THE UNWRITTEN CONSTITUTION IN BRITAIN AND CHINA



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Ewan Smith

Brasenose College

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ABSTRACT

This thesis is about the unwritten constitutions of Britain and China. Britain has no written constitution. China's written constitution is a small part of its unwritten constitution. By comparing these two unusual constitutional orders, the thesis sheds light on the nature of the constitution, the way that written and unwritten constitutions interact and the relationship between the unwritten constitution and a theory of the state.

There is a strict sense in which we can describe the rules of a written constitution as constitutional. In contrast, when we describe unwritten rules as constitutional, we need to specify what we mean by 'constitutional'. In this way, an inquiry into the unwritten constitution leads us to a substantive account of the constitution. This thesis considers how these two states develop that substantive account. In doing so, it reveals contrasting, unwritten theories of the state and of the constitution, which pose questions of general importance for constitutional theory.

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PREFACE

> 'In the mysterious East, as in the pellucid west, constitutions… are no better than the institutions they are written into.'
>
> Clifford Geertz (1983) [1]

The thesis is about two unwritten constitutions, about what they can tell us about the nature of the unwritten constitution, about the way that written and unwritten constitutions interact and about the relationship between the unwritten constitution and a theory of the state.

The two constitutional orders compared here are unusual. The United Kingdom is one of three states that do not have a written constitution. China does have a written constitution, but its direct impact on the structure, distribution and exercise of political power is slight. So far as we associate constitutional law with enforceable, written constitutions, Britain and China are outliers – peripheral examples of constitutional orders.

Not all states have a written constitution, but all states have an unwritten constitution. Every written constitution includes conventions and broader political

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1 Geertz C, Local Knowledge (Basic Books 1983) 204

understandings that explain and qualify formal constitutional rules and so shape the constitutional order. We might therefore ask 'what is the point in using examples such as these to explore the unwritten constitution?' If all states have an unwritten constitution, then why not begin with a central case of a written constitution, a state such as the United States or France?

As John Gardner notes, 'studying the central case of something can… only be part of the task of studying the nature of that thing.' [2] We study the nature of things, in part, by finding where their limits lie. We establish those limits by looking at cases that do not possess all of the features of the central case. As Clifford Geertz notes, it is the unfamiliar that sharpens our understanding of the familiar. Confrontation with the unfamiliar 'makes the mind more aware of forms of legal sensibility other than its own, but [also] more aware of the exact quality of its own.'[3]

There is no suggestion that, by themselves, the United Kingdom and China can tell us everything that we might want to know about the unwritten constitution. However, they shed light on central cases because they differ from paradigm examples of written constitutions in similar ways. They lack enforceable, written constitutions and strong-form constitutional review. It is hard to argue that either state was created by its legal

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2 Gardner J, Law as a Leap of Faith : Essays on Law in General (Oxford University Press 2014) 164-165

3 Geertz C, Local Knowledge 181

order, and they leave important constitutional functions to institutions neither defined nor controlled by law. They concentrate political power in a strong executive located in a Sovereign Parliament or a Supreme Party. On the spectrum between political and legal constitutions, they are oriented away from mandatory legal controls and towards hortatory political norms. These features illuminate contrasting features of more orthodox constitutional orders. The conclusions of this inquiry may form the kernel of a larger project, incorporating central cases of written constitutions.

As two contrasting penumbral cases**,** Britain and China also shed light on each other. This is a comparison between a relatively liberal constitutional order and a much less liberal one. The British constitution is a far more effective restraint on the British government than the Chinese constitution is on the Chinese government. There is certainly no suggestion that the similarities identified here are more important than this essential difference. So far as the act of comparing appears to pathologize Britain and to normalise China, that is not the intended effect.

The UK and China differ deeply in tradition, culture and mentality. The background political theory of each jurisdiction, the context in which the rules operate, is substantially different. The constitutional role played by political rules in the UK has been thoroughly modelled and exemplified for over a hundred and fifty years, in a canon that begins with Dicey's *The Law of the Constitution*, and extends through works such Ivor

Jennings *The Law and the Constitution*[4], John Griffith's *The Political Constitution* to modern works such as Nick Barber's *The Constitutional State*.[5] China's conception of the political constitution draws on a separate theoretical tradition including theorists of the authoritarian constitution such as Carl Schmitt[6] and Ernst Fraenkel[7], theorists of socialist legality such as A.Y. Vyshinsky[8] and contemporary theorists such as Jiang Shigong[9] and Chen Duanhong.[10] This literature influences, and is influenced by, wider cultural practices and assumptions.

In spite of their differences, these two theoretical traditions overlap. Both Jiang Shigong and Chen Duanhong, for example, begin their account of the Chinese constitution with Dicey. Dicey is of interest to Chinese theorists because his most important and original contribution to constitutional theory was the integration of legal and non-legal rules. That is a necessary step towards a satisfying theory of the Chinese constitution. However, for reasons we will explore, the UK scholars who followed Dicey tended to

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8 Vyshinsky AY, The Law of the Soviet State (Macmillan 1948)

9 Shigong Jiang, 'Written and Unwritten Constitutions' (2010) 36 Modern China 12

10 Chen Duanhong (陈端洪), '论宪法作为国家的根本法与高级法 [Considering the Constitution as the Supreme and Fundamental Law of the State]' (2008) 20 中外法学 Peking University Law Journal 485

be interested in the differences between conventions and laws, while, broadly speaking, Chinese scholars have tended to be more interested in the similarities.

Moreover, the British scholarship is more interested in some non-legal rules than in others. Broadly speaking, that literature shows a close interest in constitutional conventions and what Dicey described as 'political morality.' However, Dicey was relatively uninterested in non-legal state rules and the rules of political parties. These ideas remain relatively understudied in the UK. Political parties, in particular, have only been hesitantly described in in positive law. In contrast, in China – where a single political party commands the state – the role of partisanship and the separate domain of politics have both been thoroughly and carefully theorised. China is thus an extreme example of a global phenomenon with important implications for Britain. In this way, these distinctive and overlapping ways to think about the unwritten, political constitution shed light on one another.

If law is a distinctive way to imagine the real, then constitutional law is a distinctive way to imagine the state. To describe the constitutional arrangements of these two states we need to build an assemblage of legal and non-legal rules and the nature of that assemblage reflects the background political theory of the two jurisdictions. When we ask, 'in what sense of constitution these states have a constitution', we first need to ask, 'what goes into the constitution?'; 'is the constitution solely comprised of rules that can be enforced in court?' and 'if not, then what sorts of non-legal rules are constitutional?'

This thesis explores these questions based on five spheres of interaction between the written and unwritten constitution: unenforceable legal rules; non-legal state rules; the rules of private associations; conventional rules; and rules of political morality. Some of these are described confidently in the British tradition but much less so in China, and vice-versa. Hence, the comparison highlights obscurities in the way either polity conceives of its unwritten constitutional order. Behind these points of interaction lie distinctive theories of the constitution and the state, which the discussion brings into focus. One theory sees legal and political rules as two dimensions of a single unwritten constitution, a constitutional order in which legal sovereignty is partially moderated by political rules. Another sees law and politics as potentially conflicting principles, in a constitutional order in which political sovereignty can transcend legal rules.

These spheres of interaction are explored in five chapters, following an introductory chapter that introduces the main research question, and the key ideas that we will use to answer it. Chapter One introduces the main research question. It considers how two constitutional orders as different as Britain and China can be compared and looks at the challenges that such a comparison must overcome. More broadly, it explores ways to think about the constitution. It develops a critique of theories of the constitution based on fidelity to a constitutional text It argues that a satisfying theory of the unwritten constitution must integrates legal and political rules and explain what we mean by constitutional.

Chapter Two discusses unenforceable law, one problem at the heart of China's unwritten constitution. It argues that, if the constitution consists not only of judicially enforceable laws, but of rules that express state values, then there are many such constitutional rules, spread across the spheres of interaction considered here. The chapter begins with a legalistic account of the constitution, an account based closely upon the legal order. It challenges this account by introducing a more detailed account of the interaction of legal and non-legal rules. Some legal rules bring non-legal rules in, and other legal rules keep non-legal rules out. The conclusions of this discussion help us to compare China's unenforceable constitution with unenforceable British constitutional rules such as duties of imperfect obligation, directive principles and conventions.

Chapter Three explores justice and administration. It considers whether internal government rules – policy rules – are constitutional rules. It asks why it is important to distinguish between legal rules and policy rules and puts pressure on some simple distinctions between them. The central claim in the chapter is that, far from being antithetical, government rules and legal rules can be very difficult to distinguish. Indeed, from the point of view of the citizen, the difference may be so slight as to be imperceptible. We ought, therefore, to think about this distinction as a sliding scale, rather than a bright line. The chapter then turns to the rule of law. One account of the rule of law demands that all government rules should be lawful in order to be constitutional. On this basis, the chapter suggests three ways to think about the relationship between the state and the

rule of law. The ways in which the Chinese state can act outside the law show us what is important about the rule of law in the UK.

Chapter Three focuses on one sort of gap between the state and its legal order. Chapter Four looks at another. It considers whether political parties govern in a separate sphere to the state and its constitutional institutions. It asks if we should keep party politics out of the constitution, and whether we should keep the constitution out of party politics. It then asks whether the nature of a group changes when it inhabits public office, and argues that, when private bodies hold public power, their rules are constitutional. This chapter, along with Chapter Two, considers how constitutional silence affects our picture of the state. The way the legal order interacts with rules from outside – by recognising them, ignoring them, or refusing to consider them – plays an important role how we circumscribe the constitution.

Just as Chapter Four addresses parties with reference to established account of partisanship in China, Chapter Five addresses constitutional conventions with reference to established accounts of British conventional rules. It distinguishes between two distinctive accounts of political sovereignty – those of Dicey and Schmitt - and uses these theories to assess a new literature on conventional rules in China. It argues that the British model of conventions are underpinned not by a single, politically sovereign electorate, but by a plurality of independent institutions and this explains their durability. The same cannot be said for China's political rules. The theory of convention developed

in the chapter underlines the importance of constitutional discourse for our theory of convention, an argument that leads us into Chapter Six.

Chapter Six considers state constitutional doctrine - the theory of the constitution, by the state. The chapter compares the constitutional doctrine of the CCP with Britain's new pantheon of constitutional principles. It explores what constitutional doctrine means for convention, and for the unwritten constitution. It distinguishes between doctrine and ideology. It asks what it means to have a doctrine, what sort of institution can expound it, and what sort of constitutional order can sustain an authoritative non-legal doctrine. It argues that, when the ideology embodied in a constitutional doctrine is the ideology of the state, then the state is partly constituted by its doctrine. China has a monist, state constitutional doctrine. In contrast, there are many theories of the British state, but no singular theory of the state, by the state.

This inquiry ultimately leads us to the connection between the unwritten constitution and a theory of the state and its purposes. The constitutional order reflects and refracts the constitutional doctrine of the state. The particular theories of the state set out here are local to these two constitutional orders. However, the way that we arrive at that theory, by way of the questions posed above, has general implications for our understanding of constitutions. Drawing on this comparative material, the thesis considers the nature of the constitution and the law, and the relationship between the legal order, the constitutional order and the state. Expressive constitutional rules, state

rules, private bodies, political conventions, and constitutional doctrine are not limited to Britain and China. They inform, and are informed by, concepts such as sovereignty, the nature of the state and the nature of the legal order. In this way, this thesis lays the groundwork for the study not only of these two constitutions, but of all unwritten constitutions.

CHAPTER ONE - INTRODUCTION

This chapter explores ways to think about the constitution, and in particular, about the gap between the ideals set out in the constitution and the reality of its implementation. It begins by introducing the main research question in the thesis. It explains what Britain and China can tell us about each other, and about the unwritten constitution, and considers some methodological challenges that the comparison presents. It then introduces a theory of the constitution based on fidelity to a constitutional text and its objections to theories of the constitution-in-action. The chapter challenges these objections, including the claim that theories of the unwritten constitution betray the aspirations of the written constitution, and the claim that such theories are descriptive accounts of political power with no constitutional authority. It argues, instead, that a satisfying theory of the unwritten constitution is a theory that integrates legal and political rules. By nature, such a theory demands that we explain what is constitutional about unwritten constitutional rules.

WHY BRITAIN? WHY CHINA?

> As I was trying recently to sort out the juridical features of present-day dictatorial systems, it occurred to me that some English constitutional textbooks would be of great help.
>
> Giovanni Sartori (1961).[1]

The United Kingdom is a longstanding foil for studies of authoritarian legal systems. In 2018, Chang Wen-Chen and David Law said 'a British conceptual framework may be more appropriate than an American one when it comes to studying Chinese constitutionalism'.[2] Thirty years earlier, Chris Osakwe described Soviet law as 'solidly anchored in the notion of the supremacy of law à l'Anglais'.[3] Thirty years before that, Giovanni Sartori began his account of authoritarian constitutions with some English textbooks.[4] For Sartori, Kenneth Wheare's account of the British constitution – the

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1 Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1972) 56 The American Political Science Review 853, 854

2 David Law and Chang Wen-Chen, 'Constitutional Dissonance in China' in Gary Jacobsohn and Miguel Schor (eds), Comparative Constitutional Theory (Edward Elgar 2018) 499

3 Christopher Osakwe, 'The Greening of Socialist Law as an Academic Discipline' (1987) 61 Tulane Law Review 1257, 1272

4 Giovanni Sartori, 854

collection of legal rules and non-legal rules which govern the government in Britain – 'just gives the final touch of perfection to the concept of unchecked, uncontrolled and absolute exercise of power'. Since then, a new generation of Chinese constitutional theorists has taken the British constitution as its counterpoint. For example, Chen Duanhong's work builds on the British literature of the unwritten constitution, citing British constitutional theorists such as Albert Dicey and Ivor Jennings.[5] Jiang Shigong similarly begins his account with Dicey, Jennings and Wheare.[6] This invites us to ask why a liberal democratic state like the UK is a comparator for studies of authoritarian constitutions.

The UK does not have a single written instrument at the centre of its constitutional order.[7] Indeed, if we wish to describe the UK constitution accurately, we cannot confine our account to laws. Dicey criticised Blackstone' account of the legal constitution because it suggested that the sovereign enjoyed 'the whole, and perhaps more than the whole, of the powers actually possessed by William the Conqueror'.[8] The legal rules let the monarch decide whether to enact legislation and who to invite to form

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5 Chen Duanhong (陈端洪), '论宪法作为国家的根本法与高级法 [Considering the Constitution as the Supreme and Fundamental Law of the State]' (2008) 20 中外法学 Peking University Law Journal 485

6 Shigong Jiang, 'Written and Unwritten Constitutions' (2010) 36 Modern China 12

7 From 1653, England was briefly governed under the first modern written constitution.

8 A. V. Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) 7

a government, but real power lies elsewhere. An exclusively legal account of the UK constitution would be a partial account. It would ignore paramount institutions of state. The office of the Prime Minister – the pre-eminent political office in the United Kingdom for the last 300 years – was only mentioned in UK law in 1917.[9]

An exclusively legal account of the UK constitution would not only be partial, it would be a misleading account. It would misstate the meaning of fundamental legal rules. For example, in *British Coal v. The King*[10] the Privy Council was invited to conclude that, legally, their opinions were merely a form of political advice given to the sovereign. Hence, if a statute forbade appeals to 'His Majesty' then it forbade appeals to the Board. But Viscount Sankey was only willing to read the legal rules in light of the political rules. He said, 'according to constitutional convention it is unknowable and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate court of law'. Were it not for the convention, the legal rule in *British Coal* would mean something different, and the case would have been decided differently. In *Carltona v. Commissioner of Works*[11] a company challenged a decision to requisition its property on the grounds that the empowering statute conferred the power

9 Chequers Act 1917, Schedule 1, s.9 (f).

10 British Coal Corporation and Others v. The King [1935] AC 500 Privy Council

11 Carltona Ltd v Commissioners of Works [1943] 2 All ER 560 Court of Appeal

on the Minister personally, and the decision was made by a civil servant. The Court of Appeal, interpreted the statute in light of the convention that civil servants actions are attributed to the minister. As Sir Stephen Sedley argues 'a modern constitutional court looking for the first time at the *Carltona* issue might very well have held the practice of administrative devolution to be unlawful, unless prescribed and regulated by law'.[12] Were it not for political rules, the legal rules would mean different things. Hence, if we wish to describe the UK's constitutional arrangements accurately, we need to build an assemblage of legal and non-legal rules.

There is a connection between this method, and the concerns about the UK constitutional order set out at the beginning of this chapter. Some people are concerned that the UK's unwritten constitution privileges politics over law, that it concentrates power in supreme legislature, led by a powerful executive. This is connected to a concern that the UK constitution looks beyond legal rules, to political practices and conventions which cut across the ideals of the legal constitution. This, in turn, is connected to a concern that the UK constitution is descriptive, that it baldly describes where power lies, rather than where it ought to lie. Giovanni Sartori's concerns, set out in the first

12 Stephen Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 LQR 270 at 275

paragraph reflect this critique. This chapter explores these interconnected concerns. But from the outset, we should stress that none of these writers quoted in the first paragraph suggest that Britain is a dictatorship, elective or otherwise.[13] The UK has a body of binding constitutional law and it acts as a meaningful constraint on the government. Indeed, in general, these writers use the UK as a *counter*-example to question the association that an unwritten constitution is an illiberal constitution.

China, on the other hand, is an illiberal state with a written constitution. The submission of the CCP to constitutional controls is, at best, intermittent and neither elections nor the 'democratic parties' operate as a political control on the CCP. Following the changes to constitutional term limits passed in March 2018, the Chinese constitutional order has increasingly been described as dictatorial.[14] The 1982 Constitution is not a source of rights and duties that are enforceable in court. Chinese lawyers accordingly distinguish between the constitution (宪法) – and 'constitutional laws' (宪法性法律) which are supposed to be enforceable. In China, as in the UK, if we wish to describe the

13 Quintin Hogg, Elective Dictatorship (Dimbleby Lecture, BBC 1976)

14 See generally Carl Minzner, End of an Era : How China's Authoritarian Revival is Undermining its Rise (Oxford University Press 2018) See also e.g. Jamil Anderlini, Under Xi Jinping, China is turning back to dictatorship, Financial Times, 17 October 2017; Tom Phillips, 'Dictator for life': Xi Jinping's power grab condemned as step towards tyranny, The Guardian, 26 February 2018; David Shambaugh, Under Xi Jinping, a return in China to the dangers of an all-powerful leader, South China Morning Post, March 1 2018.

law of the constitution, we would need to refer to series of legal instruments including, for example, the Organic Law of the National People's Congress of 1982, and the Legislation Law of 2000.[15] However, as in the UK, an account of the Chinese constitution that only considered legal rules would be a partial and misleading account. Just as the office of the Prime Minister only entered UK law in 1917 the Chinese Communist Party was only mentioned in the text of the 1982 Constitution through an amendment passed in March 2018.[16]

However, compared to some other illiberal states, China is highly institutionalised. If we take China's political controls seriously, this may explain the relative stability of Party governance and the resilience of Chinese authoritarianism since 1982.[17] If we wish to describe the rules that govern the government in China accurately, we need to take account of the rules that make Party leadership work, such as the rules of the CCP's *nomenklatura* system. Just as Britain's legal constitution can only be understood in light of constitutional conventions that embody Parliamentary democracy, China's legal constitution can only be understood alongside the political rules that embody the

15 These will be addressed in Chapter Three

16 See the revised Article 1. The CCP had been mentioned in the Preamble and in the text of previous constitutions. These references will be addressed in Chapter Four.

17 Andrew J. Nathan, 'Authoritarian Resilience' (2003) 14 Journal of Democracy 6

leadership of the CCP. China's written constitution, viewed in isolation, gives a distorted account of its wider unwritten constitution. The distortion makes it more difficult to identify where power lies within the constitutional order. In turn, this makes it harder to apportion responsibility. It is one thing to claim that China's constitution should change to reflect the vision of the 1982 Constitution. But to insist that China's actual constitutional order presently reflects the 1982 Constitution is to veil the reality of Party governance.

Perhaps the UK is more than a foil for an extended discussion of dictatorship. Perhaps China's unwritten constitutional order is less dictatorial than it might appear. The enduring absence of a written constitution make the UK a control in a comparative constitutional experiment. China, on the other hand, is an interesting variable. However, any comparison between the control and the variable would need to overcome substantial methodological challenges. We turn to these in the next section.

HOW AND WHY TO COMPARE?

There is a fashion for comparing large numbers of constitutions simultaneously.[18] Studies like these draw conclusions about constitutional trends, in spite of the breadth of geography and depth of history. These studies occasionally gloss over China as a deceptive example of a constitution.[19] They occasionally ignore the United Kingdom altogether as a missing data-point.[20]

Comparative studies do not swerve around states like Britain and China because they are unimportant. They do so because their methodology makes it hard to address states like the UK and China. Comparisons of large numbers of constitutions usually focus on codified constitutional texts and implicitly assume that fidelity to the plain meaning of

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18 See e.g. Tom Ginsburg, Nick Foti and Daniel Rockmore, '"We the Peoples" The Global Origins of Constitutional Preambles ' (2014) 46 The George Washington International Law Review 305 Zachary Elkins, Tom Ginsburg and James Melton, The Endurance of National Constitutions (Cambridge University Press 2009); David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 California Law Review 863

19 See e.g. Lily Tsai, Bringing in China: Insights for Building Comparative Political Theory, 50 Comp. Pol. Stud. 295, 298 (2017) (lamenting that there has been 'so little uptake of China scholarship by non-China scholars' in the field of comparative politics).

20 See e.g. Ingrid Van Biezen, 'Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe' (2012) 42 British Journal of Political Science 187, which is addressed in detail in Chapter Four.

that text is a normal feature of constitutions. But this method can only go so far in China and in Britain it goes nowhere.

Comparative law is not just the comparison of the text of legal rules. As John Bell argues, we can only compare in light of the 'context or institutional setting' in which rules operate and the 'tradition in which a legal text or idea becomes accessible'.[21] For Liora Lazarus, comparison demands that we look beyond legal rules to the culture and mentality of the jurisdictions in question.[22] In *Public Law and Democracy in the United Kingdom and the United States*, Paul Craig argues that 'the nature and content of constitutional and administrative law can only be properly understood against the background political theory which a society actually espouses, or against such a background which a particular commentator believes that a society ought to espouse'.[23]

Comparing constitutional rules is not like comparing harmonised taxation regimes, or different implementation models for EU Directives. Comparative law is not limited to

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21 J. Bell, French Legal Cultures (Butterworths, London, 2001) 8, as quoted in Lazarus L Contrasting Prisoners' Rights: A Comparative Examination of England and Germany (Oxford University Press 2004) at 5.

22 Ibid, Introduction

23 P. P. Craig, Public Law and Democracy in the United Kingdom and the United States of America (Clarendon 1990), 1

highlighting the differences between rules. The point of comparing is not limited to knowing the impact of a given legal order on a particular set of outcomes. This thesis is not a formal comparison of the UK and China in either sense (and indeed, is hard to imagine what that sort of comparison would look like.) Instead, it compares a selection of rules in light of the background political theory, the assumptions about the state, the legal order and the constitution in both jurisdictions.

Comparative constitutional law requires the close-up as well as the wide-pan. This is difficult to achieve in large-cohort comparisons because, as we have seen, constitutional orders are profoundly embedded in particular historical and cultural circumstances. As Geertz argues, the quest to turn culturally-specific ideas into universal ideals is 'a perverse sort of alchemy to turn gold into lead.'[24] The Chinese literature call these circumstances these specific ideas the 国体 or 'national situation.' In this idea there are shades of the *Volksgeist*, of historical nationalism and of cultural tribalism.[25]

If we accept that comparison demands context, then we invite an objection. When we compare different things in detail, can we generalise at all? This observation is

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24 Geertz C, Local Knowledge (Basic Books 1983) 182

25 See Von Savigny F, Of The Vocation of our Age for Legislation and Jurisprudence (Kitchener Ontario: Batoche 1999) and Harris JW, Legal Philosophies (2nd edn, Butterworth 1997) Chapter 18.

occasionally used by government-aligned Chinese theorists, to defend a sort of exceptionalism that forbids comparison. Comparative law therefore has to navigate between two unattractive alternatives. One the one hand is a universalising vision that sees law as something that transcends culture. On the other is a parochial relativism that slides across any attempt to compare – law with Chinese (or British) characteristics. As Lazarus argues, these alternatives present us with 'bad abstractions or with no abstractions at all.' [26]

The formation of legal concepts demands both comparison and abstraction. Law is a human institution and our understanding of it should reflect the way people use it. As John Finnis argues, the social science of law 'aspires to be more than a conjunction of lexicography with local history.'[27] Although legal concepts 'vary greatly… from one society to another' and this 'social life and practice bears labels in many languages', we cannot understand law, local or foreign, without abstraction. Even a list of conceptions and practices 'requires some principle of selection of items for inclusion in the list' which is to say, it requires us to abstract from this local detail. Our concepts need to fit the rules and practices that they describe, and in this, in turn, shapes and justifies those

26 Lazarus L Contrasting Prisoners' Rights, 7-8

27 Finnis J, Natural Law and Natural Rights (Oxford: Clarendon 1980) 5

concepts.[28] Part of the point of comparing is to check our theory. Part of the point of theory is to animate our comparing. As Denis Galligan argues '[one] arrives at a descriptive theory of law by considering the practical, daily workings of municipal legal systems, and singling out the common and essential features. Generalizations are then formulated on the basis of which concepts can be formed, which may be refined by further analysis and reflection…'[29] For these reasons, we should reject both the superficial comparison of text, and the sceptical, relativist redoubt that forbids comparison. In their place, we should ask whether our concepts describe legal systems adequately and refine those concepts accordingly. In respect of the unwritten constitution, limit cases such as Britain and China challenge the received wisdom. In this way, this thesis will refine the concepts we use to make sense of the unwritten constitution through reflection on the features of these two jurisdictions.

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28 Alasdair MacIntyre, 'Is a Science of Comparative Politics Possible?' in Peter Laslett, W. G. Runciman and Quentin Skinner (eds), Philosophy, Politics and Society (Basil Blackwell 1972), to which we return in Chapter Four

29 D. J. Galligan, Law in Modern Society (Oxford University Press, 2007) 9-10

We ought, first, to set out the general concepts that frame our comparison. The rules[30] referred to here are general norms.[31] The term legal is used in the formal sense of *assessed to be legally valid*[32] rather than the material sense of *compliant with the basic desiderata of legality*[33] or in the teleological sense of *doing a law-like job*.[34] Rules are legal rules if they are acknowledged to form part of the legal system in question. This depends on the attitudes of the rule community to whom they are addressed.[35] We will return to

30 Rules are one important way to think about institutional order, but they are not the only aspect of political order that is worth studying. Constitutions, like all normative systems, include propositions other than rules and. But there is no suggestion that it is only rules that contribute to the structure and distribution of power in Britain and China. Values, social facts, commands, promises, norms and standards and many other phenomena may be constitutional but they are beyond the scope of this thesis.

31 Karl N. Llewellyn, The Theory of Rules (University of Chicago Press 2011) and Hart, The Concept of Law. Twining defines a rule as a general norm mandating or guiding conduct or action in a given type of situation. The phrase mandating or guiding behaviour ('mandating' is surely a form of 'guiding') is equivalent to 'prescriptive'. Compare John Griffith's account of rules John Griffiths, 'The Social Working of Legal Rules' (2003) 35 The Journal of Legal Pluralism and Unofficial Law 1 at fn 12.

32 H. L. A. Hart

33 Lon L. Fuller, The Morality of Law (Yale University Press 1969), John Finnis, Natural Law and Natural Rights

34 Karl N. Llewellyn, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (University of Oklahoma Press 1941)

35 The constitution includes propositions other than rules. See Tony Honoré, Making Law Bind (Clarendon Press 1987).

each of these questions in Chapters to come. The remainder of this chapter will expand on what we mean by constitution.

POLITICAL CONSTITUTIONS

If the UK or China *genuinely* lacks a constitution, then we can safely pass them by when we compare genuine constitutions. If they do not, however, then we ought to ask, 'in what sense of the word 'constitution' does Britain or China have a constitution?' To answer that question we need to consider some types of constitutions. We begin, in this section with distinction between law and politics, and its implications. In the next section, we will explore how this distinction gives wise to a wider range of typologies. We ask whether the constitutions of the UK and China fit a particular type, or whether they call the typology into question.

John Griffith described the British constitution as a political constitution, which he contrasted with legal constitutions like the United States.[36] Under a political constitution 'the constitution is identified with the political rather than the legal system and in particular, with the ways political power is organized and divided'.[37] Under this sort of constitutional order, political 'controls' including constitutional conventions and elections are preferred to legal controls like Bills of Rights. Generally speaking, advocates of the

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36 J. A. G. Griffith, 'The Political Constitution' (1979) 42 MLR 1

37 Richard Bellamy, Political Constitutionalism: a Republican Defence of the Constitutionality of Democracy (Cambridge University Press 2007) 5

political constitution believe it embraces the virtues of the open government in an open society and promote democracy and accountability. They believe political decisions ought to be taken by politically-accountable institutions and are skeptical about empowering judges.

Political and legal constitutions are not binary alternatives – they are ideal types that describe differences in emphasis in any constitution: every constitution has a political and a legal dimension, and legal controls are more prominent in some constitutions than others. It should be obvious from the most superficial comparison of Britain and China that we cannot promote values like democracy, political accountability and open government by simply empowering the government. Rejecting legal controls, like strong-form constitutional review, only takes us part of the way to a political constitution. We also need effective political controls whose effectiveness depends on the wider health of the political system. Even in a British context, some critics of the political constitution find the very idea of 'political accountability' elusive.[38]

38 Oliver, D. 'Law, Politics and Public Accountability. The Search for a New Equilibrium' (1994) PL 238

Underlying the theory of the political constitution is the claim that the constitution should insulate some sorts of decision-making from judicial controls. In a Chinese context, this idea takes on new meaning. As Albert Chen explains:

> It has been pointed out that the Chinese political system is characterized by a 'dual normative system' – that is, the 'cohabitation of two normative systems' – the party … and the State system .... Among these two systems, only the State system is governed by the Constitution and laws of the PRC, while the party system is governed by the party's own Constitution …and its internal regulations and rules. Yet party leaders and organs participate actively in, and selectively intervene in, the decision-making processes of State organs, acting behind the scenes and not being subject to the State's legal requirements of transparency and accountability or the possibility of being challenged in judicial review proceedings before the courts of the State.[39]

Like the political constitution and the unwritten constitution, the concept of the dual constitution draws certain phenomena into sharper focus. In particular, it draws our attention to the space for conflict between law and politics. Authoritarian constitutions are not merely characterised by the *presence* of political rules or the *interaction* as between political and legal rules. They are characterised the *retreat* of legal rules, leaving a partial zone of lawlessness where law does not constrain state action.

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39 Albert H. Y. Chen, 'China's Long March towards Rule of Law or China's Turn Against Law' (2016) 4 The Chinese Journal of Comparative Law 1 at 34

Ernst Fraenkel described Nazi Germany as 'dual constitution' characterised by a normative state regulated by law and a prerogative state characterised by arbitrary judgement.[40] Under the dual constitution some aspects of social life were conducted under law, while the domain of the political was governed by under arbitrary power. The limits of that domain were themselves set by what Fraenkel describes as a prerogative state, a state with substantial discretionary powers that lie wholly or partly outside the legal order. Fraenkel's account recalls Carl Schmitt's theory of the state and the constitution. Schmitt thought the state was led by an unfettered political sovereign, with the power to turn off the law and identify the enemy.[41]

Chinese constitutional theorists including Jiang Shigong, He Xin and Li Ling take the dual state as their point of departure. He Xin concludes that the domains of the legal and the political can coexist as a dual constitution.[42] Li Ling describes this as a 'dual

40 Ernst Fraenkel, The Dual State : A Contribution to the Theory of Dictatorship (Oxford University Press 2017)

41 Schmitt, Constitutional Theory, Sapio F, Sovereign Power and the Law in China (Leiden: Brill 2010)

42 He Xin, 'The Party's Leadership as a Living Constitution in China' (2012) 42 HKLJ 73

normative system'.[43] These two systems 'are each self-contained but also constantly overlap' and when they do 'their relationship is… not equal, or mutually binding… but competing'.[44] Jiang Shigong, in turn, concludes that the legal and political constitutions 'check and balance' one another.[45] By his account, political rules modify the written constitution to create a harmonious constitutional order.[46]

In contrast to some theories, which present the legal and non-legal dimensions as an organic whole, the dual constitution highlights the gap between the domain of the legal and the political and the potential for conflict between them. By this account, the political constitution does not just supplement the legal constitution, it can supplant it.[47] The dual constitution metaphor also obscures some aspects of the unwritten constitution. Generally speaking, the state does not have two constitutions – one legal and one political. It has one constitution composed of legal and political rules that partially overlap. So far

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43 Li Ling, '"Rule of Law" in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China' (2015) 2 Asian Journal of Law and Society 93. This claim runs against the grain of Li's argument, which we cannot explore fully here.

44 Ibid at 107

45 Jiang Shigong, 'Written and Unwritten Constitutions' 3

46 See also Shucheng Wang, 'Emergence of a Dual Constitution in Transitional China' (2015) 45 HKLJ 819

47 Ernst Fraenkel arguably makes the same error. The few examples set out at his Chapter 2 where the normative constitution wins out, do not in the least undermine the conclusion that this a system in which one body of rules makes good on its claim to supremacy.

as they intersect and interact, it can be misleading to present these two aspects of the constitution as separate spheres. Blackstone's mistake was to suggest that legal rules can have an existence apart from politics: at least some important legal rules can only be understood accurately in light of political rules. We have already exposed some of the limitations of that view, and we will return to it presently, at length in Chapter Two.

In a prerogative state, it is hard to describe the relationship between law and politics as a harmonious cohabitation. Jiang Shigong claims China's separate written and unwritten constitutions check and balance each other. He suggests that that the formal, legal, requirement for NPC approval acts as a substantial check on the power of the CCP:

> [W]henever the NPC and its Standing Committee fulfil their 'rubber stamp' function, the constitution is thereby activated to 'tame the prince' … that is, to cast and confine the power of the CCP in the frame of the constitution and law… the party's will [is] bound by the constitutional process. Such a difference can be compared with that between 'absolute monarchy' and 'constitutional monarchy.[48]

This is a dubious claim, which appears to get form and substance back to front. The NPC is the formal locus for power in China, but that power is in fact exercised by the CCP. We do not have to go so far as to say the NPC is a 'rubber stamp' Parliament

48 Jiang Shigong, 'Written and Unwritten Constitutions', 25

to conclude that it is, in no sense, a check or balance upon the CCP.[49] Elsewhere, Jiang appears to accept this when he says, 'sometimes the symbolic exercise of a power matters even when there is no real discretion to refuse its exercise'.[50] Perhaps, then, China's legal constitution has an hortatory function – that it exerts influence on the political that falls short of constraint. We will return to this theme in the next section.

We will return to these ideas throughout this thesis. For now, we should note the resemblance between these two ways of conceiving of the relationship between politics and law. We should ask whether the legal and the political are harmonious or dissonant, and whether they form an 'assemblage' or whether they exist in separate domains. In the UK, for writers such as Dicey and Jennings, legal and non-legal rules are different aspects of the same overarching constitution. The title of Dicey's *The Law of the Constitution* highlights the overlap of law and the constitution. In contrast, Jennings' *The Law and the Constitution* highlights their separateness. However, both theories view the constitution as a domain for interaction between legal and political rules. In China, most theorists consider these ideas, at least, to be tension. In some ways, the metaphor of the

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49 Scot Tanner argues that, in the 1990s, the NPC was an important forum for political contestation in Murray Scot Tanner, The Politics of Lawmaking in post-Mao China (Clarendon 1999). However, there is no suggestion there that this contest took place without the implicit sanction of the CCP.

50 Jeremy Waldron, 'Are Constitutional Norms Legal Norms?' (2006) 75 Fordham L Rev p10

dual state helps to make sense of conflict between law and politics. It others, it obscures the domain for interaction between them.

SOME TYPES OF CONSTITUTIONS

Karl Lowenstein and Giovanni Sartori distinguish between what Sartori calls '*garantiste*' constitutions, 'nominal' constitutions, and 'façade' constitutions. *Garantiste* constitutions are legal constitutions. They use legal controls to guarantees the structure and distribution of political power in a given constitutional order. Nominal constitutions purport to do this, but in fact, 'they frankly describe a system of limitless, unchecked power'[51]. Hence, the nominal constitution 'legitimises' the state. Façade constitutions do not even describe. They 'give us no reliable information about the real governmental process'.[52]

Sartori treats strong form constitutional review as the core case of constitutionalism. He contrasts this with a caricature of arbitrary government, in which the state enjoys limitless power. But as Stephanie Balme and Michael Dowdle argue:

> [E]ven in the most effective constitutional system, significant aspects of constitutional structure are invariably non-justiciable… Even in the United

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51 Karl Loewenstein, Political Power and the Governmental Process (2nd edn, University of Chicago Press 1965). Giovanni Sartori, 861

52 Giovanni Sartori, 861. Loewenstein uses the term 'semantic constitution' to describe this sort of arrangement. See also Albert H. Y. Chen, 'Constitutions, Constitutionalism and the Case of Modern China', University of Hong Kong Faculty of Law Research Paper No. 2017/023

> States, which may revere the practice of judicial review more than any other country, large tracts of the Constitution are nevertheless affirmatively rendered non-justiciable[53]

Sartori does not address what lies behind the façade. The thing described by a nominal constitution, or concealed by a façade constitution, might be a body of political rules that structure and distribute power, albeit one that does not draw its binding force from a supreme text. Sartori also does not consider reasons why significant aspects of the constitution might not be judicially enforceable. He briefly addresses the idea that constitutions can perform functions other than the lawful restraint of public power, but for him this is 'wishful thinking,' It is 'not the purpose of a constitution'.[54]

Thomas Franck distinguishes between what he calls declaratory constitutions and hortatory constitutions.[55] A hortatory constitution 'does not specifically confer any enforceable rights on anyone'. However, it is a 'solemn declaration of intent'[56]. It is binding, but not enforceable, in a sense which we will develop in Chapter Two. Michael Dorf refers to constitutions like these as 'aspirational' constitutions.[57] He challenges the view

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53 Stephanie Balme and Michael W. Dowdle (eds), Building Constitutionalism in China (Palgrave Macmillan 2009), 3

54 Giovanni Sartori, 861

55 Thomas M. Franck, 'Book Review: Africa: Constitutions of Nations' (1967) 22 International Journal, 158

56 Ibid, 159

57 Michael Dorf, 'The Aspirational Constitution' (2009) 77 George Washington Law Review, 1631

that constitutions are supposed to entrench a set of values in order to prevent 'backsliding' by future generations. Instead, he argues that constitutions hold up values to which the polity ought to aspire.[58] They are intended to catalyse social change, to persuade future generations of a better way to govern. We might think of a hortatory or aspirational constitution, as a political constitution, a constitution whose realisation is delegated in its entirety to the political branches (or, in China's case, the political branch.) We will discuss constitutions like these in the next chapter.

But if the constitutional is not enforceable, then when is it a sham and when is it an aspiration? David Law and Mila Versteeg distinguish between strong constitutions, which both promise and deliver a lot; weak constitutions which promise and deliver a little, modest constitutions which promise little but deliver more, and sham constitutions, which promise much and do not deliver it.[59] For Law and Versteeg all constitutions with a substantial gap between promise and delivery are sham constitutions. They recommend their approach because it 'renders it unnecessary to speculate upon the reasons for which different countries breach or uphold their constitutional obligations'[60].

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58 Loewenstein describes aspirational constitutions - constitutions that the state earnestly wishes to realise, but for its current state of development - as 'nominal' constitutions.

59 David S. Law and Mila Versteeg

60 Ibid, 880

In a separate article with Chang Wen-chen, Law goes on to address reasons why constitutions may aspire to more, or apologise for less. Chang and Law argue that a 'dissonant constitution' is a constitution where there is a 'contradictory relationship between the formal constitution and actual practice'. This is not the same as a sham constitution:

> A sham constitution – in the sense of a constitution that is simply irrelevant and ignored – generates only an insignificant and uninteresting form of dissonance… There is hardly any dissonance because the formal constitution does not make itself heard... A more interesting form of dissonance exists when a constitution is nowhere close to being realized (and, indeed, is unlikely ever to be realized) yet nevertheless has a real effect on how things are done.[61]

Law and Chang describe China as an example of a dissonant constitution. They suggest North Korea as an example of a sham constitution – a state in which the constitution is 'simply irrelevant and ignored'. The example of North Korea sets a low bar. Compared to the DPRK, most constitutions, and indeed most constitutions in history, have had 'a real effect on how things are done'. Chang and Law describe the Chinese constitution as dissonant. We will consider this view in more detail in Chapter Two.

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61 David Law and Chang Wen-Chen, 509

These typologies are largely focused on the distinction between the law-in-books and the law-in-action.[62] It is easy to assume that this overlaps with the distinction between the rules as-they-are, and the rules than as-they-ought-to-be, because the ideals in a written constitution are often more attractive than the messy reality of its implementation. However, there can be desirable unwritten constitutions as well as undesirable written constitutions.

In Britain, the legal, monarchical constitution is not a façade to conceal the true location of power. (Nobody is fooled.) Nor does the UK's unwritten constitution betray an aspiration for absolute monarchy. In the nineteenth century, Walter Bagehot emphasized the way that the monarchical and ceremonial dimension of the constitution contributed to government legitimacy in the UK.[63] But the monarchical aspects of the UK's legal constitution exert relatively little influence on the exercise of political power today and their contribution to legitimacy is debatable. At any rate, there is no *dissonance* between monarchy and constitutional democracy.

We can make a similar observation about written constitutions. Where there is a rough congruence between text and implementation, a constitution is nominal if it is

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62 Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12

63 Walter Bagehot, The English Constitution (Oxford University Press 2001)

undesirable and a guarantee if it is desirable. Where there is a gap between text and implementation, a constitution is aspirational if the political reality is tolerable, and sham if it is not. This points to another illuminating difference between Britain and China. China is an illiberal state whose written constitution is more attractive than its unwritten constitution. Britain is a liberal state whose conventional constitution is more attractive than its legal constitution.

In this section we have considered types of constitution: strong and weak; legal and political; hortatory and declaratory, nominal and façade; modest and sham; dissonant and harmonious. In different ways, these typologies demand that distinguish the constitutional text and constitutional practice – we need to compare an account of where power is located with a textual account of where it is supposed to be located. But whether we treat the overall assemblage of legal and political rules as a guarantee, an apology, an aspiration or a sham depends not just on the gap between text and reality, but also on how we evaluate the constitution, on what we think of its content. We turn to this question in the next section.

DESCRIPTION AND EVALUATION

Some advocates of the written constitution feel an instinctive aversion to constitutional models that describe the constitution-in-action. This may reflect an aversion to nominal constitutions – constitutions that describe power where it lies. But as we found in the previous section, not everyone who describes the constitution accurately is an apologist.

In 1976, Poland amended its Constitution, essentially to reflect the reality of political power under socialism. The revised Constitution attested to the socialist basis for the constitutional order, to the constitutional role played by the Polish United Workers' Party, and to the fraternal connection between Poland the USSR. It gave a nominal turn to a facade constitution. Nevertheless, opposition from intellectuals encapsulated in the 'Letter of 59' persuaded the state to reject the amendment and replace the fig leaf. They preferred a constitution that aspired to a vision of democratic government under law to a constitution that exposed the hollowness of that aspiration.[64]

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64 Stanislaw Pomorski, 'Controversies over the "Leading Role" of the Polish United Workers' Party: the 1976 Constitutional Amendment' in Dietrich André Loeber (ed), Ruling Communist Parties and their Status under Law (Martinus Nijhoff 1986)

In Poland, intellectual criticism of a nominal constitution led to a *less* nominal constitution. In China, intellectual criticism of a façade constitution made the constitution *more* nominal. On Christmas Day 2012, seventy Chinese intellectuals published an open letter calling for constitutional reform.[65] On New Year's Day 2013, the reformist Party journal *Yanhuang Chunqiu* published an editorial arguing that the best path to reform would be for the law in action to match the law in books.[66] In the end, the Party did this, not by conforming to the law but making law conform to existing practice. Constitutionalist views were ruthlessly suppressed, as were scholars who held those views. In March 2018 Article 1 of the Constitution was revised to record the fact that 'The leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics'.

John Griffith famously said 'the [UK] constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened, it would be constitutional also'.[67] This theory has been criticised as a descriptivist theory, as a nominal

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65 Chen Hongguo et al. 2012. 改革共识倡议书 [A Proposal for a Consensus about Reform], Ming Pao, 27 December 2012

66 宪法是政治体制改革的共识 [The Constitution is the Consensus for Political Structural Reform]. Yanhuang Chunqiu 2013/1, 1-3.

67 J. A. G. Griffith, 19

theory of the constitution, an apologetic theory of how power is actually exercised. Graham Gee and Gregoire Webber expand on this 'descriptivist' reading of Griffith:

> On one reading, this passage implies that there can be no norms underpinning a political constitution inasmuch as a political constitution always remains subject to the possibility of change – significantly, any change – through the ordinary political process. On this reading, in which there are no legal limits on the political process and no bill of rights to cabin day-to-day politics, everything and anything that happens is constitutional.[68]

There is a parallel critique of political constitutionalism in China. As Albert Chen notes, Chinese political constitutionalists such as Chen Duanhong have been accused of neglecting normative questions in favour of a theory that presupposes that 'what exists must be reasonable.'[69] These critics ask what an account of 'what happens' can tell us about what ought to happen.[70] The signatories to both the Letter of 59 and the Christmas Day 2012 letter challenge a constitution that records the rules as they are, rather than as

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68 Graham Gee and Grégoire C. N. Webber, 'What Is a Political Constitution?' (2010) 30 OJLS 273 287 Gee and Webber ultimately defend Griffith's vision, as discussed below.

69 Chen A. 'The Discourse of Political Constitutionalism in Contemporary China' 192. The critique is Gao Quanxi's.

70 See e.g. J. W. F. Allison, The English Historical Constitution: Continuity, Change and European Effects (Cambridge: Cambridge University Press 2007) at 34. This may reflect emotivist claims about rules, based on David Hume, A Treatise of Human Nature (David Fate Norton and Mary J. Norton eds, Oxford : Oxford University Press 2006)

they ought to be .[71] They argue that our account of the constitution ought to include aspirational legal rules that political actors do not obey.

We can respond to these objections in at least two ways. First, along the lines set out above, we can distinguish between a *constitutional text* that apologizes for arbitrary power and *an account of the constitution* that locates power where it really lies.[72] There is a difference between the nominal constitutional text, like the Polish Amendment of 1976, and an honest account of the constitution in action. Among other arguments, unless our account of the constitution describes power accurately, we cannot allocate responsibility to those who actually exercise it.

There is a second, subtler, reason why an account of the unwritten constitution cannot be merely nominal or descriptive. Unless we are referring to the rules of a text entitled 'Constitution', we can only group rules together as constitutional in light of some conception of what 'constitutional' means. To describe the rules of the unwritten

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71 See e.g. Qianfan Zhang, 'A Constitution without Constitutionalism?' (2010) 8 International Journal of Constitutional Law 950 Eva Pils, Human Rights in China (Polity Press 2017). For an extended discussion of the political debate about constitutionalism in China see Rogier Creemers, 'China's Constitutionalism Debate: Content, Context and Implications ' 74 The China Journal 91

72 In the UK, where there is no constitutional text, the distinction between law-in-books and law-in-action requires careful handling, as we will see in Chapter 5 and 6.

constitution as constitutional we need a *theory* of the constitution to stand in the place of the text.[73] In the next section, we will consider this idea in more detail.

For now, for the reasons set out in these last two sections, we can conclude that a descriptive theory of the constitution does not demand that we abandon constitutional values. The most important sham is to pretend power is constrained when it is not. If we assert that controls exist when they do not, whether legal or political, we veil the dictator.[74]

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73 See the argument to this effect in Chapter 1 of John Finnis, Natural Law and Natural Rights (Clarendon 1980)

74 Dawn Oliver, 'Law, Politics and Public Accountability.

THE MATERIAL THEORY OF THE CONSTITUTION

In The Law and the Constitution, Ivor Jennings wrote:

> The absence of any written constitution makes it difficult to distinguish between that part of the constitution that is part of the law of the land and the rest of the law… A classification must be either material, based on the nature of the subject matter, or formal, based upon its source or procedure. A classification based on a purely subjective notion like 'importance' is no classification. How is one to assess the relative importance of the rules governing the Church of England and the National Assistance Board. Or the Territorial Army and the Metropolitan Police Board?[75]

Jennings contrasts material and formal theories of the constitution. According to a formal theory, constitutional rules are rules ultimately sourced in the constitutional text. In a state with an enforceable written constitution, rules can be constitutional in the formal sense. For theorists such as Sartori, this is the orthodox sense of the word 'constitutional.'

In contrast, a material theory of the constitution distinguishes constitutional rules from other rules on account of their subject matter, not their source. In a state like the UK it is not possible to provide a satisfying formal account of what ought to be considered constitutional law. A formal theory would fall into the gap where a written constitution

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75 Ivor Jennings at 76

ought to be. In a state like China, with a hortatory constitution, a simple formal account is available to us, but it tells us so little about the rules that govern governance that it cannot provide a practicable theory.

We could try to connect rules in a non-contentious way – statutes with the word 'constitutional' in the title, for example.[76] But that would be a very partial account of constitutional rules. It would also be a very partial account of power. Some statutes are more important than others and the political power necessary to change them varies according to their constitutional content. Carl Schmitt concludes that an attempt to ground the UK constitution in parliamentary sovereignty is forlorn: 'a majority decision of the English Parliament would not suffice to make England into a Soviet state… Only the direct, conscious will of the entire English people, not some parliamentary majority, would be able to make such fundamental changes'.[77]

If we want to explain power, and constitutional rules, we need to distinguish constitutional rules from other sorts of rules. To do this, we need a material theory of the constitution, a theory based on the subject matter of the rules. There are many such

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76 Tarunabh Khaitan, '"Constitution" as a Statutory Term' (2013) 129 LQR 589

77 Constitutional Theory, 79-80, as quoted in David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' 1 Global Constitutionalism 229 at 239

theories. For example, a popular liberal theory sees the constitution as a framework for protecting vulnerable and unpopular minorities – as a means of getting the government off your back.[78] Less politically-charged accounts describe the constitution as the rules that govern the government.[79] As we have seen, Dicey develops an even broader account - the 'rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state.'[80]

This is not to say that *written* constitutions are untouched by material theories of the constitution. The content of the written constitution, and the way in which it is interpreted, usually reflects a theory of state, and we will consider the interaction between written constitutions and 'political morality' in Chapter Six. The point is that we can speak meaningfully about written constitutional rules in a formal sense, without relying on an underlying theory of what counts as constitutional. We cannot do this for unwritten constitutional rules.

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78 See Laurence H Tribe, American Constitutional Law (3rd edn, Foundation Press 2000) s.1-8 esp note 26. Ronald Dworkin, Taking Rights Seriously (Duckworth 1977). Giovanni Sartori.

79 See e.g. Martin Loughlin, The Idea of Public Law (Oxford University Press 2004). K. C. Wheare, Modern Constitutions (2nd edn, London: Oxford University Press 1966)

80 A. V. Dicey cxl.

One reason why British constitutional scholarship is unusually sensitive to non-legal rules is precisely because it needs to begin with a material theory. Dicey's search for rules 'that affect the distribution or the exercise of the sovereign power of the state' leads him to political rules like constitutional conventions. Authoritarian constitutional theorists also conceive of power and rules in this way. Martin Loughlin describes Schmitt as 'within a line of political jurists who conceived public law broadly, as 'an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing'.[81] In Chapters Five we will consider Dicey and Schmitt's contrasting material theories in detail.

A material theory is a necessary part of any descriptive account of the unwritten constitution. But it explains other things also. Without a material account of the constitution, it is harder to explain why constitutional rules are binding. Lord Wilson of Dinton describes the process of explaining constitutional conventions to a recalcitrant minister:

> If you are in the position … of advising someone that they are obliged to observe a particular convention … it is not much use telling them that the

81 Loughlin, M., The Idea of Public Law. (Oxford: Oxford University Press, 2003) 30

> convention is binding on them because they regard it as binding. That is the sort of logic which made Sir Humphrey famous'[82]

As John Finnis notes[83] in *The Fairy Tale's Moral*, no meaningful account of rules can be solely descriptive. Every rule can be understood both as a fact and as a directive standard, a distinction that Finnis describes as law's 'double life[84]'. In Chapter Six, we will come to the underlying problem of how and why we might wish to confer legitimacy on a given set of local constitutional values.

In conclusion, we cannot have a formal theory of the constitution in the UK. In China, a formal theory would be a fictional theory. The only satisfying theory available to us is a material theory, a theory that ultimately reflects assumptions about the nature of governance and the state. As Balme and Dowdle note 'constitutionalism is not a gift from the elite to the masses. It is a way of giving social meaning to the metaphor of' the state'.[85] In this thesis we will explore how these two jurisdictions give meaning to the state through material accounts of the unwritten constitution.

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82 Richard Wilson, 'The Robustness of Conventions in a Time of Modernisation and Change' (2004) PL 407, 409

83 John Finnis, 'The Fairy Tale's Moral' (1999) 115 LQR 170 at 170.

84 See also Frederick F. Schauer, Playing by the Rules (Oxford : Clarendon 1991) at 7.

85 Stephanie Balme and Michael W. Dowdle at 9

CONCLUSION

This chapter sets out what can be gained by comparing the British and Chinese constitutions, and addresses the methodological problems that this sort of comparison presents. In particular, it looks at problems of comparing constitutions, at whether political constitutions merely describe the location of political power, and whether it is possible to think of separate political and legal constitutions. It introduces some of the key definitions and concepts used in the thesis and introduces the key questions addressed in the argument to come.

In the background to this discussion is a theory of the state under law. According to this theory, government power is constrained by law, whereas under a nominal or façade constitution it is not. For thinkers like Sartori, the constitutional state is the only path to rational, legal legitimacy for state action. We return to this question in the next chapter.

We need to be mindful of what is lost when we question this account of the constitution. Some theories of the political constitution do not question the *rechtsstaat*

so much as challenge it openly. Carl Schmitt's theory famously aimed at the 'unmasking and destruction of the liberal, rule-of-law state and the conquest of the statutory state'.[86] We might be cautious about modern theories of the dual state for exactly this reason.

However, a deeper consideration of unwritten constitutions leads us to a richer account of the state under law. David Dyzenhaus observes that the rule of law should not be confused with 'mere legality in government action'.[87] By that account any government acting under an entirely nominal constitution would be acting under the rule of law. Elsewhere, Dyzenhaus argues that:

> The object of constitutionalism – a state in which all acts of public power are manifested in such a way that they are capable of being regulated by law – did not precede constitutionalism, but was the ideal to which constitutionalism aspired, as it had been for centuries before been the ideal of the rule of law.[88]

Constitutionalism is not satisfied by 'mere legality'. It demands that we specify what is properly public and what is properly legal, as well as what counts as 'being regulated by law'. Those are questions that we explore in the next chapter.

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86 Georg Dahm quoted in David Dyzenhaus, 'The Concept of the Rule-of-Law State in Carl Schmitt's Verfassungslehre' in Jens Meierhenrich and Oliver Simons (eds), The Oxford Handbook of Carl Schmitt (Oxford University Press 2015) at 490

87 Friedrich Hayek quoted in ibid at 491

88 David Dyzenhaus, 'Constitutionalism in an Old Key' at 257

CHAPTER TWO – UNENFORCEABLE LAWS

INTRODUCTION

Chapter One considered some of the limitations of the legalistic theory of the constitution defended by writer such as Giovanni Sartori. This chapter continues that line of argument, describing the way legal rules interact with non-legal rules from the bottom up. This account helps us to distinguish unenforceable legal rules, like the rules of the Chinese constitution, from unenforceable conventions and maxims of political morality.

The first half of the chapter asks what goes into the constitution. As Chapter One observed, one of the preliminary steps towards comparison is to explain what we are comparing – to set out in general terms the concepts that frame the comparison. Hence, for reasons of methodological transparency, this section begins with a general account of how political and legal rules interact, an account framed using relatively familiar examples. It explains how legal rules validate some sorts of non-legal rules and exclude others. It considers two categories of rules: rules that bring rules in; and rules that keep rules out. This step helps us to distinguish between the *validity* of a rule – whether or not it is part of a legal system - and the *enforceability* of a rule – whether a court will compel compliance with that rule. The manner in which some rules are highlighted, validated and enforced,

and other rules are labelled off-limits, has important implications for the discussion of government rules and party rules to follow.

The second half of the chapter is directly comparative. It addresses unenforceable legal rules like the rules of the Chinese constitution. It compares these rules with analogous British constitutional rules. The Chinese constitution is not a source of rights and duties that can be enforced in court. Dicey, among others,[89] defines law as 'any rule which will be enforced by the courts'.[90] He went on to say that hortatory limitations on the legislature 'are not in reality laws, since they are not rules which in the last resort will be enforced by the courts.' The 'true character' of rules like these 'is that of maxims of political morality, which derive whatever strength they have from being formally placed in the constitution and from the resulting force of political opinion.'[91]

The chapter begins with an account of the constitution framed in enforceable legal rules. This draws upon the theory of Hans Kelsen, and it connects to the paradigm of the legal constitution as a guarantee critiqued in Chapter One.

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89 See e.g. Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 991.

90 A. V. Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) at 4

91 Dicey at 122 – 123.

LAW AS AN OPEN SYSTEM

Joseph Raz argues that it is 'part of the nature of a legal system to be … an 'open system".[92] An open system of rules is a system that interacts freely with rules from outside. William Twining says:

> When confronted with a particular rule [we] may not merely be concerned to interpret it in the light of other rules in the same system; [we] may also be concerned to reconcile it with rules which form part of other systems.[93]

By this account, promises and bargains are not legal rules but they interact freely with the law of contract. They do not necessarily form part of the legal system, and yet they can be validated and enforced by that system.

In contrast, Hans Kelsen believed it is part of the nature of law to be a closed system.[94] He believed in the unity of legal rules. He argued that all valid rules form an

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92 Joseph Raz, Practical Reason and Norms (Oxford University Press 1999) 152-154

93 William Twining, Miers, David, How to Do Things with Rules (Cambridge : Cambridge University Press 2010) 102

94 Hans Kelsen, General Theory of Law and State (New Brunswick, N.J. : Transaction 2006). Note that Kelsen is not describing the rules of positive law. See Stanley L. Paulson, 'The Great Puzzle - Kelsen's Basic Norm' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), Kelsen Revisited (Hart Publishing 2013).

autonomous system, a gapless and consistent system in which all rules trace their validity to a single empowering norm.[95] Every two norms that ultimately derive their validity from one basic norm belong to the same legal system. Therefore, for Kelsen, international law and municipal law form part of the same system.

Kelsen makes a connected argument about the identity of law and the state. By this account, the state must be a legal order, or part of a legal order. For Kelsen, the state 'simply is the territorial legal order personified'.[96] In other words, the state and its legal order are one and the same thing. The acts of a group of humans – state officials – must be clothed in legal form in order to be recognizable as an act of the state.

Following Max Weber, Kelsen also argues that the authority of the state and the law is a rational legal authority.[97] By this account, state action derives its legitimacy from the fact that it is legal, not from the substantive justice of the decision nor from the wisdom of the decision-maker.[98] Hence, for Kelsen, it is not only a fact that state and the

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95 Hans Kelsen. See also Eugenio Bulygin, 'Kelsen on the Completeness and Consistency of Law' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), Kelsen Revisited (Hart Publishing 2013)

96 Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Oxford : Oxford University Press 1999) Ch 2

97 Max Weber, Economy and Society (University of California Press 2013) Ch 3 I. 2.

98 Lars Vinx, 'Kelsen and the Identity of Law and State' (Conference Paper Presented at Authoritarian Law Symposium, Kings College London, 4 October 2016)

legal order have to be identical – it is a comforting fact. The rational, liberal theory of legality, which informs the western account of the rule of law, demands that legitimate state action should be lawful action. We will return to this theory in the next chapter.

First, we ought to recall Sartori's objection to the unwritten constitution as set out in Chapter One. The 'final touch of perfection to the concept of unchecked, uncontrolled and absolute exercise of power' was the 'specification of non-legal rules' as constitutional rules.[99] That view of the constitution as a guarantee overlaps with Kelsen's view, by which legal rules provide a coherent, sufficient, and legitimate account of state action.

But Kelsen's view is complex. His account does not question the trivial truth that courts deal with non-legal rules. The 'law' to which Kelsen refers is an idealised picture of law, a picture of positive law worked pure by legal science.[100] The 'legal norm' in this picture is not an actual, legal text, like the Offences Against the Person Act 1861. It is an idealised command, from the legal system to an official, a notional command to administer

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99 Sartori G, 'Constitutionalism: A Preliminary Discussion' (1962) 56 The American Political Science Review 853, 854

100 This is especially clear in Hart's account of holism in the work of Ronald Dworkin and Roscoe Pound in H. L. A. Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream.' (1977) 11 Georgia Law Review 969

a sanction. If Kelsen's account of the closed legal system is coherent, then its coherence is bought at the price of every-increasing artificiality.

Kelsen is not committed to the position that *all* norms directed to officials are legal norms. Legal norms are those norms which are validated by a single basic norm. However, government planning rules are directed at officials and they affect the way officials apply sanctions, however indirectly. If these are legal norms then the basic norm potentially validates a very broad range of state rules indeed, from the ministerial code to the janitorial roster at Oxford City Council.

If they are not legal rules, then at least some rules that affect the exercise of state power are not legal rules, and we need to question the identity of the law and the state. Indeed, if some 'state' rules are not legal rules, then we would need to distinguish between a narrow, legal sense of 'state', and an enlarged 'state' that includes non-legal rules. This, in turn, invites us to question Kelsen's argument about the authority of the *Rechtstaat*. If the state acts through a mixture of legal and non-legal rules, then can it claim rational liberal legitimacy on behalf of the non-legal rules?

For reasons that we will presently explore, we may incline to the view that not all constitutional rules are legal rules. One problem with the claim that a single norm validates municipal and international law (never mind the janitorial roster of Oxford

Council) is that different systems of rules often conflict.[101] The legal order is situated among wider political values and rules that may *challenge* its own values and rules. We need not expect those rules to be coherent, and where they clash, we might expect the legal system to engage with the clash.

For this reason, Niklas Luhmann suggests that we would be better to 'abandon the old dichotomy of closed and open systems'.[102] In other words, we might think of openness is something that a legal system can possess to a greater or lesser extent. Openness describes the degree to which the legal order transposes, and thereby distorts, rules from outside. If the legal order gives effect to a simple contract, the legal understanding of that contract will not perfectly reflect the bargain that the parties would have achieved without legal sanction. For example, contract law can correct abusive bargains through the doctrine of undue influence.

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101 See Smith E. and Bjorge E., 'The United Kingdom', in Palombini (ed) Duelling for Supremacy Duelling for Supremacy: International Law vs. National Fundamental Principles (Cambridge: Cambridge University Press, 2019)

102 Luhmann, A Sociological Theory of Law, 282, as quoted in Dimitris Michailakis, 'Law as an Autopoietic System' (1995) 38 Acta Sociologica 323, 328. Luhmann illustrates a distinctive thesis which we cannot explore here. See generally Niklas Luhmann, The Differentiation of Society (New York: Columbia University Press 1982); Habermas, The Theory of Communicative Action Volume 2 at 354; Ewald, F (1988) The Law of Law in Gunther Teubner (ed), Autopoietic Law: A New Approach to Law and Society (Berlin: W. de Gruyter 1988).

We can now see how concepts such as the *Rechtstaat* and the constitution-as-a-guarantee are connected to the idea that law is a closed system, to the idea that law and the state are one and the same, and the idea of rational, liberal legitimacy. Those ideas explain the interaction of legal and non-legal rules only with some difficulty. We will explore these limitations in more detail in chapters to come. The next section sets out of the basis for an alternative account, based on a fuller account of the interaction of legal and non-legal rules.

Bringing Rules In

We have already considered some simple examples of the interaction between legal and non-legal rules, including promises, bargains. We have also considered cases such as *Carltona* where non-legal rules change the meaning of legal rules. If we wish to assess the way courts approach unenforceable constitutional rules, enforceable government rules, the rules of political parties, and political rules like conventions, we need to say something about the way courts approach non-legal rules. This section will explain how legal rules bring non-legal rules in.

Courts can be obliged to *enforce* some non-legal rules. Rules like promises and bargains can be *validated* as contracts. Courts can also be also obliged to *consider* non-legal rules, such as rules of soft law. Courts may also be required to address rules in certain ways, as facts, for example. However, *not all rules are legal rules*. People do not depend on the legal order to make rules. They contract, but they also promise and they sometimes just agree. For example, in *Balfour v. Balfour,* a man promised to pay maintenance to his estranged wife. She sued him in contract. Atkin LJ saw this as an essentially domestic agreement, which could not give rise to legal duties: 'each house is a

domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted'.[103]

In general, *non-legal rules are subject to law*. This follows from the sort of jurisdictional authority claim that most legal orders make. This is a general rule, and it is subject to some obvious and important qualifications which we will consider in due course. For example, the English High Court is a court of unlimited jurisdiction.[104] The common law rule was 'that nothing shall be intended to be out of the jurisdiction of [the Court of the King's Bench but that which specially appears to be so…'[105] For this reason, when considering categories of rules outside the jurisdiction of the High Court[106], judges have viewed this as a common law restriction on a jurisdiction defined by the common law.[107]

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103 Balfour v Balfour [1919] 2 KB 571 Court of Appeal, at 579. See also Cox v Green [1966] Ch 216 Chancery Division (Plowman J).

104 R (Cart) v Upper Tribunal [2011] UKSC 28 Supreme Court. Although the jurisdiction of the court is statutory, the statute maintains the jurisdiction that the Royal Courts of Justice were previously able to exercise. See Supreme Court of Judicature (Consolidation) Act 1925 s.18 as modified by Senior Courts Act 1981 s19. Compare the statutory jurisdiction of the Court of Appeal (s26.) See also Diplock LJ in Garthwaite v Garthwaite [1964] P 356 Court of Appeal.

105 Peacock v Bell and Kendall [1667] 1 Wms Saund 73 Kings Bench at 74.

106 We will consider these categories in due course.

107 Council of Civil Service Unions v. Minister for the Civil Service [1984] 1 AC 374 House of Lords per Lord Scarman at 406, Lord Diplock at 409.

Rules of recognition bring rules into the legal order. Among other functions, rules of recognition establish the test for valid law – they establish which rules are members of a given legal system.[108] Secondary rules can impose duties to give effect to rules that are not members of the legal system. For example, J.L. Brierly authoritatively described international law as 'not a part, but one of the sources of English law'.[109] The majority of the Supreme Court in *Miller* describe EU law as an 'independent and overriding source of domestic law'.[110]

Rules from outside can be a source of law in at least three different senses. They can be a source of the content of law; they can be the source of its validity; and they can be a source of its legitimacy. The content of directly effective EU law, for example, is derived from EU law-making institutions, because the text of that law is fixed by those institutions. However, from the point of view of the majority in *Miller,* the reason why

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108 For other ways to think about the rule of recognition, see e.g. John Finnis, Collected Essays: Philosophy of Law, vol IV (Oxford : Oxford University Press 2011) IV.21 419, (the rule of recognition as a power conferring rule) and e.g. Jules L. Coleman, 'Negative and Positive Positivism' (1982) 11 The Journal of Legal Studies 139 ('epistemic' and 'semantic' conceptions of the rule of recognition).

109 J.L. Brierly, 'International Law in England' (1935) 51 LQR 24 at 31, The statement is endorsed by Lord Bingham in R v. Jones (Margaret) [2006] UKHL 16 House of Lords. See also Anthony Lester QC's argument to this effect in R. (Brind) v Secretary of State for the Home Department [1991] 1 AC 696 House of Lords.

110 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union [2017] UKSC 5 Supreme Court at [65].

those are valid rules of UK law – their validity – is derived from UK legal rules, especially the European Communities Act 1972. Different observers may make different claims regarding the source of the legitimate authority of the law, and domestic, foreign and international courts will not agree.

Rules of recognition identify sources of law, but they also validate *individual* rules. For example, the 1966 Practice Direction of the House of Lords, which enabled the House to depart from its own precedents, is part of the UK rules of recognition. Other examples of individual rules which are validated by secondary rules of the legal order include the formerly valid rules of a State in transition to a new constitution.[111] We might also think of the validation and enforcement of individual contractual rules in this way – as rules which are validated '*eo nomine*'[112] by the rule of recognition.

We sometimes talk about secondary rules as if this is all that they do – as the legal order simply established whether a rule was valid and then enforce it. However, separate rules impose duties *to consider* other rules and duties to *address* rules in particular ways.[113]

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111 John Finnis, Collected Essays: Philosophy of Law.

112 H. L. A. Hart, 'Book Review, Lon L Fuller, The Morality of Law ' (1965) 78 Harvard Law Review 1281 at 1295.

113 See CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 Court of Appeal (NZ).

Secondary rules identify rules which courts *must* consider in the course of their judgment. Recommendations are one such type of 'soft law'.[114] For example, in *Grimaldi v Fonds des Maladies Professionnelles,* Salvatore Grimaldi sought compensation for an occupational illness. His insurer had rejected his claim because his disease did not appear on the contemporary schedule of Belgian occupational diseases, nor in its European equivalent. M. Grimaldi applied to the ECJ for relief. The court noted that the EU Recommendations that referred to the code were not legally binding. It went on to say:

> [I]t must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take Recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.[115]

Secondary rules do not just tell courts *whether* to consider rules from outside; they also tell them *how* to approach these rules. For example, there is a secondary rule

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114 Ibid at para 18. See also Altair Chimica SpA and ENEL Distribuzione SpA Case C-207/01 EC Reports 200, Lodato Gennaro & C. SpA v Istituto Nazionale della Previdenza Sociale Case C-415/07, EC Reports 2007.

114 C. M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850 Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 MLR 853.

115 Grimaldi v Fonds des Maladies Professionnelles (C322/88) [1989] ECR 4407; [1991] 2 CMLR 265; [1990] IRLR 400 European Court of Justice (Second Chamber) at para 14.

of English law that tells English judges to address foreign laws as facts.[116] Foreign laws must be proven[117] and they are subject to the same principles of pleading as other facts[118]. This means foreign law is proven through the testimony of expert witnesses[119] and that conclusions of inferior courts as to questions of foreign law can only be displaced by superior courts according to the standard grounds of factual error.[120] Generally speaking,[121] these conclusions of fact do not bind courts in subsequent decisions, and are only reviewable if they are unreasonable.[122] For example, there is a rule of English law that

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116 Richard Fentiman, Foreign Law in English Courts : Pleading, Proof and Choice of Law (Oxford : Oxford University Press 1998), J. H. C. Morris and Lawrence Collins (eds), Dicey, Morris and Collins on the Conflict of Laws (14th edn, Sweet & Maxwell 2006).

117 Fremoult v Dedire (1718) 1 Peere Williams 429, 24 ER 458 Court of Chancery; Ganer v Lady Lanesborough (1790) Peake 25, 170 ER 66 King's Bench; Earl Nelson v Lord Bridport (1846) 8 Beavan 547, 50 ER 215 Court of Chancery.

118 The King of Spain v Machado (1827) 4 Russell 225, 38 ER 790 Court of Chancery.

119 Baron de Bode's Case (1845) 8 Queen's Bench Reports 208, 115 ER 854 confirmed in The Sussex Peerage (1844) XI Clark & Finnelly 85, 8 ER 1034 House of Lords.

120 English courts occasionally take judicial notice of foreign legal rules. The House of Lords could (and the Supreme Court arguably can) take notice of Scottish or Northern Irish matters when deciding an English Appeal. The key is that the court itself exercises an expert knowledge of that legal system. See also A/S Tallinna Laevauhisus v Estonian State Steamship Line (1947) 80 Ll L Rep 99 Court of Appeal at 108.

121 Section 4(2) of the Civil Evidence Act 1972, which provides that findings made or decisions given by courts on questions of foreign law are admissible as evidence. These are not precedents - the finding can be displaced by evidence to the contrary.

122 See Watt or Thomas v Thomas [1947] AC 484 House of Lords Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 House of Lords Benmax v Austin Motor Co. Ltd. [1955] AC 370 House of Lords.

courts are not allowed to reason using a foreign rule of recognition[123]. English courts may not question the validity of foreign rules.[124] Parties cannot argue that a foreign law, valid on its face, is not a valid law of that State.

The fact that secondary rules of English law tell English judges which rules are rules of foreign law, and what, if anything, to do with them, does not mean foreign laws are valid English laws. If the entire corpus of English rules of conduct were transplanted to China and applied using Chinese rules of interpretation, we would not expect that system to look exactly like English law. Systems of rules with different rules of adjudication, change and recognition will diverge, even if the primary rules within those systems are identical to begin with. For example, there is an old rule, attributed to Lord Talbot in *Barbuit's Cas*e that says international law is 'to its fullest extent' part of the common law.[125]

But note Baroness Hale's distinction between interpretive and evaluative facts in R. (A) v Croydon London Borough Council [2009] UKSC 8, [2009] 1 WLR 2557 Supreme Court.

123 J. H. C. Morris and Lawrence Collins Rule 3 and authorities cited thereunder. See e.g. Buck v Attorney-General [1965] Ch 745 Court of Appeal. There are, of course, examples which do not hold to this rule. See e.g. Sir Robert Phillimore in The Charkieh (Application for Prohibition) (1872-73) LR 8 QB 197 Queen's Bench Division.

124 Princess Paley Olga v Weisz [1929] 1 KB 718 Court of Appeal, Buttes Gas and Oil Co. v. Hammer [1982] AC 888 House of Lords.

125 Buvot v. Barbuit 25 ER 777; (1736) Cas t Talb 281 Court of Chancery at 283. See also Triquet v Bath 97 ER 936; (1764) 3 Burr 1478 Court of King's Bench and Heathfield v Chilton 98 ER 50; (1767) 4 Burr 2015 Court of King's Bench.

However, English law and international law do not share rules of adjudication, change and recognition. International law has its own doctrine of sources and construction. The English doctrine of precedent used to oblige inferior English courts to apply the version of international law laid down by superior courts.[126] While international law evolved, precedents stayed the same, and so inferior English courts were bound to follow the decisions of superior English courts *as to what those rules used to be*. International rules were 'engrafted into our domestic law' but they were petrified in the process.[127] This process of uprooting and transplantation turns these rules into rules of English law, or at least, hybrid rules that do not truly belong to either system.[128]

Secondary rules therefore limit the interaction between legal rules and non-legal rules. We might think of these rules as scar tissue that grows around a foreign body. English rules, like the doctrine of precedent and the doctrine of judicial notice act as antibodies, circumscribing the growth of that body of law. This is an unconscious process,

126 The Porto Alexandre [1920] P 30 Court of Appeal The Philippine Admiral [1977] AC 373 Privy Council.
127 Compania Naviera Vascongado v Steamship "Cristina" [1938] AC 485 House of Lords at 490.
128 Zweigert refers to a 1970s study of 40 conflicts cases, in which 32 were found to have misapplied the foreign law. Konrad Zweigert, 'Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in the Conflict of Laws' (1973) 44 University of Colorado Law Review.

and indeed, a process that took the English legal system two hundred and fifty years to describe adequately.[129]

This section started with the obvious observation that not all rules are legal rules. But in a legal order that claims supremacy all rules are subject to law, subject to rules that we will consider in the next section. Rules of recognition identify and validate both individual rules and source of rules as laws. However, this is not the only sort of rule that brings other rules in – duties to consider rules, and duties to treat rules in law-like ways are also important.

These elementary conclusions connect to the arguments to come. The idea illustrated here is an orthodox, positivist understanding of legal validity and it enables us to distinguish rules that are considered to be part of the legal system from rules that are not, regardless of whether those rules are enforced. We will return to this idea in the second half of this chapter. Moreover, courts can approach non-legal rules in different ways, regardless of whether they are valid. The choice is not merely to enforce or not to

129 Smith E. and Bjorge E., 'The United Kingdom' in Palombini (ed) Duelling for Supremacy Duelling for Supremacy: International Law vs. National Fundamental Principles (Cambridge: Cambridge University Press, 2019)

enforce. Courts take judicial notice of rules of international law, whereas rules of foreign law are pleaded in evidence. This is especially true if the court is interpreting a non-legal constitutional rule, such a constitutional convention, a government rule or the internal rule of a political party. These rules are not legal rules, but nevertheless treated like laws. We will consider them in more detail in Chapters Three, Four and Five.

Keeping Rules Out

If the Chinese constitution is not enforceable, then in what sense is it a constitution? Can it be valid law? How can a legal order fail to enforce a valid legal rule, still less refuse to enforce it? In the previous section, we looked at rules that *include* rules from outside. In this section, we look at rules that *exclude* rules, both from outside and inside the legal system. Just as there are rules of recognition, there are rules of non-recognition.[130] If law is an open system, then it does not have open borders

This section considers rules that forbid the application, and indeed the consideration, of other rules, both legal and non-legal.[131] The Limitation Act 1980 prevents breaches of certain legal rules being enforced after a certain period of time. The Diplomatic Privileges Act 1964 prevents certain rules being enforced against certain persons. But the category is much wider than this. For example, a judge could decide that the question discloses no manageable standard for adjudication or touches upon a

130 There are important differences between these rules. For example, the ultimate rules of recognition are social rules, while rules of non-recognition are legal rules.

131 For a discussion of exclusionary rules and the open system see José Juan Moreso and Pablo E. Navarro, 'The Reception of Norms, and Open Legal Systems' in Stanley L. Paulson (ed), Normativity and Norms (Clarendon 1998) 286.

constitutionally forbidden area. She could decide that the question involves questions of policy or of politics or of comity, and as such is inapt for judicial consideration. She could decide that an informal agreement did not amount to a contract, or that a trust was void for reasons of public policy, or that it would not be fair to create a new category of liability in tort. The common thread is that the rule in question is rendered untouchable by another legal rule.

English courts have a general power to consider rules. Courts may consider any rules relevant to the dispute before them, both legal and non-legal.[132] Sometimes, as in *Grimaldi*, a court may have a duty to consider a non-legal rule. Conversely, sometimes a court has a duty *not to consider* a non-legal rule. Secondary rules may preclude courts from enforcing, or even from considering other rules. In the chapters to come, it will be important to distinguish between three separate ways in which rules can be excluded. A rule can be non-legal if there is no rule of law that recognises it. It can be illegal if there is a rule of law that prohibits a court from enforcing it. But if there is another rule that forbids a court from even considering the rule, then it exists in a separate realm to law altogether. We can exemplify each of these situations over the next few paragraphs.

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132 There are limits to this rule. For example, courts may not consider foreign public laws. See J. H. C. Morris and Lawrence Collins, Rule 3.

First, many rules are not recognised by rules of law. Many states of affairs, like the bargain in *Balfour v. Balfour*, do not give rise to legal rights and duties. We cannot sue on the basis of a domestic bargain, or for damage that is not proximate. In *Cox v. Green*, the plaintiff sought a declaration that the regulations of the British Medical Association did not forbid him to set up a practice in an area where he had worked as a locum. The High Court held the rules to be non-justiciable.[133] In *Buttes Gas v. Hammer* the House of Lords heard an interlocutory appeal to determine whether the international aspects of a libel case were justiciable. Lord Wilberforce, for the House, concluded that when judges examine the sovereign actions of States, actions that are not regulated by municipal law, they lack manageable standards of adjudication.[134]

Courts sometimes describe disputes like these as non-justiciable because they were not framed as matters that engage legal rules.[135] Indeed, we might argue that the prime example of a non-justiciable matter is a case that *cannot* be framed in terms of rules, a case where rules are absent. For example, a court will not substitute its view on the

133 Cox v Green, Thomas v University of Bradford [1987] AC 795 House of Lords.

134 Baker v. Carr 82 SCt 691 Supreme Court of the United States.

135 See e.g. Lord Reid in Chandler v Director of Public Prosecutions [1964] AC 763 Court of Criminal Appeal.

quality of a doctorate for the view of the examiners, because, as Sedley LJ notes, the substitution of its judgment on academic matters would be 'jejune and inappropriate'.[136]

However, these cases are not matters of arbitrary judgment. They involve complex interactions of legal and non-legal rules. Most obviously the dispute in *Cox v. Green* was a dispute about the meaning *of a non-legal rule*. In *Belhaj v. Straw*, the Supreme Court recently poured cold water on the idea that a case like *Buttes*, which was an argument about a rule of international law, could lack manageable standards of adjudication. As Lord Sumption said, courts are 'perfectly competent to construe treaties, and regularly do so when municipal law rights depend on it'.[137] The assessment of a doctorate involves the application of judgment, but it is shaped by non-legal rules, such as marking schemes, and the relevant articles of the academic regulations of the university. The nub of the issue is *whether to apply rules*, not *whether there are rules to apply*. Where no secondary rule tells officials to apply rules, as in these cases, they are non-legal.

There are many bodies of rules and institutions that are *illegal*. Obvious categories include rules that breach fundamental rules of public policy. In *Oppenheimer v. Cattermole,*

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136 Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 Court of Appeal (Sedley LJ) at [12].

137 Belhaj v Straw [2017] UKSC 3 at [244]

the Income Tax Commissioners objected to Oppenheimer's application for tax relief on the grounds that, as a Jewish person, he had been deprived of his German nationality by a Nazi decree. Lord Cross said the decree 'constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'.[138] Similarly, In *Regazzoni v K. C. Sethia*[139]*,* the House of Lords refused to enforce a contract between parties who probably sought to evade an Indian embargo on trade with South Africa, on grounds of comity and public policy.

Sometimes secondary rules forbid courts to even *consider* certain rules. In *Blad v. Bamfield*, Blad argued that he had the sole right to trade in Iceland, further to Danish letters patent. Bamfield argued that Articles of Peace between Britain and Denmark also gave British subjects that right. The Court of Chancery held that it was 'monstrous and absurd'[140] that a municipal court should determine the international obligations of states. In *Winfat v. AGHK,* Lord Diplock describes the first Peking Convention, a treaty, as being incapable of giving rise to 'rights enforceable in the municipal courts' because 'there is clear long-standing authority by decision of this Board that no municipal court has

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138 Oppenheimer v Cattermole [1976] AC 249 House of Lords (Lord Cross) at 278. See also Dalmia Dairy Industries v National Bank of Pakistan [1978] 2 Lloyd's Rep 223 Court of Appeal (Civil Division) at 300.

139 Regazzoni v K. C. Sethia [1958] AC 301 House of Lords.

140 Blad's Case 3 Swanston 603; 36 E.R. 991 (Chancery) at 607.

authority to enforce such an obligation'.[141] In other words, there are common law rules that say the court may not enforce treaty obligations, that they are outside the jurisdiction of the court. Rules like these – rules that it would be monstrous and absurd for a court even to consider, bear a numinous authority. Legal rules place them outside of the legal order. They are not unconstitutional so much as extra-constitutional.

Both in Britain and China, the constitution allocates rulemaking powers to democratically accountable institutions. For example, the power to make statutes in Britain is allocated to Parliament and the power to make basic laws in China is allocated to the NPC. In both jurisdictions, the courts do not have the power to question the legality of these rules.[142]

There are, however, other rules that the courts will not consider, or will only consider with great hesitation. The British courts accord great deference to the rules and principles that govern the disposition of the consolidated fund.

> The formulation and the implementation of national economic policy are matters depending essentially on political judgment. The decisions which shape them are for politicians to take and it is in the political forum of the

141 Winfat Enterprise v Attorney-General of Hong Kong [1985] AC 733 Privy Council at 746.

142 British Railways Board v Pickin [1974] AC 765 House of Lords.

> House of Commons that they are properly to be debated and approved or disapproved on their merits.[143]

As Lord Scarman put the point in *Nottingham CC v. Secretary of State*: 'the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and, within Parliament, especially for the House of Commons'.[144] Some policy matters, are assessed to be matters of sovereign power or of high policy and are accordingly not justiciable.[145] This is especially clear in the field of foreign affairs and national security. Lord Hoffmann argued in *Rehman* that decisions about security 'require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process'.[146]

One obvious objection is that these are cases of government discretion, rather than rulemaking. As we will see in Chapter Three, questions of policy are better understood through internal administrative rules. There, we will compare China – where

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143 R (Hammersmith and Fulham LBC) v. Secretary of State for the Environment [1991] 1 AC 521 House of Lords at 637 (Lord Bridge).

144 Nottinghamshire County Council v Secretary of State for the Environment [1986] AC 240 House of Lords at 250

145 Attorney-General v Nissan [1970] AC 179 House of Lords (Lord Reid); See also e.g. GCHQ at 410-411 (Lord Diplock).

146 Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153 at [62]

broadly speaking, the courts do not have the power to question any state rulemaking – and Britain, where the courts willingness to do so is closely related to the way the courts conceive of the political. As Jeff King argues, this reflects arbitrary judgments about what policy and the political mean.[147] Questions of taxation policy are justiciable, but questions of social security policy are not, so paying-in is political but paying-out is not.

The idea of that policy, or 'high policy' or 'public policy' was a function confined to the political departments of government would be an alien idea before the twentieth century. In *Egerton v. Brownlow*, Lord Truro said:

> [Public policy] has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do.[148]

In *Chandler v. DPP*, the House of Lords split on the question of whether, for the purposes of the Official Secrets Act 1911, the 'interests of the State' were coextensive with the 'interests of the Crown' and whether the government was uniquely competent

147 Jeff A. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409; Jeff A. King, 'The Pervasiveness of Polycentricity' (2008) PL 101.

148 Egerton v Brownlow (1853) IV House of Lords Cases (Clark's) 1, 10 ER 359. For context see Percy H. Winfield, 'Public Policy in the English Common Law' (1928) 42 Harvard Law Review 76.

to establish what that is.[149] In cases like these, it would appear that English courts recognise the difference between the national interest, and a conception of the national interest put forward by the political part of the executive. [150]

In 2014, the Supreme Court revisited the UK's political question doctrine in *Shergill v. Khaira*.[151] The Supreme Court considered two categories of cases in which the courts would refuse to interfere. One category includes cases in which the parties do not intend to create legal relations and so no rule of English law is engaged. Political parties cannot benefit from this exception and probably should not benefit from it in any event. The other category includes cases in which 'the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers'. In Chapter Four we will return to this question, looking at how rulemaking power is allocated as between the political and apolitical parts of the state.

Chapter One began with an idea of the legal constitution. It argued that in a state like the United Kingdom, we need a *material* view of the constitution. It left open the question of what goes into the constitution. These last two sections have developed an

149 Chandler v Director of Public Prosecutions.

150 Compare Justice Brennan in Baker v. Carr, as quoted by Lord Wilberforce in Buttes Gas.

151 Shergill v Khaira [2014] UKSC 33 Supreme Court.

account of what goes into the legal constitution from a legal point of view. The way some rules are highlighted, validated and enforced, while other rules are labelled off-limits, shapes our conception of the legal order, and how it fits into the State. These sections also lay groundwork for some of the arguments to come. For example, rules that *must not* be considered in the course of legal proceedings – non-justiciable rules, 'high policy', 'acts of State,' the 'political question doctrine' and similar concepts help determine what counts as political in a constitutional order and we will return to these ideas in Chapter Four and Chapter Six. There we will find that some rules are simply off limits to the courts.

Together, these ideas also help to explain how there can be binding legal rules that cannot be enforced in court. We turn to this idea in the next section.

Validity, Enforceability and Obligation

The previous two sections show that it is misleading to claim that legal rules are always enforceable and that unenforceable rules are therefore not legal rules. If a rule of recognition identifies a rule as a valid legal rule, then the fact that another secondary rule forbids the enforcement of that rule does make it an invalid rule. This section clarifies this distinction between validity, enforceability and obligation. The distinction helps us to understand the unenforceable legal rules which we consider in the next section.

The first section introduced Kelsen's theory that all state rules are legal rules and those rules are validated by a single norm. In the last section we concluded that rules do not acquire pseudo-legal force because they are addressed in legal proceedings. As Nick Barber notes:

> A paragraph of hand-written rules taped to a municipal lawn-mower, a list of instructions on the back of a packet of soup, guidance on the correct way to tie up a parcel, all of these might be recognized and approved of by a court. None of these would normally be thought of as laws.[152]

Trevor Allan argues that constitutional conventions are laws because they are enforced. He argues when courts develop the law in light of constitutional conventions 'the

152 N. W. Barber, The Constitutional State (Oxford University Press 2010) at 92.

distinction between recognition and enforcement—that last refuge of orthodox theory—plainly dissolves.[153]

Raz dismisses approaches which find 'the distinguishing mark in the manner or technique of adoption' of a rule as a 'dead end'. He notes that rules 'recognised by the legal order on an ad-hoc basis' – rules like the notes taped to the lawnmower - 'are not normally regarded as part of the legal system which gives them its sanction'. Instead, they are 'recognized and made binding in such systems by norms which require the courts to act on … these norms'.[154] Raz is distinguishing 'norms which its norm-applying institutions are bound to apply' and 'norms which are merely 'adopted''. The first sort of norms 'are recognized because they are part of the law'. The second are recognised because of what Raz describes as 'the law's function to support other social arrangements and groups'.[155]

Raz argues that that norms identified by a rule of recognition are valid, except those that 'belong to another normative system' or those 'made by or with the consent of their norm-subjects by the use of powers conferred by the system'. He would appear

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153 T. R. S. Allan, Law, Liberty, and Justice (Clarendon 1993) at 244, See also T. R. S. Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) Cambridge Law Journal 305.

154 Joseph Raz, The Authority of Law : Essays on Law and Morality (Clarendon Press 2001) at 119

155 Ibid.

to refer, implicitly, to two obvious categories of 'adopted' rules: contracts and foreign legal rules. But as we will see in chapters to come the range of enforceable non-legal rules go beyond these simple examples of adoption. Planning rules, immigration rules, government 'normative documents', the internal rule of political parties, constitutional conventions, even the broad principles of State ideological doctrine can all take effect in court. Nick Barber says, 'law lies at the formalised, institutionalised, end of a spectrum of systematic social rules, with no sharp divide existing between it and other, similar, systems of rules'.[156]

One way to read Raz is as saying that there is no clear single way of determining what is inside and outside the system. Instead, Raz says, 'we must rely on the reasons for recognising [the rules] as binding'.[157] With this in mind, we might not wish to build our model of legal validity around what would 'normally be thought of as laws'. There are many different ways to describe rules as laws. Rules can be laws in the sense of rules assessed to be legally valid by officials but also in the sense of coercive rules sanctioned by state authority.[158] The claim may reflect teleological views about law – perhaps laws

156 N. W. Barber at 103.

157 Raz, The Authority of Law, 120

158 See Andrey Yanuaryevich Vyshinsky, The Law of the Soviet State (Macmillan 1948).

are rules that perform a law-like function[159] or rules compliant with the basic desiderata of legality.[160] In the next chapter, we will consider broader ideas of what counts as law, in the socialist tradition. For now, we are concerned with validity.

Rules do not have to be enforceable to be binding. Scholars of international law, which is intermittently enforced, argue that rules can be binding without being enforced. Rules still bind regardless of the lack of any centralised enforcement mechanism. For example, Louis Henkin argues that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[161] If States accept international law as binding, then it is binding, even if there is no viable way for disputes to be settled in court.

However, it would be unwise to look for a single set of reasons why a rule should be considered to be binding. The common law rule prohibiting murder is binding, but it overlaps substantially with a strong social rule against killing, with religious rules against

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159 Karl N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 The Yale Law Journal 1355; Karl N. Llewellyn, The Cheyenne Way : Conflict and Case Law in Primitive Jurisprudence (University of Oklahoma Press 1941).

160 John Finnis, Natural Law and Natural Rights, Lon L. Fuller, The Morality of Law (Yale University Press 1969).

161 Louis Henkin, How Nations Behave: Law and Foreign Policy, (2d ed. 1979), 47.

killing, with wider moral rules against killing and so on. For Hart, social rules can be morally binding, for example, if they impose feelings of guilt and shame[162] and legally binding if 'physical sanctions are prominent'[163] but there is no singular statement of reasons for recognising a rule as binding.[164] As Nick Barber says, 'the softness of the line between informal social rules and a legal system has long been recognised by legal academics with a sociological turn of mind'.[165] We will explore the implications of this view in Chapter Five.

For now, we ought to recall Kelsen's arguments that rules validated by a single basic norm form part of the same system, and that the state is the territorial legal order personified. What about state rules like constitutional conventions? Are these legal rules? What about orders made by civil servants to other civil servants to apologise on behalf of the state. These are constitutional rules and they are binding. If we choose to describe these as non-state rules, then we distort the picture of the state. If we describe them as legal rules, we distort our picture of law and of convention. Moreover, if rules like these

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162 H. L. A. Hart, The Concept of Law (2nd edn, Clarendon Press 1994), p86

163 Ibid.

164 See John Griffiths, 'The Social Working of Legal Rules' (2003) 35 The Journal of Legal Pluralism and Unofficial Law 1, Tony Honoré, Making Law Bind (Clarendon Press 1987).

165 N. W. Barber, 'Laws and Constitutional Conventions' (2009) 125 LQR 294, 307.

are by nature legally valid, then why would we need to validate them deliberately, for example, by memorializing them in a statute or an unenforeable constitution? What difference would that make? In the next section, we turn to rules like these, working with the concepts set out above. Why do unenforceable, legal constitutional rules bind?

China

This section begins with the paradox of China's unenforceable constitution. It seeks to demystify this phenomenon, by comparing it with directive principles in other constitutional orders. Finally, it turns to the question of whether this sort of constitution is a façade, a sham, or an aspiration. Recent, high profile changes to the Chinese constitution suggest that China's political leadership take it seriously.

The Chinese constitution might have been justiciable, once. The Supreme People's Court cited a constitutional provision as the grounds for its decision in the *Qi Yuling*[166] case. Qi Yuling was a victim of identity theft by Chen Xiaoqi. Chen did badly in her school-leaving examination and would not have been admitted to further education. With the assistance of her father and the complicity of school officials, Chen impersonated Qi Yuling and completed a three-year degree at a vocational school. On graduating, she took a job at a bank.

166 Qi Yuling v. Chen Xiaoqi. Decision of Supreme People's Court, July 24, 2001.

Qi Yuling sought redress, not just for theft of her identity but for the theft of her education. The case was referred to the Supreme People's Court, whose response cited the Constitution as authority for the right to reputation and education. The decision was followed by SPC Vice President Huang Songyou's article 'Constitutional Justiciability and its Significance' in which Huang stated, 'I believe that the Constitution can be gradually introduced into legal proceedings in China'[167] and compared the case to *Marbury v Madison.*[168]

The case was decided during a period of experimentation with liberal legal reform, following the 16th Party Congress.[169] The 17th Party Congress saw a significant change in policy toward the political-legal system. The moderate legal scholar Xiao Yang was replaced by the more hardline Wang Shengjun as President of the Supreme People's Court. Wang presided over a new doctrine in which law was formally subordinated to

167 Huang Songyou, 宪法司法化及其意义[Constitutional Justiciability and its Significance] People's Court Daily (人民法院报) Aug. 13, 2001.

168 Marbury v Madison 5 US 137 (1803) (Supreme Court of the US)

169 This period of experimentation is described in Ewan Smith, 'The Rule of Law Doctrine of the Politburo' (2018) 79 The China Journal 40

public opinion and the interests of the Party.[170] A year later, Huang Songyou was purged and in December 2008, a summary notice in the People's Court Daily declared that the *Qi Yuling* case had 'already ceased to be used' (已停止使用).[171] The current Supreme People's Court Regulation[172] on sources of law, which was handed down the year after *Qi Yuling* ceased to be used, did not list the Constitution as a source that can ground the decision of the court. Zhang Qianfan describes *Qi Yuling* as a 'desolate milestone'.[173]

It is therefore accurate to say that the Constitution is not a source of law, in the narrow sense of rules enforced by courts. However, we should not dismiss it so readily. The Constitution is valid in the sense set out above, and it is cognisable in Chinese courts. In particular, Chinese courts make reference to the Constitution in their reasoning. Li Ruiyi identifies Supreme People's Court Directives which refer to the Constitution

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170 See Wang Shengjun, 'Fully Implement the Work of the 17th Party Congress, Resolutely Carry Out the Work of the People's Courts' (深入贯彻落实党的十七大精，扎实做好人民法院各项工作 (2008) Qiushi (求是) 16.

171 See SPC Decision on Abolishing Certain Judicial Interpretations Promulgated before the End of 2007 关于废止 2007 年底以前发布的有关司法解释的决定（Supreme People's Court, December 2008）

172 SPC Regulations on the Citation of Laws, Regulations and other Normative Documents in Court Decisions (最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定) of 26 October 2009

173 Zhang Qianfan, 'A Constitution without Constitutionalism?' (2010) 8 International Journal of Constitutional Law 950, at 960.

directly, dating back to 1988[174] and gives numerous examples of local courts referring to the Constitution, so as to suggest that this is a regular practice.[175]

Liberal constitutional scholars also present the constitution as a beacon for the values embodied in its text.[176] They argue, that, even though it is not enforced, the Constitution buttresses political norms, and catalyses political change. They point to examples such as the abolition of internment and repatriation, the restriction of the exercise of the death penalty[177], improved fair trial protections in the Criminal Procedure Law Amendment of 2012 and the abolition of Re-education through Labour, one sort of extra-judicial detention in 2013. Even if the Constitution is not 'law', it still performs a function.

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174 SPC Decision on the Quashing of Certain Corporate Law Interpretations and other Judicial Interpretation Documents issued between January 1, 1980 and June 30, 1997 (No.9) 最高人民法院关于废止 1980 年 1 月 1 日至 1997 年 6 月 30 日期间发布的部分公司法解释和司法解释性质文件（第九批）的决定 Supreme People's Court.

175 Li Ruiyi, 'A Positive Analysis of Constitutional Rights Protection in China' (Conference Paper, Constitutional Traditions in China and the West, Oxford, 29th-30th September 2016)

176 Zhang Qianfan, The Constitution of China : a Contextual Analysis (Hart Publishing 2012) and Eva Pils, Human Rights in China (Polity Press 2017) are representative of this tradition.

177 Amendment to the Criminal Law (VIII) in 2011.

Cass Sunstein describes the 'expressive function of law': the way in which law makes statements about social norms, as opposed to the way in which it directly controls behaviour.[178] As Sunstein notes, people who advocate anti-flag burning statutes might be less concerned about the effect of the law on the incidence of flag burning than with the clear message that it sends. Significantly, the law can do this even if it is not enforced. Indeed, the central insight of HLA Hart's *The Concept of Law* is that law is grounded in non-legal forms of social control, and that even intermittently enforced laws affect social norms.[179] In this way, legal rules are necessarily liminal rules – they have a life both inside and outside the legal order. This is significant for constitutional laws, whose constitutional functions are not limited to whether they are regularly enforced in court. If law is grounded in social rules then constitutional law is grounded in political rules.

Some constitutions create a special role for these sorts of expressive, hortatory laws. Article 45 of the Irish Constitution of 1937 contains 'directive principles of social policy' that 'shall not be cognizable by any court'. Article 37 of the Indian Constitution of 1949 lays down similar directive principles which 'shall not be enforceable by any court'. Article 41 of the Swiss Constitution declares that '[n]o direct subjective right to benefit

178 Cass R. Sunstein, 'On the Expressive Function of Law' (1994) 144 University of Pennsylvania Law Review 2021

179 H. L. A. Hart, The Concept of Law (2nd edn, Clarendon Press 1994)

by the state may be derived from the social goals [set out here]'. Section 53 of the Spanish constitution distinguishes between constitution rights that are 'binding on all public authorities'[180] and which can therefore ground claims before the regular courts, and principles that 'shall guide … actions by public authorities'.[181] All of these are legal duties, whose performance is allocated to a public authority rather than the courts.[182]

The text of Article 45 of the Irish Constitution provides that directive principles shall not be cognizable. In the early years of the Indian Republic, the Supreme Court of India took a similar approach to Article 37 of that country's constitution, refusing even to refer to directive principles as a guide to the interpretation of other provisions of the constitution. Since then, it has adopted a more liberal approach. As Gautam Bhatia observes, the non-enforceability clause

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180 S.53 (1).

181 S.53(3).

182 For a wider survey of directive principles see Stephen Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism' 107 Michigan Law Review 391, 446 et seq; Jeffrey Usman, '"Non-Justiciable Directive Principles: A Constitutional Design Defect."' (2007) 15 Michigan State Journal of International Law 643; Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters in the Indian Constitution' (2017) 16 International Journal of Constitutional Law 389; Gautam Bhatia, 'Directive Principles of State Policy' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), The Oxford Handbook of the Indian Constitution (Oxford University Press 2017). See also Stephanie Balme and Michael W. Dowdle (eds), Building Constitutionalism in China (Palgrave Macmillan 2009) Chapter 1.

> is limited to just that: citizens may not move the Court seeking remedies for either breach of a Directive Principle, or for requiring Parliament to enact a Directive Principle into law. However, the remainder of the article establishes a role for the directive principles as a source of constitutional values'. Article 37, thus, is Janus-faced: it carves out a sphere in which the [directive principles] have no role to play, and at the same time, carves out another sphere in which they do.[183]

Directive principles often impose the duty to give effect to the constitution upon another constitutional body, usually the legislature. This perhaps reflects a vision of constitutional pluralism, by which the judicial branch does not have a monopoly on constitutional interpretation or enforcement.[184] Different branches of State may have different views on what the constitution means, and different roles in implementing those values. Directive principles reflect this plural vision. For example, Art 45 of the Irish constitution makes the Oireachtas – the legislature – responsible for the implementation of its directive principles of social policy. We consider this idea in more detail in Chapter Six.

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183 Gautam Bhatia at 649.

184 Compare e.g. Larry Kramer, The People Themselves : Popular Constitutionalism and Judicial Review (Oxford University Press 2004) Mark V. Tushnet, 'Popular Constitutionalism and Political Organization' (2013) 18 Roger Williams U L Rev 1 and Eric A. Posner and Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (Oxford University Press, 2010).

We might see the Chinese constitution as a non-justiciable, directive constitution, whose implementation is allocated to China's (notionally) supreme legislature. Article 62 allocates the function of supervising the enforcement of the constitution to the National People's Congress. Article 67 confers a coordinate power 'to interpret the Constitution and supervise its enforcement' on the NPC Standing Committee. [185] Neither the NPC nor its Standing Committee has ever interpreted the Constitution, but we might see legislation as a form of progressive constitutional implementation. Yan Lin describes this phenomenon as the 'primary method' for constitutional development in China. [186]

But is it credible to argue that the Chinese Constitution is a body of directive principle that fulfils an expressive function? John Griffiths argues that:

> those who strongly believe in the importance of the objectives of a piece of high-minded but apparently ineffective legislation, that despite its seeming ineffectiveness it deserves support because of its 'symbolic' effects… [fail] to specify what sort of 'symbolic' effect one has in mind. When a rule is regarded as important despite the failure … to demonstrate direct effects… an appeal to the rule's 'symbolic' importance is just a

185 Compare Article 121 of the 1977 Constitution of the USSR.

186 Yan Lin, 'Constitutional Evolution through Legislation: The Quiet Transformation of China's Constitution' (2015) 13 International Journal Of Constitutional Law 61 at 79

> rather obscure way of calling attention to the fact that the jury is still out on the question of the rule's effectiveness.[187]

The regular observance of rules generates social practice. This is usually the point of making the rule in the first place – to generate a social practice that follows the rule. Laws which require people to clean up after their pets, for example, catalyse social norms even without rigorous enforcement. Similarly, at various points in British legal history, sumptuary laws regulated consumption. For example, they forbade paupers to wear ermine. As laws, they were 'generally ignored, flagrantly opposed, only slightly enforced and gradually became obsolete'.[188] But they were not intended to be enforced by courts. They were intended to clarify and to amplify social rules. So too, the law does not offer people a free choice between murder and freedom.[189] It sends a message – and seeks to buttress a powerful social norm against killing. We will explore this connection between law, ideology and social practice more fully in Chapters 5 and 6.[190]

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187 John Griffiths at Fn 15

188 Ibid p8, quoting Joanna Philipps and Helen Staley, 'Sumptuary Legislation in Four Centuries' 53 Journal of Home Economics 673-677

189 H. L. A. Hart at 39 et seq

190 See Alan Hunt, Governance of the Consuming Passions : A History of Sumptuary Law (Macmillan 1996) p49.

However, we cannot assume that unenforceable laws are followed *at all*. Façade constitutions, for example, are comprised of laws that are, at best, merely expressive – laws that express an aspiration, but which do not ultimately succeed in changing underlying social norms. The problem lies not in breadth of non-justiciable principles, but in the narrowness of justiciable principles. James Madison said, 'once the 'parchment barrier' [is] violated, the government... set[s] the precedent for ignoring the Constitution'.[191] With this in mind, Jeffrey Usman argues that the inclusion of non-justiciable rules in the constitution 'undermin[es] the rule of law, reduc[es] the status of the constitution in the public's eyes, and set[s] a dangerous precedent for future governmental violations'.[192] His argument is that civic virtue crowds out constitutional review.[193] It seems overstated in respect of the Indian constitution, for example. As Bhatia argues, the presence of directive principles gives shape and meaning to other provisions of the constitution. However, in China, the problem here lies in a *lack* of an *enforceable* constitution, not the *presence* of an *unenforceable* one.

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191 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) quoted in Jeffrey Usman 694

192 Ibid 676.

193 Bruno S. Frey, 'A Constitution for Knaves Crowds Out Civic Virtues' (1997) 107 Economic Journal 1043.

Whether we view the Chinese constitution as a body of directive principle or not depends, in part, on whether we believe it is either a façade, a sham, or an aspiration. The Chinese constitution, like international law, is only intermittently observed.[194] It would be a gross exaggeration to say that the political leadership of China observes almost all principles of the constitution and almost all of their obligations almost all of the time. Serious human rights breaches are widespread. Nevertheless, the signalling function of the unenforceable constitution is well understood. It is, as was said in the Oireachtas prior to the inclusion of directive principles in the Irish Constitution, 'a constant headline'.[195]

This explains why China's political leaders are not indifferent to whether their governance ideology is memorialised in the constitution. The changes made by the National People's Congress in March 2018 attracted worldwide attention. Among other changes, they enabled Xi Jinping to serve a third term as President. But we might ask why Xi bothered to change the constitution at all? In its recent history, China's has not lacked for *eminences grises.* Deng Xiaoping was paramount leader of China – an informal title -

194 See e.g. Zhang Qianfan, 'A Constitution without Constitutionalism?' Zhang Qianfan, The Constitution of China: a Contextual Analysis, Eva Pils Carl F. Minzner, 'China's Turn Against Law' (2011) 59 American Journal of Comparative Law 935.

195 Daily Debate May 11, 1937, quoted in Osman at n33.

from the Third Plenum of the Eleventh Central Committee in 1978 until 1990, when he handed over the Chairmanship of the Central Military Commission to Jiang Zemin. During this time, he did not trouble himself with the Presidency, even though he played the key role in recreating that office, nor with office of General Secretary of the CCP. In stark contrast to Deng, Xi has chosen to change the constitution, rather than to work around it. At the same time, the NPC changed Article 1, to insert the phrase 'The leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics'. This was the first reference to the Communist Party of China in the text of the 1982 Constitution.[196] This is the equivalent of recording the convention that the monarch acts on the advice of her ministers in a statute. The party wanted this fact reflected in a constant headline.

We might argue, following these changes, that China's constitution is changing from what David Law called a sham constitution[197] to what Sartori called a nominal constitution[198] a blandly descriptive account of how those in power happen to run the

196 The Party featured more prominently in the 1975 and 1978 Constitutions. See Jerome Alan Cohen, 'China's Changing Constitution' (1978) 76 The China Quarterly 794.

197 David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 California Law Review 863.

198 Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1972) 56 The American Political Science Review 853.

country. But China has not lacked for unconstitutional behaviour either and we will expand on this in the next chapter.

The first two sections of this chapter set out an account of the rules that make laws valid, of the rules that make laws (un)enforceable and of constitutional obligation, which transcends these two categories. In light of the conclusions there, we can see China's non-justiciable constitution as both valid and unenforceable according to legal rules. We found, also, that this is by no means an unusual constitutional structure. The fact that the Centre chooses to *change* the constitution, rather than to work around it, or to just ignore it altogether, suggests that it matters whether these rules are recognised as valid law. The fact that the constitution remains unenforceable suggests that the reason why it matters may be an expressive reason –the theory of the constitution as a constant headline.

Britain

Constitutional conventions are a familiar sort of British constitutional rule that famously cannot be enforced in court. This section asks why rules like these might be framed in law, and confronts examples of conventions which have been. It compares these rules to the 'constant headlines' addressed in the previous section. According to the argument set out in the first section of this chapter, constitutional conventions are not legal rules. They are non-legal rules, occasionally considered in legal proceedings. But there are other categories of statutory and common law duties – some of which are constitutional, which are legal rules but which cannot be enforced in court. We will explore these examples and ask whether the way in which they are binding is comparable to the way that constitutional conventions set out in statute are binding.

The British constitution contains directive principles. Like other British constitutional rules, the directive principles of the UK constitution can be found in statutes, in the common law, and elsewhere. People are generally more comfortable describing directive principles as *legal* rules in a state with a codified constitution. Moreover, the codified constitutions addressed above are explicit in labelling directive principles as non-justiciable or non-cognisable. The uncertain status of British directive principles leaves courts uncertain how to approach them.

The idea that the Crown owes some constitutional duties that cannot be enforced in court is an obvious and uncontroversial aspect of the UK Constitution. Duties like these include the Cardinal Convention – that the monarch acts on the advice of her ministers. Indeed, some judges have described the rule that the government always complies with the decisions of the courts as a 'constitutional convention'.[199]

It is not unusual for legally unenforceable duties like these to be framed in law. Duties like these include the Sewel Convention. Section 28 (8) of the Scotland Act, as amended, states:

> But it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

The Statute of Westminster 1931 memorialized a series of conventions that governed the relationship between Westminster, Whitehall and the Dominions. Some of these, such as the convention that UK law only legislates for a Dominion at its request and consent, were reframed as enforceable, legal duties[200] but not all them were. For example, 'the established constitutional position … that any alteration in the law touching

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199 See e.g. Simon Gardner in Campaign for Nuclear Disarmament v The Prime Minister [2002] EWHC 2777 (Admin) Queen's Bench Division at [43].

200 See s.4.

the Succession to the Throne … shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom' is also recorded in the Preamble. It is a convention, and it remains in force. Ivor Jennings described the conventions contained in the Preamble to the Statute of Westminster as having 'a more precise and definite shape than any of the conventions relating to the internal government of the United Kingdom.'[201]

Statutory preambles contain important constitutional principles, as well as conventions. For example, the Preamble of the Statute 13 Car. 2 Cl. 6 read 'within all His Majesty's realms and dominions, the sole supreme government, command, and disposition of the militia and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of His Majesty...' When that statute was repealed the Statute Law Revision Act, 1863, the Preamble was left undisturbed. It In *China Navigation v. Attorney General*, Scrutton LJ relied on the Preamble as authority for the proposition that 'there is a wide margin of executive acts done by the King or his Ministers in relation to the administration of the army, which the Courts of law will not interfere with or control.'[202]

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201 Ivor Jennings, The Law and the Constitution (5th edn, University of London Press 1959) 95

202 China Navigation Company, Limited v Attorney-General [1932] 2 KB 197 (Court of Appeal) 215

However, the fact that a rule is mentioned in a statute does not make it an enforceable rule. Indeed, it does not even make it a cognisible rule. In *Miller*, Lord Neuberger considered the argument that the Scotland Act 2016 had changed the nature of the Sewel Convention. Speaking for the majority of the Supreme Court, he said 'the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognizing the convention for what it is, namely a political convention'.[203] Note that, in Lord Neuberger's view, the Sewel Convention is not merely unenforceable. It is not cognizable.

Statutes that memorialise conventions are not the only sort of unenforceable statutory duty. The minority in *Fire Brigades Union*[204] (*FBU*) and in *Bancoult*[205], characterised the statutes in those cases as non-justiciable statutory duties. In *FBU,* Parliament placed the Home Secretary under a statutory duty to consider whether or not to bring a compensation scheme into force. The minority characterized this as statutory duty, but one that did not create enforceable rights that could be asserted by the public at large.[206]

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203 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union at [148].

204 R. (Fire Brigades Union) v. Secretary of State for the Home Department [1995] 2 AC 513 House of Lords.

205 R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61 House of Lords.

206 at 562.

In *Bancoult* the Court of Appeal accepted that grant of legislative power 'for the peace, order and good government' of a territory was a limiting provision. The Supreme Court held that it was not.[207] Two justices[208] suggested that the provision could be interpreted as a non-justiciable statutory duty.

These are *obiter* statements – the majority in each case decided on other grounds – but there is a class of statutory duties that unequivocally do not confer a right to sue. Certain statutory duties concerned with social welfare cannot be enforced by individuals. They include target duties: 'public law duties expressed in the widest and most general terms.[209]' For example, s.1(1) of the National Health Service Act 1977 places the Secretary of State for Health under a duty 'to continue the promotion . . . of a comprehensive health service'. They include 'duties of imperfect obligation' – non-justiciable common law duties, such as the Crown's duty to protect the realm and to keep the peace. Jeff King argues that these are legal duties, and by refusing to enforce them, the courts are 'emasculating a statute on the basis of an unstated theory of the limits of administrative action'.[210] Duties

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207 This is the preferable view – see Croft v Dunphy [1933] AC 156 Privy Council Riel v The Queen (1885) 10 App Cas 675 Privy Council.

208 Lord Rodger at [109] and Lord Carswell at [130].

209 Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15 House of Lords (Lord Hoffmann)

210 Jeff A. King, 'The Justiciability of Resource Allocation' (2007) MLR 197 at 215.

like these closely resemble the unenforceable social rights recorded in the Irish, Indian, Swiss and Spanish constitutions.

For example, in *R (G) v. Barnet LBC*, the House of Lords considered claims by families placed on waiting list for suitable housing. Lord Steyn distinguished between statutory duties 'of an absolute nature' which could be enforced by individuals, and statutory duties that merely demanded that the local authority consider whether to exercise its statutory powers. For example, s.14 of the Education Act 1996 requires that the local authority 'secure that there shall be available for their area sufficient schools . . . for providing primary education'. Lord Steyn said

> As a general proposition, the more specific and precise the duty, the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area.[211]

In light of these examples, it should not come as a surprise that there are also unenforceable common law duties - duties of imperfect obligation. In late eighteenth

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211 R (G) v Barnet London Borough Council [2004] 2 AC 208 House of Lords.

century case law, the expression 'duties of imperfect obligation' was used to distinguish between social and moral duties, that cannot be enforced in court, and legal duties.[212] Examples of duties of imperfect obligation include the duty to observe the Sabbath, or to provide for the education of a child.[213] However, by the late twentieth century the expression had come to be used to refer to a puzzling category of duties: common law duties that nevertheless could not be enforced at law. For example, in *Albert v. Lavin*, Lord Diplock refers to the citizen's duty to arrest criminals as a duty of imperfect obligation '[a]t common law'.[214] Likewise, in *Gouriet v. AG*[215], Lord Diplock says the same thing of the (now defunct) 'public law' duty to bring a private prosecution for a criminal offence.

More puzzling still, the term is applied to *public* duties – legal duties owed by the Crown, but which cannot be enforced. In *R (Northumbria Police Authority) v. Home Secretary* Nourse LJ said 'The King owed certain duties to his subjects, albeit duties of imperfect obligation whose performance could not be enforced by legal process. Nowadays these

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212 See e.g. Lord Kenyon in Pasley v Freeman (1789) 3 Term Reports 51, 100 ER 450 Kings Bench.

213 See e.g. R (Guardians of the West London Poor Law Union) v X (1850) 15 Queen's Bench Reports 1060, 117 ER 761 Kings Bench.

214 Albert v. Lavin [1982] AC 546 House of Lords (Lord Diplock) at 565. This passage is cited with authority in R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55, [2007] 2 AC 105 House of Lords by Lord Bingham, Lord Rodger and Lord Brown.

215 Gouriet v Attorney-General [1978] AC 435 (House of Lords).

duties are taken to be expressed in the coronation oath…They included a duty to protect the lives and property of the King's subjects'.[216]

Coke and Blackstone unequivocally tell us that the Crown's duty to defend the realm and to protect its subjects is a legal duty[217] not only 'by the common law'[218] but also by statute (23 Hen. 8, c. 5) by which the King declares that 'we are bound to provide for the safety and preservation of our realm'. In *AG v. Tomline* Brett LJ affirms that the duty of defence and protection gives rise to legal rights, but holds that these rights cannot be enforced as against the Crown. He described the duty in the following way:

> This is a duty of what is called imperfect obligation… I know no legal means - that is, no process of law - common law or statute law - by which the Crown could be forced to perform that duty… [I]nasmuch as the duty of the King seems to me to be a duty of imperfect obligation, the right of the subject is also an imperfect right. It is a right, which as against the Crown

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216 R. (Northumbria Police Authority) v Secretary of State for the Home Department [1989] QB 26 Court of Appeal (Civil Division) at 56.

217 Calvin's Case (1572–1616) 7 CoRep 1a, 77 ER 377 King's Bench.

218 The Case of the Isle of Ely (1609) 10 Coke Reports 141a, 77 ER 1139 (Coke CJ) at 1139. Blackstone connects the duty to protect with the duty to govern according to law in the Coronation oath. See William Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press 1765) Book I, Chapter VI.

> the subject has no means to enforce: nevertheless, the right exists. The right of the subject exists and the duty of the King'. 219

In *China Navigation Company v. AG* Lawrence LJ and Slessor LJ for the Court of Appeal set out Brett LJ's views in *Tomline*, and did not dissent from them.[220] The same concept is occasionally applied to other public duties, using different vocabulary. For example. *Tito v. Waddell,* Lord Megarry VC describes 'the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown' as a 'trust in the higher sense'.[221]

The literature recycles these conclusions. The idea has important consequences for litigants, both broad and narrow. For example, in 'Foreign Affairs in English Courts' F.A. Mann draws on the case law above to conclude that 'the Crown has a complete discretion as to whether or not it affords diplomatic protection to its subjects… The Crown's duty of protecting citizens abroad is said to be a duty of imperfect obligation; its

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219 Attorney-General v Tomline [1878 A 105] (1880) 14 Ch D 58 Court of Appeal (Brett LJ) at 66. Brett LJ was surprised by his own conclusion. He closed his discussion of duties of imperfect obligation by saying 'it seems to me impossible that that can be the law… But I am clearly of opinion that that ground is a good one..'..

220 China Navigation Company, Limited v Attorney-General [1932] 2 KB 197 Court of Appeal.

221 Tito v Waddell [1977] Ch 106 Chancery Division at 235. See also Alfred Kinloch v The Secretary of State for India In Council (1882) 7 App Cas 619 House of Lords.

breach is not justiciable in the courts'.[222] This is significant, because the Crown is the only body able to exercise diplomatic protection in international law – a subject cannot seek redress for an international wrong without the support of the Crown. In "Constitution' as a Statutory Term', Tarun Khaitan suggests that the Executive may owe duties of imperfect obligation, including the duty protect the lives and property of the King's subjects.[223]

We might therefore see these duties as examples of non-justiciable directive principles in English Law, comparable to the well-documented principles of the Indian and Irish constitutions, among others. But is this view correct? As we noted in the previous section, the puzzling aspect of duties like the duty to defend the realm, or the duty set out in s.14 of the Education Act is the repeated claim that these are *legal* duties.

Some judges simply treat these as non-legal duties. In *China Navigation Company v. AG* at first instance, Rowatt J says 'what is called the duty, is not that sort of thing at all… It is merely what I venture to call a political duty, using the word 'political' in its proper and original sense. It is what any government would be expected to do for its people, but

222 F. A. Mann, Foreign Affairs in English Courts (Oxford : Clarendon 1986).

223 See e.g. Tarunabh Khaitan, '"Constitution" as a Statutory Term' (2013) 129 LQR 589.

the court cannot examine it'.[224] In *Mutasa v. Attorney General*[225] the Crown conceded the uncontroversial proposition that it owed a British subject resident in a British territory a duty to protect him, from unlawful arrest and detention. But counsel for the AG argued, 'that what is called by the plaintiff 'a legal duty' is no more (as it is … than a political or moral duty or obligation' and 'that even if it is to be regarded as a legal duty it is not enforceable, nor would its breach be actionable, in this court'.[226] Boreham J accepted the submission that this was a duty of imperfect obligation, and *therefore* not a legal duty.

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How then did we get from Coke and Blackstone's unequivocal claim that the Crown owes a common law and a statutory duty, to Rowatt and Boreham JJ's claim that the duty is not only unenforceable but (perhaps) non-legal? If they are indeed legal duties, then it is harder for the Supreme Court to claim that judges are 'neither the parents nor the guardians' of these duties, but 'merely observers'.[227] When the Supreme Court of Canada observed that the Canadian Government had a political duty to consult the

224 China Navigation Company, Limited v Attorney-General (1931) 40 Ll. L. Rep. 110, 112-113.

225 Mutasa v Attorney-General [1980] QB 114 Queen's Bench Division.

226 Ibid 118.

227 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union at [146].

provinces before fundamentally changing the constitution[228], this spawned a heterodox scholarship that suggested that conventions could 'crystallise' into laws.[229] What of the converse claim – that laws can dissolve into convention? Is it correct to say that legal duties can become legally unenforceable?

We have two reasons to pull back from this surprising conclusion. First, we should not readily assume that, because a duty could not be enforced, it is *by nature* an unenforceable duty. Brett LJ's opaque turn of phrase in *Tomline* suggests that 'imperfection' is an inherent, mystical quality of the duty itself. However, adjectival law changes around these duties. The real reason why the duty could not be enforced was due of a contemporary rule of civil procedure. The key cases, cited above, were decided prior to the Crown Proceedings Act 1949. It is unsurprising that Brett LJ knew of 'no process of law' by which a subject could assert the duty against the Crown, because that process did not exist for another seventy years. This becomes clear if we read Cotton LJ's reasons for declining to enforce the duty in *Tomline* – namely 'that the Crown is not

228 Reference Re: Resolution to Amend the Constitution 125 DLR (3d) 1, [1981] 1 SCR 753 Supreme Court of Canada.

229 T. R. S. Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case'. See also Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2003) 22 Legal Studies 340 N. W. Barber, 'Laws and Constitutional Conventions'.

amenable to the jurisdiction of the Court'. Neither judge has to expand on this claim because it was considered elementary in 1878, and neither plaintiff was trying to enforce the duty against the officers of the Crown.

In both cases, the duty was relied upon to clarify the scope of another justiciable duty, in much the same way that the convention of Cabinet secrecy was used to clarify the tort of breach of confidence in *AG v. Jonathan Cape.*[230] In *Tomline*, the Crown's obligation to preserve the headland was used to determine the extent of the private right to remove shingle from a beach. In *China Navigation*, the Crown's obligation to protect was used to establish whether the Crown's officers were entitled to charge a levy for protection. Neither case sought to enjoin the Crown to perform the duty in question, even indirectly.

It is easy to imagine cases in which it would be inconvenient or even unjust for a claimant to enforce a general duty to achieve a long-term goal of a broad and vague nature, like the duty to defend the realm, or the duty to provide suitable educational facilities. But, in the first case, existing rules of standing, ripeness, mootness and so on help to limit the category of available claimants to people who have a sufficient interest in a real failure

230 Attorney General v. Jonathan Cape Ltd [1976] QB 752 Queen's Bench Division.

to perform the duty. Second, these are not the only vague political duties with amorphous cost implications that Parliament expects the government to discharge. The Public Sector Equality Duty, set out in s.149 of the Equality Act 2010 requires public authorities to 'have regard' to 'equality of opportunity' among other goals. It does not impose a duty 'of an absolute character' according to Lord Steyn's distinction in *G*.[231] However, some plaintiffs can still sue under the Act. If no-one were able to sue, then we might be inclined to call this a political duty and not a legal duty. But why would Parliament go to the trouble of enacting a rule that the government could publicise by a statement in the House?

There is another sort of misstep in this line of doctrine. In *Mutasa*, Boreham J assumes that, because a duty could not be enforced in court, that this means it is not a legal duty. This argument set out at the beginning of this chapter shows why this is a non-sequitur. The origin of the modern British constitutional order lies in a body of unenforceable law. In 1707, the Parliaments of England and Scotland passed respective Acts of Union. Under modern international law[232], and probably also under international

231 R (G) v Barnet London Borough Council at [14].

232 See the account of a treaty in Maritime Delimitation and Territorial Questions between Qatar and Bahrain [1994] ICJ Rep 112 International Court of Justice.

law as it stood then,[233] this could be considered to be a binding treaty. However, England and Scotland ceased to have personality upon its conclusion, so there was no State left standing with standing to enforce it.[234] In *Campbell v. Hall* decided between the conclusion of the treaty and the framing of the US Constitution, Lord Mansfield held that treaty rights are 'sacred and inviolable'.[235] Had Lord Mansfield meant 'enforceable at common law' then the case would have been decided differently. *Blad's Case*, which was decided about thirty years before the Union, meant the Treaty could not be a source of rights and obligations in an English court. Moreover, an uncompromising reading of Parliamentary sovereignty meant the Treaty could not fetter the new Parliament of Great Britain. The Treaty of Union contains sacred, inviolable, unenforceable, legal rules.

In an influential article, now fifty years old, T.B. Smith assessed the impact of the treaty in the following way:

> I do not think that the constituent Acts declaring the Union constitution have in practice been treated as of no greater sanctity than ordinary

233 For an account of the contemporary law, see T. B. Smith, 'The Treaty of Union of 1707 as Fundamental Law' (1957) PL 99.

234 Note that the rule that the executive cannot legislate by the prerogative – a rule which denies legal force to unincorporated treaties - does not apply in this case. Although the rule predates the Union (it is found in the Case of Proclamations 1610) 12 Coke Reports 74, 77 ER 1352) the treaty was concluded by the Parliaments.

235 Campbell v Hall (1774) 1 Cowper 204, 98 ER 1045 Kings Bench at 208.

> legislative Acts… Parliament hesitated long before venturing to repeal expressly even those parts of the Union agreement which were clearly spent.236

In *MacCormick v Lord Advocate,* Lord Cooper said the Treaty of Union contains 'clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of like effect'.[237]

Smith's argument on the fundamental nature of the Treaty of Union was recently revived before the Privileges Committee of the House of Lords. Though not a binding legal precedent, *Lord Gray's Motion* received full argument of counsel, and was considered by a panel of five Lords of Appeal. In the leading judgment, Lord Hope did not express an opinion on whether Parliament's legal powers can be constrained by the Treaty of Union but stated that it 'cannot be dismissed as entirely fanciful'.[238] He considered the argument that Article XXII of the Treaty of Union had the character of fundamental law and concluded that it did not contain the same entrenching language as Article XIX.

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236 T. B. Smith.

237 MacCormick v The Lord Advocate 1953 SLT 255 Court of Session, Inner House at 262.

238 Lord Gray's Motion 2000 SC (HL) 46; [2002] 1 AC 124 House of Lords at 138.

We might see the Treaty of Union as an antique version of modern directive principles. The two Parliaments framed constitutional rules in a solemn treaty to create rules that would endure, and that would give full play to their expressive function, but which would not be enforced in court. Writing about the Treaty of Union, Dicey said the 'statesmen of 1707 clearly believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws'.[239]

We should assess the decision of the Supreme Court in *Miller* with these examples in mind. Lord Neuberger, with unanimous agreement, correctly notes that he 'would have expected the UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts'. However, in the same passage, he concludes that 'the UK Parliament is not seeking to convert the Sewel Convention into a rule which *can be interpreted, let alone enforced*, by the courts'.[240] This does not follow from the language of the statute. Lord Neuberger presents non-justiciable and non-cognizable rules as the same when, as we have seen, they are different. Second, Lord Neuberger has the relationship between these two sorts of rules back to front. The fact that Parliament does not intend a rule to be cognizable means, *a fortiori*, it is not

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239 Thoughts on the Scottish Union at p252. As quoted, in the context of the Union, by Lord President Cooper in MacCormick v. Lord Advocate.

240 At [148], (emphasis added)

enforceable. Courts may not interpret unincorporated treaty rules, and neither may they enforce them. But the converse is not true. Unenforceable rules like statutory target duties, or the convention in the *Patriation Reference*, can be interpreted.

The words 'it is recognised' and 'will not normally' in s.29 strongly suggest that Parliament did not intend for the Sewel Convention to be enforceable. However, they tell us nothing about whether Parliament intended for the Convention to be interpreted in court. Indeed, it is difficult to think of reasons why Parliament would memorialise the Convention in the body of a statute, as opposed to its Preamble, other than the reason that Parliament intended the Convention to be interpreted in court, like the (comparable) convention in the *Patriation Reference*.

Courts do not have the final say on the meaning of political rules like these, but they can and do help to shape the debate about the meaning of those rules. Other constitutional actors can only interpret guarantees in constitutional treaties if they know what the rules mean. Courts can and should help them to do this, because they are independent, legitimate and practiced in the formulation of rules. As we saw in the Treaty of Union cases, Scottish courts have not *enforced* the provisions in the Treaty, but they have certainly given their views on what those provisions mean. Cases like *MacCormick v Lord Advocate* help to frame the debate about Scotland's present role in the Union. In turn,

they encourage a more faithful and cautious approach towards those rules, by the sovereign and also by citizens.

CONCLUSION

This chapter began with a caricature of constitutionalism, by which all government behaviour is regulated by law, law that is enforceable in courts. Drawing on themes in Chapter One, it pointed to the limitations to this view, and in particular, to the difficulty with which it explains the interaction between legal and non-legal rules. It then focused on that interaction, describing secondary rules that address duties not to apply rules, to ignore rules, and even to blind oneself to rules. This lead us to the conclusion that there can be unenforceable law, and enforceable non-law, a conclusion that may challenge our instincts about validity and obligation.

The chapter then applied this model to various species of unenforceable constitutional law: non-justiciable constitutions like China's, directive principles, target duties, statutory conventions and duties of imperfect obligation. It argued that unenforceable law is not only a feature of both constitutional orders considered here, it is a normal feature of modern constitutions.

It also compared the specific circumstances in Britain and China. There are obvious and important differences. The unenforceable parts of the British constitution have to be assessed in light of the larger body of constitutional law that is enforceable. The objection to China's non-justiciable constitution is not that *some* of the rules are non-

justiciable. It is that there are *no* justiciable rules. Nevertheless, Britain's unenforceable, legal, constitutional rules are no mere footnotes in our constitutional history. They include the basic political settlement that led to the creation of the British State. But they also include quotidian duties of local authorities to deliver social goods, fundamental Crown duties to protect citizens.

Important though the differences are, it is the similarities between these two structures that are illuminating. Though less prominent than the Chinese equivalent, Britain also has directive principles. Moreover, just as the CCP is anxious that Party Leadership should be reflected in the constant headline of the 1982 Constitution, so too, some important British constitutional rules have been embodied in statutes. And yet, the UK courts approach statutory conventions, target duties, and duties of imperfect obligation almost as if they were non-cognizable rules. In other words, they approach these rules, in a manner almost reminiscent of the Supreme People's Court. There is no need for the Sewel Convention, for example, to be a 'desolate milestone'. We will return to the question of how courts give meaning to unenforceable constitutional rules in Chapter Six.

The argument set out here also lays groundwork for the chapters to come. In the next chapter, we will address arguments that, although government rules are not

enforceable in court, they represent a sort of internal administrative law. In Chapter Four we turn to constitutional institutions that the constitution does not regulate at all, in light of the distinction between para-constitutional and non-constitutional rules. This loosely tracks the distinction developed here between non-cognizable and non-justiciable rules. Both chapters draw on the first part of this chapter in explaining how courts receive rules from outside the legal order, whether government rules or party rules. In Chapter Five, we return to things that the constitution does regulate, but not legally, through techniques like constitutional convention. In Chapter Six, we will revisit our conclusions about *Miller* and conventions, and ask what role the courts should play in developing and concretising constitutional discourse.

CHAPTER THREE – STATE RULES

INTRODUCTION

Max Weber described Imperial Chinese administration as the 'patriarchal obliteration of the line between justice and administration.'[1] He contrasted a state where scholar-officials govern by administrative decree with a model of rational, legal legitimacy, where the government derives its authority from the constitution. We recognise this picture from the previous two chapters, a picture in which constitutionalism demands that public power be framed in law. This chapter responds to that idea by exploring what is public and legal. It looks at a body of unambiguously public rules – the rules of the government – and asks whether they are legal rules.

In a state that has experienced a foundational constitutional moment[2] we can connect the state with the legal order, because the constitution supposedly creates both at the same time. Neil MacCormick says the juridical traditions of mainland Europe are inclined 'to treat the personified 'state' as the prime subject of constitutional law, that

1 Max Weber, Economy and Society (University of California Press 2013) at 264-265 quoted in Stanley B. Lubman, Bird in a Cage : Legal Reform in China after Mao (Stanford University Press 1999) at 23

2 See Bruce A. Ackerman, We the People (Belknap Press of Harvard University Press 1991)

which constitutions constitute and whose powers they define, delimit, and distribute'.[3] Hans Kelsen's views, which we set out in Chapter Two, are representative of this tradition. However. Britain lacks a constitutional text. It also lacks an original and singular constitutional moment. Instead, it has a historical constitution[4] – a series of moments stretching from Magna Carta, through the Glorious Revolution and the Treaty of Union 1707, to more recent moments such as the entry to and exit from the EU. People argue about which moments are most salient.[5]

For these reasons, MacCormick argues that Britain 'is missing any tradition of articulated reflection upon the nature of states'. The reason for the

> comparative silence of United Kingdom authorities in the matter of state doctrine … has to do with the evolutionary process of development of the modern United Kingdom out of an English feudal monarchy... New

3 Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Oxford University Press 1999) at 28

4 See J. W. F. Allison, The English Historical Constitution: Continuity, Change and European Effects (Cambridge University Press 2007)

5 Compare e.g. Adam Tomkins, Our Republican Constitution (Hart Publishing Limited 2005), J. W. F. Allison, and Neil MacCormick.

> substance retained the covering of old forms, and the kingdom became a state without avowing its changed character through a formal constitution[6]

In other words, in the UK, there is an 'imperfect identity of law and state'. The historical state predates the legal order that grew up around it. If the state extends beyond the four corners of the legal order then there can be state rules that are not legal rules.

In China, the Party-state also predates and survives the 1982 Constitution. Indeed, the CCP is the midwife for that constitution. The Party-state thus extends beyond the four corners of the legal order. Fu Hualing distinguishes between three sorts of state action in China – legal, extra-legal and 'extra-extra-legal.' Law refers to 'a constitutional legal regime in which properly constituted authorities make and state legal norms… which are subsequently applied fairly by independent tribunals.' Extra-law refers to 'a system in which power is neither directly derived from properly constituted authorities nor subject to independent oversight… It has a strong political or policy orientation and the whole system is geared to political expediency or convenience.' Extra-extra law, on the other hand:

> comprises government measures that exist in some dark space, seemingly unrelated to any legal framework and devoid of any legal authority. Extra-extra law is an informal political institution characterized by a total lack of legality. It is used to advance some predatory and repressive government

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6 Neil MacCormick at 28. See also Janet McLean, Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere (Cambridge University Press 2012)

> policies which cannot be justified by any law or extra-law. As such, extra-extra law is covered in secrecy and operates with no legal accountability. Except occasional and indirect admissions, such as the quasi-official admission of the existence of 'black jails' for petitioners, extra-extra law does not officially exist, and, as such, extra-extra law survives and thrives because it is effective in achieving certain policy goals which cannot otherwise be achieved through law or extra-law. The legal system is regarded as weak and ineffective when it comes to sensitive issues. In these situations, intimidation through extra-extra law becomes expedient and even indispensable [7]

These ideas have deeper roots in China. Imperial China did not distinguish between law and other forms of state power. As Stanley Lubman argues 'Law was addressed to officials, not to the populace'. It worked 'in a vertical direction, from the state upon the individual, rather than on a horizontal plane directly between two individuals'.[8] This echoes Hans Kelsen's account of the legal system. In his *General Theory of Law and the State*, Kelsen presents laws as norms that are directed at officials rather than the populace. The norms tell the officials when to apply sanctions and we experience these sanctions as law.[9] By this account, law is an oblique phenomenon. It reflects a dialogue between the Centre and its officials, rather than a direct relationship between the sovereign and the citizen.[10]

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7 Fu Hualing, 'The Varieties of Law in China' Human Rights in China <https://www.hrichina.org/en/crf/article/5422>

8 Derk Bodde, quoted in Stanley B. Lubman at 75

9 Compare Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1983) 97 Harvard Law Review 625

10 Kelsen H, General Theory of Law and State (New Brunswick, N.J. : Transaction 2006) at 59

This chapter explores the relationship between justice and administration. Section One asks why it might be important to distinguish between law and other sorts of state rules. It looks at functional similarities between state rules and laws. It puts pressure on some simple distinctions between them, and suggests that we ought to think about the difference as a sliding scale, rather than a bright line.

Section Two separates three demands that the rule of law makes of state rules. It identifies a misstep in one western conception of government rules. Even if the law ought to be supreme, and if coercive rules ought to be legal rules, it does not follow that state rules ought to be legal rules. It then develops that idea in respect of both constitutional orders questioning whether the state requires an affirmative constitutional source for its rulemaking powers.

The central claim in this chapter is that, far from being antithetical, policy rules and legal rules can be very difficult to distinguish indeed. From the point of view of the citizen – the immigrant seeking leave to remain or the householder seeking planning permission – the difference may be so slight as to imperceptible.[11] However, the two systems of rules overlap in different ways in each of the two constitutional orders considered here. In Britain, the operation of policy is now so thoroughly juridified that

11 On this point, see Frederick Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 Ratio Juris 1 at 15

the distinction can be difficult to discern. In contrast, in China, the operation of law remains heavily bureaucratised.

DISTINGUISHING LAW FROM POLICY

This section begins with the formal similarities and differences between law and government rules. There is a prominent American literature that describes government rules as 'internal administrative law'. In his *Principles of Administrative Law,* Bruce Wyman addressed internal rules that agencies adopt to guide their own decision-making as a variety of law – rules that govern 'the relations of officers with each other, or with the administration'.[12] Wyman's approach was unpopular throughout the twentieth century, which was dominated by judicial review scholarship. It has been revisited in the last decade by scholars of the administrative constitution and notably by Jerry Mashaw.[13] The concept of internal administrative law is superficially similar to the material constitution discussed in Chapter One – the vision of the constitution as an assemblage of state rules that serve a certain purpose. It is, however, a distinctively legal vision. It reflects a particular view about the nature of law and the state.

As we saw in Chapter Two, we need not be precious about legal validity. The rule of law, and the values that it promotes, might apply to many different systems of rules, from the rules of religious law to the Fireworks Code. Unless rules are open, prospective,

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12 Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers (Keefe-Davidson 1903) at 14

13 See esp. Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (Yale University Press 2012).

clear and consistently enforced, among other requirements, it is difficult to follow them and therefore difficult for the rules to achieve what they are intended to achieve. Perhaps all rules ought to satisfy the demands of 'legal' certainty whether or not we label them laws.

Indeed, the way we conceive of the relationship between state rules and laws is shaped both by our vision of what makes law distinctive and by our vision of what counts as the state. If all that is distinctive about law is that it is binding then lots of rules are laws. But our account of law also reflects assumptions about the state, and in particular, about the role that law is supposed to play in the constitutional order. If all government action is supposed to be legal action, then distinctions between valid law and other government rules might prove to be a distraction. In this section, we will compare ways of thinking about law in Britain and China. We will begin by considering some challenges to the view that law and government rules are simply the internal and external dimensions of a single administrative law.

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People sometimes talk about government policy as if it were antithetical to law. In *The Case of Impositions* (1606) Flemming CB describes 'policy or government' as 'the absolute power of the king', a power 'not guided by the rules, which direct only at the

common law'.[14] Indeed, and as we saw in Chapter Two, a 'question of policy' can refer to a political question that the court proposes not to answer.[15] For some legal theorists, laws are principled things whereas policy 'advances or protects some collective goal of the community as a whole'.[16] For those theorists, policy has no place in court. At the turn of the millennium, Stephen Sedley wrote

> a generation ago, law was law and policy was policy. Law was for the courts; policy, provided it did not contravene the law, was for ministers… Policies were thought of as a source of administrative guidance and were frequently unpublished… [L]awyers, so far as they had learned anything about public law, had been taught to allocate policy driven decisions to the region of unreviewable discretion.[17]

Sedley LJ says British policy rules offer 'virtues of flexibility which [legal] rules lack'.[18] Policies are 'required by law to be applied without rigidity'.[19]

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14 AG v. John Bates 2 How St Tr 371, 389

15 See e.g. Lord Scarman in Nottinghamshire County Council v Secretary of State for the Environment [1986] AC 240 House of Lords at 250

16 Ronald Dworkin, Taking Rights Seriously (Duckworth 1977) at 82. See also John Bell, Policy Arguments in Judicial Decisions (Clarendon Press 1983).

17 Stephen Sedley, 'Policy and Law' in Mads Tønnesson Andenæs and Duncan Fairgrieve (eds), Judicial Review in International Perspective (Kluwer Law International 2000) at 259

18 Pankina v Secretary of State for the Home Department [2010] EWCA Civ 719, [2011] QB 376 at [15]

19 Ibid

Albert Chen argues that we ought to distinguish between Chinese laws and administrative regulations, on three similar grounds.[20] First, there are important procedural differences between the two sorts of rule. Second, the Constitution distinguishes between law and policy. Third, Chen rejects the claim that there are multiple and independent sources of rulemaking authority in China. For him 'the supremacy of law rather than policy has not only won acceptance by constitutional theory, but is also gaining ground in practice as the Chinese legal system evolves'. He argues that a 'dynamic approach' suggests that we ought to distinguish between laws and 'mere policy documents'.

We might think policies are more flexible than laws because fewer formalities are required in order to change them. Law-making is supposed to be the domain of the legislature and the courts[21] and policymaking that of the administration. However, the administration, also makes law by delegated legislation or Orders in Council in the UK, and by Administrative Regulation in China. We might also think procedural demands on legislation are stricter than those placed on policy rules. But once again this is a sliding scale, not a bright line. As we will see, before policy rules can take effect, they often need

20 Albert H. Y. Chen, An Introduction to the Legal System of the People's Republic of China (Singapore : Butterworths Asia 1992) at 123 et seq

21 In China, we might add the Supreme People's Procuratorate to this list.

to meet certain formal and procedural requirements, both statutory and common law. Policy rules can be made subject to legislative veto, or even mandated by legislation.

Moreover, some government rules are simply legal rules. The Crown can make primary legislation without recourse to Parliament. Unlike statutes, these rules are subject to the supervisory jurisdiction of the court.[22] The Crown can also be empowered, by statute, to make delegated legislation. Statutory Instruments are subject to formalities[23] and once again, the courts can challenge delegated legislation that exceeds the statutory powers granted to the government.[24] Likewise, Article 89 of the Constitution gives the State Council the power to make administrative regulations. By any satisfying account of law, these are rules of law. In some areas, the government can *only* make rules through law. The government's prerogative rulemaking power can be eclipsed by statute[25] and cannot be exercised so as to frustrate the object of a statute.[26]

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22 R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61 House of Lords

23 Statutory Instruments Act 1946

24 Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms [1972] 1 WLR 190 Queen's Bench Division, R. (Fire Brigades Union) v. Secretary of State for the Home Department [1995] 2 AC 513 House of Lords

25 Attorney General v. De Keyser's Royal Hotel [1920] AC 508 House of Lords

26 Fire Brigades Union

But we should note that Chen makes these arguments in a book prepared at a time when China enjoyed a more politically liberal constitutional order than it does now. China's present constitutional trajectory might invite a more conservative conclusion. It is not obvious that the supremacy of law over policy is gaining ground, especially in respect of Party policy. This, we should add, also gives us good reason to be sceptical about Chen's second argument. The 1982 Constitution does purport to establish a legislative hierarchy, but China's unwritten constitution is subtler than this.

It is inaccurate to say legal rules are inflexible and policy rules are malleable. Not all policies are flexible – they can be mandatory or hortatory. 'Guidance is advisory in character it assists the decision-maker but does not compel a particular outcome. By contrast, a rule is mandatory in nature, it compels the decision-maker to reach a particular result.[27]' Sometimes even statutory directions are not binding, as in the case of the Home Secretary's directions to the parole board.[28] On the other hand, sometimes the duty to take account of a policy can be 'tantamount to duty to act in accordance' with that policy,[29] as in the case of guidance on what counts as anti-competitive behaviour.[30]

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27 R (Fisher) v North Derbyshire Health Authority 1997 WL 1106110 QBD (Admin) at 32 A-E

28 R (Girling) The Parole Board [2006] EWCA Civ 1779 Court of Appeal (Civil Division)

29 See Michael Fordham and Harry Woolf, Judicial Review Handbook (6th edn, Hart 2012) at 6.2.1.

30 Royal Mail Group v Postal Services Commission [2007] EWHC 1205 (Admin)

Moreover, as we saw in Chapter Two, legal rules are not rigid. In China, Guo Daohui[31] has illustrated the fundamental principle that Chinese primary legislation should be both 'general' (原则性) and 'flexible' (灵活性). Legislation is implemented by progressively more specific sorts of government rules. In other words, in China, law resembles the account of policy that Sedley LJ gives in *Pankina* and policy resembles his account of law. Furthermore, in previous chapters we have considered hortatory legal rules, like target duties and the common law duty to defend the realm. It would be more accurate to say rules can be flexible or rigid, and they can be embodied in policies or laws.

Furthermore, policy rules can be formal or informal. In *WL*, the Court of Appeal distinguished between formal published policies, formal internal policies and informal internal practices.[32] A White Paper is an example of a formal published policy. It is a public statement of the settled view of government on a given subject. Not all formal policies are published in White Papers. The DHSS Guidance on family planning challenged in *Gillick v West Norfolk Health Authority*[33] and the Consolidated Guidance on Treatment of

31 Guo Daohui, 'Lun Lifazhong Yuanzexing he Linghuoxing Jiehe,' (A Discussion of the Synthesis of Generality and Flexibility in Legislation) 1 Faxue Pinglun 15- 19, 15 (1987) cited in Perry Keller, 'Sources of Order in Chinese Law' (1994) 42 The American Journal of Comparative Law 711 at 749

32 See WL (Congo) v. Secretary of State for the Home Department 2010 EWCA Civ 111 at [54-55]

33 Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 House of Lords

Detainees challenged in *R (Equality and Human Rights Commission v. PM*[34] are examples of formal published policies. In *Fulford Dobson*[35], the claim was based on a booklet setting out the attitude of the revenue towards the tax code - there was 'no code or scheme other than that which appears in the booklet'. Many policies receive formal Departmental approval, for example by submission to the Secretary of State, but are not intended for publication. When they are legally significant, these unpublished policies can 'circulat[e] within the legal profession as a kind of samizdat.[36]' Finally, government is also institutionalised through informal internal practices that have 'never been subject to any formal process.[37]' These practices can crystallise into conventional rules, which we will address in detail in Chapter Five.

Just as they can be formal or informal, policy rules can be simple and complex. One matter addressed in the early stages of litigation in *Miller* was whether the government's plan to leave the EU was something it had done, something it was doing or something it was going to do. This might have looked like a moot point. However, it was agreed that the plan to leave the EU could be challenged as a government policy. The

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34 R (Equality and Human Rights Commission) v Prime Minister [2011] EWHC 2401, [2012] 1 WLR 1389 R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12, [2012] 1 AC 245 Supreme Court

35 R (Fulford-Dobson) v Inspector of Taxes, Reading [1987] 3 WLR 277 Queen's Bench Division

36 Stephen Sedley at 261

37 WL (Congo) at [55]

point is that policy can be framed in rules that are strong or weak, specific or vague. Vague, weak, general rules sometimes resemble goals, but they can be policies too.

THE DISTINCTIVENESS OF LAW?

This section sets out a key distinction between the way the British and Chinese scholarship approaches policy rules. Broadly speaking, the British scholarship was indifferent to policy rules until the late 20th Century because it preferred to characterise administrative action in terms of discretion, a discretion that was distinctive and perhaps inimical to law. In contrast, a traditional Marxist approach sees state command as paramount, and the rules chosen to express that command as secondary. For this reason, law was not always seen as distinctive – law and government rules might be seen as overlapping means by which the state expressed its will.

Early accounts of the constitution do not condemn government rules so much as ignore them. The rules of the administrative state are barely mentioned in *The Law of the Constitution*, which contrasts law with discretion, not rules. It is ironic that Dicey's account of the constitution is so sensitive to non-legal rules, while his account of governance is so strangely indifferent to them. In contrast, Harold Laski's *A Grammar of Politics*, published ten years after the final edition of The Law and the Constitution, deals with the government at length. Laski observes that 'the King in Parliament will, on the average, pass some eighty statutes each year, while the number of orders and rules made by the

executive will be about thirty times as many'.[38] Laski suggests two safeguards: that new byelaws must be submitted… 'to some specified government department which may refuse to ratify them' and that 'the legal character of any bye-law may be tested in the courts'.[39] Here, once again, having shown prescient sensitivity to the variations in government rules, Laski confines his remarks to *legal rules* made in government.

The most prominent and influential challenge to the legitimacy of the British administrative state of the 20th Century was Gordon Hewart's *The New Despotism*. *The New Despotism* reframes Weber's concern about the obliteration of the distinction between justice and administration. The remedy it prescribes is Diceyan orthodoxy: the Sovereignty of Parliament, and the Rule of Law. However, although its thesis is intimately concerned with the excesses of the administrative state, *The New Despotism* seems oblivious to what how that state actually makes rules.[40] Hewart says 'it is possible, no doubt, that the public official … does act, or persuades himself that he acts, on some general rules or principles'. But these are unknown, or unknowable: 'what value is a so-called 'law' of which nobody has any knowledge?' For this reason, and others, it was *discretion* and the manner in which discretion could be policed that came to characterize

38 Harold J. Laski, A Grammar of Politics (Pickering & Chatto 1996) at 389

39 Ibid at 392

40 Gordon Hewart, The New Despotism (London : Ernest Benn 1929)

the British approach to government rulemaking.[41] The book sparked a Royal Commission, which set the tone for judicial control of administration for a generation.[42]

By the 1970s British judges had begun to think of government discretion as something exercised subject to internal rules.[43] In *British Oxygen*, Lord Reid said 'I do not think there is any great difference between a policy and a rule. … [A] Ministry … will almost certainly have evolved a policy so precise that it could well be called a rule'.[44] A policy, in this sense is a rule, or a body of rules addressed to a government official. As Lord Scarman put the point in *Re: Findlay*: 'I find it impossible that minister could manage the complexities of his discretion without policy'.[45] Policies are 'an essential element in securing the coherent and consistent performance of administrative functions'.[46]

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41 Ibid at 44

42 Committee on Ministers' Powers (Donoughmore Committee), Report of the Committee on Ministers' Powers (Cmnd. 4060) (London HMSO)

43 See generally D. J. Galligan, Discretionary Powers: A Legal Study of Official Discretion (Clarendon 1986) Chapters 1 and 2. Compare the modern approach to discretion with S. A. De Smith, Judicial Review of Administrative Action (London : Stevens 1959). De Smith distinguishes between judicial and administrative discretion based on the 'policy', but policy is used in the sense of 'high policy'.

44 British Oxygen Co. v Minister of Technology [1971] AC 610 House of Lords, 625 (Lord Reid)

45 In re: Findlay [1985] AC 318 House of Lords

46 Lord Clyde in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295 House of Lords at [143],

That was not the way China approached state rules. Socialist legal theorists thought coercive state rules – internal and external - were essentially similar.[47] Classical Marxists, among others[48], thought state coercion was the essential element of law. The important thing for Vyshinsky or Engels was who was doing the coercing, not *how* they were doing it. Vyshinsky described law as the totality of

> the rules of conduct expressing the will of the dominant class and established in legal order' and also 'of customs and rules of community life sanctioned by state authority - their application being guaranteed by the compulsive force of the state in order to guard, secure and develop social relationships and social order advantageous to the dominant class.[49]

He argued that it is not important to distinguish between law and policy. He said, 'courts and law are necessary to the proletariat' not because law is preferable to other sorts of state rules, but rather because 'it is 'inconceivable to suppose that it is possible

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47 Other socialist legal theorists who argued law is an essentially distinctive social institution. For example, Yevgeny Pashukanis argued that law was a distinctive and essentially bourgeois social formation, because it was based on a bourgeois system of commodity exchange. For this reason Pashukanis argued that in the USSR 'law occupies… a subordinate position with reference to politics. We have a system of proletarian politics, but we have no need for any sort of juridical system of proletarian law…' E.B. Pashukanis, The Soviet State and the Revolution of Law (1930), quoted in H.J. Berman, Justice in the USSR, (Harvard University Press 1963) 42

48 See John Austin, The Province of Jurisprudence Determined (Cambridge University Press 1995) and Frederick Schauer

49 Andrey Yanuaryevich Vyshinsky, The Law of the Soviet State (Macmillan 1948) 50

to solve the problems of restraint merely by administrative repression with the aid of extraordinary and exceptional measures and methods'.[50]

Vyshinsky's view was influential in the early period of legal construction in China in the 1950s. The original decree ordering the abolition of KMT law defines law as 'the will of the state compulsorily and openly enforced through military force by the ruling class' and goes on to describe KMT laws as 'instruments designed to protect the reactionary rule of the landlords, the *compradores*, the bureaucrats, and the bourgeoisie and weapons to suppress and coerce the vast masses of the people'.[51] Here, law is used as a catch-all to describe coercive state rules. Of course, the legitimacy of rules like these does not depend on its legal form but on the identity of the rule-maker. Neither is law a distinctive form of social control – it is one way for the Party-state to express its will. Mao Zedong said the 'starting-point of all the practical actions of a revolutionary party' was not law but policy. Policy, not law, provided both 'the process and the end-result of [a revolutionary] party's actions'.[52]

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50 Ibid 50 et seq

51 Instruction of the CC of the CPC to Abolish the KMT Six Codes and Define the Judicial Principles of the Liberated Areas, 31 March 1949

52 Mao Zedong, 'On the Policy Concerning Industry and Commerce' (February 27, 1948), Selected Works, Vol. IV, (Foreign Languages Press, 1961) pp. 204-05

In the 1950s, policy directives 'served as the mainstay of Communist administration'.[53] Article 17 of the Common Programme of the Chinese People's Consultative Conference (new China's first written constitution) abolished all of the laws of nationalist China, leaving a legal vacuum.[54] Where new laws did not yet govern the dispute at issue, judges were instructed to apply the 'new democratic policies'. The incorporation of state policy by reference was a feature of Chinese law well into the 1980s. Article 6 of the General Principles of Civil Law 1986 provides that 'civil law activities shall comply with the law and where there is no relevant legal provision, comply with relevant state policy'. Art. 4(2) of the Provisional Regulations concerning Drafting and Promulgating Administrative Legal Provisions said the State Council had to comply not only with 'the constitution and the laws' but also with 'the line, directions and policies of the Party and the State'.[55] Even today, there is some formal evidence that the Central Committee expects law to conform to Party policy. In 2019, the People's Daily reported that, in the absence of superior statutory guidelines, local lawmakers should legislate in

53 Perry Keller at 719

54 See also Directive Concerning the Abolition of the Nationalist Six Codes and the Establishment of Principles of Law in the Liberated Areas), issued by the Central Committee of the CCP

55 Provisional Regulations of the State Council Concerning Procedures for Drafting and Promulgating of Administrative Legal Provisions of April 21, 1987 quoted in Robert Heuser, 'The Legal Status of the Chinese Communist Party' (1987) 4 Occasional Papers in Contemporary Chinese Studies

conformity with "the general lines of… Party policy" including "clear Decisions and Opinions of the Central Committee."[56]

Legal construction after 1978 demanded a different view of law, as a distinctive way to exercise state power. The Political Report to 14th Party Congress said, 'the main method for the Party to exercise its political leadership over state affairs is to translate Party policies into state will through legal procedures'.[57] Li Buyun distinguished between Party policies which 'to a certain extent are only principles' and law which is 'rigorously standardised and which 'explicitly and concretely stipulates what the people should, can and cannot do.'[58] Stanley Lubman, writing in the late 1990s, said: 'formal legislation has become the major framework for the organization and operation of the Chinese government'.[59] This was true, up to a point, even in sensitive areas like public security.[60]

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[56] Persist in Improving the National People's Congress System（坚持和完善人民代表大会制度）People's Daily《 人民日报 》20 June 2019, p18

57 Political Report delivered by Jiang Zemin to the 14th Congress of the CPC, People's Daily, 21 October 1992 1.

58 Li Buyun, "Certain Questions Concerning the Relationship between Party policies and state laws", (1984) Jurisprudence Quarterly 《法学季刊》3 as quoted in Keith R, 'Chinese Politics and the New Theory of "Rule of Law"' (1991) 125 The China Quarterly 109, 114

59 Stanley B. Lubman at 384.

60 See e.g. the choice of means for the amendment of the Urban Custody and Repatriation Rules discussed in He Xin, 'The Party's Leadership as a Living Constitution in China' (2012) 42 HKLJ 73 at 81-82

However, the idea that law and state rules form a continuum persisted long after 1978. Peng Zhen, the inaugural head of what became the CPC's Central Political and Legal Affairs Commission, Chairman of the NPC, and co-architect of China's post 1978 legal reforms described law as 'the legalisation and articulation of policy which has been proved correct in practice'.[61] Li Peng, also a Chairman of the NPC, later described law was the 'finalisation' of the Communist Party's line, principles and policies[62]'. By this account, law is just a stable way to express policy publicly. Writing some years later, Perry Keller's observed that

> the formal boundaries of positive law are only significant if there is also a practical distinction between norms that are within or without those boundaries. In China, it seems that there is often no difference in practice whether a norm is, for example, contained in a tertiary regulation or merely in a county government normative document.[63]

As Flora Sapio notes, the modern Chinese state engages in 'a massive use of administrative rules, which are slowly upgraded to legislation at the national legal, receiving the formal stamp of approval by law making bodies'.[64]

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61 Peng Zhen, On Political and Legal work of New China (Central Literature Publishing House, 1992) 298-299

62 Parliament Chief Distinguishes Western and Chinese Legal Supervision, Xinhua News 29 April 1998

63 Perry Keller at 748-749

64 Flora Sapio, Sovereign Power and the Law in China (Brill 2010) 248-249

China and Britain have contrasting views about the distinctiveness, autonomy, and supremacy of law. British constitutional theorists are initially oblivious to government rules, then indifferent to them, then hesitant about them, then emphatic about their non-legal nature. In contrast, China received the traditional socialist view that the demands of the state are binding, regardless of form. That idea was moderated following opening up and reform, but it was never eradicated entirely. These different views about the distinctiveness of law as a means of social control – certainty in Britain and ambivalence in China – lead to different approaches to the relationship between law and government rules. For example, in the next section we will see that, in China, it can be very difficult indeed to say whether government rules are laws or not laws. This used to be a cosy certainty in the United Kingdom, though it is far less certain in 2018. The final two sections of this chapter will pan out from this question of distinctiveness to questions of supremacy and autonomy.

China

This section will highlight three important features of Chinese government rules. First, it will underline the constitutional protection granted to state rulemaking power in China. This rule reflects the attitude towards the will of the state set out in the previous section. It arguably performs a similar role to the constitutional protection granted to certain sorts of political rules in the United Kingdom. Second, the section shows how the integrity of the rule is undermined by the arbitrary way in which different sorts of Chinese government rule are treated and further undermined by the lack of definition given to those rules. Finally, it addresses recent changes to the NPC's functions of constitutional review.

As we saw in Chapter Two, the UK constitution distinguishes statutes from other sorts of state rules, including laws. The lawfulness of a statute is not a justiciable question in Britain.[65] In contrast, all other sorts of state rules are justiciable in principle. This includes primary legislation[66] and delegated legislation, which are law, and government policy rules, which probably are not.

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65 But see R (Jackson) v Attorney General [2005] UKHL 56, [2006] 1 AC 262 House of Lords

66 AXA General Insurance v HM Advocate [2011] UKSC 46, [2012] 1 AC 868 Supreme Court; Bancoult

In the year 2000, China's NPC enacted the Legislation Law. This, apparently unique, legislation regulates state rulemaking. Articles 87 to 91 establish a hierarchy of sources, beginning with the Constitution, then primary legislation, then administrative regulations, then local regulations[67], and finally government rules or *guizhang* (规章). Keller classifies these rules as primary, secondary and tertiary legislation. National laws are primary. National administrative regulations are secondary. Local administrative regulations are tertiary. Subject to certain qualifications that we will consider in due course, courts must apply (依据) primary and secondary legislation and they may refer to (参照) tertiary rules. In turn, we can distinguish between inherent legislative power (职权立法), which is exercised by virtue of the Constitution or an organic law and delegated legislative power (授权立法) which is conferred upon a law-making body by a body with inherent legislation power.[68]

Courts generally cannot inquire into the constitutionality of state rulemaking power. Chinese administrative law draws a doctrinal distinction between making rules and applying them. This idea superficially resembles the distinction in English public law between policy and operations. In *Rowling v. Takaro*, the Privy Council defined the

67 For our purposes the differences between local regulations, regional autonomous regulations and specific regulations are not important.

68 Peter Howard Corne, 'Creation and Application of Law in the PRC' (2003) 50 The American Journal of Comparative Law 369

distinction between policy questions, which are not justiciable, and operational questions, which are, in a circular fashion. It said the distinction 'is expressive of the need to exclude altogether those cases in which the decision… is unsuitable for judicial resolution.'[69] For this reason, in *Stovin v. Wise*, Lord Hoffmann described it as 'an inadequate tool with which to discover whether it is appropriate to impose a duty of care or not.'[70] In other words, it is a distinction that can be easier to imagine than to apply.

As a matter of doctrine, rulemaking is an 'abstract administrative act' (抽象行政行为). Abstract administrative acts involve 'the formulation of general rules and policies applicable to the general public'.[71] Formally speaking, the power to oversee and regulate rulemaking is allocated to the NPC. Applying rules is a concrete administrative act, (具体行政行为). Examples of justiciable administrative acts set out in Article 12 of the Administrative Procedure Law (APL) include detaining people, fining them, rewarding them, appointing them and permitting them to do things. If a local Health Bureau sets out rules that regulate its grant of permits to run a restaurant, the decision to grant a permit is concrete, but making rules that govern that discretion is abstract.

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69 Wallace Edward Rowling v Takaro Properties Ltd [1988] AC 473 (Privy Council) at 501 (Lord Keith)

70 Stovin v Wise and Norfolk Council [1996] AC 923 (House of Lords) at 951

71 Chen Jianfu, Chinese Law Context and Transformation (Martinus Nijhoff 2008); Jiang Bixin, Review of Administrative Decisions of Government by Chinese Courts (Unpublished Paper on File with Author)

The distinction between concrete and abstract administrative acts used to be reflected explicitly in the APL. The 2014 revision of the APL removed the reference to concrete or specific administrative acts, and now merely refers to 'administrative acts'. However, the distinction has proven to be stubborn. Article 13 (2) of the law, as amended, still provides that Courts should deny leave to review administrative actions concerning 'administrative rules or regulations, or decisions and orders with general binding force issued by administrative organs'. Article 1 of the Supreme People's Court's Explanation of the statute adds that the court should also deny leave to review 'administrative guidance that is not coercive'.[72] It remains broadly true that Chinese courts cannot challenge the manner in which rule-makers make rules. In contrast to Britain, where a line in the sand is drawn as between statutes and other sorts of state rules, in China, the line is drawn between *formally recognised* state rules, which are not justiciable, and a subordinate category of *unrecognised* state rules, which are.

In his Explanation of the Legislation Law, Li Buyun asked

> What is the definition of 'law' … There are two opposing arguments at present. One does not regard government rules… made by commissions and ministries of the State Council and local governments at the provincial level and below as 'law' because they are not stipulated by state power

72 Supreme People's Court, Explanations of Several Issues Concerning the Implementation of the Administrative Litigation Law of 8 March 2000

> organs… But the other considers that these rules are law in some broad sense and belong within the concept of delegated legislation.[73]

Article 90 of the Constitution purports to grant general rulemaking authority to ministries and commissions under the State Council.[74] In 1987, the State Council set out procedural rules governing secondary legislation. Secondary legislation must be considered by the Standing Committee of the State Council or by the Premier personally, among other requirements. Because documents issued in accordance with these rules were, by definition, secondary legislation, the State Council helped to clarify the distinction between secondary legislation, and other sorts of government rules, including tertiary legislation.

The Legislation Law required the State Council to publish its procedural requirements for tertiary rules, and provided that they should take account of the legal requirements for primary and secondary legislation as set out in that Law. On 16 November 2002, the State Council published these requirements. These included the Regulations Governing the Procedures for the Making of Government Rules (规章,

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73 Li Buyun, 'Explanation on the Proposed Law on Law-Making' in Jan Michiel Otto (ed), Law-Making in the People's Republic of China (Kluwer Law International 2000) at 158

74 Under some circumstances, the NPC and NPCSC can also delegate rulemaking power to the State Council.

guizhang).[75] *Guizhang* are sort of government rule, subject to certain formal requirements. For example, the power to issue *guizhang* must be exercised in accordance with the law and within jurisdiction.[76] *Guizhang* are not usually considered to be legal rules, but as Jianfu Chen notes, in practice, they are 'perhaps more important than the state laws, as in most areas of law the principal laws and administrative regulations leave a great deal of room for implementation by *guizhang*'.[77]

The 2014 revision of the APL deleted an article that demanded that questions related to *guizhang* be referred to the State Council for interpretation and resolution. Article 63(3) of the Administrative Procedure Law, as amended, provides that, in trying administrative cases, a people's court 'may refer to *guizhang*'. However, the English and Chinese texts do not agree. The Chinese text (人民法院审理行政案件，参照规章) does not include an auxiliary verb – it does not tell us whether the court *may* refer to *guizhang*, or whether it *must* refer. As such, it does not establish whether *guizhang* are justiciable, or merely cognisable. Like the rules that receive foreign laws in English law, the verb *canzhao* gives limited guidance to a court as to the stance it should adopt. It leaves open the question of whether *guizhang* are binding law.

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75 I will use the pinyin to refer to these rules, as the official translation 'government rules' is unhelpfully vague.

76 Art. 10 of the Organic Law of the State Council of 1982. As we will see it is hard to challenge notionally unlawful exercises of rulemaking power in court

77 Chen Jianfu at 346

There is some debate about whether courts can review unlawful *guizhang: guizhang* that are inconsistent with superior laws or administrative regulations. It seems that *guizhang*, like other formal government rules, remain non-justiciable. For example, while Art. 7 of the Administrative Reconsideration Law 1999 empowers a litigant to examine the legality of what it describes as 'provisions' (规定) it does not do the same for *guizhang*. Art.53 of the new APL enables litigants to challenge the lawfulness of other sorts of government rules, but it does not include *guizhang* (不含规章).

However, new Art.53 also introduces a new category of justiciable state rules. Recall the hierarchy of sources above. From the point of view of the legal order, state rules are stratified in a three-tier hierarchy. *Guizhang* lie at the bottom of the third tier. But even though *guizhang* are formally translated as 'government rules', not all government rules are 'government rules'. In fact, *guizhang* are a *subset* of government rules. Formulated government rules that are not *guizhang* are known as 'normative documents'.

Normative documents play an important role in Chinese bureaucratic and political life.[78] However, Chinese law does not supply an adequate definition of 'normative

78 See e.g. Wu Guoguang, '"Documentary Politics": Hypotheses, Process and Case Studies' in Carol Lee Hamrin and Suisheng Zhao (eds), Decision-making in Deng's China : Perspectives from Insiders (M.E. Sharpe 1995) Michael Schoenhals, Doing Things with Words in Chinese Politics : Five Studies (University of California Press 1992) Chapter 1.

document'.[79] Even Chapter V of the Oversight Law of 2006[80], which deals explicitly with the review of Normative Documents, does not tell us what a normative document is. Some legal documents and secondary literature use normative document in a broad sense which includes laws, regulations, *guizhang* and other forms of executive and party regulation. Others use it in a narrow sense which explicitly excludes laws regulations and *guizhang*.[81] Broadly speaking, central documents tend to use the narrower sense. A recent pamphlet published by the Legislative Affairs Office of the State Council defined normative documents as

> those documents that are not *guizhang* but are issued by administrative authorities in accordance with law, administrative regulations and *guizhang*, and these documents will have general binding force that affect the rights

79 There was a definition of 'official document' [公文] in the Procedures for Handling Official Documents in the Administrative Departments of the Government of 2001, but the regulation has expired and, in any case, normative and public documents are separate categories.

80 2006 年各级人民代表大会常务委员会监督法

81 See e.g. Article 10 of the Administrative Compulsion Law of 2011 '法律、 法规以外的其他规范性文件不得设定行政强制措施' . See also the examples from Beijing, Shanghai and Tianjian in Huang Jinrong 黄金荣, 'On the Legal Limitations and Effects of Normative Documents' 规范性文件"的法律界定及其效力' (2014) 7 Legal Science 法学

and duties of citizens, legal persons and other organisations and can be applied repeatedly within a certain period of time.[82]

This narrow definition suggests that normative documents are subordinate to *guizhang*, because they ought to be 'in accordance with… *guizhang*'. However, it does not help us to tell which is which. *Guizhang* are also supposed to be issued 'in accordance with the law and administrative regulations' they have general binding force over time, and they can affect the right and duties of legal persons. Normative documents are not enacted by bodies with inherent or delegated authority, nor according to the procedure in the Legislation Law. 'They [are] otherwise indistinguishable from the administrative process itself'.[83]

The distinction between *guizhang* and normative documents is important because *guizhang* are non-justiciable, but Chinese courts can now challenge the lawfulness of normative documents. The new Art.53 provides that 'when … a normative document (规范性文件) … which forms the basis for an administrative act, is unlawful, [a litigant] can request the court to review the normative document when taking legal action against the

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82 Compare e.g. the State Council General Office Notice Regarding the Formulation of Guizhang and Normative Documents outside the Norm-making Department of 2006 <国务院办公厅关于进一步规范部门涉外规章和规范性文件制定工作的 通知> with "One Hundred Questions and Answers in Relation to Shanghai Provisions on the Making and Filing for Record of Normative Documents', as cited in Chen Jianfu, Chinese Law: Context and Transformation, p255, fn 110.

83 Perry Keller 724

administrative act'. This calls the distinction between abstract and concrete administrative acts into question.

When *neither* normative documents nor *guizhang* were justiciable it was difficult and perhaps pointless to distinguish between them. We might have advanced different reasons for their non-justiciability. Perhaps *guizhang* were not justiciable on the ground that, by questioning their legality, the court was thereby questioning the rule-making authority of the State. In contrast, perhaps normative documents were not justiciable because they were indistinguishable from administration, because they were essentially domestic, because they were not supposed to engage any rights or duties. However, following the wording of the new Art. 53, *informal* normative documents are now justiciable. This adds a hierarchy of effect to the hierarchy of form and function above. Courts must apply primary and secondary legislation and they may refer to *guizhang*. They may not question the legality of either.

However, there is now a new rung on the ladder, below tertiary rules. The 2014 revision gives limited guidance to a court on the stance it ought to take towards tertiary rules. The Chinese government cannot make primary legislation, but it can make delegated legislation by decree, and can also make *guizhang*. In spite of their formal differences, neither of these sorts of rules are justiciable. However, the government can also make normative documents which are even less formal. Jianfu Chen suggests that, if an institution lacks lawful authority to issue primary, secondary or tertiary rules, then its

rules can only be normative documents. But as we shall see in Chapter Four, there are further sorts of party-state rules which transcend this hierarchy entirely.

The logic of the distinction between abstract and concrete administrative acts reflects the fact that responsibility for reviewing laws and abstract administrative acts is allocated to the NPC. For example, Articles 97 and 99 of the Legislation Law do this in respect of higher level executive regulations and ordinances. As we discussed in Chapter Two, until now, this is not a function that the NPC has performed effectively. However, In the last few months, plans have been brought forward for the NPC to undertake more rigorous constitutional review.

Constitutional review by the NPC relies on two main processes: recording and review and review of constitutionality. Under the recording and review process, executive regulations and other government laws are tabled before the NPC Standing Committee (NPCSC). The Legislative Affairs Commission of the NPC then decides whether the legislation is compliant with the Constitution and national law. Until recently this process has been largely opaque, however, for the first time the Legislative Affairs committee published a report on its work in December 2017. The report suggests that the committee reviews a wide range of laws and regulations and has done so for some

time review. However, crucially, the NPCSC has never annulled unlawful legislation.[84] Moreover, normative documents are not currently recorded or reviewed.

Since then, the NPC has set out further plans for a new variety of review, named Constitutional Review (合宪性审查). In March 2018, the Law Committee of the NPC was renamed the Constitution and Law Committee and in June 2018, a draft decision was placed before the Standing Committee of the NPC which would enable the committee to perform new duties 'such as promoting the implementation and interpretation of the Constitution, carrying out constitutional examination, strengthening supervision of its enforcement, and coordinating with Constitution publicity'.[85] Constitutional Review would embrace normative documents, and even intra-party documents, and some commentators are optimistic that it will involve a more searching sort of review, consistent with the formal constitutional role allocated to the NPC. However, at the time of writing, it is too early to say with confidence how much power the new committee will wield.

The rule that litigants cannot challenge the validity of government rules insulates formal government rules from judicial review. This creates a domain of arbitrary power,

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84 Susan Finder discusses this anomaly at https://npcobserver.com/2018/01/19/recording-review-an-introduction-to-constitutional-review-with-chinese-characteristics/

85 The draft decision has not yet been published. The Xinhua account is available at: http://www.xinhuanet.com/english/2018-06/19/c_137265684.htm

but at the same time, it avoids arbitrary line-drawing as between the 'high policy' of taxation, which is non-justiciable and the 'low policy' of social security, which is. The Chinese rules is less like the rule that high policy is non-justiciable and more like the rule that a court may not question the validity of a statute, because statutory rules are a paramount source of law. In China, all formal rules made by the state are matters of high policy and the state interprets these rules with conclusive authority.[86]

The Chinese rules attempt to establish a hierarchy that would make a meaningful distinction between laws and other sorts of lesser government rules. This hierarchy is that it is not based on a simplistic, institutional division between law made by the courts, law made by the legislature and rules made by the government. Instead, the state makes rules. However, the lack of definition given to normative documents, in particular, still less party documents and informal rules that are 'indistinguishable from the administrative process itself' undermines the coherence of this system.

86 See e.g. Tianjin Yuyou Enterprise Co v. Tianjin Economic and Technological Development Area Administrative Committee (Supreme People's Court, July 3, 1998)

Britain

In this section, we will put pressure on the procedural distinction between government policy rules, delegated legislation and state primary legislation. It may be wiser to think about these rules in terms of their effects, whether on the citizen, in court or in government. As we will see, over the last twenty years, there has been a move away from the view that government rules are political rules that would need to be placed in evidence. There has been a corresponding move towards the view that judges can deal with government rules as if they were legal rules – they can take judicial notice of them, and can give them a true construction. In the final part of this section, we will compare the effects of this change with the Chinese material addressed in the previous section.

We can no longer say law is law and policy is policy. Across a range of different disciplines, policy rules have become increasingly law-like over the last twenty years. Policy rules in areas like tax, immigration, planning, prisons and policing are increasingly embedded in general administrative law.[87] There are many different sorts of British government rules, and courts treat each sort differently - there is no suggestion that a single rule governs the way courts treat policy. Nevertheless, the general trend is clear.

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87 Immigration Act 1971 ss 1(4)(5), 3(2), Town and Country Planning Act 1990 PI to III and XII passim Police and Criminal Evidence Act 1984 Part VI

It used to be arguable in English law that a minister might not be *permitted* to have a policy under certain circumstances.[88] English administrative law includes a doctrine that forbids the government to fetter its discretion. If the exercise of a power demands a wide choice of means then it could be unlawful to narrow that choice of means. For example, in *Tilley*, Templeman LJ speculates that even a 'policy resolution hedged around with exceptions' might be an unlawful way for a local authority to assess whether it ought to provide housing assistance to a child.

However, it may now be *generally* unlawful for the government to exercise its discretion without recourse to a policy. In *Asif Khan*, Dunn LJ held that it is unreasonable for the Crown to depart from self-imposed rules, without justification.[89] In *Lumba*, Lord Dyson concluded '[t]he individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute'.[90] In *Pankina*, Sedley LJ said, 'without policies to guide the exercise of particular powers and discretions, modern departments of state would be repeatedly challenged at law for inconsistency or arbitrariness'.[91]

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88 Note that the point is treated as 'common ground' as between the parties in H. Lavender and Son v Minister of Housing and Local Government [1970] 1 WLR 1231 QBD at 1238.

89 R (Khan) v Secretary of State for the Home Department [1984] 1 WLR 1337 Court of Appeal

90 R (Lumba) v Secretary of State for the Home Department at [35]

91 Pankina v Secretary of State for the Home Department at [15]

A policy will always be a relevant factor. When a public body makes policy rules, it has a general duty to take the policy into account. This duty can be imposed with varying intensity according to context. In some cases, it amounts to a duty to adhere to the policy.[92] At the opposite extreme, in some cases, the public authority can give the policy no weight when making a decision, provided the policy is taken into account.[93] If the public authority wishes to depart from the policy, its decision must be rational[94] and if it wishes to change the policy then it must make proper provision for people who are affected by the change.[95] And if a public authority makes a policy, or changes a policy, then it may be under a duty to publish to policy, or the change.

In *Pankina*, Sedley LJ said

> by a combination of legislative recognition and executive practice, the [immigration] rules … have ceased to be policy and have acquired a status akin to that of law. Because they derive from no empowering primary legislation, they cannot be subordinate legislation or therefore open to conventional ultra vires challenges. But as an exercise of public power, which they undoubtedly are, they can be no more immune to challenge for

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92 R (Kambadzi) v Secretary of State for the Home Department [2011] UKSC 23, [2011] 1 WLR 1299 Supreme Court at [36], R (Davies) v Revenue and Customs Commissioners [2011] UKSC 47, [2011] 1 WLR 2625 at [27] and [70]

93 R (Girling) The Parole Board at [28]

94 R. (Gangadeen) v Secretary of State for the Home Department [1998] Imm AR 106 Court of Appeal (Civil Division) at 111

95 R (Coughlan) v North Devon Health Authority, [2001] QB 213 Court of Appeal at [67], R (Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755 Court of Appeal at [28]

> abuse of power or for violation of human rights than any other exercise of the prerogative power, including prerogative Orders in Council.[96]

If a rule-making body owes its existence to statute then a court may take a juridical approach to its rules, even if the rulemaking power itself is not explicitly grounded in a statute. The Inland Revenue Commissioners are a statutory body created by the Inland Revenue Regulation Act 1890. They are not an emanation of the Crown which is the 'owner of the consolidated fund and able to deal with its property like any other owner.[97]' The power of the Commissioners to 'formulate policy in the interstices of the tax legislation' including Guidance, is implicitly derived from the statutory duty of Care and Management under s(1) of the Taxes Management Act of 1970.[98] In spite of the statutory connection, courts approach tax guidance as a species of non-statutory government rulemaking.

In Chapter Two, we considered several ways to treat non-legal rules in a law-like way. Judges are able to take judicial notice of legal rules, while non-legal rules have to be plead in evidence. Non-legal rules require expert elucidation, while a judge can interpret a legal rule of his own motion. Sir Henry Wade, former Cabinet Secretary, testified on

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96 Pankina v Secretary of State for the Home Department at [17]

97 Lord Hoffmann in R (Wilkinson) v Inland Revenue Commissioners [2005] UKHL 30, [2005] 1 WLR 1718 House of Lords at [20].

98 Lord Diplock in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 House of Lords at 636, R (Wilkinson) v Inland Revenue Commissioners at [21]

the meaning of the convention of Cabinet Secrecy in *AG v. Jonathan Cape*.[99] In *Evans v. Attorney General*[100], Professor Adam Tomkins and Professor Rodney Brazier did not provide legal advice. They took the stand.

Government policy rules used to be dealt with in this way. In *R (Ozminnos) v Secretary of State for the Home Department*[101], Auld J held that the courts should adopt the Secretary of State's own interpretation of her immigration policies unless it was unreasonable. This approach was endorsed by Hirst LJ for the Court of Appeal in *Gangadeen*. However, over the last ten years, this approach has changed markedly. First, judges can, and in some cases, must, take notice of government rules, regardless of whether they have been lead in evidence by one of the parties. It is possible, for example, to review an immigration decision of the Upper Tribunal for error of law, on the ground that the tribunal failed to take account of the correct standard. It is not possible to displace a decision on the meaning of a constitutional convention, or a rule of German law, in this way.

Second, judges are expected to provide a true construction of the meaning of the rules. The construction of government policy is considered to be a 'juridical act'.[102] Lord

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99 Attorney General v. Jonathan Cape Ltd [1976] QB 752 Queen's Bench Division

100 R (Evans) v Attorney General [2015] UKSC 21, [2015] AC 1787 Supreme Court

101 [1994] Imm AR 287

102 R (Reprotech) v East Sussex County Council [2002] UKHL 8, [2003] 1 WLR 348 at [27]

Bingham explained this in *Save our Railways*: 'the court accordingly cannot, in case of dispute, abdicate its responsibility to give the document its proper meaning. It means what it means, not what anyone — … Secretary of State or member of the public — would like it to mean'.[103] In other words, the courts approach government rules in the way it might approach a rule of international law, rather than a rule of foreign law.[104]

This approach has been followed in recent Supreme Court cases in planning, detention and immigration. In *Mandalia*, Lord Wilson said 'the search is for the proper interpretation of the process instruction, no more and no less. Indeed, in that regard it is now clear that its interpretation is a matter of law which the court must therefore decide for itself'.[105] In *Kambadzi*, Lord Hope said 'it is for the courts, not the Secretary of State, to say what the effect of the statements in the manual actually is. But there is a substantial body of authority to the expect that under domestic public law the Secretary of State is generally obliged to follow his published… policy'[106] The shift is not confined to the immigration rules. In the planning case of *Tesco v. Dundee City Council*, Lord Reed concludes

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103 R (Save our Railways) v The Director of Passenger Rail Franchising 1995 WL 1081949, [1996] CLC 589 Court of Appeal (Civil Division) at 6

104 See Michael Fordham and Harry Woolf 16.4.4. The approach recalls Lords Steyn's speech in R. (Adan) v Secretary of State for the Home Department [2001] 2 AC 477

105 Mandalia v Secretary of State for the Home Department [2015] UKSC 59, [2015] 1 WLR 4546 Supreme Court at [31] (Lord Wilson)

106 R (Kambadzi) v Secretary of State for the Home Department at [36] (Lord Hope)

that government rule-makers 'do not live in the world of Humpty Dumpty: they cannot make the [rules] mean whatever they would like [them] to mean'.[107]

Furthermore, as is suggested in these extracts, the government is now generally obliged to promulgate and deal with policy rules in a law-like way, consistent with the general requirements of the rule of law. There is a general duty for the government to publish its policies. In *Lumba*, Lord Dyson describes this principle in generous and unqualified terms. If his statement of the rule is correct, the it is obvious that there are a great many policies which are not published – UK nuclear doctrine being an obvious example. It may not even be true to say that there is a general duty not to have regard to a secret policy. Perhaps the UK publicly refuses to pay ransoms, but privately instructs officials to do so clandestinely. If it were to do so, then would this be unlawful under *Lumba*? Again, the context appears to affect the legal position.

We might argue that duties like these proceed from the state's general legal duty to deal plainly with the public according to the 'principle of good administration'.[108] But the state has to deal more plainly in some circumstances than others – what matters is

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107 Tesco Stores Limited v Dundee City Council [2012] UKSC 13 The reference is to Lord Atkin's argument in Liversidge v. Sir John Anderson [1942] AC 206 House of Lords.

108 'The principle of good administration prima facie requires adherence by public authorities to their promises' R (Begbie) v Secretary of State for Education and Employment [2000] 1 WLR 1115 Court of Appeal at 1123 (Peter Gibson J)

what is at stake. The more 'coercive' the government rule, the more likely that the court will deal with it in a law-like way. There are certainly sectors in which the government has been expected to provide guidance on the manner in which it will exercise discretions that do not necessarily engage rights, including the administration of justice[109] and the allocation of resources.[110]

In *Munjaz*, Lord Bingham had to decide whether policy guidance on seclusion under the Mental Health Act 1983 was sufficiently certain to meet the requirements of the Convention. He held that

> The requirement that any interference with the right guaranteed by [the Convention] be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied. [These] rules are accessible, foreseeable and predictable. It cannot be said, in my opinion, that they are not in accordance with or prescribed by law.[111]

In other words, the requirement that the values that the Convention protects must be 'in accordance with law' refers to law in its 'substantive sense, not its formal one'.[112] As Lord Sumption puts the point "Law' for this purpose has the enlarged meaning

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109 R (Venables) v Secretary of State for the Home Department [1998] AC 407 House of Lords at 432.

110 R (A) v North West Lancashire Health Authority [2000] 1 WLR 977 Court of Appeal at 991.

111 R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58, [2006] 2 AC 148 at [34]

112 Kafkaris v Cyprus (2008) 25 BHRC 591, para 139. In R (Purdy) v Director of Public Prosecutions [2009] UKHL 45, [2010] 1 AC 345 House of Lords, Lord Hope relied on this provision to say that the Code for

which… extends to any body of rules which is enforceable, sufficiently specific, and operates within a framework of law, including public law.'[113] When cases concerned with policy rules speak of the need for 'legal certainty' they do not mean the legal rules need to be certain.[114] Perhaps all state rules must be as certain as legal rules.[115] This is, of course, an aspect of the rule of law. We will return to this point in the next section of this chapter.

Looking back at the last two sections, we can see an enormous amplification of government rulemaking both in Britain and in China. In *Alvi*, Lord Hope lamented 'the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice and policy change'. He noted that 'the first versions of the rules were 17 and 20 pages long... There have been over 90 statements of change since [1994]… The current consolidated version which is available on line from the UKBA website extends to 488 pages…'[116]

We might be inclined to say, with Weber, that Chinese law is extensively bureaucratised, in contrast with British government rules, which are extensively juridified.

Crown Prosecutors, a set of non-legal policy instructions, was a 'law' in this sense. Compare Recommendation No. R (80) 2 of the Committee of Ministers (11 March 1980)

113 Al-Waheed v. Ministry of Defence [2017] UKSC 2 at [106]

114 Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 Court of Appeal at [54]

115 United Policyholders 117,118

116 R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33, 2012 1 WLR 2208 at [11]

At first glance, these might seem like contrasting problems. Bureaucratisation might appear to reflect a *lack* of rules, while juridification reflects their overwhelming proliferation. This contrast between bureaucracy and law only holds true if we see bureaucracy as a sort of discretion. However, Lord Hope gives us reason to doubt this conclusion. John Gardner describes juridification not as the proliferation of law but as 'the proliferation of regulation by law and through law, both the growing volume of such regulation and the way in which it is insinuated into ever more corners of our lives'.[117]

Both in Britain and in China, it is increasingly difficult to distinguish government rules from legal rules, whether they are *guizhang*, normative documents, or planning rules. This comes with a diminution of government discretion. As Lord Bingham said in *Munjaz*, to require policy rules to correspond to a single juridical standard 'deprives local managers of the judgmental authority they were given and intended to exercise, and so has a strong (and in my opinion impermissible) centralising effect.[118]'

This diminution in discretion might produce good outcomes – it might promote liberty, for example. But it relies first on the ability of the courts effectively to police the bewildering array of government rules, and second on the claim that legal rules are distinctive. If government rules of all stripes are treated in a similar fashion, the distinction

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117 John Gardner, 'The Twilight of Legality' (University of Oxford Legal Research Paper Series)

118 R (Munjaz) v Mersey Care NHS Trust at 193

between the ordinary law and executive regulation is less secure. The argument here is that Orders in Council, delegated legislation and planning rules are converging, as are *guizhang* and normative documents. That leaves courts with a much broader waterfront of rules to police.

It might therefore be clearer to analyse all government rules in terms of primary, secondary and tertiary rulemaking. Primary legislation is generally not justiciable, both in Britain and in China. However, when primary legislation is made by the government, for example by an Order in Council it can be subject to judicial review in the UK. We might therefore begin by thinking of all rules made by the government as secondary rules. Moreover, if we reject the unhelpful distinction between law and policy and instead think of government rules as different varieties of secondary and tertiary state rulemaking, then the ways courts distinguish law and government rules will be plainer to see, and easier to explain. The next section looks at these tertiary rules in more detail.

SHOULD STATE RULES BE LEGAL RULES?

We need to confront an obvious objection to the conclusion in the previous section. Perhaps we cannot ignore the distinction between laws and government rules so readily. Perhaps the type of rule is crucial. Bureaucratisation reflects the colonisation of law by policy, while juridification is the colonisation of policy by law. Bureaucratisation offends the rule of law. Juridification *is* the rule of law. As Hewart said,

> The passage of skeletal legislation requires gaps to be filled by executive regulation' and this defeats 'the operation of the ordinary law in the ordinary courts, the separation of powers, the protections wrought by the independence of the judiciary and, ultimately, Parliamentary sovereignty itself.[119]

In this section, we consider three separate claims that the rule of law makes about policy rules. These are connected claims, and they are occasionally confused. The point of this section is to show that they are separate. The next section of this chapter will illustrate why these three central propositions ought to be treated separately. In particular, our commitment to the supremacy of law, and to the principle that there should be no 'punishment' without law, need not entail the conclusion that all state action should be legal action.

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119 Gordon Hewart at 17

The first, and the least demanding, claim about law and state rules is that law is supreme, that other sorts of rules yield to law. Non-legal rules cannot change the content of legal rights and duties. John Griffiths describes this idea as 'legal centralism':

> According to … the ideology of legal centralism, law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.[120]

The second is the principle there can be no punishment without law. Friedrich Hayek, for example, believed the rule of law fosters individual liberty and opaque, centrally-administered rules are the antithesis of that sort of liberty. He said, 'government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge'.[121] In Hayek's account the demands of the rule of law apply to 'all [government] actions' and to 'coercive powers'. As we have seen, not all 'government actions' are 'coercive powers'.

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120 John Griffiths, 'What is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1 at 3

121 Friedrich A. von Hayek, The Road to Serfdom (Routledge 2014) (emphasis added) Chapter 6 1.

Dicey's vision of the rule of law demands that the citizen cannot 'be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.[122] The supremacy of law is a broader and more demanding idea than this. An adherent of a religion that permits polygamy, in a territory which prohibits it, will not be able to marry two people. The legal rule is supreme even though the rule permitting polygamy is, at least on its face, not a coercive rule.

Dicey is much more careful in his definition of law than his definition of punishment, or the rule of law. Imprisonment and expropriation – suffering 'in body or in goods' – are obvious and undemanding examples of punishment They deprive people of things to which they would be entitled in (almost) any jurisdiction. Duty imposing rules like these should unambiguously be subject to the demands of the rule of law.[123] But what about power-conferring rules - rules that tells officials when to recognise a marriage, or to issue planning permission, or to recognise someone as qualified to practice medicine? The state can exploit hope as well as entitlement and our hopes that we will receive a benefit can be 'confident or faint or anything between'.[124]

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122 A. V. Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) 110

123 On the distinction see H. L. A. Hart, The Concept of Law (2nd edn, Clarendon Press 1994)

124 Lord Megarry in McInnes v Onslow-Fane [1978] 1 WLR 1520 (Chancery Division), 1530

We can evade the question in two ways, either by watering down what it means to restrict a right, or by defining rights very broadly. But some 'effects' on 'rights' can be very oblique indeed. Imagine, for example, a Foreign Office policy that defines when it would be appropriate to apologise on behalf of the UK for historical wrongs.[125] It is hard to see rules like these as coercive. We will return to the idea of coercive rules and rights in the next section, after we consider the final claim, that the state can *only* act through legal rules. In the next few paragraphs, we compare states where all state power requires an affirmative legal source with states where this is less obviously so.

Some constitutional orders give the government no inherent rulemaking power. The Tenth Amendment says, 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'. In *McCulloch v. Maryland*, John Marshall said 'The government is acknowledged by all to be one of enumerated powers… But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described.'[126]

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125 I am grateful to Nick Barber for this example. See e.g. https://www.theguardian.com/world/2018/may/10/britain-apologises-for-appalling-treatment-of-abdel-hakim-belhaj

126 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Supreme Court of the United States) at 405

By this account, all government power, is derived, by implication from Congressional grants.[127]

As we saw in Chapter Two, Hans Kelsen argues that the state and its legal order are one and the same thing. Every act of the state must be clothed in legal form in order to be recognizable as an act of the state. This is not the same as the claim that law is supreme. In a state where law is supreme, when law and other state rules conflict law wins out, but this clearly does not mean all state rules are legal rules, any more than the supremacy of law means religious or foreign legal rules are legal rules. Unless we take the view that *all* state rules punish people, then this final claim is also separate to the principle that there can be no punishment without law. If all state rules punish people, in the end, then all state rules have to be legal rules, or else there would be punishment without law.

We can treat this as a *descriptive* claim about the personality of the state – the claim that without legal rules there can be no state, just people doing things. *Entick v. Carrington*[128] is emblematic of this view. The search in *Entick* was performed under the orders of the Home Secretary, but as far as the law was concerned, it was just two trespassers trespassing. There is a certain wilful blindness in denying that the state is acting

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127 See e.g. Cuozzo Speed Technologies v. Lee 136 S.Ct. 2131 (2016) (Supreme Court of the United States) 'Congress's grant of rulemaking authority'.

128 Entick v. Carrington 2 Wilson, K B 275, 95 ER 807 King's Bench Division

in this situation.[129] In *Pinochet*, the House of Lords was right to reject the circular argument that the state could not 'commit' torture, because states are forbidden to torture. But Kelsen's belief in the unity of state and law, and the unity of municipal and international law, would commit him to exactly this position.

For this reason, it may be better to treat the legalist claim as a *normative* claim: that state action *ought* to require an affirmative grant of authority to act, grounded in the constitution. This could be because state legitimacy is grounded in rational legal legitimacy – that the legitimate state is a *rechtsstaat*. We could argue, for example, that the state can *only* have legal rights incidental to the duties that it owes to its members.[130] But these are more modest arguments to the argument that *only* lawful official action can be state action. They concede that there might be relations between the citizen and the state other than legal relations - that there might be an imperfect overlap between the law and the state.[131]

Claims about what ought to count as law map the outskirts of each legal order and they are distinctive in different legal systems. They force us to distinguish between a narrow meaning of the state, which refers only to legal rules, and a larger meaning of the state that also includes non-legal rules. We can also present the relationship between law and state rules as a spectrum. A broad view of what counts as law lies at one end of the

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129 Compare Malone v United Kingdom (1985) 7 EHRR 14 European Court of Human Rights

130 See Laws LJ in R. (Fewings) v Somerset CC [1995] 1 All ER 513 Queen's Bench Division

131 Neil MacCormick

spectrum. On this view, we might argue that, by nature, all coercive state norms are laws, or ought to be laws. On the other hand, we can take a narrow view of what counts as law. In the first part of this chapter we considered law's formal legitimacy, its supremacy, its generality, and its validity. These features may persuade us that law is a distinctive way to coerce[132]

In the next section, we consider these claims in the context of the two constitutional orders. In China, the written constitution suggests that government rulemaking requires an explicit constitutional grant, but the unwritten constitution tells us otherwise. In contrast, in the UK, the claim that government rules need an affirmative legal source is a dogmatic claim, with little constitutional pedigree and almost no doctrinal authority. However, it is a claim that is now regularly repeated, in part because it is seen to be similar to the rule of law, the principle that there can be no punishment without law, and the rule that the law is supreme.

132 D. J. Galligan, Law in Modern Society (Oxford University Press, 2007)

China

As we have seen, China's 1982 Constitution establishes a notional hierarchy of rulemaking power. As Albert Chen observes 'it is possible to understand Chinese law as a hierarchical system of norms unified and ultimately legitimated by the provisions of the PRC Constitution and to distinguish legal norms from non-legal norms such as mere policy documents.'[133]

Article 58 of the Constitution provides that 'The National People's Congress and its Standing Committee exercise the legislative power of the State' and Art. 62 lists the powers of the plenary NPC. These include constitutional amendment, the amendment or enactment of 'basic law' (基本法律), laws (法律) and decisions (决定). Article 67 gives the NPC Standing Committee the power to make law and regulations (规定). Article 89 gives the State Council the power to adopt administrative measures (行政措施) and make administrative regulations (行政法规) and also to issue decisions and orders (决定和命令). Article 90 gives ministries and commissions the power to make administrative rules (行政规章) within the jurisdiction of their respective departments and in accordance with law. Article 100 provides that local people's congresses can adopt local regulations (地方

133 Albert H. Y. Chen, 125

法规), provided they do not conflict with the constitution or the law and Art 107 provides that Provincial Governments can issue decisions (决定) and orders (命令) within the scope of their powers.

The careful way in which state norms are stratified might lead us to believe that the constitution suggests a *comprehensive* basis for state rulemaking power. As we will see, this is a difficult position to maintain. Jianfu Chen argues

> [t]heoretically, the Chinese Constitution upholds a unitary system under which all state powers are vested with the NPC and the local people's congresses. The reality is not so straightforward… state law-making power is effectively exercised by a multi-level and multi-dimensional system of authorities.[134]

There are various forms of rulemaking power and they do not necessarily overlap.

First, explicitly-worded provisions that purport to grant exclusive law-making power are less exclusive that they might at first appear. For example, according to Article 22 of the 1954 Constitution, the National People's Congress was 'the sole organ exercising state law-making power'. Nevertheless, the State Council continued to issue administrative rules. These were collated in the Laws and Regulations of the PRC, in spite of the plain meaning of Art. 22.[135] The 1978 Constitution did not provide for the law-

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134 Chen Jianfu 230-231

135 Ibid 99

making power of Local People's Congresses and Governments. Nevertheless, Art. 6 and 27 of the Organic Law of Local People's Congresses and Local People's Governments of 1979 granted them this apparently extra-constitutional law-making power.

The present constitution, the Legislation Law and other relevant instruments makes similar compromises with rule makers that are not constitutionally empowered to make rules. For example, the Central Military Commission is notionally established by the Constitution, though we might prefer to say that it is 'recognised' as the institution predates the modern Chinese constitutions[136]. Neither the Constitution of the PRC, nor the Party Constitution grants rulemaking power to the CMC. [137] This lacuna prompted a debate in 2000 among the drafting committee of the Legislation Law of 2000, which was described by Li Buyun in his Explanation of the Law:

> Some experts disagree with placing the making of military regulations within the scope of the Law-making Law. Their reasons are that the Constitution does not authorize the Central Military Commission to make military regulations.... However, considering the nature of the Central Military Commission and its regulations within the nature of the PRC, and the fact that military organs have made nearly one-thousand military regulations, as well as the objective necessity of regulating the army by law,

136 Articles 93 and 94. The CMC has both State and Party incarnations.

137 Articles 23 and 24. Article 24 refers to the Commission's responsibility for Party and Political work in the Armed Forces.

> the Expert Draft confirms that military regulations fall within the conception of 'law'.[138]

Article 93 of the Legislation Law now provides that the CMC may make military regulations. We might be inclined to view this as a delegation of the rulemaking power of the National People's Congress. However, this requires a rather forced reading of the views of the drafting committee, especially their allusion to the 'nature of the CMC… within the nature of the PRC', an allusion to a larger constitutional order above and beyond the Constitution. It is clearer, simpler and more accurate to say China's written constitutions have never exhausted the sources of rulemaking power. The 1982 Constitution 'recognises the constitutional capacity of law-making of bodies that exercised law-making powers on a de facto basis'.[139]

The most important and obvious body of rules that transcend the Constitution and the Law on Legislation are, of course, Party rules. We will consider these rules in the next chapter. The CCP usually initiates political change by setting policy, not by making law. Even fundamental changes in the Constitution are debated in the Politburo, and prefigured in changes in Party doctrine. China's legal institutions do not lead the process of political and legal evolution. As Keller argues: '[a]ccording to orthodox legislative

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138 Li Buyun at 159

139 Chen Jianfu at 234

theory, primary legislation should only be used to consolidate these changes after the objectives of Party policy have been achieved'.[140]

In light of the range of different channels for rulemaking in China, we need to be careful when considering legal provisions that demand that rules take a given form. For example, Article 8 (v) of the Legislation Law provides that: 'Only national law may be enacted in respect of matters relating to… the deprivation of the political rights of a citizen, or compulsory measures and penalties involving restriction of personal freedom'. In China, as in Britain, if the state wishes to make rules that provide for detention, according to the Legislation Law, it must do so through primary legislation. For example, Article 7 of the Legislation Law repeats the distinction in the Constitution between basic laws and other laws. However, there is no concrete definition of basic law in either instruments or in any other legal source. The Constitution refers vaguely to 'criminal and civil matters, state organisation and other fundamental matters'. However, for example, the Civil Procedure Law of 1991 was enacted by the NPCSC, as was the Labour Law of 1994.

Art. 8 of the Legislation Law forbids the State Council to create 'crimes and criminal penalties' or other 'coercive measures' by decree.[141] Until recently, China's

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140 Perry Keller at 730

141 See also Administrative Penalty Law 1996, Art. 9

various administrative detention programmes were regulated in exactly this way.[142] There have been sporadic challenges to the legality and constitutionality of these programmes, and these challenges have occasionally been met with conciliation on the part of the authorities. For example, the abolition of the Custody and Repatriation (收容遣送) programme in 2003, is often cited as in support of the argument that China's constitution has some measure of normative force. It might be argued that the abolition of the regulatory basis for Re-education through Labour in 2013 followed the principle set out in the Legislation Law. In February 5th, 2013, the Chaoyang District Court imprisoned ten employees of a 'private security company' for running a black jail used to imprison provincial Chinese petitioners anxious to reach the Office for Letters and Visits in Beijing.

But it would be false to say that, in the field of public security, the law has cleaned house. A range of other forms of administrative detention remain, including Drug Rehabilitation, Shelter for Education and Administrative Punishment Detention, not to mention even less formal forms of state detention are governed by 'rules that we, on the outside of the departments concerned with public security… may never get to see.[143]' The recent internment of very large numbers of Uighurs in Xinjiang is only the most

142 Before it was formally abolished in 2013, Re-education through Labour was governed by three State Council documents: the Decision of the State Council Regarding the Question of Re-education Through Labour of 1957; the Supplementary Decision of The State Council For Re-education Through Labour of 1979 and the Decision on Trial Methods for the Implementation of Re-education Through Labour of 1982

143 Eva Pils, Human Rights in China (Polity Press 2017) 56

recent example of extra-extra-legal detention. The more accurate view is that administrative detention and other disappearances are not governed by secondary or tertiary legislation, but that they are still governed by state rules: extra-extra-legal state rules.

As Fu Hualing notes 'when the government uses, or even abuses the law, it still signals a commitment to law … A mere legal trapping may not be sufficient to convert a political persecution to a fair legal process, but it is a necessary first step in developing a rule of law.'[144]With this in mind, we should be cautious about claims that the 1982 Constitution establishes a monopoly on the coercive power of the state. China provides a vivid illustration of the dangers inherent in a constitutional order that fails to do this. So far as its citizens can be detained under extra-legal measures, China is not a state under rule of law.

However, we ought to be precise about the steps China would have to take to remedy this. The fact that the government can evade the law does not entail the conclusion that all government power requires an affirmative legal source. That would be one way to address the problem, but even that would be a partial solution. Recall David Dyzenhaus argument, set out in Chapter One, that there is more to the rule of law than legality. As we will see in Chapter Four, the CCP's historic powers of arbitrary detention

144 Fu Hualing

have recently been memorialised in law the constitution. That is not a step forward for the rule of law.

Perhaps there are other ways of approaching this problem. We might start with the fact that law is not supreme, or the fact that there can be punishment without law. If we can describe a state in which the government can act extra-legally, but in which law is supreme and there is no punishment without law, this might help to isolate the problem of extra-legal action. As we will see, this describes the United Kingdom.

Britain

The idea that the British Crown could direct officials in the course of their duties without being empowered to do so by the legal order would have gone unquestioned a generation ago. Dicey describes the prerogative as 'the residue of the discretionary or arbitrary authority' of the government. He presents the relationship between the citizen and the state as a liberty to do what is not prohibited by law.[145] He contrasts this vision of liberty and the rule of law with 'every system of government based on the exercise by persons in authority of wide, authority, or discretionary powers of constraint'.[146] Indeed, writing in the first half of the 20th Century, Sir Ivor Jennings said 'the Cabinet does not consider the nature of the legal source from which powers are derived. It is concerned only with the problems of government... [I]t acts whether there are already legal powers or not' [147] But picture of public power as an residue is neither limited to the prerogative nor even to the Crown. Janet McLean notes that, prior to the re-foundation of Local Government by the Local Government Act 1888, 'courts treated many borough powers, such as the making of by-laws, as inherent and the product of local custom'.[148] Bruce

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145 A. V. Dicey at 420. With the exception of the nature of parliamentary and non-Parliamentary executives, Dicey barely mentions the British government. As we have seen, he does not attend to government rulemaking.

146. See also Janet McLean at 184

147 Ivor Jennings, The Law and the Constitution (5th edn, University of London Press 1959) at 88-89

148 Janet McLean at 102

Harris has since extended this argument into a developed theory of the powers of the Crown. He argues that the government is free to take action – including rulemaking - which is not prohibited by law.[149] It has the inherent power to act, but subject to legal restrictions.

Until the late 1960s, it was common to think of the rulemaking power of the state in this way. In *(R (Lain) v. Criminal Injuries Compensation Board*, Lord Diplock had to decide whether a body established purely according to policy rules was subject to the jurisdiction of the High Court in a case where no vested rights were engaged. Counsel for the Board argued 'in the ordinary exercise of prerogative the Crown cannot invest any body of persons employed by them with any independent authority at law so as to impose on them duties enforceable by law'.[150]

The argument is subtle. There is no suggestion that such a body enjoys numinous, sovereign authority. Government rules could be removed from the jurisdiction of the High Court by a legal rule. Since the *GCHQ* case, certain sorts of prerogative rules remain non-justiciable, not least of them, the rules at issue in that case. The reason why rules like these are independent of law is because a law says so. Their independence is both established and shaped by law. However, in *Lain* the government is suggesting deeper

149 B. V. Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 LQR 225; B. V. Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 LQR 626.

150 R (Lain) v. Criminal Injuries Compensation Board [1967] 2 QB 864 Queens Bench Division at 871

reasons why government rules are non-legal. The argument is that prerogative rulemaking has nothing to do with law, like the agreement between spouses in *Balfour v. Balfour*. The government is arguing that its rules are para-constitutional as opposed to non-constitutional. There are two steps to this argument. First the government is asserting that it requires no affirmative legal authority to make the rules in question. Second, it is asserting that the rules in question do not breach any prohibition of positive law.

In response to this argument, Lord Diplock said:

> It may be a novel development in constitutional practice to govern by public statement of intention made by the executive government instead of by legislation. But this is no more than a reversion to the ancient practice of government by Royal Proclamation, although it is now subject to the limitations imposed upon that practice by the development of constitutional law in the 17th century…, [A] proclamation cannot deprive any subject of any rights to which he is entitled at common law or by statute, or grant to him any immunities to which he is not so entitled.[151]

Recall the three different ways in which the rule of law affects government rules – by demanding the supremacy of law, by demanding no punishment without law, and by demanding that all state action take place under colour of law. Taken as a claim about the *supremacy* of law over government, Lord Diplock's argument above is undoubtedly correct. But the government's argument does not challenge the supremacy of law – it challenges the claim that government rules require affirmative legal authority. In turn, it

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151 Ibid at 886

challenges the claim that the rules punish Ms Lain. The Board argued that Ms Lain has no claim because its rules engaged no rights. Lord Parker did not deal with that argument. He asserts that legal jurisdiction was not limited to deprivation of rights 'in the sense of enforceable rights'.[152] Lord Parker did not elaborate on what an unenforceable right might look like (though Chapter Two suggests a few candidates.)

Lord Diplock answered that question directly. He said the determination need not 'give rise directly to any legally enforceable right or liability'. It may just be 'one step in a process' that has that result. Moreover, it 'is not even essential that the determination must have that result'.[153] By this account, government rules that *might ultimately affect legal rights* and duties must be made under colour of law. If all state rules are slightly punitive, then the principle that there can be no state punishment without law can be turned in the principle that there can be no state rules without law.

This rheumy-eyed approach to the overlap between public power and rights has been broadly consistent since *Lain*. In *Gillan v. CPM*, a case about rights, Lord Bingham makes a more lavish claim about public power.

> the exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that

152 Ibid at 881

153 Ibid at 884

> for which the power was conferred. This is … the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.[154]

Lord Bingham is correct to say that arbitrary interference with rights is the antithesis of legality. But this means an 'exercise of power by public officials' that interferes with or derogates from a Convention right' is unlawful and contrary to the rule of law. It does not mean any exercise of power that 'affects members of the public' is.

As we have seen, *Lain* did not address the claim that some government rules are essentially domestic in the sense developed in Chapter Two. Instead, it vastly expanded the space for conflict between government rules and laws, by diluting the concept of a legal right. After *Lain*, the law protected a much broader range of interests from government interference than 'enforceable rights'. This argument has since flourished into the law of legitimate expectations. The key point for now is that *Lain* did not settle the question of whether the government has inherent, non-legal rulemaking authority.

The most prominent case in which an English judge has used this reasoning is *Fewings*. There, Laws J said, 'any action to be taken [by the government] must be justified

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154 R (Gillan) v Commissioner of Police of the Metropolis [2006] UKHL 12, [2006] 2 AC 307 House of Lords at [34]

by positive law.'[155] This dictum has been repeated in the Court of Appeal[156], but it has never formed the reasoning of a case, nor has it ever been grounded in another source of constitutional law. Some commentators maintain that *Fewings* is an accurate statement of the law. Michael Fordham and Harry Woolf argue in the most recent edition of their handbook on Judicial Review that there are no 'free standing' powers[157]. But again, the sources they cite are no stronger than this ungrounded and barely reasoned obiter claim in the High Court. The principle that Laws J put forward to justify this claim was that the rule is necessary 'in order to protect people from arbitrary interference by those set in power over them.' This might give us good reason to enact a British version of the Tenth Amendment, but we should not assume that one already exists. As in *Lain*, the argument assumes that the rule of law in the UK demands a legal source for all sorts of state rules.

The courts have not decided whether all Crown rulemaking powers require a legal source, but in some cases, such as *C*[158]*, Shrewsbury and Atcham*[159] and *Hooper*[160] they

155 R. (Fewings) v Somerset CC at 524 (Laws J)

156 R (Watson) v Richmond upon Thames London Borough Council, [2001] QB 370 Court of Appeal at 385

157 Michael Fordham and Harry Woolf at 6.1.1.

158 R (C) v Secretary of State for Health 2000 WL 559 Court of Appeal

159 Shrewsbury & Atcham Borough Council v The Secretary of State for Communities and Local Government [2008] EWCA Civ 148

160 R (Hooper) v Secretary of State for Work and Pensions 2005] UKHL 29, [2005] 1 WLR 1681 House of Lords

give some credence to the argument that all administrative powers are derived either from statute, from the common law or from the prerogative. In *R (New London College Ltd) v Secretary of State for the Home Department* a case which directly concerned the Crown's rulemaking power, Lord Sumption said 'It has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of government which are not exercises of the royal prerogative and do not require statutory authority… The extent of these powers and their exact juridical basis are controversial'.[161] Here, the words 'ordinary business of government' do a great deal of work.

Chapter Two introduced the obvious fact that people do not depend on the legal order in order to make rules. People contract, but more often they agree. The same principle extends to the rules of organisations and groups.[162]

On this basis, Adam Perry questions Harris's view of government power as a sort of residual freedom. Perry argues that 'most of the Crown's administrative powers are not legal powers of any description, including common law powers… including powers

161 R (New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51, [2013] 1 WLR 2358 at [28]

162 See Michael Bratman, Faces of Intention : Selected Essays on Intention and Agency (Cambridge University Press 1999)

to… adopt policies and guidelines (as in New London College).'[163] In doing so, he helps to advance the case that there is no affirmative doctrine of sources in English law. Perry concludes that 'ultimately, the Crown's non-legal powers derive from our willingness as a community to attribute ordinary acts to the Crown.' We might attribute the acts of officials to the government where they are performed for an essentially public purpose, or where they use public resources. We can see the overlap between Perry's claim and the argument in *Lain*, that the rules issued to officials are non-legal rules, and they do not need legal authority until they affect the legal position of an individual.

Perry exposes a limitation of conceiving of state power in solely legal terms. He concludes that it would not be possible to replace these 'ordinary powers' of state by statute.

> The Crown could be prohibited from using its ordinary powers, and while this would not make it impossible for the Crown to use these powers, it might discourage it from doing so. But difficult issues lurk in the background. If the Crown did not rely on its ordinary powers, would it have to refrain from …creating policies…? Would that be desirable? … And perhaps the most difficult question: although we think of the rule of law as an ideal, what exactly is good about the state ruling through law, and can this good be achieved by other means?[164]

Perry's observation draws us back to the thread running through Chapters One and Two, a thread that connects constitutionalism with the subjection of government in

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163 Adam Perry, 'The Crown's Administrative Powers' (2015) 131 LQR 652 at 662

164 Ibid 670

all of its dimensions to laws enforced by courts. For better or for worse, this is not how the UK constitution works.

CONCLUSION

We began this chapter, as for previous chapters, by returning to a debate about the demands of constitutionalism. One simple account of constitutionalism demands a legal constitution which provides an affirmative and comprehensive account of the sources of public power. This is, of course, one way to read the US constitution. A related argument suggests that the state and its legal order are identical, that constitutionalism connects the two. The argument developed here puts pressure on this idea by examining the gap between the state and its legal order in British and China. In both, the state partly precedes the legal order and in both countries some aspects of state power transcend the legal order.

In doing so, we also considered a series of arguments about the relationship between law and the state. Some socialist arguments suggest that law is not a distinctive exercise of state power, and it doesn't matter whether the edicts of the state are framed in law or not. By this account, law and policy blend into each other. A symmetrical argument suggests that internal government rules ought nevertheless to be treated as a species of administrative law. Although they proceed from very different assumptions about the relationship between law and the state, both of these arguments put pressure on the distinction between law and policy, a distinction which forms the basis for the hierarchy of norms in China's written law, and a distinction which was essentially taken for granted in Britain 'a generation ago'.

This shift in perspective may have contributed to a trend in both jurisdictions to address state rules as if they were legal rules. It is difficult to distinguish sharply between government law-making and government rulemaking. The differences are better conceived as a sliding scale rather than a bright line. The Chinese doctrine questions the simplistic, institutional division between law made by the legislature and rules made by the government. In a sense, all formal government rules are sorts of legislation, and the way to which courts can refer to them, interpret them or even question their validity descends by degrees.

In particular, the constitutional protection that the justiciability rules extend to British statutes extends to all formal state made rules in China. There is no need to decide whether the rule regulates a matter of high policy. In contrast, in Britain, there has been a substantial convergence between law and many areas of policy over the last twenty years, producing a regulatory hierarchy that is similar, in certain respects, to that established by the Legislation Law. In some cases, government rules may essentially have to mirror *legal* rules. In others, they may nevertheless be subject to similar standards of formality and interpretation to legal rules.

We then turned to the argument that government rules *ought* to be legal rules, an argument that reflects a vision of the rule of law. We found that it is not obvious that the rule of law requires that all state action should be prescribed by law. The nature of government coercion is subtle. Not all government rules interfere with rights. The

distribution of bounty and the formation of documents 'indistinguishable from the process of administration' are coercive only in a very limited sense. Even in a state under rule of law, rules like these need not be legal rules just because law is supreme, and because there should not no punishment without law.

This discussion began with assertions about the need for affirmative sources for state power in Britain and China. But the real need to constitutionalize power lies in cases where the state interferes with rights. Not all state rules interfere with rights, but judges have avoided having to choose between them by equating rules that 'affect people' with rules that interfere with rights. But not all state rules are coercive. By conniving in this fiction we contribute to the vast juridification of government, a development which promotes neither efficiency, legitimacy nor liberty.

CHAPTER FOUR – PARTY RULES

INTRODUCTION

An account of the constitution that does not describe how political parties are connected to the government is as misleading as an account that does not describe how the monarchy is connected to the government. In this chapter, as in previous chapters, we explore which rules ought to be considered part of the constitution. The previous chapter responded to an idea that we encountered in Chapters One and Two, the idea that public rules ought to be legal rules. That chapter looked at rules made by the state in the course of government. In this chapter, we consider rules made by political parties in the course of government.

Many of the policy rules that we addressed in the previous chapter have their origins in party politics. As Albert Chen argues, 'the policies of the CPC are the foundation or basis of socialist law in China. Law is a mature form of party and state policy which has, through the state's legislative process, become concretised, formalised and elevated to the will of the state'.[1] To a lesser extent, this is also true in the United Kingdom. In *Re: Findlay* the claimant challenged new rules to govern parole because they

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1 Albert H. Y. Chen, An Introduction to the Legal System of the People's Republic of China (Butterworths Asia 1992) at 152

had been formulated in a speech at the Conservative Party Conference without consulting the parole board.[2] That Party policy was only belatedly recorded in a statement to the House of Commons.

At heart, both Britain and China are governed by political parties, but the reality of Party government is only intermittently reflected in the legal constitution, and sometimes not at all. For this reason, political parties are enigmatic subjects of public law. They sometimes appear to be private subjects, with private rights. They sometimes appear to be public utilities, with public duties. They can have privileged access to the state and yet they can be insulated from state organs, like the judiciary and the civil service. They are rarely assigned formal constitutional powers and duties, and sometimes they are overlooked altogether.

This chapter considers how the constitution allocates functions to parties. It begins by asking how the party controls the state and moves on to ask *why* the party controls the state. It begins by setting out the general lines of how constitutional orders regulate political parties and by applying this model to Britain and China. If parties are supposed to inhabit the constitutional structures of the state – and they are – then their rules require much closer constitutional attention, especially in the United Kingdom.

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2 In re: Findlay [1985] AC 318 House of Lords

THE FUNCTIONS OF POLITICAL PARTIES

Nick Barber describes four functions performed by democratic political parties.[3] Parties provide a conduit for public engagement in politics, and bring together individuals with overlapping political views, in pursuit of political power. They enable voter choice in elections and enable democratic control of the administration. These functions are not of equal importance. By far most important thing political parties can do is to *inhabit the government*. The fact that the local Conservative Club provides a congenial environment in which to discuss politics is constitutionally important, but it is not as important as the fact that the Conservative Party grants ultimate control of the United Kingdom to a small group of likeminded individuals. Moreover, parties do not perform all of the functions on an ongoing basis. Some political parties provide a permanent home for people of a particular mindset, but other parties coalesce purely in order to win elections, with little or no personnel or infrastructure to sustain other activity at other ties. There is a certainly a *change* in the role of a political party when it contests an election, and another change when it inhabits the institutions of state.

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3 N. W. Barber, The Principles of Constitutionalism, (Oxford University Press 2018)

This may not be a change in the function of a political party so much as a change in the nature of the group altogether. Valdemar Key shows how different functions may refer to essentially different institutions, organisations and groups.[4] He disaggregates the political party into the party-in-government; the party organisation, and the party-in-the-electorate. Political parties are organisations – they set objectives, and deploy resources like staff, and money towards these objectives. But it is also meaningful to talk about Democrats, Republicans and Communists without referring solely to the organisation. Society can be divided into groups who adhere to values projected by political parties, and who mobilise in support of those values. There is a small but growing legal literature on the constitutional dimension of elections[5] and on the manner in which individuals fund political parties.[6]

We often refer to political parties as shorthand for institutions or individuals who exercise power through and/or alongside the state. The nature of the party is different when it inhabits the state. Unlike electoral functions, which are only truly important in democracies, the party-in-government is a global phenomenon. Parties select leaders; they place party members in positions of power; and they make policy through the state.

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4 V. O. Key, Politics, Parties, & Pressure Groups (5th edn, Thomas Y. Crowell 1964)

5 Anika Gauja, Political Parties and Elections (Routledge 2010)

6 K. D. Ewing, The Funding of Political Parties in Britain (Cambridge University Press 2009) On either topic, see generally Ingrid Van Biezen, 'Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe' (2012) 42 British Journal of Political Science 187

But party power is not merely exercised through the state. The party organisation also makes rules[7] and administrative decisions[8] in party caucus and these rules and decisions can be constitutionally significant. As Key notes 'we tend always to speak as if there were such a group which could be held accountable for the conduct of the government'.[9] Lord Keith makes a similar point in *Derbyshire County Council v. Times Newspapers* when he says 'it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change'.[10] Parties seek office, but at times party power might be thought of as an office in itself.

This chapter considers party leadership in comparative context. With this in mind, 'a fundamental difficulty about the term 'political party' is that it is applied without discrimination to many types of groups'.[11] This is especially true when we compare different sorts of institution in different constitutional orders. In 'Is a Science of Comparative Politics Possible?' Alasdair MacIntyre considers the various social and political functions performed by bodies described as political parties. He asks why we think colonial liberation movements are parties:

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7 In re: Findlay

8 R (Jackson) v Amber Valley District Council [1985] 1 WLR 298 QBD

9 V. O. Key at 163

10 Derbyshire County Council v Times Newspapers [1993] AC 534 House of Lords at 550

11 V. O. Key at 163

> Why do we think of these as parties, rather than, say, as churches? The answer that they have some of the marks of American political parties, and that they call themselves parties does nothing to show that in fact the meaning of 'party' is not radically changed when the cultural context is radically changed, or that even if it is not changed the description has not become inappropriate.[12]

Some comparative scholars of political parties agree it is an error to compare parties that compete for power with parties that do not compete. Sigmund Neumann said, 'the very definition of party presupposes a democratic climate'.[13] The mid twentieth-century scholarship on monolithic parties drew a sharp distinction between political parties in pluralist societies and what some describe as 'monolithic parties'[14] and others describe as 'movement regimes'.[15]

We need to be cautious that we are describing constitutional bodies that do similar things. We might, for example, assume that 'monolithic' parties are essentially public institutions. We might think of them as forums in which political differences can be settled, like legislatures, rather than as representative institutions, private bodies represent a sectional interest rather than the public interest.

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12 Alasdair MacIntyre, 'Is a Science of Comparative Politics Possible?' in Peter Laslett, W. G. Runciman and Quentin Skinner (eds), Philosophy, Politics and Society (Basil Blackwell 1972) at 14

13 Sigmund Neumann, Modern Political Parties (University of Chicago Press 1956) at 395

14 Leonard Schapiro and John Wilson Lewis, 'The Monolithic Party under the Totalitarian Leader' in John Wilson Lewis (ed), Party Leadership and Revolutionary Power in China (Cambridge University Press 1970)

15 Robert C. Tucker, 'Towards a Comparative Politics of Movement-Regimes' (1961) 55 The American Political Science Review 281

In 1961, at the 22nd Party Congress of the CPSU, Nikita Khrushchev restyled the CPSU as a 'State of the Whole People'. 'The state, which arose as a state of the dictatorship of the proletariat has in the new contemporary stage, become a state of the entire people, an organ expressing the interests and will of the people as a whole'.[16] Since then, and especially since 1989, critics have debated whether the Party can and should represent everyone's interests.[17] The CCP is not open to everyone who is politically sympathetic to its aims.[18] Article 1 of the Party Charter provides that 'any Chinese worker, farmer, member of the armed forces, intellectual or any advanced element … who accepts the Party's program … *may apply* for membership in the Communist Party of China'. In 2016, 21 million Chinese people sought leave to apply to join the Party. Fewer than 10 million were granted leave and a proportion of this group actually became Party

16 , The New Soviet Society: Final Text of the Program of the Communist Party of the Soviet Union (1962) at 165-168

17 For claims to this effect see Larry Catá Backer, 'Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State Party Rule of Law System' (2012) 30 Boston University International Law Journal 331, Jiang Shigong, 'How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer' (2014) 40 Modern China 196.

18 '[A system of granting membership to everyone] supported the Party in one way or another would inevitably have led to our Party becoming inundated with professors and high-school students and to its degeneration into a loose, amorphous, disorganized 'formation' Joseph Stalin, Problems of Leninism (Foreign Languages Publishing House: Moscow 1953)

members.[19] Six percent of Chinese population are party members, and the majority are farmers and fishermen.

Communist parties, however, were not originally conceived as institutions that represent the people. CCP doctrine describes it as a vanguard party, as the organised expression of the interests of the people. The Preamble to the state Constitution notes that the PRC 'was established by the Chinese people under the leadership of the CCP'. It also notes the achievements of the Chinese people under the leadership of the CCP and sets future goals for the people, under Party Leadership. Notably, it is the organised expression of the interests of the people (人民) and not of the nation (国民) which might include exploiting classes. In contrast, the CPSU represented the 'narod' whose meaning ambiguously combines people and nation.[20] As Brantly Womack notes, 'The people are the masters in a vanguardist system in the same sense that the sheep are masters of the shepherd: their interests are supposed to control the shepherd's behavior'.[21]

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19 People's Daily Editorial 充分认识当今党情新变化 [Fully Understand the New Changes in the Party Today] 人民日报 (People's Daily) 5 January 2017

20 Franz Schurmann, Ideology and Organization in Communist China (2nd edn, University of California Press 1968) 110 at note 3.

21 Brantly Womack, 'Party-State Democracy: A Theoretical Exploration' (1989) 25 Issues and Studies 37 at 44

The CCP's own doctrine on its representative capacity is the theory of the 'three represents'.[22] The canonical account of this theory says the Party 'always represented the requirements for developing China's advanced productive forces, the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people'.[23] This is a broad representative doctrine, but it is not the same as a state of the whole people. The party represents a broad range of sectional interests, but it does not represent all interests.

But crucially, this may be true of political parties generally. Parties can be sectional when they compete for power, but as we will see, when they inhabit the government, we expect them to represent a wider sort of public interest. Mindful of the differences between the CCP and democratic parties, we ought to consider this dual nature of political parties more closely. It contributes to an ambiguity in the way they are regulated, which we will consider in the next section.

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22 We will explore this question further in Chapter Six.

23 Work Report to the 16th Party Congress. Jiang Zemin, Selected Works, Foreign Languages Press, Beijing, 2013, Vol. III, p. 519.

HOW CONSTITUTIONS REGULATE POLITICAL PARTIES

Ingrid van Biezen surveys the constitutional oversight of continental European political parties. She says:

> Political parties seem to occupy a somewhat ambiguous space in the political system at the interstices of government and civil society, as few constitutions have been able to develop a coherent framework for defining the relationship between the parties, the state and the individual…[24]

The trend in almost all jurisdictions is towards closer constitutional regulation of political parties[25]. In many common-law or western European jurisdictions, political parties are treated as public utilities – as private organisations that perform essential public functions, subject to state regulation.[26] As Justice Reed puts the point in *Smith v. Allwright*, in which black Texans sought the right to select the Democratic candidate in a primary election, 'The United States is a constitutional democracy'. The right to vote cannot 'be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied'.[27]

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24 Ingrid Van Biezen 207

25 Ingrid van Biezen, 'Political Parties as Public Utilities' (2004) 10 Party Politics 701; Ingrid Van Biezen 'Constitutionalizing Party Democracy'; Anika Gauja;

26 Leon D. Epstein, Political Parties in the American Mold (University of Wisconsin Press 1986); Ingrid van Biezen 'Political Parties as Public Utilities.'

27 Smith v. Allwright 321 US 649 Supreme Court of the United States, 664

Some political parties are *constitutional.* Constitutions recognize existing political parties. The Preamble to China's 1982 Constitution recognises the 'democratic parties' and the Chinese Communist Party (CCP). Likewise, some constitutions give political parties constitutional duties. Art. 21 (1) of the German Constitution says states 'shall participate in the formation of the political will of the people'. Some constitutional orders require that there *shall* be a political party or parties. In principle, a constitutional order could create a political party or parties, in the same way that Article 1 of the US Constitution creates Congress. Even constitutions that do not mention political parties can allocate important public functions to them. The jurisprudence of the Supreme Court of the United States treats the two major parties as essential components of the American democratic process.[28]

Political parties can also be *unconstitutional*. The constitution can ban all political parties. Article 12 of the Saudi Basic Law provides that 'fostering national unity is a must, and the state shall forbid all that may lead to disunity, sedition and division'. This is interpreted as a prohibition on political partisanship. More liberal constitutional orders can also treat political parties with suspicion, because party rules have the potential to

28 See e.g. Buckley v. Valeo 424 US 1 Supreme Court of the United States, especially Justice Rehnquist's characterization of the majority as having 'enshrined the Republican and Democratic Parties in a permanently preferred position' (at 293)

pervert representative democracy.[29] The American and French republicans were sceptical about the 'baneful spirit of party'.[30] Some constitutions ban all but one existing party[31] or acknowledge the political monopoly of a single existing party.[32] Others ban certain categories of political party. Article 21 (2) of the German Constitution provides that parties 'by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany' shall be unconstitutional. The European Court of Human Rights has regularly been asked to consider the compliance of party bans with Article 11 of the Convention, especially in cases brought by Turkish political parties.[33]

Political parties can clearly be constitutional or unconstitutional, but there can be more subtle relationships between parties and the constitution. Political parties can be

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29 Adam Tomkins, Our Republican Constitution (Hart Publishing Limited 2005)

30 George Washington, Farewell Address, in Documents of American History 169, 172 (Henry Steele Commager ed., 8th ed) quoted in Gardner JA, 'Can Party Politics Be Virtuous?' (2000) 100 Columbia Law Review 667 at 667

31 See e.g. the German Law against the Founding of New Political Parties of July 14th 1933

32 See e.g. art. 126 of the 1936 Stalin Constitution of the USSR.

33 See e.g. United Communist Party of Turkey v Turkey, 62 Eur. Ct. H.R. 1 (1998); 26 Eur. H.R. Rep. (1998) 121; Refah Partisi (The Welfare Party) and Others v. Turkey, (Apps. 41340/98, 41342/98, 41344/98 Eur. Ct. H.R. (2003)(Grand Chamber), unpublished, summary available at http://www.echr.coe.int/eng/Press/2003/feb/ RefahPartisiGCjudgmenteng.htm. See generally Yigal Mersel, 'The Dissolution of Political Parties: The Problem of Internal Democracy' (2006) 4 International Journal of Constitutional Law 84

invisible to the constitution. For example, until 1993, Australian political parties were non-legal institutions, and their organizational rules were not justiciable in court. In *Cameron v. Hogan*[34], the Australian High Court held that the Labor Party was a 'voluntary association'. Because members of the party did not have a proprietary interest in the organization, they could not ask the court to review its rules or decisions. 'The policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment'.[35]

Similarly, some constitutional orders *ignore* the way parties inhabit constitutional organs, like the executive or the legislature. Ivor Jennings said, 'since 1689 the party system has grown up and the general political control is vested in a Cabinet of party members… The balance of power in the constitution has been shifted without any formal change in the 'ordinary law of the land'.[36] Jennings' view invites a comparison between the way English law views party governance and the way it views cabinet governance. Cabinet governance is, of course, embodied in constitutional convention and as we will see in Chapter Five, the conventions of cabinet governance change the law.

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34 Cameron v. Hogan 51 CLR 358 High Court of Australia. Cameron v. Hogan is no longer good law. See Baldwin v Everingham [1993] 1 Qd R 10; Coleman v Liberal Party of Australia 212 FLR 271 Supreme Court of New South Wales

35 Cameron v. Hogan 378

36 Ivor Jennings, The Law and the Constitution (5th edn, University of London Press 1959) 68

We can describe parties whose organization or activities are invisible to the constitution as *non-constitutional* parties. However, parties can be invisible to the constitution in a different way. In some constitutional orders, political parties do not invite indifference so much as awe: they are *para-constitutional* rather than *non-constitutional.* This distinction roughly tracks the different senses of justiciable developed in Chapter Two. Non-legal rules can be non-justiciable in the sense that there are no legal rules to bring the non-legal rules within the ambit of the legal system. Conversely, they can be non-justiciable because there are rules that deliberately preclude courts from considering those rules. In this case, courts do not ignore political parties or their activities so much as blind themselves to them.

This section has set out the generalities of constitutional regulation of political parties. Parties can be forbidden by constitution, dissolved by constitution, recognized by constitution, created by constitution and required by constitution. The constitution can regulate parties, but it can also fail to notice political parties. At times, when confronted by party leadership, the constitution averts its gaze. The next section will address the specific ways in which the Chinese and British constitutions regulate political parties.

THE PARTY AND THE CONSTITUTION IN BRITAIN AND CHINA

This section considers how the legal rules of state law interact with the non-legal rules of the party organisation in light of the scheme set out in the previous section. It will start with the relatively clear constitutional role played by the CCP, then turn to the less clear constitutional status of British political parties.

In the first section we considered the argument that the CCP is a private body, but this view is hard to sustain in law. Unsurprisingly, political parties are not mentioned in Art. 50 of the General Principles of Civil Law 1986, which governs legal persons, nor in the State Council Regulations on Registration of Social Organizations of 1998. Moreover, private bodies that are not businesses generally have to register with the Ministry of Civil Affairs and set up a party group.[37]

A better view is that the CCP is a constitutional party. It performs public duties. The Chinese constitution recognizes the CCP and allocates a constitutional duty of leadership to it. The Party Charter, among other party documents, explains the nature of that leadership. In this section, we will consider the legal rules that memorialise the Party's leading role. In the next section, we turn to Party rules.

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37 See e.g. State Council Regulation on the Registration of Social Organizations of October 25 1998); State Council Interim Regulation on the Registration of Private Non-Enterprise Entities of October 25, 1998; State Council Regulation on the Registration of Foundations of June 1 2004.

The first post-1949 constitution – the Common Programme - only mentions the Party once. The CCP is identified as one of the political forces that formed the Congress. Significantly, the Common Programme does not allocate a leading role to the CCP. Rather, the state was supposedly led by 'the working class'. The 1954 Constitution only mentions the CCP in the Preamble. By then, the political forces that formed the Congress came to be described as a United Front under the Leadership of the CCP.

Party leadership was an explicit feature of China's short lived 1975 and 1978 Constitutions. But when the 1982 Constitution was drafted, the CCP was originally only mentioned in the Preamble. The Preamble mentions the CCP four times.[38] However, the division between Preamble and text should not be approached as if it were a prologue to a justiciable constitution.[39] Some Chinese scholars, notably Jiao Shilei, argue that the preamble is the only 'strictly legal' part of the constitution.[40]

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38 Until 2018, the CCP was not mentioned in the text.

39 Ginsburg T, Foti N and Rockmore D, "'We the Peoples" The Global Origins of Constitutional Preambles ' (2014) 46 The George Washington International Law Review 305

40 I am grateful to Jean-Christophe Mittelstaed for bring this example to my attention. See Jiao, Shilei, 'Discussing the Efficacy of the Constitution's Preamble' <论宪法序言的效力> (2010) Guide to Business < 企业导报> 9, as quoted in Mittelstaedt JC, 'Understanding China's Two Constitutions' (Conference Paper, ECLS, Cologne, September 25th 2015) 8. See the other examples cited there.

In March 2018, the constitutional role of the CCP was memorialized in the text of the constitution, with the inclusion in Article 1 of the clause 'the leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics'. That article prohibits the 'disruption of the socialist system by any organization or individual' but its effect is much larger than this, as a broader range of Chinese laws refer to the socialist system.[41] Those references should now be understood to refer to the system of CCP leadership. So, for example, Article 105 of the Criminal Code criminalizes 'incitement of subversion of the regime or overthrow of the socialist system'. Conversely, Article 5 of Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990 provides 'the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region…'

It might be argued that the constitutional amendment abandons the notional separation of Party and State embodied in the 1982 Constitution.[42] However, a wide variety of laws have made reference to Party leadership, beginning with the NPC session immediately after the Constitution was promulgated. Article 3 of the Legislation Law 2000 provides that laws shall be made 'in compliance with the basic principles laid down in the

41 See e.g. Article 6 of the Regional Ethnic Autonomy Law of 1984 (as amended.)

42 Zheng Shiping, Party vs. State in post-1949 China : The Institutional Dilemma (Cambridge University Press 1997) Chen Jianfu, 'Out of the Shadows and Back to the Future: CPC and law in China' (2016) 24 Asia Pacific Law Review 176

Constitution' including 'upholding leadership by the Communist Party of China'. Article 19 of the National Defence Law of 1997 provides that the armed forces are 'subject to the leadership of the Communist Party of China'. Article 4 of the Public Servants Law of 2005 (as amended) provides that 'the cadre line and policy of the Communist Party of China shall be carried out, and the principle that cadres are under the administration of the Party shall be adhered to'. Article 4 and 15 of the National Security Law of 2015 demands that the state 'shall adhere to the leadership of the Communist Party of China'.

The 1982 Constitution purports to subordinate all political parties to the constitution and the law and the Party Constitution purports to accept this supremacy claim. The Preamble to the 1982 Constitution stresses that 'all political parties' 'must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation'.[43] The General Programme of the Party Constitution provides 'the Party must conduct its activities within the framework of the Constitution and laws of the country' and Article 3(4) of the Party Constitution requires that Party members abide by the law. The same subjection can be seen in legislation. Article 19 of the National Defence Law, considered above, provides that the armed forces are subject to Party Leadership, but goes on to provide that the 'organizations of the Chinese Communist Party in the armed forces shall carry out their

43 See also Article 5 of the PRC Constitution

activities in accordance with the Constitution of the Communist Party of China'. Article 3 of the Organic Law of Village Committees of 1998 provides that the CPC organisation in the countryside shall carry out work in accordance with the Constitution of the CPC but also 'in accordance with the Constitution and the laws'.[44]

Yet as we noted in Chapter Three, the Party and its role in China's wider constitutional order both predate and survive the 1982 Constitution. The Constitution is a declaration of the Party's constitutional role. We cannot build a convincing account of that role out of legal rules alone, not least because it is not possible to review the unlawful actions of the CCP in a Chinese Court.[45] In the language developed in Chapter Two, the Party's duty to obey state law is a duty of imperfect obligation.

In 1992, Guo Luoji, a dissident academic, sought to bring an action under the Administrative Litigation Law (ALL) against the Party Committee of Nanjing University, which had decided that he would not be allowed to teach. The Jiangsu Higher People's court refused to docket the case on the ground that a CCP organisation cannot be sued

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44 For a German counterpoint, see Ernst Fraenkel, The Dual State : A Contribution to the Theory of Dictatorship (Oxford University Press 2017) at 34 et seq. Fraenkel's argument is addressed in the next chapter.

45 Pei Minxin, 'Rights and Resistance' in Elizabeth J. Perry and Mark Selden (eds), Chinese Society: Change, Conflict and Resistance (3rd edn, Routledge 2010) at 47; Keith O'Brien and Li Lianjiang, 'Suing the Local State: Administrative Litigation in Rural China' (2004) 51 The China Journal 75

under the ALL.[46] Following Guo Luoji's case, we can conclude that unlawful acts by the Party are not justiciable in the sense developed in Chapter Two.

There is some evidence to suggest that the Chinese courts approach cases like these in terms of the *function* of the defendant body rather than its *form*. They focus on what the body in question does, rather than on whether it is labelled Party or State. In 2004, Shang Jin tried to sue the Chang'an District Government for breach of his right to public competition and for breach of the civil right to take up a public post. Shang had secured first place in competition to be Deputy Director of the local Health Bureau but had been denied the job due to his political record. Unlike Guo Luoji's case, where the respondent was the Party Committee of the University, Shang sued the state. On 26 February 2004 the Xi'an Intermediate People's Court refused to docket the case because it deemed that the decision was not an administrative act of the Xi'an government, but of the relevant CCP organisation department. This arguably extends the principle in Guo Luoji's case to matters that fall within the allocated *responsibilities* of the party even when the litigation is directed at an organ of state. We will consider which responsibilities, if any, are allocated to be Party in due course.

The functional approach may also apply to Party organizations performing state functions. This is especially important at the grassroots level, where most administrative

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46 I am grateful to Guo Yicong for bringing these examples to my attention.

matters fall within the purview of the Party Committee. In March 1998, a village level Party Committee in Huaping, Shanxi, ordered the illegal felling of trees to ensure that a floorboard factory could start work on time. The committee did not secure the necessarily approvals from the State Forestry Administration. In December 2001 the County-level People's Procuratorate with responsibility for Huaping arraigned the Party Committee and its Party Secretary Kang Deming before the Zhenping County People's Court on the ground that the felling of the trees was a crime (of illegal logging). This was a crime committed through a work unit (单位犯罪), a category which extends to 'government organs' (机关) among other bodies. The prosecution argued that the Party Committee was a government order for the purposes of the Criminal Law, and Tang could therefore be liable for his crime committed through the committee. The defence had argued that the court should not wantonly expand the meaning of the word 'organ'. The county court was initially willing to assert jurisdiction, but the case foundered on the lack of legal guidance on whether a Party Committee could be the subject of a corporate criminal trial. The Zhenping Procuratorate eventually postponed proceedings, and formally sought guidance from the next level procuratorate on whether a party committee could form the object of a trial. Eventually, it received an answer, in the affirmative, and the trial went ahead on the 28th of March 2002.[47] More recent legislation

47 华商报 (China Business Gazette) 9 April 2002

suggests that this functional approach to litigation against Party Committees performing state functions may be extended. Section 4 of the Draft Amendment to the Law on the Prevention and Control of Water Pollution 1984, (published June 2016) would create responsibility not only for the people's government, but also for certain party officers (党政主要负责).

Hence, we may conclude that in its political capacity the CCP is best conceived of as a *para-constitutional* political party. It is not invisible to the constitution (on the contrary) but decisions on Party matters are not subject to the jurisdiction of state courts. This should be contrasted with the non-constitutional vision of the Australian Labor Party in *Cameron v. Hogan*.

British political parties, on the other hand, have verged on being *non-constitutional*. In Britain, political parties are barely legally recognized. The way in which they underwrite the democratic formation of policy is all-but-invisible to the constitution and there is no substantial legal literature on the role that political parties play in other state institutions.[48] Political parties were not statutorily regulated until the very end of the twentieth

48 For example Dawn Oliver, 'Accountability and the Foundations of British Democracy —the Public Interest and Public Service Principles' in Nicholas Bamforth and Peter Leyland (eds), Accountability in the Contemporary Constitution (Oxford University Press 2014) addresses the independence of the civil service, but does not develop the contrast with a democratically dependent political executive.

century.[49] The party system was implicitly recognised by the Ministers of the Crown Act 1937, which provides funding for the opposition. However, political parties were not explicitly mentioned in statute until the Sex Discrimination Act 1975. Section 33 exempts 'political parties' from obligations under the Act, without defining them. Even the Political Parties, Elections and Referendums Act 2000, which does provide for registration of political parties, does not seek to define them, except as organizations that sponsor candidates at elections.[50] However the role that political parties play in inhabiting state organs is almost absent from constitutional law, from legal doctrine, and from academic commentary in the United Kingdom. This is not a uniquely British problem. Following a survey of 28 liberal constitutions Van Biezen concluded, 'parties are rarely assigned any influence on functions that fall within the domain of government or executive power'.[51] We will consider that problem in the next section.

Before we do so, we turn to the non-constitutional approach to political parties. Vernon Bogdanor said, 'political parties were treated as if their constitutional significance was akin to that of golf or tennis clubs'.[52] In *Charter v. Race Relations Board*, Lord Reid

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49 See the Explanatory Notes to the Political Parties, Elections and Referendums Act 2000

50 See also the approach to political parties' electoral activities taken by Lord Bingham in al R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] 1 AC 1312 House of Lords

51 Ingrid Van Biezen 'Constitutionalizing Party Democracy' 207

52 Vernon Bogdanor, 'The Constitution and the Party System in the Twentieth Century' (2004) 57 Parliamentary Affairs 717 at 718

walked through a series of organisations analogous to the Conservative club: a woman 'who lets it be known among her neighbours that she is willing to take a few children into her house for some hours each day' or 'a small bridge club which meets in the houses of its members' or a man who 'lets it be known among his friends that he would like to take a congenial party abroad'.[53]

This private nature of political parties is a cause for concern for people who wish to see more strenuous regulation of party politics. But paradoxically, it should also concern those who wish to see *less* strenuous regulation of political parties. *Public* bodies are granted a margin of deference in the manner that they exercise their discretion. Deference is valuable if discretion is needed to perform a duty effectively. For example, s.21 of the German Constitution allocates the function of establishing 'the public will' to political parties. This function arguably deserves deference. However, if the law treats parties as *non-constitutional* bodies – as bodies structured and regulated solely by non-legal rules – then parties cannot benefit from the deference that courts show to public bodies and *para-constitutional* bodies like the CCP. In order to explain how this may be so, we need to consider how English law supervises the organisational rules of political parties.

If parties are non-constitutional, there is nothing for the constitution to supervise. English law prescribes no structure for political parties, and parties adopt a great variety

53 Charter v Race Relations Board [1973] AC 868 House of Lords

of structures. UKIP is a company limited by guarantee.[54] The Labour Party is an unincorporated association.[55] The Conservative Party is neither. In *Conservative Central Office v. Burrell*[56], the Court of Appeal had to establish the liability of the Conservative Party for income tax purposes. The High Court held that the Conservative Party was a 'political movement' that was not governed by any justiciable agreement. In the Court of Appeal, Lawton and Brightman LJJ accepted that Conservative Central Office held funds on behalf of 'an organisation known as the Conservative Party'.[57] The turn of phrase recalls the reference to the official 'popularly known as [the] Prime Minister' in the Chequers Act 1917.[58] *Burrell* is the closest British judges have taken to a *non-constitutional* view of a political party.[59] The lack of a specified legal form for political parties, has meant judges have supplied legal forms off the shelf, or have failed to confront the issue of legal personality altogether. If the examples that judges reach for include child-minders and bridge clubs, then we might rightly be wary of this sort of judicial innovation.

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54 See https://beta.companieshouse.gov.uk/company/05090691. The Referendum Party used the same structure.

55 Choudhry v Treisman [2003] EWHC 1203 (Comm)

56 Conservative Central Office v Burrell [1982] 1 WLR 522 Court of Appeal

57 Ibid 528

58 Schedule 1, 9(f)

59 The organizational structure of the party has changed since Burrell was decided. For example, the National Union has been reformed as the National Conservative Association and the Conservative Central Office has been reformed as the Conservative Campaign Headquarters.

If an institution lacks a structure that the law can recognise, the law cannot mediate its disputes. As we saw in Chapter Two, 'essentially domestic'[60] institutions, such as agreements between spouses, do not bind contractually. Some people might consider this to be a desirable status for a political party. But the fact that the 'organization known as the Conservative party' lacks a legal structure does not *insulate* it from legal scrutiny, not least because political parties can owe special duties at common law. [61] More recent cases have cast doubt on the suggestion that a registered party with a very loose institutional structure can evade legal scrutiny. In *Weir v. Hermon*[62], the claimant argued that the Ulster Unionist Party did not exist, drawing on similar grounds to *Burrell*. Girvan J said courts may dismiss the argument that a registered political party is essentially domestic.[63]

The structure of the Conservative Party and the Ulster Unionist Party are exceptional. If a party has legal personality, then the courts can interpret their rules. In

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60 Atkin LJ in Balfour v Balfour [1919] 2 KB 571 Court of Appeal

61 In Goldsmith and the Referendum Party v Bhoyrul [1998] QB 459 Queen's Bench Division Buckley J struck out a defamation claim by the Referendum Party on account of the public interest that in a free, democratic, society, political parties should be open to uninhibited public criticism .The fact that the Referendum Party, which later became UKIP, was a political party meant it had no right to sue in defamation. Its founder Sir James Goldsmith, who was joined in the action, was subject to no such disability. See also Chief Constable of the Bedfordshire Police v Golding [2015] EWHC 1875 (QB)

62 Weir v. Hermon [2001] NICh 8 High Court (NI) Girvan J

63 In any event, the leader of the party could still be responsible for the actions of his subordinates See Equalities Commission v. Griffin [2010] EWHC 3343

the case of contractual associations like the Labour Party, 'on matters of law the court's jurisdiction cannot be ousted by any provision in the rules of the Association'.[64] In *Evangelou v. McNicol*[65], the National Executive Committee of the Labour Party (NEC) purported to use powers under Chapter IV of the Party Rules, to provide that only members of six months standing may vote in a leadership election. The rule disenfranchised a large number of new members, including Ms Evangelou. She alleged that the decision was made on factional grounds and that it breached her contract with the Party. We might argue that the NEC was exercising a public function in selecting its leader.[66] The election selected the leader of Her Majesty's Most Loyal Opposition, which is a statutory office under the Ministers of the Crown Act 1937, among other statutes.[67]

If the Labour Party were exercising a public function when it made this decision, then ordinarily the court could give weight to the NEC's view of its own regulations. It might also have considered the issue to be essentially political in nature, and not justiciable, for constitutional reasons. However, neither party to the litigation wished to place its argument on a public law footing. Ms Evangelou presumably thought that deference to the NEC would have been to her disadvantage, and the Labour Party presumably wanted

64 Weir v. Hermon [2001] NIJB 260 at 265 (Girvan J)

65 Evangelou v. McNicol [2016] EWCA Civ 817

66 See C.P.R. Part 54.1 (2)(a)(ii)

67 See e.g. Ministerial and Other Salaries Act 1975

to be treated as a private association by the courts. The High Court ultimately refused to defer to the Labour Party and held that its interpretation of its rules was a breach of contract. [68] This conclusion alarmed some politicians and journalists though it received less attention from legal commentators.[69]

The Court of Appeal reversed Hickinbottom J's decision. Beatson and Sales LJJ, for the Court, said 'the principles to be applied were the same as those applied in public law cases, i.e. not only that the decision is made rationally and in good faith, but also that it is made consistently with its contractual purpose and, we add, that all relevant matters have been taken into account and irrelevant matters not taken into account'. The Court of Appeal cited a mixture of public and private law cases for the proposition that, even in a private law case such as this, there was room to defer to the party.[70] It gave weight to the NEC's view of the Labour Rules. It broke with the view of political parties in cases like *Charter v. Race Relations Board* and the line of authority reaching back to *Dawkins v. Antrobus.* It did so by judging parties not by their structure but by their functions. It recognized that those functions are essentially public, and not private in nature. It marked

68 at [87]

69 See e.g. 'Judges must keep out of political minefields like Labour's leadership contest and Brexit', Philip Johnston, Telegraph 9 August 2016

70 R (Ross) v Life Assurance Unit Trust Regulatory Organisation Ltd. [1993] QB 17 Court of Appeal; Swain v The Law Society [1983] 1 AC 598 House of Lords' Choudhry v Treisman

a shift from the *non-constitutional* view of a political party towards a *constitutional* view of a political party.

There is another implication of the private view, which perhaps carries more serious implications. It is conceivable, that at some point in the future, a major political party will suffer a schism, in which different factions claim property belonging to the party not least of which, the party name. In that case, a court could be required to establish which is the real political party. *Lewis v. Heffer*[71] settled a factional struggle for control of the north-east Newham constituency Labour Party. The NEC intervened, to the advantage of one faction, and to the disadvantage of another. This changed the political orientation of the constituency party. Lord Denning and Ormerod LJ held that, on a broad construction of the Labour Party rules, the NEC had acted lawfully. However, they were also urged to consider whether the NEC was acting on the basis of an 'ulterior motive'. As Lord Denning put the point, 'if the N.E.C. did have the ulterior purpose of promoting sectional differences of one faction against the other — I should have thought that would have invalidated the suspensions'.[72] The Court of Appeal took a similar approach in *John v. Rees*[73], which settled another factional conflict in the Pembroke Constituency Labour Party. If our institutional view of parties is contractual, and if the party organisation is

71 Lewis v Heffer [1978] 1 WLR 1061 Court of Appeal

72 Ibid at 1073-1074

73 John v Rees [1970] Ch 345 Chancery Division

obliged to treat party members equally, without regard to the *politics* that underlie differences between litigants, then this structure is ill suited to the party's constitutional function.

According to the justiciability rules laid down in *Shergill v. Khaira*, which we considered in Chapter Two, a court could be called upon to settle a sensitive question of political policy. Shergill excludes cases 'beyond the constitutional competence assigned to the courts under our conception of the separation of powers'.[74] In other words, if the political doctrine of political parties were *para-constitutional*, as it is in China, then the court could not be called upon to consider this question. It is precisely because political parties are *not* given a structure in English law that the question remains live.

This section has looked at two different ways in which political parties can be treated as non-legal institutions. It draws on a distinction developed in Chapter Two. The CCP is a *para-constitutional* institution. Although it is mentioned (perhaps even regulated) by the 1982 Constitution, its constitutional duties are not justiciable in Chinese courts. This shields arbitrary behaviour from legal scrutiny. The limited way in which Chinese courts have approached administrative questions in terms of function, rather than organisation, are to be welcomed. In contrast, British parties are no longer treated as non-constitutional bodies, but they are certainly not treated as fully constitutional bodies,

74 Shergill v Khaira [2014] UKSC 33 Supreme Court at [42] et seq.

even in respect of the public duties that they perform. This prevents English courts extending deference to political parties in respect of its political programme. It could even force a court to arbitrate as between factions on explicitly ideological grounds. The first step in our argument is that, in order to allocate constitutional functions to political parties, the constitution has to recognise political parties as proper, public bodies fit for constitutional regulation, in a manner that neither China nor Britain does effectively. Our conclusion does not affect our judgment on how *well* the constitution allocates constitutional functions, which we will turn to presently. In doing so, we shift our focus from legal rules to non-legal rules.

THE FOUR ELEMENTS OF CCP LEADERSHIP

In this section, we consider a variety of rules that describe how the Party leads the state, and how these rules fit into the constitution.

In China, Party leadership should not be thought of as a latent principle. It predates the State constitution, but it is also an explicit, written principle of constitutional law. Party Leadership is not only written into the first article on the Constitution, it is one of the four Cardinal principles enshrined in both the State Constitution[75] and the Party Charter.[76] According to its Charter, the CCP is a 'Marxist governing party'.[77] Unlike liberal democratic parties, it is not an office-seeking institution. It is an office-holding institution, and it might be simpler to describe it as an office.

In 1978, Deng Xiaoping proposed a new relationship between the party and the state, and between the party-state and the law.[78] The essence of this vision was to

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75 Preamble

76 General Program

77 This language, found in the General Programme was developed following the Fourth Plenum of the Sixteenth Central Committee, which set the goal of establishing the CCP as a permanent governing party (执政党).

78 Deng Xiaoping, Speeches and Writings (2nd edn, Oxford : Pergamon 1987); Ding Bangkai (丁邦开), 'A Legal Theory of the Separation of Party and State 党政分开的法学思考' (1988) 3 Studies in Law (法学研究) 15

distinguish between the CCP, which is responsible for settling political questions, and the state, which is responsible for implementing those decisions.[79] In October 1987, at the Thirteenth Party Congress, the progressive faction in the leadership of the CCP put forward a programme to implement this policy.[80] In August 1988, Zhao Ziyang announced a decision to abolish Party groups in most government departments and issued draft 'Temporary Regulations on the State Civil Service'.[81] Together, these measures would have established a relatively independent civil service in China. In the 1987 General Program for Political Reform, 'party leadership' was redefined as 'political leadership'. Officials involved in the drafting of the General Programme expand on this meaning of political leadership as 'leadership in ideology and political guidelines to provide correct political principles, political direction, political line, and major general policies'[82] alongside the appointment of important officials. At this point in time, there is a clear, albeit theoretical, distinction between the two. However, following the Tiananmen Massacre, the conservative faction in the CCP leadership saw this policy as a threat to the continued

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79 See Li Ling, "'Rule of Law" in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China' (2015) 2 Asian Journal of Law and Society 93; Jiang Shigong, 'Chinese-Style Constitutionalism: On Backer's Chinese Party-State Constitutionalism' (2014) 40 Modern China 133; Larry Catá Backer

80 See Pen Hsiao, 'Separating the Party from the Government' in Carol Lee Hamrin and Suisheng Zhao (eds), Decision-making in Deng's China : Perspectives from Insiders (M.E. Sharpe 1995); Ding Bangkai; Li Ling

81 People's Daily, 1 August 1988

82 Pen Hsiao at 154-155

existence of the party. The doctrine of 'party-state separation' was stricken from party doctrine and the 1990 *nomenklatura* list restored the former prominence of Party core groups. Party committees resumed their control personnel decisions in economic enterprises and universities.[83] Since then, the CCP has governed both through and alongside the state.[84]

Party members are the transmission belt into the state machine for the Party's political will. There are at least three ways in which issues are allocated to the Party. In the previous chapter, we considered the Party's control over 'organizational matters': the process of appointing officials. The Party is also responsible for political and ideological guidance, the constitutional dimensions of which will be addressed in Chapter 6.[85] More generally, though, the Party claims responsibility for 'major issues' which is to say, matters

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83 'Zhonggong zhongyang guanyu jiaqiang dangde jianshede tongzhi' ('Notice of the Central Committee on strengthening Party building'), Zhongfa, No. 9 (28 August 1989) in Renshibu zhengce faguisi (ed.), Renshi gongzuo wenjian xuanbian, Vol. 12 (Beijing: Zhongguo renshi chubanshe, 1990), pp. 12-23. Quoted in John P. Burns, 'Strengthening Central CCP Control of Leadership Selection: The 1990 Nomenklatura' (1994) (1994) 138 The China Quarterly 458

84 To explore this question fully would require an organizational account of party leadership, and I cannot attempt this task here. The focus of this account is on the distinction and interaction between party and state rules. For a broadly consistent explorations of this question account see Li Ling and Zhu Suli, 'Political Parties in China's Judiciary' (2007) 17 Duke Journal of Comparative and International Law 533

85 See Charles Edward Lindblom, Politics and Markets (Basic Books 1977); Michael Schoenhals, Doing Things with Words in Chinese Politics : Five Studies (University of California Press 1992)

that are important enough to warrant its attention.[86] Article 10.5 of the Constitution of the Communist Party says '… All major issues shall be decided after discussion in accordance with the principle of collective leadership, democratic centralism, individual consultations and decision by meetings...'. The lack of definition given to 'major matters' leaves a substantial overlap between the Party and the State.

The Organisation Department of the Communist Party promulgates rules to guide the formal penetration of the state by the Party.[87] The Organisation Department publishes a list of key positions in government. CCP Central Committee approval is required before appointments to positions on its list. Additions to and deletions from the list also required approval.[88] A separate list of positions requires that the Central Committee be notified prior to personnel moves.[89] John Burns notes 'probably from at

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86 Constitution of the Communist Party (rev.2013) Art. 10.5 '…All major issues shall be decided upon by the Party committees' (emphasis added). For context see Li Ling; Jiang Shigong

87 The origins of this system can be found in An Ziwen's report to Mao Zedong and Liu Shaoqi on Cadre Management of December 8. 1950 in Zhonghua Renmin Gongheguo renshi gongzuo dashiji (1948-1983) [Diary of major events in personnel work of the PRC [1949-1983]) Beijing, Guojia Kewei Rencai Caiyuan Yanjiusuo 1985) 160-161 cited in John P. Burns, The Chinese Communist Party's Nomenklatura System (M.E. Sharpe 1989)

88 A separate list of positions requires that the Central Committee be notified prior to personnel moves.

89 The rules were consolidated in two Central Committee Decisions: Zhonggong Zhongyang guanyu jiaqiang ganbu guanli gongzuo de jueding (Decision on Strengthening Cadre Management Work) of November 1953; Zhonggong zhongyang guanlide ganbu zhiwu mingcheng biao de jueding (Decision on the Job Title list of Cadres Managed by the Central Committee) January 1955 both cited in Burns.

least this time, party core groups have been organised in central and local governments and mass organisations and have maintained the nomenklatura for their own units and functional systems'.[90]

The CCP Constitution provides that party groups shall be established in non-party organisations. Article 46 provides:

> A leading Party members' group may be formed in the leading body of a central or local state organ… The group plays the role of the core of leadership. Its main tasks [include]: to see to it that the Party's line, principles and policies are implemented...[91]

These principles are expressed in permissive terms rather than imperative terms – the Party actively promotes the establishment of Party groups. However, the presence of Party groups in other state organisations is occasionally required by state laws. Article 19 of the Company Law of 2005 (Revised 2013) provides that

> In a company, an organization of the Communist Party of China shall be established to carry out the activities of the Party in accordance with the

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90 John P. Burns, The Chinese Communist Party's Nomenklatura System xiii-xiv. For an update on Burns accounts of the nomenklatura system in the 1980s see Hon S. Chan, 'Cadre Personnel Management in China: The Nomenklatura System, 1990–1998' (2004) 179 The China Quarterly 703. The list is now a restricted document.

91 The origins of this system can be found in Decision of the Third Revision of the CCP Constitution. See also the Constitution endorsed at the Sixth Party Congress in 1928. See Pen Hsiao

> charter of the Communist Party of China. The company shall provide the necessary conditions for the activities of the party organization.

According to the Central Committee's own journal, government and civil society are now more densely penetrated[92] by Party groups than at any time since 1989.[93]

A cadre may struggle to distinguish the binding force of a Party instruction and a state law. However, at least in theory, they reflect separate authority claims: one based on ideological submission of party members to party discipline and the other on state law. The distinction is described in Leninist theory:

> The carrying out of a party directive rests upon voluntary ideological submission of party members to party discipline and to the decisions of the central bodies of the party; the carrying out of Soviet laws is linked to coercion by the state of the dictatorship of the proletariat... The identification of the party directive with Soviet laws signifies the

92 See State Council Regulation on Registration and Administration of Social Organisations of 25 September 1998, State Council Regulations on Religious Affairs of March 1st 2005; CCP Regulation on Party Group Work (Provisional) of 11 June 2015; Charity Law of 2016; Foreign Non-Governmental Organisation Management Law of 2017;

93 Of the 3.6 million new private enterprises established in 2015, slightly more than half had already set up Party Cells. (99.9% of private enterprises have a Party cell.) 40% of social enterprises already had a Party cell, a slight rise. About 99.1% of social enterprises have a Party cell 充分认识当今党情新变化, (Fully Understand the New Changes in the Party Today), 人民日报 (People's Daily) 5 January 2017

substitutions of the dictatorship of the party for the dictatorship of the proletariat.[94]

The Party issues instructions to its members by means of 'public documents' (公文). Public documents reflect a separate system of social and bureaucratic control directed at party members.[95] Each administration publishes its own regulations on the use of public documents. The regulation currently in force sets out eighteen categories of documents, along with their effects and rules regarding who may issue them. For example, one important sort of public document is a Decision (决定). Decisions are issued by key party organs such as the CCP Central Committee.[96] Each plenary meeting of the Central Committee deals with an issue of public policy and summarizes its conclusions in a Decision. The regulation stipulates that Decisions are used for purposes such as 'making or implementation of policy for important issues or actions' and 'quashing inappropriate decisions made by sub-branches'. Public documents form a separate category to 'normative documents' (规范性文件), which we considered in Chapter Three. Indeed,

94 M. Rezunov, 'Sovetskii zakon na novom etape NEPa (Soviet Law During the New Phase of NEP) ' 4 Sovetskoe Gosudarstvo i Revoliutsiia Prava.

95 See State Council General Office, CCP Central Committee General Office, Joint Regulation on the Use of Official Documents in Party and State Work of 1 July 2012 s9.

96 Public documents are not exclusively issued by the Party. However certain sorts of public documents (such as Resolutions 决议) are not issued by state bodies.

normative documents' are explicitly excluded from the regulation that governs the use of public documents.[97] These are mutually exclusive systems of rules.

The binding force of Party instructions is supposed to reflect voluntary submission to the discipline of the Party. We will return to Party rules like these when we consider the constitutional impact of Party doctrine in Chapter Six. However, alongside the invisible hand there is a visible boot. Party members can be disciplined on Party channels for 'misinterpreting instructions from the Centre' (妄议中央)[98], which is considered to be a form of official corruption. From 2012, when Xi Jinping came to power until 2015, almost 750,000 cadres were disciplined on Party channels.[99]

In March 2018, a constitutional amendment created a new body with new powers to punish Chinese citizens outside the formal legal system. The National Supervision Commission has the power to detain not only Party members but also: 'personnel engaged in public affairs… or lawfully retained by state organs'; the 'Management of state-owned enterprises'; and 'Personnel engaged in management in public education, scientific research, culture, health care, sports and other such units'. The Commission's remit is broad, including not just legal infractions, but also breaches of 'integrity and ethics'. In

97 State Council General Office, CCP Central Committee General Office, Joint Regulation on the Use of Official Documents in Party and State Work of 1 July 2012, Part 4 (Appendix)

98 Article 46, Central Discipline and Inspection Commission Regulations of October 12 2015

99 Hudson Lockett, China's Corruption Campaign Backfire, Financial Times, 9/10/2016

effect, this vastly expands the reach of the Party's Central Commission for Discipline, whose staff and functions overlap with those of the Commission. The Commission has the power to detain individuals under investigation at a designated location for three months, extendable for three months.

Jeremy Daum of Yale University said, 'what is really being abolished' by the creation of the Commission is the pretence of the separation of party and state'.[100] But as we have seen, it is far from obvious that the constitution ever pretended to separate Party and state. Party leadership was re-enshrined in law from the moment the constitution was promulgated and has been consistently enshrined since then. The Party legislates, for example, when the Central Committee jointly issues regulations with the State Council. Moreover, the Supervision Commission is only the latest attempt to apply Party disciplinary rules through a state institution. For example, Article 15 of the National Security Law of 2015 vests the power to develop, coordinate and implement national security policy to the Central Leading Group of National Security, an organ of the Central Committee of the CCP. But when the party and the state make competing claims on party members, these claims do not coexist harmoniously.

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100 Quoted in 'China gets a new system to curb corruption—and ideological lapses', The Economist, December 8 2017.

How then, should we describe this tension? John Griffith distinguishes between two different sorts of legal pluralism.[101] 'Weak' legal pluralism describes the coexistence of two or more systems of rules under the jurisdiction of a superior system of rules. For example, colonial legal systems recognised and gave effect to more than one system of religious law within the same legal order. In British India, it was possible to obtain a marriage according to Hindu law.[102] In contrast, 'strong' legal pluralism describes the competition of systems of rules that are not regulated by an overarching system. In a constitutional order that displays strong legal pluralism, competing claims to supremacy are not resolved by superior rules. There can be multiple and unranked sources of obligation, and therefore of power.

We might argue that China is a state of legal pluralism. To make this claim, we would have to show that the conflict between the Party and the law introduced in Chapter One is an unregulated conflict. We can certainly reject the claim that Party rules are uniformly subordinated to the law. The constitution purports to claim supremacy, and the CCP Constitution purports to concede that claim, but both the claim and the concession are a sham. Institutionally, the Party precedes and survives the promulgation of the constitution and Party rules do not rely on the legal system for their validity nor for their enforcement. In the previous chapter, we considered Fu Hualing's argument

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101 John Griffiths, 'What is Legal Pluralism?' (1986)18 The Journal of Legal Pluralism and Unofficial Law 1

102 Parkasho v Singh [1967] 2 WLR 946 Divisional Court

about the extra-legal and extra-extra-legal domain. We also considered cases in which law and regulation are expected to conform to the general lines of Party policy. This chapter expanded on that theory in light of detailed party disciplinary procedures. Mayling Birney described this para-legal system disciplinary system as a 'rule of mandates':

> Instead of directing officials to implement the regime's laws and policies unconditionally, the party directs them to implement a subset of 'mandates' according to their relative prioritization. As I invoke the term here, mandates do not simply represent an alternate set of laws parallel to the public body of laws. In contrast to a body of laws, mandates are directives that are hierarchically ranked against each other. Lower officials are expected to give more weight to the higher priority mandates, and they are authorized to adjust the implementation of laws and lower priority mandates to aim at the desired ends. In this system, the implementation of laws is thus conditional on their compatibility with higher priority mandates.[103]

By Birney's account, higher priority mandates do not merely qualify the law – they take precedence over it. On the basis of this evidence we can tentatively conclude that, at under some circumstances, Party rules bind regardless of clear legal provisions to the contrary.

This does not prove that Party rules invariably yield to law. For example, in the Kang Deming case, discussed above, a Party body was arraigned for a work-unit crime. The example is doubtful, because it involves a dispute between Party bodies at different

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103 Mayling Birney, 'Decentralization and Veiled Corruption under China's "Rule of Mandates"' (2014) 53 World Development 55 at 55

levels of the hierarchy, but it might be possible to identify cases in which law takes precedence over Party rules. However, on the evidence set out above, it would appear to be Party rules, not legal ones, that determine the ambit of state power, on account of the constitutional principle of Party leadership.[104] For reasons we will explore in the next chapter, it is hard to imagine the NPC or the SPC meaningfully restraining the Party. For this reason, it is hard to conclude that China is in a state of weak legal pluralism because it is hard to identify a body of rules independent of the CCP that resolves conflicts between the Party and the Law.

We can draw four essential elements from this discussion. The first is a constitutional principle that the Party should lead the state. The second and third are organizational rules – one that requires Party members to make decisions in Party caucus; and one that requires caucuses to secure Central Committee approval before appointing new officials. Both rules are required for central control. Without Party groups it would not be possible to arrange new appointments, and without the *nomenklatura* rules, power would diffuse into the Party groups. Finally, while Party members are supposed to obey the law, it is tolerably clear that, when they are confronted with conflicting claims, their loyalty is owed to the Party in the first instance. In the next chapter, we will consider the possibility that this rule is a constitutional convention.

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104 Ewan Smith, 'The Rule of Law Doctrine of the Politburo' (2018) 79 The China Journal 40

The British Party-State?

Britain does not have a party-state in the sense that China has. Instead, it has rules that provide for the independence of important state organs from political parties and from politics more broadly.[105] These rules play a particularly important role in the establishment of the civil service. Since the implementation of the 1854 Northcote Trevelyan Report, British civil servants have also been appointed independently of the political part of the government. As we saw in the previous chapter, the institutional rules that provide for its independence has been codified. Civil servants can be members of political parties, but they cannot participate in high-level politics, including national election campaigns.[106] The Ministerial Code also sets rules to separate the party and the state. The Code was formulated further to a duty in the Constitutional Reform and Governance Act 2010 alongside codes for civil servants, and for special advisers. For example, s1(2)(i) of the Ministerial Code provides that Ministers must not use government resources for Party political purposes. Section 1(2)(j) provides that Ministers must not 'ask civil servants to act in any way which would conflict with the Civil Service

105 See e.g. House of Commons Disqualification Act 1975

106 The bar also extends to special advisors and senior local government officials. See e.g. R (National and Local Government Officers Association) v. Secretary of State For the Environment 1992 WL 895523 Court of Appeal (Civil Division)

Code…' Section 3.1 provides that Ministers have a duty to ensure 'that influence over civil service and public appointments is not abused for partisan purposes'.

However, the British political executive can appoint its *nomenklatura* to key offices of state. Ministers are appointed and dismissed by the Prime Minister along Party lines and under the supervision of the Party organisation. By convention, ministers must be Parliamentarians, but unelected Party officials earmarked for ministerial office can be ennobled and then appointed. The governing party can also appoint partisan special advisers to work for British ministers. In 1974 Harold Wilson formalised the existing practice of appointing partisan experts to support the work of the civil service. Thirty Special Advisors were appointed, and Wilson established the Downing Street Policy Unit. Numbers remained relatively steady until the mid 1990s and have trebled since then. At the last data-release there were 92 Special Advisors.[107] The status and functions of the Special Advisers are defined by s.15 of the Constitutional Reform and Governance Act 2010. They are appointed personally by the minister, and the appointment ends if the minister ceases to hold that office, or with a general election. 'It is Ministers, as members

107 See: https://www.gov.uk/government/publications/special-adviser-data-releases-numbers-and-costs-december-2017 Recently, the Prime Minister, as Minister for the Civil Service has also extended ministerial powers to appoint external advisers in their private offices – what is now known as the 'Extended Ministerial Office See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440470/EMOguidance01062015.docx.pdf

of the Executive and as members of the governing party, who decide how the transmission of party policies into government policy should be achieved'.[108] Ministers issue instructions to officials, which those officials are constitutionally (and ultimately, legally) obliged to follow. The party implements these policies in government by means of the party whip. After a decision is made in party caucus, instructions are issued to party officers to vote accordingly in state forums. Like government rules, these instructions often take the form of rules and they ensure that official action is efficient and democratically legitimate.

The vision of unitary parliamentary democracy that we find in Dicey erases parties from the picture.[109] We often talk about the British government as if it were an undifferentiated whole, regardless of the competing demands of party and state. In a sense, this reflects the legal picture, which is one of direct representation of constituents by a member of parliament, rather than a political or conventional picture of representation by a member of a political party.

In *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport*[110] the Supreme Court was asked whether the use of the Party Whip prevented legislation receiving the scrutiny

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108 , Committee for Standards in Public Life, Ninth Report (Cm 5775) (London: HMSO) 3.16

109 P. P. Craig, Public Law and Democracy in the United Kingdom and the United States of America (Clarendon 1990) Chapter 2

110 R. (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3 Supreme Court

required by EU environmental law. Only three Justices out of the seven justices sitting in the Supreme Court considered this argument and all three dismissed it. Lord Reed said 'there is nothing… in the case law of the Court of Justice to suggest that the influence of parliamentary parties, or of Government, over voting in national legislatures is incompatible with [the law]'[111] not least because 'parliamentary parties are recognised as playing a legitimate role in democratic decision-making in other member states besides the United Kingdom'.[112] Lords Neuberger and Mance put the point in rather more forthright terms 'The claimant's case that the parliamentary process will be tainted by considerations such as whipping or collective ministerial responsibility or simply by party policy, amounts to challenging the whole legitimacy of parliamentary democracy as it presently operates'.[113]

This is an attractive and practicable conclusion. But it is less resounding than it might appear. First of all, this is a *minority* of the Supreme Court. Lord Carnwath ignored rather than endorsed the role of political parties in democratic decision-making. He stressed that '[f]ormally, and in reality, Parliament is autonomous, and not bound by … Government statements'.[114] Second, the argument of the minority is a rather qualified

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111 Ibid at [101]

112 Ibid at [106]

113 Ibid at [210]

114 Ibid at [39]

defence of the whip. Lord Reed concludes that EU law does not require a free vote, and that it would be unlawful for a court to inquire into the adequacy of legislative scrutiny. Finally, it does not address a substantial body of case law which questions the legality of the whip, which casts doubt on the legality of the transmission of policy from Party to State and which does not take account of the democratic dimensions of this process. The decision in *HS2* did not consider and did not overrule these cases. The *electoral* dimension of democracy is obvious, but the democratic principle also extends to the transmission of policy from the democratic part of government to the civil service.[115]

The origin of this line of doctrine lies in a unitary, legal vision of British democracy.[116] In *Osborne v. Amalgamated Society of Railway Servants*[117], the majority of the Court of Appeal held that a contractual levy to support whipped MPs was void for reasons of public policy, on the ground that it was 'utterly opposed to the whole theory of representative government'.[118] Citing Coke, Locke, Blackstone and Burke, Lord Shaw

115 See also e.g. Moohan, Petitioner 2015 SLT 2 Supreme Court at [77] (Lord Kerr)

116 Lord Carnwath's judgment in HS2 perhaps reflects this approach. Lord Reed also addresses the constitutional propriety of judicial oversight of the proceedings of the legislature, but this issue is not strictly limited to political parties, not least for the reasons Lord Carnwath puts forward.

117 [1909] 1 Ch. 163,

118 Per Farwell LJ at 197

echoed Farwell LJ's decision that a parliamentarian's 'primary duty is to his country, and he cannot bind himself at law by any promise in abnegation of such duty'.[119]

These ideas about policy transmission were current throughout the twentieth century. In *Franklin v. Minister for Town and County Planning*[120], the House of Lords held that party political decisions do not constitute bias, at least for a limited category of ministerial decisions. Political parties were not mentioned in Lord Thankerton's leading judgment. In *Jackson v Amber Valley*[121] the claimant alleged that the rules of natural justice forbid the pre-determination of government business in party caucus. Following *Franklin,* Woolf J held that it did not constitute bias for decisions of state to be made in party caucus. He defended the democratic transmission of policy from party to state. He said, 'it was almost inevitable, now that party politics play so large a part in local government, that the majority group on a council would decide on the party line in respect of the proposal' and that to try to prevent political parties from doing so would be 'almost impossible to achieve in practice'.

In *R (Baxter) v. Waltham Forest*, the Labour group agreed on a large rise in rates in caucus, and then implemented the decision in council. The decision was challenged on

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119 Osborne v Amalgamated Society of Railway Servants [1910] AC 87 House of Lords [1909] 1 Ch. 163 at 197. The effect of Osborne was overturned by the Trade Union Act 1913

120 Franklin v Minister of Town and Country Planning [1948] AC 87 House of Lords

121 R (Jackson) v Amber Valley District Council

fettering grounds. Lord Donaldson suggested reasons why the whip *might* be condemned, but ultimately refused to condemn it. He concluded that councillors could not vote 'on instructions from' another authority. This required a 'fine… but… nevertheless very real' distinction between 'giving great weight to… party policy… and voting blindly in support of party policy' He also held that if the councillors felt they had 'no option but to vote as they did' then their vote would be unlawfully fettered. He examined the relevant standing orders of the Labour Group, which said councillors are 'required' to vote in accordance with decisions of the Labour Group.[122] He decided that the practice of the group in implementing these rules was not mandatory, as the group did not immediately remove the whip from councillors who failed to toe the party line.

The previous section explored a Chinese principle that state offices can be parasitized, provided the parasite does not kill the host. This is one way to read the principle in *Franklin, Jackson* and *Baxter*. But it may be more accurate to say that the United Kingdom has not developed a workable model, which describes the way the Party transmits the democratic will into the government. The legal form of Parliamentary debate is unusual in that it has not yet evolved with convention. To insist that Parliamentary debate continues in the same form it did when Lord Bolingbroke wrote is

122 Except in certain circumstances, such as free votes and judicial decisions.

as 'impossible to achieve in practice' as the pre-*Carltona* claim that the Minister makes decisions personally.

Hence, British party leadership is only partially acknowledged by the constitution. The constitutional role of political parties was belatedly and elliptically reflected in legislation. Moreover, the constitutional propriety of the party whip – an essential instrument of party leadership – remains open to challenge in British courts. However, as we have seen, the constitution allocates some decisions to the political process, but expects others to be made in a more independent and impartial fashion.[123] As in China, certain sorts of decisions are made in party caucus, and others are made by the state. We consider this tension between the political and apolitical parts of the government in the next section.

123 Franklin v Minister of Town and Country Planning R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295 House of Lords

THE SEPARATE CONCERNS OF PARTY AND STATE

The Party as Whole and The Party as Part

This section considers the interaction of the Party and the State. A party can interact with the state in at least three ways. A Party can coexist with the state in relative harmony, according to stable rules that define separate spheres of influence. A party can compete with the state: an antagonistic relationship in which either state or party is liable to be replaced. If these rules are unclear or unstable, a party may partly or completely supersede the state, performing state functions when it is politically convenient for it to do so.[124]

The Chinese literature begins from the standpoint that the partisanship and state constitutionalism are held in tension. Peng Chun elegantly streamlines this literature into four possible relationships between Party leadership and constitutionalism: constitutionalism *or* Party leadership, constitutionalism *through* Party leadership, constitutionalism *and* Party leadership, and constitutionalism *in* Party leadership.[125]

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124 For a discussion of these alternatives in historical context see Zheng at 49

125 Peng Chun, 'Constitutionalising Party Leadership in China' (Conference Paper, ICON-S, Hong Kong, 23 June 2018). I have adapted Professor Peng's account slightly.

Some thinkers see constitutionalism and Party leadership as inconsistent alternatives. These thinkers divide into two groups. One group sees Party leadership as a bulwark against the sincere implementation of China's constitution.[126] They conclude that we have a choice of constitutionalism *or* Party leadership. We might see Zhang Qianfan's views as representative of this tradition. Some theorists agree that Party leadership is inconsistent with the aspirations of China's written constitution, but see Party leadership as a phase in Chinese constitutional development that will ultimately lead to constitutionalism. This group concludes that that constitutionalism comes *after* Party leadership.[127] Sun Yatsen's evolutionary theory of constitutionalism (宪政), following a period of party-political tutelage (训政), reflects this position.

Some thinkers do not accept the premise that constitutionalism and party leadership are inconsistent alternatives. We can also divide these thinkers into two groups. One group think constitutionalism and party leadership coexist in harmony in a sort of dual state. They conclude that we can have constitutionalism *and* Party leadership. We might see Jiang Shigong's theory of China's dual constitution as representative of this tradition.[128] Finally, some thinkers reject the idea that China has two constitutions. They

126 Qianfan Zhang, The Constitution of China: a Contextual Analysis (Hart Publishing 2012)

127 See also Albert H. Y. Chen, 'The Discourse of Political Constitutionalism in Contemporary China' (2014) 14 China Review 183

128 Jiang Shigong

think Party leadership is the essence of China's constitution, and reject the idea that the written constitution is an alternative. They see constitutionalism *in* Party leadership. We might see Chen Duanhong's views as representative of this tradition.[129]

In contrast, democratic theorists such as Giovanni Sartori and Sigmund Neumann view the state constitution as a integrative body of rules that can cabin partisanship. They describe political parties as parts of a whole. Parties articulate a conception of the national interest and in turn the constitutional order reconciles different conceptions of the national interest and sets the limits of what counts as an acceptable conception. Sartori calls this model the 'party-as-part'. Neumann goes further, arguing that, if parties do not perform this task 'the modern state is in danger of deteriorating into a neo-feudalism of powerful interest groups'.[130] We might describe this as constitutionalism through Party submission. By this accounts, parties are essentially constitutional actors, braiding local and special interests into a single conception of the national interest.

Sartori contrasted the party-as-part with the single party – the party-as-whole: 'The single party displays the characteristics of holism, or of wholeness, in that it flatly rejects the idea of a whole resulting from a competitive interplay of parts. Even within the single party, any kind of formalised intra-party division is banned: It is heresy,

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129 See Albert H. Y. Chen, 'The Discourse of Political Constitutionalism in Contemporary China'
130 Sigmund Neumann at 397

intolerable deviance'.[131] By this account, constitutionalism is Party leadership. But it is significant that this holism is not limited to one party states - it was an important theme in Enlightenment constitutionalism. The French and American republicans believed in a rational account of the national interest and were broadly sceptical about the spirit of party because this suggested that the national interest could be plural. Speaking of political parties, Condorcet said, 'one of the primary needs of the French republic is to have none'.[132] They were sceptical because it was clear to them that the spirit of party entailed a diversity of different conceptions of the public interest - a feudalism of powerful interest groups.

Even Edmund Burke highlights the dangers of partisanship. Burke wrote the first modern account of political parties.[133] The familiar gist describes 'a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed'.[134] However, the concept of the national interest is nevertheless central to Burke's account. Burke distinguished between parties and other

131 Ibid at 35.

132 Quoted in Giovanni Sartori at 10.

133 Giovanni Sartori, Parties and Party Systems (Cambridge University Press 1976) traces the development of Burke's ideas through Machiavelli, Bolingbroke, Montesquieu, and Hume, and later through the American and French republicans.

134 Edmund Burke, Thoughts on the Cause of the Present Discontents (6th edn, J. Dodsley. 1784) at 110

office seeking groups, such as factions, according to the reason why they seek power.[135] Parties act (or at least ought to act) in the 'national interest'. Factions, on the other hand, serve essentially private interests. In Burke's view, 'a generous contention for power... will easily be distinguished from the mean and interested struggle for place and emolument'.[136] Burke saw political parties as essentially private bodies that need to be independent of the state. For Burke, political parties, and democratic politics are the product of a *lack* of interference and regulation.[137] The risks of this approach are a mean and interested struggle for place.

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In respect of the Party as a whole, Nick Barber asks, 'why have a party in a party state?'[138] The assumption behind the question is that the Party in the Party-state is obsolete, because its concerns and functions are identical with those of the state. Barber's question reflects his account of the concerns of the state, a state that cares for all of its members.[139] From a Marxist point of view, the state is not necessarily a body whose

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135 For a social account of a faction, developed in a Chinese context see Andrew J. Nathan, Peking Politics, 1918-1923 : Factionalism and the Failure of Constitutionalism (London : University of California Press 1976) Chapter 2

136 Edmund Burke at 111

137 For further examples of each of these ideas, see Anika Gauja, Chapters 1, 2, 9

138 N. W. Barber The Principles of Constitutionalism

139 N. W. Barber, The Constitutional State (Oxford University Press 2010).

concerns extend to all of its members. It could be a machine that is used by a class to dominate other classes. The class that controls it shapes its concerns. The question, from a Marxist point of view is not 'why do we need a Party' but 'why do we need a state?'

If the Party purports to represent all of the members of the state, rather than a section of its members, then we have a separate argument for its obsolescence: the party been absorbed by the state, it has become a state in party's clothing. As we noted earlier, the party represents 'the fundamental interests of the overwhelming majority of the Chinese people'.[140] This is not universal. The Party does claim to represent the fundamental interests of the overwhelming majority of the Chinese people, but it represents other things too. It is not a state-like organisation, not least because only a small minority of Chinese citizens can be members of it.

Perhaps all parties pursue the only account of the public interest they know. Nick Barber distinguishes between ideological parties, which are committed to the good of the whole community and sectarian parties, which are committed to the good of a part of that community. Barber accepts that the distinction is much sharper conceptually than in practice: 'actual parties shift between these two over time and contain elements of each' and indeed that 'at some points it might be impossible to say which of these two characterizations is more accurate'. It is, indeed, hard to say whether a party that purports

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140 Jiang Zemin, Work report at the 16th Congress

to represent 'working people' is more sectarian than a party which purports to represent everyone but which mainly helps rich people. Even explicitly sectarian parties, like ethno-nationalist parties, often describe their campaigns in terms of the interests of the whole nation. For example, the Scottish Nationalist Party argues that independence would turn Scotland from a bad tenant into a good neighbour.

Each of these theories highlights the connection between the concept of a political party and the concept of the public interest. Broadly speaking, Chinese theories highlight the potential for conflict between the interests furthered by Party leadership and the state interest. Broadly speaking, democratic theories of party present the state constitution as an integrative institution, the whole of which parties are part. Each of these theories highlights the danger that parties will pursue essentially private interests. In Chapter Six, we will consider the implications of these separate theories of the Party and the public interest in more detail. First, in the final section of this Chapter, we will use them to point to an important way in which UK constitutionalism moderates Party leadership.

Public Policy and Political Policy in the UK.

Some constitutions leave room for dissent about the content of the national interest, and how to pursue it. This reflects a distinction between policy and political policy we encountered in Chapter Two and to which we will return in Chapter Six.

The fact that Britain retains a permanent civil service, led by political appointees acknowledges the fact that governance and politics might make separate demands. One advantage to this system, among many, is that it builds an extra layer of independence into a Parliamentary system that has fewer checks and balances than some other constitutional orders. Political parties can be charged with the constitutional task of channelling the democratic will, so as to form a conception of the national interest, at least until that conception is displaced by a competing one. Unlike in China, UK courts do not give conclusive authority to the conception of the public interest formed by the political part of the executive.

Four principles govern the permanent civil service, as set out in the Civil Service Code: honesty, integrity, impartiality and objectivity.[141] Based on the definitions of these virtues in the Civil Service Code 2010, impartiality is impossible for party officials.

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141 One would hope that honesty and integrity flourish in politics just as much as they do in government. See Ministerial Code s1.

Impartiality, for the purposes of the Civil Service Code, is 'acting solely according to the merits of the case and serving equally well Governments of different political persuasions'. Political appointees cannot and should not be impartial in this sense. For this reason, while it appears in the Civil Service Code, impartiality is not one of the seven principles of public life, which bind Ministers under the Ministerial Code. Objectivity, on the other hand, appears in both the Civil Service Code and the Ministerial Code. As such, it binds both ministers and civil servants. However, it bears a different meaning for each. The definition of objectivity in the Principles of Public Life is to 'act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias'.[142] For the purposes of the Civil Service Code, it is 'basing your advice and decisions on rigorous analysis of the evidence'.[143] Ministers need not be impartial, but they must be objective in the distinct sense set out above. Special advisors are obliged neither to be objective nor impartial.[144]

In Chapter Two, we briefly addressed rules which demand that courts adopt a distinctive view of the public interest on questions of high-policy.[145] We returned to this idea in Chapter Three, when we considered rules that allocate decision-making power to

142 Committee for Standards in Public Life (1995), First Report (Cm 2850-I) (London: HMSO)

143 Civil Service Code (S.I. 2010 No. 2703)

144 Special Advisers Code (S.1. 2010 No 2703) at [8]. See also Committee for Standards in Public Life, Ninth Report (Cm 5775) (London: HMSO) 7.10

145 Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18

the government in certain vaguely defined circumstances. There is, however, a more recent line of cases in English law in which government policies have been challenged as irrational, essentially because the government obstinately persists with a policy in the face of reasonable opposition by civil servants. In these cases, the courts are asked to arbitrate between separate conceptions of the public interest put forward by the political and apolitical parts of government.

These are controversial cases, because they involve questions of political judgment. There are democratic objections to the court's decision to assert jurisdiction. One problem with much of the commentary on these cases, is that its treats the government as an unalloyed whole. In fact, government is a dyad, with political and apolitical sides. Different parts of the government specify the public interest in different ways. If we put political parties back into the picture, we might read these controversial cases as cases in which a court is forced to arbitrate between the political and the apolitical side of the government.

In *R (World Development Movement) v. Secretary of State for Foreign and Commonwealth Affairs*[146], the political part of the executive wished to build a dam in Malaysia, as a kickback for an arms deal. It sought to pay for the project using money

146 R. (World Development Movement) v. Secretary of State for Foreign Affairs [1995] 1 WLR 386 Divisional Court

statutorily earmarked for development. The Permanent Under-Secretary advised the minister that the project had no development value and so could not be paid for in this way. An NGO challenged the way the government proposed to use this money. The government did not challenge the civil service conclusion that the dam had no development value. Instead it argued that it did not matter, because wider political and diplomatic concerns should prevail. As such, the court was being asked to arbitrate between two conflicting views *within* government – the view of the minister, as reflected by the department's lawyers, and the view of the permanent secretary, which was submitted in evidence by the interveners. Rose LJ, for the Court of Appeal, held that the minister could not draw upon ODA funds.

In *Roberts v. Hopwood*, the Metropolis Management Act 1855 gave London Borough Councils the power to 'appoint or employ' officials and to pay them 'such salaries and wages' as they may think fit. In 1919, the Labour Party was elected on a platform that included a minimum wage of four pounds per week paid for through local rates. A civil servant refused to allow the expenditure, essentially on the ground that a minimum wage was not a wage, but a gift.[147] It surcharged the councillors who made the decision, who then sued. In *Roberts* the conflict between the political and apolitical part of the

147 Roberts v Hopwood [1925] AC 578 House of Lords

government is even clearer because the claimant is a civil servant and the respondent is a politician.[148] As in *WDM*, the House of Lords agreed with the civil servant.

Perhaps the most controversial example of this sort of dispute is *Bromley LBC v. GLC*[149]. In 1981, a new General London Council was elected on a platform including reductions in tube and bus fares. Whitehall moved to block this by cutting subsidies, meaning that the cost of the policy to ratepayers would be many times greater than the money actually saved in fares. The GLC persisted with the policy. A London borough sought to quash an order to increase its rates, on the ground that the GLC had breached its statutory duty to run London Transport 'along business lines'. But the essence of the dispute in *Bromley* is between the political and apolitical part of the government. The council's civil servants had made representations to its political officers about the viability of a policy.[150] Both the Court of Appeal and the House of Lords concluded that the political part of the executive did not give sufficient weight to that advice and held that it was irrational for them to do so.

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148 Porter v. Magill can arguably be read in a similar fashion. Like Roberts, Porter is also a dispute between a party official and an unelected auditor, asking the politician to account for losses to the public purse. The officers of Westminster council warned Shirley Porter that her policy was illegal, for reasons expressed in terms of the limits of her statutory powers, and in particular, on the effect that the policy would have on the council's statutory housing obligations.

149 Bromley London Borough Council v Greater London Council [1983] 1 AC 768 House of Lords

150 Ibid at 773, 786.

In each of these cases, and in cases like them,[151] officials raised concerns regarding the lawfulness of implementing a policy aspiration in a particular way. If we treat the government as an undifferentiated whole, we miss this important dimension to these cases.

The problem with deciding according to what works in practice, is it depends what you mean by 'works'.[152] We can only decide what works with reference to some set of goals or values, which is to say, with reference to a conception of the national interest. With this in mind, the claim in *Bromley* that the government's desire to implement a manifesto commitment could be an improper purpose seems particularly poorly thought-through.[153] However, the threat to truly democratic policy selection does not only come from a lack of opportunity for people to choose. It comes also from a culture in which parties propose policies that cannot be delivered by the state – the offer of more with less. To be clear, neither the minimum wage policy in *Roberts*, nor the Fares Fair policy in *Bromley* falls into this category. However, to say that policies the party knows to be ineffective, inefficient or counterproductive are 'democratic' on the grounds that they

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151 Porter v Magill [2001] UKHL 67, [2002] 2 AC 357 House of Lords above. See also Lord Templeman's approach to the division between the political and apolitical part of the executive in Wheeler v Leicester City Council [1985] AC 1054 House of Lords

152 See generally Gerry Cohen, 'Facts and Principles' in Thomas Christiano and John Philip Christman (eds), Contemporary Debates in Political Philosophy (Wiley-Blackwell 2009)

153 Bromley London Borough Council v Greater London Council at e.g. 796

have been selected requires a rather rudimentary account of democracy. In particular, it fails to take account of the fact that the nature and function of the party can change depending on the constitutional office that it occupies.

As we have seen, parties can be *structurally* different when they inhabit the institutions of state. The Labour Party is currently the Opposition, but they are not one and the same. It is intelligible to substitute the words 'The Conservative Party' for the local council and, as Lord Keith noted in *Derbyshire*, above, we often attribute political responsibility in this way. 'Reputation in the eyes of the public' lies with 'the controlling political party.' However, not all '3 Pound Supporters' of the Labour Party are members of the Opposition. Not all registered Republicans work for the Administration. Parties are overlapping groups with distinct responsibilities, and at least some of these groups and responsibilities need to be established by the constitution. Cases like *WDM*, *Roberts* and *Bromley* perhaps form the seed for a more robust approach to the division between the apolitical and political parts of the government – the institutional dimension of this task. Deng Xiaoping's vision of the separation of the party and the state suggest one way to address the functional dimension.[154]

154 I am grateful to Leah Trueblood for clarifying this argument.

CONCLUSION

This chapter began by setting out four ways in which a constitutional order can regulate political parties. Parties can be constitutional and unconstitutional, if they are created, recognised, regulated or forbidden by the constitution. They can also be non-constitutional, if the constitution fails to recognise them, and para-constitutional if the constitution refuses to recognize them. While the outcomes may appear similar, these are opposite poles of a spectrum. In China, the CCP has a decisive role in determining the public interest, and courts defer to this entirely. On the contrary, UK courts fail to give due prominence to the role that political parties play in determining the public interest. This opens up the possibility that state courts will be asked to settle intra-party disputes on explicitly ideological grounds. That would be bad for courts and bad for parties. The gradual influence of public law reasoning in cases concerned with party organization will produce better results.

We noted that the existing British scholarship and doctrine about political parties was tightly focused on funding and elections, which is to say, on the party in the electorate. However, the key powers held by the party reside in the party organization and in the party-in-government. Parties need institution rules that enable them to appoint loyalists to state positions, and to influence the decisions of those loyalists decisively. If parties are involved in the formation and implementation of the democratic will, then there are sound constitutional reasons to allocate certain decisions to them. However, British party

leadership, unlike its Chinese equivalent, is still a latent rule, a rule that is only partially acknowledged by the British constitution. If we ignore the role of non-legal rules in structuring and distributing public power, then we make the same mistake Blackstone made when he described monarchical power purely in terms of legal rules.

Both in China and in Britain, there is a difference between Party leadership and party supremacy. This presupposes that the party and the state can have separate functions and attributes, and that there can be a meaningful division of labour between them. The national interest, as distinguished from a party's conception of the national interest, is crucial to this division of labour. This suggests a reason why the nature and constitutional function of a political party may change when it enters office. In China, the constitution and the doctrine of the CCP suggest that the CCP decides on what counts as the national interest with conclusive authority. In Britain, certain sorts of issues are allocated to the political part of the executive, and others to the apolitical part. We can find the seeds of a doctrine that approaches public policy in this way in cases like *Chandler, Wheeler, WDM, Roberts* and *Bromley*.

There is, we should stress, no suggestion that British political parties are equivalent to the CCP. Rather, China is an extreme example of a phenomenon present in the UK, and perhaps in all constitutional orders where political parties assume power. Some of the same arguments about the leadership of the CCP apply to British political parties also. Harold Laski described the British government as 'a committee of the party

in power'.[155] When a British party inhabits the government it assumes a constitutional function and its rules should be thought of as part of the constitution. The constitutional nature of that Party ought to shape the approach of the legal order to its rules. For example, it might be appropriate for a court to approach those rules in the same way it approaches the government rules considered in Chapter Three.

Once again, we return to the question 'what goes into the constitution?' This chapter argues that the rules that regulate private bodies are constitutional where those private bodies wield power. One advantage of comparing Britain and China in this respect is that it is obvious that the rules of the CCP are constitutional rules. Any account of the Chinese constitution that sought to exclude these rules would be a transparent fiction, an account as misleading as the claim that the British monarch actually governs. Party leadership is not merely 'what happens' – it is not the 'efficient secret' of the Chinese constitution.[156] It is what the Party is supposed to do, by any satisfying account of the constitution.

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155 Harold J. Laski, A Grammar of Politics (Pickering & Chatto 1996) at 356

156 Bagehot at 12.

CHAPTER FIVE – POLITICAL RULES

INTRODUCTION

Some political rules are constitutional rules. If the British and Chinese constitutions did not include political rules, then Britain would be a monarchy and China would be a constitutional democracy. Any satisfying account of the unwritten constitution in these jurisdictions ought to account for rules such as these.

Political rules – often styled as constitutional conventions - have always been at the core of the British theory of the unwritten constitution. Recently, Chinese legal thinkers have described Chinese political rules as constitutional conventions. Jiang Shigong contrasts China's legal constitution with the 'unwritten rules' that contextualize it.[1] Chen Duanhong has written about the distinction between the written and unwritten constitutions, emphasising the need for political rather than legal controls over the government. He identifies one sort of fundamental or higher law, composed of 'a body of undisputed values and customs established customarily by a the [political] community over a long period of time'.[2] Luo Haocai underlines the importance of what he called 'soft

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1 Jiang Shigong, 'Written and Unwritten Constitutions' (2010) 36 Modern China 12

2. Chen Duanhong (陈端洪), '论宪法作为国家的根本法与高级法 [Considering the Constitution as the Supreme and Fundamental Law of the State]' (2008) 20 中外法学 Peking University Law Journal 485

law' in China's legal and constitutional order, looking at the 'self-regulatory norms' of political organisations.[3] Finally, Hu Angang's influential book China's Collective Presidency, projects a distinctively conventional picture of Party power.[4] This body of work is based, explicitly or implicitly, on ideas developed in the British literature of the unwritten constitution of the late nineteenth and early twentieth centuries.

This chapter begins by critiquing this new wave of Chinese literature in light of its British forebear. It looks at convention through Chinese eyes and asks which political rules are truly conventional. In particular, it uses the British literature on conventions to analyse the political norms that govern the exercise and transition of power by the Party centre. In the previous chapter we described China as an extreme example of a global phenomenon, exhibiting the singular role played by political parties. In this chapter the tables are turned. British is an extreme example of a global phenomenon, exhibiting the singular role played by political conventions.

The chapter begins by setting out a British account of convention. It distinguishes between theories of convention that are focussed on what people do, and theories of convention that is focussed on what people say they are doing. It also takes issue with theories of convention which are agnostic as to why officials should follow political rules,

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3 Luo Haocai and Song Gongde, Soft Law Governance: Towards an Integrated Approach (Hein 2012)

4 Hu Angang, China's Collective Presidency (Springer 2014)

a theory that sits in tension with our material account of the constitution. Political rules may be harder to identify and to explain than the categories of rules that we have considered so far. Complex but tolerably clear rules of recognition identify valid laws, government policy rules, and the internal rules of political parties.[5] Moreover, generally speaking, we can explain why each body of rules bind without reference to the constitution. In contrast, both the identity and the bindingness of political rules can be hard to specify.

In the second part of the chapter, we address Chinese political rules directly and ask if we can describe them as constitutional – if we can include them in our account of the constitution – without distortion. Although the Chinese literature pays homage to Dicey and Jennings, we will find that it is far easier to explain Chinese conventions through the ideas of Carl Schmitt. Both Schmitt and Dicey locate political rules in a larger theory of political sovereignty and constituent power. However, it is difficult to account for the bindingness of conventions in a state with a political sovereign in the Schmittian mould – a political sovereign like the CCP. As such, the asks which political rules are constitutional rules. It begins with the notion of the dual constitution, which we introduced in Chapter One.

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5 As we noted in Chapter Three and Four,, both government and political parties can be subject to internal social rules.

A BRITISH THEORY OF CONVENTION

In this section we ask what conventions are and in the next we ask why people follow them. Here, we put pressure on a customary account of convention which is prominent in the twentieth century literature. We begin with the practice theory of social rules, a theory that lies at the heart of the modern British theory of convention.

In *The Concept of Law*, Hart develops a practice theory of social rules. For Hart, a *social practice* is a pattern of convergent behaviour that can be described by an observer. The simplest sorts of practice are forms of social learning.[6] Practices spread when people copy behaviour. Participation in a social practice is not compulsory and participants may not even be aware that they are participating.

In order for a social practice to grow, it has to be observed by a wider audience. Unless the group participating in a practice is aware of each other's behaviour, then any convergence is random. Widespread practices are sustained by a discourse, which defines and broadcasts the behavioural trend. For example, Vogue describes the evolving social practice of fashion in highly specific terms. This allows participants in the practice to observe, internalise and copy behaviour. It sustains and develops the practice and can disseminate it to a wider audience.

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6 Albert Bandura, Social Learning Theory (Prentice-Hall 1977)

A social rule combines a social practice with a state of mind, a critical, reflective attitude towards the practice that must be described subjectively. A social rule is a social practice that is considered to be obligatory by the people who participate in it. From Nimes to Ningxia, people wear denim. People do not feel they *ought* to wear denim – the social practice is not a social rule. In contrast, in the Oxford of the 1950s men like Herbert Hart thought they should take their hats off when they enter a church. This is not merely a social practice – it is a social rule, because it is accompanied by a sense of obligation. Deviations from the social practice are criticized, and the criticism is considered to be both justified and legitimate by the critic.[7] Any satisfying theory of social rules – including constitutional conventions – ought to explain why they are considered to be binding.

In order for that practice to become a rule, it must be possible to articulate that practice – to describe its contours with a reasonable degree of precision and clarity. Social practices are sustained, disseminated, and partly defined by discourse and this can make it difficult to distinguish between social rules and formulated rules.[8] There is, nevertheless, a difference between the social *practice* of fashion which is partly described by Vogue

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7 For an expanded account of these criteria see Margaret Gilbert, 'Social Rules: Some Problems for Hart's Account, and an Alternative Proposal' (1999) 18 Law and Philosophy 141, at 144. See also Dennis Galligan's gloss on Hart in D. J. Galligan, Law in Modern Society (Oxford University Press, 2007) p61-62

8 On this distinction see 'Some Types of Law' in John Gardner, Law as a Leap of Faith : Essays on Law in General (Oxford University Press 2014). I understand this to be the way Hart uses the word 'enacted'.

8 For an expanded account of these criteria see Gilbert, Social Rules – Some Problems for Hart's Account, Law and Philosophy 1999, p141, Margaret Gilbert, at 144.

magazine, and the social *rules* of etiquette that are partly defined by *Debrett's Correct Form*.[9] Discourse lends stability and durability to both social rules and social practices. They cease to be tacit, imitative institutions and become partly defined by the discourse that sustains them. Crucially, a discourse often supplies reasons why a social rule ought to be followed.

Discourse is important, in part, because it helps us to assess inconsistent practice. Dissent need not undermine a social practice if the practice is overt and the dissent is covert.[10] However, overt dissent challenges the rule and changes the critical attitude towards it. For example, there is a widespread social rule against cannibalism, and yet there are cannibals. Cannibalism may take place covertly, as in cases of famine. People who might publicly defend the rule against cannibalism may nevertheless be forced to break it. Non-conformity, and even relatively widespread non-conformity, may not undermine the social rule if it is covert and if the discourse is consistent. Ritual cannibalism, on the other hand, undermines the rule in a different way – it denies that the rule exists. This also explains why, even though torture is relatively widespread, this fact does not undermine the customary international legal rule against torture, provided covert

9 Debrett's Correct Form (Richmond: Debrett's, 2006)

10 See David Gauthier's account of constrained and concealed maximization in David P. Gauthier, Morals by Agreement (Oxford University Press, 1987)

torturers condemn overt torturers.[11] Discourse is therefore especially important when we analyse constitutional conventions in states that routinely break the rules.

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Constitutional conventions are institutional rules.[12] For example, the convention of ministerial responsibility to parliament is very general, and nested within it are more specific rules, such as the personal responsibility of ministers for errors by civil servants in their department and still more specific rules, such as the constitutional obligation of the Prime Minister to answer Parliamentary question on at noon on a Wednesday afternoon while Parliament is in session. Likewise, the conventional practice of cabinet governance can be said to include conventions like ministerial responsibility to parliament, collective responsibility and cabinet secrecy.[13]

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11 The International Court of Justice came to the same conclusion in respect of the prohibition on torture in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986 p14 International Court of Justice at [186]

12 By 'institution' I mean a 'stable, valued, recurring pattern of behaviour'. See Samuel P. Huntington, Political Order in Changing Societies (Yale University Press 1968) 12; John R. Searle, 'What is an Institution?' (2005) 1 Journal of Institutional Economics 1

13 Attorney General v. Jonathan Cape Ltd

Drawing on Hart's account, the orthodox modern literature views constitutional conventions as a *type* of rule. Conventions are seen as customary rules.[14] For example, Ivor Jennings said we 'develop habits in governance,' these 'practices tend to be followed' and 'people begin to think that practices ought to be followed'.[15]

> First, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule.[16]

Among other leading cases, *Evans v. Information Commissioner*[17] and the Canadian *Patriation Reference*[18] endorse this test for convention. It closely resembles the test for customary rules of various sorts.[19] It ought to be familiar as one aspect of the practice theory of social rules.

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14 Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) Cambridge Law Journal 149; Joseph Jaconelli, 'The Nature of Constitutional Convention' (1999) Legal Studies 24. Compare the account of customary law in e.g. John Gardner, Law as a Leap of Faith : Essays on Law in General (Oxford University Press 2014) ('Some Types of Law')

15 Ivor Jennings, The Law and the Constitution (5th edn, University of London Press 1959) at 80-81

16 Ibid 134-136

17 Rob Evans v. Information Commissioner [2012] UKUT 313 (AAC)

18 Reference Re: Resolution to Amend the Constitution 125 DLR (3d) 1, [1981] 1 SCR 753 Supreme Court of Canada ibid 70-74, 104

19 See e.g. , Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law (Report of the Sixty-Ninth Conference, London, 2000)

However, it is not clear that the progenitors of the modern theory of convention thought about political rules in this way. When Dicey described conventions in 1885, he was describing a limited set of rules that political actors understood intimately. He was not trying to describe a *type of rule* so much as a *body of rules*, rules that could be listed, with a little effort. For example, he asks if there have been any changes to constitutional conventions between 1885 and 1915.[20] He concludes there had been: a minister was obliged to resign following defeat at a General Election; and some conventions had been enacted, for example, through the Parliament Act 1911. The brevity of his account suggests he saw conventions as a relatively closed category.

In turn, a closer reading of Jennings *The Law and the Constitution* reminds us that his test, set out above, is a test for *nascent* conventions. Jennings deals at length with unambiguous conventions of the sort described by Dicey. He only turns to doubtful conventions in the last few pages of his study. He gives only one example of the sort of convention that might require us to use this test – the duty to consult. Jennings was not trying to distil a nuanced account of convention set out over a hundred pages of analysis in a three-step formula.

British constitutional actors who follow conventions also refer to a familiar *body* of rules rather than a type of rules, identified by a formula. When the Joint Committee

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20 A. V. Dicey, The Law of the Constitution at cxliii

on Conventions reported in 2006 it said, 'we do not offer a definition of 'convention'. We believe we will know one when we see it'.[21] When Lord Wilson, a former Cabinet Secretary, was confronted with a question of convention his 'final source, kept in a drawer, was of course the Precedent Book, seven loose-leaf folders covered in tatty red plastic, full of loose slips of paper which have to be kept carefully in place, which each Secretary of the Cabinet hands on to his successor'.[22]

Perhaps courts look for customary rules, while political actors, and theorists like Dicey and Jennings look to a body of intimately familiar rules. The difference matters. Customary rules are formed gradually, as if by sedimentation. Describing custom in international law, James Crawford says, 'The magic ingredient of that formula is time… One cannot describe a habitual practice as a custom if it has arisen instantaneously'.[23] Second, the customary view draws our attention to the *actions* of the norm-community, rather than the body of 'political morality' that explains their actions. John Gardner says 'customary law, unlike legislated law, is not made by acts of communicating it. It is made

21 Joint Committee on Conventions of the UK Parliament, Conventions of the UK Parliament, (HL Paper 265-I, II, HC Paper 1212-I and II), 2005-2006 at 14

22 Richard Wilson, 'The Robustness of Conventions in a Time of Modernisation and Change' (2004) PL 407, 408

23 James R. Crawford, 'The Identification and Development of Customary International Law' (Conference Paper, Spring Conference of the ILA British Branch – Foundations and Futures of International Law) 1

by acts of conforming to it. It is related and changed, not by what people say is to be done, but by what they actually do'.[24]

However, in customary rules of all sorts, there is a balance to be struck between the evidence of practice and the discourse that explains why the rule is in force.[25] If political actors frequently attest to the existence and importance of a rule, this can sustain it even in the face of contrary practice. For example, widespread condemnation of torture affirms the customary prohibition, even in the face of similarly widespread practice of torture.[26] Practice alone gives us a very partial view. As Lord Wilson says: 'looking for precedents in the constitution is like driving in the rear-view mirror… It is hard for those outside the government machine to know what is going on'.[27] Nevertheless, some British constitutional theorists believe conventions are located in practice alone. For example, there is a debate about whether the Sewel Convention refers to the authoritative statements of the Convention in Hansard, in Devolution Guidance Note No. 9, and in s2 of the Scotland Act 2016, or to the shifting attitudes of officials who follow these rules.[28]

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24 John Gardner at 67

25 Final Report of the Committee on the Formation of Customary (General) International Law

26 Nicaragua Case, 1986 I.C.J. Rep. 14, 98, at [186]

27 Richard Wilson at 410

28 But see Jane Munro, 'Thoughts on the "Sewel Convention"' (2013) Scots Law Times 194, Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 MLR 853

With this in mind, Adam Perry and Adam Tucker distinguish between 'top down' and 'bottom up' conventions.[29] They say one sort of convention reflects a formulated rule, and another sort of convention bubbles up from social practice. Top-down conventions are easy to explain. As we have seen, whenever a formulated rule is followed, we can describe this 'social working'[30] as a custom or convention. The paradigm 'top down' convention is the Sewel Convention, because it began with a statement in the House of Lords. But as the Supreme Court notes in *Miller*, legislative consent motions are not merely tabled when a Bill touches on legislative competence. They are also customarily tabled when the UK Parliament enacts provisions that alter the competence of a devolved legislature or executive.[31]

Bottom-up conventions are harder to explain. Few conventions are definitively set out in a statement, memorialised in statute[32] or codified pursuant to a statutory duty.[33] However, the connection between custom and discourse is subtler than this. It is not

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29 A Perry and A Tucker, 'Top-Down Constitutional Conventions' (2018) 81 MLR 765

30 John Griffiths, 'The Social Working of Legal Rules' (2003) 35 The Journal of Legal Pluralism and Unofficial Law 1

31 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union [2017] UKSC 5 Supreme Court [140]

32 Scotland Act 2016 s.2

33 Andrew Blick, 'The Cabinet Manual and the Codification of Conventions' Parliamentary Affairs 191; C. J. G. Sampford Wood and David, 'Codification of Constitutional Conventions in Australia' PL 231; Constitutional Reform and Governance Act 2010.

enough to distinguish between formulated rules and customary rules. Bottom up conventions can be recorded in writing, whether in Lord Wilson's loose-leaf folder, in decisions of the Upper Tribunal, or in Dicey. That discourse does not define the meaning of the convention conclusively, but then again, as we see above, neither does formulation in a statute. It might be more accurate to say that there is a complex relationship between a custom, any formulated rule that describes it, and the broader discourse that also describes and sustains it.

It is normal for social rules – including conventions to be sustained, disseminated, and partly defined by discourse. One argument, which will be developed over the course of this chapter and in the next, is that we can only form an accurate view of convention by referring to constitutional discourse as well as practice. Discourse also plays an important role in stabilising conventions because it generates a widely shared account of constitutional reasons to obey conventions.

Jennings' test, quoted above, requires that there should be a reason for the convention. Other theorists share this view[34], and it has been endorsed by British courts.[35] However, some writers object to the requirement, on the ground that it excludes some obvious political rules. For example, we might agree, on the basis of the argument in

34 Geoffrey Marshall, Constitutional Conventions : The Rules and Forms of Political Accountability (Clarendon Press 1986) at 12

35 Rob Evans v. Information Commissioner [2012] UKUT 313 (AAC) at [73]-[75]

Chapter Four, that there is a clear and consistent rule that Party rules take precedence over legal rules, where the conflict between the two cannot be resolved. But we might not agree that there are sound constitutional reasons for this rule. Nick Barber argues that 'some conventions may just be mistakes; rules that are followed, but which would be better ignored… Bad conventions, conventions which are not backed by justificatory reasons, might also require judicial recognition in certain situations'.[36]

Other theorists share Barber's view[37], which ultimately reflects Hart's view of social rules. Hart says social rules bind in various ways and for various reasons.[38] Where Austin saw sanctions - a single genus of obligation - Hart saw species and subspecies.[39] But Hart makes it clear that he is not presenting a complete account of the reasons why people might follow social rules. That question is the proper concern of the sociologist.[40] By this account, provided the rule community accept a rule as binding, we can agree that there is a social rule.

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36 N. W. Barber, The Constitutional State (Oxford University Press 2010) at 91-92

37 See e.g. K. C. Wheare, Modern Constitutions (2nd edn, Oxford University Press 1966). Adam Perry, 'Constitutional Conventions and the Prince of Wales' (2013) 76 MLR 1119

38 See H. L. A. Hart, The Concept of Law (2nd edn, Clarendon Press 1994) at 203. See also David K. Lewis, Convention : A Philosophical Study (Oxford : Blackwell Publishers 2002) at 121

39 H. L. A. Hart at 84-85

40 What Hart describes as the habit of obedience is in fact a social rule of obedience. While popular obedience to law is a social fact, it is certainly accompanied by a critical reflective attitude.

This is a coherent approach to social rules, including constitutional conventions, but it can only provide a partial answer to many of the questions posed here. In the first instance, it cannot tell us why constitutional rules are binding. We cannot afford to be agnostic about this, for at least three reasons: because it fails to explain obligation, because it fails to distinguish between rules of political expediency and constitutional conventions and because it therefore fails to explain the resilience of truly constitutional rules

A theory of convention that is indifferent to reasons places us in the invidious position Lord Wilson described in Chapter One. It is not much use telling the minister that the convention is binding on her because she regards it as binding. A connected problem, which we will presently explore in more detail, is how to account for the resilience of conventions. Public opinion is fickle. The attitudes of the rule community towards the bindingness of a rule may change suddenly. Unless our theory is grounded in a substantial constitutional discourse then we run the risk of describing fragile compromise as constitutional convention.

In their *Soft Law Governance: Towards an Integrated Approach*, Luo Haocai and Song Gongde contrast hard law, by which they mean 'legal norms … which exhibit the behavioural pattern of command and obedience, and which can brandish the state's

coercive power to ensure their enforcement'[41] with soft law, which they describe as 'non-coercive norms [that] may not employ state coercive power to ensure their enforcement soft law'.[42] By Luo and Song's account, an essential feature of rules like these is that they are not 'coercive' and in particular that they do not employ the coercive power of the state. But in the quotation set out above, Aileen McHarg cautions against overestimating the role of 'personal commitment' and underestimating the role of external policing of soft law.

The unwritten constitution presents a deeper problem. Chapter One set out a 'descriptivist' accounts of the constitution that draws on John Griffith's work.[43] It explained that the material theory of the constitution – a theory based on the subject matter of rules rather than their source or procedure. It argued that this is the only way to conceive of the unwritten constitution. In an unwritten constitution, we can only describe rules as constitutional if we specify what 'constitutional' means. But we cannot describe conventions as constitutional while remaining indifferent to what 'constitutional'

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41 Luo Haocai and Song Gongde at xvii See also A. V. Dicey, The Law of the Constitution; Jiang Shigong, 'Written and Unwritten Constitutions' at 23-24

42 Luo and Song do not refer to conventions (宪法惯例) but they do discuss 'self-regulatory norms devised by… political organisations seeking to determine such political issues as exercise of power, participatory government and public political discourse'.

43 The argument there is that this account, though associated with Griffith, is not faithful to Griffith's purposes.

means. But an account that explains what constitutional means is an account that includes reasons. Constitutional conventions are oriented towards the purposes of the constitution; rules that lack this orientation are not parts of the constitutional order. In short, there can be no useful formal theory of convention. When we distinguish *constitutional* convention from other sorts of social rules, we take a step towards a reasoned theory of convention.

Not all social rules, still less all 'precedents' are constitutional. In *Blackburn v. Attorney General*, Lord Denning gave a prescient example:

> [L]egal theory does not always march alongside political reality… Legal theory must give way to practical politics... If Her Majesty's Ministers sign this treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should do so… [w]e will then say whether Parliament can lawfully do it or not.[44]

Lord Denning is distinguishing between a legal power, the power to exit the EU, and a political reason why Parliament would be unlikely to exercise that power. There is a sort of 'precedent' for the notional rule as the UK has consistently not left the EU over the last forty years. But no one would say there is a *convention* that says Britain has to remain in the EU. The 'political reality' that Lord Denning is talking about is closer to a threat than to a custom. It is the same 'political reality' that forbids us to invade Russia.

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44 Blackburn v Attorney-General [1971] 1 WLR 1037 Court of Appeal at 1040

Over ten years ago, Mark Elliot said conventional would ultimately circumscribe Parliament's authority to legislate on devolved matters and human rights matters. He said it was 'abundantly clear that a gap exists between the theory of unlimited legislative authority and the political reality which in practice constrains the exercise of that power'.[45] We need to be careful when equating convention with self-interest in this way. The 'political reality' that was believed to protect the devolution settlement, the Human Rights Act 1998, and, indeed, Britain's membership of the EU has proved to be much more fragile than convention.

For this reason, Joseph Jaconelli says, 'constitutional conventions are those social rules that possess a constitutional - and not merely a political – significance'.[46] In an unwritten constitution, we need explain the bindingness of convention in terms that go beyond immediate political expediency. However, we still have to address Barber's sensible objection. Our account of the constitution cannot be so idealistic that it fails to identify 'rules that are followed, but which would be better ignored'.

The argument set out here is that an account of convention that focusses on discourse can supply constitutional reasons, and still identify 'bad' rules. Our account of the state and the constitution need not be a timeless account of constitutional principle,

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45 Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies 340 at 340

46 Jaconelli J, 'Do Constitutional Conventions Bind?' (2005) Cambridge Law Journal 149 at 151.

like Trevor Allan's account.[47] It does not have to supply good reasons for constitutions *in general*, reasons that would apply in all states. On the contrary, the material theory of the constitution developed above is particular to a given state. As we note above, conventions are sustained and partly defined by constitutional discourse that is particular to a given state. But what counts as a good constitutional reason in China will be substantially different to a good reason in the UK and we can still form the view that they are bad reasons.

For example, we can find a democratic account of convention in the British literature. Jennings said we should ask whether a practice 'helps to make the democratic system operate'[48] Geoffrey Marshall famously said, 'the most obvious and undisputed convention of the British constitutional system is that parliament does not use its ultimate sovereign power of legislation in an oppressive or tyrannical way'.[49] This account invites challenges that we will consider in the penultimate section of this chapter, but we will have to look much harder to find a corresponding Chinese theory.

Chapter Six will give full play to the role of constitutional discourse in sustaining political rules like conventions. It will show that the nineteenth century British theory of convention is firmly rooted in a theory of political morality, which is to say, of

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47 T. R. S. Allan, Law, Liberty, and Justice (Clarendon 1993) at 244

48 Ivor Jennings at 135-136

49 Geoffrey Marshall at 9

constitutional discourse. It will distinguish this positive morality of the constitution from more amorphous accounts of constitutional morality and constitutional principle. It will describe the clear constitutional discourse of the CCP, and contrast it with the partial, questionable constitutional discourse that emerges in a pluralist state like the UK. It will ask whether that original nineteenth century vision of 'political morality' is sustainable in this sort of state.

The debate about good reasons, set out above, follows the distinction between the reasons why people follow rules and the reasons why they ought to follow rules. Some reasons – we might call them moral reasons – ought to apply in all constitutional orders. In contrast, some reasons – we might call them behavioural reasons – only describe the state of mind of a particular official at a particular time. But there might be reasons that ought to apply to officials in a given constitutional order, on account of the local constitutional discourse of that state.

This section has highlighted two important aspects of the British theory of convention – the relationship between practice and discourse, and the connection between the demand for a good reason and our account of why conventions bind. In the final section, we will see how a failure to address this essential question creates a misconception in some Chinese accounts of the unwritten constitution.

A CHINESE THEORY OF CONVENTION

This section examines the Chinese theory of constitutional convention in light of the British literature addressed in section one. In particular, it asks whether the rules that govern the *nomenklatura* system, which we first encountered in Chapter Four, and the CCP norms of leadership succession can plausibly be described as conventions. Building on the argument above, the section exposes some deeper questions. It explores the connection between convention and official statements about convention? It then asks whether the CCP follows political norms rules for constitutional reasons, and whether this matters.

Some strands of the Chinese literature on convention follow the customary account set out above. Referring to China's constitutional conventions (宪法惯例), Jiang Shigong says 'compared with the written state constitution and the party constitution, the binding force of constitutional conventions depends… upon consensus among … political elites'.[50] Jiang approves of K.C. Wheare's claim that conventions 'have usually not been precisely formulated and put in writing'.[51] In light of this customary view, Jiang considers three notional political rules that structure and distribute power in China: the rule of Party leadership; the rule that the three great offices of state are occupied by one person;

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50 Jiang Shigong, 'Written and Unwritten Constitutions', at 30

51 K. C. Wheare at 21

and the rule that the Centre respects the decisions of provincial administrations within their own sphere of autonomy. There are superficial similarities between these political rules and British constitutional conventions. For example, the concurrent holding of Party-State offices[52] appears to resemble the British convention that the Prime Minister concurrently holds the positions of First Lord of the Treasury and Minister for the Civil Service, for example.

If we are faithful to this customary approach, then we can only describe these rules as conventions with some reservation. It is not clear that the rule that the General Secretary of the Party should lead the Central Military Commission has been followed, let alone followed consistently. From 1949 until 1991, the three offices in question (General Secretary of the Party, President of the Republic and Chairman of the Central Military Commission [CMC]) were either held by different leaders, or they did not exist. As Jiang accepts, one reason for the political rivalry between Mao Zedong and Liu Shaoqi was that these important offices were divided between them. When Mao purged Liu, this did not formally result in the unification of the offices but in what Jiang describes as the 'destruction' of the system of concurrent office holding. The office of Chairman was abolished in the 1975 Constitution, because the NPC didn't need one – it had ceased to

52 The 'trinity' of Party-state positions arguable comes with train of further offices. See Wang Zhengxu and Anastas Vangeli, 'The Rules and Norms of Leadership Succession in China: From Deng Xiaoping to Xi Jinping and Beyond' (2016) 76 The China Journal 24

meet. When Deng Xiaoping restored the formal institutions of the Party-state, starting in 1978, he *divided* the offices as a bulwark against arbitrary government by a single leader. In 1992, the first Plenum of the Fourteenth Central Committee resolved that Jiang Zemin, the General Secretary of the CPC should also be the President and the Chairman of the Central Military Committee. However, these three offices were not handed to Hu Jintao in 2002, because Jiang Zemin retained the chairmanship of the CMC. Hence, Xi Jinping's assumption of these three offices in 2012 was the first time in the history of the PRC that the offices had been handed over concurrently, and only the second time they had been held concurrently.

Hu Angang argues that the connection of Party and State offices under the principle of the leadership of the Party embodies a system of collective leadership. He claims this system is comparable to the separation of powers. Once again, if we were faithful to the customary approach, then the variation in how Party leadership is put into practice makes it difficult to identify a convention. Hu frequently refers to the manner in which Party leaders are entrusted with leadership of 'major institutions'. However, his account of representation at the top table in this period resembles a game of Three Card Monte. What he describes as the 'six major institutions' of state are quickly replaced with 'five major institutions' and then 'four major institutions'.[53] In the 1980s, 'the six major

53 Ibid, at 19, 21, 25

institutions' return to the top of the pack, only to be switched for 'the four'. By 1997 we have 'the seven major institutions' and in 2008 this swells to 'the eight major institutions'.[54] It is hard to say that actors are following a rule here, because it is hard to specify the rule that they are following.

Hu Angang claims that these offices were united at the First Plenary Session of the Fourteenth Central Committee 'according to a resolution made by the Central Committee and by Deng Xiaoping.'[55] This is a curious claim. It would appear that the First Plenum of the Fourteenth Central Committee did not issue a Resolution（决议）or a Decision（决定）. It did issue a Communique（公报）[56] which formally reappointed Jiang Zemin to his positions as General Secretary and President of the Central Military Commission. However, the Communique does not establish a rule, or even refer to a rule uniting the three offices. The Fourteenth Party *Congress* issued four Resolutions, one approving a constitutional amendment, and three approving Work Reports of the Central Committee, the Central Discipline and Inspection Commission and the Central Advisory Committee. This last Resolution underlined the importance of the peaceful and complete

54 There have been further changes since the publication of China's Collective Presidency.

55 Hu Angang at 34. Cryptically, Hu's citation refers generally to the Collected Works of Jiang Zemin.

56 Communique of the First Plenary Meeting of the 14th Central Committee of the Communist Party of China, October 19, 1992

transition of power to the Third Generation Leadership.[57] It praised the Commission for reforming the gerontocratic system of 'lifelong office.'[58] But it did not establish or refer to a new rule. Neither did the amendment to the Party Constitution, which abolished the Central Advisory Commission and amended the historical narrative.[59]

Even if we cannot find evidence for the resolution that Hu cryptically mentions, his method may lead us to an important insight. Hu's method is not dissimilar to the way British lawyers search for conventions. He places great weight on the formal statements of senior leaders about internal party rules: whether they practice what they preach is not decisive. Discourse might enable us to build a more nuanced, and more durable vision of Chinese conventional rules than practice. Resolutions, Decisions and Communiques of Party bodies arguably form a discourse that can generate and clarify social rules. We will return to this point in the next Chapter.

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57 Resolution of the 14th National Congress on the Work Report of the Central Advisory Committee of 18 October 1992. See also Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Strengthening Party Building adopted on September 28, 1994

58 Ibid. The language used was 废除实际存在的领导职务终身制

59 People's Daily (人民日报) October 22, 1992. The wording of the new Article 22, which deals with the office of General Secretary substantially reproduces the old Article 21. requirement that General Secretary and the Chairman of the Central Military Commission must be members of the Politburo Standing Committee is unchanged from the 1982 Constitution. See also Saich T, 'The Fourteenth Party Congress: A Programme for Authoritarian Rule' (1992) 132 The China Quarterly 1136

Jiang Shigong's most compelling example of a customary convention is the principle of Party leadership of the NPC, which he specifies in the following way:

> In [the] constitutional structure of the party-state regime, the NPC and its Standing Committee must necessarily function as a 'rubber stamp'. By the letter of the written constitution, the NPC and its Standing Committee can fully exercise their power independently of the CCP, but in actual political practice they cannot develop a political will with regard to national goals and the political mission without the party.[60]

Again, the problem here is identifying whether the legislators are following a rule. As we have argued conventions need to bind officials. Conventions like Cabinet Collective Responsibility – the rule that British ministers and certain other officials, like Parliamentary Private Secretaries, have to vote with the government in a division, applies not only to the Cabinet as an institution but to each of its members as individuals. The NPC enacts legislation, appoints ministers proposed to it, and approves the work reports of other state organs. But only 60% of NPC members represent the CCP, and a significant minority of NPC members do not vote with the Party bloc.[61] It is not obvious that these deputies consider themselves *constitutionally* bound to support government bills. If there is a rule to the effect that the NPC members cannot develop an independent political will

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60 Jiang Shigong, 'Written and Unwritten Constitutions', at 25

61 For details of voting patterns see Murray Scot Tanner Zhang Qianfan, The Constitution of China : a Contextual Analysis (Hart Publishing 2012); Albert H. Y. Chen, An Introduction to the Legal System of the People's Republic of China (Butterworths Asia 1992) at 130 et seq. Qianfan Zhang, The Constitution of China : a Contextual Analysis (Oxford : Hart Publishing 2012) Chapter 4.

then this is a rule from which a significant minority of legislators dissent. It is simpler and more accurate to say that the CCP members of the NPC are supposed to vote with the Party programme, and we will presently consider whether this is a constitutional convention.

More generally, the problem in respect of each of these three putative constitutional conventions is the difficulty of finding consistent practice in a rapidly developing constitutional order. Nevertheless, some Chinese political rules can be described as constitutional conventions. For example, the institutional rules of leadership succession are important constitutional rules.[62] For example, 'the increasingly norm-bound nature of [China's] succession politics' is the main reason Andrew Nathan puts forward for the resilience of China's political order.[63] A broad literature has given us plenty of evidence of constitutional practice in this area. Accounts of these rules vary, especially accounts of why and whether they bind, but we can identify certain important rules that may have conventional status.[64] Moreover, just as the convention that the

62 Kou Qianwen and Zang Xiaowei, Choosing China's Leaders (New York: Routledge, 2013); Cai Wenxuan and Kou Qianwen, 'The Party's Disciples: CCP Reserve Cadres and the Perpetuation of a Resilient Authoritarian Regime,' (2015) China Quarterly, 221: 1–20.

63 Andrew J. Nathan, 'Authoritarian Resilience' (2003) 14 Journal of Democracy 6

64 Compare e.g. Hu Angang (胡鞍钢); Lowell Dittmer 'Chinese Informal Politics' (1995) 34 The China Journal 1; Zeng Jinghan, 'Institutionalization of the Authoritarian Leadership in China: a Power Succession System with Chinese Characteristics?' (2014) 20 Contemporary Politics 294

monarch always acts on advice may be considered the Cardinal Convention of the UK constitutional order the principle that the state is led by Party members under the supervision of the Party institution may be considered to be the Cardinal Convention of the Chinese constitutional order.

Chen Duanhong argues that the basic principle of the fundamental law of China is the principle of Party leadership, a system in which the sovereign is 'the Chinese people under the leadership of the Communist Party'. We might conceive of this rule as a nested system of constitutional conventions, of various levels of generality, like the British convention of ministerial responsibility. There is a wealth of Party doctrine that specifies the nature of the convention. As we saw in Chapter Four, Party leadership is a Cardinal Principle. It is recorded in the Preamble to the 1982 Constitution and now in the new Article 1. Nested within it are a series of rules. The most important of these conventions are the rules of the *nomenklatura* system, and the system of party groups, The top few thousand Chinese officials are appointed by the Organization Department of the Central Committee of the Communist Party on explicitly political grounds, including, in particular, proven loyalty to the political mission of the Party.[65] The appointment rules are buttressed

65 For a fuller consideration see Zheng Shiping, Party vs. State in post-1949 China : The Institutional Dilemma (Cambridge University Press 1997); John P. Burns, 'Strengthening Central CCP Control of Leadership Selection: The 1990 Nomenklatura' (1994) 138 The China Quarterly 458; John P. Burns, The Chinese Communist Party's Nomenklatura System (M.E. Sharpe 1989); Hon S. Chan, 'Cadre Personnel Management in China: The Nomenklatura System, 1990–1998' (2004) 179 The China Quarterly 703; Maria

by separate rules of Party Discipline, by which party members can be punished through Party disciplinary channels for substantial deviation in word or in action from the political position of the Central Committee.

Together, these conventional rules provide a much more comprehensive explanation of why the NPC votes consistently with the Party's programme. The informal rule that Party members are expected to obey party orders even when they conflict with other rules[66] is the convention at the bottom of this system. It constitutes the supremacy of the CCP over the state and the law. It also explains why some legislators are obliged to vote with the Party but others are not. The convention applies to Party members.

The nested rules that embody Party leadership are stable. But other conventions rules now seem under threat. The most obvious are rules of institutional succession. These are important rules. They regulate the appointment of officials to the key CCP committees that lead China, and also ensure that officials step down at the end of their term and retire at a certain age. In 2002, PBSC member Li Ruihuan was forced to retire by Jiang Zemin on account of his age. This helped to establish a rule that officials appointed

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Edin, 'State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective' (2003) The China Quarterly 35.

66 On this rule see Birney M, 'Decentralization and Veiled Corruption under China's "Rule of Mandates"' (2014) 53 World Development 55

to new terms on the Central Committee, the Politburo and the Central Military Commission[67] should be no older than 67 years old upon their appointment.

Together, these rules help determine which posts fall vacant when, and who is eligible to fill them. The rule helps to ensure a stable transition of power, and this is important because non-democratic regimes can be vulnerable during leadership transition. They do this, in part, by reducing the scope for factional competition for power.[68] According to some accounts of recent practice, candidates for the core leadership should already hold full central committee membership when they are appointed to the PBSC.[69]

If officials were expected to serve one five-year term on the Politburo Standing Committee in preparation for office, followed by one full term in office before their sixty eighth birthday, this would limit the pool of potential candidates for China's top leadership to full Central Committee members no older than fifty-eight when appointed to the Standing Committee. When the current core leadership was selected in 2008, there were three candidates who fulfilled these criteria. Were the age limit convention to be eroded,

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67 The Chairmanship of the Central Military Commission is not subject to a clear age limit.

68 See Wang Z and Vangeli A, 'The Rules and Norms of Leadership Succession in China: From Deng Xiaoping to Xi Jinping and Beyond' (2016) 76 The China Journal 24 for a fuller account of these rules.

69 An alternative account of this rule requires that candidates hold a ministerial or provincial post. The size of the candidate pool is similar regardless of the formulation. See Alice Miller, 'The 18th Central Committee Politburo: A Quixotic, Foolhardy, Rashly Speculative, But Nonetheless Ruthlessly Reasoned Projection' (2010) 33 China Leadership Monitor.

this would corrode the rule that current leaders need to step down, dramatically increase the pool of potential candidates for the Core Leadership, enlarge the scope for factional competition for power, and diminish the stability of any future transition of power.[70]

Before the Nineteenth Party Congress in 2017, there was widespread speculation that Xi Jinping would breach these emerging norms of leadership succession. Xi had already set aside some of the rules which buttress stable leadership transitions. However, shortly after the Sixth Plenum of the Eighteenth Central Committee in October 2016, Deng Maosheng, a member of the drafting committee for the Plenum Communiqué and a senior researcher in the Central Policy Research Office spoke about the rule. He told reporters 'there is no specific standard [retirement] age' and went on to describe the rule as 'pure folklore'.[71] These comments were not repeated in Chinese state media. At this point, some people speculated that Xi Jinping might also be willing to dispense with a rule that contributes to stable succession in order to retain a trusted lieutenant or elevate a loyal retainer from political obscurity.[72] With this in mind, many were surprised that the Nineteenth Party Congress left the Party Succession conventions largely intact. The current PBSC has seven members. None of them are over sixty-seven – all five

70 Ibid

71 Retirement rule for CCP leaders 'pure folklore', Straits Times, 2 November 2016.

72 See e.g. Tom Kellogg, Xi Jinping Is About to Face a Constitutional Crisis, Foreign Policy, September 7 2017.

superannuated PBSC members stood time on time. All of the members of the PBSC have held senior ministerial posts in the right bureaucratic system.

However, Xi Jinping made two changes to the succession norms that indicate that he may plan to remain in power after 2022 First, he did not appoint any PBSC members of the right age to serve two terms after 2022.[73] Second, he started a process of constitutional amendment that deleted the two-term limit for the Presidency in Article 79 of the Constitution. These changes generated widespread alarm among liberal constitutional scholars in China. Once again, though, if we are faithful to the customary approach, it is hard to find practice that confirms these were *conventional* rules. Unlike the age limit rules, we cannot make out a practice of appointing a new core leadership five years prior to their assumption of a ten-year term. Practice was highly irregular prior to Tiananmen. Hu Jintao was appointed to the Fourteenth Politburo's Standing Committee in 1992, fully ten years before he assumed power. However, the other half of the core leadership, Wen Jiabao, was only appointed when he became Premier in 2002. The core leadership appointed to the PBSC five years before assuming power was the current core leader – Xi Jinping, and his Premier, Li Keqiang. Two eligible candidates – Hu Chunhua and Sun Zhengcai – were both appointed to the Politburo when Xi became leader and were widely considered to form a potential sixth generation leadership. But

73 Three current PBSC members – Wang Yang, Wang Huning and Li Keqiang are of the right age to serve beyond 2022.

this did not follow a pattern. Xi and Li were appointed directly to the PBSC. In any event, Hu has not been elevated, and Sun is now in jail. If there was a norm that every PBSC would carry the seeds of its succession then it was at best an emergent norm, which lacked the firmness of a convention. It is even harder to make the argument that the term limit memorialised in Article 79 of the Constitution established or reflected a broader constitutional convention that binds the General Secretary. It was normal for Presidents to serve a term, or less, until Jiang Zemin took power in 1992. China has only had two Presidents who served exactly two terms.

With these two examples in mind, one interesting dimension of the most recent phase of constitutional change in China is how respectful the leadership has been of constitutional *form*. Prior to the Party Congress, Wang Qishan was widely tipped to remain in post in breach of the age convention. Wang has assumed a new and extremely substantial role with responsibility for foreign policy, especially the relationship with the United States. His State and Party positions, however, are unusually junior. The heads of the National People's Congress and the Chinese People's Political Consultative Conference conventionally serve concurrently on the PBSC. They are accordingly subject to its age limit. However, although the constitution provides for a *minimum* age for more junior NPC and CPPCC posts, there is no maximum.[74] Wang complies with the Party age

74 Art. 79

limit because he does not hold a Central Committee position, let alone a Standing Committee seat. He is the most junior Party official to be Vice President since Rong Yiren in 1989. Rong held no substantial portfolio.

Far from undermining the norms of succession, recent changes to China's unwritten constitution have fastidiously obeyed well-established conventional rules. In doing so, they expose the limitations of conventions. They also illustrate the two features of convention highlighted in Section 1. First whether we think these are conventional rules depends, in part, on the connection between practice and official statements. If, as Hu Angang asserts, the First Plenary Session of the Fourteenth Central Committee had clearly said the three offices of state go together, then perhaps we could be more tolerant of inconsistent practice. Second, without an account of why people ought to follow a convention, rules like these are harder to assess. Unless we can say whether *all* NPC members feel constitutionally bound by the rules of Party leadership, it is hard to say if this is a widely flouted convention, or a rule that only binds party members. As above, we do not only need to ask if they feel bound, but if they ought to feel bound according to the political morality of that state. Equally, we might ask whether the Party follows its own rules of leadership succession for essentially constitutional reasons, or for other reasons.

POLITICAL SOVEREIGNTY AND CONVENTIONAL OBLIGATION

The previous section looks at similarities between British and Chinese views of convention. It argues that both bodies of rules invite a focus on discourse rather than practice and require an account of political obligation. In this section, we focus on an important difference between political rules in Britain and in China. That key difference, is the CCP's monopoly on political power.

The General Secretary of the Party now sits on the transition committee and personally interviews candidates for the Central Leadership.[75] Under the principles of Party leadership, and Democratic Centralism, there can be no independence from the Party Centre. In contrast, the British confidence removability rule – part of the British norms of leadership transition – is guarded by a bureaucracy that is independent of the political part of government.[76] It is not the government that determines what happens when it loses a vote of no-confidence. The apolitical part of the civil service plays a crucial role. In turn, when coalition governments are formed, negotiations are mediated by the independent civil service. Indeed, when courts seek to determine the content of a convention, the witnesses are not the politicians who follow conventions, but the civil

75 Alice Miller, 'The 19th Central Committee Politburo' (2017) 55 China Leadership Monitor

76 Chapter Four describes this independence in greater detail.

servants who guard them.[77] This independent apparatus that attests to convention is broader than the central civil service. It includes the courts, as we saw in Chapter Two. It also includes the separate (and independent) executives of Scotland, Wales and Northern Ireland. British conventions are stabilised by this plural, independent executive. They are overseen by actors who do not follow the rules.

Dicey did not suppose that political rules like conventions were obeyed out of delicacy. Independent oversight is central to his account. He argued that, if Parliament were to legislate in breach of convention, it would suffer grave political consequences.[78] While the legal powers of Parliament are unlimited, the 'absolutely sovereign legislature… should yet be bound by unalterable laws'.[79] Dicey's theory is based on the oversight of a legal sovereign by a political sovereign. The binding nature of convention is backstopped by this oversight.

However, this distinction between political and legal sovereignty may seem troublesome. For Harold Laski, the idea that sovereignty can be divided in this way 'is entirely contradictory of the original definition'. [80] But like Bentham and Austin, Dicey was

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77 See e.g. the role played by Sir Henry Wade, the Cabinet Secretary in Attorney General v. Jonathan Cape Ltd

78 Dicey put forward a less convincing argument that conventions were backstopped by legal sanctions especially the need to pass the Army Act annually. See The Law of the Constitution, Chapter XV.

79 A.V. Dicey, Thoughts on the Union Between England and Scotland (London: Macmillan, 1920) at 252

80 Harold J. Laski, A Grammar of Politics (Pickering & Chatto 1996) 54.

not 'dividing' sovereignty. He referring to different sorts of sovereignty that interact in the same constitutional order. He says, 'the word 'sovereignty' is sometimes employed in a political rather than in a strictly legal sense.' The body 'the will of which is ultimately obeyed by the citizens of the state' is "politically" sovereign or supreme in a state."[81] Dicey is writing in a British tradition that views political sovereignty as a fact of actual political power. As Janet McLean notes, in this tradition, 'what constitutes rulers is not normative and neither is it the product of political theory: it is a fact of power.' Bentham, for example, 'urges us to focus on real powers and on real people, and to avoid abstractions, such as King and Crown, which do not do any real work'.[82]

Dicey identifies 'the electors of Great Britain' as 'the body in which sovereign power is vested'.[83] He regularly repeats this claim.[84] In his eyes, the Queen in Parliament is the legal sovereign, but legal sovereignty is exercised subject to the supervisory sovereignty of the electorate.[85] However, Dicey is not consistent in this attribution of

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81 Dicey makes a similar claim in A. V. Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) at cix, 27-28, 290-291

82 Janet McLean, Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere (Cambridge University Press 2012)

83 A. V. Dicey, The Law of the Constitution 27

84 A. V. Dicey, The Law of the Constitution, makes a similar claim at cix, 27-28, 290-291

85 Dicey sees this principle as a qualification of the historical prerogative: The Law of the Constitution at 281 See also James Bryce, Studies in History and Jurisprudence (Oxford University Press 1901) at 511 et seq

political sovereignty to the electorate. He says conventions 'have all one ultimate object. Their end is to secure that Parliament… shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State -… *the Nation*'.[86] He later says 'the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance and ultimately to *the will of the nation* as expressed through Parliament'.[87] In *The Development of Administrative Law in England*, he vests political responsibility in '*the nation* as represented in Parliament…'[88] Dicey, like Austin 'vacillates between treating parliament and a complex idea of 'we, the people' as the sovereign'.[89] And like Austin, Dicey 'finds himself unable to give any coherent account of how the people might exercise [their sovereign] authority'.[90] When *The Law of the Constitution* was first published, the electorate was a small minority. But Dicey asserts that the electorate control the government, but he does not explain his assertion.

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86 A. V. Dicey The Law of the Constitution at 290-291 (emphasis added).

87 Ibid at 456 (emphasis added.)

88 A. V. Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148 149

89 David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' 1 Global Constitutionalism 229, 248.

90 Ibid

Chapter Four argued that electoral control of the government, parliament and the state is mediated by political parties. It underlined the differences between political power as wielded by the people, the nation, the electorate or the party caucus. Parties pose a fundamental challenge to Dicey's unitary theory of democracy. He paid little attention to political parties for thirty years after *The Law of the Constitution* was first published. He belatedly recognised their importance in the revised introduction to the Eighth Edition:

> [It] is not yet fully recognized inside or outside Parliament… that the Cabinet… can defy, on matters of the highest importance, the possible or certain will of the nation. This growth of the authority [of] the men who can control the party machine is the more formidable if we adopt the view… that party government has been for generations not the accident or the corruption but… the very foundation of our constitutional system.[91]

In later editions of *The Law of the Constitution* and *Law and Public Opinion in England*, Dicey begins to chart what he describes as 'the growth or misgrowth of the party system…' and later as 'the great party game'.[92] He says 'in each country you have a real system of popular government, in each country Parliament is supreme, in each country parliamentary government means party government'.[93] This reflects Leon Trotsky's near contemporary comment that 'in the internal politics of the party these methods lead, as we shall yet see, to this: the party organisation is substituted for the party, the Central Committee is

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91 A.V. Dicey, The Law of the Constitution at 481 (emphasis added.)

92 A. V. Dicey, Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century (2nd edn, Macmillan 1914) xxvi, lxiv

93 Ibid lxvii

substituted for the party organisation and finally a 'dictator' is substituted for the Central Committee'.[94]

Other scholars have noticed this kink in Dicey's theory. Paul Craig notes that the expansion of the franchise leads to expansion of party organisation, placing more power in the hands of the executive, and we should add, in the hands of the political executive.[95] He concludes 'the party became the conduit for the transfer of power from the legislature to the executive' and 'Dicey's union between historical precedent and constitutional principle was… rendered less secure than hitherto'. Craig then cites later theorists, including Ostrogorski and McKechnie who describe parties as 'absolutely supreme, without let or hindrance'.[96]

Recall Dicey's argument that Parliamentary government in Britain is legitimate because the political sovereign – the electorate – restrains the legal sovereignty of Parliament. The electorate would supposedly bring down a government that did not obey constitutional convention. But if, as Dicey concedes here, political parties can 'defy the

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94 Daniels, A Documentary History of the Soviet Union (London: UPNE, 1984) p21 quoted in T.H. Rigby, 'The Soviet Political Executive 1917-1986' in Archie Brown (ed), Political Leadership in the Soviet Union (Macmillan 1989)

95 P. P. Craig, Public Law and Democracy in the United Kingdom and the United States of America (Clarendon 1990)

96 Moisei Ostrogorski, Democracy and the Organization of Political Parties (1st edn, Routledge 2018), W. S. McKechnie, The New Democracy and the Constitution, 24, as quoted in P. P. Craig 47

certain will of the nation' then how exactly is the political sovereign supposed to hold the legal sovereign to account? How does this independent oversight work?

Perhaps for this reason, in his later work, Dicey betrays far less confidence in the bindingness of conventions. He casts doubt on 'the belief that… ministerial responsibility is a real check upon the action of a Minister or a Cabinet when tempted to evade or override the law of the land'.[97] By 1915, Dicey described ministerial responsibility as 'the censure not in fact by Parliament, nor even by the House of Commons, but by the party majority who keep the Government in office' and concludes that it 'is a very feeble guarantee indeed against action which evades the authority of the law courts'.[98] Dicey does not deny the political reality that ministers are beholden to the majority of the Commons, refracted through the Party system. His point is that convention is much less constitutional than he suggested. This is one important reason to question the traditional British connection between democracy, the constitution and convention, set out at the beginning of this chapter.

Dicey's attempt to embed the binding force of convention in the political sovereignty of the electorate ultimately fails. However, its central insight – that political rules normally demand some sort of independent stewardship – is still persuasive. Legal

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97 A. V. Dicey, 'The Development of Administrative Law in England' at 152

98 Ibid

disputes over the meaning of convention like *Evans* or the *Patriation Reference* show us how fragile conventions might be if the government had unfettered power to decide what the rules meant. More recent controversy over the meaning of the Sewel Convention[99] and pairing in parliamentary votes[100] serve to underline the point. Aileen McHarg argues 'it is sometimes claimed to be an advantage of non-legal rules that they are less reliant upon external coercion and more upon internal commitment and socialisation for their effectiveness'.[101] She concludes, 'this overestimates the role of personal commitment and underestimates the role of external policing and sanctions in securing compliance with non-legal constitutional norms. Conversely, it overestimates the role of sanctions and underestimates the role of moral and political factors in ensuring compliance with legal rules'.[102]

China's model of political sovereignty is altogether different to Dicey's. However, it arguably draws on a contemporary picture – that of Carl Schmitt. Schmitt's career overlaps with Dicey's. He famously defines the political sovereign is the person who is able to distinguish between friend and enemy – between those who are on the side of the

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99 Holyrood refuses consent for Westminster Brexit bill, BBC News 15 May 2018

100 Helen Lewis, The Jo Swinson Pairing Scandal Matters, Observer, 22 July 2018

101 Aileen McHarg 871-872

102 Ibid

nation and those who are not. For Carl Schmitt, the study of this political sovereignty was not the proper object of constitutional theory, but of a 'general theory of the state'.[103]

Schmitt enables us to distinguish between two senses of sovereignty – a narrow sovereignty, exercised through law – and a larger political sovereignty, which transcends state and law. The sovereign, in this larger sense, is the person who can decide when to suspend the law in an emergency. In turn, this means we have to distinguish between two uses of state. State can be used in a narrow legal sense, to refer to the legal order that can be switched off by the sovereign. It can also be used in a larger, political sense, to refer also to all of the institutions of the constitutional order, including the sovereign.

Schmitt's account invites various objections that we cannot explore here,[104] but it does help us to make sense of the 'dual constitution'. China has a legal constitution surrounded by a political constitution. State (国家) is usually used in the narrow sense, and refers to organs established by state law, like the People's Courts, The National People's Congress and the State Council. It is used in contrast to the Party, which has the power to suspend and to transcend state law.

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103 Renato Cristi, 'Carl Schmitt on Sovereignty and Constituent Power' in David Dyzenhaus (ed), Law as Politics : Carl Schmitt's Critique of Liberalism (Duke University Press 1998) 185

104 N. W. Barber, The Constitutional State, addresses some of these problems at 121 et seq.

Schmitt is a far better key for the Chinese scholarship than Dicey.[105] For example, Jiang Shigong says 'the [CCP] embodies the fundamental law that acts as the absolute constitution; the [NPC] embodies the fundamental law codified in the written constitution…'[106], the 'absolute constitution' that he describes is a Schmittian idea. Jiang later concludes 'the CCP as a political entity transcends both the constitution and the rule or law, it is 'above and beyond the state'.[107] Larry Catá Backer, expanding on Jiang's account, says:

> [The CCP] serves as a representative and proxy for the nation in two respects – it is the site where political values are elaborated and protected and it serves as the body of individuals charged with the task of such elaboration and protection within both the political order and in its state institutions.[108]

The power to transcend law is of the essence of the theory of the dual state in China. This idea not present in the British tradition. If the jacket for Jiang's theory is Dicey's, then the trousers are Schmitt's.

In Chapter Four, we considered the Party's role in representing the fundamental interests of the People (though not the Nation and certainly not the electorate.) Robert

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105 See generally Flora Sapio, 'Carl Schmitt in China,' The China Story, October 7, 2015

106 Jiang Shigong, 'Written and Unwritten Constitutions' at 24

107 Jiang Shigong, 'How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer' (2014) 40 Modern China 196

108 Larry Catá Backer, 'Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State Party Rule of Law System' (2012) 30 Boston University International Law Journal 331

McIver makes a similar argument in respect of liberal democracies: 'the only means by which the ultimate political sovereign, … a fluctuating majority can definitively control government' is through political parties.'[109] Carl Schmitt rejects the idea that the people can exercise this sovereignty directly. As Renato Cristi notes, it is neither a 'firm and organized entity' nor the 'organized subject of decision'.[110] Jiang Shigong restates this orthodoxy when he says 'the people must exercise sovereignty under the Party's leadership; that the Party's leadership must be in line with the written constitution; and … the Party's political sovereignty (政治主权) must be legally recognized before it becomes a state sovereignty (国家主权)'.[111]

In *Constitutional Theory*, Schmitt reintroduces an analogous idea to Dicey and Austin's notion of political sovereignty. For Schmitt, the idea of constituent power is 'a surrogate for sovereignty'[112] and the legitimate subject of constituent power is the people. In China, of course, the CCP is the body with the power to interpret the constitution.[113] It is also the midwife for formal constitutional change in China. The key provisions of the

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109 Quoted in Leon D. Epstein, Political Parties in the American Mold (University of Wisconsin Press 1986) at 21

110 Renato Cristi

111 Jiang Shigong, 'Written and Unwritten Constitutions' at 26

112 Renato Cristi See also Martin Loughlin, 'Politonomy' in Jens Meierhenrich and Oliver Simons (eds), The Oxford Handbook of Carl Schmitt (Oxford University Press 2015)

113 Compare e.g. the power conferred on the National People's Congress to interpret the State Constitution.

1982 Constitution were approved in Politburo meetings six months before their promulgation by the National People's Congress.[114] Some Chinese theorists therefore suggest that the CCP is a constitutional, not a constituted body: it is a body with the power to constitute. Flora Sapio describes this vividly:

> Exactly as in liberal democratic systems China's state organs draw their authority from constituent power. Unlike liberal democratic systems, constituent power is not only hidden behind the state of exception. It is, moreover, visible, alive and moving and goes by the name of the Chinese Communist Party.[115]

Chen Duanhong argues that, as the Party created the State in China, and is therefore logically prior to the state, it has the power to reconstitute the state. For Chen, the Party is a permanent institution for the constituent power of the people.[116] It is a Constitutional Convention, in the sense that the Philadelphia Convention was a Constitutional Convention.

If the CCP possesses this sort of extra-legal sovereignty, then it is difficult to see how it is bound by conventions, let alone by laws. At best, it could only be bound by rules of thumb, rules that can be set aside when it pleases the Party to do so. To adapt Dicey's turn of phrase, it is not clear how such an 'absolutely sovereign' party could yet be bound

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114 Politburo Meetings, February 20 & 23, 1982 identified in H. Lyman Miller, 'More Already on Politburo Procedures Under Hu Jintao' (2006) 17 China Leadership Monitor

115 Flora Sapio, Sovereign Power and the Law in China (Brill 2010) at 246

116 Chen Duanhong (陈端洪)

by 'unalterable law'. He Xin likens the CCP to 'the sovereign described by Austin that requires only others to obey its orders, but such a sovereign will not be bound by its own orders'.[117] If this is true for a political sovereign then it is doubly true for a body with the power to constitute. If Party Leadership is central conventional principle of the constitution then we might conceive of Party norms as conventions that constrain factions within the Party so as to vouchsafe the stable, leading role that the Party plays. But who would decide what the rule meant? The body with the conclusive authority to decide what counts as an interest of the people, or economic development, or even Party Leadership is the CCP.[118]

There is, however, an important response to this point which we will have to consider at length. As we have seen, both the Party Centre and its leaders have the power to bend or break important Party norms. They do not, however, have the power to change the doctrinal account of those norms. It is easier to change the way that the principle of collective leadership is instantiated, than to delete the principle of collective leadership, which is memorialised on an almost annual basis in each Party Plenum.

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118 Xi Zhong (习中), 'Reflections on Benign Violations of the Constitution (对良性违宪的反思)' (1998) 6 Legal Science Review 法学评论 26

The *discourse* of China's collective leadership holds power over individual leaders, including Xi Jinping. Like the Constitution, it acts as a constant headline. Changing it takes time and political capital. Hence, it lends stability to some Chinese political rules. For example, the 'Norms Regarding Intra-Party Political Life Under New Circumstances' and Regulation Regarding Intra-Party Supervision, published contemporaneously with the Sixth Plenum of the Eighteenth Central Committee emphasized that 'no single person should be able to undermine [collective leadership] for any reason under any circumstance'. If we wish to explain the constitutional nature and the bindingness of rules of leadership succession, then we need to examine this sort of discourse. This will be the focus on the next chapter.

CONCLUSION

The constitution does not command any divisions. Constitutional rules take effect only with the acquiescence of powerful political actors. Every constitutional order is buttressed by a wider body of political institutions and political norms. It is political rules, not legal rules that ensure that the Electoral Colleges vote for the same candidate as the majority in their states, and that the Queen enacts bills approved by Parliament. As Jeremy Waldron notes:

> In the end [law and political order] amount to an interlocking system of rules and practices that depend on nothing more concrete and nothing more secure than the readiness of those involved in political life to regulate and judge their own and others' behavior by certain standards.[119]

This chapter has emphasised the way legal and political rules form an interlocking system and has exposed the limitations of those rules. It refines the dual constitutional model. In doing so, it puts pressure on the characterization of China's unwritten constitution as something separate but equal to its written constitution. Many constitutions combine legal and non-legal elements, but the legal rules came first, and were gradually eroded by convention. In China, the institutions of Party leadership predate the written constitution, and survive it, in some cases unchanged. The attempts

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119 Jeremy Waldron

to divide this group of rules into two contrasting constitutions more accurately reflects Carl Schmitt's constitutional scheme than Albert Dicey's.

By comparing the Chinese account with its English forebear, the chapter illuminates three essential features of political rules. It distinguished accounts of convention that are grounded in what people do, rather than in what they say they are doing. Accounts like these fail to capture longevity of some political rules, especially relatively young political rules, in a fast-developing constitutional order like China's. The *nomenklatura* rules, which are conventional rules embodied in Party doctrine, are a compelling example.

It distinguishes theories of convention that account for their constitutional nature from theories that do not. Joseph Jaconelli's superficially trite observation, that the important thing about constitutional conventions is they are constitutional, contains a profound insight. Unless conventions are anchored in an account of the constitution that transcends immediate political priorities, it is hard to explain their resilience because it is hard to explain why they are regarded as binding. Indeed, it is hard for us to describe them as conventions at all, or to distinguish them from broader political and social practices. This is especially true for a material account of the constitution, an account that describes rules as constitution based on their subject matter.

Finally, it underlines the importance of independent oversight in preserving conventions. The Chinese experience suggests that conventions that serve ephemeral values can be overridden by the political actors they seek to constrain. Conventions are more likely to bind if there are multiple institutions in the constitution that regard them as legitimate, and which are in a position to pressure obedience. If we wish to build a conventional account of the Chinese constitution, we need to explain how rules like these could bind the Communist Party.

A key strength of Dicey's account of convention, which underpins the British scholarship on political rules, is the crucial role it grants to independent oversight of the 'political morality of the constitution. Dicey's conventions are supposed to be binding because they are guaranteed by the nation, or perhaps the electorate. Dicey did not describe the nature of this oversight accurately. If power lies not with the nation but with the Party machine, as Dicey belatedly concedes, then we should expect constitutional conventions to wax and wane with the electoral cycle. However, Chapter Four sets out a clear account of how constitutionally independent parts of the state could act as custodians for political rules.

Accordingly, the chapter explains the relationship between political practice, political discourse and the constitution. In the next chapter, we look at the relationship between discourse and doctrine.

CHAPTER SIX – CONSTITUTIONAL DOCTRINE

> The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions.
>
> E.P. Thompson (1975)[1]

INTRODUCTION

The previous chapter concluded that the modern customary account of constitutional convention places great emphasis on practice, and less emphasis on the discourse that describes and sustains that practice. We did not always think about constitutional rules in this way.

The nineteenth century literature refers to conventions as 'habits', 'maxims' and 'practices' and, almost uniformly, describes them as a species of political or constitutional 'morality'. In the sixth lecture of his *Province of Jurisprudence Determined,* John Austin refers to breaches of 'principles or maxims which the sovereign habitually observes, and which

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[1] E.P. Thompson, Whigs and Hunters, The Origin of the Black Act (1975) 263-265, quoted in Horwitz M, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 The Yale Law Journal 561, at 565

the bulk of the society, or the bulk of its influential members, regard with feelings of approbation'. He goes on to note that these maxims are often '*expressly* adopted… 'by the sovereign or state'.[2] *In Considerations on Representative Government*, John Stuart Mill refers to 'the unwritten maxims of the constitution – in other words the positive political morality of the country'.[3] In *The Growth of the English Constitution*, Edward Freeman refers to 'a whole code of political maxims' and goes on to describe these maxims as 'a whole system of political morality'.[4] In *Constitutional History*, Frederic Maitland refers to 'the customs or the conventions of the constitution' as 'rules of constitutional morality'.[5] Dicey said 'the conventional code of political morality is… merely a body of maxims…'[6] intended to embody the supremacy of Parliament, and ultimately of the electorate. Larry Kramer argues that at this time, the word constitution used to refer to this this wider body of political rules:

> Constitutional or Fundamental Law [was] distinct from both politics and from the ordinary law interpreted and enforced by courts. It was a special category of law. It possessed critical attributes of ordinary law: its obligations were meant to be binding, for example, and its content was not a matter of mere will or policy but reflected rules whose meaning was determined by argument based on precedent, analogy, and principle. Yet constitutional law also purported to govern the sovereign itself, thus

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2 As quoted in O. Hood Phillips, 'Constitutional Conventions: Dicey's Predecessors' (1966) 29 MLR 137 at 138, (emphasis added.)

3 Ibid at 140

4 Ibid at 144 - 145

5 Ibid at 147

6 A. V. Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Macmillan 1915) at 440

> generating controversies that were inherently matters for resolution in a political domain.[7]

This chapter addresses this 'special category of law', building upon ideas set out in previous chapters. Constitutional law, or political morality, spans the various categories considered in the chapters above, from unenforceable laws, to binding convention. In Chapters Two and Five we considered ideas that straddle the boundaries of the legal order – concepts like the Rule of Law or Party Leadership that live both inside and outside law. Constitutional doctrine suggests a deeper answer to the question with which we began – in what sense of constitution do Britain and China have a constitution? Once again, we find that the constitution is not exhausted by its enforceable law.

As we saw in Chapter Two, law has an expressive function. It makes statements that shape social rules. Dicey wrote 'Every law or conduct must… lay down or rest upon some general principles, and must therefore, if it succeeds in attaining its end, commend the principle to public attention or imitation… The true importance, indeed, of laws lies far less in their direct result than in their effect upon the sentiment or convictions of the public'.[8] This constitutional morality might be a timeless skein of moral rules. It might be

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7 Larry Kramer, The People Themselves : Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 24

8 A. V. Dicey, Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century (2nd edn, Macmillan 1914) at 41-42

something more concrete. In his work on convention, Geoffrey Marshall amplifies this idea:

> One [possibility] is that conventions are what we might call the positive morality of the Constitution - the beliefs that the major participants in the political process as a matter of fact have about what is required of them. On this view, the existence of a convention is a question of historical and sociological fact. The alternative possibility is that conventions are the rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly. This permits us to think of conventions as the critical morality of the Constitution.[9]

In Chapter Five, Lord Wilson, the Cabinet Secretary, recalled that when he considered a question of convention, he turned to a source of positive morality – 'loose-leaf folders covered in tatty red plastic'.[10] In other words, there is another possible source of constitutional rules, an important and understudied body of constitution rules and a body of rules that preoccupied constitutional theorists before the 20th century. As we shall see, constitutional doctrine is a commonplace idea in China. China has a formal constitutional doctrine, an authoritative constitutional morality. The meaning of a principle like the Rule of Law or Party Leadership is partly established by the doctrine of the Communist Party. The Party-state projects a set of rules, values and meanings that hold authority for Party members, and for others too.

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9 Geoffrey Marshall, Constitutional Conventions : The Rules and Forms of Political Accountability (Clarendon Press 1986) at 11-12

10 Richard Wilson, 'The Robustness of Conventions in a Time of Modernisation and Change' (2004) PL 407

Britain, on the other hand, does not have a formal constitutional doctrine. In *Law and Public Opinion*, Dicey refers to 'a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion'.[11] These ideas do not have authoritative sources (though Dicey refers vaguely to the influence of thinkers like Adam Smith.) Instead, they are 'held by the people of England, or to speak with more precision, by the majority of those citizens who have at any moment taken an effective part in public life'.[12] However, the maxims and moralities identified by Austin, Mill, Freeman, Maitland and Dicey were maxims shared by a much smaller and more homogenous political community than in modern Britain. The vast expansion in the body of citizens who take part in political life poses challenges for a British political morality, challenges that we will presently explore.

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11 A. V. Dicey, Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century at 19

12 Ibid 9-10

IDEOLOGY AND DOCTRINE

The introduction referred to different senses of political morality ranging from a timeless body of moral principle to a drawer full of loose-leaf folders. This section will begin to clarify what political morality ought to mean for constitutional theory, distinguishing ideology from ideological doctrine, with examples of how ideological doctrine can underpin a constitution.

Michael Freeden defines ideology as a thought practice: 'a recurring pattern of (political) thinking, one for which there is evidence in the concrete world'.[13] To describe an ideology is to describe locations on the map and how they connect together. It is to suggest meanings for the component concepts of a complex of ideas, and to suggest how these ideas may relate to one another. Ideology, in this sense, is a map of the ideas that we create, project, receive and reproduce when we describe the world around us.

Law is an important component of ideology and it is influenced by ideology in turn.[14] Ideology shapes legal discourse. It affects decisions made by judges and legislators.[15]

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13 Michael Freeden, Ideology: a Very Short Introduction (Oxford University Press 2003) 21. See generally Michael Freeden, Ideologies and Political Theory: A Conceptual Approach (Clarendon 1996) Ch 1 and 2.

14 Michel Foucault, Discipline and Punish (Penguin Books 1991)

Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review

Since the American realists introduced a sociological approach to the study of law from the 1920s, people have accepted that judges take account of social standards, political imperatives, moral beliefs about justice and fairness, underlying assumptions about the role of state and many other general, vague, non-pedigree materials when they select or interpret rules.[16] Legal process scholars went further, arguing that *legal* principles expounded by courts are not limited to statutory texts.[17] These ideas still pose a challenge to a rational, liberal vision of the legal order in which citizens agree to obey laws that they make together. If judges give effect to an ideology that is theirs, rather than ours, this poses a challenge to a democratic account of the legal and constitutional order.

Law also shapes ideological discourse. Individuals understand the world through legal ideas[18] and legal systems seek to influence the way individuals see the world.[19] Legal

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15 Jerome Frank, Courts on Trial : Myth and Reality in American Justice (Atheneum 1963); Lee Epstein and others, 'Ideology and the Study of Judicial Behavior' in Jon Hanson (ed), Ideology, Psychology and Law (Oxford University Press 2012); J. A. G. Griffith, The Politics of the Judiciary (5th edn, Fontana 1997)

16 See e.g. SW v United Kingdom (A/355-B); CR v United Kingdom [1996] 1 FLR 434; [1996] 21 EHRR 363; European Court of Human Rights. See also Schauer's discussion of Henningsen v. Bloomfield Motors, Frederick F. Schauer, Playing by the Rules (Oxford : Clarendon 1991) at 201-202

17 The Legal Process – Henry M. Hart and others, The Legal Process : Basic Problems in the Making and Application of Law (Foundation Press 1994) at 156-158

18 David M. Engel, 'How Does Law Matter in the Constitution of Legal Consciousness' in Bryant G. Garth and Austin Sarat (eds), How Does Law Matter? (Northeastern University Press 1998)

19 Shirley Scott, 'International Law as Ideology: Theorising the Relationship between International Law and International Politics' (1994) 5 EJIL 313. Compare Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 AJIL 205

ideas, like substantive due process and good faith, affect the way people think about the world, about what is good, and what is possible.[20] Law makes claims about the world and embodies values. It tells us what is important and what is not important, both in what it chooses to regulate, and how it chooses to regulate those things. It is a 'distinctive manner of imagining the real'.[21] The idea that we contract freely suggests that we are sovereign equals, and, in contrast, the idea that we are landlords, tenants, consumers and retailers clarifies important social differences.[22] Law sometimes projects more explicit values; for example, when it criminalizes attacks on Christianity[23] or forbids the promotion of gay relationships.[24]

Writing about Soviet law, Bernard Rudden says 'ideology first describes things as they are; this leads to rules; and the latter include a duty to believe the description. Once this is done the system is sewn up'.[25] The problem that Rudden encapsulates – that we see the world in light of the law, but that the law is not a scientific reflection of the world – is not a uniquely Soviet problem. It is a problem for any legal or constitutional order. To say that the Soviet Union had 'ideology' whereas Britain does not is to misunderstand

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20 Göran Therborn, The Ideology of Power and the Power of Ideology (Verso 1999)

21 Clifford Geertz, Local Knowledge (Basic Books 1983)

22 Hugh Collins, Marxism and Law (Oxford University Press 1984) Chapter 3

23 Rex v. Williams, 26 How. St. Tr. 653 (1797)

24 For example, Section 28 of the Local Government Act 1988

25 Bernard Rudden, 'Law and Ideology in the Soviet Union' (1978) 31 Current Legal Problems 189, 204

what ideology is. But perhaps this is not the 'ideology' that Rudden is referring to. Soviet ideology did not merely refer to thought practice. It also referred to a distinctive political institution. It referred to formal, articulated rules, to articles of faith that Marxists were expected to accept. To draw this into focus, we first need to distinguish ideology and state ideological doctrine.

Doctrine is teaching about belief. A doctrine proposes an authoritative meaning given to certain ideas and an authoritative explanation of how these ideas relate to one another. It is anchored in an authoritative discourse.[26] In practice, for lawyers, Communists, Methodists or homeopaths, doctrine is found in rules. Churches, for example, have laws that establish what constitutes doctrine, who can develop it, and what counts as fidelity to doctrine. Though the point will need refinement later, for now we can observe the difference between the thought practice of Christianity, and the rules in the Code of canon law.

The exposition of doctrine is a bounded problem, whereas the exposition of ideology is not. The process of identifying and reproducing legal doctrine, for example, is supposed to be guided by tolerably clear rules that tell lawyers where to find law. When superior courts discuss the rule of law or legislative supremacy, they are not merely

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26 This is not necessarily a philosophical process. The elaboration of doctrine may aspire to avoid contradiction, fallacy, vacuity and other errors, but it need not.

suggesting ideas that inferior courts may find appealing. They propose authoritative meanings for concepts and authoritative accounts of the way those concepts relate to one another.

We might therefore describe a doctrine – legal, religious, medical or political – as a *practical, working type* of an ideology. One can adhere to a doctrine by accepting it, without having to believe it is correct. To accept a proposition 'is to treat it as true for some reason. One ignores, at least temporarily, and perhaps in a limited context, the possibility that it is false'.[27] An accountant who privately believes that EBITDA should be calculated differently is still an accountant.[28] A Catholic who privately disagrees with the stance of the church on contraception can probably still claim to be Catholic.[29] Provided one accepts the doctrine for certain public purposes, one can adopt a degree of private, critical distance from these rules. It is *rules*, rules like these, that constitute doctrine. In contrast, ideology is constituted by *ideas*.

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27 Robert Stalnaker, quoted in Adam Perry, 'The Internal Aspect of Social Rules' (2014) 35 OJLS 283 at note 14.

28 See e.g. SEC Compliance & Disclosure Interpretations of 4 April 2018, Question 102.09

29 See e.g. Humanae Vitae, Encyclical Letter of Paul VI of July 25, 1968, Part II – 'Doctrinal Principles'. Canon law distinguishes between 'definitive' and 'non-definitive' doctrine. An assent of faith is owed to the former. The latter demand 'obsequium' – meaning either 'respect' or 'submission'. There is a lively debate about whether declarations of assent to doctrine under church law require acceptance or something more. I am grateful to Norman Doe for explaining this area of law.

Ideological doctrine is especially important in unwritten constitutions, but it is found in almost every constitutional order. Article 2 of the 2014 Egyptian Constitution states 'the principles of Islamic Sharia are the primary source of legislation'. The principles of Islamic Sharia are a body of doctrine, distinct from 'ideas about Islam'. Some constitutions incorporate political principles. The Preamble to the constitution of France's Fifth Republic as amended, states 'The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946…' The Preamble does not explicitly incorporate the Declaration by reference. However, as in Egypt, this language invites judges to treat these rules as rules that have to be enforced. There is, once again, a difference between this discourse, which is anchored in two texts and the thought practice of human rights.

Jennings compares these principles of political morality with British constitutional conventions:

> French writers, for instance, included the Declaration of the Rights of Man as … though its terms are not to be found in the constitutional laws nor established under them. However, emphasis on rules in and not in the constitution would make a useful formal distinction [in France]. With us, no such distinction is possible. All the governmental institutions have been established either by custom or convention, or by the authority of an institution so established, and their powers are derived either from custom or convention, or from an institution established by custom or convention. The rules which govern these institutions, as well as the rules enunciated

> by them, are of the same kind, whether they are called laws, or customs or conventions.[30]

Following Jennings' logic, constitutions can incorporate ideological principles that are *not* mentioned in the text. For example, many American judges treat the Federalist Papers as a commentary on the US Constitution. In *Cohens v. Virginia*[31] John Marshall described the essays as 'a complete commentary on our constitution... Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution put it very much in their power to explain the views with which it was framed'. The Federalist Papers are not incorporated by reference in the same way that the *Declaration* is. They are factors that judges may, and perhaps must, take into account, but not rules that judges must enforce.

In this section, we have distinguished between ideology and ideological doctrine. There is a range of views in the Supreme Court, Parliament, the Conservative Party and The Times, about whether the Human Rights Act should apply on the battlefield. There is also a broadly coordinate range of views about whether judges have too much power.[32] The first question is a question of legal doctrine – a finite, bounded problem. By contrast,

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30 Ivor Jennings, The Law and the Constitution (5th edn, University of London Press 1959) at 107

31 Cohens v. Virginia 19 U.S. 264 (1821) (Supreme Court of the United States) 418-419. See also Pierson CW, 'The Federalist in the Supreme Court' (1924) 33 The Yale Law Journal 728

32 Note, for example, the overlap between the two questions in the work of the Judicial Power Project, a project that exists at the intersection of law and politics explored here. http://judicialpowerproject.org.uk.

the second question might seem intimidatingly vast. To answer it adequately, we might need a history of ideas, or perhaps a sociology of how people relate to those ideas[33]. Unlike the specific doctrine of the HRA, this question of constitutional ideology can only be answered in the most general or the most compendious terms.

The sections to come will explain how ideological doctrine can form part of the constitution.

33 For a practical account of how political scientists code the preferences of American judges see Lee Epstein and others

CONSTITUTIONAL DOCTRINE IN CHINA

Doctrinal, moral rules were central to the constitution of ancient China. Law and administration had their place within an overarching system of positive morality, embodied in mosaic of moral rules, rites, rituals, and customs.[34] China still has a core, state ideology, promulgated independently of the legal system. [35] The CCP has developed an authoritative constitutional doctrine in this tradition – a Party-led ideology that settles matters of constitutional principle.

Charles Lindblom said the symbol of authority in China is 'not the gun but the word'.[36] Lindblom's broad claim is that ideological indoctrination is a distinctive sort of social control, comparable to force or to law. He claims that the major form of control during the first twenty-five years of the PRC was neither orders nor rules, but persuasion. Ideological indoctrination is an important and permanent feature of modern Chinese

34 For an introduction see e.g. Luke Lee and Lai Whalen, 'The Chinese Conceptions of Law: Confucian, Legalist and Buddhist' (1977) 29 Hastings Law Journal 1307. For connections with CCP doctrine see Fu Zhengyuan, China's Legalists : The Earliest Totalitarians and their Art of Ruling (Routledge 2016)

35 For a sense of the evolution of this idea from Imperial to Communist China see Patricia M. Thornton, Disciplining the State : Virtue, Violence, and State-making in Modern China (Harvard University Press 2007)

36 Charles Edward Lindblom, Politics and Markets (Basic Books 1977) 52

politics and the formal processes of indoctrination in China have been carefully documented.[37]

The CCP describes indoctrination as 'ideological work' (思想工作). It develops an official account of the meaning of political ideas, ensures that they are absorbed, and polices their use in discourse. The Party Centre expects officials to understand these ideas, and ambitious officials learn how to follow them. Lindblom, among many others, is correct to say that the CCP governs partly by persuasion.[38] The CCP has a bureaucratic system devoted to what it calls 'publicity' under the overall control of a member of the Politburo Standing Committee. [39] The Publicity Department, a component of this bureaucratic system, disseminates an official State account of the values of the state.

That account is anchored in a discourse about text. Franz Schurmann said, 'mass media are not only to be read when a man is reclining in a comfortable chair, but mainly

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37 Michael Schoenhals, Doing Things with Words in Chinese Politics: Five Studies (Berkeley: University of California Press, 1992); Wen-Hsuan Tsai and Peng-Hsiang Kao, 'Secret Codes of Political Propaganda: The Unknown System of Writing Teams,' China Quarterly, no. 214 (2013): 394; Qian Gang, 'China's Constitution Rollercoaster,' China Media Project, available at http://cmp.hku.hk/2014/11/06/36962/; Michael Swaine, 'Chinese Leadership and Elite Responses to the U.S. Pacific Pivot,' (2012) 38 China Leadership Monitor 1; Frank Pieke, 'Cadre Training and the Party School System in Contemporary China,' in The EU-China Relationship: European Perspectives, ed. Kerry Brown (London: Imperial College Press, 2015).

38 See e.g. Schurmann infra

39 Kenneth Lieberthal and David M. Lampton (eds), Bureaucracy, Politics, and Decision Making in post-Mao China (University of California Press 1992)

in ‘study sessions’. Study sessions involve guided, collective reading and discussion of ideological documents. Through this process, 'over time, people learn the real meanings of these terms'.[40] In his history of 'ideological work' to disseminate the authorised understanding of the 1954 Constitution, Neil Diamant observes that these meetings 'were not gatherings of freely assembled, flinty citizens engaged in coffee-house-style political critique'. Instead 'they were organized by the state and took place in work units in the presence of officials'.[41]

This process of indoctrination is guided by political rules. CCP documents derive their formal authority from a system of rules directed at officials and at Party members.[42] According to the Party Regulation on the Use of Official Documents in Party and State Work, most recently issued in 2012, 'public documents' (公文) form a separate category to 'normative documents' (规范性文), which include laws and regulations.[43] For example, Section 9 of the Regulation says a 'Decision' is a type of public document used to 'make

40 Franz Schurmann, Ideology and Organization in Communist China (2nd edn, University of California Press 1968) 60

41 Neil J. Diamant and Xiaocai Feng, ‘The PRC’s First National Critique: The 1954 Campaign to “Discuss the Draft Constitution”’ (2015) 73 The China Journal 1, 8

42 See State Council General Office, CCP Central Committee General Office, Joint Regulation on the Use of Official Documents in Party and State Work of 1 July 2012.

43 On normative documents see Perry Keller, 'Sources of Order in Chinese Law,' American Journal of Comparative Law 42 (1994): 711; Peter Howard Corne, 'Creation and Application of Law in the PRC,' American Journal of Comparative Law 50 (2002) 369.

or implement policy for important issues' and for 'changing or quashing inappropriate decisions made by subordinates'. In 2014, the Central Committee issued important guidance on the meaning of the Rule of Law, in the form of a Decision. There are also informal rules that make it clear that the state or the Party is speaking in a certain form. For example, the Party speaks through Guiding Editorials in the People's Daily, the official newspaper of the Party Central Committee, often published using pseudonymous bylines like Zhong Sheng (种声) which is a homophone for 'the voice of the Center'. This helps readers to identify authoritative sources of CCP doctrine.[44]

Wu Guoyang says, 'the Chinese Communist regime operates … in documents, in contrast to western democracy, which operates through constitution and law'.[45] Wu does not address whether the documents in question might be constitutional. Franz Schurmann does:

> If Chinese Communist ideology is a systematic set of ideas, one would expect to find a systematic presentation of those ideas in some major document, somewhat in the manner of a constitution. Such a major

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44 The example is drawn from Wen-Hsuan Tsai and Peng-Hsiang Kao, 'Secret Codes of Political Propaganda: The Unknown System of Writing Teams' (2013) 214 The China Quarterly 394. See also Michael Swaine, 'Chinese Leadership and Elite Responses to the U.S. Pacific Pivot' (2012) 38 China Leadership Monitor 1

45 Wu Guoguang, '"Documentary Politics": Hypotheses, Process and Case Studies' in Carol Lee Hamrin and Suisheng Zhao (eds), Decision-making in Deng's China : Perspectives from Insiders (M.E. Sharpe 1995), 24.

> document exists in the form of the Party Rules…The Party Rules can be said to contain the formal ideas basic to the ideology.[46]

Chapter Four addressed the way in which the Party constitution is regularly updated in the light of the changing priorities of the CCP. Schurmann expands on this idea: 'although every published document can be regarded as a reflection of the ideology, some documents are regarded as doctrinal; these contain the conscious systematization to which the ideology aspires. The Party rules, of course, are such a document'.[47] He Xin provides a slightly larger account. He says, when we look for answers to constitutional questions, 'it would be naive to rely on the Constitution or the law. The answers, instead, are to be found in CCP documents, party practices, speeches of party leaders and empirical evidence'.

The doctrine of the CCP is thus a self-articulated theory of the party-state, a theory of the party-state, by the party-state. But it is much broader than this. It purports to be a universal theory of history, of economic and social development, of governance, of representation, of democracy, of political liberty and of the good for man.[48] I will not attempt to provide a comprehensive account of it here. However, we can briefly illustrate

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46 Franz Schurmann at 19

47 Ibid at 21

48 Creemers R, 'Party Ideology and Chinese Law' in Sue Trevaskes and Rogier Creemers (eds), Law and the Party in Xi Jinping's China: Ideology and Organization (Cambridge University Press: Forthcoming)

the process described above, with reference to the way the Party interprets the meaning of the rule of law.[49] This is a concrete example of a constitutional principle developed through the doctrine of the Politburo.

In 1999, the Rule of Law was inserted into the State Constitution. This lead to an important and largely internal debate about its meaning, and how it ought to be reconciled with the principle of Party Leadership. There is an obvious tension between an account of the rule of law that demands government be subject to law, and an account of Party leadership that demands that the Party transcends the law. One way in which the Party sought to resolve the tension was through a series of guiding editorials published on the front page of the People's Daily, intended for further study by officials. This discourse developed three main themes. First, the rule of law was presented in instrumental terms – as the means to certain ends, including economic development and long-term political stability. Second, the rule of law was presented initially as an idea existing in tension with Party Leadership and the principle of Democratic Centralism. Over a series of statements, this position shifted from the claim that rule of law was important, and the party would have to change its leadership style to accommodate it, to the position whereby rule of

49 Ewan Smith, 'The Rule of Law Doctrine of the Politburo' (2018) 79 The China Journal 40

law was formally subordinated to Party leadership. This last account was confirmed in the Decision of the Fourth Plenum of the Eighteenth Central Committee in October 2014.[50]

In sum, the CCP's theory of the constitution is not just an idea carried in a newspaper. It is an authoritative account of a constitutional idea that guides the behaviour of Chinese officials, especially judges. As we will see, constitutional doctrine has important effects on the legal order. Chinese judges are already required to give effect to the 'interests' of the CCP and the rule that requires them to do so is found not in the law but in the Party's ideological doctrine.

For example, 2007 Hu Jintao said Chinese judges should make three values the touchstone of their work. Those values were, in descending order of priority, 'the party's cause, the people's interest and the constitution and laws'.[51] This doctrine is now known as the 'Three Supremes' (三个至上). Hu's command was not issued in the form of law. However, the following March, just after new leaders had been appointed to national courts, the CCP's Political Legal Committee issued an important notice, directed primarily to Party members working in law, demanding that they 'study' Hu's speech. In 2011, at the annual meeting of the NPC, Wu Bangguo – then China's third most senior official –

50 CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to Law Forward,' October 28, 2014.

51 Hu Jintao, 'The Three Supremes', Speech to National Conference on Political Legal Work, December 2017

delivered an address that ruled out pluralism, federalism, multi-party governance, the separation of powers.[52] In 2017, Zhou Qiang, President of the Supreme People's Court, Central Committee Member and former First Secretary of the Communist Youth League said Chinese courts

> must firmly resist the western idea of 'constitutional democracy', 'separation of powers' and 'judicial independence'. These are erroneous western notions that threaten the leadership of the ruling Communist Party… We must not fall into the trap of western thoughts [of] judicial independence.[53]

This admonition reflects the vision of Party Leadership confirmed in the Fourth Plenum Decision, which, in turn, reflects President Hu and Chairman Wu's views. It is not law but Party doctrine that requires the court to pay attention to the interests of the CCP. That same doctrine ultimately fixes the general lines of the constitution.

Party doctrine contributes to the way legal concepts used in legislation are interpreted. As Robert Heuser argues, ideas such as 'disturbance of the socialist order' (Art. 158 Criminal Code), 'state secrets' (Art. 186 Criminal Code), 'independence of people's courts' (Art. 4, II, Code of Criminal Procedure)… [were] concretized in the light of the Party's doctrine and policies'.[54] Chinese legislation often uses terminology whose

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52 Reported at http://www.npc.gov.cn/npc/xinwen/syxw/2011-03/11/content_1641626.htm

53 Reported at http://www.chinanews.com/gn/2017/01-14/8124300.shtml

54 Robert Heuser, 'The Legal Status of the Chinese Communist Party' (1987) 4 Occasional Papers in Contemporary Chinese Studies

meaning is ultimately fixed by the Party. In Chapter Five, we noted how Article 105 of the Criminal Code criminalizes 'incitement of subversion of the regime or overthrow of the socialist system'. Those words recur, for example, in Article 2 of the Criminal Code. They are understood in light of both the constitution and Party doctrine. Article 3 of the Legislation Law provides that law shall be made in compliance with the Constitution, but also in compliance with the Four Cardinal Principles, which we will consider in more detail presently. Article 3 of the Organic Law of the People's Courts of 1979 obliges judges to 'ensure the smooth progress of the Socialist revolution and Socialist construction in the country ... [and] educate citizens in loyalty to their socialist motherland and voluntary observance of the Constitution and laws'. The 'constant headlines' that we encountered in Chapter Two multiply these examples.

Party doctrine also contributes to the way cases are decided. Bjorn Ahl recently presented a wide-ranging study of the influence of Party ideology on judicial decisions.[55] The current Regulations on the Citation of Laws, Regulations and other Normative Documents in Court Decisions – the same Regulations that do not list the constitution as a source of law – do not list ideological doctrine as a source of law either. Courts may not cite ideological doctrine as the grounds for their decisions, just as they may not cite

55 Ahl B, 'Why do Judges Cite the Party? References to Party Ideology in Chinese Court Decisions' (Conference Paper, ICON-S, Hong Kong, 24 June 2018)

the constitution. Nevertheless, Ahl's study identified 798 court decisions reported between 2010 and 2016 that cite ideological doctrine including concepts such as: 'socialist rule of law', 'socialist harmonious society' and 'core socialist values'. If the 1982 Constitution is a constant headline, then so is Party doctrine.

Specific SPC regulations also provide guidance on the use of certain ideological doctrines in legal cases. For example, the concept of the 'Harmonious Society' was shorthand for party doctrine on how to address challenges of development and inequality during Hu Jintao's Chairmanship. It was authoritatively expanded in a Decision of the Sixteenth Central Committee in October 2006.[56] Although, for reasons we explore in Chapter Five, the Decision is not a source of law, the Supreme People's Court has issued two judicial interpretations on the implementation of the 16th CCP Central Committee Decision.[57] As Ahl notes, 167 reported decisions refer to the Harmonious Society in their

56 Decision of the CPC Central Committee on Major Issues Regarding the Building of a Harmonious Socialist Society of 11 October 2006.

57 SPC Opinion on Providing Judicial Safeguards for Constructing a Socialist Harmonious Society (最高人民法院关于为构建社会主义和谐社会提供司法保障的若干意见) (Supreme People's Court, 1 March 2007)

SPC Opinion on Further Elaborating the Active Function of Mediation in Court Proceedings in Order to Construct a Socialist Harmonious Society (最高人 民法院关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见) (Supreme People's Court, 1 March 2007.)

reasoning. The SPC has issued similar Opinions with respect to other points of ideological doctrine.[58]

The influence of CCP ideology over the constitution and the law does not flow in one direction only. In July 2017, CASS Professor Mo Jihong called for a law to manage ideology.[59] He said China needed to legislate to ensure that Socialist Values were not subverted by 'hostile forces'. In other words, he argued that ideological principles established by the Party, such as Socialist Core Values needed to be memorialised in a *law*.[60] But China already does this, at least in part. For example, Article 23 of the National Security Law of 2015, provides:

> The State Persists in the orientation of the advanced socialist culture… and practicing the socialist core values, guarding against and resisting negative cultural influences, taking hold of dominance in the ideological,

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58 SPC Opinion on the Cultivation and Practice of Core Socialist Values in the Work of the Peoples' Courts (最高人民法院发布《关于在人民法院工作中培育和践行社会主义 核心价值观的若干意见) (Supreme People's Court, 15 January 2007)

59 Mo Jihong, '稳步推进意识形态阵地建设法治化 [We Should Promote the Legalisation of Ideological Construction] (2017) 19 People's Tribune (人民论坛)

60 There are twelve Socialist Core Values: the national values of prosperity, democracy, civility, and harmony; the social values of freedom, equality, justice, and the rule of law; and the individual values of patriotism, dedication, integrity and friendship. See joint CCP Central Committee General Office, State Council General Office Guiding Opinion on Progressing the Entry of the Socialist Core Values System into the Establishment of Rule of Law of December 26th 2016

> culture and enhancing the overall strength and competitiveness of the entire culture.

In May 2018, the Central Committee published a plan 'to fully incorporate socialist core values in legislation' within ten years.[61]

As we noted at the very beginning of this section, law shapes ideological discourse. We understand the world, in part, through legal ideas and those ideas reflect, reinforce and shape ideological discourse. They do so even when the scope for coercive judicial enforcement is limited. For example, in international law, where legal sanctions are far less prominent than municipal law, law still shapes political discourse and behavior. Hans Morgenthau saw international law as an instrument for the projection of political ideology. He said, 'legitimate power, which can invoke a moral or legal justification for its exercise… has a better chance to influence the will of its objects than equivalent illegitimate power'.[62] In legal orders dominated by soft law, by non-directive principles, or by non-justiciable legal rules, it is hard to explain the point of legal rules unless they are designed to influence constitutional discourse.

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61 CCP Central Committee Plan to Incorporate Socialist Core Values in Law of May 28th 2018 <中共中央社会主义核心价值观融入法治建设立法修法规划 >

62 Hans J. Morgenthau, Kenneth W. Thompson and W. David Clinton, Politics among Nations : The Struggle for Power and Peace (7th edn, McGraw-Hill Higher Education 2006) at 81

In Chapter Two, we considered unenforceable constitutional rules in detail, including non-directive principles, duties of imperfect obligation, and preambular provisions. Rules like these are not justiciable, but they are important, because they influence constitutional and political discourse. In Chapter Four, we highlighted the most important constitutional revision approved at the Two Sessions in March 2018, was the insertion of Party Leadership into the text of the Constitution. This is the first reference to the Communist Party in the text of the 1982 Constitution. But it is not the first reference to Party leadership. The Preamble already records the importance of Party leadership:

> Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road.

It is noteworthy that this formula was originally laid down not in a law or a constitutional convention, but in a keynote speech delivered by Deng Xiaoping on behalf on the Central Committee on March 30 1979.[63] The speech resolved a political debate about whether China would return to Maoism, would democratise, or do neither. Deng said:

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63 The Central Committee had met between January and April 1979 to discuss 'guidelines for theoretical work'. Deng's address was the outcome of that long meeting. 'Uphold the Four Cardinal Principles, carried in Deng Xiaoping, Speeches and Writings (2nd edn, Oxford : Pergamon 1987)

> We must uphold the four cardinal principles ideologically and politically… The four principles are: 1. We must keep to the socialist road. 2. We must uphold the dictatorship of the proletariat. 3. We must uphold the leadership of the Communist Party. 4. We must uphold Marxism-Leninism and Mao Zedong Thought.

Whether they are found in Article 1 of the Constitution, in the Preamble, or in an address on behalf of the Central Committee, rules like these shape constitutional discourse. They are more like the doctrine of the CCP than the rules of the Civil Code.

The Constitution itself operates as a body of ideological doctrine – it is an unenforceable law with an important expressive function. But the ideology is expresses is now dissonant with the ideological discourse of the Party, at least in part. Zhang Qianfan argues that 'the spread of legal and constitutional knowledge has led to institutional practices that, however limited and defective, have helped to inculcate popular consciousness for defending the individual rights provided for in the Constitution'. Zhang believes state institutions could work 'if the constitutional rules were given minimal respect and some efforts at enforcement were made'.[64] In turn, Randy Peerenboom argues that, even if China will not implement a thick version of the rule of law[65] it will implement a thin version, which reflects basic standards of openness, prospectiveness and clarity.[66] Rogier Creemers argues that, even if law does not limit the power of the state,

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64 Zhang Qianfan, The Constitution of China : a Contextual Analysis (Hart Publishing 2012) 143

65 Lon L. Fuller, The Morality of Law (Yale University Press 1969)

66 Randall Peerenboom, China's Long March toward Rule of Law (Cambridge University Press 2002) 65.

the constitution can channel that power.[67] He Xin argues that constitutional principles are reflected in administrative and disciplinary rules implemented by other organs of state.[68]

Chang and Law describe this dissonance as 'constructive irritation':

> [D]issonance exists when a constitution is nowhere close to being realized (and, indeed, is unlikely ever to be realized) yet nevertheless has a real effect on how things are done… In such cases, the constitution might be said to serve as a constructive irritant. It is rightly described as constructive if and to the extent that the resulting state of deep tension and contradiction furnishes the intellectual material and generates the dialectic needed for transformation of the constitutional order. Like a grain of sand in an oyster, it is simultaneously alien to, and deeply embedded within, the constitutional order.[69]

This argument perhaps explains why even the most powerful Party administration in a generation has chosen to change the constitution, rather than work around it. One reason Party Leadership can now be found in the text as well as the Preamble is to reduce the level of dissonance as between Party doctrine and Constitutional doctrine. This also explain why it was important for Xi Jinping to amend the term limit in Article 79 of the Constitution, rather than govern as the power behind the throne.

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67 Creemers R, 'Party Ideology and Chinese Law' in Sue Trevaskes and Rogier Creemers (eds), Law and the Party in Xi Jinping's China: Ideology and Organization (Cambridge University Press: Forthcoming)

68 He, Xin. 2009. 'Administrative Law as a Mechanism for Political Control in Contemporary China,' in Balme, Stéphanie & Michael Dowdle (eds.), Building Constitutionalism in China, Palgrave MacMillan at 143-161.

69 David Law and Chang Wen-Chen, 'Constitutional Dissonance in China' in Gary Jacobsohn and Miguel Schor (eds), Comparative Constitutional Theory (Edward Elgar 2018) at 509

When it expounds constitutional doctrine, the CCP acts less like a constitutional court, and more the Philadelphia Convention, commenting on a text it has framed. This doctrine is more like the Federalist Papers than the Federal Supplement. Principles like those set out in the Federalist Papers are one sort of theory of the state, by the state. But unlike these historical documents, the doctrine of the CCP is always speaking. The originalist interpretation of the Federalist Papers by modern judges might look like a sort of dialogue, but it is not, because the Framers are dead. The Politburo are very much alive, and their commentary on the changing nature of Party leadership is a living constitution.[70]

In the Chapter Five, we compared the Party's constitutional role to that of a Standing Constitutional Convention. Its power is not constituted power but the power to constitute. This has obvious consequences for the rule of law, and ultimately for individual liberty in China. However, it also leads to instability, because the rules that the convention promulgates are subject to change, according to more immediate interest of the Party, or its evolving view of China's immediate needs.

In this section, we added an important qualification to this claim. The Party is able to change convention in China according to the way it perceives China's immediate needs. However, the institution of Party Doctrine places important procedural limits on the freedom of action of the Party Centre. The Politburo cannot easily set aside constitutional

70 He Xin, 'The Party's Leadership as a Living Constitution in China' (2012) 42 HKLJ 73

rules embodied in a Decision of the Central Committee. Hence, one limitation of the practice-led view of constitutional convention is that it fails to take account of the clarifying and stabilising role played by constitutional discourse. Xi Jinping has arguably eroded collective leadership but collective leadership remains as a constant headline. The political consequences of flaunting decisions of the central committee are not insurmountable, but they are not insignificant either.

This section has shown how law and constitutional doctrine influence one another. For example, doctrine affects the interpretation of legislation and guides the decisions of courts. In turn, legal ideas reflect, reinforce and shape ideological doctrine. In general, constitutional doctrine clarifies and stabilises constitutional rules. However, at times this leads to dissonance, as between the vision of the state set out in the state constitution, and the vision embodied in party doctrine. In the next section, we will compare CCP doctrine with its pluralist, British equivalent.

MONISM AND PLURALISM

A constitutional order can be monist in at least two senses. It can be institutionally monist, and it can be ideologically monist. An institutionally monist constitutional order entrusts a single institution with the power to settle constitutional disagreement. Ideological monism is a more complex idea. In a monist culture, values are supposed to be compatible with one another, because they form a coherent whole, or because they are reducible to more fundamental principles.[71] In contrast, liberal constitutional orders are plural in at least two respects – they admit of more than one political party and of more than one way to conceive of the national interest. They need institutions that can reconcile different conceptions of the national interest: parliaments, elections and so on. A state committed to diversity might promote a plural constitutional discourse, but separately, it might promote a plurality of institutions that engage constitutional discourse. – it can be *institutionally* and *ideologically* pluralist.

As we noted in Chapter Four, 'unity and unanimity' not dissent and diversity, were the bywords of early democratic theory.[72] The theory of the state that came from Hobbes, Locke and Rousseau saw the state as an integrative institution, as a body that could reconcile different conceptions of the national interest into one coherent, singular, whole.

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71 Isaiah Berlin, Two Concepts of Liberty (Clarendon Press 1958)

72 Giovanni Sartori, Parties and Party Systems (Cambridge University Press 1976) 12

James Madison said constitutional disputes ought to be settled by 'the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case'.[73] Separately, he argued that 'Public opinion sets bounds to every government, and is the real sovereign in every free one'. [74] This might appear to be a radical vision of institutional and ideological pluralism. However, when enlightenment rationalists like Jefferson and Madison spoke about the public will, this was not a defence of majoritarianism so much as a defence of rationalism. As Kramer notes 'public opinion would work to secure rather than undermine republican government only if and for so long as the public was guided by reason'.[75]

We might think of pluralism as a spectrum. The more scope for unregulated disagreement among more institutions, the more pluralist a state is. Theorists like Hobbes and Schmitt would place all states at an extreme point on this spectrum. Hobbes imagined sovereign government as an authorised representative of the people.[76] He thought the state was an imagined embodiment of a monist public will. The people, in this sense, are not simply the body of citizens, but an imagined embodiment of their will – the 'state'.[77]

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73 James Madison quoted in Larry Kramer at 108

74 James Madison quoted in Larry Kramer at 112

75 Larry Kramer at 114

76 Thomas Hobbes, Leviathan (Oxford University Press 1998). See also Quentin Skinner, 'A Genealogy of the Modern State' (2009) 162 Proceedings of the British Academy 325

77 Quentin Skinner. On the concept of the public interest in English law see John Bell, Policy Arguments in Judicial Decisions (Clarendon Press 1983)

That will is made manifest through legislation made in a sovereign Parliament. Schmitt also believed in a unitary public will. He thought that will was vindicated by a sovereign invested with the authority to settle disputes. As we have seen in Chapter Five, Dicey also thought the public were the ultimate guarantors of the constitutional order. He believed Parliament obeyed constitutional conventions because the electorate would not tolerate their breach.

If all monist states are alike then each pluralist state is pluralist in its own way. The British and American pluralist traditions are different, so they fall at different points on the spectrum.[78] For example, some people think the power to settle constitutional questions is shared. Alison Young[79] argues that Parliament and the Courts shape the meaning of the UK constitution through a complex constitutional dialogue. Still other theorists think institutions are entitled to hold their own opinion of about what the constitution means. Thomas Jefferson encapsulated this departmentalist view when he said '[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question'.[80] The departmentalists believed that separate,

78 See P. P. Craig, Public Law and Democracy in the United Kingdom and the United States of America (Clarendon 1990) Chapters 3-6

79 Alison L. Young, Democratic Dialogue and the Constitution (Oxford University Press 2017)

80 Thomas Jefferson quoted in Larry Kramer, 106

dissonant public institutions would be more likely to arrive at a rational account of the public interest than a single body vested with that authority. There were *institutionally* pluralist, but *ideologically* monist.

On the other hand, some people believe in the primacy – perhaps the supremacy – of one institution over other constitutional organs. Dicey thought the UK Parliament possessed this singular authority to resolve disagreement. In Chapter Four and Chapter Five we considered how certain aspects of this function are in fact performed by political parties, just as they are charged with establishing 'the public will' in Germany. Some people think the courts ultimately decide. Fred Schauer and Larry Alexander argue that the Supreme Court has the final authority to decide what the constitution demands.[81] In Chapter Two and Chapter Five we looked at examples of cases where courts define the public interest. Some people argue that the government ultimately settles the meaning of public policy. Eric Posner and Adrian Vermeule argue that the great majority of constitutional questions have already been settled by the executive before they come anywhere near the legislature or the courts.[82] Chapter Three provides British and Chinese examples of this phenomenon.

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81 Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 Harvard Law Review 1359

82 Eric A. Posner and Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (Oxford University Press 2010)

With few exceptions, the theories described above focus on what we might think of as traditional constitutional institutions, and chiefly on Aristotle's three branches. But it is not obvious why we would stop there. Mark Tushnet[83] argues that popular constitutional debate is channelled through institutions like political parties, factions, and pressure groups. So far as the public shape the meaning of the constitution, they do so though non-legal institutions, from the New York Times to the Tea Party. The views in favour of a single sovereign body set out here do not come from arch-authoritarians. They come from liberal political theorists, who believe there is more than one conception of the public interest, but who nevertheless support the idea of having a constitutional institution that can authoritatively reconcile those separate conceptions.

Many people believe constitutional questions are ultimately settled in the largest of all state groups – the citizens. Larry Kramer argues that, in the early years of the US constitutional order, constitutional controversies were ultimately settled in the court of public opinion, whether at the ballot box, by petition, by mob-justice, or by local evasion of central rules. Kramer argues that 'Legislative power, it was said, is always 'accountable to the Community' whose members could judge whether lawmakers had acted consistently with 'the Fundamental Rule of society' and withhold support from measures that 'Breach the Constitution''. In turn 'Crowd action represented a direct expression of

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83 Mark V. Tushnet, 'Popular Constitutionalism and Political Organization' (2013) 18 Roger Williams U L Rev 1

popular sovereignty, justified as a last resort in the writings of Grotius, Pufendorf, and Locke, not to mention by long tradition'.[84] Tushnet claims that because the values of the thin constitution permeate American public life 'someone who rejects judicial supremacy does not thereby defend an anarchic system in which the law is whatever anyone thinks it ought to be'.[85] If constitutional questions cut across legal and political debate, then we might not need any institutional means of settlement. They are settled by all citizens, rather than by their representative institutions. As we have seen, there are strains of this idea in the nineteenth century vision of British unitary democracy.[86]

Some theorists have described Chinese politics as a very limited sort of pluralism, in which local interests compete for primacy[87], in which society sometimes wins out against the state[88] and the State sometimes wins out against the Party[89]. By this account, the decisive weight lies with the Party Centre, but there are situations in which a decision

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84 Larry Kramer at 24, 27

85 Mark V. Tushnet, Taking the Constitution away from the Courts (Princeton University Press 1999) at 14

86 P. P. Craig

87 See e.g. Kenneth Lieberthal and David M. Lampton

88 See e.g. Mertha A, "Fragmented Authoritarianism 2.0': Political Pluralization in the Chinese Policy Process' 200 The China Quarterly 995. In contrast, see Bruce Gilley, 'Paradigms of Chinese Politics: Kicking Society Back Out' (2011) 20 Journal of Contemporary China 517

89 See e.g. Murray Scot Tanner, 'The Erosion of Communist Party Control over Lawmaking in China' (1994) 138 The China Quarterly 381

is formulated in interaction with other locations of power. By this account, the Party can do anything, but it cannot do everything.

However, the CCP is a monist party in both senses developed above. It claims monopolistic authority for its vision of ideological doctrine, because it claims to represent the interests of the Chinese people, and also because it claims to enjoy special insight into China's development needs. It presents that insight as 'scientific', which is to say, as being grounded in objectively verifiable knowledge of the laws of historical development and of prevailing historical conditions. The general programme of the Party Constitution says, 'Marxism-Leninism brings to light the laws governing the development of the history of human society. Its basic tenets are correct'. Historical development can be described and predicated according to objective laws. Those laws are hard to identify and even harder to apply in practice, but they are laws, to be followed, not claims, to be weighed against other claims.[90] As such, the CCP does not believe different conceptions of the national interest compete. It believes in a justified vision of the national interest and its mission is to implement that vision. Moreover, as we saw in Chapter Four, it is not practicable for any social organization deemed to be antagonistic to the CCP to occupy a position in government.

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90 'Any country and society has an ideology that occupies a dominant position… Guiding thought in the ideological area is always monist, it cannot be pluralist'. Qiushi Editorial 巩固马克思主义在意识形态领域的指导地位 [Consolidate the Guiding Position of Marxism in the Ideological Area] (Qiushi (求是) 2013/19 .

Britain, in comparison, is pluralist. There is no body with the power to fix the meaning of concepts like democracy and the rule of law. The meaning and scope of constitutional conventions is constantly contested. Even if there is a loose-leaf folder which sets out the precedents, at best that is just the UK government's view of the meaning of a convention. Perhaps British constitutional principles are supposed to develop in a contested space, through ongoing debate among judges, parliamentarians, officials, 'distinguished publicists'[91] and the general public. However, the fact that Britain lacks *official* ideology doesn't mean it lacks *ideology*. It just makes it harder for one conception of the British Constitution to claim a privileged legitimacy or authority. We turn to this question in the next section.

91 C.f. Article 38 of the Statute of the International Court of Justice

BRITISH CONSTITUTIONAL DOCTRINE AND CONSTITUTIONAL PRINCIPLE

Britain is pluralist. The 'political morality' of the British constitution is not a homogenous body of values shared by 'the majority of those citizens who have at any moment taken an effective part in public life'. It is a dissonant set of values shaped by a range of different institutions, groups and people. But some theories of the constitution remain anchored in the fantasy of shared constitutional doctrine, whether it is labelled as natural law, constitutional principle, the 'thin constitution' or something else.

Twenty years ago, Rodney Brazier described the idea of principled restraint of government as an 'Elysium'[92] but the yearning for a shared body of constitutional morality has gradually left its mark on the common law. In the *HS2* case, Lord Neuberger said

> The common law… recognizes certain principles as fundamental to the rule of law…. [T]here may be fundamental principles, whether contained

92 Rodney Brazier, 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) NILQ 262

> in other constitutional instruments or recognized at common law, of which Parliament… did not either contemplate or authorize the abrogation.[93]

Lord Neuberger suggests there may be a commanding body of constitutional principles that can only be repealed in painstakingly specific words. In other words, there may be political morality outside the statute book.[94]

This section begins by exploring how modern theorists have updated the nineteenth century concepts of political morality set out in the introduction. It asks how there be a positive morality of the constitution in a pluralist state. In the later part of the section, we ask what this means for the United Kingdom constitution.

Ronald Dworkin describes the principles at the apex of the constitutional order as 'an interpretation of our own political culture, not an abstract and timeless political morality'.[95] There are many ways to read Dworkin, but he does not appear to be writing about the impact of universal moral truth or even about the contemporary social morality of a particular nation.[96] He is talking about a distillate of our 'political culture'. Tushnet

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93 R. (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3 Supreme Court at [207]

94 Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413

95 Ronald Dworkin, Law's Empire (Oxford : Hart 1998) at 216

96 See e.g. Hart's reference to 'wider ranging questions of justice and political morality' in Dworkin's theory in H. L. A. Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream.' (1977) 11 Georgia Law Review 969

draws on this theory.[97] He distinguishes between the thin constitution – the distillate of constitutional principles of equality and inalienable right in the Declaration of Independence – and the thick constitution – the detailed-ridden rules buried in the Articles. For Tushnet, constitutionalism demands that the public vindicate its own understanding of the thin constitution through political action.

In contrast, Mark Elliot develops an account of constitutional principle that is closely derived from legal doctrine. He says, 'the law reports are replete with examples of constitutional principle shaping and determining the content of law'.[98] He suggests some, including 'sovereignty', 'democracy', 'constitutionalism', 'the rule of law', 'the separation of powers', 'access to justice', 'freedom of speech' and 'rights-oriented interpretation' among others. By this account, constitutional principles are found in cases, and they are authoritative because the common law is authoritative.

However, it is hard to accept that constitutional principles are derived solely and unambiguously from the common law, still less that these rules take effect solely as rules of law. Elliot makes no such claim.[99] It is hard to agree that ideas like 'the rule of law' or

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97 Mark V. Tushnet, Taking the Constitution away from the Courts

98 Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies 340

99 This might be one way to read Trevor Allan, whose views are addressed below.

'constitutionalism' or the conventions are *endogenous* concepts.[100] How could we separate the common law threads of an idea like democratic accountability to Parliament from the non-legal threads? The principle of democratic accountability gives binding force to the convention of ministerial accountability. It also justifies the legal rule that says parliament may not prorogue itself.[101] The principle therefore exists equally in the eye of judge, the parliamentarian and of the permanent secretary. It is a political principle as much as it is a legal one. But as we saw in the previous chapter, it is essential to the British system that the meaning of this principle is vouchsafed by more than one institution. It is not an idea that is forged in the heat of political contestation. It is also nurtured by politically independent institutions like the courts and the civil service.

John Finnis' account of constitutional principle transcends this problem. He argues that the rules of positive law are to be understood, not in light of the particular views of constitutional actors, but in light of a *justified* account of universal basic goods.[102] For Finnis, principles are 'those elements of the common good which the law of our constitution articulates and promotes'.[103] Trevor Allan makes a similar claim:

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100 Niklas Luhmann, The Differentiation of Society (New York: Columbia University Press 1982)

101 Moohan, Petitioner 2015 SLT 2 Supreme Court

102 John Finnis, Natural Law and Natural Rights (Clarendon 1980)

103 John Finnis, Collected Essays: Philosophy of Law, vol IV (Oxford : Oxford University Press 2011) III. 9. 134

> we must reject any attempt to describe the law of the constitution as if… we were merely reporting the opinions of powerful officials however distasteful we might find them. We are instead reporting our own opinion, based on a view of constitutional practice that we find defensible—an account of our practice that shows how legal doctrine furthers the moral and political values that a good constitution ought to serve.[104]

This account of constitutional principle demands that we adopt a 'view of constitutional practice that we find defensible'. In contrast, doctrine only demands that we identify and accept the view of the political community that shapes that constitutional order. It is a vision of positive morality, not critical morality. For example, Chinese judges can learn the catechism of Xi Jinping Thought, in order to pass the National Judicial Exam, without having to also believe that it is correct.[105] British judges can agree on much of legal doctrine demands of them, even though their private views about what is constitutionally 'defensibly' may vary greatly.[106]

John Finnis is, of course, alive to this tension and carefully explains that legal doctrine does not reflect constitutional morality. It is interesting, and perhaps significant, that while natural law is a *justified* account in Finnis' writing, it used to be a *doctrine*. Mediaeval catholic theologians might not agree with Aquinas teachings on, for example,

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104 T. R. S. Allan, The Sovereignty of Law : Freedom, Constitution and Common Law (Oxford: Oxford University Press 2013), 19

105 Björn Ahl, 'The Politicization of the Chinese National Judicial Examination, 2007–2012' (2018) 44 Modern China 208

106 On this point see Jonathan Sumption, 'The Limits of the Law' (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20th November 2013)

human sexuality, but they would certainly have to purport to accept it as catholics.[107] Indeed, in the absence of such an institutional doctrine, it is difficult to imagine how a positive account of the constitution based on the moral views of officials could ever generate agreement, as opposed to acceptance.

Some theorists accept that ideology plays an important role in the formation of constitutional principle, but do not view this as a critical morality. John Bell, for example, develops Dworkin's idea of constitutional principle in terms of positive rather than critical morality. He describes principles are a species of what he variously calls moral and political philosophy and, tellingly 'an ideology'. What Bell has in mind seems much closer to an ideological doctrine than a form of moral reasoning. He says

> the ideology of the legal system consists of the general ideals about the purposes of society which justify the rules and principles of the legal system... The ideology provides a unifying factor that enables weight to be assigned to the various principles of the system. As a justification of the system, the ideology is not a static value. As social conditions change, and the rules of the legal system are modified to meet new conceptions of

107 There is a lively debate, which we cannot enter here, about whether law permits a detached approach to its rules or demands a committed approach. See e.g. John Finnis, Natural Law and Natural Rights at 360.

> social needs, so understandings about the ideology of the system must be revised.[108]

When we explain constitutional principles, we need 'political as well as legal acumen'.[109] Bell is not referring to an ideological doctrine, in the sense developed here. He is referring to an *ideology*, in the capacious sense set above. It is not clear how far political acumen will get us, when we try to select constitutional principles from the competing values and rules that inform constitutional discourse in the UK. Bell may be trying to say little more than ideology influences law. If so, then we can legitimately ask 'what ideology' and 'from where?'

This survey helps us to plot a spectrum of views about the meaning of constitutional principle. At one end of the spectrum are *positive* views of constitutional principle. Legal doctrine is an obvious source of constitutional doctrine. The rules and principles of the legal system are animated by 'general ideals about the purposes of society'. Like Party doctrine its canons are familiar, it aspires to coherence and, most important, it is authoritative for certain purposes. However, it is challenging, and perhaps pointless, to develop an account of constitutional doctrine from legal rules alone, for reasons we originally encountered in Chapter One.

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108 John Bell at 27

109 Ibid

At the opposite end of the spectrum are *critical views* of the constitution, like those of Finnis and Allan demand a different sort of attitude. They may have a strong influence on ideology and constitutional discourse, but they are not doctrines. They are authoritative so far as they are justified. In the middle are views that are positive – in the sense that they reflect the views of participants in the political process – but which are not doctrinal.

The first part of this section describes how theorists have conceived of constitutional doctrine in the UK. We now turn to look at how this works in practice.

Britain memorializes constitutional values in law.[110] Dicey and Blackstone argued that Britain's unfolding theory of the state, by the state is the common law. Dicey said the closest approximation to a British account of the state was the 'august dignity of the judges.'[111] Previous chapters address examples of cases in which courts have built an evolving theory of the constitution, from *Carltona*[112] to *Miller*[113]. As we have seen in

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110 Parliament's ability to develop constitutional doctrine is limited by the rule in Pepper (Inspector of Taxes) v. Hart [1992] UKHL 3 House of Lords. See Aileen Kavanagh, 'Pepper v Hart and Matters of Constitutional Principle' (2004) 121 LQR 98.

111 Dicey, The Law and the Constitution at 389 quoted in McLean, Searching for the State in British Legal Thought : Competing Conceptions of the Public Sphere (Cambridge University Press 2012) at 122

112 Carltona Ltd v Commissioners of Works [1943] 2 All ER 560 Court of Appeal

113 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union [2017] UKSC 5 Supreme Court

Chapter Two, judges recognise that they can speak for the state[114] and seek comity, both with other branches, and with other states.[115] We have also seen that judicial decisions often reflect a substantive conception of the public interest.[116]

Some aspects of judge-made constitutional doctrine are expressed as conventions. This is significant, not least because it further underlines the overlap between convention and constitutional discourse identified in Chapter Five. For example, in *Smedley*, Lord Donaldson MR describes 'the constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another.'[117] In *Johnson & Co v. Minister for Health*, Lord Greene M.R. described the principle of good governance in conventional terms: 'every Minister is under a duty, constitutionally, to the King, to perform their functions on behalf of the Crown fairly and honestly and to the best of their ability.'[118] In *CND v. PM,* Simon Brown LJ observes the conventional basis for the rule of law, referring to 'the constitutional convention [that] the government will

114 Compare Mighell v Sultan of Johore [1894] 1 QB 149 Court of Appeal; Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Company, Limited [1939] 2 KB 544 Court of Appeal; with Belhaj v Straw [2017] UKSC 3

115 Adrian Briggs, The Principle of Comity in Private International Law (Brill 2012)

116 John Bell

117 R. (Smedley) v HM Treasury [1985] QB 657 Court of Appeal (Civil Division) at 667

118 B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395 Court of Appeal at 400..

always comply with decisions of the court.'[119] However, even though judicial accounts of constitutional principle are presented as monist, and are certainly persuasive to other political actors, they are only *authoritative* for other courts.

In theory, as we note above, Parliament is supposed to have the ultimate authority to settle disputes, but it exercises this authority rarely. There are a small number of ideological laws – statutes which establish or clarify the meaning of constitutional ideas.[120] We might think the UK is a constitutional monarchy on account of the gradual influence of constitutional convention, but the Preamble to the Scottish Claim of Right Act 1689 *says* Britain is a constitutional monarchy. It says King James 'Invaded the fundamentall Constitution of this Kingdome And altered it from a legall limited monarchy to ane Arbitrary Despotick power'. The British armed forces cannot pledge allegiance to a particular vision of the constitution, but the Security Services are required to defend parliamentary democracy by Section 1 of the Security Service Act 1989. That section defines the function of the Security Service as being to protect Britain from 'actions intended… to undermine parliamentary democracy'. We might compare this to Article 12 of China's Cybersecurity Law of 2016 which provides that it is an offence to incite the 'overthrow of the socialist system'. Section 3(6) of the Constitutional Reform and

119 Campaign for Nuclear Disarmament v The Prime Minister [2002] EWHC 2777 (Admin) Queen's Bench Division at [43]

120 Tarunabh Khaitan, '"Constitution" as a Statutory Term' (2013) 129 LQR 589

Governance Act 2010 says 'in exercising his power to manage the civil service, the Minister for the Civil Service shall have regard to the need to ensure that civil servants who advise Ministers are aware of the constitutional significance of Parliament and of the conventions governing the relationship between Parliament and Her Majesty's Government.' Finally, some of the Constitutional Principles to which Lord Neuberger refers are framed in statute. For example, the Constitutional Reform Act 2005, s.1(a) provides that the Act does not adversely affect 'the existing constitutional principle of the rule of law'.

The British government also plays a role in giving meaning to constitutional principles. It does so, in part, through government rules. For example, schedule 3 to the Counter Terrorism and Security Act 1995 – passed by Parliament – provides that specified authorities must have 'due regard to the need to prevent people from being drawn into terrorism'. The Secretary of the State – a member of the government – has the power to issue statutory guidance on the content of the duty. The relevant statutory guidance note[121] defines extremism vocal or active opposition to 'fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance for those with different faiths'. The Secretary of State can seek an order to ensure

121 HM Government, Revised Prevent Duty Guidance: for England and Wales (London: HMSO, 12 March 2016)

compliance with that guidance – issued by a court – and can withdraw funding from any educational body that does not comply.

Less formal government rules, such as the content of Lord Wilson's loose-leaf folders also contribute to constitutional discourse. In Chapter Three, we considered the relationship between informal government rules. In Chapter Five, we looked at how rules such as these can act as a lattice on which constitutional conventions are overlaid.

The government also plays an influential and far reaching role in shaping constitutional doctrine through its ability to conclude treaties. In Chapter Two, we considered the way in which the Treaty of Union can be compared to a set of Directive Principles – instructions to the British legislature. There are other treaties like this. The British Irish Agreement of 1998 is a prominent and significant example. The treaty is partially incorporated in the Northern Ireland Act 1998, but the principles set out in the treaty itself are a durable monument to the constitutional rights of the Northern Irish people, and the principles that govern Northern Ireland's constitutional settlement.

As we saw in Chapter Four, groups like political parties also play a role in shaping our view of the constitution. And as we saw in the previous section, public opinion plays an important, if not decisive, role in shaping debate about the constitution. But in light of the argument at the beginning of this chapter, we can accept this trite fact without agreeing that the values of the thin constitution permeate public life. To think this is to

confuse ideology and ideological doctrine. To say that the values of the constitution permeate public life is to beg the question. Public life is a way of establishing what those values are.

Public debate about constitutional ideology is not, however, a state of nature. The state guides the direction of constitutional discourse. As we saw in Chapter Two, statutes and constitutional treaties, such as the Treaty of Union and the British-Irish Agreement are perhaps the most important ways in which the state can create a 'constant headline' for constitutional ideas, enforceable or unenforceable. Public opinion and political debate about the meaning of constitutional rules is influenced by authoritative statements of rules in statutes, and authoritative statements about the meaning of those rules by courts.

In Chapter Two we asked why Parliament would go to the trouble of *enacting* a rule that could be publicised by a statement in the House? We also suggested an obvious answer. Constitutional doctrines play a unifying and stabilizing role in the formation of constitutional discourse. They help to clarify the meaning of conventions and underline their binding force. While the UK is pluralist, as we saw in Chapter Four, the UK constitution has carefully maintained the political independence of certain institutions, including the civil service and the judiciary. No constitutional organ is better practiced in the interpretation of constitutional rules than a court and one important function played by courts is to nurture the constitutional order in which they serve. Even if the court cannot have the final say, its opinion is a valuable part of a plural constitutional discourse.

By memorializing a convention in unenforceable statutory rules, Parliament reduces the rules to writing and grants the courts the opportunity to set the boundaries of debate about its meaning. However, in *R (Miller and Dos Santos) v. Secretary of State for Leaving the European Union*[122], the Supreme Court refused to engage with a constitutional principle memorialised in a statute. In that case, the devolved governments had argued that, by withdrawing from the European Union, the UK government would change the structure of the devolution settlement, and that this would require legislative consent under the Sewel Convention. The Supreme Court was asked to interpret that convention, then apply it. It unanimously refused to enforce the convention. More controversially, it unanimously refused to give meaning to the convention.

Lord Neuberger said judges 'are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognize the operation of a political convention in the context of deciding a legal question… but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world'.[123] He said this in spite of the fact that it the convention is memorialised in a statute: s.28(8) of the Scotland Act. The court was correct to conclude that a

122 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union

123 Ibid [146]. In spite of these protestations, the Supreme Court arguably sets out a concise account of the Sewel Convention at [139]

statutory convention was not a legal rule. It was incorrect to conclude that it was not a *cognizable* rule.

We might be inclined to make the simple distinction between common law constitutional rules – which are rules of law – and conventions – which are not rules of law. But, for reasons set out in Chapter Two, this would be glib. First of all, the Sewel Convention was recorded in a statute for a reason. It is not an enforceable legal rule, but, in Britain as in China, there is a point in memorializing ideological rules in laws. Second, note Lord Neuberger's careful language in *HS2*. The principles to which he refers are principles *recognized* by the common law. If he was referring to statutory rules, or common law rules, he might have said so. Rather, he is referring to 'principles' contained in 'other constitutional instruments' that are 'recognized by the common law'. If so, then why was the court so reticent in *Miller*?

In *The Patriation Reference*, the Supreme Court of Canada said if a question 'even if in part political, possesses a constitutional feature, it would legitimately call for our reply'.[124] That view is consistent with, for example, the holding of the Privy Council in *British Coal v. The King*. Chapter Five argued that unless a convention is combined with a clear reason why officials ought to follow then it is a brittle convention. Those reasons,

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124 Reference Re: Resolution to Amend the Constitution, [1981] 125 DLR (3d) 1 (Supreme Court of Canada) at 87-88

whether expressed as rules or values, are constitutional principles. The rule in *British Coal v. The King* was styled as a convention. But is also a constitutional principle, and it is recorded in a statute. The Claim of Right Act 1689 provides that we have a 'legally limited monarchy'. It would be difficult to say whether a rule, cast at this level of generality, is a constitutional convention, a constitutional principle or a weak, general, legal rule.

While we might prefer to live in a state founded on dissent and diversity rather than on unity and unanimity, in a constitutional context, dissent has costs as well as benefits. In the previous chapter, we tentatively concluded that British constitutional conventions were less stable than Chinese political rules. That may be so, but if we focus solely on practice, we can overlook the importance of party doctrine. This singular institution, an institution which pluralist constitutional orders lack. Party doctrine can, of course, be changed by the CCP, but only subject to substantial formalities. A Decision of the Central Committee cannot lightly be set aside. Party doctrine might therefore act as a stable keystone for constitutional convention in China, even in a new, and rapidly evolving constitutional order, where practice is patchy and inconsistent.

Recall the 'political morality' of the constitution set out in the early twentieth century accounts at the beginning of this chapter. This notionally stable ideology, shared by the political community, and vouchsafed by the political sovereign, acts as the keystone for British constitutional rules. In this section, we have questioned whether this requires a widely shared conception of the public interest – a 'thin constitution' of sorts, or

whether it enough to have some means of settling institutional disputes. If constitutional doctrine – an authoritative account of constitutional principle – is unavailable in a pluralist state then we ought to revise the way we think about constitutional convention and constitutional principle. If political morality is essentially up for grabs, then constitutional obligation is harder to explain. Significantly, if our courts are willing to accept that there is an omnipresent body of constitutional principle immanent in the common law, it is harder to explain their reticence in interpreting those constitutional principles that Parliament enacts.

CONCLUSION

Larry Kramer argues:

> We in the twenty-first century tend to divide the world into two distinct domains: a domain of politics and a domain of law. In politics, the people rule. But not in law. …The Constitution, in this modern understanding, is a species of law— special only inasmuch as it sets the boundaries within which politics takes place… Constitutional politics, in which the people have a role, is the process by which new constitutional law is made… Gerald Leonard puts the point nicely in observing how we are inclined today 'to see politics as working within a constitutional order rather than working out that constitutional order.[125]

Like this thesis, this chapter is located at intersection between politics and law. As Kramer notes, in the twenty-first century, we are inclined to institutional rules with the vast and ungoverned terrain of political debate. But in some constitutional orders, political debate about the constitution is mediated by institutional doctrinal rules. We considered what it means to have a doctrine, what sort of institution can expound it, and what sort of constitutional order can sustain an authoritative non-legal doctrine.

Doctrines are interestingly different to other sorts of constitutional rules. It is useful to group them together with conventions and laws, because they clarify and stabilise the meaning of both. That relationship is mutual. We can understand the constitutional conventions discussed in Chapter Five more clearly in light of constitutional doctrine, and,

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125 Larry Kramer at 7

in turn, we can understand constitutional doctrine more clearly in light of the constant headlines discussed in Chapter Two. Chang Wen-chen and David Law expand on this idea.

> Constitution-writing faces governments with … the opportunity [to] rationalize the operation … of the state, and to depict themselves to the world in a normatively defensible manner. There is therefore no such thing as a constitution that lacks an implicit narrative and ideology of the state… Given that constitutions perform ideological and expressive functions, the neglect of … ideology fails to capture what is most interesting and important about constitutionalism.[126]

When the ideology embodied in a constitutional doctrine is the ideology of the state then the state is partly constituted by its doctrine. Once again, China is an extreme example of a constitutional phenomenon also found in the UK. The account of the state, by the Party-state, is peculiarly clear in China. In Britain, doctrine partly constitutes legal rules like parliamentary sovereignty, and political rules like ministerial responsibility to Parliament. We might think of the intersecting lines of discourse about these rules as a sort of British constitutional doctrine.

However, by nature, British constitutional doctrine is contested. Some legal theorists find this idea challenging, especially those who prefer to identify constitutional rules by their sources, rather than their merits. Those positivist theorists should find comfort in the distinction between doctrine and ideology, which tracks the distinction between social rules, and moral principles that we find in Hart.

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126 David Law and Chang Wen-Chen at 492

Constitutional doctrine can be shaped by the text of the written constitution or by canonical commentaries on that text. In the first part of this chapter, we explored the singular Chinese constitutional doctrine of the CCP, a doctrine which arguably provides clearer orientation for constitutional convention than China's patchy political practice. The CCP's constitutional doctrine, of course, reflects its monist view of the constitution and the structures that sustain constitutional debate. With this in mind, in the middle section of this chapter, we charted a spectrum that separates strongly monist constitutional orders from more pluralist orders, through progressive degrees of difference. We noted the challenges that strongly pluralist states face in developing constitutional doctrine.

The nature of the British constitutional order gives a prominent role to non-legal constitutional rules. The most salient are constitutional conventions and the newfound constitutional principles, but British political rules range from statutory target duties to the non-entrenched provisions of the Treaty of Union.[127] For rules like these to work properly, we need a clear and coherent account of constitutional principle. That account cannot be provided solely by the British courts, as if they were the CCP. But if we want a stable constitutional doctrine, we need courts to play their part in shaping it.

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127 On the distinction, see Lord Hope Lord Gray's Motion 2000 SC (HL) 46; [2002] 1 AC 124 House of Lords

Britain does not have a codified constitution. There are many theories of the British state, but there is no theory of the state, by the state. The fact that theories of the state are contested does not mean Britain lacks a theory of the state, any more than it lacks 'public law' or 'constitutional law'.[128] It means we have to look harder to find it, and we argue harder with people who find it in different places, and the outcomes of those arguments remain contested for longer.

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128 Ivor Jennings at 36, 38.

CONCLUSION

> 'I was one of the people who wrote the Constitution, and even I can't remember what it says.'
>
> Mao Zedong (1958)[1]

THE LIMITS OF THE LEGAL CONSTITUTION

This thesis set out to explore the unwritten constitution in Britain and China. This chapter sums up the arguments presented in this thesis.

The first argument set out in this thesis was a critique of a traditional account of constitutionalism that underpins the comparative study of written constitutions by scholars such as Tom Ginsburg and David Law and the constitutional theories of scholars such as William Blackstone, Hans Kelsen and Giovanni Sartori. That account is limited because it fails to account for the interaction of legal and non-legal rules and thus offers a partial and misleading account of constitutional rules.

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[1] Mao Zedong, Speech at Beidaihe Meeting of 21 August 1958, cited by Schram S, 'Mao Tse-tung's Thought from 1949 to 1976.' in MacFarquhar R and Fairbank J (eds), The Cambridge History of China (Cambridge University Press 1993) at 51.

A satisfying account of the unwritten constitution will have to do at least two things. First, in the absence of a formal, legalistic theory of the constitution, we would need to provide a material theory of the constitution, an account of what counts as constitutional in these two polities. Second, that theory would need to account for the interaction of legal and non-legal rules. No constitution is exhausted by its law.

We began by asking in what sense of 'constitution' do Britain and China have a constitution. A formal theory of the constitution calls rules 'constitutional' on account of their source or procedure. But because it lacks a written constitution, a formal theory of the constitution is not unavailable in Britain. Because China's written constitution does not faithfully describe the reality of political power, a formal theory is equally unattractive there. Under a material theory of the constitution rules are constitutional on account of their subject matter. It is in this sense of constitution that Britain and China have a constitution. It demands a deeper theory of what counts as constitutional.

The second step in this argument is that a material theory of the constitution in will need to explain the interaction of legal and non-legal rules. The thesis identifies five important domains in which legal and non-legal rules interact. The unwritten constitutions of the UK and China embrace not only legal rules enforced by courts, but expressive legal rules, non-legal state rules, rules of private bodies holding public office, conventional, political rules about conduct and doctrinal rules about belief.

These five domains provide a framework for comparison. The comparison identified lessons Britain can learn from China and China can learn from Britain. On a basic level, the thesis highlighted differences in legal rules. For example, it compared the careful stratification of Chinese state rules, with the more amorphous rules that distinguish between UK law and policy. We cannot concisely and usefully catalogue these lessons here, but in due course we will generalise from them.

At a higher level, the thesis compared institutions. It first compared the different ways in which Britain and China use hortatory political norms. What is distinctive about China's constitution, in this respect, is not the absence of justiciable rules nor the presence of non-justiciable rules. It is the codification of non-justiciable rules in a constitutional text. Under the current British judicial approach to convention, it does not seem to matter if a convention is embodied in a statute. In contrast, in China it is clearly important that certain fundamental political rules are recorded in the constitution and considerable political capital has been expended to do this.

The thesis also compares the rules that regulate state rulemaking power. British constitutional theorists were originally oblivious to non-legal government rules. Ultimately, they came to conceive of these rules as something distinctively (and perhaps suspiciously) separate to legal rules. In light of the fine line between bureaucratisation and juridification, this was a mistake. In contrast these differences of form are less significant

in China. These institutional differences reflect contrasting views on the distinctiveness and supremacy of law, which we will consider presently.

We also compared the explicitly constitutional principles of CCP leadership, with the ambiguous constitutional status of British political parties. Chinese experience underlines the importance of clarity in the allocation of constitutional functions to private groups such as parties. The Chinese example invites us to ask how the state should police the rules of political parties. When parties occupy public office, their rules are constitutional, in the sense of 'constitution' used here. The internal rules of parties that occupy public office should therefore be justiciable, but in turn, they may attract deference.

In Britain, independent state institutions play an important role in moderating politics. They act as guarantors for political rules. With this in mind, we compared constitutional conventions and the political rules of the CCP. We found British constitutional rules to be more durable and more concrete than the rules suggested by Chinese theorists, in part on account of the stabilising role played by independent institutions in the UK.

Finally, we compared constitutional doctrines. The meaning and effect of the constitution is partly shaped by constitutional discourse. The state does not leave that task entirely to private actors, or to the marketplace of ideas. It engages in discourse about the meaning of constitutional rules itself and it does so, in part, through

constitutional doctrine. Constitutions perform ideological and expressive functions. China has highly developed institutions that police constitutional doctrine. The equivalent British institutions are pluralist but they are also important and understudied. This is curious in light of the importance of 'political morality' to theories of the UK constitution.

The next step in the argument is that political morality – the 'background political theory' of each jurisdiction – is of the essence of a material theory of the constitution. The thesis compared two concepts of the constitution and two concepts of law. It contrasted two separate conceptions of political sovereignty, one that traces its genealogy through Albert Dicey and one that stretches through Carl Schmitt. These two conceptions of political sovereignty shape the way each jurisdiction conceives of the relationship between politics and law. In one model, the two are presented as dissonant and even inconsistent alternatives, and, occasionally, as a dual state. In the other model, the political and legal dimensions of the state are presented as consistent, as coexisting, and perhaps even as different aspects of the same thing.

In the next section, we will amplify what the thesis had to say about these larger themes. That section points to two gaps between the state and the legal order. It considers whether the model of the dual constitution helps us to make sense of these gaps. In doing so, it specifies what it is about this lacuna that offends the rule of law. In the final section of this conclusion, we explain why a satisfying material account of the unwritten constitution ultimately leads us to a theory of the state and its purposes, a

theory that can explain why constitutional rules are binding and how they are resilient. The starting point for that analysis is the institutional comparison that runs through the thesis.

THE DUAL STATE

In Britain and in China there are gaps between the state and its legal order. First, there is a gap between the state and the laws that empower the state. Second there is a gap between private institutions that exercise public power and the laws that empower the state.

The first gap is a gap between the state and its legal order. The British state evolved from a feudal monarchy. The Chinese Communist Party was the midwife for the current written Constitution. In this sense, in each constitutional order, the institutional identity of the state precedes and survives the emergence of the legal order. For example, each state makes policy rules – internal bureaucratic rules that affect the lives of individuals – and, unlike in some states, it is not obvious that these rules require affirmative legal sanction. When we circumscribe the constitution, we need to decide whether it includes rules like these.

We might think of these states as prerogative states, in contrast to the legal state set out above. Carl Schmitt, for example, distinguishes between a narrow sense of the state, centred on the legal order, and a larger political sense of state that also embraces institutions that transcend the legal order. At the apex of this order is a political sovereign, the person who can switch off the law and identify the enemy.

The prerogative state is an affront to the rule of law. It could offend the rule of law in at least three different ways. It might challenge the supremacy of the law – the idea that there should be law cannot be trumped by non-legal rules. It might offend the idea that there should be no punishment without law. This idea requires an account of what it means to be punished, an account of the sort of interests can only be interfered with by legal means. Finally, it might offend the more lavish claim that law is a comprehensive account of public power and so all government power must have an affirmative legal source.

It is important to distinguish these three arguments, because they are not equally powerful. The Chinese state, whose extra-legal and extra-extra legal activities are vividly described by Fu Hualing, offends all three principles. But the most important principles are the first and the second. Where party prerogative and law meet, the law can give way. Important values are not secured against government action by the legal order. In comparison, the lack of legal sanction for government actions might seem formalistic. Indeed, it is not legality that satisfies constitutionalism and the rule of law but the genuine subjection of government to rules. This is the essential difference between Britain and China. A state under a nominal constitution can, at least in a sense, be a state under law because state power is embodied in law, and the unity of law and state is preserved. However, that does not make it a state under the rule of law.

Bodies can act outside the law in Britain and China, including state bodies. This may be true of all states. However, on one understanding of the constitution the fact that bodies can act outside the law is a failure of the constitutional order and an affront to the rule of law. Whether we share that understanding depends on whether we see the legal constitution as the only legitimate embodiment of the state, or as an aspiration, a sham, or something else. The Chinese examples show the dangers of a prerogative state. The British example shows that not every gap between the state and the law leads to a prerogative state.

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The second gap is a gap between private institutions that exercise public power and the laws that empower the state. A theory of the constitution that imagines politics as the independent decisions of parliamentarians is as misleading as a theory that imagines government as ministers taking orders from the monarch. Nonetheless, theorists including Burke and Condorcet have argued that the constitution and party politics ought to occupy separate spheres – that there ought to be a gap between them. This does not describe all parties or all constitutions. Parties can constitutional and unconstitutional, if they are created, recognised, regulated or forbidden by the Constitution. They can also be non-constitutional, if the Constitution fails to recognise them, and para-constitutional if the Constitution refuses to recognize them. There is an important difference between

an institution that is overlooked by the constitution and an institution that causes the constitution to avert its gaze.

The gap between the party and the law is one aspect of a broader debate about the relationship between law and politics. Dicey described this gap between law and politics. Like Schmitt, he describes two sorts of sovereignty – legal and political. The Queen in Parliament is the legal sovereign, while the nation is the political sovereign. Dicey believed the political sovereign keeps the legal sovereign in check. Dicey thought decisions of the electorate were the institutional expression of the will of the nation. However, he barely acknowledged the next institutional development – the intercession of the party machine. Dicey's view of democratic power continues to influence British law, and especially, the theory of how conventions constitute cabinet governance. It's failure to capture the importance of partisanship causes it to overestimate the constitutional effects of political rules.

An alternative way to think about the gap between the law, the state and sovereign is the theory of the dual state, represented here by Ernst Fraenkel and Carl Schmitt, among others. The spatial metaphor illuminates tensions between politics and law, but it also conceals the way legal and political rules interact. Legal and political rules do not occupy hermetic spheres. Political rules change legal rules and vice versa. Conventions have eroded British legal rules and many other legal rules are glossed, subverted or otherwise distorted by political rules. Conversely, laws influence political behaviour,

including political rules. Even laws that are widely flouted and intermittently enforced, such as speed limits, have an obvious effect on social behaviour. This phenomenon, which we described as the expressive function of law, explains how law shapes clarifies and sustains political rules. The thesis has set out numerous examples of this phenomenon, from the Statute of Westminster to the 1982 Constitution of the PRC.

Schmitt's legal state is not the equal of the political state. It is a *component* of the political state. By his account political and legal rules interact. In China, the Party and the law are not coequal systems of rules sheltering under a larger, unwritten constitution. At best they are dissonant and unregulated systems of rules. But perhaps we can go further. Perhaps Party members follow a constitutional obligation to follow Party rules where they conflict with legal rules. In contrast, while the British examples do not show that British political rules take precedence over legal rules, they do show is that it is foolish to look at convention and law in isolation. A satisfying account of the constitution should be a singular account, which embraces the interaction between law and politics. One important sort of interaction occurs when one body of rules takes precedence over the other.

If we ignore this interaction and assume that we can describe each facet of the constitutional separately, as a harmonious coexistence of discrete rules, then we make the same mistake Blackstone made when he mistook George the Third for William the Conqueror. The constitution is a combination of legal and political rules, not a comparison as between them. It cannot be described by tracing two bodies of rules that nestle side

by side, nor by imagining several pluralist systems of rules operating in harmony under one overarching umbrella. Instead, there is a single constitution with interlocking legal and political dimensions.

TOWARDS A THEORY OF THE STATE AND ITS PURPOSES.

Rational liberal legality explains why legal constitutional rules. But not all constitutional rules are legal rules, so we cannot rely on this theory to explain why all constitutional rules bind. In the first section of this conclusion we concluded that we can only describe unwritten rules as constitutional if we explain their function. If the constitution is an assemblage of rules, enforceable and unenforceable, and grouped together according to function, the obligation to obey them is only as compelling that account of their functions. The alternative is the coy circularity that constitutional rules bind because they are constitutional.

Jennings called this a material theory of the constitution. For this to be an adequate theory, it ought to be able to explain the nature of constitutional obligation. When Lord Wilson's minister asks us why she should consider a constitutional rule binding, the constitutional theorist ought to have an answer. There are also instrumental reasons to demand an account of obligation. Unless we can explain obligation, we cannot fully account for the durability of constitutional rules. We cannot distinguish between durable rules like confidence-removability and fair-weather rules like pairing in parliamentary votes. For this reason, among others, a material theory of the constitution requires a careful account of constitutional function.

Any account of constitutional function will face challenges from several quarters. For example, pluralists – represented here by Harold Laski or Mark Tushnet, could take issue with the desire to privilege one theory of the constitution and the state above another. Perhaps for this reason, twentieth century positivist theories evaded the question. By that account, provided it could be shown that rule community accept a rule as binding, there was no need to explain why it is binding. Early theories of convention were content to assert that a homogenous political community already shared a common political morality. Likewise, moral constitutional theorists, represented here by Ronald Dworkin and John Finnis, might argue that the only alternative is a universal theory of the constitution, the state and its purposes.

The thesis plots a course between these alternatives. It argues that there can be a local theory of the constitution, the state and it purposes: a theory of state, by the state. A monist, one-party state like China can develop an overarching theory of the state that is authoritative for its members. It is a theory grounded not in amorphous ideology but in concrete doctrine – in rules about belief. As we have seen, this theory holds a strong influence over both legal and political rules. Indeed, constitutional doctrine forms the basis for durable political rules, even in a state where the party-in-office has the power to constitute. The constitutional doctrine of the CCP describes the purposes of the state. So far as we accept it, we can describe behaviour that is inconsistent with those purposes as unconstitutional, without surrendering our ability to criticise that doctrine.

China is not unique in having constitutional doctrine. Once again, it is an extreme example of a larger phenomenon. Other states have constitutional doctrine, distinct both moral claims about the constitution and also from granular rules like the precedents found in Lord Wilson's loose-leaf convention files. Many strands of this doctrine, both legal and political, have been identified here: from directive principles, to target duties, to duties of imperfect obligation, to common law rules of public policy, to political rules memorialised in statutory conventions. These rules play important expressive functions. They act as constant headlines, reminding political actors of the limits of their powers.

With this in mind, we might question Neil MacCormick's argument that Britain lacks a tradition of articulated reflection on the nature of states. MacCormick is partly correct. Britain naturally lacks a tradition of reflection on the relationship between the state and its written constitution. Moreover, the canonical English literature alludes to a theory of the state, through coquettish references to 'political morality' and 'constitutional maxims', but it does not draw that theory into the spotlight. But as we saw in Chapter Six, the fact that British theories of the constitution are contested does not mean Britain lacks a theory of the state, any more than it constitutional law. It does not mean the constitution is agnostic as between different conceptions of the public interest, which is to say, different conceptions of the purposes of the state. It means we have to look harder to find a British theory of the state; we need to argue with people

who find it in different places, and we need to accept that politics will not settle those differences with conclusive authority.

Some important constitutional rules are placed under the guardianship of independent state institutions, such as the courts and the civil service. The presence or absence of independent institutions draws a sharp contrast between Britain and China. In China, no constitutional organs are genuinely independent of the Party. One wonders how resilient the confidence removability rule would be if it was administered, not by a structurally independent civil service, but by the National Executive Committee of the political party in office. This suggests that the constitutional rules memorialised in the British Irish Agreement, or the Scotland Act will only endure if there are institutions willing to articulate, and to nurture them. Whether these rules end up as desolate milestones or live on as constant headlines depends on how vigorously they are defended.

Law is a distinctive way to imagine the real and, in this way, the written constitution is a distinctive way to imagine the state. The written constitution brings forth certain features for inspection, while placing others in the background. It is a partial account of the state. But it is not merely judicially enforceable constitutional rules that perform constitutional functions. The legal constitution is not the only legitimate embodiment of the state. Political rules, of various stripes, do also. These political rules grow in the gaps between the state, in the wider sense, and its legal order.

A material theory is a particular account of constitutional function that holds sway in a given constitutional order. Each jurisdiction projects a distinctive account of the state and its purposes. The nature of that discourse, the features that it considers essential or peripheral, identify which rules are constitutional and which are not. The search for an unwritten constitution leads, therefore, to a richer theory of the state and its purposes. The focus of this thesis, its comparative nature, and the space available, mean this is not the place in which to set out a full account of that theory. The thesis does, however, point the way to an answer, reflected in the constitutional discourse of these two states.

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