

BOOK REVIEWS

The Ecological Constitution: Reframing Environmental Law, by Lynda Collins
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National constitutions serve many important roles. Despite their domestic focus, constitutions have a significant transnational impact, occupying a crucial part of a holistic approach to multilevel environmental governance.¹ Scholars in the field of global environmental constitutionalism have long argued that ‘the environment is a proper subject for protection in constitutional texts and for vindication in constitutional courts worldwide’.² Scholarship on ecological law has also grown, calling for law’s radical inclusion of the non-human world rather than the environment existing as an ontologically distinct domain from that of human beings. While both fields have been vital in advancing ecological objectives, limited attention has been devoted to their interdependent relationship.

In *The Ecological Constitution: Reframing Environmental Law*, Lynda Collins fills this gap by creating a roadmap for constructing an ‘ecological constitution’. Collins opens with a simple question – ‘How can states constitutionally ensure their ongoing survival on planet Earth?’ (p. 1) – and challenges the relevance of any constitution that fails to achieve this aim. Thus, she asserts, it is imperative for states to constitutionalize ecological principles to successfully attain long-term planetary sustainability. The central thesis of her book is that domestic constitutions must safeguard ‘the ecological foundation on which all societies stand’ (p. 1). As conventional environmental law has largely failed to address destructive human behaviour and to eliminate processes of commodification and exploitation, *The Ecological Constitution* represents an imaginative ideological turn towards ecological constitutionalism as an alternative regulatory paradigm in the Anthropocene.

At the heart of Collins’ vision is the constitutional codification of six core elements: (i) the principle of ecological sustainability; (ii) environmental human rights, especially the right to a healthy environment and Indigenous environmental rights; (iii) inter-generational equity and the public trust doctrine; (iv) the rights of nature; (v) the principles of precaution and non-regression; and (vi) the rights and obligations relevant to the climate. Each of Collins’ chapters then makes a strong case for the above principles as necessary components of an ecological constitution.

¹ L. Kotzé, ‘A Global Environmental Constitution for the Anthropocene?’ (2019) 8(1) *Transnational Environmental Law*, pp. 11–33; R. O’Gorman, ‘Environmental Constitutionalism: A Comparative Study’ (2017) 6(3) *Transnational Environmental Law*, pp. 435–62; D.A. Kysar, ‘Global Environmental Constitutionalism: Getting There from Here’ (2012) 1(1) *Transnational Environmental Law*, pp. 83–94.

² J.R. May & E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014), p. 1.

In Chapter 2, Collins calls for states to constitutionalize the principle of ecological sustainability, defined as ‘the long-term viability or well-being of ecological systems, including human communities’ (p. 18). She sets out various legal tools for achieving this constitutionalization, noting that the principle requires long-term solutions that permeate all areas of domestic law, constrain human behaviour, and bind successive governments. As such, Collins considers the advantages of constitutionally recognizing ecological sustainability as a fundamental legal principle that centres ecological considerations in all aspects of legal systems and policy decisions.³

Collins argues, in Chapter 3, that states should expand their existing streams of environmental human rights, as well as realize an autonomous, substantive right to a healthy environment and embrace the constitutional protection of Indigenous environmental rights. Collins also considers the potential for ecological limits on existing human rights, though she notes that ecological constitutionalism must not violate existing human rights. Using the example of ecological limits on property rights as the ‘most obvious and morally defensible application of ecological limitations to human rights’ (p. 42), she proposes that the Ecological Constitution may be used to combat long-standing enclosures of the commons. Accordingly, a future avenue for research may be an assessment of how the Ecological Constitution might be used to protect against further (neo)liberal capitalist accumulation by dispossession and privatization of the commons.

Collins explores the constitutionalization of intergenerational equity and public trust in Chapter 4. She stresses the importance of these doctrines for ‘incorporating the intertemporal and collective dimensions of ecological law’ (p. 52). While acknowledging the principles’ anthropocentricity, Collins counter-argues that they have the capacity to improve ecological sustainability and benefit the more-than-human world. Accordingly, Collins suggests that deploying the concept of ecological justice ‘would remedy this defect by adding interspecies equity to inter- and intra-generational equity’ (p. 58), or alternatively that intergenerational equity could be complemented with a recognition of the rights of nature. These proposals, which seek to harmonize ecological law with human-centred environmental doctrines, reflect Collins’ overall holistic approach to developing an inclusive and ambitious Ecological Constitution.

Collins evaluates the rights of nature in Chapter 5. The discussion in this chapter indicates Collins’ willingness to engage with legal and philosophical thinking alongside doctrinal reasoning – including developments in the case law of Colombia, India, and Bangladesh – to support her argument for a holistic, interconnected Ecological Constitution. Arguably, this is one of the more nuanced aspects of her thesis. Rather than evading the criticisms leveraged against the rights of nature in favour of an abstract plea for legal personality for the more-than-human entity,⁴ Collins confronts the alleged limitations directly. She addresses the key legal and political issues surrounding

³ See further K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd edn (Routledge, 2016).

⁴ E.g., J. Bétaille, ‘Rights of Nature: Why It Might Not Save the Entire World’ (2019) 16(1) *Journal for European Environmental & Planning Law*, pp. 35–64. Collins also outlines several critics of the rights of nature.

the rights of nature, reiterating the importance of balancing the rights of nature with environmental human rights.

In Chapter 6, Collins argues that the fifth element of an Ecological Constitution is the constitutional codification of the precautionary principle and the related principles of non-regression and *in dubio pro natura* ('when in doubt, in favour of nature'). Collins helpfully highlights the benefits of textually codifying these principles, noting that, through codification, they would operate as regulatory mechanisms and guide decision making to bolster other ecological constitutional principles that would otherwise be challenged by scientific uncertainty.

The final elements of Collins' Ecological Constitution are the rights and obligations relating to a healthy climate, which are being developed incrementally through emerging patterns of climate constitutionalism in domestic contexts. In Chapter 7, Collins stresses that states must begin to incorporate climate-related protections into their constitutions to safeguard planetary boundaries, preserve the Earth system, and guarantee human rights. She argues that evolving trends in climate constitutionalism may signify a wider movement towards the equitable constitutionalization of a substantive climate right (and obligations), existing either within the right to a healthy environment or as an autonomous right to a stable climate 'buttressed by access to justice provisions' (p. 107).

The Ecological Constitution is a thought-provoking and convincing work of scholarship. A particularly positive feature of the book is that Collins utilizes the broadest possible range of constitutional examples to support her thesis. She does not limit herself to western legal developments and appears to focus predominantly on non-western national constitutions and case law. Moreover, throughout the book Collins highlights the importance of inclusively incorporating Indigenous Traditional Knowledge into the principles of an Ecological Constitution. Although Collins does not claim that the majority of the 'radical' ecologically beneficial developments have emerged from non-western legal contexts (though it would be possible to argue this point), she ensures that she centres these developments and allows them to speak for themselves, rather than letting her own analysis dominate their importance.

A minor quibble with the book is that, while Collins continuously asserts that the core principles of an Ecological Constitution may materialize in constitutional frameworks through explicit textual codification or judicial interpretation, she does not detail how this might happen. A future avenue for research may be an assessment of whether ecological constitutionalism through judicial interpretation and case law might be sufficient on its own for establishing an ecological constitution in the few countries with uncodified constitutions.

As Collins outlines in her final chapter, '[a]n ecological constitution – one that makes a serious, science-based attempt to sustain natural systems (including human communities) over time – could play a pivotal role in re-orienting our societies' (p. 118). Effective governance and the rule of law depend on the transition towards ecological constitutionalism. Fundamentally, the transformation from a constitution devoid of robust ecological consciousness towards a holistic, multilevel system of governance, informed and guided by ecological principles and supported by ecologically literate courts, is necessary now more than ever, given the conditions of the Anthropocene.

Manifesting ecological law and ecological constitutionalism through national and subnational Ecological Constitutions is a vital tool for achieving this transformative change. Ultimately, Collins' accessible contribution effectively makes the case for the Ecological Constitution as a beacon of hope in an otherwise uncertain world.

Hannah Blitzer
University of Sussex, Brighton (United Kingdom)

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Protecting the Third Pole: Transplanting International Law, by Simon Marsden
 Edward Elgar, 2019, 328 pp, £95 hb
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The environment knows no boundaries, but environmental law and scholarship often do.¹ Transboundary environmental governance has become a focal point of scholarship across the globe. However, developments in Asia have received relatively less attention, especially transboundary developments. Simon Marsden has helped to fill this gap with a trilogy of volumes, one of which co-authored with Elizabeth Brandon focuses on transboundary environmental governance within Asia.²

This review focuses on the third of these books, *Protecting the Third Pole: Transplanting International Law*. The 'Third Pole' refers to the Himalaya-Hindu Kush (HHK) mountain range and the Tibetan Plateau, which contain glaciers that store the largest supply of freshwater outside the Arctic (the First Pole) and Antarctica (the Second Pole). The Third Pole is the source of ten major river systems that provide power, irrigation, and drinking water to more than 1.3 billion people in Asia. Despite its significance, the Third Pole receives much less scholarly attention than other ecosystems.

Protecting the Third Pole examines how and whether international, regional, sub-regional, and national legal frameworks could be transplanted to help in protecting this vast and important region. Marsden explores a wide variety of existing legal regimes, including the law of international watercourses, various international conservation treaties, laws applicable to the two other poles, and existing regional governance agreements, that could be tailored to enhance environmental governance of the Third Pole. However, in recognition of the challenges such legal transplants often face, Marsden ultimately concludes that adequate protection of Asia's polar region may require the development of a new treaty.

¹ M.I. Khan & Y.-C. Chang, 'Love for the Climate in Sino–Pakistan Economic Romance: A Perspective of Environmental Laws' (2020) 23 *Clean Technologies and Environmental Policy*, pp. 1–13.

² S. Marsden & E. Brandon, *Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Agreements* (Edward Elgar, 2015); S. Marsden, *Environmental Regimes in Asian Subregions: China and the Third Pole* (Edward Elgar, 2017).