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The Constitution of the Environmental Emergency, by Jocelyn Stacey

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Book Review

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Abstract

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Abstract
Jocelyn Stacey's *The Constitution of the Environmental Emergency* is a unique text in the area of environmental law. It argues for reframing environmental law from the premise that environmental issues confront lawmakers as emergencies that are impossible to reliably predict. Stacey relies on a constructive tension between two somewhat overlapping theories of legitimate government action: common law constitutionalism and deliberative democracy. When Stacey argues that environmental issues constitute emergencies, she shows how lawmakers are confronted with problems that entail "deep uncertainty where the possibility of a catastrophe cannot be reliably eliminated in advance." This approach allows her to draw on insights from scholarship on emergencies and the rule of law to reimagine the purpose and orientation of environmental law, namely the centrality of having government institutions publicly justify important decisions.

The Constitution of the Environmental Emergency is a unique text in the area of environmental law. The first book written by Jocelyn Stacey, Assistant Professor at the Peter A. Allard School of Law at the University of British Columbia, it argues for reframing environmental law from the premise that environmental issues confront lawmakers as emergencies that are impossible to reliably predict. The book is an elaboration of Stacey's doctoral studies at the McGill Faculty of Law and builds on arguments put forward in the Osgoode Hall Law Journal and the Review of Constitutional Studies.[3]

As hundreds of municipal and regional governments across Canada and the globe—mostly in common law jurisdictions—issue declarations of climate emergency,[4] critical scholarship on the ways in which environmental management and law challenge some of our fundamental assumptions about the rule of law is increasingly relevant. When Stacey argues that environmental issues constitute emergencies, she shows how lawmakers are confronted with problems that entail "deep uncertainty where the possibility of a catastrophe cannot be reliably eliminated in advance."[5] This approach allows her to draw on insights from scholarship on emergencies and the rule of law to reimagine the purpose and orientation of environmental law, namely the centrality of having government institutions publicly justify important decisions. Stacey anticipates the critique that environmental issues are not typically met with the overzealous state action that characterizes conventional emergencies, such as those found in counter-terrorism measures, by focusing on the nature of the fundamental challenge in law that these issues present and not the state response to them.[6]

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[1] (Hart Publishing, 2018) [Stacey, *Constitution of the Environmental Emergency*].
[2] JD Candidate 2020, Osgoode Hall Law School.
[3] Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52 Osgoode Hall LJ 985 [Stacey, "Legality of Discretion"]; Jocelyn Stacey, "The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy" (2016) 21 Rev Const Stud 165.
[4] "The Exponential Growth of Local Climate Emergency Declarations" (26 March 2019), online (blog): *The Climate Mobilization* <www.theclimatemobilization.org/blog/the-exponential-growth-of-local-climate-emergency-declarations> [perma.cc/CT3S-HGUD].
[5] Stacey, *Constitution of the Environmental Emergency*, *supra* note 1 at 1.
[6] *Ibid* at 6-7.

Stacey relies on a constructive tension between two somewhat overlapping theories of legitimate government action: common law constitutionalism and deliberative democracy. The former posits that "public officials must justify their decisions on the basis of core common law constitutional principles, such as reasonableness and fairness" and allows judicial intervention when they do not, while the latter emphasizes that "collective rule is legitimate when public decisions are justified by general, public-regarding reasons that those affected can reasonably accept."[7] The confluence of these two theories constitutes Stacey's public-justification theory of the rule of law, which she contrasts with the formal conception of the rule of law wherein distinct powers are separated between institutions of government.

This book is made up of two parts, with a total of eight chapters. In part one, entitled "The Environmental Emergency," the first chapter introduces the controversial Nazi legal theorist Carl Schmitt's challenge to find a system of law that can govern emergencies, and argues that the complexity and unpredictability of human interaction with the environment fulfill the constitutive features of emergencies. These constitutive features, as Stacey says, are "an inability to know in advance which issues contain the possibility of a catastrophe and an inability to know in advance what to do in response to such an unforeseen event."[8] The second chapter is a critique of the environmental reform position that dominates Canadian environmental law. Stacey characterizes the position as grounded in a formal conception of the rule of law whereby a façade of legality does not meaningfully constrain the exercise of administrative decisions and creates "legal black and grey holes" throughout environmental law. The third chapter turns its attention to environmental governance instead of law, wherein the complexity of environmental problems is addressed at the expense of attention to the rule of law, ignoring in particular the respect of individual participation in democratic systems of governance. These three chapters make up the bulk of Stacey's critique of the existing literature. Her approach avoids the more common contemporary debates such as provincial-federal responsibilities and the role of Indigenous rights[9] and instead focuses on the fundamental assumptions about where decision-making authority comes from.

Part two, entitled "Responding to the Environmental Emergency," begins with chapter four, which offers a rule of law theory that responds democratically to the environmental emergency idea from chapter one. Chapter four draws on Canadian administrative law jurisprudence requiring officials to publicly justify their exercises of authority based on common law principles such as fairness and reasonableness. Public justification through common law principles form the basis of legitimate governance that answers Schmitt's challenge to manage disasters through a system of law that both empowers and constrains public authority. The fifth chapter is the first of three chapters that use specific case studies of environmental governance challenges to outline the components of the public-justification rule of law theory. The chapter shows how the hybridity of the British Columbia Forest Practices Board has responded to a range of environmental challenges with creative institutional design that helps it justify its decisions to the public. The sixth chapter examines the institutional failure of the National Energy Board and its crisis of legitimacy arising from the fact that it operates within one of Stacey's "legal grey holes" under the formal conception of the rule of law described in chapter two. Stacey argues that the common law principles of reasonableness and fairness can be informed by key environmental

[7] *Ibid* at 3.
[8] *Ibid* at 9.
[9] See *e.g.* Stepan Wood, Georgia Tanner & Benjamin J Richardson, "What Ever Happened to Canadian Environmental Law?" (2010) 37 Ecology LQ 981.

principles—precaution and sustainable development—to re-imagine processes and decisions from the National Energy Board that are publicly justified on a democratic basis. The seventh chapter narrows in on the reasonableness principle in the complex and contested context of industrial wind turbine development in Ontario. The chapter explores the robust Ontario Environmental Review Tribunal jurisprudence on the potential harms that wind turbines pose to human and environmental health and argues that the Tribunal has implicitly operationalized the public-justification theory of the rule of law. Stacey suggests that the Tribunal would benefit from relying on public-justification theory more explicitly in order to resist the apparent "plain meaning" of its governance statute, "which threatens individual agency by purporting to preclude the operation of the precautionary principle."[10] In the final chapter, Stacey develops the public-justification conception of the rule of law to engage with David R. Boyd's leading academic proposal for a *Charter* right to a healthy environment.[11] She argues that Boyd has "failed to sufficiently attend to the practice and method of rights adjudication in Canada" within environmental claims made under section 7 of the *Charter*, offering the public-justification theory as a theoretically defensible and practically realizable foundation for adjudicating environmental rights.[12]

Stacey's book presents a detailed and compelling case for reconceptualizing environmental law as she envisions it. The book's normative vision is perhaps most compelling in its roadmap for rethinking the National Energy Board, an institution that has sustained several high-profile rebukes by the courts[13] and suffers from a crisis of legitimacy.[14] Whereas most scholarship on National Energy Board reform relies on reforming institutional practices or shifting its mandate and underlying government energy policy priorities, Stacey's argument provides a realistic roadmap for National Energy Board reform that could accommodate the various competing priorities of Canadian elected officials.[15] Stacey argues that the National Energy Board should publicly justify its decisions through the lenses of environmental law principles like sustainable development and the precautionary principle. She further argues that it should use a process that combines public deliberation and scientific expertise that "would provide the public with the information it needs to hold the ultimate decision maker democratically accountable."[16] In doing so, Stacey "elaborates a theory of environmental law that does not conclusively reject a series of major pipeline proposals that are nothing but bad news for the environment" and instead offers "a set of questions that the NEB must answer in order to comply with the rule of law."[17] This approach does not sidestep the various other pressing debates and challenges the National Energy Board and

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[10] Stacey, *Constitution of the Environmental Emergency*, *supra* note 1 at 11.
[11] See *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012).
[12] Stacey, *Constitution of the Environmental Emergency*, *supra* note 1 at 209.
[13] See Stacey, *Constitution of the Environmental Emergency*, *supra* note 1 at 139-42 (for a detailed discussion of the National Energy Board's pipeline problems). See also *Tsleil-Waututh Nation v Canada (AG)*, 2017 FCA 128.
[14] See Stacey, *Constitution of the Environmental Emergency*, *supra* note 1 at 148; Jonathan Montpetit, "National Energy Board fights to Restore Legitimacy at Quebec Hearings" (28 August 2016), online: *CBC News* <www.cbc.ca/news/canada/montreal/national-energy-board-montreal-hearings-analysis-1.3738888> [perma.cc/V7HC-SWL7].
[15] See *e.g.* Geoffrey H Salomons & George Hoberg, "Setting Boundaries of Participation in Environmental Impact Assessment" (2014) 45 Envtl Impact Assessment Rev 69; Karena Shaw et al, "Conflicted or Constructive? Exploring Community Responses to New Energy Developments in Canada" (2015) 8 Energy Research & Soc Science 41; Dwight Newman, "The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Resource Sector" (May 2014), online (pdf): *Macdonald-Laurier Institute* <www.macdonaldlaurier.ca/files/pdf/DutyToConsult-Final.pdf> [perma.cc/AP4K-MDGU].
[16] Stacey, *Constitution of the Environmental Emergency*, *supra* note 1 at 181.
[17] *Ibid* at 183.

environmental law in general face, rather, it provides a general principled framework that could reorient a debate that has seen few signs of resolution. Stacey's best examples of what this might look like in practice are from Canada's first environmental review of a pipeline and Ontario's reform efforts to protect drinking water sources after the Walkerton crisis. These examples bolster her opening argument that environmental issues are confronted as disasters.[18]

An early version of Stacey's argument about the environmental emergency was met with criticism by Bruce Pardy, who argued that giving unfettered control over environmental management to the executive under the guise of emergency powers is incompatible with the rule of law.[19] While not accurately representing Stacey's arguments, Pardy does put forward some important challenges to her thesis, namely that emergency powers in Canadian law are derived from the common law Crown prerogative and several federal statutes and that this executive power is reviewable by the courts. In her book, Stacey incorporates Pardy's critique and successfully uses it to strengthen her argument. She shows how the rationale by which courts review emergency powers is constitutive of the response to Schmitt's challenge to govern emergencies through law. However, that Stacey's base argument that environmental issues act like emergencies because they are complex and unpredictable would benefit from elaboration remains a pertinent critique. As Pardy notes:[20]

> If your mandate is to manage ecosystems and they cannot be managed, that will seem like an emergency. The nature of ecosystems is incompatible with the aspirations of those who wish to manage them, but it is not incompatible with the requirements of the rule of law. The management imperative does not arise from variability and unpredictability in ecosystems but from the culture of the administrative state, which exists to manage, facilitate, and control the attributes of modern civilization.

This critique also begs the question of why emergencies are framed as ongoing when Canada's most important emergency legislation treats emergencies as inherently temporary and does not allow for a perpetual state of emergency governance.[21] These challenges show that the book provokes discussion because it provides a controversial way of looking at environmental law problems. The fact that it leaves some questions unanswered is inevitable given its ambitious thesis, the risk Stacey has taken in putting forward a novel thesis should pay off by challenging conventional thought among environmental and administrative law scholars.

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[18] See *ibid* at 167.
[19] See Stacey, "Legality of Discretion," *supra* note 3; Bruce Pardy, "The Unbearable Licence of Being the Executive: A Response to Stacey's Permanent Environmental Emergency" (2015) 52 Osgoode Hall LJ 1029.
[20] Pardy, *supra* note 19 at 1036.
[21] *Emergencies Act,* RSC 1985, c 22 (4th Supp), s 3.