

RULE OF BELIEFS: CONSTITUTIONAL CONVENTIONS AND THE RULE OF LAW

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I INTRODUCTION

The concept of the rule of law and not individuals has been the subject of much debate as to what it is, which states have it (or how strongly they have it) and how to encourage its development in those states that don't have it. One emphasis has been upon what Krygier describes as "anatomical" or "morphological" accounts.¹ These focus on institutional or formal elements of existing rule of law states (such as the separation of legislative, judicial and executive powers) and seek to formulate a rule of law field kit (or "*bric-à-brac*" as Krygier puts it) deployable in any country sorely in need of the rule of law. There are number of criticisms to be made against these approaches which need not be repeated here.² There is one fatal deficiency in institutional accounts which goes to their failure to engage with the logical fiction that underlies the expression "rule of law"; law is a creature of people, is interpreted by people and is enforced by people.

No matter what formal institutions one implements, be they written constitutions, separation of powers, a paramount democratic legislature or requirements as to the non-retroactivity, non-secrecy, and generality of individual laws,³ there must be a human or group of humans exercising legal and practical control over the enforcement and maintenance of those institutions. The best that formal prescriptions of the rule of law can achieve in a nightmare scenario (where the ultimate power holder chooses overtly to ignore the law or to act in an oppressive or grossly arbitrary manner) is an institutional deadlock between the ultimate legislative, executive and adjudicative institutions which of itself provides no answer

¹ See Martin Krygier, 'Why the Rule of law is too important to be left to lawyers' (unpublished); Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, 2012), 233–49.

² See, generally, Krygier, 'Rule of Law', above n 1, 235–40.

³ See Lon Fuller, *The Morality of Law*, (Yale University Press); Krygier, 'Rule of Law', above n 1, 237.

to the question of why in “strong” rule of law states the nightmare scenario does not arise and is not expected to arise beyond mere good luck over the centuries.

Sitting atop and among the institutions of a strong rule of law state, there must exist a web of beliefs, which beliefs are held in various forms by the various actors and power holders within the state so as to give the “law” in the rule of law its normative force and efficacy.

This essay considers one aspect of the question “*who* has to believe *what* for the rule of law to be effective?” It is part of a much bigger inquiry involving important sociological questions about the notion of “the public” and how it (or each of its various constituents) might react in different situations in different societies (and, in particular, how it might react in strong rule of law states as against those states where the rule of law is entirely absent). That broader sociological inquiry is beyond the scope of this essay, which is concerned with the narrower theoretical question of the need for something more than certain formal characteristics of the law and institutions in a rule of law society and which examines briefly one aspect of that “something more” – namely, constitutional conventions. These conventions, despite their apparent lack of legal force, are an essential ingredient of such constitutional systems as those of Australia, England and Canada and yet they do not appear in formalist accounts (arguably they can be forced into Fuller’s requirement that the laws be administered in ways that conform to their terms, but this is an awkward fit).

This essay is divided into three sections. In the first section, I consider some of the inherent risks in purely legal or institutional implementations of the rule of law (in particular, the separation of powers doctrine) and conclude that an account is also required of the beliefs held by various actors in society to give effect to rule of law rules and institutions. In the second part of this essay I examine the significance of constitutional conventions⁴ to the notion of rule of law beliefs. And in the third part, I consider briefly the Australian “constitutional crisis” of 1975 involving the dismissal of the Whitlam government and the dissolution of both Houses of the Commonwealth Parliament. I argue that although conventions were breached or redefined by those whom they were supposed to bind, and although these acts of breach or redefinition were not directly and

⁴ In this essay, “convention” is generally intended to refer to “constitutional conventions” unless expressly stated otherwise or the context otherwise requires.

immediately punished or addressed by the Australian electorate, the aftermath of the dismissal shows that the breaches did not go unnoticed or unremedied.

II THE RULE OF LAW: LAW AND FORMAL INSTITUTIONS ARE NOT ENOUGH

For the limited scope of this essay, I adopt the purposive concept of the rule of law based on a central goal of freedom from arbitrary, capricious and malicious or otherwise corrupt exercise of power (referred to in this essay collectively as “arbitrariness”), which the rule of law aims to achieve through law.⁵ To this end, I also adopt the notion that the rule of law requires both rule *through* law and rule *subject to* law. It envisages limits insofar as they are impossible and enforceable upon all exercises of public power, and very likely upon private power as well.

At lower levels of government action and power, anatomical accounts are highly useful in suggesting the mechanisms and institutions by which arbitrariness can be reduced or even eliminated. There are, of course practical difficulties, such as the limited availability of personnel and resources which may call for decisions about what additional mechanisms can be made available to the individual and at what cost. But, legally speaking, it is possible to provide for independent review of executive decisions including exercises of discretion so that the question is one of balance, which question has evolved over the centuries under the common law of judicial review.⁶

However, there is a significant conceptual difficulty at the top levels of government. The rule of law is often described in contradistinction to despotism,⁷ and yet the paradox of the rule of law is that no matter how many laws there are, someone must have the final say as to what is or is not permitted. Even if there were a paramount law expressly providing “all

⁵ See, generally, Krygier, ‘Rule of Law’, above n 1.

⁶ Under the common law of Australia, a plainly arbitrary decision could be challenged under the no evidence, improper purpose, bias, procedural fairness, or *Wednesbury* unreasonableness tests: see, generally, Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th Ed, 2009), chs 5, 7, 8, 9; Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 2nd Ed, 2009), chs 8, 9, 10, 12, 14.

⁷ See e.g. Krygier, ‘rule of law’, above n 1.

decisions which are arbitrary are to be declared void and of no effect” and expressed to be binding upon *all* without exception, the content of “arbitrary” in a given case must still be decided by a final adjudicator. The legislative power in the *Australian Constitution*⁸ is expressed subject to the words “for the peace, order, and good government of the Commonwealth”,⁹ but these words are generally considered non-justiciable by any court.¹⁰ The result is that there can be no direct legal (or legally enforceable) limit upon the choices of the ultimate decision-maker.

The anatomical solution to this problem is the doctrine of separation of powers. This doctrine theoretically insulates against the interpretation and adjudication risks by separating (at the least) the judicial arm of government from the executive and legislature. The risk of arbitrariness is reduced by isolating the proactive arms of government from the review of their decisions, instead reposing the risk in an institution only permitted to act when its jurisdiction is properly invoked. But the risk cannot be completely excluded by law. As the final adjudicator with no one to correct it, the constitutional court is capable of interpreting perversely the limits of its own power. It might discover implied powers of pro-active inquiry or powers of legislation in cases of constitutional “emergency”. Indeed, in Australia, when the High Court found that the separation of powers applied under the *Constitution* so as to isolate the Federal judiciary from the other arms of Government, it did so by implication from the structure of the *Constitution* (drawing also, of course, upon the words of the constitution).¹¹ These implications may generally be considered good for the rule of law, but the point is that a rogue constitutional court could also “discover” self-serving extensions of its own power.

Democracy is a next-best formal solution to this problem. But (at least in states with a sovereign, democratically elected legislature) the insulation is indirect and occurs at two levels of abstraction. At the first level, the sovereign legislature may be empowered to remove members of the

⁸ (*Constitution*’).

⁹ *Constitution* ss 51, 52.

¹⁰ See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. See, also, *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

¹¹ See *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (*Boilermakers’ Case*’). The power of the United States Supreme Court to declare actions and legislation unconstitutional is also implied: see *Marbury v Madison* 5 US (1 Cranch) 137 (United States Supreme Court, 1803).

constitutional court where the court reaches a manifestly arbitrary decision (or series of decisions).¹² It is abstracted from the decision because the legislature is not empowered directly to replace the judicial decision with its own. There is, of course, the risk that Parliament could de facto achieve this result in abuse of its power by replacing an unfavourable Judiciary with a friendly one but, even in a system of party-based politics, the collective decision-making nature of the legislature (especially where it is required that both houses act together or where a special majority, such as a two-third majority,¹³ is prescribed) makes this a far less significant risk than if the judiciary were left wholly unchallengeable or if the power to remove were reposed in a single individual or smaller unelected body.¹⁴ The risk is also reduced by mechanisms by which the electorate may remove the legislature. This is the second level of abstraction. Not only is the electorate unable to implement its own majority decision, but its capacity to remove the legislature is even more indirect than parliamentary removal of constitutional judges. Under the *Constitution*, the Australian electorate cannot dissolve the Houses and call an election. Legally, this must be done by the Governor-General (in Council except pursuant to ss 5, 28, 57) and the Governors of the States, democracy being safeguarded by constitutionally prescribed maximum periods between elections.¹⁵ Of course, the electorate has no direct power to remove an arbitrary High Court (or member thereof). If the legislature fails in its duty to remove any judge who repeatedly makes manifestly arbitrary judgments on constitutional questions, the only remedy in the electors is to vote-in a

¹² For example, in Australia a Justice of the High Court may be removed by the Governor-General on address from both Houses of the Commonwealth Parliament on the basis of “proved misbehaviour or incapacity”: *Constitution* s 72. There is some debate about what would satisfy this test, but there is ample reason to believe at least that Parliament’s decision would not be justiciable by the High Court. See, generally, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th Ed, 2010), 541–543; Harry Evans and Rosemary Laing (Eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th Ed, 2012) 655–685.

¹³ E.g. *United States Constitution* art I § 3.

¹⁴ See Harry Evans and Rosemary Laing (Eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th Ed, 2012), 668–71; AR Blackshield, ‘The “Murphy Affair”’, in Jocelyne Scutt (Ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 230, 253–4.

¹⁵ *Australian Constitution* ss 12, 13, 28, 32, 57.

party that promises to effect a removal (or, perhaps more properly, to consider the judge's fitness for office).

But these limited (albeit elaborate) mechanisms do not constitute a satisfactory account of the rule of law, even purely in respect of the risk of arbitrary action at the top levels of government. In the first place, the notion of popular adjudication and enforcement is an oversimplification of a complex sociological concept. What exactly is the "public"? It is easy to speak of the public as the collective result of the action of a large number of individuals or as some kind of singular (but collective) conscience, but neither approach is sufficient to explain why (or how) the "public" might be expected to act so as to uphold the rule of law (whether on that basis or in the name of democracy) as against arbitrary action.¹⁶ As already stated, it is a sociological question beyond the scope of this essay, but it is not sufficient to prescribe in detail the formal characteristics of laws and institutions in the rule of law while stipulating only a general concept of a "public-as-ultimate-enforcer safety valve".¹⁷

Secondly, leaving aside popular action, the best that formal institutional arrangements can yield is a deadlock. The constitutional court may declare action or statute unconstitutional, the legislature may impeach members of the constitutional court or executive, and the head of the executive may veto (or refuse assent to) bills passed by the legislature. In purely legal terms, the power may either be left as a simultaneous deadlock (Winterton and others have suggested a "bee sting" power in a republican Governor-General which would allow for the simultaneous dissolution of both Houses, and dismissal of the government and the Governor-General)¹⁸ or by giving indirect paramountcy to the legislature with various mechanisms to reduce the risk of improper appointment of a replacement (such as an electoral college)¹⁹. But neither of these is a particularly satisfactory answer

¹⁶ See Krygier, 'Why the rule of law is too important to be left to lawyers', above n 1, 8–22.

¹⁷ See, generally, Krygier, 'Why the rule of law is too important to be left to lawyers', above n 1.

¹⁸ George Winterton, 'Reserve Powers in an Australian Republic' (1993) 12(2) *University of Tasmania Law Review* 249, 262.

¹⁹ *United States Constitution* art 2 §1. See, in respect of a proposed electoral college for the appointment of a president were Australia to become a republic, Sir Gerard Brennan AC KBE, 'A Pathway to a Republic', *George Winterton Memorial Lecture 2011* (given at the University of Sydney, 17 February 2011).

to the issue, and neither solution explains why Australia and England are considered to have a strong rule of law.

Thirdly, the democratic safety-valve is the ceiling solution to the rule of law paradox. But it is only relevant at two extremes of the rule of law spectrum: to pick the most stable political party when things are going well (which is not to say that this actually happens or is adverted to by any particular segment of the electorate) and as a last-resort mechanism at a point of political crisis (civil uprising being one stage too late for the rule of law).

Fourthly, there are two additional fundamental threats to the rule of law which are not dealt with by the separation of powers or anatomical approaches more broadly: non-justiciability and disobedience risk

Non-justiciability bears a correlation to the degree to which the constitutional framers (or, in the case of unwritten constitutions, the common law courts and those involved in other constitutional landmarks) have been prepared to fetter the powers of government. The constitutional court may be able to declare legislation invalid or review most executive action to see if it is within power,²⁰ but it cannot review a decision by the Governor-General to appoint or to dismiss a minister²¹ or (presumably) to dissolve Parliament, in the absence of an express constitutional limitation. This does not mean that fetters should be preferred. At a sufficiently high level, specific limitations on governmental power (though designed to prevent arbitrariness) may themselves give rise to arbitrariness in unforeseeable circumstances.²² The view that a constitution is made (at least those such as the Australian and United States constitutions) 'broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve'²³ applies with equal force to primary governmental powers (such legislative and general executive power) and constitutional safeguard powers alike (such as powers of dismissal, appointment, veto and dissolution). No written constitution or fixed institutional arrangement could detail every

²⁰ See *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 for a recent expansion of judicial review in Australia.

²¹ See *Stewart v Ronalds* (2009) 259 ALR 86.

²² See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009), 277–8.

²³ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8.

contingency in advance so as to eliminate completely the risks associated with non-justiciability.

However, the more problematic deficiency in anatomical accounts is their omission to resolve the risk that an official will simply ignore the constitution or a declaration, by the constitutional court, of invalidity or illegality. This need not occur blatantly – and it is unlikely there will be much left of the rule of law in any state in which a government openly commits breaches of the constitution. More often, it will occur under claims (colourable or genuine) of some paramount right or exception to the rule, perhaps even with a strong moral (or even democratic) justification.

The recent constitutional crisis in Papua New Guinea (discussed in more below) is an example. The Parliament effectively expressed a vote of no confidence in Prime Minister Sir Michael Somare and elected Peter O’Neill to lead in his stead. The trouble was that this was not done in accordance with the *Papua New Guinea Constitution*. When the Supreme Court declared the dismissal and appointment invalid, Parliament took fairly blunt steps to remove the Court. Ultimately, the new Deputy Prime Minister led police and troops into the Courthouse and arrested the Chief Justice (followed by one of the puisne Justices, with ample to reason to believe that the remaining Justice would eventually have been arrested also) on charges of sedition. This, notwithstanding that the Court had twice held the current regime to be illegal. Separation of powers is an express feature of the *Papua New Guinea Constitution*, and yet it did not (and could not of its own) stop the arrests of members of the Supreme Court.

Another example comes from 19th century New South Wales. In 1888, Premier Sir Henry Parkes chose to ignore, and to direct the police to ignore, a Supreme Court decision to issue a writ of habeas corpus on the basis that the Court’s decision was “technical” and that ‘the law of preserving the peace and welfare of civil society’ must prevail.²⁴ Chief Justice Darley protested in the highest terms at this grave breach of the rule of law, but the government persisted in its defiance for a considerable period before it eventually backed down and accepted the Court’s judgment.²⁵

²⁴ *Ex parte Lo Pak* (1888) 9 LR(NSW) L 221, 235. See JJ Spigelman AC, ‘The rule of law: and challenges to it’ [2008] (March) *Law Society Journal* 57, 57.

²⁵ See, generally, JJ Spigelman AC, ‘The rule of law: and challenges to it’ [2008] (March) *Law Society Journal* 57, 57–8.

There are three significant features these examples have in common. First, they illustrate that binding legal institutions cannot eliminate the risk of the government (and, in particular, the executive) simply choosing to ignore the law, particularly where it believes it is doing so for the benefit of the state – and especially during a perceived crisis. Secondly, the judiciary did not back down. In the case of PNG, not only did the Court maintain its position in the face of arrest, but when the Chief Justice was brought before another court on charges that were fairly obviously for the purpose of keeping him out of the Supreme Court issue, the other court stayed proceedings as an abuse of process. Thirdly, the executive eventually backed down, at least in part. In the case of PNG, neither the possibility that the release and reinstatement of the Supreme Court judges was only a result of the government finding an ostensibly more legitimate means of getting what it wanted, nor the evident fact that it was in the government's political interest to reinstate the judges, changes the result that the government backed down.

Each of these three characteristics underlines the deficiencies described above in relation to institutional accounts. In the case of PNG, the acts of O'Neill and the Parliament in ousting Somare, in disregarding the orders of the Supreme Court, and in taking some fairly blunt and manifestly unconstitutional approaches to the removal of unfavourable judges were, in their totality, grave breaches of the constitution and of the rule of law. But they were not punished by the voters at the ballot box. Instead, O'Neill (with a little help from the man he had just ousted) secured an overwhelming majority of seats in the legislature. It may be that the voters of Australia *would* punish such action. It may be that there would be no better candidate (that is, one less likely to commit similar breaches in the future). But institutional accounts do not provide an answer to this problem. Even if one is theoretically able to bring the most fundamental constitutional principles within a "master ideal" capable of being held by the bulk of people in a pluralist society,²⁶ what item in the rule of law field kit would be suitable to the purpose?

Nor do formalist accounts explain why the judges in PNG and New South Wales stood their ground. It is easy to say that the rule of law requires an independent judiciary. But Chief Justice Sir Salamo Injia's appeal to the Papua New Guinean police and military personnel and to the heads of the armed services to 'take your oath seriously and stand up for the

²⁶ For a discussion of master ideals, see Philip Selznick, 'Sociology and Natural Law' (1961) 6 *Natural Law Forum* 85.

constitution'²⁷ was not merely an appeal to legal obligations contained in the terms of the *Papua New Guinea Constitution*. It stemmed from something more. That kind of appeal, as with the New South Wales Supreme Court's protest in 1888, stems from an underlying judicial culture, of which belief in the rule of law is considered a fundamental part.²⁸

This leads to the broader proposition, only part of which is explored in this essay. An essential feature of strong rule of law states is the existence of a series of beliefs and values held, maintained and pursued by certain actors or classes of actor in those societies. These systems of embedded beliefs cannot be reduced to a readily deployable field kit. They emerge slowly over time and in different ways, although undoubtedly the emergence of some of them may be accelerated.²⁹ In untangling some the question of "who must believe what for the rule of law to be effective?" some basic subdivisions are assumed for the purposes of this essay:

The activist "public": a sufficient number of individuals hold rule of law beliefs in the form of general (and strongly held) notions of "legality" and "democracy" which they are prepared to express or uphold. In a strong rule of law culture, many (if not most) citizens expect officials to act within authority and expect there to be mechanisms for redress against arbitrary (or at least unfair) decision-making either through lawyers or through an elected representative (or through voting-in another representative or government).³⁰ The more individuals or groups who hold these beliefs and the more strongly they hold them, the stronger this aspect of the rule of law.

²⁷ Eoin Blackwell, 'PNG police block parliament ahead of court hearing', *The Sydney Morning Herald* (25 May, 2012).

²⁸ See, generally in relation to early New South Wales, David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991).

²⁹ For broader discussions of the social embedding of rule of law values and practices see Krygier, 'Why the Rule of Law is too important to be left to lawyers', above n 1, 20–22; Martin Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism' (1990) 15(4) *Law & Social Inquiry* 633, 643–4. See also Joseph Raz, 'The Politics of the Rule of Law' (1990) 3(3) *Ratio Juris* 331, 338–9.

³⁰ This is a very basic description. For a discussion of the relationship between the rule of law and how the private citizens of a state think about law, see Krygier, 'Why the Rule of Law is too important to be left to lawyers', above n 1, 13–18.

Elected leaders (including, to a lesser extent, local councillors): democratic leaders are held to rule of law values by a combination of political self-interest (that is, the risk of losing votes or the faith of the party or otherwise being dismissed by those with the power to do so), convention (in acting as others in similar positions or offices generally do) and personal belief in the importance of the rule of law (or at least in such values as democracy and legality as with the public above).

Unelected officials (and subordinate elected representatives, such as councillors): officials are held to rule of law values by a combination of practically enforceable legal restraint and review (including the threat thereof), by convention as with elected leaders and by personal belief in the rule of law (in the same way as described above).

III CONSTITUTIONAL CONVENTIONS

Constitutional conventions³¹ are an essential concept in the constitutional framework of the Westminster system of responsible government and constitutional monarchy, and in a number of constitutional arrangements derived from that system, such as those of Australia and Canada.³² At the very least, they operate to reduce the broad and potentially dictatorial powers of the head of state and other governmental figures and bodies, are considered essential to this end, and have been argued by a number of scholars to be part of constitutional law, or at least to be capable of crystallising into law.³³

³¹ The term was first used by AV Dicey: see Léonid Sirota, 'Towards a jurisprudence of constitutional conventions' (2011) 11(1) *Oxford University Commonwealth Law Journal* 29, 30; WS Holdsworth, 'The Conventions of the Eighteenth Century Constitution' (1932) 17 *Iowa Law Review* 161, 161; AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 8th Ed, 1915). See, also, Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009), 9.

³² See Léonid Sirota, 'Towards a jurisprudence of constitutional conventions' (2011) 11(1) *Oxford University Commonwealth Law Journal* 29, 29; Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009), 1–10; TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, (Clarendon, 1993), 237–9, 240–6.

³³ See Léonid Sirota, 'Towards a jurisprudence of constitutional conventions' (2011) 11(1) *Oxford University Commonwealth Law Journal* 29; Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules*

There are two principal questions to be asked with respect to constitutional conventions and the rule of law: (i) what do they do (or how do they affect the rule of law)?, (ii) what can be learned from their history?

In answering each of these questions, it is necessary to consider what is a “constitutional convention”. There are three fairly widely accepted elements or features of constitutional conventions, and a fourth more contentious proposition:³⁴

1. they have come to be established (such as through precedent or past usage);
2. they are not law;
3. they are, nonetheless, binding;
4. they exist for constitutional reasons, and not merely out of habit.

The first element is fairly straightforward. It is after all, inherent in the notion of a “convention” in the ordinary meaning of the word. The other three, however are of some significance.

The second and third elements, going to the legal status and de facto “bindingness” of constitutional conventions are inter-related. In Canada, the Supreme Court has held that conventions are not legally enforceable.³⁵ It is, however, more conceptually accurate to say that Court’s decision was consistent with the view that conventions cannot crystallise into law. This

of Australia’s Constitutions (Australian Scholarly Publishing, 2009), 9–46; TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, (Clarendon, 1993), 237–9, 253–263; L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 36–8; Jeremy Waldron, ‘Are constitutional norms legal norms?’ (2006) 75 *Fordham Law Review* 1697.

³⁴ See L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), ch 1, 7–46. See, also, Léonid Sirota, ‘Towards a jurisprudence of constitutional conventions’ (2011) 11(1) *Oxford University Commonwealth Law Journal* 29; WI Jennings, *The Law and the Constitution* (University of London Press, 5th Ed, 1959), 136; *Re Resolution to amend the Constitution* [1981] 1 SCR 753, 888 (Supreme Court of Canada).

³⁵ *Re Resolution to amend the Constitution* [1981] 1 SCR 753 (Supreme Court of Canada) (*‘Patriation Reference’*).

view has been criticised by a number of legal theorists.³⁶ There may be some merit to this criticism in a country with an unwritten constitution, such as England. However, in the case of states with written constitutions, such as Australia and Canada, there is greater difficulty in accepting that conventions can crystallise into law. Undoubtedly, the enactment of the *Australian Constitution* was based on, and assumed the incorporation of, underlying English constitutional principles such as responsible government.³⁷ However, such an argument must still overcome the point that the very object of a written constitution is to give certainty to a constitutional arrangement. The High Court has, of course, found a number of implications in the *Constitution* by reference to underlying constitutional principles and features of the English legal system at the time of federation, but these implications have always had at least some foundation in the text of the *Constitution*.³⁸

It is not proposed here to resolve conclusively the crystallisation debate. It is sufficient to draw from it two points. First, whatever side one takes, constitutional conventions fall short of posited law. If the content of a particular convention is expressed in a written constitution, it ceases to be a convention and becomes a constitutional provision.³⁹ Likewise, if a convention has been the subject of judicial decision, it necessarily either becomes law as the result of the decision or is acknowledged as a convention but rejected as law.⁴⁰ Secondly, those who reject the argument of crystallisation of conventions into law do not necessarily (and probably do not at all) reject the idea that conventions are themselves the product of

³⁶ See, e.g., L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 20–24; Jeremy Waldron, 'Are constitutional norms *legal norms*?' (2006) 75 *Fordham Law Review* 1697. See also TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, (Clarendon, 1993), 253–263.

³⁷ See L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), ch 1, 1–38.

³⁸ See, e.g., *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; *South Australia v Totani* (2010) 242 CLR 1.

³⁹ Cf express incorporation of the convention by reference to its status as a convention, as in (for example) s 16A of the *Constitution Act 1975* (Vic) or s 24B of the *Constitution Act 1902* (NSW). For the difficulties and uncertainty that such provisions create, see L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 16–20.

⁴⁰ See, e.g. *Re Resolution to amend the Constitution* [1981] 1 SCR 753 (Supreme Court of Canada) ('*Patriation Reference*').

crystallisation. They are, by their very nature, the product of crystallisation. Rather, a line is drawn, particularly in states with written constitutions, beyond which some authorised lawmaker must posit the convention as law in accordance with the applicable rules of recognition.

In any event, the rule of law is not merely concerned with posited law.⁴¹ Rather, it extends to the beliefs of those who bear the capacity to give effect to, or to act contrary to, its principles. So, when the debate arises as to whether the constitutional conventions should be codified,⁴² a rule of law approach can only inform the debate by asking whether the risk of arbitrariness in freezing the development of the convention is outweighed by the risk that the convention will simply be ignored.

The third element, that the convention be binding, is in some respects problematic. If it is not legally binding, who enforces it or why is it obeyed? De Smith and Brazier give a list of reasons (including the risk of enforcement):⁴³

force of habit, inertia, desire to conform, belief that it is 'right' to obey them and wrong to disobey them because they are reasonable rules or because they are part of reasonable structure of rules which ought to be preserved and upheld. Insofar as they are observed by persons involved in politics who feel inclined to break them, obedience can usually be attributed to fear of disrepute and its political implications.

This catalogue bears a similarity to the subdivisions discussed above in relation to who must believe what in order to give efficacy to the rule of law. The reference to those "involved in politics" likewise draws the distinction between elected and unelected officials, but it does not provide any specificity in answer to the question of who adjudicates and enforces any given convention. From a rule of law perspective, we are only a little better off than under the democratic safety-valve discussed above in relation to anatomical accounts. But there is more to the notion of constitutional conventions. They are not just constitutional principles that have yet to crystallise into (or be posited as) law – though there are obvious

⁴¹ See, especially, Philip Selznick, 'Sociology and Natural Law' (1961) 6 *Natural Law Forum* 85.

⁴² See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009), 276–81;

⁴³ W De Smith and R Brazier, *Constitutional and Administrative Law* (Penguin, 1990), 39.

candidates among them for such elevation (such as non-refusal of Royal assent, the Presidential equivalent of which has been dealt with in the *United States Constitution* by provisions granting and dealing with the Presidential veto).

The fourth element, constitutional reason rather than mere force of habit, is the most critical distinction between constitutional conventions and law. It explains why many hold these conventions sacred and why it has repeatedly been argued that they should be legally binding. In Australia, conventions are not merely the English constitutional baggage that the framers of the *Constitution* assumed would continue to apply, though undoubtedly the framers did so assume. Constitutional convention is the natural companion to a choice made with respect to the very form of the Commonwealth government (in the broader sense of the term). On its terms, the *Australian Constitution* seemingly confers dictatorial power upon the Governor-General: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative'.⁴⁴ Her Excellency has 'such powers and functions of the Queen as Her Majesty may be pleased to assign'⁴⁵ and, among other things, may appoint such times for holding Parliamentary sessions as she "thinks fit", may summon, prorogue and dissolve Parliament,⁴⁶ and may withhold assent to bills (even though passed by both Houses of Parliament).⁴⁷ The Governor-General has specific powers to appoint or dismiss the Ministers of State, the potentially arbitrary exercise of which is only legally limited by the requirement that the Ministers shall not hold office for more than three months without becoming a senator or member of the lower House.⁴⁸ It is convention, when observed or enforced, that effectively limits the breadth of those powers and their scope for arbitrary exercise.

⁴⁴ *Constitution* s 61.

⁴⁵ *Constitution* s 2.

⁴⁶ *Constitution* s 5.

⁴⁷ *Constitution* s 58.

⁴⁸ *Constitution* s 64. For general discussion of the Governor-General's power and role, see Peter Hanks QC, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary*, (LexisNexis Butterworths, 7th Ed, 2004), 492–507 [7.4.1]–[7.4.25]]; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th Ed, 2010), 470–80.

The result of this arrangement, including the combination of broad expressly granted legal power and constitutional convention, is that the Governor-General is invested with the role of constitutional guardian.⁴⁹ As with the Queen, the days have long since passed under which the Governor-General was expected to exercise direct governmental power. The *Constitution* grants nearly unfettered power to the Governor-General, but convention takes away all save a set of “reserve powers”.⁵⁰ The sole purpose of those powers is to resolve constitutional crises, and their exercise is itself subject to convention designed to prevent abuse.

Constitutional conventions, then, play an extremely important role in the prevention of arbitrariness in governmental action in Australia, England, and Canada –each a strong rule of law state. Yet, they are not a feature of anatomical accounts. It is arguable that Fuller’s eighth desideratum, that the laws be administered in ways that conform to their terms,⁵¹ encompasses constitutional conventions. However, this is not a particularly comfortable fit and, in any event, does nothing more than to acknowledge their existence without engaging in any of the underlying rule of law belief issues.

IV WHITLAM DISMISSAL: WHAT CAN BE LEARNED FROM THE HISTORY OF CONSTITUTIONAL CONVENTIONS?

The constitutional crisis of 1975 provides a rare opportunity to examine the operation, strength and public perceptions of constitutional conventions. There are a number of points to be made in respect of the Whitlam dismissal and the events surrounding it with respect to the rule of law. The salient convention events are as follows:

Two casual vacancies arising from the departure of two Labor Senators are filled respectively by an Independent and a Labor party member hostile to the Whitlam government (allegedly in breach of a convention that casual

⁴⁹ See George Winterton, ‘Reserve Powers in an Australian Republic’ (1993) 12(2) *University of Tasmania Law Review* 249.

⁵⁰ See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia’s Constitutions* (Australian Scholarly Publishing, 2009).

⁵¹ See Fuller, above n 3, Krygier, ‘Rule of Law’, above n 1, 237.

vacancies in the Senate are to be filled by members of the same party as the outgoing senator), changing the balance of power in the Senate.⁵²

In response to the ‘continuing incompetence, evasion, deceit and duplicity’ of the Whitlam government, including the overseas loan-raising controversies, the Senate blocks supply bills from the House of Representatives.⁵³ It declares that the legislation will not proceed further ‘until the Government agrees to submit itself to the judgment of the people’.⁵⁴ This was alleged to breach a convention that upper houses do not block supply.⁵⁵

The Prime Minister refuses to resign or to request a double dissolution under s 57 of the *Constitution*.

Governor-General Sir John Kerr dismisses the Prime Minister without warning (in alleged breach of convention)⁵⁶ and appoints the Leader of the Opposition, Malcolm Fraser, as caretaker Prime Minister – that is, on the condition that he make no appointments or dismissals and initiate no policies before the election. With Fraser’s support, the Senate passes the supply legislation. Fraser then formally advises the Governor-General to dissolve both Houses. The House of Representatives passes a motion of no confidence in Fraser. The Speaker of the House attempts to inform the Governor-General, but is told to call at 4.45 pm. By that time, the Governor-General has signed a proclamation dissolving both Houses (on Fraser’s advice).⁵⁷

⁵² L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 113–14.

⁵³ See Richard Hall and John Iremonger, *The Makers and the Breakers: The Governor-General and the Senate vs the Constitution* (Wellington Lane, 1976), 184–187.

⁵⁴ Harry Evans and Rosemary Laing (Eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th Ed, 2012), 721.

⁵⁵ See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia’s Constitutions* (Australian Scholarly Publishing, 2009), 262–7; L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 120–125. But see Harry Evans and Rosemary Laing (Eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th Ed, 2012), 721–723.

⁵⁶ See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia’s Constitutions* (Australian Scholarly Publishing, 2009), 205–9.

⁵⁷ See Peter Hanks QC, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary*, (LexisNexis Butterworths, 7th Ed, 2004), 502–6.

In response to each of these events a number of observations may be made. First, the Senate vacancies issue is significant because it allowed the States to alter the balance of power without the support of the people. There is good reason to believe that there was a convention that casual vacancies should be filled by the same party as the outgoing Senator. As a result of, and in response to, this action the *Constitution* was subsequently amended so that it matched the convention.⁵⁸

Secondly, it was the express purpose of the Senate's blocking of supply to drive the Whitlam government to the polls.⁵⁹ But the *Constitution* does not confer upon the Senate the power to demand an election. The Senate's solution was really directed at forcing the hand of either the Prime Minister or the Governor-General by holding the budget to ransom. The double-dissolution mechanism envisages dissolution *in order to resolve the deadlock*. If the Prime Minister refuses to accede to the demand and the Governor-General resolves the situation by dissolving the Houses, the supply bill cannot be passed until the elections have occurred. Kerr's solution was to use deadlocked legislation *other than* the supply bills as a basis for dissolution. Without double dissolution, convention would have required the Governor-General to dismiss Fraser on the basis of a no confidence motion in the House of Representatives –which motion was, in fact, passed. By dissolving Parliament before being formally advised of the no confidence motion, the Governor-General was able to dodge this convention. This is a manifest abuse of s 57. The Senate's actions are difficult to classify as anything other than base blackmail. Unquestionably, the economic and civil consequences of letting supply run out would have been dire.⁶⁰ The acts of both the Senate and the Governor-General constituted grave threats to the rule of law. Cooray called the Senate's behaviour an act of "gross irresponsibility".⁶¹ If there was not a convention,

⁵⁸ See Peter Hanks QC, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary*, (LexisNexis Butterworths, 7th Ed, 2004), 30–31.

⁵⁹ See L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 117.

⁶⁰ See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009), 148–152; L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 117–120, 124–5.

⁶¹ L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 117.

there ought to have been. In England the law was changed in the early twentieth century to prevent the House of Lords from blocking supply.⁶²

But the principal significance of the Senate's acts, and of its express denial of any such convention, is twofold: (i) it constituted itself the adjudicator of the convention, being a convention as to the limits of its own power; (ii) although it was widely criticised, there were no substantial consequences of its breach (although there was considerable outrage and criticism).

Thirdly, the Governor-General's acts, although widely and vigorously criticised, were not deliberate abuses of power. To the contrary, Sir John was deeply concerned about his duty and the consequences of supply running out. He had a number of supporters for his actions, including High Court judges.⁶³ He sought informal and written advice from the Chief Justice of the High Court and, it has recently been revealed, from Sir Anthony Mason (then a puisne Justice of the High Court).⁶⁴ Although the propriety of the involvement has been much criticised, the significance is that Sir John sought legal advice. He was, after all, former Chief Justice of the Supreme Court of New South Wales. So, even in breach of convention (the duty to warn), he acted on a legal view of the situation.

Another interesting feature of Sir John's actions is that he could have used his "reserve powers" to dissolve Parliament and leave Whitlam in caretaker mode. More obviously than with the decision to dismiss, it would have been disastrous not to warn Whitlam of an intention to dissolve since he would find out anyway. This alternative course of action (dissolving instead of dismissing) would have accorded with the convention that only a person with the support of the lower house should be Prime Minister. Of course, one can only speculate what Whitlam's actions would have been if informed that the Governor-General *would* dissolve the Houses should Whitlam fail to resolve the dispute.

⁶² *Parliament Act 1911* (UK). See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions*, (Australian Scholarly Publishing, 2009), 23.

⁶³ See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions*, (Australian Scholarly Publishing, 2009), 152.

⁶⁴ See ABC News, 'Whitlam dismissal still stirs division', *The World Today*, 27 August 2012, 2.33 pm (Eleanor Hall, Jenny Hocking); Sir Anthony Mason, 'It was unfolding like a Greek tragedy', *National Times* (27 August 2012).

This leads to the question of Sir John's fear that Whitlam would have requested the Queen to dismiss the Governor-General if warned of Sir John's intentions. That would have invoked the convention that gubernatorial appointments are always on the First Minister's advice.⁶⁵ Had Whitlam so requested, this would have been a far more significant crisis than the blockage of supply.⁶⁶ It has recently been revealed that Kerr spoke to Prince Charles about the prospect of dismissal was assured by the Queen's secretary that any attempt by Whitlam to remove the Governor-General would be delayed.⁶⁷

Fourthly, all of these events occurred in a state in which the rule of law was thought to be very strong. Nearly 40 years after these events, the rule of law in Australia is still thought to be very strong. As Krygier has noted, Whitlam's response was a legal one – he contested the election and lost. He did not resort to extra-legal means.⁶⁸ For the most part, the immediate public response was through peaceful protests.

However, the public did not enforce the various conventions alleged to have been breached, instead voting Fraser an overwhelming majority in the election. Cooray has argued that this should not be seen as a vindication.⁶⁹ Undoubtedly, this is true, but it does not change the fact that the breaches of convention were not punished or remedied. As Cooray says, the election may well have been decided primarily on economic grounds.⁷⁰

The constitutional crisis of 1975 leads to two qualified conclusions about conventions and rule of law beliefs (generally) in society. In the first place, the broad public reaction seems more likely to be to the overall political or

⁶⁵ See Ian Killey, *Constitutional Conventions in Australia: an Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009) 205–9.

⁶⁶ See L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 144–5.

⁶⁷ Tony Bramston, 'Labor stalwarts still maintaining the rage over judge's secret role in dismissal of Whitlam', *The Australian* (1 September 2012).

⁶⁸ Martin Krygier, 'Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society' (1996) 11 *East European Politics and Societies* 37, 41; Martin Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism' (1990) 15(4) *Law & Social Inquiry* 633, 643–4.

⁶⁹ L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 128–9.

⁷⁰ L J M Cooray, *Conventions, The Australian Constitution and the Future* (Legal Books, 1979), 128–9.

democratic issues involved in a breach of convention, rather than the fact that the convention was breached itself. One can only speculate what the reaction would have been had the breaches been breaches of the constitution and which were not remedied by action in the Courts. It gives support to the notion that the public is not an ideal rule of law enforcer except in all but the most dire of situations. The significance of this should not be overstated. Were electoral enforcement of conventions merely a question of replacing the governing party who has disobeyed them with one who can be expected to uphold them in the future, the electoral consequences (or lack thereof) in the Whitlam dismissal would be deeply troubling. However, there are always other factors. It must be remembered that the Labor party, including Whitlam himself, had also previously threatened to block supply in the Senate.⁷¹ Presented with the dilemma of choosing a party one does not trust to lead the nation and electing one which has breached convention in much the same way as the other has previously threatened but otherwise is preferable to the incumbent government, one will naturally choose the second contender.

Secondly, in the absence of posited law and the threat of direct public enforcement of conventions (that is, being ousted as a result of their breach *as conventions*), the holders of highest office have a large degree of latitude to define the content and bindingness of conventions. If one takes the view that the key distinction between a constitutional convention and constitutional law is that the latter is binding *as law*, then the events of 1975 give some weight to the view that the rule of law *is* a primarily positivist concept. But this latter proposition would go too far. It does not follow that because the alleged breaches of convention in 1975 did not result in Whitlam being re-elected constitutional conventions have no real force. It must be remembered that there was significant public reaction in the form of protests and public criticism –the political controversy continues even to the present. There was (and continues to be) considerable dispute about the existence of more than one of the conventions involved, and the lack of more severe public reaction may simply reflect the lack of certainty about those conventions.

The point is that there was reaction and there were consequences. The dismissal immediately attracted (and continues to attract) the widest academic debate, and is now a standard feature of Australian constitutional law textbooks. Sir John suffered great infamy as a result of his actions,

⁷¹ See Harry Evans and Rosemary Laing (Eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th Ed, 2012), 722–723.

living the remaining years of his life in misery. And there was *some* direct, substantive, public reaction; in relation to the convention about filling casual Senate vacancies, the *Constitution* was amended.

It is interesting to note that in *Re Resolution to amend the Constitution*,⁷² although the Supreme Court of Canada held that a particular (and democratically highly important) convention (which it found *was* a convention) could not be enforced as law, the Canadian government ultimately chose to comply with the convention. One might wonder what would have happened if either the Senate supply or casual vacancy convention had been brought before the High Court (perhaps it would simply have held the matter non-justiciable without entertaining the question of whether the convention existed or had been breached).

V CONCLUSION

This essay has explored one of the shortcomings of anatomical accounts: their failure to explain satisfactorily the strength and role of rule of law beliefs in strong rule of law societies. Some of the theoretical problems with separation of powers as the driving force of institutional accounts have been considered – in particular, the risk of arbitrary interpretation and disobedience by the ultimate enforcers of the state's constitutional law. On their own, formal mechanisms and institutions can only produce, at best, a deadlock between the legislative, adjudicative and executive arms of government, leaving the electorate as ultimate enforcer. Beyond those rigid mechanisms lies the realm of beliefs. It has been argued that institutional accounts are defective for want of engagement with these beliefs.

Constitutional conventions are one manifestation of rule of law beliefs. They are principles which evolve and crystallise over time and which are essential to the rule of law in restraining the arbitrary exercise of governmental power, and yet they are also able to adapt to suit the needs of a slowly changing society.

Although crises in which the normative force and resilience of constitutional conventions have been tested are rare, limiting the conclusions that can safely be drawn, the Whitlam dismissal and its surrounding events lend support the proposition that conventions, far from being mere habits of convenience and though unenforceable in the courts, have consequences for their breach. The events of 1975 illustrate the

⁷² [1981] 1 SCR 753 (Supreme Court of Canada).

complexity of rule of law beliefs, showing that constitutional conventions are upheld in diverse ways by diverse actors and, unlike constitutional laws, are capable of having an escalating and (politically) proportional response to their breach ranging from public and individual protest and academic and (lay) public criticism to (there is no reason to doubt) punishment at the ballot box, riot or even civil war. It also illustrates that where the consequences for breach are not prescribed (in contrast to most legal rules)⁷³ other factors (especially political factors) may affect the degree to which, and manner in which, breaches are addressed by the various actors in society.

The rule of law requires more than just law. It requires a rule of law culture, which culture is complex and involves different beliefs held by different actors or groups of actors. In relation to the acts of apex governmental bodies and officials such as the legislature, executive, constitutional guardian (or head of state) and the judiciary, constitutional conventions are an essential part of that culture. In encouraging the growth of the rule of law in developing or newly-formed democracies, it is not sufficient to prescribe institutions such as written constitutions, separation of powers, democratically elected legislatures and desiderata of the laws themselves and to assume that they can be deployed as a form of field kit. Consideration must also be given to the role of constitutional conventions – and, more broadly, rule of law beliefs– and how to address their absence in a newly reconfigured state which has not yet had the chance to develop them over a steady course of history.

⁷³ For example, a declaration of invalidity flowing from a purported enactment in excess of the legislature's power.