land Back” or re-configured as “Jurisdiction Back,” there are many lands, waters, and so-called “parks” over which Indigenous governing authority can be and must be returned. There are also processes—such as environmental assessment, permitting,

19 Collins, *supra* note 1 at 5, citing Ecological Law and Governance Association, “‘Oslo Manifesto’ for Ecological Law and Governance” (June 2016), online: <elgaworld.org/oslo-manifesto>.

20 Jeff Corntassel, “Indigenous Laws on Indigenous Lands: Land Back as Community Resurgence” (2021) 1:2 Rooted 15 at 16, 20.

and climate monitoring—over which Indigenous jurisdiction should be immediately restored.

Collins' careful synthesis of these various strands of influence on environmental law assists in this project—by demonstrating the salience, the necessity, you might say, the superiority—of these governing principles that exist in Indigenous legal orders, ecologically-speaking. At the very least, she demonstrates their enhanced compatibility with continued life on the planet. As a settler scholar, I do not abandon the project of also correcting the flawed logics in settler laws and regulatory regimes, of course, but perhaps more urgently we need the settler state to step back and make space for other political communities to do the governing.

CONSTITUTIONS FOR THE FUTURE

Finally, Collins acknowledges the likely conflicts between rights and interests of presently existing humans as we go down this road, as well as the very difficult problems that arise when thinking through the intergenerational aspects. Collins' Chapter 4, on intergenerational equity and the public trust doctrine, presents a rich exploration of the available avenues for incorporating "the intertemporal and collective dimensions of ecological law into constitutions."²¹ Collins notes how "the recognition of kinship with, and an obligation towards, future generations is consonant with a wide range of legal and political traditions," noting Islamic law, Asian philosophical traditions, African customary law, and the Haudenosaunee Great Law of Peace.²² In conventional articulations of international law, intergenerational equity exists much as it was formulated by legal scholar Edith Brown Weiss now over 30 years ago. The conception holds that "each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations."²³ The basic premise, heavily influenced by liberal political theory, is that the present generation is both entitled to benefit from the natural environment and obligated to preserve it for future generations.²⁴

What can we do when we believe that the *intragenerational* justice aspects of the climate crisis are at least as significant as the intergenerational ones?

²¹ Collins, *supra* note 1 at 52.

²² *Ibid.*

²³ Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989) at 2.

²⁴ *Ibid* at 7, citing John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971).

Attention to the vast disparities of circumstances, resources, and interests within generations, especially as they correspond with histories of racism and colonialism, has been a central focus of the environmental justice movement, but is not featured centrally in scholarship under the banner of intergenerational equity. However, as Collins herself has maintained, this critique does not have to be fatal to the larger project.²⁵ In fact, there are obvious openings for expanding and enriching the concept through the explicit incorporation of equity concerns, aided by critical feminist, relational, and decolonial approaches. As Angela Harris argues, “[H]umans are dependent not only on one another but on a series of trans-human systems.”²⁶ On this account, we can conceive of constitutions establishing obligations to maintain ecological systems and processes necessary for human survival, as in the conventional conception of intergenerational equity, but without the need to construct the generations as separate and competing, and without glossing over the vast disparities within generations.²⁷ In the recent collection of essays asking “what kind of ancestor do you want to be?,” the editors argue that confronting the question:

deepens our awareness of the roots and reach of all of our actions and non-actions. In every moment, whether we like it or not, and whether we know it or not, we are advancing values and influencing systems that will continue long past our lifetimes. These values and systems shape communities and lives that we will never see. The ways we live create and reinforce the foundation of life for future generations.²⁸

Professor Collins has provided resources for considering what we owe our descendants. Through this gift of careful, honest, and brave scholarship, she has contributed a tremendous legacy of hope; her book will allow you a few glorious hours of imagining constitutions *otherwise*.

25 See Lynda M Collins, “Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance” (2007) 30:1 Dal LJ 79 at 116 (noting the shortcomings in Brown Weiss’ model in relation to addressing intragenerational equity). See also Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester, UK: Manchester University Press, 1999) at 109, n 208.

26 Angela P Harris, “Vulnerability and Power in the Age of the Anthropocene” (2015) 6:1 Washington & Lee J Energy, Climate & Environment 98 at 126.

27 See Jessica Eisen, Roxanne Mykitiuk & Dayna Scott, “Constituting Bodies Into the Future: Toward a Relational Theory of Intergenerational Justice” (2018) 51:1 UBC L Rev 1.

28 John Hausdoerffer et al, eds, *What Kind of Ancestor Do you Want to Be?* (Chicago, Ill: University of Chicago Press, 2021) at 2.