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Book Review: Environmental Law for Sustainability: A Reader, by Heather McLeod-Kilmurray (ed)

ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER,
EDITED BY BENJAMIN J. RICHARDSON & STEPAN WOOD
(OXFORD: HART PUBLISHING, 2006) 443 pages.¹

HEATHER MCLEOD-KILMURRAY²

The fact that the Osgoode Readers Series chose *Environmental Law for Sustainability* as the subject matter of its inaugural volume suggests that it is too soon to declare environmentalism dead.³ To the contrary, the contributors to this book suggest that concern about the environment, and the sub-field of law devoted to it, is undergoing profound and significant change. Indeed, the topic seems ideal to launch this series, since the Osgoode Readers claim to be “distinguished by ... dealing not only with traditional legal concerns but also with newer challenges posed by changes in social, ethical, economic and political environments.”⁴ Environmental sustainability involves changes in all of these dimensions simultaneously.

The Osgoode Readers Series chose two of its own, Professors Benjamin Richardson and Stepan Wood, both leading experts in environmental law at Osgoode Hall Law School, to direct this work. Having identified the major areas to be addressed in a book on environmental law for sustainability, Richardson and Wood, in keeping with a declared hallmark of the series, commissioned new works from leading scholars in these areas who, in turn, elaborated on their existing writing. The result is a very broad, deep, comparative, and current survey of the many facets of law and sustainability, with each author able to summarize and push forward an established and significant research agenda.

¹ [*Environmental Law for Sustainability*].

² Assistant Professor of Law, University of Ottawa.

³ Michael Shellenberger & Ted Nordhaus, “The Death of Environmentalism: Global Warming Politics in a Post-Environmental World” (2004), online: The Breakthrough Institute <http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf>.

⁴ Richardson & Wood, *supra* note 1 at inside cover.

The collection has many strengths. The first is the comprehensive introductory chapter by the editors themselves. This chapter is ideal for students of all levels, as well as new and experienced scholars in the field. In a remarkable feat, the overview of the history and evolution of environmental law is brief yet comprehensive and brings the reader up to date on current challenges and innovations. Since the tome feels, in many ways, more like a book than a collection, I was left wishing for a similar concluding chapter to round things off.

Another strength of the book is the continuity of tone and style across the very disparate topics and authors. This is seen in the structure of most chapters, which begin with clear definitional sections. Many chapters also have a strong list-like quality, with important points and their sub-issues clearly numbered. This may be due to the fact that the two editors co-authored many of the chapters with the invited specialists. It may also be a nod to the intended audience of the Osgoode Readers, which are "primarily aimed at upper-year LL.B. and J.D., as well as graduate law, courses as either companion volumes or core prescribed readings," as well as established scholars and new researchers.⁵

However, that may also be one of the greater challenges presented by the collection: it is not clear precisely which audience it is best suited to. There are some chapters which seem to be intended more as introductory and summative expositions of an area of environmental law, which would be ideal for students in their first environmental law class but might leave experienced scholars wanting more. Other chapters are clearly intended as deep and advanced critical essays with considerable prescriptive and agenda-pushing content. These chapters are very satisfying and helpful for those who are well versed in the topic but may require considerable prior reading for the newcomer. While this might make the book somewhat of a challenge to use as the main text in either an introductory or graduate course in environmental law, the reader has clearly achieved its purpose of offering something for everybody, from the second-year student to the advanced scholar.

After the thorough overview chapter, the text is divided into four parts, each containing three chapters. Part one, entitled "Environmental Regulation and Administration," contains chapters on institutions and

⁵ *Ibid.*

policies,⁶ command and control approaches,⁷ and risk.⁸ Part two deals with “Ethical and Human Rights Dimensions,” including ethics,⁹ public participation,¹⁰ and the intersection between indigenous people and environmental law.¹¹ Part three addresses “Economic and Business Dimensions,” including chapters on voluntary codes,¹² other economic instruments,¹³ and the even more recent concern with sustainability and financial institutions.¹⁴ Part four covers “International and Comparative Perspectives,” including a chapter on international environmental law,¹⁵ the environmental effects of trade law,¹⁶ and the sustainability challenges that post-colonial societies face.¹⁷ As would be expected, some parts form a more cohesive group than others.

Although there are subjects that are not addressed, anyone who has attempted to craft an environmental law syllabus knows of the impossibility of being comprehensive when addressing this vast and disparate subject. For example, the editors themselves point out that the book “touches only briefly on property law instruments ... informational

⁶ Stephen Dovers & Robin Connor, “Institutions and Policy Change for Sustainability” in *Environmental Law for Sustainability*, *supra* note 1, 21 [Dovers & Connor, “Institutions”].

⁷ Carolyn Abbot, “Environmental Command Regulation” in Richardson & Wood, *supra* note 1, 61.

⁸ Elizabeth Fisher, “Risk and Environmental Law: A Beginner’s Guide” in Richardson & Wood, *supra* note 1, 97.

⁹ Klaus Bosselmann, “Ecological Justice and Law” in Richardson & Wood, *supra* note 1, 129 [Bosselmann, “Ecological Justice”].

¹⁰ Benjamin J. Richardson & Jona Razzaque, “Public Participation in Environmental Decision-making” in Richardson & Wood, *supra* note 1, 165.

¹¹ Benjamin J. Richardson & Donna Craig, “Indigenous Peoples, Law and the Environment” in Richardson & Wood, *supra* note 1, 195.

¹² Stepan Wood, “Voluntary Environmental Codes and Sustainability” in Richardson & Wood, *supra* note 1, 229 [Wood, “Voluntary Environmental Codes”].

¹³ David Driesen, “Economic Instruments for Sustainable Development” in Richardson & Wood, *supra* note 1, 277.

¹⁴ Benjamin J. Richardson, “Sustainable Finance: Environmental Law and Financial Institutions” in Richardson & Wood, *supra* note 1, 309.

¹⁵ Jaye Ellis & Stepan Wood, “International Environmental Law” in Richardson & Wood, *supra* note 1, 343.

¹⁶ Oren Perez, “International Trade Law and the Environment” in Richardson & Wood, *supra* note 1, 381.

¹⁷ Benjamin J. Richardson, Ikechi Mgbeoji & Francis Botchway, “Environmental Law in Post-colonial Societies: Aspirations, Achievements and Limitations” in Richardson & Wood, *supra* note 1, 413 [Richardson, Mgbeoji & Botchway, “Environmental Law in Post-colonial Societies”].

policy mechanisms ... nature conservation legislation or integrated pollution control.”¹⁸ However, the diversity and range of topics that are tackled is impressive.

Through these diverse sub-issues runs the common goal of the work: to investigate and/or prescribe the changes that must be made to traditional approaches to environmental law and institutions as a result of the new framework of sustainability. In attempting this, one of the book's strengths is its careful definitions, which allow the contributors to challenge presumptions and perceptions that either were inaccurate to begin with or are no longer true given the new challenges presented by sustainability. Part one on “Regulation and Administration” is a good example of this. Dovers and Connor emphasize that “command and control” has always been something of a misnomer and could be more accurately described as “command and compromise.”¹⁹ These authors, like several of the other contributors, take pains to define sustainability. They highlight that “sustainability problems are different in kind from many problems in other policy domains,”²⁰ and claim that “the sustainability idea” results

from the convergence of three concerns, each with its own values, problem definition and language – ecological integrity, economic efficiency, and social justice ... One precondition for institutional change for sustainable development is therefore the provision of a discursive space where these concerns can be brought together.²¹

Having challenged presumptions and defined terms, they then put meat on the bones by applying their analysis to five case studies to show how policies and institutions have been changed in various jurisdictions when dealing with a particular problem of sustainability. The case studies are compared under the structure of seven principles “to inform policy and institutional change.” The result is a chapter that is both theoretical and practical, with universal prescriptions as well as concrete comparative examples. The structure of most chapters is

¹⁸ Benjamin J. Richardson & Stepan Wood, “Environmental Law for Sustainability” in Richardson & Wood, *supra* note 1, 1 at 17 [Richardson & Wood, “Sustainability”].

¹⁹ Dovers & Connor, “Institutions” in Richardson & Wood, *supra* note 1 at 22. Wood in part three similarly points out that so-called “voluntary” measures are often commanded or at least strongly encouraged by mandatory rules. See Wood, “Voluntary Environmental Codes” in Richardson & Wood, *supra* note 1 at 248-49.

²⁰ Dovers & Connor, “Institutions,” *ibid.* at 35.

²¹ *Ibid.* at 41.

similar, as most define, or redefine, terms and most also contain a section applying their arguments to a range of specific examples, often in a way that includes interjurisdictional comparisons.

The other two chapters in part one are also interesting. The chapter by Abbot is very thorough and clear in its historical overview and assessment of command and control approaches. Although its more expository tone suggests it may have been better placed as the introductory chapter of part one, it is ideal for newer students or those who are trying to review where we have been and where we are going. Again, a vast range of examples adds to the utility of this essay.

By contrast, the chapter by Elizabeth Fisher is one of the most challenging and prescriptive of the works in this book, despite the fact that Fisher has entitled the essay "Risk and Environmental Law: A Beginner's Guide." Drawing on her extensive writing in the area of risk, Fisher presents us with a strongly argued perspective that the concept of risk is "deployed" like a weapon.²² Fisher makes a very strong case that risk assessment and management, and the politics of the precautionary principle versus precautionary approach that recently played out at the World Trade Organization (WTO) (among other fora), is a very political and socially constructed debate. Fisher's goal is to shred any remains of the notion that risk and science are objective and neutral, so that we can get past this thinking and open the door to a wider range of perspectives and potential options for resolving our risk-management problems. Fisher's prescriptions are bolstered by a clear case study, and this thought-provoking and illuminating chapter is very useful.

Although the chapters in part two on social and human rights dimensions of sustainability have many strengths, the same diversity in terms of audience and purposes found in part one is also found here. Part two clearly succeeds in the important endeavour of demonstrating that "sustainability is just as much about social justice and protection of cultural diversity as it is concerned with plants, animals and ecosystems."²³ In my view, the most thought-provoking piece is Klaus Bosselmann's chapter on "Ecological Justice and Law."²⁴ This chapter is an ethics chapter with a twist—Bosselmann succeeds not only in briefly

²² Fisher, "Risk and Environmental Law" in Richardson & Wood, *supra* note 1.

²³ Richardson & Wood, "Sustainability" in Richardson & Wood, *supra* note 1 at 18.

²⁴ Bosselmann, "Ecological Justice" in Richardson & Wood, *supra* note 1.

but thoroughly justifying the importance of environmental ethics to law, he also incorporates political theory. This chapter provides a very strong argument that sustainability requires a new definition of justice. The author provides a compelling prescription for what this new definition should contain. According to Bosselmann, sustainability law should be based on intergenerational equity, intragenerational equity, and interspecies justice. While the first two principles are more well known—intergenerational equity refers to the more commonly phrased “concern for future generations” and intragenerational equity refers to the more common term “environmental justice”—the third principle pushes the link between environmental ethics and law forward by including the tool of intraspecies equity for operationalizing ecocentric ethics in law. Bosselmann bolsters his argument by pointing to existing examples of legislation and treaties that incorporate his vision of ecological justice. Thus, his argument that “environmental law should be informed by ecological justice, in much the same way as law in general is informed by justice,” seems more of a practical possibility than merely a theoretical perspective.²⁵

Part three keeps in line with current trends to emphasize the importance of economic approaches, including the emerging area of financial services as tools of sustainability. However, each of the three chapters in this part takes a very critical approach to presumed benefits and underlying assumptions in relation to economic instruments and voluntary measures; each makes valuable contributions to the literature on this level. In particular, seeing all of these issues dealt with in a cohesive manner sheds light on the differences and similarities between alternative approaches to achieving sustainability.

The final part of the book deals with international law: evaluating the history and current role of international law, trade and environment issues, and the experiences of developing countries. Jaye Ellis and Stepan Wood, in a remarkably concise chapter, provide the broad strokes of the basic concepts, historical background, and underpinnings and evolution of international law in relation to the environment. Yet the chapter is strongly analytical. The essay is general, focusing on big principles, but is also very specific, in clarifying and challenging traditional understandings of key cases and principles. This

²⁵ *Ibid.* at 163.

is one chapter that seems equally useful to the beginner and the advanced scholar.

Looking at the other chapters in the final part, Oren Perez's chapter on trade and the environment is strong, complex, and very specific in its prescriptions, particularly in its linkages between theory and practice, although this chapter may be another for the more advanced reader. The final chapter by Richardson, Mgbeoji, and Botchway on developing countries is crucial to any text on sustainability given the central role of the conflict between developed and developing nations on the issue of sustainable development. This chapter is especially helpful in including not only the least developed areas, such as African nations, but also the less frequently discussed rapidly industrializing economies. Mirroring the strengths of the other chapters, this chapter also employs case studies and specific comparative examples to highlight its main points.

The Osgoode Readers Series claims to offer interdisciplinarity, and perhaps this is one place where the first volume comes up somewhat short. Of the fourteen contributors, including both editors, all but two are law professors.²⁶ Insights from scholars in economics, politics, philosophy, and health and science on the role and record of law for sustainability would perhaps have added diversity of perspective, although this might have brought the risk of reduced consistency and harmony in the collection.

In addition, as a text edited in Canada and one that seeks to be "alert to comparative-law insights,"²⁷ it is regrettable that it does not contain any contributors from Quebec, any comparisons drawn between Canadian common and civil law approaches to the environment, or some of the innovations in environmental law in Quebec such as the different approach to class actions²⁸ and the provincial right to a clean

²⁶ Robin Connor is a senior policy analyst at the Ministry of Fisheries in Wellington, and Stephen Dovers is a professor at the Centre for Resource and Environmental Studies at the Australian National University.

²⁷ Richardson & Wood, *supra* note 1 at inside cover.

²⁸ André Durocher, "Le recours collectif et le droit de l'environnement" (February 2002), online: Fasken Martineau DuMoulin LLP <[http://www.faskenmartineau.com/web/fmdwebsite.nsf/AllDoc/39E58F7927944CEA85256C4E00647779/\\$File/COLLECTIFCOUVERTURE2.PDF!OpenElement](http://www.faskenmartineau.com/web/fmdwebsite.nsf/AllDoc/39E58F7927944CEA85256C4E00647779/$File/COLLECTIFCOUVERTURE2.PDF!OpenElement)>.

environment.²⁹ As a series purporting to be “relevant across legal jurisdictions,” also notably absent are Islamic and socialist legal approaches to the environment. Apart from these gaps, however, the book thoroughly achieves its comparative law goals in other ways. The contributors work in a range of jurisdictions, including Canada (Richardson, Wood, Ellis, and Mgbeoji), New Zealand (Bosselmann and Connor), Australia (Craig and Dovers), England (Botchway, Fisher, and Razzaque), Israel (Perez), and the United States (Driesen). The work as a whole is richly comparative, as are most chapters within themselves. Some examples include the chapter by Dovers and Connor, which emphasizes innovations undertaken by the European Union, and the essay by Richardson, Mgbeoji, and Botchway, which, as noted above, using illuminating examples, provides detailed distinctions between the sustainability and development issues in sub-Saharan African nations and the rapidly industrializing states in Asia.

Overall, the book is remarkable for achieving coherence and unity in a work of such diversity and complexity. If *Environmental Law for Sustainability* was the only environmental law book a newcomer to the area had read, he or she would come away with considerable historic and general knowledge, as well as deep and insightful critiques on detailed and complex questions that are at the forefront of current issues facing law and sustainability. The book makes even greater contributions in its many specific and timely prescriptions for improvements to sustainability law. Richardson, Wood, and the many contributors to this work have provided a unique and very useful tool, not only for students taking their first steps on the path of sustainability law, but for well-seasoned travellers as well.

²⁹ *Environmental Quality Act*, L.R.Q., c. Q-2, s. 19.1: “Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act.”