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‘ADMINISTRATIVE LAW IMAGINATION’ AND ‘LEGALITY WITHOUT LIBERALISM’ IN NEW EMERGENCIES: SOME REFLECTIONS FROM COMPARATIVE CONSTITUTIONAL LAW

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Introduction

This is a response to two very different types of paper presented at this symposium on public law and ‘new emergencies’. Professor Elizabeth Fisher’s paper is a granular doctrinal analysis of administrative law adjudication in common law jurisdictions, where she demonstrates the frequency and centrality of statutory construction in climate change cases, in the context of the climate emergency. Fisher then goes on to show how the challenge posed by climate change to public law adjudication gives rise to complex legal questions requiring an evolution of the ‘legal imagination’. She suggests three areas in which that development ought to take place: in the ‘mental constructs’ of legal reasoning in appreciation of the multivalence of climate change; in the understanding of statute as a specific form of law; and in methodological styles of public legal scholarship.

Based on a conceptualisation of the rule of law under liberal constitutionalism drawn from aspects of Dworkin, Raz, and Fuller, Dr Michael Foran’s theoretical contribution argues that the rule of law in emergencies is better conceptualised by reference to the objective reason of the classical natural law tradition than by the subjective reason of positivist liberal constitutionalism. Foran uses the recent pandemic and the ongoing climate emergency as examples of emergencies that highlight certain theoretical, practical, and moral weaknesses of the liberal model. He suggests that the normative and institutional postulates of liberal constitutionalism emasculate the possibilities of the rule of law in not merely the short-term response to, but also the long-term recovery from, emergencies. The jurisprudential target of Foran’s attack is the principle of state neutrality, which, together with the principles of value pluralism and moral equality, are the second-order norms that are essential to liberal constitutionalism’s central first-order norm, the maximisation of private autonomy within a legitimate order of procedural constitutional authority.[1] The broader point of Foran’s critique is that the Western classical legal tradition provides a more prudential and moderate as well as a more morally satisfying account of constitutionalism.[2] This applies not only to the legal regulation of emergencies, but also to more general contemporary debates about theorising, legislating, executing, interpreting, adjudicating, and designing constitutional laws.[3]

In this response from the perspective of my own field of comparative constitutional law, I will have more to say about the applications of Foran’s constitutional theory in a global context than about Fisher’s doctrinal administrative law in the common law world. At the beginning of Fisher’s paper, she acknowledges the broader relevance of legal culture and constitutional law to the resolution of public law disputes in relation to climate change, but expressly (and legitimately) excludes them from the terms of her enquiry. That would appear to exclude her discussion from the kinds of questions that

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[1] John Rawls (2005) *Political Liberalism: Expanded Edition* (New York: Columbia University Press): 134 et seq.; See also János Kis, ‘State Neutrality’ in Michel Rosenfeld and András Sajó (Eds.) (2012) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press): Ch.15.

[2] Michael Foran, ‘Rights, Common Good, and the Separation of Powers’ (2023) *Modern Law Review* 86(3): 599-623. See also Ferenc Hörcher (2000) *Prudentia Iuris: Towards a Pragmatic Theory of Natural Law* (Budapest: Akadémiai Kiadó).

[3] Conor Casey and Adrian Vermeule, ‘Myths of Common Good Constitutionalism’ (2022) *Harvard Journal of Law and Public Policy* 45: 103-144.

comparative constitutional lawyers are typically interested in, especially those like me with a focus on jurisdictions that are very unlike her cases, which are all mature rule of law systems, functioning according to well-entrenched institutionalist logics, and nested within fully consolidated liberal democracies. Nevertheless, there are aspects of her idea of the 'legal imagination' in the final part of her argument, in particular the points about the role and nature of statute law, institutional competence, and styles of legal scholarship that do have some relevance, by extension, for comparative constitutional law.

I generally accept the key aspects of the high-level theoretical argument in Foran's paper that have transferable salience to my interests. I extend these insights to a discussion of a set of more meso-level concerns in comparative constitutional law, at a time when the core normative and institutional assumptions of that field are entering upon a period of major reappraisal.[4] For multiple reasons including ideological realignments in constitutional politics within consolidated liberal democracies, and shifts in geopolitical balances of power, global mores, and in scholarly and policy agendas, the understanding that constitutionalism is essentially liberal and that liberal constitutionalism is the telos of comparative constitutional law is, today, fundamentally challenged.[5] The nature of the comparative constitutional law that emerges in future remains to be seen.

The relevance of these developments for the present discussion is that they are the basis for my premise that 'constitutionalism', as both concept and conception, is today essentially contested, if it is accepted that liberal constitutionalism no longer provides the explanatory and prescriptive consensus required for the unity of comparative constitutional law as a global discipline.[6] That is, what constitutionalism does (constitutionalism as an explanatory concept), and what concrete instantiation of it best does that job in different empirical conditions (conceptions of constitutionalism as normative doctrines), are two questions around which there is "…contestation at the core, not just at the borderlines or penumbra…" in comparative constitutional theory today.[7] If this is true, then the current debates surrounding the revival of the classical legal tradition are not just debates within the Western intellectual tradition, let alone just the US constitutional tradition.[8] They are of central relevance for comparative constitutional law, which encompasses the diversity of comprehensive

[4] Philipp Dann, Michael Riegner, and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner, and Maxim Bönnemann (Eds.) (2020) *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press): Ch.1.

[5] Peter Reid and Asanga Welikala (2023) *Constitutional Transitions in a Changing World: A Discussion Report*, PeaceRep: The Peace and Conflict Resolution Evidence Platform, University of Edinburgh, PeaceRep Policy Paper 2023.

[6] For 'essentially contested concept' in legal theory, see Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' *Law and Philosophy* (2022) 21(2): 137-164. See also Walter Bryce Gallie, 'Essentially Contested Concepts' *Proceedings of the Aristotelian Society* (1956) 56: 167-198. For the distinction between 'concept' and 'conception', see Ronald Dworkin, 'The Jurisprudence of Richard Nixon' *The New York Review of Books* (1972) 18(8): 27-35 at Part II.

[7] Waldron (2002): 148-149.

[8] The preponderance of the existing academic commentary, hostile as well as supportive, on the revival of the classical legal tradition has been around Adrian Vermeule's 2022 book, *Common Good Constitutionalism*, by US constitutional lawyers focussing on the US constitutional law aspects of the book. The scope of Vermeule's book and its comparative implications are in fact universal. There is thus a growing body of public law literature, in Europe and beyond, discussing the classical legal tradition as an alternative to, or a response to the failures of, liberal constitutionalism.

constitutional doctrines of good government of the whole world, many of which do not share liberal constitutionalism's first and second order commitments mentioned above.[9]

In what follows, I will allude to those aspects of Fisher's paper that have importance for comparative constitutional law, specifically in the domain of law in times of crisis. But the proposition I will be mainly interested to test, in the light of Foran's forceful contribution, is whether the classical conception provides a concept of constitutionalism that has a greater functional and normative capacity than liberal constitutionalism to fit into a greater variety of constitutional regimes across the world.

Normative Constitutional Theory and Comparative Constitutional Law

Despite radical differences of methodology and substance, Fisher and Foran are united in the acceptance of climate change as an emergency that, due to its nature, scale, and intensity, demands the attention of public law at a fundamental level. I share this perspective. The anthropocentric orientation of (especially the economic dimension of) liberal constitutionalism is one I reject in favour of a general approach that views "…the human place in the natural world as embedded and reciprocal rather than as rational and dominant."[10]

In Foran's argument, a classical conception of the rule law is superior to a liberal conception because it incorporates the duties of government to proactively secure the general welfare of the community (defined by the natural law triptych of peace, justice, and abundance[11]). Those duties are woven into the very fabric of the rule of law in the classical tradition, and heightened and specified in the context of emergencies commensurate to the threat faced. They are not, as in liberal constitutionalism, a set of otherwise disallowed functions permitted during emergencies in the form of exceptions to the norms of fundamental rights and the rule of law. In the classical conception, those duties are as inherent to the rule of law as the community is inherent to individual selfhood.

By contrast, liberal constitutionalism sees the community and the individual in oppositional terms, and therefore its overriding concern is to ensure that the state in the charge of the community does not trample upon the individual. Liberal constitutionalism's suspicion of government is only heightened during emergencies. In the classical approach to emergency law, it is not that liberty rights are de-prioritised in favour of collective aims or of untrammelled discretion. It is, rather, that they are protected as part of the whole exercise of public authority aimed overall at the communal welfare, which to be consistent with the rule of law, must give due – but only due – protection to the rights of the individual. The legitimate scope of law and authority is determined not solely or mainly by the limits imposed by liberty rights, but by natural juristic principles that embed individual rights within the common good, the achievement of which is itself the highest individual good, such that both the individual and the community enjoy the capacity to flourish within a well-governed order.

[9] See e.g., Mark Tushnet and Bojan Bugaric (2022) *Power to the People: Constitutionalism in the Age of Populism* (Oxford: Oxford University Press); Thio Li-ann, 'Varieties of Constitutionalism in Asia' (2021) *Asian Journal of Comparative Law* 16: 285-310; Koos Malan (2019) *There is no Supreme Constitution: A Critique of Statist-individualist Constitutionalism* (Stellenbosch: African Sun Media); Simon Căbulea May, 'Religious Democracy and the Liberal Principle of Legitimacy' (2009) *Philosophy & Public Affairs* 37(2): 136-170; Nathan J. Brown (2001) *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: State University of New York Press).

[10] Katey Castellano (2013) *The Ecology of British Romantic Conservatism, 1790-1837* (New York: Palgrave Macmillan): 16. See also: Kieron O'Hara (2011) *Conservatism* (London: Reaktion Books): Ch.9; Roger Scruton (2012) *Green Philosophy* (London: Atlantic Books).

[11] Adrian Vermeule (2022) *Common Good Constitutionalism* (London: Polity): 30-38.

Next to its commitment to individual liberty, one of the defining claims of liberal constitutionalism is its principle of moral and cultural neutrality as between plural and equal conceptions of the good in society. Accordingly, it sees the primary role of the rule of law as the constraining of government in general and executive discretion in particular, so that pluralism may effloresce through the maximum exercise of private liberty on a basis of moral equality. The judicial enforcement of fundamental liberty rights is both a means and an end of the rule of law qua constitutional constraint. Given that liberal constitutionalism sees the interests of the individual and the community as counterposed if not conflicting forces, it uses various balancing devices, such as proportionality review or aggregative public interest doctrines, to resolve the tension between individual rights and public order. In Foran's account, this approach comes out as not only theoretically incoherent, but also morally flawed.[12] Liberal constitutionalism's individualism principle demands that individual rights ultimately must trump the public good. Its neutrality and equality principles demand that it can have neither a moral conception of an objectively shared public good, nor any conception of the public other than an aggregation of private interests. To Foran's critique it may be added that from communitarian and immaterialist conceptions of the good common in non-Western societies, this could well appear to be a constitutionalism in which both meaning and purpose are confined to the temporal gratification of the self.

The classical legal tradition invoked by Foran is not focussed on constraints and individualism in these ways, and it rejects moral neutrality and legal positivism. It embraces instead a morally informed law and politics of the constitution that is substantively oriented towards, and which enable and empower institutions of government to purposively pursue, the good of the commons. It is this very orientation to the common good that supplies the classical tradition with the moral foundation for its own legal principles of constraint and liberty.[13] And to any dispassionate reader of Foran's argument and student of the broader tradition in which it is anchored, it should be clear that the necessarily unitary conceptualisation of the 'common good' in the classical tradition is no license whatsoever for authoritarianism, theocracy, or purely majoritarian forms of political monism.[14] All this ought, ex facie, to have immediate resonance with comparative constitutional lawyers, whose work perforce encompasses constitutional systems and cultures far removed from Western liberalism. In many countries beyond the West, that is, countries for which the European Enlightenment is not an organic part of their historical evolution towards liberal democracy – apart from the complicated experience of European imperialism[15] – such values do in fact dominantly orient social expectations in respect of constitutions and constitutionalism.[16]

[12] See also, Kirsten Rundle, "The Morality of the Rule of Law" in Jens Meierhenrich and Martin Loughlin (Eds.) (2021) *The Cambridge Companion to The Rule of Law* (Cambridge: Cambridge University Press): Ch.10.
[13] Vermeule (2022): 164-167.
[14] For a description of liberal fears of non-liberal conceptions of the rule of law in the early modern era, see Roberto Gargarella, 'The Majoritarian Reading of the Rule of Law' in José María Maravall and Adam Przeworski (Eds.) (2003) *Democracy and the Rule of Law* (Cambridge: Cambridge University Press): Ch.6 at 148-149.
[15] Terence C. Halliday and Lucien Karpik, 'Political Liberalism in the British Post-Colony: A Theme with Three Variations' in Terence C. Halliday, Lucien Karpik, and Malcolm N. Feeley (Eds.) (2012) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge: Cambridge University Press): Ch.1; Nasser Hussain (2019) *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press).
[16] Li-ann Thio, 'Constitutionalism in Illiberal Polities' in Michel Rosenfeld and András Sajó (Eds.) (2012) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press): Ch.5; Daniel A. Bell (2006) *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (Princeton: Princeton University Press): Ch.1; Graham Walker, 'The Idea of Nonliberal Constitutionalism' in Ian Shapiro and Will Kymlicka (Eds.) (1997) *Ethnicity and Group Rights* (New York: New York University Press): Ch.6.

Of course, the resemblances, connections, and analogies are only facile at this stage. In so many ways, the institutional morality of Western classical constitutionalism may be as alien as Western liberal constitutionalism to non-Western historical, cultural, ethnic, religious, or civilizational conceptions of political order. Yet it is at least a plausible hypothesis that a model of constitutionalism that fundamentally orients itself, on explicit grounds of public morality, to the good of the community would have more of a purchase in these places than one in which the commitment to open-ended individualism is seen to produce the deleterious consequences of social atomism and weak authority.[17] But before we consider these questions more closely, a brief account of the rise and recession of liberal constitutionalism within comparative constitutional law would be useful.

Comparative constitutional law has developed exponentially in several global waves of growth since 1945 (the end of World War II and the beginning of decolonisation), and especially after 1991 (the end of the Cold War and the start of the last wave of democratisation).[18] The making and the implementation as well as the study of constitutions since 1945 have been framed by a normative-institutional model that might be called 'modernist constitutionalism', which originates in (the French and American encounters with) the European Enlightenment.[19] Between 1945 and 1991, the ideological traditions of liberalism and socialism that were otherwise engaged in an existential geopolitical conflict were nevertheless united by a common subscription to the universalist postulates of post-Enlightenment constitutional modernity.[20] At a basic level of generality, modernist constitutionalism is defined by the rejection of tradition, hierarchy, and organicism – the sources of pre-modern small 'c' constitutions – and the celebration of empiricism, egalitarianism, and transformation as the basis and purpose of modern Big 'C' Constitutions. In their understandings of constitutional foundations, liberalism and socialism were agreed on these modes and ends of modernity, but they differed on the means and forms through which the shared ends might be achieved. With the triumph of the West in the Cold War, after 1991 the socialist variant of modernism withered and liberal constitutionalism subsumed constitutional modernism as a whole.

The post-Cold War ascendancy of liberal constitutionalism was manifested in three major movements in transnational constitutional practice. First, the explosion in the number of written legal constitutions through the spread of the practice of 'transformative' constitution-making.[21] Second, the increasing normative and institutional convergence in the foundations and structures of these legally posited constitutions, in otherwise highly diverse political, cultural, and historical settings.[22]

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[17] For the illustration of this point from Theravada Buddhist and Confucian perspectives in Asia, see: D. Christian Lammerts, 'Buddhism and Constitutionalism in Precolonial Southeast Asia' in Tom Ginsburg and Benjamin Schonthal (Eds.) (2023) *Buddhism and Comparative Constitutional Law* (Cambridge: Cambridge University Press): Ch.2; Daniel A. Bell and Wang Pei (2020) *Just Hierarchy* (Princeton: Princeton University Press): 93-105.

[18] Mark Tushnet (2018) *Advanced Introduction to Comparative Constitutional Law* (2nd Ed.) (Cheltenham: Edward Elgar): 1-11.

[19] Asanga Welikala, 'Theorising Constitutionalism in Buddhist Dominant Asian Polities' in Ginsburg and Schonthal (2023): Ch.3 at 63-67.

[20] Ryszard Legutko (2018) *The Demon in Democracy* (New York: Encounter Books): 1-9.

[21] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) *South African Journal on Human Rights* 14(1): 146 at 150; Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) *The American Journal of Comparative Law* 65(3): 527–565.

[22] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) *International Journal of Constitutional Law* 8: 563. A simple search on Constitute, the core database of world constitutions, reveals that there are currently 193 constitutions in force, whereas in 1945, there were only 19 constitutions (including the non-documentary UK and New Zealand constitutions). Seventy-three constitutions came into force between 1946 and 1990 (including the non-documentary Israeli constitution), while in the period after 1991, 101 constitutions came into and remain in force. That reflects a more than doubling of the activity (a 109.7%

The third and complementary movement in liberalism's normative subsumption of constitutionalism was the expansion, institutionalisation, and increasing specification of the regime of international human rights law.[23]

Contemporary constitutional design exhibits the doctrinal hallmarks of the liberal constitutionalism at the heart of comparative constitutional law. The constitution is a written, legal instrument enjoying supremacy over other laws and political practices. The making of a constitution marks a break if not a rupture in historical continuity whereby the new constitution provides the exclusive basis of the legal identity of the new society. In this sense, the constitution also transforms the society it serves, by eradicating or ameliorating the traditions, hierarchies, and the injustice and unreason of the past, and by instantiating liberal modernity's reason, liberty, equality, and justice. Inherited virtue ethics are arcane, morally and scientifically questionable, or irrelevant, whereas modernity's values, on account of their normative superiority, are expressed in enforceable form in the legal constitution. At the level of institutions, aside from procedural democracy, the major focus of the post-Cold War constitutions has been bills of justiciable fundamental rights and strong-form judicial constitutional review. Rights, moreover, are internationalised in various ways including constitutional interpretative injunctions to municipal courts and the expanding jurisdiction of supra-state bodies over the monitoring and adjudication of rights. These are, in short, a set of institutional prescriptions that can only come from a normative constitutional theory that draws not merely a temporal but a sharp analytical distinction between tradition and modernity, and sees the purpose of modern constitutionalism as the maximisation of liberty through constrained government and an open-ended catalogue of (preferably justiciable) legal rights.[24]

However, as a growing body of scholarship in international relations, comparative politics, macroeconomics, and global history has been pointing out for some time now, the balance of power of the post-Cold War era is changing. In particular, the rise of China as an economic, diplomatic, and military power with the capacity to challenge Western dominance of the global order may bring with it the more normative ambition to reshape the world of models and ideas. China's rise comes at a time when the Western and especially the American appetite for assertive global leadership in political, economic, and legal ideas is waning. While the precise shape of what this more multipolar world might take is yet to be seen, it seems clear that a world of unipolar ideational hegemony is giving way to

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growth) of constitutional replacement in the 32 years since 1991. A 'non-documentary' constitution is one that does not find expression in one single legal document: Colin Munro (1999) *Studies in Constitutional Law* (2nd Ed.) (London: Butterworths): 3.

[23] Javaid Rehman (2003) *International Human Rights Law: A Practical Approach* (3rd Ed.) (Harlow: Longman): Ch.1; Anthony J. Langlois, 'Normative and Theoretical Foundations of Human Rights' in Michael Goodhart (Ed.) (2013) *Human Rights: Politics and Practice* (Oxford: Oxford University Press): Ch.1.

[24] For similar conceptualisations in the recent literature, albeit with critical differences of emphasis, see: 'constitutionalism': Martin Loughlin (2002) *Against Constitutionalism* (Boston: Harvard University Press): 6-7; 'liberal constitutional democracy': Tom Ginsburg and Aziz Z. Huq (2018) *How to Save a Constitutional Democracy* (Chicago: Chicago University Press): 9-15; 'structural liberalism': Michael W. Dowdle and Michael A. Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in Michael W. Dowdle and Michael A. Wilkinson (Eds.) (2017) *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press): Ch.1 at 17-20 ; 'the postwar paradigm': Lorraine E. Weinrib, 'The postwar paradigm and American exceptionalism' in Sujit Choudhry (Ed.) (2006) *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press): Ch.4; 'American Constitutionalism': Richard S. Kay, 'American Constitutionalism' in Larry Alexander (Ed.) (1998) *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press): Ch.1.

what might be, for the foreseeable future, a more complex world of competing worldviews about political and legal order.[25]

Whatever might be the historical outcome of this first new global contest of ideas since the end of the Cold War, what seems reasonably clear is that liberal constitutionalism has to contend with a new environment of normative pluralism and competition. As I have noted, in previous phases of growth, comparative constitutional law projected the lessons of European and North American historical experience and Enlightenment thought in the transformation of societies from tradition to modernity as universal precepts. While no doubt emancipatory in intent, this approach was always morally questionable from the perspective of non-Western countries, especially those of the post-colonial Global South.[26] It negated the inclusion of the very different non-Western historical experience in the process of norm-creation, rendered non-Western populations passive or reluctant norm-receivers, and by de-legitimating norm-reception in these countries in these ways, unintendedly undermined its own teleological project of universalising constitutional democracy.

Thus at nearly the quarter-way mark of the twenty-first century, there is a wide scholarly and policy consensus that the world is in a 'democratic regression', measured by liberal constitutionalism's internal standards of human rights, the rule of law, and the separation of powers.[27] International IDEA's *Global State of Democracy 2021* report, one of the most widely used quantitative democracy barometers, observes an intriguing phenomenon.[28] It notes that more states in the world are moving in an authoritarian than in a democratic direction, while simultaneously noting the resilience of democracy as a social ideal and practice. One of the significant markers of democratic resilience is what the report calls the 'explosion of civic activism' around the world. Democratic erosion is in part measured by the non-compliance, often by governments elected by democratic majorities, of liberal standards of liberty rights and institutional role morality.

This may seem a paradox – *if* the analytical premise is that there can be no constitutional democracy without liberalism. But it is possible to draw a different conclusion from this phenomenon for constitutional theory, echoing the explanation 'post-liberal' theorists have offered in relation to the dysfunction of late modern liberal politics.[29] Individualism, aggregation, rights, separations, and constraints are a normative matrix that makes for an impoverished account of constitutionalism when seen against the social conditions of human flourishing, such as embodied experience, civic friendship, historically contextualised territory, and a sustainably liveable environment. What therefore comparative constitutional law needs is a normative account of constitutional government that accommodates these sociological requirements, but at the same time is robustly ordered to the

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[25] Fareed Zakaria (2008) *The Post-American World: And the Rise of the Rest* (London: Penguin); Martin Jacques (2012) *When China Rules the World* (London: Penguin); Christopher Coker (2019) *The Rise of the Civilizational State* (Cambridge: Polity); Adrian Pabst (2019) *Liberal World Order and Its Critics: Civilizational States and Cultural Commonwealths* (London: Routledge).

[26] Zoran Oklopcic, 'The South of Western Constitutionalism: A Map ahead of a Journey' (2016) *Third World Quarterly* 26(11): 2080-2097.

[27] Larry Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes' (2021) *Democratization* 28(1): 22-42.

[28] International IDEA (2021) *The Global State of Democracy Report 2021: Building Resilience in a Pandemic Era* (Stockholm: International IDEA): Ch.2.

[29] See e.g., John Gray (2007) *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge); Phillip Blond (2010) *Red Tory* (London: Faber and Faber); Patrick J. Deneen (2018) *Why Liberalism Failed* (New Haven: Yale University Press); Adrian Pabst (2019) *The Demons of Liberal Democracy* (Cambridge: Polity Press); Ryszard Legutko (2021) *The Cunning of Freedom* (New York: Encounter Books); Adrian Pabst (2021) *Postliberal Politics* (Cambridge: Polity); Maurice Glasman (2022) *Blue Labour: The Politics of the Common Good* (Cambridge: Polity).

common good, so that the dangers of ethnic and religious nationalism, competitive or military-bureaucratic authoritarianism, corruption, factionalism, state-capture, and mob-rule are anticipated and addressed, if not neutralised.[30] This is the way in which the theories of 'common good constitutionalism' that Michael Foran and others represent may contribute to the normative reorientation and rejuvenation of comparative constitutional law as it faces a post-Western, or at any rate, a post-liberal world.

With all this in mind, we might now turn briefly to the two types of global emergency that are discussed in Fisher's and Foran's papers: the time-bound pandemic and the open-ended climate crisis.

Constitutional Design of States of Emergency and Comparative Constitutional Law

Neither Fisher nor Foran say much about constitutional design, and Fisher's paper does not deal with the pandemic. Foran focusses on the theoretical definition of emergency and in particular on the contrasting liberal and classical structures of justification for authority and rights in emergencies. In the light of what I have already said, his arguments on these two points are easily summarised. Liberal constitutionalism approaches the question of the legality of emergency powers primarily from the perspective of individual rights, which are set up against government overreach, and where the object of public law is the procedural one of balancing the two sets of competing claims.[31] This procedural legalism is unable, in extremis at least, to conceptually meet the possibility of law-less emergency action. This is partly because rule-by-law can fairly easily satisfy the formalistic conditions of the liberal conception of the rule of law, and partly because liberalism eschews any substantive conception of the public good, other than some aggregation of a set of private interests, against which the exercise of emergency powers can be assessed. Under the liberal rule of law, legality is measured by the right, not the good, to paraphrase Foran. But it is morally wrong, or at least inappropriate, and analytically incomplete, to judge emergency action by the effect it has on individual liberty alone. Per contra, the classical model of the rule of law accommodates the mediation of individual and communal interests in its very substantive conception and procedural operation. As a consequence, the core question is not how the scope of individual rights determines the scope of legal public authority during the exception to the norm, but how the scope of rights, the relevant social interests, and the duties of government to safeguard both, are all determined by the overall aims and needs of public safety. The classical view of emergency law shifts the focus of legality from individual rights to governmental duties, and from aggregated individual interests to a unitary common good.

These are all germane considerations for comparative constitutional law. In the constitutions made after 1945 and especially after 1991, there is a high degree of commonality in the design principles of emergency powers frameworks.[32] Most constitutions following the dominant liberal constitutionalist

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[30] For the antonyms of the common good, see Vermeule (2022): 26-28.

[31] For a survey of the use of emergency powers in this mode during the Covid-19 pandemic, see Joelle Grogan, 'Analysing Global Use of Emergency Powers in Response to COVID-19' (2020) *European Journal of Law Reform* 22(4): 338-354. For a discussion of competing theoretical accounts of emergency powers during the pandemic, see Rachel MagShamhráin, 'The State of Exception Between Schmitt and Agamben: On Topographies of Exceptionalism and the Constitutionality of COVID Quarantine Measures (with Examples from the Irish Context)' (2023) *Society* 60: 93-105.

[32] For illustrations of the neo-Roman model with a range of internal variations from Anglophone, Francophone, and Lusophone legal traditions, see Constitutions of: Ghana (1992): Art.31; South Africa (1996): Sec.37; Senegal (2002): Arts.52, 69; Afghanistan (2004): Art.143; Iraq (2005): Art.61(9); Angola (2010): Arts.57, 58, 119, 161, 162, 164, 173, 204, 237; Kenya (2010): Art.58; South Sudan (2011): Arts.189-192; Nepal (2015): Art.273. The emblematic liberal constitutionalist design case was South Africa in post-Cold War transnational constitution-making practice, for analysis of which, see: Halton Cheadle, Dennis Davis, and Nicholas Haysom (2002) *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths): Chs.1,30,31.

model have established what is known as the 'neo-Roman model of constitutional accommodation'.[33] The structural and procedural features of this model for the accountability of government draw from the classical institution of the dictatorship in the Roman republic, but it relies on the post-World War II conception and regime of human rights (both in constitutional and international law) for substantive control of governmental action. International human rights law, specifically the International Covenant on Civil and Political Rights (ICCPR), closely follows the neo-Roman model in establishing supra-state standards for the protection of human rights during a state of emergency.[34] The common design features of this constitutional and international legal regime are: (a) legally pre-defining the state of emergency; (b) providing for the declaration, extension, and termination of a state of emergency;[35] (c) identifying the legal consequences of a state of emergency; and (d) establishing appropriate checks and balances for the exercise of emergency powers within the broader constitutional separation of powers.[36]

It is in relation to (c) that human rights considerations are most directly implicated: human rights constitute substantive limits on governmental power, either through absolute prohibitions, or in the case of qualified rights, through proportionality review and various public interest overrides. While this has been the norm during the ascendancy of liberal constitutionalism in constitution-making, it is not inconceivable that the classical law revival may impact comparative constitutional design and interpretation in one of two obvious ways, not least because the modern framework stems so directly from an institution of Roman law. The first is through presenting, where possible, an alternative structure of justification in the interpretation of existing textual provisions on rights and emergency powers, such that rights and duties are determined by reference to common good principles rather than to autonomy-maximisation. The second, of course, is that post-liberal constitution drafting may well turn to classical principles in appropriate cases, including, but not limited to, societies in which sociological structures and democratic expectations are more conducive to a communitarian rather an individualist form of constitutionalism.[37]

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[33] Oren Gross and Fionnuala Ní Aoláin (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press): 35-46; Alan Greene (2018) *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Oxford: Hart): Ch.1.

[34] The structure of Article 4 of the ICCPR reflects seven fundamental principles: exceptional threat; proclamation; notification; non-derogation; proportionality; non-discrimination; and consistency. See Gross and Ní Aoláin (2006): Ch.5; Jaime Oraá (1992) *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press).

[35] Clinton Rossiter (1948) *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton University Press): 297-306.

[36] Gross and Ní Aoláin (2006): 46-66.

[37] In 'Reconstituting Sri Lanka', an eight-year north-south research and knowledge exchange partnership between the Centre for Policy Alternatives (Sri Lanka) and the Edinburgh Centre for Constitutional Law (University of Edinburgh), a draft Constitution Bill to repeal and replace Sri Lanka's current 1978 Constitution has been prepared as a civil society initiative. Responding to the project's structured network feedback from elite-level stakeholders as to local needs and aspirations (including after Sri Lanka's severe economic crisis of 2022 and unprecedented 'system change' seeking public protests), the design of this Constitution Bill eschews liberal constitutionalism in favour of common good constitutionalism as its underpinning normative framework. The early academic work so far on common good constitutionalism has been concerned with normative constitutional theory and with interpretive or amendatory critiques of established constitutional doctrines and institutions in consolidated liberal democracies that are not contemplating wholesale constitutional reform or replacement. The Sri Lankan civil society initiative is the first to articulate a concrete instantiation of the theory of common good constitutionalism, in legislative bill form, for the complete structural reconstitution and normative reorientation of the constitution of an existing state.

Global and Intergenerational 'Emergencies' and Comparative Constitutional Law

In the way it is correctly described in Fisher's paper, the term 'climate emergency' is more of a political instrument of global climate action, not a legal emergency in the way comparative constitutional law understands or provides for emergencies. Nevertheless, she does rely upon Giorgio Agamben's notion of the exception as the 'suspension of the juridical order' to define what she terms a 'legally conventional' state of emergency. If Agamben is right, then an emergency is an 'anomic space', and Fisher's purpose here is to contrast that against the rich and 'complex administrative law architecture' that has developed around climate change. That is fine as far as an analytical conceit goes, but from a comparative constitutional law point of view, Agamben's theory is, at best, a contentious claim, at worst an evidently inaccurate statement about contemporary constitutional design.[38] For one thing, Agamben's work in political philosophy occurs at a very high level of conceptual abstraction (similar to, and as tendentiously as, that of his ideological nemesis, Carl Schmitt). Fisher's focus, on the other hand, is on a much more empirically grounded level of cases, doctrines, and institutions. Therefore a definition of legal emergency drawn from comparative constitutional design, such as I have described in the previous section, would have had more analytic traction for both her argument and selection of cases. That said, there are three key points from Fisher's discussion that have interesting extensions into comparative constitutional law debates. These are her observations about multivalence, the role of statute, and scholarly method.

One of the key insights of Fisher's paper for comparative constitutional law is the understanding of the climate crisis as multivalent: it requires legal responses that are vertically integrated (between international and domestic law), horizontally integrated (between different branches of the state and branches of law), and temporally integrated (between present and future generations). These requirements do not fit comfortably within the neo-Roman model based on the norm and exception distinction – or if made to fit, without running the high risk of normalising the exception. The climate emergency, and the responses to it, are both intergenerational in time and require coordination rather than separation in space (between institutions of the state, between the state and the public, between states, and between states and international organisations). Above all, however, it is a type of threat, as Foran points out, that is better faced through a thick emphasis on the common good (of humanity as a whole in this case), rather than on the self-regarding footing of individual rights and of a thinly aggregative conception of the public. In some other accounts of common good constitutionalism, moreover, the environment is in fact a policy and regulatory subject in which an expansion of rights is deemed appropriate.[39] For all these reasons, it is perhaps better that the climate 'emergency' is addressed by constitutions not as an emergency as such, but by more permanent provisions.

Fisher also argues that the administrative legal imagination needs to evolve to take better account of statute as a form of law, and she criticises 'instrumentalist' accounts of legal scholarship as inadequate to the task of integrating climate change in the administrative law imagination. Her empirical case for the centrality of statute in administrative law adjudication is made in great and persuasive detail. However, there are two ways in which this point might have been differently made, consistently with her broader aims. One is to give closer and more prominent attention to 'public law modernism' as a style of British – and by extension Commonwealth – legal scholarship; the other is to more actively draw the direct connection between public law modernism and statute as a form of law.

[38] See fn.32, supra.
[39] Vermeule (2022): 173-178.

As illuminatingly theorised by Martin Loughlin, modernism is a historic public law style that was dominant in the twentieth century, which sought to achieve aims similar to Fisher's in the present.[40] In facing the challenges of deep existential change to prevailing patterns and conceptions of order in the post-World War I period, modernism rejected the analytical legal positivism and the normative classical liberalism of the common law. It argued for the evolution of the legal imagination through both a new functionalist jurisprudence of public law, and by the greater and instrumental use of statute – the form of law having both the input legitimacy of democratic majoritarianism and the output legitimacy of bureaucratic implementation – to modernise the common law in the pursuit of the welfarist aims of the positive state.[41] Furthermore, the leading lights of British modernism played an influential intellectual role in British decolonisation – at least one of them a decisive role in several associated constitution-making processes – and thereby extended its influence to the Commonwealth, the comparative terrain of Fisher's paper.[42] However ancient non-Western polities may be, their modern reincarnation as post-colonial states dates to the period after 1945. In them, moreover, the process of constitutional modernisation and the introduction of rule of law systems date no further than the mid-nineteenth century. With no large body of common law accreted over centuries of organic growth, the fact that statute (including written constitutions) is the main source of law and almost the exclusive means of legal change requires no belabouring. In many, large areas of substantive and procedural law are found in colonial statutory codes. And with the 'Global South turn', the post-colonial world is increasingly the arena of constitutional practice that is the focus of attention in comparative constitutional law, displacing the West as the synecdoche of the field so far.[43] Public law modernism is therefore a historically contextualised, jurisprudentially rich, and comparatively relevant tradition of public law thought, which moreover was remarkably successful in the achievement of its transformative goals. To embed Fisher's arguments about legal imagination within it is to strengthen their force and extend their reach.

In my own work on how constitutions and constitutionalism must adapt to meet the climate crisis, given that climate change is in fact a 'constitutional' matter for many of the reasons Foran has canvassed, I have advocated three complementary approaches.[44] First, climate change must have express references in the text of a written constitution, and legal devices and institutions established by the constitution, or authorised by the constitution to be established by other legal means, that deal with the subject of climate change, broadly defined to also include the environment, biodiversity, and sustainable development. Second, while climate and environmental litigation has its place, the constitutional superintendence of climate change must move from rights and courts to broader constitutional principles and provisions, for the implementation or enforcement of which, responsive and accountable executive, legislative, and independent/administrative bodies must be primarily

[40] Martin Loughlin, 'Modernism in British Public Law, 1919-1979' (2014) *Public Law*: 56-67.
[41] Ibid: 56-57, 59-64.
[42] Harshan Kumarasingham (Ed.) (2014) *Constitution Maker: Selected Writings of Sir Ivor Jennings* (Cambridge: Cambridge University Press); Asanga Welikala, ''Specialist in Omniscience'? Nationalism, Constitutionalism, and Sir Ivor Jennings' Engagement with Ceylon' in Harshan Kumarasingham (Ed.) (2016) *Constitution-making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (London: Routledge): Ch.6.
[43] Florian Hoffman, 'Facing South: On the Significance of An/Other Modernity in Comparative Constitutional Law' in Dann et al (2020): Ch.2.
[44] Navraj Singh Ghaleigh, Joana Setzer, and Asanga Welikala, 'The Complexities of Climate Constitutionalism' (2022) *Journal of Environmental Law* 34: 517-528. These principles were also embodied in the formal proposals submitted by the Edinburgh Centre for Constitutional Law (ECCL) to the Experts Committee of the Ministry of Justice of Sri Lanka, which was tasked with drafting a new constitution in 2020. See Navraj Singh Ghaleigh and Asanga Welikala, 'Need for a new constitutional and statutory framework on the environment and climate change in Sri Lanka', *The DailyFT*, 23 March 2021: https://www.ft.lk/opinion/Need-for-a-constitutional-and-statutory-framework-on-the-environment-and-climate-change-in-Sri-Lanka/14-715165

responsible. Third, the normative justification for constitutionalising climate change depends on the moral plausibility of claims based on the common good and intergenerational justice, and for this, ideational resources from the particular cultural idioms of the context of the constitution, including religion where appropriate, must be openly used. In unsecularised societies, liberal constitutionalism's regimes of separation – as between state and religion, and between state and market – are often meaningless for the effective constitutional superintendence of climate change in this symbolic sense. By contrast, virtually all world religions and moral philosophies have good conduct principles based on ideas of human and animal welfare, sound ecology, environmental stewardship, and on intergenerational responsibilities, which are ripe for adaptation to modern constitutional use.[45]

Conclusion

If liberal constitutionalism no longer dominates the analytical landscape of comparative constitutional law, and as a consequence, its prescriptive nostrums no longer operate in an imperialistic mode, then there is a need to rearticulate the ontological and epistemological foundations of the field. More specifically, this must happen in a way that allows the field to develop normative, doctrinal, and institutional responses to the global challenge of climate change that are nevertheless effectively tailored to specific constitutional contexts. This presents difficult challenges.

The global scale of the climate emergency requires comparative constitutional law to set aside its method of liberal teleology and encompass non-liberal democracies as well as non-democracies. This calls for a simultaneously more neutral and more expansive notion of constitutional ontology. This ontological pluriverse would still require classification for analytical and prescriptive purposes, and here the taxonomic scheme proposed for comparative law by Ugo Mattei, appropriately updated and adapted, could be useful.[46] Mattei's taxonomy divides the world into three 'patterns of law': the Rule of Professional Law (where law is autonomous of politics), the Rule of Political Law (politics often, although not necessarily always, determine the outcomes of the legal process), and the Rule of Traditional Law (no separation between traditional sources of binding rules and modern political and legal processes). These categories are defined by reference to the dominant conception of law within a system, but they are not self-contained and most systems would also have characteristics of all or some of the three patterns.

How this taxonomic approach might work can be illustrated by applying it to the two papers under consideration here. Fisher's analysis is based on a set of comparative cases that ostensibly fits exclusively within the Professional Law category (e.g., UK, Australia), but that analysis may also have relevance in some Political Law systems (e.g., Singapore). Foran's more open-textured theoretical analysis could have relevance in all three of Mattei's categories, including jurisdictions which have little connection to the Western classical natural law tradition. Foran's contribution has a negative and a positive dimension. The negative aspect is his powerful theoretical critique of liberal constitutionalism, in particular the avowed formalism and neutrality of the liberal rule of law ideal. The positive aspect is his argument in favour of a more classical conception of constitutional order that is oriented to the good of the community rather than the autonomy of the individual, and for a conception of public authority that is obligated to act in that regard. Both types of argument are highly relevant to current debates in comparative constitutional law, which is in a state of flux.

[45] See e.g., Willis J. Jenkins, Mary Evelyn Tucker, and John Grim (Eds.) (2017) *The Routledge Handbook of Religion and Ecology* (London: Routledge).

[46] Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) *The American Journal of Comparative Law* 45(1): 5-44.

The normative ideology that has so far underpinned its most successful waves of growth – liberal constitutionalism – is under challenge, both on merits and on prestige. Some of the ideological contenders to liberal constitutionalism in the world today are deeply unedifying from the perspective of good, which is to say constitutional, government. But the power and presence of these ideologies only underscore the urgency of regenerating the rigour of comparative constitutional law, in order that it fulfils its true promise as a globally relevant and inclusive discipline. A post-liberal conception of comparative constitutional law will need to come to terms with categories such as culture, history, ethnicity, religion, community, hierarchy, and tradition in conspicuously non-liberal ways, while maintaining its integrity and coherence as a branch of law, not realpolitik. The revival of the classical natural law tradition, with its metaconstitutional focus on the common good in contradistinction to liberalism's atomistic and centrifugal individualism, may be opportunely timed to contribute to this endeavour.