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## The Public Law Paradoxes of Climate Emergency Declarations

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# **The Public Law Paradoxes of Climate Emergency Declarations**

Jocelyn Stacey\*

## **Abstract**

Climate emergency declarations occupy a legally-ambiguous space between emergency measure and political rhetoric. Their uncertain status in public law provides a unique opportunity to illuminate latent assumptions about emergencies and how they are regulated in law. This article analyzes climate emergency declarations in Canada, the United Kingdom, Australia and New Zealand. It argues that these climate emergency declarations reflect back a set of paradoxes about how emergencies are governed in law—paradoxes about defining the emergency, its relationship to time and who gets to respond to the emergency and how. These paradoxes productively complicate long-held and over-simplified assumptions about emergencies contained in public law. They allow us to see the complex ways in which public law regulates emergencies—a necessity in a climate-disrupted world.

**Keywords:** Climate emergency, emergency powers, disaster law, public law, Commonwealth

## **Introduction**

‘We are in the midst of a climate emergency which poses a threat to our health, our planet and our children and grandchildren’s future,’ London Mayor Sadiq Khan told the Guardian upon declaring a climate emergency in the United Kingdom’s capital city.<sup>1</sup> Over 2,000 ‘climate emergency declarations’ have been issued by governments around the world governing a total of over one billion people.<sup>2</sup> These declarations are a specific step taken by governments to acknowledge the severity of global climate change and their own responsibility to act in response. They track the increasingly urgent projections of scientists, global waves of youth climate strikes, and repeated

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<sup>1</sup> Matthew Taylor, ‘London mayor unveils plan to tackle “Climate Emergency”’ (11 December 2018) <<https://www.theguardian.com/uk-news/2018/dec/11/london-mayor-sadiq-khan-city-climate-emergency>> last accessed 07 July 2021.

<sup>2</sup> International Climate Emergency Forum (ICEF), ‘Climate Emergency – Governments’ (13 Oct 2021) <<https://docs.google.com/spreadsheets/d/1tb-Lk1FWLujYnjmCSvCWRcLUJCCWAL27dKPzVcFq9CQ/edit#gid=0>> last accessed 13 Oct 2021.

experiences of extreme events amplified by climate change—catastrophic flooding, engulfing wildfires, deadly heatwaves around the world.

Framing climate change as an emergency is one of many ways of understanding this transnational, existential, and all-encompassing phenomenon. Researchers have investigated the strategic potential of various frames (such as economic and health) for advancing climate policy.<sup>3</sup> Legal scholars have focused on alternate frames that emerge through climate litigation.<sup>4</sup> Climate emergency declarations present a new framing and a new site for legal analysis. Climate emergency declarations seem to track the new reality of repeated, frequent extreme events, and thus might be seen as laudable, or at least banal instruments in how they recognize sound scientific evidence on climate impacts and require governments to take steps to fulfill commitments many have already made through strategic plans, legislation or international agreement. But declarations of emergency have always had an uncomfortable status in public law. Any attempt to invoke the language of declarations of emergency should be scrutinized carefully, especially by legal scholars, in light of the long history of emergencies undermining rule-of-law and human rights commitments.

As we will see, climate emergency declarations present a public law puzzle. They are not declarations of states of emergency—a conventional legal ‘tool’ employed by the state for responding to an extreme event such as a wildfire—but nor are they mere rhetoric. They have attracted scholarly attention, but not yet in law. In light of their ambiguous status, one temptation for public law scholars might be to dismiss these declarations as irrelevant or incoherent. But it is the transnational and legally-ambiguous nature of climate emergency declarations that creates a unique opportunity to interrogate common assumptions about emergencies and how they are regulated in law.

This article argues that climate emergency declarations can and should be used as a ‘spotlight,’ illuminating latent assumptions about emergencies held within public law scholarship. The disruption of emergencies can ‘bring to the surface otherwise implicit aspects of normal politics’<sup>5</sup> or highlight background systemic discrimination and oppression.<sup>6</sup> We will see that, when reviewed closely, these climate emergency declarations reflect back a set of paradoxes about how emergencies are governed in law. These paradoxes productively complicate long-held and over-

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<sup>3</sup> H.M. Osofsky and J. Peel; ‘Energy Partisanship’ (2016) 65 *Emory Law Journal* 695; H.W. Cann, ‘Policy or scientific messaging? Strategic framing in a case of subnational climate change conflict’ (2021) 38 *Review of Policy Research* 570.

<sup>4</sup> G. Nosek, ‘Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories’ (2018) 42 *William & Mary Environmental Law & Policy Review* 733; C. Hilson, ‘Framing Time in Climate Change Litigation’ (2018) 9 *Oñati Socio-legal Series* 361.

<sup>5</sup> D. Dyzenhaus, ‘Emergency, Liberalism and the State’ (2011) 9(1) *Perspectives on Politics*, pp. 69-78, at 69.

<sup>6</sup> B. Anderson, ‘Emergency Futures: Exception, urgency, interval, hope’ (2017) 65(3) *The Sociological Review*, pp. 463-477 at 464-465; R. Luft, ‘Beyond Disaster Exceptionalism: Social Movement Developments in New Orleans after Hurricane Katrina’ (2009) 61(3) *American Quarterly*, pp. 499-527.

simplified assumptions about emergencies contained in public law and, in so doing, allow us to see the complex ways in which public law regulates emergencies.

This article proceeds in three parts. Part I introduces the phenomenon of climate emergency declarations, the puzzle they present for public law scholars, and my methodology for analysing these declarations. Part II addresses a set of perennial concerns and questions that emergencies provoke in public law scholarship. We will see that three sets of questions emerge: how emergencies are defined (the definitional challenge), how time regulates and contains emergency power (the temporal challenge), and who responds to emergencies and how (the exceptionality challenge). Part III is the heart of the paper, addressing in depth declarations of climate emergency. Using the three sets of questions from Part II as guides, it analyses climate emergency declarations and identifies definitional, temporal and exceptionality paradoxes contained in these declarations. This article does not present a simple resolution to the legally-ambiguous nature of climate emergency declarations. Rather, it insists on highlighting the nuance, variation and complexity contained in these declarations. Climate change does not present a simple narrative, nor do climate emergency declarations. Indeed, they can be understood as presenting a type of warning about the necessity of a nuanced and multi-faceted understanding of emergencies as we contemplate the role of law in governing a climate-disrupted world.

## **Part I. The Emergence of Climate Emergency Declarations**

### *a. Introduction*

The notion of climate emergency moved to the mainstream in 2019,<sup>7</sup> though scholars have explored the notion of ‘climate emergency’ as a political or legal response to climate change for some time.<sup>8</sup> As a specific tool, climate emergency declarations occupy many of the intersections that characterize transnational environmental law: the intersection between non-governmental and governmental action, the intersections of multi-level governance, and the intersection between law, policy and politics. The transnational climate emergency declaration phenomenon began in 2016 in Australia with campaigns by non-governmental actors successfully targeting municipal governments worldwide. Broad uptake by municipal governments in turn put pressure on national and sub-national governments, regional and international actors as well as other institutions (e.g. universities) to follow suit.<sup>9</sup> The Guardian estimates that at least 38 countries have declared a

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<sup>7</sup> Oxford Languages, ‘Word of the Year 2019’ (Oxford University Press) <<https://languages.oup.com/word-of-the-year/2019/>> last accessed 7 July 2021; Damian Carrington, ‘Why the Guardian is changing the language it uses about the environment’ (17 May 2019) <<https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>> last accessed 07 July 2021.

<sup>8</sup> B. Lindsay, ‘Climate Exception: What Might a “Climate Emergency” Mean in Law?’ (2010) 38(2) *Federal Law Review*, pp. 255-281.

<sup>9</sup> For instance, the European Parliament declared a climate emergency on 29 Nov 2019; the United Nations Secretary urged all countries to declare climate emergencies (12 Dec 2020), and universities around the world have

climate emergency<sup>10</sup> and a global database reports that nearly 2,000 municipalities have done the same.<sup>11</sup>

Climate emergency declarations proliferated during 2019 alongside global student climate strikes and on the heels of the 2018 Special Report of the Intergovernmental Panel on Climate Change (IPCC) on *Global Warming of 1.5°C*, which detailed the anticipated catastrophic impacts of exceeding a 1.5°C increase in average global temperature. Scientific projections grow increasingly urgent each year. Relying on a suite of climate vital signs that extends beyond emissions (e.g. growing livestock populations, tree cover loss), over 11,000 scientists concluded ‘clearly and unequivocally that planet Earth is facing a climate emergency.’<sup>12</sup>

These dire projections, however, coincide with models outlining how rapid societal transition to mitigate greenhouse gas emissions can curb the worst of the projected impacts. The same 2018 IPCC Special Report projected a deep reduction of emissions to 45% below 2010 levels by 2030, reaching net zero by 2050, would be consistent with limiting warming to 1.5°C.<sup>13</sup> Further, the report provided four model pathways for achieving these reductions.<sup>14</sup> The IPCC’s reporting on this narrow window of opportunity for concerted action to avoid catastrophe helped propel activism around the climate emergency.

The promise of framing climate change as emergency is that this framing will provoke government action to both mitigate greenhouse gas (GHG) emissions and further reduce vulnerability to climate impacts through adaptation. In a widely-cited report for local governments, Spratt writes:

The purpose of climate emergency declaration campaigning is to accelerate sustained and meaningful action by all levels of government, and for people globally to engage with the challenge of avoiding catastrophic climate change and restoring a safe climate.

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declared climate emergencies as well: e.g. Briony Latter and Stuart Capstick, ‘Climate Emergency: UK Universities’ Declarations and their Role in Responding to Climate Change’ (2021) *Front. Sustain*, online: <https://doi.org/10.3389/frsus.2021.660596>.

<sup>10</sup> Fiona Harvey, ‘UN secretary general urges all countries to declare climate emergencies’ (12 December 2020), <<https://www.theguardian.com/environment/2020/dec/12/un-secretary-general-all-countries-declare-climate-emergencies-antonio-guterres-climate-ambition-summit>> last accessed 11 Oct 2021.

<sup>11</sup> Climate Emergency Declaration, ‘Climate emergency declarations in 2, 030 jurisdictions and local governments cover 1 billion citizens’ <<https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>> last accessed 11 Oct 2021.

<sup>12</sup> W. Ripple, et al, ‘“World Scientists” Warning of a Climate Emergency’ (2020) 70(1) *Bioscience*, pp. 8-12, at 8.

<sup>13</sup> M. Allen et al, *Summary for Policymakers*, in V. Masson-Delmotte et al (eds) *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC, 2018), pp. 3-24, at 12.

<sup>14</sup> *ibid*, at 14-16.

The goal is to provide maximum protection for the local community and for people, civilisation and species globally, especially the most vulnerable, and to enable local communities to be strong in the face of any unavoidable dangerous climate impacts.<sup>15</sup>

Spratt, and others, identify a number of features of ‘emergency mode,’ which serve as a way of breaking from a business-as-usual approach to governing. Climate emergency declarations, in their view, have the virtues of taking seriously the worst-case scenario and presenting a clear purpose for governmental action.<sup>16</sup>

At the same time, climate emergency declarations have been critiqued by some who take seriously the climate challenge. For instance, Murphy argues that the call for climate emergency declarations is ‘at best an ethically dubious move’ because of the grim historical record of states of emergency and the reification of sovereign powers.<sup>17</sup> Indeed, much of the literature that favourably considers climate emergency discourse draws directly on wartime responses in support of climate emergency action.<sup>18</sup> Hulme extends on this critique, observing that the reductive logic of the climate emergency—intended to provoke urgent and coordinated action—does not help us address the multitude of interlinked global challenges we face (e.g. climate change, biodiversity loss, socioeconomic inequality) which demand ‘plural goals and political creativity’.<sup>19</sup> Indigenous scholars similarly worry that climate emergency discourse crowds out alternate narratives and justifies measures which retrench colonial power (e.g. the siting of ‘green’ energy projects).<sup>20</sup>

Scholars have analysed the use of emergency rhetoric as a tool for social change in other fields, addressing similar concerns. While recognizing the long history of oppressive emergency actions, Anderson notes that emergency discourse is often called upon by equity-seeking organizations to make urgent ‘unbearable or barely bearable conditions into ethical or political scenes demanding response.’<sup>21</sup> In these cases, he argues that emergency declarations may be seen as hopeful because

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<sup>15</sup> D. Spratt, *Understanding Climate Emergency and Local Government* (Australia: Breakthrough - National Centre for Climate Restoration, 2019).

<sup>16</sup> D. Spratt & P Sutton, *Climate Code Red: The Case for a Sustainability Emergency* (Friends of the Earth, 2008); K. Davidson, et al, ‘The Making of a Climate Emergency Response: Examining the Attributes of Climate Emergency Plans’ (2020) 33 *Urban Climate*, pp. 100666; M. Chou ‘Australian Local Governments and Climate Emergency Declarations: Reviewing Local Government Practice’ (2020) *Australian Journal of Public Administration*.

<sup>17</sup> M. Murphy, ‘Clement to the Corinthians (on climate change?): sojourning as a theologico-political alternative to environmental emergency rhetoric’ (2020) 1 *Cambridge Review of International Affairs*, pp. 1-18.

<sup>18</sup> S. Klein, *A Good War: Mobilizing Canada for the Climate Emergency* (ECW Press, 2020); Spratt, n. 15 above; Leo Hickman, ‘James Lovelock: Humans are too stupid to prevent climate change’ (29 March 2010) <<https://www.theguardian.com/science/2010/mar/29/james-lovelock-climate-change>> last accessed 19 July 2021.

<sup>19</sup> M. Hulme, ‘Climate Emergency Politics Is Dangerous’ (2019) 36(1) *Issues in Science and Technology*, pp. 23-25, at 25.

<sup>20</sup> K. Whyte, ‘Against crises epistemology’ in B. Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020), pp. 52-64.

<sup>21</sup> Anderson, n. 6 above, at 465.

emergencies ‘are events or situations where action can still make a difference.’<sup>22</sup> Similarly, Arbel observes that treating as exceptional or anomalous the outcomes of unjust systems operating as designed helps diffuse responsibility and perpetuate an unjust status quo.<sup>23</sup> Turning to Arendt, Arbel argues that instead a declared ‘emergency’ must provoke the needed reflection (and action) on the structural causes of the declared emergency that have been laid bare.<sup>24</sup>

In contrast to these literatures, public law literature has thus far ignored climate emergency declarations. Climate emergency declarations are not declarations of states of emergency. Unlike the standard state of emergency declaration, these declarations are not orders made by the executive under pre-existing emergency management legislation. Rather, they are statements made predominantly by legislative bodies (Parliaments, legislatures and municipal councils),<sup>25</sup> sometimes accompanied by legislative reform and at other times not. Further, these declarations do not authorize the use of measures typically associated with emergency response such as evacuations or appropriations.<sup>26</sup> While legal scholarship has begun to adopt emergency discourse as an appropriate framing of the challenge of climate change,<sup>27</sup> courts have yet to rule on climate emergency declarations.<sup>28</sup>

The uncertain status of climate emergency declarations in public law presents somewhat of a puzzle. They are neither conventional declarations of emergency nor mere rhetoric. They are simultaneously seen as effective, dangerous and also ignorable. The remainder of this article engages with the uncertain status of climate emergency declarations. It does so, not as an object of law reform or external critique. Rather, it investigates the potential of these declarations to illuminate existing assumptions about emergencies contained in public law.

### ***b. Methodology***

This paper undertakes a close reading of a subset of climate emergency declarations. It addresses declarations issued in the United Kingdom, Canada, Australia and Aotearoa/New Zealand. The selection of these jurisdictions is based predominantly on the shared common law tradition

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<sup>22</sup> Ibid, at 470.

<sup>23</sup> E. Arbel, ‘Rethinking the “Crisis” of Indigenous Mass Imprisonment’ (2019) 34(3) *Canadian Journal of Law and Society*, pp. 437-456.

<sup>24</sup> Ibid, at 454-5. See also: Anderson, n. 6 above, at 474.

<sup>25</sup> Although, in some jurisdictions, both the executive and the legislative branches of the state have declared a climate emergency (London and Wales), or just the executive (Scotland).

<sup>26</sup> New Zealand, Parliamentary Debates, *Hansard*, 53<sup>rd</sup> Leg, Vol 749 (December 2, 2020) at para 240; New Zealand, Auckland Council, Environment and Standing Committee (11 June 2019), at section 9.

<sup>27</sup> M. Fenner, ‘Constitutionalism during the Climate Emergency: Towards a Legal Realist Account of Transnational Law’ (2020) 12(1) *Amsterdam Law Forum*, pp. 1-31.

<sup>28</sup> But see J. Stacey, ‘Climate Disruption in Canadian Constitutional Law: References re Greenhouse Gas Pollution Pricing Act’ (2021) *forthcoming, Journal of Environmental Law* on how the Supreme Court of Canada has seeded the field for legal recognition climate change constituting an emergency.

dominant in all countries.<sup>29</sup> This shared common law tradition is reflected in literatures on emergency powers and the law, which frequently incorporate judicial decisions and other legal developments from all four jurisdictions.<sup>30</sup> I have not included the United States in this analysis to avoid the ‘prism of the American experience’<sup>31</sup> which refracts uniquely on both emergency powers and climate change law and policy.

For each country, I have included and analysed all declarations issued at the national and state/provincial/territorial scales. I have also included declarations for major cities within each jurisdiction.<sup>32</sup> Table 1 summarizes the key attributes of the declarations and their included in the analysis. Climate emergency declarations began as a local phenomenon. As an example of ‘contagious environmental lawmaking’<sup>33</sup> they have been taken up by higher levels of government in addition to their world-wide transmission. In total, 16 jurisdictions have been included in this study. While climate emergency declarations are a product of a transnational movement, and patterns do emerge, the analysis that follows shows that these declarations are varied and textured and contain complex dialogues about emergencies in public law.

## **Part II. Emergencies and Public Law**

Emergencies feature prominently in legal theory, constitutional law and disaster law. While different questions drive each of these literatures, they converge on a core set of worries: how emergencies are defined (the definitional challenge), how time regulates and contains emergency power (the temporal challenge), and who responds to emergencies and how (the exceptionality challenge). For legal theorists these challenging issues of definitions, time and exceptional measures emerge from the focus on the relationship between emergency (or the exception) and legal order itself. Constitutional law scholars engage with these challenges through debates over constitutional design. And for disaster law scholars, these challenges flow from their identification of the predictable ways in which law and policy fails to prevent and ameliorate disaster

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<sup>29</sup> Although I note that Quebec and Scotland have hybrid legal traditions—with the common law tradition governing public law and the civilian tradition governing private law—and Indigenous legal orders coexist alongside the common and civil law in Canada, Australia and Aotearoa/New Zealand.

<sup>30</sup> E.g. K. Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016); D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).

<sup>31</sup> A. Dodek, ‘A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review’ (2009) 47(2) *Osgoode Hall Law Journal*, pp. 287-316, at 294, quoted in R. Leckey, *Bill of Rights in the Common Law* (Cambridge University Press, 2015), p. 27.

<sup>32</sup> Vancouver, Toronto, London, Melbourne, Sydney and Auckland.

<sup>33</sup> N. Affolder, ‘Contagious Environmental Lawmaking’ (2019) 31(2) *Journal of Environmental Law*, pp. 187-212. I am mindful of Affolder’s caution about erasing local context and have sought to avoid a broad-brush analysis within the scope of this study. I fully acknowledge the limits of a study that excludes Indigenous legal orders, civil law traditions and the Global South. All of these jurisdictions have different legal histories and socio-political dynamics associated with the exercise of emergency powers and each is deserving of detailed analysis of climate emergency law and politics.

vulnerability and their pathways for reform. Relying on the detailed work of Karin Loevy, this part highlights how each of these bodies of scholarship rest on different sets of assumptions about emergencies. Bringing these literatures together presents a complex picture of how emergencies are governed by public law.

**a. The Definitional Challenge**

All three literatures engage with the definitional challenge of what constitutes an emergency. In legal theory, the work of controversial Nazi legal theorist, Carl Schmitt, looms large.<sup>34</sup> For Schmitt, the exception (the extreme emergency which threatens the state) is unpredictable and cannot be anticipated nor completely defined in advance.<sup>35</sup> The declaration of the state of exception and its response, he argues, are purely political determinations—made by and revealing of sovereign power. As Loevy observes, this quality of ‘indefinability’ is presumed in much of the legal theory and constitutional law scholarship. As a result, this literature is ‘either too focused on an excessively limited set of conditions [the liminal case] or, more often, too invested in institutional design that will confront all possible exigencies.’<sup>36</sup> For instance, scholars debate whether emergency powers should be understood as ‘inside or outside’ constitutional order.<sup>37</sup>

In contrast to the indefinable emergency, disaster literature offers numerous definitions of the emergency, often focusing on the definitional contours between emergency, disaster, crisis, etc.<sup>38</sup> In disaster law literature, the emergency is very much definable—and also observable and often predictable. Hurricanes, fires, floods, and earthquakes all occur with regularity. Emerging literature on climate disasters and the law confronts the issue of predictability. Scholars note, on the one hand, that climate change is amplifying the threat of extreme events such that ‘[d]isasters are becoming the new normal.’<sup>39</sup> But at the same time, they observe that we can no longer ‘rely

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<sup>34</sup> O. Gross & F. Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), pp. 171-244; Loevy, n. 30 above; D. Dyzenhaus, ‘Schmitt v. Dicey: are states of emergency inside or outside the legal order?’ (2006) 27(5) *Cardoza Law Review*, pp. 2005-2039.

<sup>35</sup> C. Schmitt, *Political Theology: four chapters on the concept of sovereignty* (George Schwab tr, MIT Press, 1985), at 6-7.

<sup>36</sup> Loevy, n. 30 above, pp. 59-60.

<sup>37</sup> Dyzenhaus, n. 34 above.

<sup>38</sup> E. L., Quarantelli, *What is a Disaster? A dozen perspectives on the Question* (Routledge, 1998); S.C. Breau & K.L.H Samuel, ‘Chapter 1: Introduction’, in S.C. Breau & K.L.H Samuel (eds) *Research Handbook on Disasters and International Law*, (Edward Elgar Publishing, 2016), pp. 1-20, p. 4; J. Hopkins, ‘The first victim: administrative law and natural disasters’ (2016) 1, *New Zealand Law Review*, pp. 189-211; A. Herwig, ‘Resilience and Responsibility in international law: The achievements of the Sendia framework through the example of climate change’, in A. Herwig & M. Simoncini (eds), *Law and the Management of Disasters* (Routledge, 2016), pp. 139-159.

<sup>39</sup> D.A. Farber & L. Grow Sun, ‘Foreword’ in S.S. Kuo et al (eds) *Cambridge Handbook on Disaster Law and Policy* (Forthcoming), pp. 1-23, p. 5.

on historical data to assess future risks’ and that we must prepare for clustering and cascading disasters, for which we have little precedent.<sup>40</sup>

Bringing together some of these background assumptions, Loevy shows how the definitional challenge materializes in law. Her close examination of the prominent post-9/11 decision of the UK House of Lords in *Belmarsh*<sup>41</sup> shows how, on the one hand, the Court insists that the declaration of an emergency was indefinable—a political decision that the Court could not review. Yet, at the same time, the record before the Court and, indeed the Court’s own reasons, were crowded with potential definitions for the alleged emergency. These potential definitions drew on standardized sources (legal precedent, the parties’ evidence) and precise attention to who or what was threatened and how. The definitional challenge—and conflicting responses to this challenge—are embedded in law. And, as Loevy’s interpretation *Belmarsh* shows, these conflicts can reside in a single decision to significant legal effect.

### ***b. The Temporal Challenge***

Legal theory, constitutional law and disaster law each address the role of time in regulating the emergency. Legal theory and constitutional law scholarship emphasize the role of time in defining and containing the emergency. In these literatures, time plays a ‘double role’ of urgency and temporariness.<sup>42</sup> Loevy describes this as the assumption of ‘exceptional time: because emergencies require immediate response, emergency powers enable exceptional measures to be exercised for an exceptional, limited period of time.’<sup>43</sup> The worry, then, in both legal theory and constitutional law is the normalization of exceptional, emergency powers as permanent features of constitutional order. Indeed, many argue that this is already the case.<sup>44</sup> Agamben argues that the emergency threat is not the suspension of legal order in its entirety, as Schmitt’s theory suggests, but rather the pockets of exceptional power embedded throughout the legal system.<sup>45</sup> This produces ‘zones of indifference’, not inside or outside legal order but suspended in between, which deprive individuals of the full protection of the law.<sup>46</sup> For Agamben and others, the emergency reveals the failure of liberal legal order both in theory and in practice.<sup>47</sup>

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<sup>40</sup> *ibid*, pp. 6-7; L. Grow Sun & S. McCormick, ‘Foreseeable Disaster Mismanagement in a Changing Climate’ in A. Sarat (ed) *Special Issue Cassandra’s Curse: The Law and Foreseeable Future Disasters* (Emerald Publishing Limited, 2015), p. 81.

<sup>41</sup> *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2AC 68.

<sup>42</sup> Loevy, n. 30 above, p. 218.

<sup>43</sup> *Ibid*.

<sup>44</sup> Gross & Aolain, n. 34 above; S. Levinson, ‘Constitutional Norms in a state of permanent emergency’ (2006) 40(3) *Georgia Law Review*, pp. 699-751; K. Scheppele, ‘Small Emergencies’ (2006) 40(3) *Georgia Law Review*, pp. 835-862.

<sup>45</sup> Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press, 2005), at 6-7.

<sup>46</sup> *ibid*, at 23.

<sup>47</sup> These failings are powerfully documented in research on emergency powers and colonialism. See, eg, J. Reynolds, *Empire, Emergency and International Law* (Cambridge University Press, 2017); N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2019).

The observation that emergency powers are permanent—not temporary—jibes with disaster law scholarship. This literature emphasizes ongoing regulation through a cycle of disaster management, not simply the declaration of emergency.<sup>48</sup> In this way, emergency measures are very much normalized: public institutions should always be in some stage of regulating the emergency, be it prevention, preparedness, response or recovery. Moreover, principles such as ‘disaster risk reduction’ make clear that it is not just specialized government departments that should be engaged in this cycle, but rather all institutional decision-making must implement disaster risk reduction.<sup>49</sup> On this view, managing emergencies ought to be built into the very machinery of government.

Loevy’s work demonstrates how these layers of time play out in the real-world regulation of emergencies.<sup>50</sup> By examining the archetypal question of the legality of torture in the face of the ‘ticking time bomb,’ Loevy convincingly refutes the conventional assumption that this is a situation governed by ‘exceptional time.’ Through a close analysis of the famous 1999 torture decision of the Israel Supreme Court,<sup>51</sup> Loevy unpacks the multiple timescales in the decision. This includes, for instance, the notion of ongoing and circular time relied on by intelligence officials (and emergency management staff generally)<sup>52</sup> to anticipate, prepare, respond and recover from threats. She observes that multiple legal timescales factor into the decision: for instance, the expedited court proceedings, and the possibility of *ex post* criminal liability.<sup>53</sup> Pushing beyond the assumptions of urgency or the temporary/permanent binary, her careful attention to context reveals multiple timescales, some exceptional, but others structural and ongoing—all of which govern the emergency.

### c. *The Exceptionality Challenge*

Finally these literatures all address questions of whether and how to authorize exceptional emergency response measures and how to hold accountable the exercise of such powers. While many scholars doubt the resort to exceptional powers in specific cases,<sup>54</sup> few doubt that in *some*

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<sup>48</sup> J. Stacey, ‘Vulnerability, Canadian Disaster Law and The Beast’ (2018) 55(4) *Alberta Law Review*, pp. 853-887; R. Verchick, ‘Disaster Justice: the geography of human capability’ (2012) 23(1) *Duke Environmental Law & Policy Forum*, pp. 23-71.

<sup>49</sup> N. Britton, ‘A New Emergency Management for the New Millennium?’ (2001) 16(4) *Australian Journal of Emergency Management*, pp. 44-54; M. Picard, ‘Disaster Management, risk reduction and international disaster response laws in the Commonwealth’ (2017) 43(3-4) *Commonwealth Law Bulletin*, pp. 403-437; Sendai Framework for Disaster Risk Reduction, Sendai (Japan), 19 Mar. 2015. Available at: [https://www.preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf)

<sup>50</sup> See also U.F. Paleo, ‘Timescape of disaster risk governance in contemporary Japan: Neither state of normalcy nor constancy in regulation’ (2019) 14(4) *PloS one*, pp. 1-16. On multiple timescapes in Japanese disaster law.

<sup>51</sup> H CJ 5100/94 *Public Committee against Torture in Israel v Israel* [1999] IsrSC 46(2).

<sup>52</sup> Stacey, n. 48, above.

<sup>53</sup> Loevy, n. 30 above, pp. 245-255.

<sup>54</sup> The literature on 9/11 is voluminous.

instances exceptional measures will be necessary to respond to an extreme threat.<sup>55</sup> Exceptional emergency powers raise a set of worries shared across literatures: consolidating power in the executive branch, unfettered discretion, undermining individual rights and freedoms (especially of vulnerable populations), and eroding administrative law protections of transparency, participation and access to the courts.<sup>56</sup> Legal theory, constitutional law and disaster each address whether and how these powers can be authorized and held to account, though in slightly different ways.

In legal and constitutional theory, emergencies are often tied to notions of ‘sovereign control.’<sup>57</sup> For Schmitt and legal theorists who follow his thinking, both the state of exception and its response are declared by the sovereign (the modern-day executive), and conversely, the exception reveals who in fact the sovereign is.<sup>58</sup> In this view, the executive is activated, empowered and wields power that is unconstrained by law. Legal theorists and constitutional scholars thus focus on questions of constitutional design which acknowledge the need for emergency response but still contain the exercise of these exceptional powers. For instance, some argue in favour of derogation models, as represented by Article 15 of the European Convention on Human Rights, which is said to create a ‘double-layered constitutional system: both layers exist within a regime of legality but only one exists within the human rights regime.’<sup>59</sup> Others note the prevalence of a legislative model in which emergency management legislation delegates specific emergency response powers to the executive branch.<sup>60</sup> Both constitutional and legislative models acknowledge the necessity of exceptional measures, but seek to subject these measures to some legal constraints to ensure the preservation of legal order.

Disaster law, too, urges law reform that anticipates the emergency and the appropriate response. Contemporary paradigms for disaster management—namely risk, vulnerability and resilience—all ‘decentre’ emergency response. Instead, they emphasize preparedness and continuous learning, which take place through ordinary and familiar practices of legislation, regulation and planning.<sup>61</sup>

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<sup>55</sup> However, Dyzenhaus persuasively articulates and defends a rule-of-law theory which does not countenance any exceptional powers, arguing that public officials are always subject to requirements of justification and to abandon these obligations is to abandon the claim to act with legal authority. Emergency measures such as quarantine and impinging freedom of movement is subject to the same rule-of-law requirement of public justification as a non-emergency measure: Dyzenhaus, n. 30 above.

<sup>56</sup> E.g. T.R. Hickman, ‘Between Human Rights and the Rule of Law: Indefinite Detention and Derogation Model of Constitutionalism’ (2005) 68(4) *The Modern Law Review*, pp. 654-680; D.A. Farber, ‘Chapter 6: Governance principles and climate disasters: constitutional and administrative law issues’, in R. Lyster & R.R.M Verchick (eds), *Research Handbook on Climate Disaster Law* (Edward Elgar Publishing, 2018), pp. 117-132; Grow Sun & McCormick, n. 40 above; Hopkins, n. 38 above.

<sup>57</sup> Loevy, n. 30 above, p. 217.

<sup>58</sup> Schmitt; E. Posner & A. Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

<sup>59</sup> Hickman, n. 56 above, at 659.

<sup>60</sup> J. Ferejohn & P. Pasquino ‘The law of the exception: a typology of emergency powers’ (2004) 2(2) *International Journal of Constitutional Law*, pp. 210-239; Gross & Aolain, n. 34 above, pp. 17-85.

<sup>61</sup> Herwig & Simoncini, n. 38 above, p. 1; Herwig in Herwig & Simoncini, n. 38 above, at 141; D. A. Trissel, ‘Resilience Strategy in the United States’, in A. Herwig & M. Simoncini (eds), *Law and the Management of Disasters* (Routledge, 2016), pp. 177-186; Stacey, n. 48 above. The Sendai Framework on Disaster Risk Reduction

Disaster law researchers identify the predictable ways in which emergency response fails and, accordingly, they identify the best practices that address these forms of mismanagement.<sup>62</sup> Emergency management legislation, which identifies roles and responsibilities, is a must.<sup>63</sup> Dedicated emergency management legislation which explicitly links to other legal regimes to reduce vulnerability to disaster is even better.<sup>64</sup> Scholars argue that legislation must require or facilitate adaptive and resilient practice, such as through robust emergency planning.<sup>65</sup> And they highlight the role of legislation in addressing predictable failures by countering disaster myths, setting out guiding principles and making tough choices in advance.<sup>66</sup> In this literature, it is very much the law of the ‘ordinary’ that is—or should be—the dominant mode of governing the emergency.

In contrast to legal and constitutional theory, disaster law literature does not presume a unified and activated executive responding to a threat. Growing out of major disasters, such as Hurricane Katrina, disaster law scholarship identifies the ‘jurisdictional problems’<sup>67</sup> that often characterize emergencies. Indeed, recent emergencies such as wildfires and the COVID-19 pandemic have highlighted numerous high-stakes jurisdictional problems around the world in federations and settler states.<sup>68</sup> In these moments of emergency response, such as the pandemic, different jurisdictions (national, sub-national, Indigenous) jostle for control—or redirect blame elsewhere—as they engage other jurisdictions to mount a response. Moreover, the influence of ‘resilience thinking’ on disaster scholarship means that all sectors of society—e.g. community members, business, international organizations—should be enlisted in disaster management. Catch phrases of ‘whole community’ and ‘all purpose means’ capture the capacious concept of disaster resilience, which aims to have as much of the affected population as possible be in a position to help themselves and each other and freeing up government support for the most vulnerable.<sup>69</sup> In contrast to the image of centralized emergency powers portrayed in legal theory and constitutional literature, disaster law literature emphasizes decentralization through the mobilization of all of society in disaster risk reduction.

Holding accountable the exercise of emergency powers is a major theme in all of these literatures. Much legal theory and constitutional scholarship focuses on the relatively weak role that courts

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emphasizes the structural drivers of disaster risk and vulnerability (such as poverty, racism, ableism) all of which must be addressed through reform that happens outside of the acute emergency response.

<sup>62</sup> Grow Sun & McCormick, n. 40 above; Picard, n. 49 above.

<sup>63</sup> M. Eburn ‘Responding to Catastrophic Natural Disasters and the Need for Commonwealth Legislation’ (2011) 10(3) *Canberra Law Review*, pp. 81-102.

<sup>64</sup> Picard, n. 49 above.

<sup>65</sup> Herwig & Simoncini, n. 38 above; Trissell in Herwig & Simoncini, n. 61 above; Stacey, n. 48 above.

<sup>66</sup> Grow Sun & McCormick, n. 40 above, at 83-84.

<sup>67</sup> Loevy, n. 30 above, p. 217.

<sup>68</sup> J. Stacey, ‘How Indigenous leadership is protecting communities from climate disasters’ (The Conversation, 13 June 2019) <<https://theconversation.com/how-indigenous-leadership-is-protecting-communities-from-climate-disasters-115902>> last accessed 7 July 2021.

<sup>69</sup> Trissell in Herwig & Simoncini, n. 61 above; Herwig in Herwig & Simoncini, n. 38 above, pp. 142, 156.

have historically played in constraining the exercise of emergency powers. This leads some to argue for an understanding of the emergency response which is ‘extra-legal’ and subject only to political—and not judicial—oversight.<sup>70</sup> Others argue for more robust judicial review of emergency powers,<sup>71</sup> or for creative institutional design.<sup>72</sup> Picking up on the possibility of creative institutional design, and on the complicated jurisdictional problems documented in disaster law literature, Loevy argues that accountability can only be understood by a close analysis of real-world institutional dynamics. She argues that institutional competence and culture always contain constraints, even if conventional and formal legal controls appear weak.<sup>73</sup> She observes, as examples, the influence of public institutions such as the UK Joint Commission on Human Rights and the US Office of Legal Counsel in the exercise of counter-terrorism measures. She finds that specific institutional cultures and competencies of those actors involved in emergency response explain how power is constrained.

Legal theory, constitutional law and disaster law scholarship contain many and varied assumptions about emergencies—how they are defined, regulated by time, authorized and held to account. Sometimes these assumptions operate in parallel, but often these literatures present intersecting and divergent characterizations of emergencies and their governance in law. We have also seen that discordant assumptions appear in specific legal decisions, sometimes with significant legal effect. We will now see that climate emergency declarations reflect back this complexity through manifold definitions, diverse temporal narratives, and tensions between authorization and accountability.

### **Part III. The Paradoxes of Climate Emergency Declarations**

This part turns to the climate emergency declarations themselves.<sup>74</sup> While not conventional declarations of emergency, we will see that these declarations engage with the same three sets of perennial concerns about emergencies in public law. Furthermore, we will see that the ways in which these challenges of definition, time and exceptionality are addressed in climate emergency declarations reveal multiple paradoxes in emergencies and emergency powers.

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<sup>70</sup> Gross & Aolain, n. 34 above, pp. 110-170; Posner & Vermeule, n. 58 above.

<sup>71</sup> E.g. J. Masur, ‘A hard look or a blind eye: administrative law and military deference’ (2005) 56(3) *The Hastings Law Journal*, pp. 441-522; D. Cole, ‘Judging The Next Emergency: Judicial Review and Individual Rights In a Time of Crisis’ (2003) 101(8) *Michigan Law Review*, pp. 2565-2595.

<sup>72</sup> Dyzenhaus, n. 34 above; J. Stacey, *The Constitution of the Environmental Emergency* (Hart Publishing, 2018), pp. 113-136.

<sup>73</sup> Loevy, n. 30 above, pp. 122-175.

<sup>74</sup> This part relies heavily on primary sources: the text of climate emergency declarations, legislative debates, climate action plans and other government documents. The climate emergency declarations themselves are short and most do not have page numbers. When I refer to a declaration of a specific jurisdiction, I therefore do not include a footnote to avoid redundancy with the with main body of the article. When referencing all other primary materials, I cite to the document and provide, where possible, a pinpoint reference.

*a. Definitional Paradoxes*

*City Council declare[s] a climate emergency for the purpose of naming, framing, and deepening our commitment to protecting our economy, our ecosystems and our community from climate change. — Toronto City Council*

What *precisely* is the climate emergency? Two definitional paradoxes emerge from the texts of these declarations and their justifications. First, the declarations call upon the known and the unknowable elements of emergencies. Second, the declarations narrow the problem of climate change to an acute crisis while simultaneously addressing the systemic nature of the problem.

Many climate emergency declarations tap into the sense that emergencies are fundamentally unknowable. In Quebec, the threat is “**abrupt and irreversible climate change**” threatening life and civilization as we know it.’ In the UK, ‘we are talking about nothing less than the irreversible destruction of the environment.’<sup>75</sup> South Australia, too, describes the emergency as the destruction of vital ecosystems. The Senedd/Wales Legislative Assembly declaration anticipates that the climate emergency ‘will wreak havoc upon the livelihoods of countless people across the world.’ In these ways, the emergency is presented as looming, dramatic, and ill-defined.

At the same time, these declarations tie the definition of the ‘climate emergency’ to known threats, conventional emergencies, and in many cases recent experiences of record-breaking extreme events. The City of Sydney states: ‘it is not just their frequency which is alarming – [heat waves] start earlier, become hotter, and last longer.’ In Vancouver, the experiences of the 2017 and 2018 wildfires in British Columbia and neighbouring California provide evidence of the climate emergency.<sup>76</sup> These declarations then extrapolate out from these known events. In Yukon, South Australia and Aotearoa/New Zealand, declaration sponsors identify the underlying purpose of emergency measures—to protect lives and communities from acute threats—and extrapolate to climate change. Climate change, one sponsor observes, poses the same kind of threat but on a ‘much grander scale.’<sup>77</sup>

Most jurisdictions rely on scientific projections of climate impacts, and in particular the 2018 IPCC Special Report, to justify their emergency declarations and render the emergency ‘knowable.’<sup>78</sup> The scientific consensus on climate change and its impacts is a vital and necessary part of these debates. Indeed, the 2018 IPCC Special Report performs significant justificatory work. In the UK,

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<sup>75</sup> United Kingdom, Parliament, *House of Commons: Parliamentary Debates*, Vol 294, No 659 (1 May 2019) at 225.

<sup>76</sup> See also ACT 1(b)(c) and the debate on the Canadian motion in the House of Commons also contains repeated references to extreme weather events across the country in recent years.

<sup>77</sup> Yukon, Legislative Assembly, *Hansard* 34<sup>th</sup> Leg, 3<sup>rd</sup> Session, No 5 (October 10, 2019), at 132; South Australia, Legislative Council, *Hansard*, 54<sup>th</sup> Parl, 1<sup>st</sup> Session (11 September 2019), at 4340; New Zealand, n. 26 above, at 239-240.

<sup>78</sup> Vancouver, UK, Scotland, Wales, London, ACT, Sydney, NZ, Auckland. Other jurisdictions adopt IPCC temperature or emissions targets without specifically relying on the 2018 IPCC report: e.g. Canada and Toronto.

for instance, the motion's sponsor stated '[t]he science tells us this is an emergency...'<sup>79</sup> In Canada, this same sentiment was echoed by the declaration's sponsor: 'The reason we need to recognize [the] increasing climate emergency is because that is what the science tells us.'<sup>80</sup> In these rationales, we can see attempts to render emergency declarations knowable—but also apolitical—by invoking the 'exonerating discourses' of scientific and rational assessment of the problem.<sup>81</sup>

We see in these declarations what Wainwright and Mann call

two rhythms... not synchronized... There is, on one hand, the almost imperceptible background noise of rising seas and upward ticking of food prices, punctuated, on the other hand, by the occasional pounding of stochastic events.<sup>82</sup>

The climate emergency is a threat known and experienced, felt acutely in those stochastic events of deadly wildfires, floods and heat waves. But in many ways, the coming real emergency is still unknown. The reminder that the worst is still to come is rendered 'almost imperceptible' as background noise. The chaotic agent of the emergency is ever-present, the looming backdrop to contemporary life.

These declarations also work to both narrow and widen the definition of the threat of climate change by delineating its acute and systemic dimensions. A narrow and specific definition of emergency is necessary to mobilize an emergency response—to prioritize and coordinate action around a central purpose. Climate emergency declarations narrow the framing of the global and all-encompassing phenomenon of climate change by focusing on the local. The Vancouver declaration, for instance, depicts the emergency as the estimated \$7 billion in property damage that would result from a major flood in the urban centre.

Declarations also narrow the framing of climate change to the core challenge of GHG emissions reductions.<sup>83</sup> As one legislator said, 'The new currency of the ACT [Australian Capital Territory] needs to be emissions and climate change. That is what we must value.'<sup>84</sup> As we will see below, these declarations commit specifically to emissions reductions targets and measures.

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<sup>79</sup> United Kingdom, n. 75 above, at 234.

<sup>80</sup> Canada, Parliament, *House of Commons Debates*, 42<sup>nd</sup> Parl, Vol 148, No 435 (17 June 2019), at 29201.

<sup>81</sup> S. Jasanoff, *Science and Public Reason* (Routledge, 2012), p. 4.

<sup>82</sup> G. Mann & J. Wainwright, *Climate Leviathan: A Political Theory of our Planetary Future* (Verso Books, 2018), p. 7.

<sup>83</sup> All jurisdictions reference the need to reduce emissions. Most declarations announce or recommit governments to meeting specific emissions reductions targets: Canada, Vancouver, Toronto, UK, Scotland, London, ACT and New Zealand. On targets as central to climate law, see C. Hilton, 'Hitting the Target? Analysing the Use of Targets in Climate Law' (2020) 32(2) *Journal of Environmental Law*, pp. 195-220.

<sup>84</sup> ACT, Legislative Assembly, *Hansard*, 9<sup>th</sup> Assembly (16 May 2019), at 1857.

At the same time, the global and systemic nature of the climate challenge is not completely lost in the climate emergency debates and resulting measures. Many jurisdictions reference climate impacts felt elsewhere in the world and the responsibility to act to ameliorate those impacts.<sup>85</sup> The Aotearoa/New Zealand declaration (one of the latest declarations in this set) references ‘the over 1,800 jurisdictions in 32 countries’ who have already declared a climate emergency as support for its declaration. The Quebec National Assembly supports its declaration almost entirely on the basis that other jurisdictions have acted, citing the UN Security Council and the fact that emergency declarations have been issued by ‘395 municipalities, ten universities and nearly a hundred civil society organizations’ in the province. The Welsh declaration expresses support for local governments across Wales in declaring a climate emergency. Each of Vancouver, London and Sydney’s declarations expresses solidarity with local governments worldwide, which have also declared a climate emergency.

A number of jurisdictions widen the emergency frame to capture systemic and interrelated challenges by coupling the threat of climate change with species extinction. In Aotearoa/New Zealand, the climate emergency declaration also ‘recognise[s] the alarming trend in species decline and global biodiversity crisis.’ Melbourne declared that both climate change and ‘mass species extinction... should be treated as an emergency.’ The unique ecologies of these two countries might explain the explicit reference to species extinction. But the UK Parliament and Northern Ireland Legislative Assembly also recognize species decline as part of the climate emergency. This repeated linking of climate change and mass extinction is an important reminder that climate change ‘is part of a family of interlocking problems... all planetary in scope and all speaking to the fact of an overall ecological overshoot on the part of humanity.’<sup>86</sup> Moreover, the finality of species loss is a tangible reminder of the existential nature of the climate threat.<sup>87</sup>

Many jurisdictions identify the particular communities made more vulnerable by climate change and, in so doing, hint at systemic issues such as colonialism, racism and economic inequality entangled with climate change. For example, Canada’s declaration notes the heightened impacts on coastal, northern and Indigenous communities. Sydney connects the climate crisis to ongoing colonization, through the continued approval of coal mines which undermine the ‘sovereignty and self-determination of First Australians.’ Economic inequality features across the declarations, noting the vulnerability of those in poverty to both climate impacts and climate transition. Sydney identifies ‘the poorest amongst us – the vulnerable, the marginalised and those that live in remote communities’ as susceptible to climate change. Government inaction on climate mitigation, Sydney’s declaration notes, has had significant social impacts: ‘Thousands face unemployment, denied potential jobs in a burgeoning renewable energy sector...’ Yukon, too, notes the social vulnerability of being a northern territory and the associated challenges of transitioning from fossil

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<sup>85</sup> ACT, South Australia, Auckland.

<sup>86</sup> D. Chakrabarty ‘Humanities in the Anthropocene: The Crisis of an Enduring Kantian Fable’ (2016) 47(2-3) *New Literary History*, pp. 377-397, p. 380.

<sup>87</sup> A. Akhtar-Khavari et al, ‘Environmental law’s extinction problem’ (2021) *Griffith Law Review*, pp. 1-20.

fuels.<sup>88</sup> Finally, in many jurisdictions climate emergency declarations have since become linked with recovery from the COVID-19 pandemic, with some jurisdictions translating lessons learned in the pandemic to climate change.<sup>89</sup>

This tension between the acute and systemic is eloquently captured in the debates leading to the unanimous declaration in Yukon, a northern Canadian territory:

We are seeing wildlife and plant species claim habitat in places they haven't been before. Water systems are changing course or drying up. They are low or taking new paths as glacial sources retreat. Species like the pine beetle are threatening to make their way to Yukon's forests. Wildfires are becoming more frequent and intense. Buildings and highways are needing more and more expensive repairs due to the permafrost thawing under them. These changes and more are affecting the way that we do business, our economy, the way we interact with the land, and our cultures. There's no doubt we are in the midst of a climate crisis.<sup>90</sup>

The environment, the community, the economy, and a way of life are all threatened by the climate emergency. But these are not generic statements or 'imperceptible background noise.' In the north, the climate emergency is tangible and felt: 'you [can] smell the soil in the air because of the permafrost melting.'<sup>91</sup>

Climate emergency declarations provide layers of definitions for the emergency. I have identified two paradoxes embedded in these layered definitions. First, the climate emergency is known and felt through the lived experiences of many communities which now lived 'under' a declared climate emergency. Common sets of experiences, concerns and sources—such as the IPCC Special Report—provide the basis for defining and declaring a climate emergency. At the same time, these declarations also call upon the unknowable looming future which is 'worse, much worse, than you think'<sup>92</sup> to justify declaring a climate emergency. This framing of the extreme threat is used to engage 'emergency mode' to focus government attention and action on the immediate emergency of rapidly reducing GHG emissions. But this narrow framing, too, is embedded within a web of systemic crises highlighted through these declarations, such as mass extinction and systemic inequality.

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<sup>88</sup> Clause (3) of the declaration is 'ensure Yukoners have access to reliable, affordable and renewable energy'; Yukon, n. 77 above, at 133, 135.

<sup>89</sup> Welsh Government, *COVID-19 Reconstruction: Challenges and Priorities* (Welsh Government, 2020), p. 16; City of Vancouver, *Climate Emergency Action Plan* (City of Vancouver, 2020), p. 10. Auckland Council, *Te Tāruke-ā-Tāwhiri: Auckland's Climate Plan* (Auckland Council, 2020), pp. 89, 117.

<sup>90</sup> Yukon, n. 77 above, at 128.

<sup>91</sup> *ibid* at 131.

<sup>92</sup> D. Wallace-Wells, *Uninhabitable Earth: Life After Warming* (Tim Duggan Books, 2019) p. 3.

**b. Temporal Paradoxes**

*The IPCC has given us 12 years. In climate science, that is a heartbeat. We have to get this right.*  
– Richard Benyon (Member for Newbury), UK Parliament<sup>93</sup>

As we saw in Part II, debates about the legal regulation of emergency are bound up in notions of time. While the notion of ‘exceptional time’—that there is no time in an emergency—is a common assumption in public law literature, emergencies are in fact regulated along multiple timescales. Climate emergency declarations eschew simple temporal narratives. We will see that two further paradoxes emerge from a close read of the timescales portrayed in these declarations. First, climate emergency declarations both compress and expand our perception of time. Second, the declarations treat the climate emergency as both temporary and permanent.

As the epigraph shows, Loevy’s notion of exceptional time plays a prominent role in the framing of these climate emergency declarations, compressing our sense of time and generating urgency.<sup>94</sup> The emergency takes place in ‘a heartbeat.’ Most of the declarations, as we have seen above, emphasize the urgent need for action. This is because communities are *already* experiencing the disruption of a changing climate.<sup>95</sup> In the words of the UK Parliament, ‘[t]his is no longer about a distant future.’<sup>96</sup> In Quebec, it is ‘too late for gradual transition’ and the time to take dramatic action is now.<sup>97</sup> The UK motion extolled that ‘We have no time to waste’ and, in Wales, that ‘time is ticking away against us.’<sup>98</sup> Urgency is stressed in multiple declarations, both to reduce emissions and also to ‘capture economic opportunities and green jobs.’<sup>99</sup> In contrast, the Canadian declaration is critiqued by the opposition for the one month delay in placing it on the agenda, undermining the claim that there is no time.<sup>100</sup> And in Wales, legislative members criticized the mere thirty minutes allowed for parliamentary debate on the motion.<sup>101</sup>

But these declarations also expand the temporal horizon beyond the present to incorporate both the past and future. As we have seen, the climate emergency in some cases is a response to the immediate past: recent record-breaking heat waves, floods and fires. But they stretch even further

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<sup>93</sup> United Kingdom, n. 75 above, at 275.

<sup>94</sup> See also, Hilson, n. 4 above, at 367 (on ‘policy time frames’).

<sup>95</sup> Canada, Quebec, Vancouver, ACT, South Australia, Sydney.

<sup>96</sup> United Kingdom, n. 75 above, at 225.

<sup>97</sup> Quebec Municipalities Statement – Citizens’ Universal Declaration.

<sup>98</sup> Wales, Plenary, Fifth Senedd, (1 May 2019), at 411.

<sup>99</sup> UK. See also: Canada, n. 77 above, at 29204, 29208, Yukon, n. 77 above, at 131; Scottish Government, ‘The Global Climate Emergency – Scotland’s Response: Climate Change Secretary Roseanna Cunningham’s Statement’ (14 May 2019) <<https://www.gov.scot/publications/global-climate-emergency-scotlands-response-climate-change-secretary-roseanna-cunninghams-statement/>> last accessed 19 July 2021; Wales, n. 98, at 393; Welsh Government, ‘Welsh Government Makes climate emergency declaration’ (Welsh Government, 2019) <<https://gov.wales/welsh-government-makes-climate-emergency-declaration>> last accessed 19 July 2021; New Zealand, n. 26 above, at 238; Auckland Council, n. 26 above, at section 9.

<sup>100</sup> Canada, n. 80 above, at 29200-29201.

<sup>101</sup> Wales, n. 98 above, at 404.

back along geologic time. In Yukon, the legislative debate repeatedly noted the remarkable increase in average temperature in the north: a 2.3°C increase between 1948 and 2016 (with a corresponding 4.3°C increase in winter temperatures).<sup>102</sup> One member captured the sense of geologic time by calling the climate emergency a ‘slow-moving... ever-evolving emergency.’<sup>103</sup> Others called the declaration ‘bittersweet’ because while government action is finally happening, there is still so much to do.<sup>104</sup> In Aotearoa/New Zealand, one member spoke of the ‘time we cannot get back’ in reference to now precarious species survival.<sup>105</sup> The sense that the climate emergency has now arrived thus hangs together with the much longer timescale along which human activity has brought this emergency into being.

Climate emergency declarations also contain the decidedly ‘unexceptional’ timescale of emergency management: plodding, ongoing, managerial. As discussed further below, this manifests through the combination of targets, plans and reporting obligations, all consistent with conventional, regularized and continual government tools for emergency management. Time marches steadily on through ongoing planning, interim targets, reporting requirements and end goals.

In contrast to the quotidian, ongoing practice of emergency regulation, grander temporal narratives emerge as well. Climate emergency declarations tell constitutional stories about the past and future identity (or identities) of the community and the roles of their public institutions.<sup>106</sup> This constitutional narrative is perhaps the strongest in the UK debates in which multiple members noted the country’s responsibility to act on climate change:

This is the mother of all Parliaments. This is the country that had the first industrial revolution. It is our moral responsibility to come together as a Parliament and show the leadership that people across the world rightly expect of us.<sup>107</sup>

The distant past—the industrial revolution—offers a source of inspiration for the coming ‘green industrial revolution.’<sup>108</sup> The debates also draw on the nation’s responses to the World Wars to galvanize support for efforts to address the climate emergency. While the constitutional narrative in the UK is one of national unity, legislative debates in Canada, Scotland, Northern Ireland and Aotearoa/New Zealand failed to generate this sense of ‘rally round the flag’ unity.

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<sup>102</sup> Yukon, n. 77 above, at 128, 132.

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*, 133; Northern Ireland, Assembly, 2019-2020 Session (3 February 2019), at time stamp 7:00PM.

<sup>105</sup> New Zealand, n. 26 above, at 245.

<sup>106</sup> See also Hilson, n. 4 above, at 366-367 (on ‘generational time frames’).

<sup>107</sup> United Kingdom, n. 75 above, at 253.

<sup>108</sup> *ibid.*, at 232.

The constitutional narrative is also projected into the future by imagining how this moment of either action or inaction will be looked back upon. In the UK, one parliamentarian notes: ‘We have a chance to act before it is too late... It is our historic duty to take it.’<sup>109</sup> Across national governments, this timescale is represented through an acknowledged obligation to young people and future generations. In Aotearoa/New Zealand, this obligation flows from Māori law as well:

We have an obligation to our rangatahi [young people] to unite and to do everything as kaitaki [leaders] to protect our taiao [world] and our whānau [future generations] from the climate crisis in the short time we have left.<sup>110</sup>

This connection between the urgent now and the far-off future flips on its head the conventional worries about the permanent emergency in legal scholarship. The moral (or perhaps even constitutional) obligation to act now, as discussed here, is what is needed to ensure that a state of climate emergency does *not* become permanent.

These varied and criss-crossing timelines complicate the assumption that emergencies are temporary events. We see that, in some ways, the contemplated response is very much ordinary law and governance with no clear end point for measures such as new building code regulations or carbon pricing schemes. At the same time however, the year 2050 operates as a precipice in these declarations.<sup>111</sup> It is an open question of what the future beyond 2050 looks like. Is it permanent climate emergency, as the Quebec Citizens’ Universal Declaration describes: ‘economic collapse, public health crises, worldwide food shortage, annihilation of biodiversity, and national and international security crises of unprecedented scope’?<sup>112</sup> Or is it restoration of some pre-2005 or pre-1990 status quo ante?<sup>113</sup>

These declarations of climate emergency and their implementation thus reveal another temporal paradox, a tension between preservation and transformation. If the climate emergency is

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<sup>109</sup> United Kingdom, n. 75 above, at 235.

<sup>110</sup> New Zealand, n. 26 above, at 244.

<sup>111</sup> With the notable exception of Northern Ireland, which relies on 2100 for its target date.

<sup>112</sup> Citizens’ Universal Declaration of Climate Emergency (Group Mobilisation, ‘Publications & Communiqués’ (nd) <<https://www.groupmobilisation.com/la-duc-the-dce-la-dec>> last access 23 July 2021) adopted by Quebec Municipalities (Late 2018 [Teika Newton, ‘A History of Québec’s Declaration of Climate Emergency Campaign’ (Climate Action Network, 2019 February) <<https://climateactionnetwork.ca/wp-content/uploads/2019/02/DUC-2019.02.25-1.pdf>> last accessed 23 July 2021]) and relied upon as a source for Quebec National Assembly declaration.

<sup>113</sup> 2005 and 1990 are two commonly used reference dates for emissions levels. For instance, under the Paris Agreement the UK has committed to a 68% reduction compared to 1990 by 2030 (UK Government, ‘UK sets ambitious new climate target ahead of UN Summit’ (03 December 2020) <<https://www.gov.uk/government/news/uk-sets-ambitious-new-climate-target-ahead-of-un-summit>> last accessed 23 July 2021.); Canada’s enhanced target is 40-45% reductions below 2005 levels by 2030 (Government of Canada, ‘Prime Minister Trudeau announces increased climate ambition’ (22 April 2021) <<https://pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition>> last accessed 23 July 2021.), Australia’s is 26-28% below 2005 levels by 2030 and Aotearoa/New Zealand is 30% below 2005 levels by 2030.

temporary, then the objective of the declaration is to preserve some notion of pre-emergency normality. But perhaps the climate emergency has permanent transformative potential to bring about some different vision of the future. Much in these declarations focuses on preventing the worst of anticipated climate impacts in order to stabilizing some notion of the status quo. For instance, most implementation documents prominently feature support for electrification of transportation, e.g. investments and incentives for electric vehicles.<sup>114</sup> Some jurisdictions are explicit about intentions to rely on carbon capture technology or offset measures, which may not yet (nor ever be) feasible.<sup>115</sup> Many are enthusiastic about new opportunities for developing biofuels, hydrogen technology, and generally the renewable energy economy.<sup>116</sup> The UK Citizens' Assembly report also echoes this desire to preserve the status quo through, for instance, its recommendations to minimize restrictions on travel and lifestyles and to balance the freedom to fly with net zero targets.<sup>117</sup> On this view, the climate emergency is something temporary, exceptional—and avoidable—by taking steps to adjust current practices but without disrupting the status quo.

At the same time, however, many of these declarations contemplate something more transformative. Vancouver's climate declaration is framed around justice and equality, with these commitments deepening through implementation in the form of a Climate Justice Charter and partnership with Indigenous Peoples.<sup>118</sup> While the Scottish government has expressed its keen interest in status-quo-reinforcing carbon capture technology, the Scottish Just Transition Commission and Citizens' Assembly have called on the government to undertake transformative change by, for instance, centering government decision-making frameworks on the concept of well-being rather than GDP.<sup>119</sup>

The Tāmaki Makaurau/Auckland response to the climate emergency also outlines a transformative vision which, incorporating Māori law, calls for

a change in our response to climate change, re-framing, re-imagining and re-setting the current system, and a shift from a human-centred approach to an ecological-centred approach given our symbiotic relationships with the natural environment.<sup>120</sup>

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<sup>114</sup> E.g., Yukon, Vancouver, UK, London, ACT, Scotland Wales, South Australia, Auckland, Quebec.

<sup>115</sup> Scottish Government, n. 99 above; Government of South Australia, *South Australian Government Climate Change Action Plan 2021-2025* (Government of Southern Australia, 2020), p. 25; Auckland Council, n. 89 above, p. 67.

<sup>116</sup> In particular see: Yukon, Quebec, South Australia.

<sup>117</sup> Climate Assembly UK, *The path to net zero: Climate Assembly UK Full Report* (Climate Assembly UK, 2020), p. 14.

<sup>118</sup> City of Vancouver, n. 89 above, pp. 14-15, 20-23, 57, Appendix A-10, Appendix J-18, Appendix M-4, 8,12-13, Appendix N 1,3.

<sup>119</sup> Just transition Commission, *Just Transition Commission: A National Mission for a fairer, greener Scotland* (Just Transition Commission, 2021) p. 41; Climate Assembly UK, n. 117 above, p. 10.

<sup>120</sup> Auckland Council, n. 89 above, p. 8.

With Māori knowledge integrated throughout, the plan outlines a broad set of goals—not simply rapid emissions reduction—but also ‘social, environmental, economic and cultural wellbeing.’<sup>121</sup> The plan incorporates Māori-led ‘transformational priority pathways’ including regeneration of ecological systems and shifting to a regenerative economy,<sup>122</sup> and these are further backed by specific actions.<sup>123</sup> While many specific items of the plan’s 26 sub-actions track those in other jurisdictions, the Tāmaki Makaurau/Auckland framing of the climate emergency also embraces permanent, transformational change.

From the perspective of the official opposition in the New Zealand House of Representatives, the anticipated climate transformation does not bend in the direction of justice. Speaking against the motion, one member described the climate emergency as license to

tell you what car you can drive, what days you can drive, the size of your house, how much energy you can use and where you buy it from, and how many flights you can take. ... Success means not having the climate change Minister telling us how to live our lives to cut emissions—because that means failure in every sense.<sup>124</sup>

On this view, the climate emergency is being used as cover to avoid scrutiny of a transformative government agenda, engaging the enduring skepticism of legal scholars that emergency powers can ever be temporary. We can see how conflicting characterizations of time are embedded in these declarations. In some ways, they seem to invoke conventional emergency framing which demands temporary departure from the rule of law to preserve the status quo ante. In other ways, they reflect an expression of the urgent need to depart from the status quo to better realize rule-of-law aspirations in a changing environment. If the latter is the case, then perhaps the ‘emergency’ frame is too limited to describe the full potential of these declarations.<sup>125</sup>

A close read of these declarations shows that multi-layered temporal horizons characterize the climate emergency. The effect of these declarations is both to compress and extend our perception of time and challenge assumptions about the temporary nature of emergency measures. By declaring an emergency, these statements present a picture of ‘an on-rushing future that severs the present from the past and compresses the time for decision and action.’<sup>126</sup> As stated in the Yukon Legislature and Senedd, the declaration must be treated as a new beginning.<sup>127</sup> At the same time, however, these declarations call on both distant pasts and futures as sources of obligation, inspiration and action. And they grapple with competing objectives of preserving the status quo—

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<sup>121</sup> *ibid*, p. 10.

<sup>122</sup> *ibid*, pp. 33-34.

<sup>123</sup> Auckland Council, n. 89 above, pp. 132-158.

<sup>124</sup> New Zealand, n. 26 above, at 241.

<sup>125</sup> Thanks to the anonymous reviewer for raising the connection between climate emergency declarations, permanent states of emergency and revolution.

<sup>126</sup> Anderson, n. 6 above, at 470.

<sup>127</sup> Yukon, n. 77 above, at 132; Wales, n. 98 above, at 402, 405.

by treating the climate emergency as temporary and exceptional—versus the transformative possibilities of emergency governance. Just as climate change plays out on multiple time scales, so too do these declarations.

*c. Exceptionality Paradoxes*

*The motion before us employs all the implied drama of the word “emergency”, but it does so with zero practical effect. – Nicola Willis, New Zealand House of Representatives<sup>128</sup>*

This section considers who responds to the climate emergency and how. As we saw above, questions about emergency response focus on anxieties about authority (who gets to decide and what exceptional powers they have) and accountability (how to prevent and correct executive overreach). Climate emergency declarations contain paradoxes of authority and accountability. We will see that implementation of these declarations is characterized by both the ordinary and exceptional; familiar practices and new instruments. Moreover, implementation is characterized by both unilateral action and jurisdictional challenges; consolidation and creative institutional design.

Responses to the climate emergency contemplate both familiar measures and also institutional creativity. One view of climate emergency declarations, captured in the epigraph, is that they do nothing—they do not authorize anything new and certainly not the kind of exceptional powers typically associated with emergencies.<sup>129</sup> Indeed, the bulk of these climate emergency declarations operate through ordinary government functions of planning, setting targets, and reporting. Thus far, implementation of these plans has not led jurisdictions to invoke exceptional measures.<sup>130</sup> Rather, they have relied on investment, non-binding policies, education, advocacy and the ordinary legislative process (e.g. bills to legislate GHG reduction targets and new city by-laws).<sup>131</sup>

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<sup>128</sup> New Zealand, n. 26 above, at 248.

<sup>129</sup> See also the Senedd, where the declaration commends actions already being taken and the opposition suggests that the government’s declaration is simply a ‘rebranding’ of existing policy: Wales, n. 98 above, at 397.

<sup>130</sup> Greater London Authority, *Zero Carbon London: A 1.5°C compatible plan* (Greater London Authority, 2018), p. 5; Scottish Government, *Investing for Jobs: Capital Spending Review 2021-22 to 2025-26* (Scottish Government, 2021), p. 1.

<sup>131</sup> Significant legislative reform has been undertaken in Canada (*Canadian Net-Zero Emissions Accountability Act*) and the UK (*Environment Bill*). While these legislative developments will directly impact climate emergency response, the connection to climate emergency declarations is somewhat tenuous. There is nothing in the legislative history of Canada’s legislation to connect this Act to the declaration of climate emergency. While the UK’s Bill contains some important measures such as the duty to conserve biodiversity and references the climate and environment emergency in its purposes provision, the impetus for the Bill was Brexit—not the declaration of environmental emergency. In the UK and Northern Ireland, private members bills have been proposed to directly implement climate emergency response, though it’s unclear whether these will be passed into law: Caroline Lucas, ‘Climate and Ecology Bill’ (2 November, 2020) <<https://bills.parliament.uk/bills/2772>> last accessed 21 July 2021; Suzie Cave, ‘Private Member Bill: Climate Change (Northern Ireland) Bill 2021’ (13 May 2021) <<http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/agriculture-environment-and-rural-affairs/research-papers-2021/private-member-bill-climate-change-northern-ireland-bill-2021/>> last accessed 21 July 2021. At the municipal level, see e.g. Vancouver’s zero-emissions bylaws for new homes described here: Michelle

This reliance on decidedly ordinary governmental powers lends some support to the view expressed in the epigraph, that climate emergency declarations have no emergency ‘substance.’ So too does the fact that a number of jurisdictions have undertaken subsequent climate measures that make no reference to their declaration of climate emergency.<sup>132</sup> In most cases, jurisdictions have not issued separate plans or measures to respond to the climate emergency declaration.<sup>133</sup> Rather, many incorporate references to the climate emergency declaration into plans and actions already underway. From a strictly causal perspective, it is thus difficult to discern what, if any, difference the declaration of climate emergency has made to a ‘business as usual,’ which, in some jurisdictions, already contemplated considerable emissions reductions.<sup>134</sup>

Recall, though, that disaster law literature emphasizes the predictable and ongoing regulation of emergency management. From this perspective, climate emergency declarations are operating as they should. With contemporary disaster research emphasizing resilience, the regulatory emphasis shifts from response to preparedness and risk reduction. A key feature of emergency preparedness is an emergency a plan which identifies vulnerabilities, priorities, roles and responsibilities. Relatedly, as we have seen, disaster risk reduction requires all institutions of government to operate in concert to mitigate disaster risk outside of acute emergency response. The Scottish Climate Change Secretary, in her declaration of climate emergency, captures these insights stating that “[a]n emergency needs a systematic response that is appropriate to the scale of the challenge and not just a knee-jerk, piecemeal reaction.”<sup>135</sup> Many of the climate implementation plans issued by these jurisdictions do just this—provide a systematic response which engages cross-government departments and multiple sectors of society. A number of these plans specifically require a ‘whole of government response,’ including the application a ‘climate lens’ to all government decision-making.<sup>136</sup>

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Garage, ‘Vancouver Council Votes Against Delay for Climate Emergency Plan’ (11 June 2021) <<https://theyyee.ca/News/2021/06/11/Vancouver-Council-Votes-Against-Delay-Climate-Emergency-Plan/>> last accessed 22 July 2021.

<sup>132</sup> South Australia, Toronto. At least in the case of Toronto, the exceptional nature of the emergency is undermined by the significant slash to the budget for implementing the climate emergency response: Nick Boisvert, ‘“We can’t afford to lose a year”: Worries abound over Toronto’s plan to reduce climate funding’ (18 February 2021) <<https://www.cbc.ca/news/canada/toronto/toronto-climate-budget-2021-1.5914810>> last accessed 21 July 2021.

<sup>133</sup> Vancouver and Sydney are exceptions with distinct climate emergency response plans. These are discussed further below.

<sup>134</sup> See e.g. New Zealand, Parliament, Cabinet Business Committee, *Climate Change Emergency* and whole-of-government responses (2 December 2020), pp. 2, 4. Scotland, too, had a number of important developments already underway (e.g. Just Transition Commission and Climate Change Bill amendments) which interact with the climate emergency declaration in non-linear ways.

<sup>135</sup> See also the Northern Ireland legislative debates as the rationale given for the adopted amendment to the motion is that it provides a plan moving forward: Northern Ireland, n. 104 above, at time stamp 5:45 PM (“Miss Woods”).

<sup>136</sup> Government of the Yukon, *Our Clean Future: A Yukon Strategy for climate change, energy and a green economy* (Government of the Yukon, 2020), p. 63; City of Sydney, *Climate Emergency Response* (City of Sydney, 2020), p. 6; Auckland Council, n. 89 above, p. 17; Australian Capital Territory, *ACT Climate Change Strategy 2019-2025* (Australian Capital Territory, 2019), pp. 6, 12.

At the same time, climate emergency declarations tap into the energetic nature of emergency powers. As noted above, most jurisdictions emphasize the urgency of action to reduce emissions and many set out an expedited or accelerated schedule for specific actions. The Climate Change Strategy for ACT illustrates the rapidity of anticipated reductions under its plan: its 2030 projection for emissions reduction with additional measures is 8.5 times that of reductions for business as usual.<sup>137</sup> After the First Minister's climate emergency declaration, which stated 'if we can go further or faster, we will do so,' Scotland did indeed update its proposed Climate Change Bill amendments to a 2045 target, rather the original 2050 date.<sup>138</sup>

New instruments are also proposed or implemented through the emergency declaration. For instance, Vancouver's climate emergency declaration requires the development and implementation of a carbon budget for the city, based on its proportion of emissions in a 1.5°C warming scenario. London and Tāmaki Makaurau/Auckland have explicitly based their current plans on detailed carbon budgets.<sup>139</sup> One goal of the Tāmaki Makaurau/Auckland plan is to ensure all decision-making does not exceed its carbon budget, an enduring commitment even through the COVID-19 pandemic.<sup>140</sup> A further example of creativity is Sydney's call to create a federal Just Transition Authority, an independent commission with a mandate to transition workers in the fossil fuel industry into alternate, suitable employment. While the Australian government has not responded, Scotland implemented a similar innovation. The Scottish Just Transition Commission, an independent commission, issued wide-ranging recommendations to the government on how to give effect to a just and fair transition.<sup>141</sup> Some of these recommendations include new tools for land-use planning and a reformed legal framework for land ownership.<sup>142</sup>

Related to this paradox is a second. Climate emergency declarations address the need for unilateral action while also embracing society-wide mobilization and partnership. We have seen that conventional emergencies evoke concerns about the concentration of power in the executive branch because emergencies present an opportunity for a power grab with only weak mechanisms for accountability. Indeed, it is this notion of the activated executive which appeals to climate activists who draw on wartime analogies for framing the response to climate change.

Some of this activation and consolidation is evident in the declarations. In Aotearoa/New Zealand, the urgency and priority of the climate emergency is signalled by leadership at the very top: a

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<sup>137</sup> Australian Capital Territory, n. 136 above, p. 35.

<sup>138</sup> Government of Scotland, 'Climate Change (Emission Reductions Targets) (Scotland) Bill Explanatory Notes (23 May 2018) <<https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/climate-change-emissions-reduction-targets-bill/introduced/explanatory-notes-climate-change-emissions-reduction-targets-scotland-bill.pdf>> last accessed 19 July 2021, pp. 4-5. Compare with the amended and enacted bill [Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 (asp 15)] which legislates the target for 2045.

<sup>139</sup> Greater London Authority, n. 130, pp. 10-11; Auckland Council, n. 89, p. 50.

<sup>140</sup> Auckland Council, n. 89, p. 50.

<sup>141</sup> Just Transition Commission, n. 119 above.

<sup>142</sup> Recommendations 14 and 19.

climate response ministerial group, chaired by the Prime Minister.<sup>143</sup> Scotland's Just Transition Commission calls for the Deputy First Minister to be responsible for the just transition to zero emissions.<sup>144</sup> Similarly, the City of Toronto's declaration is a long list of directives issued to city staff. New cabinet committees and lists of new tasks and measures to be undertaken by a largely out-of-sight bureaucracy raises common concerns about the use of emergency powers: that is, they expand executive powers and undermine public participation and transparency through a rapid and technical response.<sup>145</sup> The centrality of emissions modeling and accounting in many of these plans may raise similar concerns—that emergency response is moved into the realm of the technical thereby limiting democratic engagement and political creativity.<sup>146</sup> While perhaps an unintentional mix-up, the exclusion of climate activists from the Senedd during the climate emergency declaration debate is emblematic of wider concerns about emergency powers.<sup>147</sup>

However, this seems only part of the story. Implementation post-declaration has, in many jurisdictions, emphasized society-wide mobilization and partnership. This is evident both in terms of the measures identified in these plans and in the processes used to devise them. For instance, a cornerstone of both the UK and Scottish governments' implementation have been Citizens' Assemblies, in which representative groups of roughly 100 citizens deliberated on how to address the climate emergency.<sup>148</sup> Citizens Assemblies provide a process through which to directly engage citizens in policy development for responding to the declared climate emergency. The plan issued by Tāmaki Makaurau/Auckland features partnership and cooperation as framing devices and method.<sup>149</sup> The plan was developed with guidance from the Mana Whenua Kaitiaki Forum, a governance body of Māori authorities; it was co-drafted with rangatahi (Māori youth); and it specifically outlines which parts of implementation are the responsibility of Auckland Council, central government, mana whenua, local boards, businesses, individuals and communities, young people and rangatahi Māori, civil society, research institutions and academia, and C40 Cities.<sup>150</sup>

Beyond this broad engagement, some jurisdictions have designed institutions to make climate emergency response accountable to those most vulnerable to climate change. For instance, Yukon has constituted a Youth Panel, which advises the government on its 2030 Climate Plan.<sup>151</sup> Vancouver has a Climate and Equity Working Group, which reviews all actions on climate

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<sup>143</sup> New Zealand, Parliament, Cabinet Business Committee, *Climate Change Emergency* and whole-of-government responses (2 December 2020), p. 5.

<sup>144</sup> Just Transition Commission, n. 119 above, p. 72.

<sup>145</sup> Hopkins n. 38 above; Grow Sun & McCormick, n. 40 above.

<sup>146</sup> Hulme, n. 19 at 25.

<sup>147</sup> Wales, n. 98 above, at 472.

<sup>148</sup> Climate Assembly UK, n. 117 above, p. 4; Scotland's Climate Assembly, *Scotland's Climate Assembly: Recommendations for Actions* (Scotland's Climate Assembly, 2021).

<sup>149</sup> Auckland Council, n. 89 above, pp. 6-7.

<sup>150</sup> *ibid.*, at p. 118. London too sets out partnership and roles for all governments and sectors of society: Greater London Authority, n. 130 above, pp. 30-35

<sup>151</sup> Yukon, n. 136 above, p. 64.

emergency response and has had a notable impact on the policies announced thus far.<sup>152</sup> In Tāmaki Makaurau/Auckland, the Independent Māori Statutory Board and the Mana Whenua Kaitiaki Forum are both involved in the implementation of the city’s climate plan.<sup>153</sup> In addition, Yukon, Vancouver Sydney, and Aotearoa/New Zealand all contemplate implementing climate actions in partnership with Indigenous Peoples. Further institutional reform in the UK and Northern Ireland contemplates new enforcement tools to ensure compliance with climate measures.<sup>154</sup>

What is clear is that, across these declarations, climate emergency response is unfolding through complex, multi-level institutional dynamics. Multiple jurisdictions, government institutions and communities are being engaged in the response. These intricate institutional relationships pose questions about accountability and coordination, which are worthy of further analysis in light of each jurisdiction’s legal culture and institutional norms. At a broad-level, however, it is worth observing that climate emergency declarations are, in many instances, provoking institutional innovation as a form of accountability.

This institutional creativity cuts against the assumption that an emergency activates a centralized, unified executive. Climate emergency declarations reveal a suite of ‘jurisdictional problems,’<sup>155</sup> through coordination challenges with other governments and calls to mobilize society broadly. These jurisdictional problems are illustrated by Sydney’s climate emergency declaration, which identifies climate impacts on the people of Sydney but then declares that climate change ‘should be treated as a *national* emergency.’<sup>156</sup> Similarly, the Scottish government declared a ‘global climate emergency.’<sup>157</sup> Australian municipal and territorial governments capture coordination challenges when they place the blame squarely on the ‘shameful’ conduct and inaction of the federal government.<sup>158</sup> Sub-national governments in the UK, too, note the constraints they face from an unresponsive central government.<sup>159</sup>

Cities have played a leading role with climate emergency declarations and responses, as local governments continue to find new and innovative ways to advance climate action in the face of limited resources and power.<sup>160</sup> Municipal climate emergency responses feature specific measures to engage higher levels of government. Developing ‘a lobbying strategy for a range of new and

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<sup>152</sup> City of Vancouver, n. 89 above, pp. 5, 19.

<sup>153</sup> Auckland Council, n. 89 above, p. 30.

<sup>154</sup> UK Office of Environmental Protection; N. Ireland proposed Independent Environmental Protection Agency (proposed in Climate Emergency declaration and in New Decade, New Approach Agreement).

<sup>155</sup> Loewy, n. 30 above, pp. 176-217.

<sup>156</sup> Emphasis added.

<sup>157</sup> Secretary of Climate Change.

<sup>158</sup> Sydney; ACT “condemns” the Federal Government for continued failure. Vancouver’s declaration less directly suggests that provincial and federal inaction are the threat.

<sup>159</sup> E.g., Scottish Government, n. 130 above, p. 1; Greater London Authority, n. 130 above, p. 5.

<sup>160</sup> J. Díaz-Point, ‘Cities and the governance framing of climate change’ (2021) 31 *Environmental Policy and Governance* 18. See also campaigns such as Taking Climate Justice Into Our Own Hands <<https://wcel.org/publication/taking-climate-justice-our-own-hands>> last accessed 11 Oct 2021.

existing asks from central government’ is identified as a key priority under London’s climate emergency declaration.<sup>161</sup> Vancouver also notes a pandemic-induced shift from investment to regulation and advocacy.<sup>162</sup> Partnership and coordination with other cities is a theme across these declarations, and one that echoes both the necessity and challenge of multi-level governance in emergency response.

Climate emergency declarations illustrate the challenge of needing to act unilaterally in response to threats to life, livelihood and property, while also facing jurisdictional and coordination complexity. Indeed, much of the most tangible climate emergency response action is taking place at the scale of the local. What makes the unilateral action remarkable is that most of these jurisdictions are municipalities—the relative contribution of each to global GHG emissions is tiny—yet they forge ahead with some of the most specific and ambitious climate emergency actions. Like other systemic, social issues, ‘[a]lthough federal and provincial governments have helped to create this ... crisis, it is largely the cities that are left to solve the problem.’<sup>163</sup> Vancouver, London, Sydney and Tāmaki Makaurau/Auckland all seek greater support from central governments, but they do not wait on this.<sup>164</sup> Rather, their declarations all express the hope that they will be in a stronger position to make these requests of other jurisdictions—and indeed broader society—if local governments themselves show leadership.

The need for rapid, exceptional and coordinated action animates these climate emergency declarations and thus engages similar questions of authority and accountability that occupy public law scholars. Climate emergency declarations and their implementation thus far reveal mostly familiar, routine governance practices as well as some institutional invigoration through actual and proposed novel measures (carbon budgets) and executive bodies (Cabinet committee, Just Transition Commission). While these new features raise familiar concerns about undermining democratic norms and consolidating power, much of ongoing implementation has featured partnership and society-wide mobilization. Climate emergency declarations contain a rich dialogue about the regulation of emergencies as exception and, in fact, highlight the varied modes of governance that are being brought to bear on the climate challenge.

## **Conclusion**

Climate emergency declarations spotlight ongoing public law debates over how emergencies are governed by law. The legally-ambiguous nature of these declarations concentrate disparate and contested assumptions about emergencies. Through an analysis of a subset of climate emergency

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<sup>161</sup> London Assembly, *The Climate Emergency: Extreme Weather and Emissions* (London Assembly, 2020), p. 6.

<sup>162</sup> City of Vancouver, n. 89 above, p. 62.

<sup>163</sup> R. Levi & M. Valverde, ‘Freedom of the City: Canadian Cities and the Quest for Governmental Status’ (2006) 44(3) *Osgoode Law Journal*, pp. 409-459, at 440.

<sup>164</sup> City of Sydney, n. 136 above, pp. 3, 17; City of Vancouver, n. 89 above, p. 17. Greater London Authority, n. 130 above, p. 5. Auckland Council, n. 89 above, p. 40.

declarations, it has argued that these declarations engage the perennial worries of public law scholars about emergencies: the difficulty of definition, the necessary but shifting role of time, and the issues of authority and accountability that flow from resort to emergency powers. It has shown that, along each of these dimensions, climate emergency declarations are filled with paradoxes. The climate emergency is at once known and unknown, acute and systemic, immediate and expansive, temporary and transformative, routine and exceptional, centralizing and decentralizing.

These paradoxes have legal significance because they are rooted in ongoing debates over the governance of emergencies in law. The proliferation of climate emergency declarations around the world has shifted climate discourse to emphasize the need for wide-scale, coordinated action to protect communities from worst-case scenarios. But, as we have seen, the emergency frame does not circumvent difficult legal and policy dilemmas. Instead, climate emergency declarations shift the terrain to new debates over how to govern through crisis. Emergencies are always complex political, legal and regulatory phenomena, characterized by multiple paradigms. Climate emergency declarations provide a snapshot of these debates; they condense and crystallize the many paradoxes of emergencies in public law; they allow us to see the dialogic nature of ‘the emergency’ as it plays out on this new terrain of climate disruption.

Public law scholars have described climate change as a ‘legally disruptive phenomenon’ because, climate change forces legal concepts, doctrines, and assumptions to evolve beyond incremental application.<sup>165</sup> Perhaps climate emergency declarations are one site of legal disruption. Emergencies always contain the possibility for disruption. They are unstable moments in which a fixed image of the future is not a given.<sup>166</sup> Climate emergency declarations reflect back to us this instability in the form of public law paradoxes. They stress that, in a climate disrupted world, the future is very much up for debate.

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<sup>165</sup> E. Fisher et al, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80(2) *The Modern Law Review*, pp. 173-201 at 174.

<sup>166</sup> Anderson, n. 6 above, at 471; Loevy, n. 30 above, p. 313.