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Public Offices in Processes of Constitutional Development

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1. Introduction

The foundation of this volume is a collection of case studies dealing with jurisdictions undergoing some process constitutional change. These include both smaller states (such as the Maldives) and larger ones (such as Ethiopia) which lie outside the typical comparative constitutional law circuit One professed aim of the volume to take a fresh look at the dynamics of how constitutions are created, altered, and degraded, not ignoring the conventional scholarship, but attempting to transcend its conventions by looking at a somewhat novel data-set. The deeper aim is to develop new theoretical resources for studying processes of constitutional development—which resources could be applied, subsequently, to the usual subjects of study, and indeed to established democracies themselves.

In this spirit, this thematic chapter approaches *processes of constitutional development* through the lens of a concept that is also somewhat eccentric to mainstream constitutional law scholarship: the concept of *office*. My central claim is that any study of constitutional change can be (best) understood as a study of changes within the network of offices that structures and animates what we think of as the "constitution" of an organised political community. If I am right, then stories of constitutional change are stories of changes to *offices themselves* (e.g., the powers that inure in them, procedures of appointment and demission) and, to the extent it differs, of changes to *relations between offices* (e.g., cross-institutional accountability *versus* immunity, hereditary *versus* meritocratic selection). It would provide a mode of comparison between very different constitutional situations both in contemporary societies and across time. Understanding what an office is, and how offices connect individuals to institutionalised social roles, is therefore fundamental to understanding processes of constitutional development. This is so regardless of the direction of change, and how we evaluate it—that is, regardless of whether the direction of travel is towards "democratic consolidation", "constitutional endurance" or "authoritarian backsliding". All of these processes can most accurately be modelled as changes to the network of offices that structures the political life of the relevant political community. If this is correct, then office is a central category for understanding the core concerns of the case studies and the themes running through this volume as a whole.

2. The Search for an Organising Concept

A number of intersecting themes emerge from the case studies. The challenge is to find a concept with which to organise them into a set of commensurable experiences rather than so many instances—accepting some inevitable loss of resolution.

One common theme is the role of ethnic and religious politics in constitutional development, which features strongly in the case studies on Ethiopia, Malaysia, Myanmar, Sri Lanka, and the Gambia. A frequent story is that of political leaders subverting a constitution by using the powers granted to them by that constitution to favour one or the other ethnic group. Ethnopolitics are closely related to the idea of "nation building", in the sense of constructing a new imagined community[1] as the primary target of political loyalty. In many of the case study countries, there is no homogeneous community of ancestry, language, or religion coterminous with the geographical boundaries of the post-colonial state. For example, Ethiopian constitutional history since 1974 has been characterised by a form of federalism between ethnic blocs in the country's various regions. The civil war (current at time of writing) between the central government and the Tigray Region is the latest iteration. Current Malaysian politics, and the promise of a new government formed by a coalition of traditional opposition parties, also illustrates the difficulty of ethnically-based political mobilisation.

A second, closely related, theme is the dynamic of federal arrangements between a centre and one or more peripheries. Alongside Ethiopia, Myanmar provides a study in the difficulties of negotiating an ethno-federal constitutional form. Myanmar's post-colonial constitution of 1948 created a federation including numerous autonomous regions; instabilities in this constitutional framework led to a coup and long-standing military rule. Ethnic and federal tensions have characterised Myanmar's punctuated experience with democracy, too.

Another important theme characterising multiple case studies constitutional pathway is the interaction between some "*ancien regime*" of institutions (often comprising pre-colonial and colonial-era institutions alike) and some new constitutional order (often the result of an independence/de-colonisation process, and often in multiple iterations reflecting pivotal constitutional watersheds such as a *coup d'état* or a new constitutional document). For example, even under Myanmar's 2008 constitution, the military has held over constitutional prerogatives, such as the power to appoint 25% of parliamentary representatives in the federal regions. In the Maldives, we see an ancient Sultanate being replaced, in fits and starts over the 20th century with various forms of presential and parliamentary rule on loosely British models—before the passage of a landmark democratic constitution in 2008. In other cases, such as Malaysia, we see ancient monarchies surviving colonialism, independence, and democratisation to the present, where they interact with the current affairs of Malaysian constitutional politics: ethnic tension, party politics, corruption scandals, and a state of emergency induced by the pandemic.

The focus on arrangements of institutions begins to hint towards the focus of the chapter—"processes of constitutional development"—because it is institutions (presidents, political parties, militaries, but also potentially non-state institutions such as religious orders or militias)

[1] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

and the relations between them are so often the *locus* of such developments (for good or ill). Another pervasive theme, in this regard, is the diversion of state resources by officials to favour sectional constituencies, at both the central and regional level. For example, in the Gambia, Yahya Jammeh systematically diverted state resources to his ethnic power-base while pursuing discriminatory and exclusionary policies against others. So too is systemic corruption, turning the state into a *cosa nostra* rather than a *res publica*, as in the recent 1MDB scandal in Malaysia.[2] Closely related to this, again, is the "weaponization" of state bureaucracies and resources—even the law itself, in the permutation of "rule of law" into "rule by law"—to serve interests other than the general interest. These form the backdrop, for, and inform, debates about the form of state that should be developed.

Other thematic chapters deal with many of these themes in detail. In this chapter, I wish instead to search for an organising concept to study these themes in a systematic fashion. Such a concept should allow us to understand the mechanics of what is actually going on—on a conceptual level—when a President extends her tenure unilaterally or a constitutional amendment gives judges stronger protections from political dismissal, for example. It should allow, and indeed enable, better comparative study of processes of constitutional development across geography, time and different social conditions—looking past the plumage and providing a view of the bones and sinews of a "constitution".

That skeletal structure of any constitution can be understood as a *network of offices*. My claim is not that office is the *only* conceptual framework for understanding processes of constitutional development, nor do I need to insist that it is necessarily the best. But I do think it provides a crucial perspective on understanding what is going on. An "office" is an institutionalised social role with implicit jural positions *vis-à-vis* other actors, including both individual subjects and other officials. Constitutional developments can be understood as (i) changes to the composition of that network of offices, typified in post-independence or post-revolutionary reforms, or (ii) incremental evolution of the content of extant offices, that is, the powers they wield and the duties they owe *vis-à-vis* the public and other offices. For example, the classic question of parliamentary *versus* presidential *versus* military rule boils down to a question of *what officials* exercise *what powers*—or in the distribution of competence between offices in different levels of (centralised and decentralised/regional) government. This is a meaningful and informative analysis of any process of constitutional development in any society. On this view, for example, the competition of personal, sectional (e.g., ethno-religious), and broader social interests can be told as a story of individuals aligned with one set of interests capturing offices that are meant to serve the common good of the whole society and using their powers *virtute officii* to promote their own personal interests (simple corruption) or the interests of their class, ethnic, or religious group.

3. Mapping Changes of Political, Legal, and Constitutional State

In order to describe processes of constitutional development, it is helpful to unpack what, exactly, that term means. To avoid assuming liberal democracy as the ultimate goal of

[2] "Our thing" in the parlance of Southern Italian organized crime syndicates *versus* "public thing" in the paralance of Western political theory since the ancient Roman republic.

constitutional development, let us first consider *constitutional change* irrespective of the direction of travel in the first instance. To that end, let us indulge in a closer examination of the terminology.

How does *constitutional* change differ from *political* change and *legal* change? When a new party comes to power (by whatever means), new people come to occupy offices within the various branches of government and use that position to change the political agenda pursued by the state. This may spell a policy sea-change, but is not "constitutional" without something more. Likewise, the law of the land can be changed in ways that affect the lives and interests of citizens fundamentally (again, effected by persons occupying offices in the legislative, executive, and judicial branches of government using their powers to make new law of different forms). But, without more, even important legal changes are not necessarily "constitutional" in nature.

While there is no accepted technical meaning, by constitutional change we generally mean some *structural* change to the institutions which organise the relevant body politic in a way that is intended to be enduring in nature. The metaphor implicit in "organisation" is of specialised roles that forge individuals into a corporate entity capable of joint action. Constitutional change is a change to the way that political body is made up and animated, rather than just what it does or how it does so. For example, the Second Republican Constitution shifted the balance of power in the Sri Lankan constitution from a Parliamentary system (on the British Westminster model) to an Executive Presidency with substantial powers over Parliament, as well as introducing justiciable fundamental rights and a different system for electing parliamentary representatives. These are all changes to the way the organised political community of Sri Lanka is constituted and acts as one "body" through "organs".

As I have argued elsewhere, "constitution" connotes some fusion of legal and political institutions and processes distinct from ordinary "politics". A constitution can be understood as a complex network of shared institutions, social practices, and symbols that organises the common life of a political community, with a degree of stability over time. This fusion of politics and "organic" law is intended to keep politics within a certain set of parameters. A constitution is something that a state *is* rather than just something it *has*; our focus should be on the way that communities order their associational life rather than on documents—as important as declarations of independence, bills of rights, and (written) constitutions are.[3] A study of constitutional development is the study of the totality of institutions (in the broadest sense) that structure the life of a political community.

How, then, do we describe *processes* of constitutional change? The English word comes to us via Old French (from *procés* or "journey"), implying transitive movement from one point to another. That movement, however, is through time, not space, and the transition is from one *form of organisation* to another. A focus on process thus asks about changes from one "state of a constitution" (in the sense of a set of facts obtaining at a particular point in time) to another.

[3] J.G. Allen, "What Is Transitional Constitutionalism and How Do We Study It?" (2014) 4(4) *Cambridge Journal of International and Comparative Law* 1098, 1099.

Through this admittedly trite exercise in linguistic analysis, we are brought to a simple question that points clearly to the kind of concept we need. When talking about changes in the constitution of a state over time, *what is actually being changed*? The short answer is: offices, broadly defined, are being changed, within the relevant institutional apparatus of the political community in question. What exactly an office is, and how it changes, is the subject matter of this chapter.

Constitutionalism and the Westphalian State

Although the Westphalian nation-state model has driven most post-colonial processes of constitutional development, the statist paradigm is empirically weakest in the context of post-colonial states.[4] While states are (and will likely remain) a very important category of geo-political organisation, the state cannot demand the conceptual primacy it once did.[5] Ideally, we should be able to develop a concept of office that is fit for application to such states *and* to other organised political communities such as tribes, churches, or corporations that exist below, above, across, and between states. The case studies themselves show, in their complex federal arrangements, just how important non-state associations are in constitutional theory. In many cases, the national state is a (more or less crude) imposition from outside. However, it would also seem like one that is here to stay, as very few political groupings disclaim the state form. The explanatory value of a state-agnostic concept of office, then, would seem precisely to allow analysis of state and non-state formations according to a common conceptual framework that sidesteps (without denigrating or taking a substantive position in) the statist/pluralist debate.

This notwithstanding, the state does provide a convenient frame of reference for heuristic purposes at least. Modern theory sees the state as an emergent product of *territory*, *government*, and *people*, for example in Georg Jellinek's "three element theory".[6] Although things like secession events are important forms of constitutional development (for example in the 1976 *Vaddukoddai* Resolution for an independent Tamil state in Sri Lanka) we are not concerned only with extreme events like territorial expansion or (voluntary or forced) changes to the composition of a population. Thus, leaving the equally important ideas of territory and people to one side, "processes of constitutional development" would seem to implicate changes to the "government" element, and that requires a working theory of what a "government" actually is.

The answer is suggested by the case studies themselves, all of which deal in detail with the dynamics within and between particular offices within the different branches of government including the executive, legislature, judiciary, and military. The offices discussed (such as President and Prime Minister, to use one example that arises frequently) are absolutely central to the dynamics of constitutional development at play. These roles seem to be the chairs at stake

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[4] See generally Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford University Press 2021), particular Ch 2, "Postcolonial Legal Pluralism".

[5] See, e.g., Joseph Raz, "Why the State?" in Nicole Roughan and Andrew Halpin (eds.), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017), Ch 7.

[6] See generally Georg Jellinek, *Allgemeine Staatslehre* (Häring Verlag 1900); Jens Kersten, "The Normative Power of the Factual: Georg Jellinek's Phenomenological Theory of Reflective Legal Positivism" in Torben Spaak and Patricia Mindus (eds.), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021), 248-271.

when politics, for example, is described as a "game of musical chairs". The case studies could, in fact, be read has historical analyses of officials interacting (i) with outside entities, such as other states and international organisations, (ii) with other officials within the state and (iii) with citizens and subjects within their own state.

Of course, there is hybridity—for example, in the question of federal politics and *de facto* or *de jure* autonomous federal units, which are common in case studies such as Ethiopia and Myanmar. These external, horizontal, and vertical dynamics of official action determine, to a large extent, the stability and endurance (or otherwise) of the constitution under study. My claim is simply that taking an office-based approach to processes of constitutional change can, in fact, take us very far in understanding the processes at play and comparing experiences in different times and places. This suggests a categorical, but normatively modest, claim: a "constitutional" system is one characterised by some degree of *permanence in the offices* associated with it, whatever specific form the geo-political association takes.

Office, Status, and Role (in Western Modernity and Beyond)

Taking an office-based approach to processes of constitutional change requires a well-developed concept of office itself. Unfortunately, such a concept is oddly lacking. The purpose of this section is to sketch the contours of a concept appropriate to studying processes of constitutional development in diverse societies.

I take *an office* to be an institutionalised social role that implies a certain jural status, in the sense that it comes with (or *itself is*) a bundle of interwoven powers and duties.[7] Offices, as opposed to private statuses, are bestowed on an individual by society, often with rituals full of symbolism, and are always for purposes that transcend that individual's private interests. The concept of office is not limited to the political—offices are also found in private law associations (such as corporations) and in religious ones (such as churches). Offices, however, are central to the very idea of political life and are typified by offices such as "King", "Prime Minister", or "President".

One 19th century American treatise on the law of offices defined an office helpfully as a "the right, authority and duty, created and conferred by law, by which for a given period … an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public."[8] The relevant period might be fixed by law or at the pleasure of the creating power, although an role which is too precarious may be something less office-like and more employment-like.[9] What is really determinative in distinguishing an "official" from a mere state employee, however, is the delegation of a (limited) bundle of the

[7] Moral incidents also attach to offices, but I am more concerned with the legal ones. Their interrelation will depend on one's view of law. Cf Nicole Roughan, "The Official Point of View and the Official Claim to Authority" (2018) 38(2) *Oxford Journal of Legal Studies* 191.

[8] Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (Callaghan & Co 1890) I §1 at 4, §4 at 5.

[9] See Janet McLean, "Between Sovereign and Subject: The Constitutional Position of the Official" (2020) 70(2) *University of Toronto Law Journal* 167.

sovereign authority: "that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit."[10]

The conceptual resources nearest to hand in constructing a concept of office are not found in Western modernity so much as Western early modernity and the European Middle Ages, stretching back to the classical civilisations of the Mediterranean. As I have explained elsewhere, the concept of office in Anglophone public law, at least, declined precipitously during the administrative reforms of the 18th and 19th centuries as the traditional system of offices was swept away to make room for a modern, managerialist bureaucracy.[11] However, if we approach office at the right level of abstraction, there are certain structural features that—albeit described in a modern Western idiom—are capable of broader application and reflect, to a greater or lesser degree, non-Western modes of political organisation too. In the present context, as we are searching for concepts and categories of general application across very different (and non-Western) societies, it is convenient to explore the concept of office in a broader context.

In the Western tradition, Melissa Lane has recently set out in fascinating detail the role of office in Greek (particularly Athenian) constitutional thought.[12] In the *Politics*, Aristotle describes a constitution (*politeia*) as an "order" (*taxis*) of offices:

> A constitution arises when the hierarchical power of command is transmuted into the lineaments of offices defined by their ordering and limiting features: their legal capacities, their terms, their mode of selection, and the controls exercised over them. Indeed there is an important linguistic and conceptual interplay in Attic Greek between the noun for office (*he arche*) and the verb for "to rule" (*archein*) which can also become, especially in participal constructions, a way to refer to "officeholders".[13]

The Roman statesman Cicero's treatise on government—entitled *De Officii*—admonished those involved in government to place the common weal above their personal interests and the interests of "some one party" within it; the administration of government, he says, "like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, and not of those to whom it is entrusted."[14] Indirectly, this classical tradition informs modern

[10] Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (Callaghan & Co 1890) I §1 at 4, §4 at 5.

[11] See J.G. Allen, *Non-Statutory Executive Powers and Judicial Review* (Cambridge University Press 2022), Ch 6; see also Norman Chester, *The English Administrative System 1780–1870* (Clarendon Press 1981).

[12] See Melissa Lane, "The Idea of Accountable Office in Ancient Greece and Beyond" (2020) 95(1) *Philosophy* 19.

[13] Melissa Lane, "The Idea of Accountable Office in Ancient Greece and Beyond" (2020) 95(1) *Philosophy* 19, 23; citing *inter alia* Alex McAuley, "Officials and Office-Holding" in Hans Beck (ed.), *A Companion to Ancient Greek Government* (Blackwell 2013), 176. On the state's nature as a network of offices, see also M.J. Braddick, *State Formation in Early Modern England c. 1550–1700* (Cambridge University Press 2000), 11, 45.

[14] Cicero (Walter Miller trans.), *De Officiis* (William Heinemann Ltd 1913) I §25 at 87. The terms used in the original Latin are of course not 'guardianship' and 'trust' but rather '*tutela*' and '*commissi*' – the point, however, is carried by these Roman law cognates adequately.

conceptions of public office, with additions from ecclesiastical law and Roman private law, from which ideas of trust, in particular, were borrowed.[15]

The historical transition by which offices came to be seen as institutional structures occupied by persons from time to time, rather than *personal* statuses, explains much about the emergence of the "state" and, indeed, of "constitutional law" in the Western tradition. Jean Bodin, who coined the term "sovereignty", is known for his advocacy of absolute royal power, but he actually presented something like Jellinek's three element doctrine *avant la lettre:* It is "neither the wals, neither the persons, that maketh the citie, but the union of the people under the same soveraigntie of government."[16] Bodin's theory of state was office-centric, and, as Daniel Lee and others have argued, once office is (re)incorporated into our understanding of his account, Bodin's theory is less absolutist than it first appears.[17] In particular, Bodin stresses whether a public functionary is to be seen as an "officer" or a "commissioner". The main criterion for determining this is the functionary's security of tenure in his role—does he have a proprietary interest in it, or does he hold it only on the monarch's pleasure? Bodin associated the former with "lawful" and the latter with "arbitrary" rule.[18]

Looking to the seminal work of the Anglophone social contract tradition, Thomas Hobbes' *Leviathan* describes a system of government established "by art", namely through the erection of an "abstract seat of power" separate from the individual human beings that occupy it. The sovereign "is no person, nor has capacity to do anything" except through (human)

[15] See in particular Daniel Lee, '"Office is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government' (2013) 41(3) *Political Theory* 409; Daniel Lee, "Private Law Models for Public Law Concepts: The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Sovereignty" (2008) 70 *The Review of Politics* 370; see Claude Nicolet (P.S. Fallas trans.), *The World of the Citizen in Republican Rome* (University of California Press 1980), 21; Joseph Canning, *A History of Medieval Political Thought 300–1450* (Taylor & Francis 2006), 9.

[16] Jean Bodin (Richard Knowles trans., Kenneth McRae ed.), *The Six Bookes of a Commonweale* (Cambridge University Press 1962 [1606]) I:2, 10.

[17] See, in particular, Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press 2016); Daniel Lee, "'Office is a Thing Borrowed': Jean Bodin on Offices and Seigneurial Government" (2013) 41(3) *Political Theory* 409; Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford: Oxford University Press, 2016); Janet McLean, "Between Sovereign and Subject: The Constitutional Position of the Official" (2020) 70(2) *University of Toronto Law Journal* 167.

[18] As Daniel Lee explains, Bodin saw "seigneurial" government as government by the sovereign's arbitrary will; the "subjects" of such a regime were, effectively, slaves. Of course, power could be delegated by the sovereign to be exercised by others, but this delegation was precarious and could be revoked at any time. Bodin contrasted this to the "lawful" mode of rule in which power is (*via* a somewhat complicated and paradoxical line of reasoning), laid "in trust" upon officers to exercise on behalf of the (thereby de-politicised) sovereign, who could not revoke the trust without some cause. A well-ordered state, he argued, stood in virtue of officers and was distinct from a state where functionaries ruled by commission. There is an ambiguity here. In Bodin's scheme, as in English law, office is seen as a form of property and the tenure of this property ensures lawful rule. But (private) property is also a force conducive to personalism. Bodin borrowed on Roman private law concepts here, like others, to forge early modern European public law. See Daniel Lee, "Roman Private Law Models for Public Law Concepts: The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Soveriegnty" (2008) 70(3) *The Review of Politics* 370; Daniel Lee, "Sources of Sovereignty: Roman *Imperium* and *Dominium* in Civilian Theories of Sovereignty" (2012) 1 *Politica Antica* 79; Daniel Lee, "'Office is a Thing Borrowed': Jean Bodin on Offices and Seigneurial Government" (2013) 41(3) *Political Theory* 409, 420.

representatives.[19] As Martin Loughlin has observed, this illustrates the critical importance of office to the very idea of "public law": office distinguishes the powers and duties which attach to a post from the personal attributes of the post-holder, which creates a "public realm".[20] Again, Hobbes is known for his royal absolutism, but once the structural role of officials is appreciated, there are good reasons to view his absolutism as more attenuated.[21]

In sum, as Conal Condren writes, office was a crucial category of thought in European early modernity, in which so many of the classic ideas of modern state theory were forged. Medieval and early modern Europeans shared the ubiquitous presupposition that proper official action was action by the office as a *persona* separate from the official; conversely, improper conduct was conceptualised as abuse of office. At its most extreme, abuse of an office "sloughed off" the *persona*, erasing the moral identity and social standing generated by association with it.[22] This idea is incipient with A.V. Dicey's seminal 19th century concept of the rule of law—and his antagonism towards a distinct body of "administrative law". But—for example, compared to the ancient Athenians, who also dealt with the personal *versus* collegiate liability of officials for wrong-doing[23]—Dicey is illustrative of the anaemic office concept characteristic of English public law in modernity.[24] Janet McLean explains:

> When Dicey uses the word "official" throughout […] his constitutional treatise, it is denuded of all the special public law controls that defined and constrained an official *qua* official in the eighteenth and early nineteenth centuries. Indeed, the central thrust of Dicey's invocation of the rule of law is that there should be no special category of law for officials. Officials should be treated more like citizens than sovereigns, and they are not considered to have any mediating role.[25]

Officials, of course, occupy a position *between* sovereign and subject, inasmuch as they exercise delegated powers of sovereignty—in fact, "sovereignty" itself is a *product* of the appointment of officials. Officials themselves are both organs of that power and subjects of it themselves, in their private capacity.

Looking beyond the Western tradition, we have already encountered ancient monarchies in South East Asia; it is trite, but necessary, to point to ancient traditions of complex administration in South Asia and East Asia, as well.[26] Colonial history is replete with examples

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[19] Thomas Hobbes (Richard Tuck ed.), *Leviathan* (Cambridge University Press 1996), 3, 184.

[20] Martin Loughlin, *The Idea of Public Law* (Oxford University Press), 157.

[21] See Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011); David Dyzenhaus, "Hobbes' Constitutional Theory" in Ian Shapiro, ed., Leviathan: Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill (New Haven: Yale University Press, 2010) 453-480.

[22] Conal Condren, *Argument and Authority in Early Modern England* (Cambridge University Press 2006), 6.

[23] See Melissa Lane, "The Idea of Accountable Office in Ancient Greece and Beyond" (2020) 95(1) *Philosophy* 19, 26

[24] For an excellent overview of Dicey's tendency to "disaggregate" the government, and (in my view) thereby undermine the very office concept on which his theory of public law depends, see Janet McLean, "The Crown in Contract Law and Administrative Law" (2004) 24(1) *Oxford Journal of Legal Studies* 129.

[25] Janet McLean, "Between Sovereign and Subject: The Constitutional Position of the Official" (2020) 70(2) *University of Toronto Law Journal* 167, 180.

[26] See, e.g., Ch'ien Mu (Chün-tu Hsüeh and G.O. Totten trans.), *Traditional Government in Imperial China: A Critical Analysis* (Chinese University Press 1982). On the sale of venal offices, which bears obvious parallels to

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of local kings, chiefs, and other constituted leaders being incorporated into the formal structure of (for example) the British Empire and into the administrative apparatus of the colonial state. Indeed, it was only after direct rule in India that Queen Victoria styled herself an "Empress", that is, a Queen of Queens.[27] An interesting, but underexplored, feature of some colonial histories was the assumed categorical (if not substantive) parity between the contracting parties—consider the Treaty of Waitangi between the Maori *rangatira* and representatives of the Crown,[28] or the numerous cession treaties that use the title "King" for West African political leaders.[29] Richard Bradley, who was sent in the 1780s to procure an island in the Gambia River for the British Government, wrote back with unhappy news of limited chiefly power:

> [I]n concluding this business I experienced difficulties which I had no idea of when I engaged with Your Lordship to undertake it. The Principal Men of the Country disputed the right of the Chief to dispose of the Island, and to obtain their Consent the expence of the Purchase was increased.[30]

One inroad into a non-Western, pre-modern, but surviving tradition of office is the work of Cambridge anthropologist Meyer Fortes, who studied political leadership in West African societies in the mid-20th century. His work in West Africa inspired a general theory of office, personality, and corporation that Fortes astutely compared back to British constitutional arrangements. There is an obvious caveat in using the work of a mid-20th century British anthropologist in this manner: This body of scholarship was often regarded by administrators, and acknowledged by scholars themselves, as a tool of colonial administration.[31] That said, it

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the European experience, see R.M. Marsh, "The Venality of Provincial Office in China and in Comparative Perspective" (1962) 4(4) *Comparative Studies in Society and History* 454. On India, see Harnam Singh, 'The Indian States: A Study of their Constitutional Position' (1949) 64(1) *Political Science Quarterly* 95; H.N. Sinha, 'Constitutional Position of the Orissa States' (1940) 2(1) *Indian Journal of Political Science* 63; C.L. Tupper, 'Indian Constitutional Law' (1903) 5(1) *Journal of the Society of Comparative Legislation* 90.

[27] after all: see, e.g., Harshan Kumarasingham, 'A new monarchy for the Commonwealth? Monarchy and the consequences of republican India' in Robert Aldrich and Cindy McCreery (eds.), *Crowns and Colonies: European Monarchies and Overseas Empires* (Manchester University Press 2016).

[28] Article 1 of the Treaty of Waitangi (1840) reads: "The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation of Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof."

[29] See, e.g., *Cession of the Island of Buma* by the 'King of Biafra' in Edward Hertslet, *British Colonies, Protectorates, and Possessions in Africa Vol I* (3rd Edition, Routledge 1967), 36.

[30] As reproduced in Stuart Banner, "Terra Nullius? Anthropology and Property Law in Early Australia" (2005) 23(1) *Law and History Review* 95, 98.

[31] See Meyer Fortes and E.E. Evans-Pritchard, "Introduction" in Meyer Fortes and E.E. Evans-Pritchard, *African Political Systems* (Oxford University Press 1940), 1; Richard Brown, "Passages in the Life of a White Anthropologist: Max Gluckman in Northern Rhodesia" (1979) 20(4) *The Journal of African History* 525; see generally Lyn Schumaker, *Africanising Anthropology: Fieldwork, Networks, and the Making of Cultural Knowledge in Central Africa* (Duke University Press 2001) on the "Manchester School", whose founder drew on Fortes' work. Personally, I think it is problematic to call Jewish anthropologists like Fortes and Gluckman "white" during the time of a genocidal regime that held the were *not*. This pulls us into the strange world of Jews' placement in (i) Apartheid, (ii) Nazi racialogy, and (iii) colonial British society. For what it is worth, Fortes himself attributed his interest in the study of race and class, through which he came to anthropology, as a result of his experience of South African racial politics and being the son of Jewish immigrants: see Susan Drucker-Brown, "Notes Towards a Biography of Meyer Fortes" (1989) 16(2) *American Ethnologist* 375, 382; Moses Anafu, "Meyer Fortes: A Personal Memoir" (1983) 8(2) *Cambridge Journal of Anthropology* 9, 13.

provides an organised body of learning on non-Western societies couched in terms that are readily integrated with the lexicon of constitutional and political theory as used by Western and non-Western scholars today. It has helped me to formulate my own conception of kingship in the British tradition considerably, and for that reason I have returned to it often.[32]

A seminal study deals with Ashanti kingship and chiefship.[33] Classical anthropology had stressed relations and disjunctions between physical or biological phenomena and socially constituted phenomena (e.g., biological *versus* social parenthood, as in cases of adoption) but, according to Fortes, such an approach left some important questions unanswered. His key to exploring these questions was to ask why *ritual* is so important in marking changes of social status.[34]

Rather than starting with the Roman origins of the English term "office", Fortes starts with the pervasive duality found, in various societies, between the internal or private self and the outward, public self that both situates the individual in society—and (in so doing) structures the associational life of the society itself. Office, he argues, is "not an artifice of modern sociological theory" but is "so essential to the management and comprehension of the social relations of persons and groups that it is present in all social systems" in some form.[35] In an address to the Royal Anthropological Institute "On Installation Ceremonies",[36] Fortes observes that office should be regarded as a "special variant of the general phenomenon of status in social structure"; the central question (contrary to contemporary prevailing opinion) was "whether office invariably carries power and authority".[37] An office is a "perpetual institutional entity" that is "owned by society" and separate from its temporary holder:

> [H]owever metaphysical this may sound, it comes nearer to the reality than do the traditional anthropological interpretations. Evans-Pritchard's re-analysis of divine kingship of the Shilluk offers a striking illustration. He shows how the office is set apart from its incumbents, and how this is objectified in the effigy of Nyakang, and is dramatized in the mock battle of accession rites. His epigrammatic summing up "The kingship captures the King" makes the point clear.[38]

As I have glossed it elsewhere, taking the above points together, Fortes' anthropology of office posits the following structural properties. First, office and officeholder are distinct from one

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[32] See J.G. Allen, "The Office of the Crown" (2018) 77(2) *Cambridge Law Journal* 298, 304.

[33] Ashanti society knows both chiefs and kings, and these two offices bear structural parallels. They exist in a hierarchical structure, but it is unclear to me where the line between chiefship and kingship ought to be drawn; the *Asantehene* Osei Tutu II would certainly be referred to as a "king" in English, but other "chiefs-of-chiefs" may not.

[34] Meyer Fortes, "Ritual and Office in Tribal Society" in Max Gluckman (ed), *Essays on the Ritual of Social Relation* (Manchester University Press 1962), 55.

[35] Meyer Fortes, 'Ritual and Office in Tribal Society' in Max Gluckman (ed), *Essays on the Ritual of Social Relation* (Manchester University Press 1962), 58.

[36] Meyer Fortes, 'Of Installation Ceremonies' [1967] *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* 5.

[37] Meyer Fortes, 'Of Installation Ceremonies' [1967] *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* 5, 6. Citations omitted.

[38] Meyer Fortes, 'Of Installation Ceremonies' [1967] *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* 5, 6-7. Citations omitted.

another, i.e., there is a segregation between the "perpetual and self-identical office" and the "transient and mortal holder". The officeholder is not the office *qua* political corporation, but is invested through a fiction with qualities *as if* he were the office. Secondly, offices are perpetual and entail succession, as suggested by the aphorism "The King is dead, long live the King" (or, as Fortes rephrased it, "The King is dead, the Kingship lives forever"). A corporation unifies several individuals into a juristic entity. An office unifies individuals across time, making succession delicate, and the conceptual independence of the office much more important; the death or demission of the officeholder potentially disrupts the ideal perpetuity of the office itself.[39] Thirdly, offices have outward and visible trappings and material insignia which objectify their function and the jural implications of office-holding, i.e., the incumbent's powers and duties. Fourthly, officeholders must conform to certain modes of behaviour connected with the office: the powers of an office are always, inherently, connected to and conditioned by duties. Fifthly, offices have a moral and jural sanction from society, either directly (e.g., through popular acclamation) or indirectly (e.g., through other representative officeholders). Finally, the insignia of office are socially conferred, generally by means of ritual.[40]

The comparative investigation of ritual installation sheds further light on the structural features of office. Fortes proffers an ethnography of the subject using the Provost of King's College, Cambridge by way of example, comparing it to the installation ceremonies of the Archbishop of Canterbury, the Bishop of Ely, and the Queen.[41] Looking past the "splendidly dramatized symbolism" in these ceremonies, he sets out the features they share with such ceremonies in other parts of the world, which number seven. First, the candidate must be recognised as legitimately entitled to accede to the office. Secondly, the tenant cannot take possession of the office by his own unilateral action—office is conferred by functionaries who often do not hold the office themselves. Thirdly, office is conferred by representatives of the community, in its name, and often in the name of some superior politico-jural or religious authority recognised in the charter of the office. Fourthly, a number of distinct steps mark the installation to the office, for example a step of *accession* (in which the office—but not yet its powers and duties—is put into the holder's hands), followed by a rite of *investiture* (in which the office is formally entrusted to the holder), followed by the *installation* proper (which finally transfers the lawfully vested capacities and appurtenances of the office). Fifthly, while many rites are carried out in private, there is a public element as the community must participate, whether through its representatives and/or as a congregation. Sixthly, a recurrent theme is the concern to demonstrate that the office has a reality and continuity, "one might almost say immortality", as

[39] The late medieval French practice of maintaining an effigy of the dead king until the day of his funeral, which continued until the installation of Louis XIII, is instructive here; the effigy would be carried around, and even presented with food, but according to Mayer, 'the effigy was not believed to hold the soul of the late kind, it was only an "as if" aspect of the late king's continuance: and this referred less to his actual person than to his status, the dignity of kingship which continued until his internment.' A.C. Mayer, 'The King's Two Thrones' (1985) 20(2) *Man* 205, 212. This change reflects changes to the process of installation, which I cannot go into here.

[40] This list is adapted from Burkhard Schnepel, 'Corporations, Personhood, and Ritual in Tribal Society: Three Interconnected Topics in the Anthropology of Meyer Fortes' (1990) 21(1) *Journal of the Anthropological Society of Oxford* 1, 8.

[41] Meyer Fortes, 'Of Installation Ceremonies' [1967] *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* 5, 8.

an institutional complex that is separate from and prior to its succession of holders—often through enduring material relics and regalia. Finally, the actual installation ceremony finally places the incumbent in office such that he can exercise its powers and is subject to its duties—he merges with his office, putting his former lay self aside for the duration of his incumbency.[42]

A general concept of office, then, is of an institutionalised social role to which an individual accedes and in which she wields powers and is subject to duties that are separate to her private ones—to the extent that she acts, as it were, in a separate capacity. The incidents of any office could be mapped more or less formally (for example, using a scheme such as W.N. Hohfeld's scheme of jural relations or any other comparable scheme[43]) to comprise a map of the constitution as a graphic "network of offices", and changes to that network could be mapped dynamically over time. As Neil MacCormick writes:

> The law of a modern state is indeed an institutional order of great and bewildering complexity… Yet behind the complexity, it is possible to discern simplicity. A state has, as such, a constitution. This is a complex of explicit rules, implicit rules, and conventions, that essentially establish three types of institutional agencies, namely, of course, judiciary, legislature, and executive.[44]

These rules, and the offices they instantiate, change over time—often through implicit and conventional as much as explicit means. This provides a useful logical framework for studying processes of constitutional development over time and might render such processes in different societies more readily comparable.

4. Putting the Office Concept into Action

Broadly speaking, there are two obvious modes of constitutional change. The first mode is the decommissioning of old offices and the creation of new ones. This is perhaps the textbook case of regime change, whereby the table is swept more or less clean of the *ancien régime* complete with not only a turnover of the personnel formerly engaged in ruling but also the offices and institutions in which they do so. Historically, the paradigm example is the French revolution in which the complex offices and statuses of the feudal system were swept aside in the "Reign of Terror".[45]

This mode of constitutional change has been the experience in Ethiopia, which experienced a change from hereditary monarchy in 1974, through a protracted civil war, to an unstable communist military regime, to today's fragile ethno-federalist constitution. It has also been the experience in the Gambia, where independence occurred first as a form of home rule under the British monarchy in 1965, evolving to a republican constitution in 1970, and experiencing drastic rupture only following a military coup in 1994. And it has been the experience in Myanmar, which moved directly to a republican form upon independence and experienced

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[42] I have paraphrased this list from Meyer Fortes, 'Of Installation Ceremonies' [1967] *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* 5, 8-9. Citations omitted.

[43] See J.G. Allen, *Non-Statutory Executive Powers and Judicial Review* (Cambridge University Press 2022), Ch 7; W.N. Hohfeld, "Fundamental Conceptions as Applied in Judicial Reasoning" (1917) 27 *Yale Law Journal* 711.

[44] Neil MacCormick, "Norms, Institutions, and Institutional Facts" (1998) 17 *Law and Philosophy* 301, 326.

[45] See, e.g., Alexis de Tocqueville (Gerald Bevan trans.), *The* Ancien Régime *and the French Revolution* (Penguin 2008).

decades of communist military rule. Despite their important differences, these case studies show the difficulty of establishing brand new constitutions *qua* networks of offices. It seems that when things are in flux, older political loyalties play an outsized role in determining the success or otherwise of the new order. In many cases, those older loyalties are ethnic and religious. In such situations, ethnic competition has been a competition for control of the state apparatus—and its military apparatus, especially.

The post-colonial experience of Malaysia, Sri Lanka, and the Maldives has been more nuanced, however, and Thailand did not experience direct colonisation. In all of these case studies, we see a second mode of change. In this mode, processes of constitutional change are driven by changes to the *content* of extant offices and relations between them. Of course, where only the name remains, it is hard to see any difference between modification of an old office, on the one hand, and the destruction of the old and creation of a new one, on the other. But there is a degree of continuity in, for example, pre-colonial monarchies that have survived through to the present day that is essential to understanding their constitutional pathway.

Modern Malaysia, for example, is an elective monarchy in which a collegiate body of (mostly) Sultans elect a "Paramount Ruler" or *Yang di-Pertuan Agong* for a term of years. This ancient system has been effectively incorporated into a broadly Westminster-style parliamentary system,[46] complete with the all-important conventions such as royal action on advice of elected ministers responsible to the legislature. What exactly it means to be *Yang di-Pertuan Agong* has changed over the past two centuries despite much continuity in regalia, appointment, title, and honorifics. Studying processes of Malaysian constitutional development involves, at the very least, some descriptive account of how the office of *Yang di-Pertuan Agong* has changed over time—what powers it holds, what duties it implies, what mechanisms exist to enforce those duties, and what kind of social consensus supports the office. This is not only essential for explaining how the office could survive British imperialism but also for explaining contemporary politics, for example in the powers of the *Yang di-Pertuan Agong* in relation to the Prime Minister around things like declarations of emergencies, as illustrated by the events of 2020 set out in the case study chapter on Malaysia in this volume.

Modelling Competition between the State and its Rivals

In many of the case study countries, we can observe competition between a post-colonial constitution made for something built on the model of a modern a nation state with older and deeper ethnic loyalties. In others, we can observe the role of sub-state associations like political parties assuming primacy as a locus of official loyalty rather than the state they are meant to serve. In both cases, what usually results is the diversion of resources that should be allocated within the whole political community to a section of it only. As we saw from Cicero, above, this problem is likely as old as politics.

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[46] See generally Harshan Kumarasingham, "Eastminster – Decolonisation and State-Building in British Asia" in Harshan Kumarasingham (ed.), *Constitution-Making in Asia – Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge 2016), Ch 1.

The office concept is useful in both of these scenarios because it allows us to understand what is going on, both at a societal and an individual level. At a societal level, it would seem that there are not one but two or more "constitutions" in operation. This articulates quite naturally with a legal pluralist approach to legal order. On an individual level, it also helps us to understand what is actually happening. In a tribal society, for example, where officials use their offices to channel social goods towards their in-group, the officials are not "just" being dishonest and corrupt; their wrongdoing is the subversion of a state office to the *normative imperatives of a competing political association*. Although this is speculative, it may even be possible to map the constitution of a sub-state association and track its patterned interactions with the constitution of the state on this basis.[47]

The same can be observed in societies where religious institutions, which generally display ideal-typical offices, are implicated into the political system. It is sometimes easy to forget from a modern perspective, which takes the state as a given, but the Westphalian state form itself is of course a product of the dynamic between organised religion and territorial politics in early modern Europe. Here, for example, we could compare the experience in Sri Lanka and Thailand and examine both through the lens of office. In the former, Buddhist monks are allowed to be politically active and even to hold political offices. Their role in nationalist Sinhala politics is well-documented.[48] In Thailand, the Buddhist *sangha* (monastic community) has interacted with state politics in complex ways.[49] Despite successive bans from participation in politics, monks are involved in politics and in the broader project of building a robust national loyalty in a society ridden with political tension. The *sangha* itself is an important constitutional institution.

Religious associations, like ethnic ones, seem to command a high degree of political loyalty in individuals and the actions of their leaders can be of critical importance to the form—and ultimate success—of constitutional developments. In many cases, the offices of a religious institution may actually just be offices within the relevant constitution. As I have argued previously, most people live closer to pre-, post-, sub-state political associations such as tribes and religious traditions than they do to "their" nation-state, and in the decades since the Second World War supra-state institutions have assumed increased importance. "In phases of constitutional transition, these institutions come to fill any void left by the state—from United Nations peacekeeping missions or religious customary law filling the void in a 'failed state', non-state law breaks through weak or unpopular state institutions."[50] In all cases, this can be understood as the resurgence of an alternative "network or offices" or the defection of state

[47] It could perhaps also be linked to Martin Loughlin's account of a "formal" and "material" constitution—possibly a factor in the stability of a constitutional order being the internal coherence of those two. See, e.g., Martin Loughlin, "Political Jurisprudence" (2016) 16 *Jus Politicum* 15.
[48] See Suren Raghavan, *Buddhist Monks and the Politics of Lanka's Civil War: Ethnoreligious Nationalism of the Sinhala Saṅgha and Peacemaking in Sri Lanka, 1995-2010* (Equinox Press 2018).
[49] See Katewadee Kulabkaew, *The Politics of Thai Buddhism under the NCPO Junta* (ISEAS–Yusof Ishak Institute 2019).

[50] J.G. Allen, "What is Transitional Constitutionalism and How Should We Study It?" (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1098, 1104.

officials to a pre-state normative order in preference to the state they are ostensibly appointed to serve.

Towards a Minimum Normative Concept of "Constitutionalism"

As elaborated above, the living core of the concept of office is the distinction between the office and the person occupying it. The case studies in this volume, and the broader literature, show that a major issue in constitutional development is the blurring of this line between office and incumbent. For example, the rules governing accession to and termination from an office might be amended in order to ensure a populist ruler's tenure. Admitted prerogatives such as declaring a state of emergency—vital in times of real need—might be used in an opportunistic way in order to postpone elections or hand over power. In my view, a clear view of what an office is, how it is created by society and conferred on an individual, could be extremely helpful in teasing out the mechanisms by which official rule is degraded into personal rule, and to articular clear and peremptory norms governing the use of high officials' powers.

In a sense, all states have a "constitution", even brutal dictatorial ones. I began this chapter with the express intention of avoiding any normative conceptions of constitutional development that might imply liberal parliamentary democracy as the preferred, or only acceptable, form of constitutional state. This commitment is genuine, despite my personal commitments to that form of political organisation. However, it seems arguable that the concept of office as impersonal public service in a special capacity could entail some minimum normative conception of "constitutionalism" in the sense that not all relationships of domination and subordination could really be described as "official" or even "political" at all. In their seminal study of African political systems (and, whether aware of it or not, echoing Bodin), Fortes and E.E. Evans-Pritchard argue:

> [A] king's power and authority are composite. Their various components are lodged in different offices. Without the co-operation of those who hold these offices it is extremely difficult, if not impossible, for the king to obtain his revenue, assert his judicial and legislative supremacy, or retain his secular and ritual prestige... Every one who holds political office has responsibilities for the public weal corresponding to his rights and privileges. The distribution of political authority provides a machinery by which the various agents of government can be held to their responsibilities.[51]

If something like offices are found in every society and in every constitutional order, there might be an office-based argument for some minimum conception of power limited by separation and apportionment throughout an apparatus of administration, too.

More exciting still is the normative implication of office itself as a status that is socially (that is, multilaterally) constructed and endowed on a person. A perennial theme in the study of constitutional developments in the Global South is the perception, right or wrong, that (liberal) democracy is a Western idea that has been imposed, often through processes of colonisation and decolonisation, on other political cultures and traditions. Adopting an office-based

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[51] Meyer Fortes and E.E. Evans-Pritchard, 'Introduction' in Meyer Fortes and E.E. Evans-Pritchard, *African Political Systems* (Oxford University Press 1940), 12.

approach might, perhaps, reframe some of the usual debates in this context. First, it offers one doorway through which non-Western traditions of political leadership might enter contemporary constitutional discourse. If pursued, this approach could potentially provide a more neutral conception of the "democratic constitutional state" for analysis of constitutional developments in post-colonial states. More ambitiously, provided we can arrive at a concept of "office" that is not inherently Western or modern, office could provide a stub from which to develop a conception of "constitutionalism" including the rule of law and democracy that draws on epistemological reference systems endemic to the Global South, as well as the canonical Western ones.

While I am not the scholar to do it,[52] truly expanding the concept of office beyond Western modernity could, perhaps, provide a common framework within which to study very different societies (with all the usual caveats that apply against folk ethnography and historical anachronism). In my view, there is a good cause to be made that the inherently limited nature of "official power" is a universal theme in all traditions of constituted political authority. Office is the bridle by which communities harness the action of (hopefully extraordinary) individuals and, simultaneously, keep that power in check. The terms on which offices are bestowed, withdrawn, and made accountable determine the substantive characteristics of the constitutional order that results—elite or popular, autocratic or deliberative, conscientious or dismissive of the law.

The role of the public official, at base, is to act (whether in a representative, expressive, coercive, or other manner) as an "organ" on behalf of an "organised" political community. The idea is that a group of subjects are elevated to a status of "active citizenship" in which they can act for and on the community as a whole. The attribution of such a status, according to Jellinek, necessarily *limits* official power:

> A power to rule becomes legal by being limited. Law is legally limited power. The potential power of the ruling commonwealth is greater than its actual power. Through auto-limitation it gains the character of legal power. Such auto-limitation is not arbitrary, i.e., whether the state actually wants to cultivate this is not something that lies at the state's pleasure. The limitation is, in type and extent, disclosed through the entire antecedent process of history. *Staatsgewalt* is thus not power [*Gewalt*] per se, but power exercised within internal legal limits, and hence legal power.[53]

A focus on office, and the idea that official power is inherently subject to legal limits, shifts our focus towards the normativity immanent within socio-political organisation itself, rather than the imposition of exogenous imperatives upon assumed social structures. My claim is that the "organ-isation" of a political community generates its own, inherent but limited, normativity.

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[52] Because "office", as I have presented it, is a concept informed most directly by European legal history and analytical philosophy in the Western tradition, there is a danger that this kind of approach not only puts experiences from the Global South (i.e., the case studies) into a preconceived theoretical box (i.e., office) but also smuggles Western values (e.g., democracy and the rule of law) surreptitiously into the concept of "constitutional development".

[53] Georg Jellinek, *Allgemeine Staatslehre* (3rd Edition, Springer 1932), 386, as translated in Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2012), 217. Emphasis mine.

This minimal normativity provides the basic conceptual structure and content of the concept of "constitutionalism" and permits us to present a slightly thicker concept of "constitutional development".

Bernard Williams' classical argument for the priority of the "political" over the "moral" might offer one such possibility.[54] According to Williams, both deontological and utilitarian approaches to political philosophy treat the moral as something *prior to*, and therefore existing *independently of*, the political. Whether they present politics as the instrument of the moral, or present the moral as a set of constraints on what politics can rightfully do, "political theory is something like applied morality."[55] In contrast to this approach, Williams advocated a theory of political realism in which the demands and constraints of legitimacy arise from the nature of politics *itself*. This starts with the "first political question": the Hobbesian question of how to secure "order, protection, safety, trust, and the conditions of cooperation."[56] Debate naturally centres on whether that necessary condition of legitimacy (i.e., an ordered state) is sufficient in itself, but the more important point is that this minimum necessary condition already starts to imply some minimal propositions of political morality. First and foremost, the purported cure cannot be worse than the affliction—even Thomas Hobbes did not think that a reign of terror could save people from the terror of his state of nature.

As such, Williams argued that the *mere idea* of meeting the basic legitimation demand implies a sense in which the state must offer a justification of its power to *each subject*.[57] He used the example of a community of dissentients living within the borders of an organised geo-political community. They are subject to its official power structures, but are radically disadvantaged relative to their fellow subjects. (This was, indeed, the condition for many of the religious dissenters of early modern Europe who generated so much of our political philosophy, and is echoed in the overarching theme of ethnic and other minorities in the case studies). There is nothing that can be said *to this group* to explain why they should voluntarily submit to those power structures rather than revolting. Using the example of the Helots in ancient Sparta, Williams argued that such a situation is rather one of continuing warfare rather than any kind of "political" condition:

> The situation of one lot of people terrorising another lot of people is not *per se* a political situation: it is, rather, the situation in which the existence of the political is in the first place supposed to alleviate (replace). If the power of one lot of people over another is to represent a solution to the first political question, and not itself be part of the problem, *something* has to be said to explain (to the less empowered, to concerned bystanders, to children being educated in this structure, etc.) what the difference is between

[54] See Bernard Williams (Geoffrey Hawthorn ed.), *In the Beginning Was the Deed* (Princeton University Press 2007), Ch 1, "Realism and Moralism in Political Theory"; Tully Rector, *The Structure of Global Injustice: A Realist Account* (Doctoral Dissertation, Freie Universität Berlin, 2019).

[55] Bernard Williams, "Realism and Moralism in Political Theory" in Bernard Williams (Geoffrey Hawthorn ed.), *In the Beginning Was the Deed* (Princeton University Press 2007), 2.

[56] Bernard Williams, "Realism and Moralism in Political Theory" in Bernard Williams (Geoffrey Hawthorn ed.), *In the Beginning Was the Deed* (Princeton University Press 2007), 3.

[57] Bernard Williams, "Realism and Moralism in Political Theory" in Bernard Williams (Geoffrey Hawthorn ed.), *In the Beginning Was the Deed* (Princeton University Press 2007), 4.

> the solution and the problem, and that cannot simply be an account of successful domination. It has to be something in the mode of justifying explanation or legitimation.[58]

If this is a "moral" principle, argues Williams, it is not a morality that is *prior to* politics but one which is *inherent in* the idea of politics itself. While it looks a lot like an account based on the rights of the person on a Kantian view, for example, it is more modest and rests on a foundation that purports to a kind of factuality that the Kantian account cannot. As Tully Rector has argued, the demands of the rule of law that are generated from the nature of politics—from the ontology of political organisation itself—*just are* the necessary prerequisites for associational life to exist at all. To violate them is not to "act wrongly", it is to undermine the nature of a political association and denature it into a structure of domination between groups.[59]

This speaks, in particular, to the persistent theme not only of personalism (in which a constitutional state degrades into a crony network of insiders dominating a society of outsiders) but also of ethnic and religious federalism (where a constitutional state degrades, as in the Helot example, into a relationship of domination between one group that has weaponised the apparatus of state and its competitors).

5. Conclusion

In this chapter, I have urged the importance of the category of office to understand processes of constitutional change and attempted, by way of reference to historical sources and also to the contemporary case studies, to sketch out (i) what an adequate concept of office might look like and (ii) what it might reveal about constitutional development if adopted as a frame of enquiry.

This account of office provides a quasi-formal system for analysis of processes of constitutional development, which is useful in at least three respects. First, it could be used to *compare* offices in different systems, or in the same system over time. For example, what is the jural position of an American judge compared to a South African judge? How are they both selected, appointed, demitted, remunerated, and held to account for misconduct? Or, for example, what is the jural position of the Maldives President under the Constitution (of 1932 or 2008) compared to the traditional jural position of the Sultan?

Secondly, it could also be used to describe the *dynamics* of the process of constitutional development over time. I have suggested that the two ideal processes of "constitutional development" are (i) abolishing and replacing offices and (ii) changing the jural incidents that attach to the offices within a continuing, complex structure. Either of these approaches could be taken to, for example, establish a representative democracy in a traditionally autocratic monarchy or convert a representative democracy into an autocratic one-party state. I would not venture any categorical claims about the relative merits of either approach, but there would seem to be intuitive appeal to maintaining a set of status functions that is familiar and enjoys popular loyalty even while changing the powers and duties attached to relevant posts. To me,

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[58] Bernard Williams, "Realism and Moralism in Political Theory" in Bernard Williams (Geoffrey Hawthorn ed.), *In the Beginning Was the Deed* (Princeton University Press 2007), 5.

[59] Tully Rector, *The Structure of Global Injustice: A Realist Account* (Doctoral Dissertation, Freie Universität Berlin, 2019), 6.

this would seem to provide a particularly attractive framework for examining the interplay of parallel or competing political communities—for example, in contested federal systems or in systems where the status functions of a religious legal system compete with those of a top-down imposed secular state modelled along Western lines.

Thirdly, the concept of office I have suggested provides a way to argue for a minimum internal morality, as it were, of a "constitutional" system understood as a system in which political power is legally bundled and bestowed on individuals in an enduring structure. I claimed (categorically) that official power is limited power; although the examples I provided cannot, by a long shot, make this claim out, I think they put the onus on advocates of unlimited political authority to rebut the argument. If I am right, the very idea of "official power" a protean, but powerful and intuitive, idea of popular sovereignty that speaks against both dominative ethnic politics and for something like "democracy" (very) broadly defined. The minimal normativity inherent in office, I think, reflects the constitutional aspirations of all reasonable people, and of the contributors to this volume in particular. Perhaps, in time, it might become a fixture of scholarly analysis—and constitutional rhetoric—in processes of constitutional transition.