The Constitution of the Environmental Emergency

Jocelyn Stacey

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According to the controversial political theorist Carl Schmitt, in a state of emergency 'the state remains, whereas law recedes'.[1] Against a backdrop of overwhelming socio-ecological catastrophe, *The Constitution of the Environmental Emergency*, written by Canadian environmental and public law scholar Jocelyn Stacey, questions our understanding of the rule of law in times of crisis.

Instead of focusing on the implications of any particular environmental issue, as many scholars have done regarding catastrophic events such as the 9/11 attacks or the 2008 Global Financial Crisis, Stacey argues that all environmental issues present an *ongoing* emergency, similar to global hunger. She justifies this position by referring to complex adaptive theory (which emphasises that ecological processes fluctuate and change rapidly) and risk sociology (which emphasises that catastrophic risk, due to advances in science and technology, is always present in industrial society).[2] As a result, environmental issues contain what she describes as the two salient epistemic features of emergencies: the 'inability to know in advance which issues contain the possibility of catastrophe' and the 'inability to know in advance what to do in response to a catastrophe'.[3] This book is based on these premises.

Stacey's work responds to Carl Schmitt, who argued that in a state of emergency, the executive would not be constrained by legal norms.[4] Given the inability to predict the nature of an emergency and the appropriate response, the executive must be given broad powers to decide what constitutes an emergency and what to do when an emergency occurs. This necessarily means that the executive could act with unfettered discretion, not being subject to any meaningful rule of law constraints. As Stacey points out, Schmitt's theory appeared to offer an explanation for the extraordinary executive actions taken by the United States in the wake of the 9/11 attacks. However, due to the very nature of the emergency, Stacey

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[1] Carl Schmitt, *Political Theology*, tr George Schwab (Massachusetts Institute of Technology Press, 1985) 13.

[2] Crawford S Holling and Lance H Gunderson, 'Resilience and Adaptive Cycles' in Crawford S Holling and Lance H Gunderson (eds), *Panarchy: Understanding Transformations in Human and Natural Systems* (Island Press, 2002) 26; Ulrich Beck, *Risk Society: Towards a New Modernity*, tr Mark Ritter (Sage Publications, 1992) 21–2, 24 cited in Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Hart Publishing, 2018) 20, 22.

[3] Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Hart Publishing, 2018) 25–6.

[4] Carl Schmitt, *Political Theology,* tr George Schwab (Massachusetts Institute of Technology Press, 1985) 6, cited in Stacey (n 3) 18.

considers this discretion necessary. The purpose of this book, therefore, is to create a legal framework for combating the ongoing environmental emergency which is both effective and accountable.

According to Stacey, the key to overcoming Schmitt's challenge lies in what gives law authority. With detailed case studies and analysis, Stacey argues that by requiring public decision-makers to justify their decision with regard to the common law principles of reasonableness and fairness as well as sustainable development and the precautionary principle, individuals are framed as autonomous agents capable of rational thinking and participating in governance. In later chapters, Stacey applies this framework to Canadian case studies. She concludes with a discussion of a constitutional right to a healthy environment.

I note that Stacey's public justification theory and its emphasis on public participation is echoed in existing environmental governance standards, expressed in the Aarhus Convention and recognised in jurisdictions around the world.[5] In Australia, for example, the Freedom of Information regimes allow for public participation in environmental decision-making and mandate that decision-makers provide statements of reasons when requested. The public may also legally contest the denial of information as well as the denial of opportunities to participate.. This, however, does not mean that this book is any less relevant. Indeed, Australian environmental decision reviews have been criticised for the difficulties the public faces in obtaining standing and the inability of courts to assess the merits of certain types of decisions.[6] Stacey addresses both of these issues directly.

Stacey's rejection of existing environmental law reform positions, however, is unsatisfactory. Public decision-making must balance complex and often competing considerations. This reality is often demonstrated in environmental law by broad discretion that allows decision-makers to exercise their own judgement. Such broad discretion creates legal grey holes – where the legislature provides only minimal constraints on the decision-makers, effectively elevating decisions above the rule of law.

The current law reform position thus seeks to minimise discretion through imposing substantive criteria. This is also the position of many environmental scholars and lawyers in Australia.[7]

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[5] See Benjamin J Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing, 2006) 174.

[6] See Allan Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009) 259–60.

[7] See, eg, Jan McDonald and Phillipa McCormack, Submission No 162 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Australia's Faunal Extinction Crisis* (14 September 2018) 4.

I am surprised, therefore, to see Stacey rejecting the environmental reform position. She argues that due to the nature of the environmental emergency, it would be impossible to pre-emptively legislate what we ought to do in the face of uncertainty. Surely, in some situations, prescribing exactly what a decision-maker needs to do could prevent arbitrariness and provide favourable environmental outcomes. The Canadian case studies analysed by Stacey suggest that all environmental issues could bring about unforeseen and potentially catastrophic consequences. However, Stacey fails to reconcile this position with the precautionary principle that plays a big part in her book. Uncertainty in our knowledge of ecosystems should not discourage attempts to prevent environmental disasters. Rather, it means that we need to invest more in acquiring knowledge.

While Stacey focuses mainly on Canadian jurisprudence and case studies, I am convinced that her book is of great value to Australia. Not only are the sustainable development principle, precautionary principle, and the principles of fairness and reasonableness extremely relevant in Australian environmental law, the Canadian administrative regimes that Stacey has analysed also functions similarly to their Australian counterparts. Specialised judicial and quasi-judicial courts and tribunals tasked to review environmental decisions and disputes, similar to the Ontario Environmental Review Tribunal, exist in many jurisdictions around Australia.[8] It is, however, unfortunate that for a book that looks at *the* environmental emergency which evidently would require a more globalised response, it includes no discussion of international law.

Despite these criticisms, the *Constitution of the Environmental Emergency* is well structured with clear introductions, sub-headings, and closing conclusions in each chapter. With well-developed arguments supplemented by cases and legislation, this book provides refreshing perspectives on how governments should respond to environmental harm in a world where the survival of humankind seems to be overshadowed by rapid environmental degradation. It also makes a valuable contribution to constitutional law scholarship with its refreshing perspectives on the meaning of the rule of law and its implications.

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[8] Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26(3) *Journal of Environmental Law* 365, 366–67. See, eg, Land and Environment Court of New South Wales, Planning and Environment Court of Queensland, and the Resource Management and Planning Appeals Tribunal of Tasmania.

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