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Book Review, David R. Boyd, The Right to a Healthy Environment, Revitalizing Canada's Constitution

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As implied above, the authors of this volume conceive of a greater role for literature and literary criticism in the human rights enterprise. In practice, the content of this book offers more on the forms and genres of writing rather than ethical content or social outcomes. Discussions about empathy, for example, focus on definitions, literary insights, and societal impact rather than a rights analysis. Wendy Kozol in her chapter, "Complicities of Witnessing in Joe Sacco's *Palestine*," for example, develops a critique of a news reporter's coverage on the basis of its conforming to the western rescue narrative that structures such forms of witnessing. In particular, she notes the reporter's obsession with getting the story rather than showing empathy to the interviewees for their suffering. This and other analyses in the volume show how literature can and does identify, convey, construct and, attribute meaning to literally everything that both occupies human minds and defines our physical lives and relationships. In other words, the realized and potential scope and concerns of literature are vast. Human rights is just a small part of that universe, but nonetheless subject to social construction by society and individual authors in particular. The core human rights regime is concerned more specific content and remedies, namely the group of norms, institutions and practices that have acquired some degree of universal acceptance by the world community.

In the end, the volume shows that literature and the modern human rights movement share many common roots that go back deeper than the current literary community associated with the *Bildungsroman* in the West and western-inspired literatures. The predominance of literary form rather than ethical analysis

in the book's examination of Western literature reappears in the epilogue where the editors quote successively two authors: J.M. Coetzee, calling human dignity a fiction that may be indispensable for a just society; and James Dawes, suggesting that human rights work is, at its heart, a matter of storytelling. Is that all they are? Missing in the book are attempts to identify and analyze core human rights concepts such as social justice, discrimination, and equality. The editors touch on this problem of theorizing and practice in their final words of the epilogue. There they urge accepting "the responsibility of theorizing not only our own pain but also the pain of others, not only the actions of others but also our own complicities."⁴ There is much to debate and build on in this volume.

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David R. Boyd, *The Right to a Healthy Environment, Revitalizing Canada's Constitution* (UBC Press, W. Wesley Pue general ed., 2012) 336 Pages, ISBN: 978-0-7748-2412-5

I. INTRODUCTION

David R. Boyd wears many hats: as one of Canada's leading environmental lawyers; as an adjunct professor at Simon Fraser University; as an environmental policy adviser to the Canadian and Swedish governments; and as an international expert

4. *Id.* at 263.

on human rights and the environment, assisting countries from Iceland to Tunisia in securing constitutional protection for the right to a healthy environment.

His book, *The Right to a Healthy Environment, Revitalizing Canada's Constitution*,¹ is a follow-up to his last book, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*,² which was favorably reviewed in a previous issue.³ In that book, Boyd provided a comprehensive overview of nations that have incorporated the right to a healthy environment in their constitutions, and demonstrated that constitutional provisions guaranteeing the right to a healthy environment have measurable, positive effects on the environment in many different nations.⁴

Because *The Environmental Rights Revolution* concluded that almost all nations—except two outliers, Belgium and Denmark—are better off if they adopt a constitutional right to a healthy environment,⁵ Boyd's new book, *The Right to a Healthy Environment*, attempts to prove that Canadians would benefit if they amended their constitution to recognize the right to a healthy environment.⁶ Throughout this work, he emphasizes the general benefits of recognizing environmental rights as human rights and the

positive impact recognizing these rights in the Canadian constitution would have on the lives of Canadian citizens. He examines the gradual domestic emergence of environmental rights both in Canadian law and from a global perspective. By including both viewpoints, Boyd attempts to identify the complexities and intricate questions that arise regarding various environmental issues both at local and global levels. He asserts that the environmental rights of today will affect future generations and encourages Canadians to think of what they will be passing on to their children.

II. CHAPTER ANALYSIS

In the first chapter, "Canada Needs Environmental Constitutional Rights," Boyd proposes five compelling reasons why the constitutional recognition of the right to a healthy environment is imperative for Canada's future well-being:

1. Environmental protection has evolved into a fundamental value held by the overwhelming majority of Canadians.
2. There is a pressing need to improve Canada's poor environmental performance and preserve the country's magnificent landscapes, natural wealth, and biodiversity.

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1. DAVID R. BOYD, *THE RIGHT TO A HEALTHY ENVIRONMENT, REVITALIZING CANADA'S CONSTITUTION* (W. Wesley Pue general ed., 2012).
 2. DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (W. Wesley Pue general ed., 2012).
 3. Bradford C. Mank & Suzanne Smith, *David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012), 35 *HUM. RTS. Q.* 1021 (2013) (book review).
 4. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION*, *supra* note 2, at 16–19.
 5. Through his analysis, Boyd acknowledges two outliers: Belgium and Denmark. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION*, *supra* note 2, at 274. Denmark's constitution does not have an environmental protection provision, but it is highly ranked for its protection of the environment. *Id.* In contrast, Belgium's constitution does recognize the right to a healthy environment, but it does not have a strong environmental record. *Id.* at 274–76.
 6. BOYD, *THE RIGHT TO A HEALTHY ENVIRONMENT*, *supra* note 1, at 3–4.

3. It is imperative to protect Canada's health from environmental hazards like air pollution, contaminated food and water, and toxic chemicals.
4. Uncertainty regarding the responsibility of all levels of government for environmental protection has undermined efforts to make Canada more sustainable and needs to be clarified.
5. Environmental rights and responsibilities are fundamental elements of indigenous law, and acknowledging them would take an important step toward reconciliation with Aboriginal people.⁷

In Chapter Two, "The Pros and Cons of the Right to a Healthy Environment," Boyd examines and analyzes the benefits of embedding the right to a healthy environment in Canada's constitution. Some of the benefits he identifies are: (1) providing a stimulus for stronger environmental laws; (2) bolstering the implementation and enforcement of existing environmental laws; (3) offering a safety net to fill gaps in environmental legislation; (4) protecting environmental laws and regulations from rollbacks under future governments; (5) promoting democracy through greater citizen participation in environmental decisions through procedural rights including access to information, participation through public meetings or electronic commenting, and access to judicial review; (6) increasing the accountability of government officials through the previously mentioned procedural rights for citizen participation; (7) ensuring a level economic and social playing field; (8) fostering environmental rights for all citizens and especially vulnerable popu-

lations; and (9) promoting environmental education.⁸

Next, he examines the various arguments against environmental rights in Canada, including the criticisms that such rights are (1) too vague to be meaningful; (2) that they pose a threat to the economy in Canada, especially natural resources activities; (3) such rights are redundant in light of existing laws; (4) that such rights are undemocratic by transferring power from elected legislatures to unelected judges; (5) that such rights are non-justiciable because courts are ill-suited to address complex polycentric disputes; (6) that such rights unduly focus on individuals at the expense of the broader public interest; (7) that such rights are likely to open the floodgates for litigation; (8) that environmental rights disputes will dilute more fundamental human rights; (9) that the right to a healthy environment is anthropocentric by focusing excessively on human health at the expense of broader rights for nature; and (10) that such rights are likely to be ineffective.⁹ While acknowledging that some of these criticisms are plausible to a degree in theory, Boyd uses a variety of Canadian and international examples to show that these criticisms are either exaggerated or false.¹⁰

In Chapter Three, "The History of Environmental Rights in Canada," Boyd evaluates the history of efforts and proposals to include environmental rights and responsibilities in Canada's constitution at the local, provincial or territorial, and national levels of government.¹¹ He acknowledges "modest successes in securing legislative recognition of the right

7. *Id.* at 4–17.

8. *Id.* at 18–24.

9. *Id.* at 24–35.

10. *Id.* at 24–36.

11. *Id.* at 37–66.

to a healthy environment at the provincial and territorial level," but he argues that such limited successes pale in comparison to the potential impact of amending the Canadian constitution to include environmental rights.¹² Beginning in 2009, the Canadian Parliament considered Bill C-469—the Canadian Environmental Bill of Rights, which would have guaranteed "the right of present and future generations of Canadians to a safe and ecologically balanced environment"—but the bill died when Parliament was dissolved for new elections in May 2011.¹³ Boyd recognizes that the Environmental Bill of Rights was limited because it applied primarily to federal decisions and lands; however, he believes that passage of the Bill of Rights would have been a step toward both constitutional environmental rights and the enactment of similar laws at the provincial or territorial level.¹⁴ He concludes this chapter by criticizing Canadian prime ministers and political leaders for failing for more than forty years to support various proposals for environmental constitutional rights and thereby reducing Canada to an international environmental laggard compared to the majority of nations that have adopted such constitutional rights.¹⁵

In Chapter Four, "Green Constitutions in Other Countries," Boyd explains the broad movement in numerous countries beginning in the 1970s to adopt the right to a healthy environment or similar rights in their constitutions.¹⁶ As of 2012, 147

out of 193 national constitutions include environmental rights and/or responsibilities.¹⁷ Boyd concludes Chapter Four by stating that the recognition of environmental constitutional rights is part of "a rapid and worldwide evolution of human values," but he laments that Canada has not joined this evolution.¹⁸ Readers looking for a fuller discussion of the international trend toward environmental constitutional rights should examine Boyd's previous book, *The Environmental Rights Revolution*.

In Chapter Five, "Lessons Learned: Implementing Environmental Rights and Responsibility," Boyd addresses whether the adoption of a constitutional right to a healthy environment in Canada would "actually enhance Canada's environmental record and improve people's lives."¹⁹ Summarizing data that is discussed in more detail in *The Environmental Rights Revolution*, Boyd examines environmental performance data in mostly wealthy and industrialized Organisation for Economic Co-operation and Development (OECD) nations in a number of areas, including air quality; water quality; natural resources management; adherence to international conventions and treaties on various issues including climate change, biodiversity, and regulation of toxic chemicals; and the overall national ecological footprint to demonstrate that nations adopting a constitutional right to a healthy environment have improved environmental performance records com-

12. *Id.* at 55.

13. *Id.* at 59–61.

14. *Id.* at 60–61.

15. *Id.* at 66.

16. *Id.* at 67–89.

17. *Id.* at 68–71 (listing the years in which various nations first adopted constitutional environmental rights), 88–89 (summarizing the types of environmental rights adopted in various nations).

18. *Id.* at 88–89.

19. *Id.* at 90; see generally *id.* at 91–121.

pared to economically similar nations that do not.²⁰ In particular, three important common law nations without such constitutional rights fare poorly: Australia, Canada, and the United States.²¹

In Chapter Six, "International Law and Environmental Rights," Boyd "examines the evolution of international recognition of the right to a healthy environment, Canada's flip-flop from proponent to opponent of the right, and the implications for Canada of developments in the field of international law."²² Boyd argues that international law increasingly recognizes the right to a healthy environment, even if these rights are still unenforceable, and that Canadian courts should at least consider international law supporting this right when they have discretion to interpret an ambiguous Canadian statute because they consider international law in many other areas.²³ Boyd examines the state of international environmental rights law in various conventions and treaties, customary international law, and general principles of international law.²⁴ He contends that each of these sources of international law can establish legal obligations that bind Canada, especially where Canada has signed a treaty, convention, or declaration.²⁵ Boyd asserts that the right to a healthy environment has been increasingly recognized under international law growing from several

United Nations human rights conventions protecting the right to life or health and various regional human rights agreements that directly or indirectly protect the environment through protections for life, health, families, or indigenous natural resources.²⁶ For example, Boyd argues that the right to a healthy environment is implicit in the International Covenant on Economic, Social and Cultural Rights, which in Article 12(2)(b) requires "improvement of all aspects of environmental and industrial hygiene."²⁷ Canada is a party to the Convention, although Canada has not signed a new Optional Protocol for enforcing rights in the Convention.²⁸ He concludes Chapter Six by predicting that the increasing recognition of a right to a healthy environment in many nations and several regional treaties will pressure the Canadian national government and provincial/territorial governments to recognize and respect the right to a healthy environment in their constitutional documents.²⁹

In Chapter Seven, entitled "What Difference Would the Right to a Healthy Environment Make in Canada," Boyd criticizes the Canadian Government for its claim that its existing laws and policies are adequate to guarantee a healthy environment for its citizens.³⁰ Boyd argues that the evidence in Canada is otherwise, with an "appalling environmental record"

20. *Id.* at 107–21.

21. *Id.* at 111, 113 (OECD environmental ranking of thirty OECD nations ranks Australia tied for twenty-fifth, Canada as twenty-eighth and the United States as thirtieth and last). (Conference Board of Canada's environmental rankings of seventeen wealthy industrialized OECD nations ranks Canada fifteenth, Australia sixteenth, and the United States as seventeenth, and last.)

22. *Id.* at 122.

23. *Id.* at 122–23, 141–45.

24. *Id.* at 123–45.

25. *Id.*

26. *Id.*

27. *Id.* at 125–27.

28. *Id.* at 126–27.

29. *Id.* at 141–45.

30. *Id.* at 146.

and “extensive adverse health effects” documented in Chapter One.³¹ Boyd asserts that while recognizing the right to a healthy environment is not a solution to all of Canada’s environmental problems, it is a key authoritative tool that can be utilized to close the gap between constitutional goals and current environmental problems.³² He examines other countries that have included the right to a healthy environment in their constitutions and provides examples of a series of improvements the right has brought to those countries and their citizens.³³ Readers interested in more details about the successes of other countries that have adopted constitutional environmental rights should consult *The Environmental Rights Revolution*.

In Chapter Eight, “Pathways for Greening Canada’s Constitution,” Boyd argues that a country’s constitution is composed of four elements: (1) the formal written constitution, including direct amendments; (2) laws that do not alter the formal constitution but create or change major government institutions; (3) political practices that evolve into constitutional conventions; and (4) judicial decisions interpreting the formal constitution and clarifying the principles underlying the constitutional system as a whole.³⁴ Next, Boyd proposes three ways—one legislative and two judicial—that Canada could employ to amend its constitution to include the right to a

healthy environment.³⁵ First, supporters of a right to a healthy environment could convince sympathetic political leaders to introduce a direct constitutional amendment through the political process, which would require the support of federal and provincial legislatures.³⁶ Second, supporters of a right to a healthy environment could file litigation seeking a court decision recognizing that the right to a healthy environment is implicit in an existing constitutional provision.³⁷ Third, supporters could convince either the national government in Ottawa or a provincial/territorial government to ask the courts whether Canada’s constitution already includes an implicit right to a healthy environment.³⁸ Boyd examines each of these three options in considerable detail; a reader with training in Canadian law would have an advantage in understanding some of his arguments about the best options for amending the Canadian Constitution or pursuing litigation arguing that the Constitution already implicitly recognizes such rights.³⁹ Boyd concludes this chapter by identifying the advantages and disadvantages of his proposals.⁴⁰ He warns that his proposals are neither mutually exclusive, nor do they guarantee successful results.⁴¹ For instance, the advantage of using litigation is that it could obtain a court ruling that the right to a healthy environment is implicitly included, for instance, in Section 7 of the Canadian Charter of

31. *Id.*

32. *Id.* at 146–47, 169.

33. *Id.* at 146–69.

34. *Id.* at 170–71.

35. *Id.* at 171.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 171–88.

40. *Id.* at 189.

41. *Id.*

Rights and Freedoms, which guarantees the right to life, liberty, and security of a person.⁴² Conversely, litigation is financially burdensome, time consuming, and filled with uncertainty.⁴³

In Chapter Nine, entitled "Prospects for Change," Boyd discusses the prospects for achieving constitutional reform in Canada.⁴⁴ According to Boyd, a national poll conducted in 2011 showed that over 60 percent of Canadians supported amending the constitution.⁴⁵ Further, he asserts that a 2010 poll suggested that 96 percent of Canadians believe the right to clean water should be guaranteed as a human right for all citizens.⁴⁶ Boyd contends that the long-term solution for Canada to improve its environment is to amend its constitution to incorporate the right to a healthy environment.⁴⁷ He recognizes an alternative approach, a judicial recognition that the right is implicit in the constitution, but cautions that this approach will be more difficult and require an even longer process.⁴⁸ Boyd capably addresses the fears of some environmental rights activists that amending the constitution would open a can of worms for constitutional amendments that could negatively impact Canada's environmental record.⁴⁹ He believes a strategic and sustained effort would help avoid the complications associated with other constitutional changes such as entrenching property rights or transferring

federal environmental responsibilities to provincial governments.⁵⁰

Boyd proposes amending Canada's constitutional documents, specifically the existing Section 7 of the Canadian Charter of Rights and Freedoms, by adding the following terms: "7.1 Everyone has a right to live in a healthy and ecologically balanced environment, including clean air, safe water, fertile soil, nutritious food, and vibrant biodiversity."⁵¹

Additionally, he proposes a second option of a more comprehensive approach, involving amendments to Sections 16–23 of the Canadian Charter, using France's Charter for the Environment as an example.⁵² The French Charter for the Environment not only recognizes a right to a healthy environment, but also the precautionary principle, policies promoting sustainable development and the public's right to information.⁵³ Furthermore, Boyd proposes a draft Canadian Charter for Environmental Rights and Responsibilities to be incorporated into the existing Charter of Rights and Freedoms or another constitutional document.⁵⁴ Boyd believes that the current French Charter and the draft Canadian Charter of Environmental Rights and Responsibilities provide useful models for both substantive and procedural environmental rights and responsibilities necessary for an effective right to a healthy environment in Canada.⁵⁵ The Canadian draft Charter

42. *Id.* at 176–85, 189–90.

43. *Id.* at 189–90.

44. *Id.* at 191–201.

45. *Id.* at 191.

46. *Id.*

47. *Id.* at 191–201.

48. *Id.* at 192.

49. *Id.* at 193.

50. *Id.*

51. *Id.* at 197.

52. *Id.* at 195–97.

53. *Id.* at 195–96, 210–11.

54. *Id.* at 197–99.

55. *Id.* at 199.

of Environmental Rights and Responsibilities addresses complex questions of constitutional jurisdiction by clarifying that governments at all levels are trustees for environmental protection.⁵⁶ He concludes this chapter by arguing that Canada cannot become a sustainable nation with its existing laws and institutions and that only constitutional recognition of environmental rights will make Canada a better nation for the future.⁵⁷

III. CONCLUSION

Boyd's previous book, *The Environmental Rights Revolution*, convincingly demonstrated that countries that have adopted constitutional environmental rights generally have a better record than those that do not.⁵⁸ His new book, *The Right to a Healthy Environment*, shows that Canada has a relatively poor environmental performance record for a wealthy country that could afford to do better. Using comparisons from his prior book *The Environmental Rights Revolution*, Boyd makes a convincing argument that Canada would likely have a better environmental record for present and future generations if it adopted a right to a healthy environment in its constitutional documents because numerous other nations have made significant progress when they enacted constitutional environmental rights.

For the most part, Boyd's work avoids legalese and is accessible to the educated reader. Because Canada has both a national government and provincial/territorial governments, its governmental system is somewhat complex, but he attempts to clarify its workings for the novice student. In chapter Eight, Boyd necessarily wades

into some of the details of the Canadian constitutional amendment, constitutional litigation, and judicial reference processes. This chapter is still accessible, but a reader with a background in Canadian law would have an advantage in understanding the material.

Overall, this is a well-written book with an important message. Boyd is both a scholar and an advocate for environmental rights. He is obviously an advocate for constitutional environmental rights in Canada, but he does carefully respond to various criticisms of such rights. Boyd will undoubtedly only be satisfied with his work when he is able to convince the Canadian government, or at least some of its provincial/territorial governments, to adopt a right to a healthy environment in its constitutional documents or by judicial recognition of such a right among its existing constitutional rights.

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56. *Id.*

57. *Id.* at 201.

58. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION*, *supra* note 2; Mank & Smith, *supra* note 3.

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Jean Franco, *Cruel Modernity* (Duke University Press, 2013), 326 pages, ISBN 978-0-8223-5442-0.

Professor emeritus Jean Franco is considered to be among the most acclaimed and influential scholars writing about Latin America today. Her numerous books are not only original and inspirational, but have the extraordinary ability to forge new paths in the field. Her work is varied as well as prolific. Professor Franco has written about a variety of subjects including Peruvian Poet César Vallejo in her book *César Vallejo: The Dialectics of Poetry and Silence*, women in Colonial Mexico in *Plotting Women: Gender and Representation in Mexico*, and her collected essays *Critical Passions*, where the reader encounters her inquisitive mind as well as her extraordinary capacity for analytical thinking.

Since the early seventies, Professor Franco has been exploring the essential connections between literature, culture, and human rights. Her essays on the theme of the disappeared and her interest in marginalized communities and indigenous rights have also placed her at the center of important critical debates that examine the role of the scholar and the writer as advocates for human rights.

In her most recent book *Cruel Modernity*, Jean Franco is at her best. This is an impressive study representing varied themes, meditations, and interpretations on the nature of cruelty in Latin America. In addition, she covers the evils of state sponsored terrorism and the role artists, especially photographers and film makers play in denouncing the culture of

terror and cruelty that has defined Latin America since the turn of the century to the end of the era of military dictatorships in the nineties.

Even though this is a book that centers in the history of cruelty from the perspective of Latin America. It is also a very universal book that can be read as a metaphor for other places in the world. Franco recognizes that cruelty is inherently human, especially the cruelty we see toward women and children as well as the marginalized indigenous communities throughout the world.

This book is deeply impressive in its depth and scope. Franco has an extraordinary command of philosophy, history, and the social sciences, including the complex history of Latin America. At the same time, Franco has the strength to ask why such terror is possible, why the genocide of indigenous communities in Guatemala was allowed, and why nations have engaged in the perfection of cruelty and terror while the numbers of those that advocate for justice diminishes.

I was very impressed by each of the nine chapters included, especially by the poignancy of her vision. The chapters dedicated to the aggression of military governments in Haiti and the Dominican Republic is written with an extraordinary perception. It was also very moving to read the Chapter Eight of this book, "The Ghostly Arts," as Franco is able to depict the ways in which literature, photography, and film accurately represent the cruelty and atrocities experienced in Latin American countries. It is particularly interesting how Franco explores the works of visual artists such as videographer Catalina Parra and filmmaker Patricio Guzman. These artists are devoted to denouncing human rights violations of innocent citizens in Chile and Argentina in their work.

Franco also addresses the unsolved murders of Ciudad Juarez and the ways