Legality without Liberalism:

The Rule of Law and The Environmental Emergency

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The rule of law is often said to be a liberal ideal, intrinsically associated with the enlightenment and, being necessary for each, supplying the link between liberalism and constitutionalism. In this paper, that idea is challenged. The rule of law, even in its most 'formal' conception embraced by Lon Fuller, cannot be severed from an account of law which is thoroughly infused with moral purpose and value. The specific values which inform this principle are often portrayed as confined to action guidance, restraint of state power, and the protection of individual rights. Framed as such, the rule of law often conflicts with the moral and political obligation of political authority to preserve the conditions necessary for the community to survive and flourish. An alternative conception of the rule of law, rooted in the classical legal tradition, sees no conflict here and can thus provide the intellectual framework needed to explain how *inaction* on behalf of public authority can be as much of a threat to the rule of law as abusive action. With this in mind, the duty upon the state to respond to threats such as climate change or the COVID-19 pandemic is itself best understood as one arising from the requirements of legality. Analysis of state action or inaction in the face of such threats must thus begin with this duty in mind as a constitutive aspect of the rule of law. The threats posed by the environmental emergency are best viewed by reference to the communal underpinnings of the rule of law. The liberal desire to frame all moral issues in the language of individual rights should therefore be resisted. The framework of an individual right to a liveable climate may be the best way for liberal constitutionalism to frame the climate crises, but it is by no means the only way. Indeed, it is a manifestly impoverished attempt to concretise what can only be understood as a threat to the common good itself, grounded within the needs of the global community as a whole.

Introduction

The rule of law is, like any important concept, contested.[1] Sometimes this contentedness is presented as a particular problem for the rule of law above other contested legal concepts, prompting calls for a 'theory-agnostic' approach which allows useful doctrinal development without the messiness of jurisprudential debate.[2] While this sentiment is understandable, it proves too much. If contestedness, even essential contestedness, is sufficient to 'eliminate' theoretical inquiry, then almost no

[1] Jeremy Waldron, 'Is the Rule of Law and Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137.

[2] See; Paul Burgess, 'The Rule of Law: Beyond Contestedness' (2017) 8 Jurisprudence 480.

concept can survive.[3] Legal scholars and practitioners, including and perhaps especially judges, cannot avoid the need to *decide* what constitutes reasonableness, fairness, best interests, sufficient accountability, unjustified infringement and so on. Disagreement about these concepts is the premise of legal argumentation, it cannot be sufficient to shut down analysis. It is simply not possible to engage with or draw upon a social concept without tacitly or explicitly adopting some conception of it informed by a view of what its purpose is.[4] It is simply not possible to be 'theory-neutral' when using concepts which are necessary and essentially informed by theoretical premises. This is perhaps especially true of the rule of law, given its various conceptions, formalities, substances, and so on.

This paper will not eschew theoretical inquiry. Indeed, it proceeds from the view that it is impossible to provide a coherent account of the rule of law without first identifying the jurisprudential priors one is working with, including priors relating to the concept of law itself. For example, it is only possible to distinguish – as many do – between the rule *of* law and rule *by* law if one first adopts a positivist account of law. Even the attempt to distinguish between the concept of law and the ideal of the rule of law presupposes very specific – positivistic – theoretical premises. This much is germane, but not particularly novel. More apposite for our purposes are the theoretical presumptions which associate the rule of law with liberalism.

In this paper, those presumptions will be set out and partially challenged as providing an impoverished account of the moral underpinnings of legality as a distinct standard of governance. Once that is done, a more classical account of legality will be provided, one which restores to the rule of law an underlying purpose that has been obscured by the eclipsing presence of liberal constitutional theory. This more robust account of legality can then provide the theoretical resources needed to explain how and why existential threats to the community such as Covid-19 and the environmental emergency are also direct threats to the rule of law. Understood as such, measures taken to respond to these threats are best viewed as engaging rule-of-law principles rather than manifesting some clash between the rule of law and some other, external principles of survival, for example. With all of this in mind, some scepticism will be directed towards the ever-expanding liberal individualism which grounds most important moral issues within a rights-based framework. The framework of an individual right to a liveable climate may be the best way for liberal constitutionalism to frame the climate crises, but it is by no means the only way. Indeed, it is a manifestly

[3] This is particularly relevant for those wishing to eliminate the concept of law from jurisprudential inquiry. See; Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 Yale Law Journal 1160.
[4] John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) ch 1.

impoverished attempt to concretise what can only be understood as a threat to the international common good itself, grounded within the needs of the global community as a whole.

Liberal Constitutionalism and the Rule of Law

Just as the rule of law is a contested concept, liberalism and liberal constitutionalism are also contested. Here, liberal constitutionalism is taken to be associated with several distinct but interrelated principles set out below. To the extent that certain forms of liberalism are not reflected in these principles, they are not subject to criticism in this paper. Notably, perfectionist forms of liberalism, while prevalent within political and moral theory, tend not to be associated with liberal *constitutionalism*, nor with a liberal account of the rule of law.

I take the central tenant of liberal constitutionalism to be encapsulated in what Dworkin describes as the requirement "that governments must be neutral on what might be called questions of the good life … that political decisions must be, so far as is possible, independent of any particular conception of the good life or of what gives value to life … liberalism takes [this] as its constitutive political morality".[5] Dworkin argued that this neutrality on the good is what distinguishes liberalism from rival left-wing and right-wing doctrines which embrace some substantive conception of the good life as an important aspect of political and constitutional theory.[6] In conjunction with this, liberal constitutionalism tends to also embrace an individualism which seeks to remain neutral not just on the good life but on any conception of the public or common good.

Within rule of law scholarship, this neutrality is manifest within attempts to distinguish – sometimes quite sharply – between "formal" and "substantive" conceptions of the ideal.[7] On this framework, formal conceptions of the rule of law are neutral as to the substantive ends of law, focusing only on legal form or the procedures for the promulgation and application of legal rules. In this sense, formal conceptions are portrayed as politically neutral, compatible with a liberal constitutionalism which seeks to establish normative constraints on the exercise of state power without collapsing into any given theory of political morality. Formal or procedural versions

[5] Ronald Dworkin, 'Liberalism' in S Hampshire (ed), *Public and Private Morality* (Cambridge University Press 1978) 127; cf. Patrick Neal, 'Liberalism & Neutrality' (1985) 17 Polity 664; Richard J Arneson, 'Liberal Neutrality on the Good: An Autopsy' in Steven Wall and George Klosko (eds), *Perfectionism and Neutrality: Essays in Liberal Theory* (Rowman & Littlefield 2003).

[6] Dworkin, 'Liberalism' (n 5) 128.

[7] See; Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law' [1997] Public Law 467; Alison L Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?' (2012) 6 Vienna Journal on International Constitutional Law 259.

can thus survive challenges that to have a richer or more theoretically grounded conception is to expand the idea to breaking point.[8] In contrast, substantive theories are presented as an expanded version of formal theories, demanding protection of certain fundamental rights and committing to a more substantive vision of political morality.[9] These approaches can eschew any pretence to neutrality between different conceptions of political morality while nevertheless (at least ostensibly) remaining neutral on questions of the good life.

With this in mind, however, the modern distinction between formal and substantive conceptions of the rule of law could be recast as an intra-liberal dispute. On the one hand are formal or procedural theories claiming to be neutral as to political morality while nevertheless embracing a conception of the rule of law "whose key elements are the restraining of executive power and ensuring that all are subject to the same law".[10] On the other hand are substantive theorists who point out that even these supposedly formal theories are informed by distinct – and contestable – moral theories about the purpose and value of the rule of law.[11] This argument is bolstered by the observation that even the most formal theories cannot remain neutral as to the content of law or the protection of fundamental rights.[12] If the purpose of the rule of law, even on a formal or procedural conception, is to ensure that "those who exercise political power should do so within a structure of fixed norms rather than in an arbitrary or capricious manner", then that will have substantive implications.[13] It will necessarily prohibit any law, the content of which, seeks to give the executive too much discretion and will consequently entail rights for individuals not to be subject to arbitrary detention or abuse at the hands of the state.

Once this is accepted, it becomes clear that the distinction between formal and substantive conceptions of the rule of law is not a difference in kind but of degree. More 'formal' theories are centred around fewer rights and less onerous restrictions upon state power than more substantive ones. Yet what tends to unify theories within this spectrum is a commitment to the liberal framework unmoored from any solid grounding within communal concepts such as the public good. Liberal constitutional

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[8] See; Raymond Wacks, *The Rule of Law Under Fire?* (Hart Publishing 2021) 5; J Shklar, 'Political Theory and the Rule of Law' in A Hutchinson and P Mobahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987).
[9] See; Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 11–12; TRS Allan, 'The Moral Unity of Public Law' (2017) 67 University of Toronto Law Journal 1; TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221.
[10] Wacks (n 8) 7.
[11] See; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001); John Laws, *The Constitutional Balance* (Hart Publishing 2021); John Laws, *The Common Law Constitution* (Cambridge University Press 2014).
[12] See; John Gardner, 'The Supposed Formality of the Rule of Law', *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012); Michael Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78 The Cambridge Law Journal 570.
[13] Wacks (n 8) 17.

theory is grounded in a desire to restrain the power of the state through the enforcement and protection of individual rights. With this in mind, competing accounts of how best to achieve this purpose can be advanced. Thus, we can see legal and political constitutionalists disagree strongly about how best to design a constitutional order and how best to separate constitutional powers, but all using the same justificatory lens of analysis. Liberal constitutional theorists may disagree strongly about which institution is most legitimate and best placed to secure individual rights or to check the abuse of state power, but they tend to agree that this is the grounding justification of constitutionalism with no higher purpose or end from which these purposes are derived.

This framework is mirrored within liberal theories of the rule of law which are similarly grounded in these same purposes; the rule of law then serves as a mediator between the individual and the state where each is set up as fundamentally in tension with the other. Thus, liberal arguments in favour of the primacy of the right over the good presuppose a tension between them such that individual rights act as 'trumps' against the common good.[14] But this conception of both rights and the common good is mistaken. Properly understood, rights and the common good do not conflict. This can only be fully understood once one breaks from the mistaken belief that the common good is the will or interests of the majority rather than the totality of a given community.[15]

Central to liberal constitutionalism is the premise, often unspoken, of a conflict between the right and the good. On this view, the good is either manifest individually as a subjective (external) preference concerning how one ought to live or collectively as some kind of aggregative majority will.[16] Individual rights on the other hand are objective checks which can be used to defend the individual from an encroaching majority seeking to impose its conception of the good on others. Latent within this framework is the belief that while there may be objective fundamental rights, there is either nothing objective about the good or it is of vital importance that the state remain neutral on the good but partisan on rights.

There is thus an important but subtle difference here that may lead to tensions within liberal constitutionalism, namely that neutrality on the good life is not and cannot be classed as neutrality as to political morality. The commitment to neutrality

[14] See; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).
[15] See; Michael Foran, 'Rights, Common Good, and The Separation of Powers' (2023) (First View) Modern Law Review; Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 American Journal of Jurisprudence 93.
[16] See; Dworkin, *A Matter of Principle* (n 9) 335–72; Dworkin, *Taking Rights Seriously* (n 14) 223–39; Cf. Yowell (n 15); John Hart Ely, 'Professor Dworkin's External/Personal Preference Distinction' (1983) 5 Duke Law Journal 959; PM O'Connor, 'External Preferences and Liberal Equality' (1994) 6 Utilitas 117; Mikhail Valdman, 'Respecting Persons, Respecting Preferences' (2007) 19 Utilitas 21.

on the good is itself a theory of political morality. A liberal one. This form of liberalism might be a political theory which purports to be neutral on the good life, but it is not neutral on questions of political morality, given what neutrality on the good life requires in terms of state action and inaction. This is obviously not an insurmountable obstacle for liberal constitutionalism. It need only accept that the commitment to neutrality on the good life is its own separate principle of political morality that is not inherent within formal conceptions of the rule of law. The issue, however, is that this will force a liberal constitutionalist to choose between a formal account of the rule of law which is neutral as between political morality – thus rendering a commitment to liberal constitutionalism severable from a commitment to the rule of law – or one which is more substantive that explicitly associates the rule of law with political morality but opens the door for a similar severing of the link between legality and liberalism. Either way, the idea that the rule of law is a distinctly liberal ideal comes open to challenge.

In what follows, an account of the rule of law will be advanced which rejects liberal neutrality on the good life. Indeed, it will be argued that to properly respect the normative commitments necessary for the rule of law to have any salience, legal officials must – and do – reject this neutrality. This is done both in the protection of fundamental rights, which are themselves not neutral on the good, and also in the embrace of a connection between legality and custodianship. This is true of both formal and substantive conceptions of the rule of law, but it is more obvious how substantive theories can embrace non-liberal conceptions of legality. For that reason, it will be argued that even formal theories of the rule of law necessitate and presuppose these commitments.

The paradigmatic example of a formal conception of the rule of law is that of Lon Fuller.[17] Fuller argued that legal systems, if they are to be truly classed as such, must generally contain laws which are (i) general, (ii) open, (iii) prospective, (iv) sufficiently clear, (v) non-contradictory, (vi) stable, (vii) capable of being obeyed, and, further, (viii) there must be congruence between laws as enacted and as applied.[18] Conformity with these eight desiderata ensures that governance occurs in accordance with law as opposed to the arbitrary will of some tyrannical political ruler and generates what Fuller referred to as the "internal morality of law". While Fuller referred to these desiderata as constitutive of this inner morality of law and integral to the concept of law, later theorists have recast these requirements as pertaining to the "rule of law" and often attribute to Fuller a neutrality that is not properly contained within his theory.

[17] Lon Fuller, *The Morality of Law* (Revised ed, Yale University Press 1969).
[18] ibid 2.

To Fuller, there is an important distinction between the morality of duty and the morality of aspiration.[19] The distinction between duty and aspiration is by no means new, and reflects, in some way the distinction deontic and teleological or consequentialist outlooks.[20] The morality of duty represents bare minimum requirements below which one is not permitted to fall. It is the morality of rights protection; it "lays down the basic rules without which an ordered society is impossible or without which an ordered society directed towards certain specific goals must fail of its mark".[21] In contrast, the morality of aspiration is not about rights (or principles of right action); it is about the good: "[i]t is the morality of the Good Life, of excellence, of the fullest realization of human powers".[22] It is grounded in the firm realisation that a person, or citizen, or official, may fail to live up to their potential and so may be found wanting. Crucially "in such a case he [is] condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing".[23]

To fully grasp Fullers account of the rule of law it is imperative to understand that he viewed the inner morality of law as fundamentally aspirational. It was concerned with the morality of the good life, with excellence in human endeavours and with principles of good social order. The principles of legality "though they concern a relationship to persons generally, demand more than forebearances … to meet these demands human energies must be directed towards specific kinds of achievement and not merely warned away from harmful acts".[24] As such, the rule of law appeals to "a sense of trusteeship and the pride of the craftsman" on the part of the lawgiver.[25]

It is important to recognise both of these aspects of the aspiration in legality: excellence in the crafting and application of law and also excellence in trusteeship. It is this sense of trusteeship or custodianship which grounds and justifies how we are to measure excellence in crafting and applying law. Fuller may therefore be mistaken to place so much emphasis on the capacity of law to guide conduct, for that is clearly a means to a more fundamental end of advancing the interests of those under one's charge. Law must not simply prevent people from acting in ways that wrong or harm

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[19] ibid 1.

[20] Fuller cites several examples. See; Fuller, *The Morality of Law* (n 2) 5 fn.; AD Lindsay, *The Two Moralities: Our Duty to God and to Society* (Eyre & Spottiswoode 1940); A Macbeath, *Experiments in Living* (Macmillan 1952) 55–56 et passim; WD Lamont, *The Principles of Moral Judgement* (Clarendon Press 1946); WD Lamont, *The Value Judgement* (The University Press 1955); Hart, *The Concept of Law* (n 5) 176–80; JM Findlay, *Values and Intentions: A Study in Value-Theory and Philosophy of Mind* (Allen & Unwin 1961); Richard B Brandt, *Ethical Theory* (Prentie-Hall 1959) 356–68.

[21] Fuller (n 17) 5–6.

[22] ibid 5.

[23] ibid.

[24] ibid 42.

[25] ibid 43.

others, it must also direct human action towards excellence and flourishing. A good custodian, embodying the ideal of both reciprocity and the related concept of civic friendship, must not violate the fundamental rights of subjects.[26] But it cannot neglect their flourishing either.

This might seem, at first glance, to be unconnected to the principles of the rule of law set out above. One could reasonably ask what does custodianship have to do with requirements that law be prospective, general, clear, and so on? The answer lies in the important connection between the principles themselves and the underlying rationale or unifying normative core which gives them meaning and weight. As Raz notes, there must be something common to these desiderata which makes them one doctrine rather than a hodgepodge of disconnected principles.[27] We must have a normative, theoretical, and conceptual account to explain what unifies these seemingly disparate desiderata.

Raz initially identified this in the idea that "in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance. The principles do not stand on their own. They must be consistently interpreted in light of the basic idea".[28] However, in his early writing, this basic idea was action-guidance. On this view, the virtue of the rule of law is simply that it can ensure that law guides human conduct. As such, it is akin to the virtue of a sharp knife:

> A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument.[29]

As an instrument, the rule of law, according to Raz's early writings, is "essentially a negative value. It is merely designed to minimize the harm to freedom and dignity which the law may cause in its pursuit of its goals".[30] Yet, there are strong reasons to challenge this description. The first has already been discussed above: the rule of law is evidently not neutral as to the ends to which law is put. If the rule of law does preclude certain ends and demand the pursuit of others, then the concept itself begins

[26] On reciprocity, see; ibid 19–27, 39–40, 48, 61–62, 137–40. On civic friendship, see; Finnis (n 4) 141–156.
[27] Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1, 3.
[28] J Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 218.
[29] ibid 226.
[30] ibid 228.

to direct law towards good goals rather than simply to minimise the collateral damage to dignity that might occur in the pursuit of whatever goal happens to be chosen. Second, the requirement of effective guidance does not fully account for the normative underpinning of the rule of law: it cannot explain its purpose. As such, in Raz's more recent work, he recognises the incompleteness of a guidance-based account:

> "People can plan and organise their affairs on the basis of partial information, and in the face of risk … the law itself, however clear in language, and even in the absence of discretion in interpreting, applying or modifying it, generates uncertainties and risk. On occasion, the law deliberately adopts rules that generate risk. We must conclude that, while the law aims to guide, its ability to do so is much less securely connected with the rule of law principles I enumerated than is often assumed".[31]

With action guidance abandoned, this new account ties the rule of law to the concept of good governance such that "acting for a purpose which is clearly not one that governments are entitled to pursue" offends against the rule of law.[32] As such, drawing on standards of legitimacy, he argues that conformity with the rule of law "requires that government action will manifest an intention to protect and advance the interests of the governed".[33] While he leaves this idea of the government as a custodian somewhat underdefined,[34] this idea begins to capture and reflect the image of the legal subject which law presupposes.

Indeed, despite his insistence that the rule of law does not affect the content of law, Raz himself implicitly accepts that it does. He does so in his reliance on an example of the misuse of public funds.[35] A hereditary monarch using the public purse to purchase an expensive diamond ring for his lover breaches the rule of law by failing to distinguish the rights and powers of governments from the rights and powers of private owners: "even though he controls the public purse, he does not own it".[36] As such, if there were laws in existence, the content of which elided this distinction, Raz accepts that this would be a breach of the rule of law, even if they were legally valid on his view.[37] He cannot then maintain that the rule of law does not affect the content

[31] Raz (n 27) 4.
[32] ibid 7.
[33] ibid 1.
[34] ibid 7.
[35] ibid 6.
[36] ibid.
[37] ibid.

of law, nor the proper ends of government. What is more, these concerns are entirely distinct from the idea of action guidance.

Many ends are precluded by the rule of law; if one wishes to rule through law, one accepts those limitations on both the means and the ends of legitimate governance.[38] Crucially, Raz cannot maintain that the rule of law does not take sides "on which purposes this or that government should pursue" and also that the use of public mean for private ends is precluded because "it is not something that any government can *legitimately* do".[39] Once you introduce legitimacy into the picture, you have moved beyond description and into evaluation and can no longer claim to be neutral as between competing accounts of political morality.[40] It is for this reason that Fuller stressed that "a proper respect for the internal morality of law limits the kinds of substantive aims that may be achieved through legal rules".[41]

Clearly the private enrichment of political leaders, their friends, and their families through misuse of the public purse is a purpose that rule of law compliant governance would preclude. But this has nothing to do with action-guidance. The reason why Raz considers there to be a breach of the rule of law here is because the monarch has failed to adequately distinguish the rights and powers of government from the rights and powers of private owners. A core insight here is that breaches of the rule of law need not include failure to guide conduct but instead what we might call the privatisation of a public good; the use of a public good for private ends. But if this is true – and it is – then this creates a problem for liberal constitutionalism. Now we have two categories that we can use to describe the ends of government: public ends and private ends. The rule of law then directs government to pursue public ends and curtails the pursuit of private ends. But now we must determine what these categories entail.

It is simply not possible for liberal constitutionalism to meet this challenge while remaining neutral on questions of the good; not without collapsing the concept of the public good into some kind of aggregation of private individual rights. In that case there has been no priority of the right over the good but a complete subsumption of the good into the right, robbing the concept of all independent meaning.

That may be desirable for some but it will represent an extreme impoverishment for others. Without a detailed conception of the public good there can be no coherent understanding of the communal aspects of the rule of law and

[38] Foran (n 12). Cf. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006).
[39] Raz (n 27) 7 emphasis added.
[40] Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2008) 3.
[41] Fuller (n 17) 4.

without that we will find it increasingly difficult to account for how legality operates in emergency contexts when there is a threat to the community as a whole. Individual rights are insufficient to explain what is at stake during a global pandemic or an ongoing environmental crisis. Individual concerns must be supplemented by an understanding of the public good which makes appropriate reference to both the public and the good. For that, we need to look beyond a liberal constitutional lens. Indeed, we need to look back to an older way of thinking about law which has mostly been abandoned by constitutional theorists.

Legality, Emergency, and the Public Good

If liberal constitutionalism provides an impoverished account of the rule of law, the classical legal tradition may prove instructive. Grounded within natural law theory, the classical legal tradition focuses on identifying the proper ends of law. A central feature of the natural law tradition was the understanding that the purpose of political institutions is to ensure the flourishing of the community.[42] On this view, law plays an important role by inculcating habits of virtue, protecting the vulnerable from the predations of bad actors and helping to maintain and sustain other social institutions such as the family or the local community that also serve this function.[43] In contemporary contexts this will include administrative institutions which provide public goods such as healthcare, education, a police force, court system, and so on. Law was also seen to serve an important social function by providing a framework of rules and principles which allowed people to plan their lives, secure in the confidence that the binding agreement they enter into will generally be upheld and the wrongs they suffer will be adequately rectified. This idea that law could be defined by reference to the social function that it serves is central to Fullers project of eunomics: the principles of good social order.[44] But this was always supplemented by a virtue-oriented political arena actively seeking the good, with the help of other social institutions such as the local community and the family that reduced the need for coercive law.[45]

If we conceive of law – and the rule of law – as tied to this more expansive tradition oriented towards the collective benefit of all, we can begin to make sense of the communal or collective claims which are internal to legality. Rather than being

[42] Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Thomas Hanley tr, Liberty Fund 1998) ch 1.
[43] NE Simmonds, 'Constitutional Rights, Civility and Artifice' (2019) 78 Cambridge Law Journal 175, 175.
[44] See; Lon Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Kenneth Winston ed, Revised Edition, Hart Publishing 2001).
[45] Amitai Etzioni, 'The Common Good and Rights: A Neo-Communitarian Approach' (2009) 10 Georgetown Journal of International Affairs 113, 115.

conceived as entirely within the purview of external political morality, a commitment to peace, justice, and the collective flourishing of all members of a community become core to an ideal of custodianship necessary to given meaning and coherence to the disparate principles we call the rule of law. This is only possible if we abandon any pretence to neutrality as to either political morality or the good life. To be a good custodian is to take an interest in improving the lives of those under one's charge. That cannot be done if there is no conception of what would constitute a 'better' life.

The core insight of the classical natural law tradition is that it is much better (for you) to live in a society of flourishing equals than to be extravagantly wealthy in a crumbling dystopia.[46] Law in its central case is oriented towards facilitating the advancement of the best interests of all within a society.[47] Raz, perhaps unintentionally, reveals the important link between this traditional way of thinking about law and the modern concept we call the rule of law. In tying legality to an ideal of custodianship, he tacitly accepts that there is more to the rule of law than simply checks on state power or the protection of individual liberties. A failure on the part of legal officials to maintain a system of peace, justice, and prosperity is a threat to the rule of law itself, constituting a failure to maintain the conditions necessary for law to serve the social function that it should. The rule of law is undermined not just by the privatisation of public goods but also by their neglect. We can see this starkly when we look to the underfunding of the justice system. A failure to provide adequate resources to maintain a functioning justice system is a direct threat to the rule of law. That much is accepted by virtually all rule of law theorists. Usually, however, the fact that the rule of law requires positive action on the part of the state to set up and run vital social institutions is rarely extrapolated to inform wider thinking on the concept. But if we accept the idea that legality is tied to good custodianship in the best interests of the governed, then it becomes much easier to see how this requirement to positively invest in the community is a central rather than peripheral instantiation of the rule of law. With this in mind, it becomes possible to see how action – sometimes extraordinary action – taken to preserve and protect the community as a whole is not just compatible with the rule of law but required by it.

In the context of recent and ongoing crises, a more classical understanding of the rule of law may shed light on how best to conceive of government attempts to act in the best interests of the community as a whole. The Covid-19 pandemic has presented an extreme challenge to legal and political structures around the globe. Institutions are struggling to cope with this new reality, none more strenuously than

[46] See; Adrian Vermeule, *Common Good Constitutionalism* (Polity Press 2022); Conor Casey, 'Common-Good Constitutionalism and the New Battle over Constitutional Interpretation in the United States' [2021] Public Law 765; Foran (n 15).

[47] On the central case of law, see; Finnis (n 4) ch 1.

our legal systems which have rapidly introduced and frequently amended criminal and other sanctions in the hopes of curbing the spread of the virus. In such circumstances, the old adage that desperate times call for desperate measures rings true, prompting calls for a loosening or suspension of previously held legal norms.

Emergencies are often defined as abnormal instances demanding extraordinary responses. As Greene puts it, "emergencies are simultaneously a universal, inevitable reality but also unforeseen, exceptional events invariably requiring equally exceptional responses".[48] One thing that unifies different conceptions of emergency is an emphasis on departure from the ordinary state of affairs.[49] Varieties of emergency arise because there are different standards of normalcy. A medical emergency is one which can't be dealt with by booking an appointment with a GP. The kinds of emergency which are interesting for constitutional theory are therefore those which are not or cannot be dealt with by the normal legal or political responses. In this context, emergency is invoked as the justification for a departure from existing constitutional constraints upon executive or legislative power. International terrorism poses such a threat, it is argued, that it justifies denying suspected terrorists the right to a fair trial or the capacity to challenge the legality of their detention.[50] As Greene notes, "[t]he entire purpose of declaring a state of emergency is to enable powers not ordinarily permissible under the constraints of the constitution".[51] This is true in other emergency contexts too. Ambulances and fire trucks are permitted to depart from the ordinary rules of the road and doctors may preform urgent procedures on an unconscious patient, even if they might ordinarily be required to obtain consent

Exceptional responses in the context of constitutional law are often equated with departures from the rule of law.[52] Just as we have seen a conceptual tension between individual rights and the public good within liberal constitutional theory, we can also see a conceptual tension between the rule of law and exceptional action taken to preserve the public good in response to emergencies. The presumption here is that the rule of law mitigates only on the side of existing legal rules and individual rights and does not in any way inform principles which might give reasons for acting in response to an emergency. Rather than understanding this as a tenson within the rule of law, it is instead treated as a clash between the rule of law and external political need in response to real or purported threat.

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[48] Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 1.

[49] The dichotomy between norms and exceptions has been described as the very "structure of emergency powers". See; John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 I.CON 210, 221.

[50] See A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68.

[51] Greene (n 48) 19.

[52] See; Dyzenhaus (n 38).

Yet if instead we adopt a more classical understanding of law, it becomes possible to interpret fundamental principle in such a way as to include requirements on public authority to protect and preserve the conditions necessary for a community to survive and flourish in the long term. Conceived as such, concepts such as a threat to the life of the nation are best understood as arising not because of objective material conditions which will always produce such a threat, but by reference to the actual or perceived inadequacy of existing institutions to achieve the ends needed in the time-frame demanded. Greene refers to this as a "severity threshold" and argues that it "is only crossed when normal responses to the threat are ineffectual".[53] We could therefore define constitutional emergencies as those situations where an exception to constitutional law is demanded, justified by reference to the real or perceived urgent need to depart from constitutional law, and which is therefore not bound by law at all.[54]

Yet this description is only intelligible if there are no constitutional principles underpinning the ends in question here. If the rule of law demands that legal officials act first and foremost to preserve the conditions needed to maintain public order, then there are in fact existing constitutional norms to regulate these crises and that end must be balanced against the means chosen to achieve it in a way that recognises that fundamental constitutional concerns mitigate on both sides. To the extent that emergences are *legal* concepts, their meaning and scope must be determined by reference to legal principle, interpreted by reference to constitutional fundamentals such as the rule of law. If an emergency constitutes a legal justification for departure from some constitutional principles, then departure is itself informed by adherence to other, perhaps more fundamental constitutional principles. As such, it ceases to be the case that constitutional law is unable to address these matters and so this ceases to be an emergency. What we have instead is simply a more nuanced understanding of constitutional obligation wherein the scope of existing norms and even rights is tempered by their ordering towards the public good.

It may be tempting to view individual rights as disconnected from communal concerns such that they constitute trump cards against an encroaching majority.[55] If that is the framework one operates in, rights must then take their scope and normative content entirely free from concepts such as the public good. They must instead be fully realised in a 'state of nature' free from social context such that they ground the

[53] Greene (n 48) 2.
[54] See; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 1985); Carl Schmitt, *Dictatorship* (Michael Hoelzl and Graham Ward trs, Polity Press 2014).
[55] See; Dworkin, *Taking Rights Seriously* (n 14).

existence of duties that legal officials must respect.[56] An alternative framework of rights is to see them as derived from duties rather than the ground of duties.[57] On this view, rights may be derived from several obligations such that their scope is informed by principles pertaining to the importance of protecting the underlying interest as well as those pertaining to the importance of overriding or infringing upon the interest in question. Indeed, if sufficient attention is paid to the scope of rights, many ostensible infringements which might prompt proportionality analysis simply do not arise. One reason for this is that there is no actual conflict between the right in question and the countervailing public interest.

When cast in these more defined terms, courts may be better equipped to assess infringement, where the duty associated with a given right is engaged but its normative force is overridden or outweighed by other important considerations.[58] Some rights are not subject to this kind of override, for example a right not to be tortured. Nevertheless, many rights are, although this will arise in rare circumstances and demand compensation for their breach, even if it is justified. An example of this is the interest of liberty and the derived right not to be falsely imprisoned. Here it is essential to understand that the scope of this right is determined partially by the underlying interest in liberty but also in the background principles of justice and the public good which inform the right itself. As such, a custodial sentence is not a justified infringement on this right precisely because the right does not extend to create a duty not to imprison criminals. Where someone is imprisoned in a manner which does engage the right, say a requirement to quarantine or isolate to prevent the spread of a dangerous pathogen, the confinement may infringe this right justifiably. In this instance, the right is genuinely engaged and has been infringed, but for justified and exceptional reasons. In such cases, the residual normative force of the right will mitigate in favour of some form of compensation or, at a minimum, an apology from legal officials in recognition of the infringement. Unjustified imprisonment would simply violate this right and would be covered under the duties captured and remedied by habeas corpus.

It is here where we can see the importance of emergency as a constitutional – legally relevant – concept. It cannot simply be the case that we conceive of all exceptional responses to emergencies as threats to the rule of law by virtue of their impact on individual rights. If that were the case then the rapid response to Covid-19, exemplified by lockdown orders confining people to their homes would be a clear

[56] This is most associated with a post-Hobbesian account of natural rights. See; Eleanor Curran, 'Hobbes's Theory of Rights - A Modern Interest Theory' 6 The Journal of Ethics 63; J Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press 1986).

[57] See; Foran (n 15).

[58] See; John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120 Ethics 647.

threat to both the rule of law and fundamental rights. Yet most of us recognise that lockdown policies were capable of constitutional justification, notwithstanding the impact that they had on individual liberty. This is not to say that the infringement upon liberty here was trivial. Rather the claim here is that such rights were in fact engaged but were nevertheless qualified by exactly the kinds of rule of law considerations that would justify such policies; considerations grounded in the public good and the idea of custodianship.

Essential to fully understand how the rule of law might mediate between individual rights and the common good is a need to conceive of the rule of law as informed by both individual and communal concerns. The great failure of contemporary liberal approaches to the rule of law is to conceive of it as almost entirely grounded within a rights framework. Indeed, this is serious problem for constitutional theory generally. As Simmonds puts it, "when every important interest comes to be spoken of as a right, the distinct logic of rights is obscured".[59] In the next section, this concern will be elaborated with respect to the ongoing environmental crisis. The threats posed by the environmental emergency are best viewed by reference to the communal underpinnings of the rule of law. The liberal desire to frame all moral issues in the language of individual rights should therefore be resisted.

Some Scepticism about a Right to a Liveable Climate

One of the most pressing issues that all governments will face over the next century is the ongoing climate crisis. This can plausibly be described as an emergency because it constitutes an existential threat to the fabric of our communities and there is seemingly very little within existing constitutional frameworks that can adequately address it. In the face of legislative and executive intransigency, many activists have turned to the judiciary in the hopes that there can be some legal solution found to kickstart serious action that has thus far been lacking.

One such legal solution is a putative right to a liveable climate. Prior to 2015 only a handful of rights-based climate lawsuits has been filed globally. Since then there has been an explosion of litigation and as of 2022 there have been close to 200 cases brought.[60] Much of this constitutes what has been descried as a "rights turn" within climate litigation, resulting from an expansion of international human rights norms to reframe environmental concerns as infringements on rights to health, life,

[59] Simmonds (n 43) 187.

[60] The data derives from a database of human rights and climate change (HRCC) cases maintained by the Climate Litigation Accelerator at New York University School of Law. See 'CLX Rights-Based Climate Cases Database' *Climate Litigation Accelerator*, available at: https://clxtoolkit.com/casebook/.

and culture.[61] This is a prime example of the impoverishment of our moral language identified by Simmonds.[62] Some of this may be entirely strategic – advancing arguments that are likely to succeed rather than being overly concerned with conceptual slippage. But some of it is assuredly grounded in the belief that the best way to describe the harm of climate change is as a human rights violation.

Indeed, we have seen in some contexts that the right-bearer need not be a human at all. Within a liberal constitutional framework, it is hard to conceive of duties that legal officials may owe that are not the corelative of individual rights.[63] Undirected duties do exist – primarily within administrative law – and are characterised precisely by the fact that the obligations are informed by duties which are general and so are not directed towards individual rights-bearers. Thus, the obligations on an executive decision-maker to take into account all relevant considerations or to act reasonably and fairly do not derive from individual rights but from a more fundamental legal concept: the rule of law.[64] Nevertheless, because liberal conceptions of the rule of law tend to eschew the communitarian concerns mentioned above, administrative law has not historically been seen as fertile ground to address climate issues, at least not when compared to human rights law. But this raises several difficulties and has resulted in unintuitive solutions.

The source of these difficulties can be summarised as the undue individualisation of what is better understood to be a threat to the common good. If climate change is addressed primarily in the language of individual rights, then litigation must find a rights-bearer with sufficient standing to bring a claim. This rights-bearer must establish not only that they have the putative right to a liveable climate but also that a given policy, action, or inaction on the part of the state violates that right. This generates significant issues in terms of the proximity to harm that must be establishes, especially given that most of the people who will be most effected by policies implemented today have not yet been born.

One of the ways that theorists have raised to get around these issues is to maintain a commitment addressing climate issues by means of individual rights while cutting out the difficult task of identifying a human person as the right-bearer. Instead,

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[61] J Peel & H M Osofsky 'A Rights Turn in Climate Litigation?' (2018) 7 *Transnational Environmental Law* 37; D R Boyd 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in J H Knox & R Pejan (eds) *The Human Right to a Healthy Environment* (2018) 17 – 41.

[62] Although Simminds is by no means the first to comment on this impoverishment. See; Alasdair MacIntyre, *After Virtue* (University of Notre Dame Press 1981).

[63] On correlativity generally, see; Wesley Hohfeld, *Fundamental Legal Conceptions* (W Cook ed, Yale University Press 1919).

[64] On the connection between administrative law and the rule of law, see; John Laws, 'Law and Democracy' [1995] Public Law 72; TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' [2002] Cambridge Law Journal 87; Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (n 9).

the middle-man has been cut out entirely and natural phenomena or objects such as rivers or trees have been substituted as rights-bearers. This was initially advanced in the context of US standing law where it was argued that trees can be legal persons and this rights-bearers.[65] Since then we have seen similar arguments advanced and accepted in other contexts. Most notably, New Zealand has legislated to declare parks and rivers to be separate legal persons, with the Whanganui River being recognised as "an indivisible and living whole from the mountains to the sea".[66] Once a natural phenomenon or object is recognised as a person it can become a rights bearer and those rights can give rise to duties on the part of the state as well as other persons. Rather than looking more closely at the duties legal officials and others may be under to preserve the natural environment, the focus has remained on rights. Part of this may be tactical, but part of it is a direct consequence of a constitutional framework which finds it difficult to account for normative claims or obligations which are not in some way tied to a fundamental right.

So we can see that there are ways around these problems, but they involve a stretching of legal concepts unnecessarily and ultimately compound the problem of rights monopolising our moral, political, and legal landscape. The framework of an individual – or even group - right to a liveable climate may be the best way for liberal constitutionalism to frame the climate crises, but it is by no means the only way. Indeed, it is a manifestly impoverished attempt to concretise what can only be understood as a threat to the common good itself, grounded within the needs of the global community as a whole. The simplest explanation of the wrong that is done by constitutional actors failing to take action to prevent the destruction of the natural environment is a failure to act as a good custodian of the community, including future generations. This may have been recognised as an accurate descriptor of the political or moral wrong that is occurring. But it has rarely been tied to a distinct legal wrong, precisely because liberal constitutionalism does not have adequate conceptual frameworks to address this issue on its own terms. It cannot focus on concepts such as collective flourishing or the preservation of the community, it cannot see this failure as a threat to the rule of law except when it is filtered through the lens of rights. This is partially because this conception of the rule of law is incapable of grounding a robust positive obligation on government to act in the best interests of the governed and partially because of an undue focus on individual rights free from an underlying grounding in the common good.

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[65] Christopher D. Stone. "Should Trees Have Standing—Toward Legal Rights for Natural Objects." *Southern California Law Review* 45 (1972), 450.

[66] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 13(b). See also; Te Urewera Act 2014, ss 12–13

The result is that although there has been an explosion of litigation – some of it successful – to establish and enforce a right to a liveable climate, this can be bolstered by a focus not on environmental rights but on environmental duties. Once we move away from a liberal rights-based framework, we need not identify, or invent, specific rights-bearers. Instead we can identify undirected, general duties upon legal officials to adequately care for the natural environment. Indeed, in many instances we already have such duties latent within administrative law, derived from a classical conception of the rule of law. Requirements to act reasonably and proportionately, to take into consideration relevant considerations and the disregard irrelevant considerations could very easily be utilised in the context of an existential threat to the environment. In such contexts, the health of the environment and the impact the certain policies have on it will be relevant for government decision-making. The purpose of this paper is not to provide an extensive doctrinal elaboration of how such claims might be brought. Rather it is to stress that such claims are plausible and defensible within a framework of the rule of law which is more attuned to the idea of custodianship set out above.