Introduction

In recent years there has been renewed public and practitioner interest in constitutional conventions that govern so much of the operation of Westminster systems. Yet surprisingly, given their importance and the extent of changes that have occurred or been proposed, constitutional conventions have been relatively neglected by scholars. Our book remedies this, explaining the character of conventions with comparative and up-to-date accounts of four of the main Westminster countries: the United Kingdom, Canada, Australia and New Zealand.

Comparing Westminster countries flourished in earlier times (Brady 1947) but became 'an intellectual backwater', according to Rhodes, Wanna and Weller (2009: 17). Their book *Comparing Westminster* signals a revival of this rich field for comparative study. Westminster countries provide a paradigm grouping of 'most similar' nations, 'related by history, belief systems, and inclination. They form a loose family of governments, not clones of one another. Westminster was, and remains, useful shorthand to identify their origins and some of their basic characteristics' (Rhodes, Wanna and Weller 2009: 230). Comparing conventions in Westminster systems also flourished earlier on with the classic accounts of H.V. Evatt (1936) and Eugene Forsey (1943). These became authoritative texts that were referred to when the occasional issue arose during the post-war decades. For the most part, however, conventions were pretty much taken for granted, attracting only occasional attention and comparative updating (Marshall 1984; Butler and Low 1991).

A second reason for the relative neglect of conventions over the last half century has been the dominance of law that focused, not surprisingly, on legal aspects of Westminster systems. Following Dicey, many constitutional lawyers spoke disparagingly of 'mere conventions', or more recently as 'soft laws' that approximated some of the preferred attributes of law. Our book provides a corrective account of conventions as primary political institutions that rely on political and social support.

Chapter 1 sets out our political account of conventions, and something of their nature, legitimacy and flexibility. Chapter 2 by constitutional lawyer Nicholas Aroney is complementary, showing the complexity and interconnectedness of constitutional law and convention.

The book is comparative but restricted to the four Westminster countries with the 'most similar systems', the United Kingdom, Canada, Australia and New Zealand. Comparing Westminster conventions enables us to identify the highly comparable features in the executive and legislative branches of government, and the variations due to differences in historical development, political culture and circumstances, and institutional choices. Our selection of these four countries was limited by considerations of comparability in the closeness of shared traditions of government, and constraints of space and manageability. A much larger study or further volumes would be required to cover all of those countries with Westminster-derived systems of government, including 'Eastminster' countries such as India, a vast democratic republic, and Malaysia, with its strong Islamic heritage, as well as smaller Pacific and Caribbean countries such as Papua New Guinea and Trinidad and Tobago. Our study of constitutional conventions in the four 'most similar' countries might provide a comparative model for exploring the development of constitutional conventions in these other more varied Eastminster and smaller Pacific and Caribbean countries.

The structure of the book is as follows. The first two chapters define the character of conventions and how they compare with law. This is followed by three thematic chapters on key institutions of executive government: the basic institutions and rules of responsible government in Chapter 3, cabinet government in Chapter 4 and caretaker conventions in Chapter 5. These chapters are comparative but selective in their coverage with individual authors focusing on aspects and examples that illustrate their narrative. Chapter 6 explains how changing party political arrangements and the prevalence of minority and multi-party governments have sparked renewed interest in constitutional conventions. Chapters 7 and 8 focus on the parliamentary conventions that govern parliaments and restrict upper houses. The cluster of country studies, Chapters 9 through 12 on the United Kingdom, Canada, Australia and New Zealand, give succinct profiles of the current state of play in each of the four countries. The final two chapters are concerned with codifying (Chapter 13) and reforming conventions (Chapter 14). A brief conclusion brings out some of the overall themes of the book.

In discussing conventions that govern Westminster parliamentary systems and previewing the detailed work of subsequent chapters, it is worth distinguishing two broad types of conventions that we might term 'core' and 'customary' or 'administrative'. This is not meant to be a sharp distinction of an essentialist kind, but a way of facilitating discussion of the different types and attributes of institutions and practices encompassed by the umbrella term of convention. Core conventions are the more fundamental ones that determine the institutional structure and procedures for forming governments and specifying relations between the political or real executive and the formal head of state. They include the complementary conventions that privilege the lower house of parliament where the executive is primarily based. Core conventions are underpinned by, and give effect to, fundamental democratic values and their breach would be a violation of such values.

Core conventions that cover the executive and relations between the chambers in bicameral systems are manifest in the four countries under consideration, and testified in the country studies in Chapters 9 through 12 on the United Kingdom, Canada, Australia and New Zealand, respectively. These studies show that, for the most part, core constitutional conventions work in predictable and comparable ways in all four countries, with variations being exceptions explained by different circumstances and events. The Canadian prorogation crisis of 2008 was exceptional, but not unknown as New Zealand was faced with a similar proposal to suspend parliament by a beleaguered minority premier back in 1910. The New Zealand attempt was aborted by the wise counsel of an authoritative governor-general as Grant Duncan recounts in Chapter 12, while the recent Canadian prorogation was achieved by a dominant prime minister. Nevertheless, despite ongoing dispute about the rights and wrongs of 2008 that Peter Russell explains in Chapter 13 and proposals for codifying the conventions at play in this explosive episode, government practice continues in 'the peaceable kingdom', as Andrew Banfield calls his beloved country of origin in Chapter 10, in conventional ways.

There is a common conventional discourse across these countries deriving from the original British model and its adoption and retention as the dominion countries became equal Commonwealth countries and autonomous in their national government. Conventions relating to the responsible government executive and the monarchic and vice-regal head are highly comparable in all four countries, as discussed in Chapter 3. The dominance of the elected lower house of parliament – New Zealand

being unicameral – over the appointed upper houses in Britain and Canada, complements the executive arrangements. This primacy of the lower or popularly elected house is brought out by J. R. Nethercote in Chapter 7 on parliament and by Campbell Sharman in Chapter 8 on upper houses. Government is formed by those who have the confidence, or majority support, in the lower house. Executive and legislative institutions without democratic legitimacy – the Queen, the House of Lords and the appointed Canadian Senate – are the ones most neutered by controlling conventions. In the Canadian case, convention trumps written text, marginalising an appointed chamber that has enormous paper powers but lacks democratic legitimacy.

Despite its elected Senate, Australia also has a standard responsible government executive, although one that was compromised somewhat during the 1975 constitutional crisis when the Senate blocked supply and the governor-general dismissed a prime minister who had the confidence of the House of Representatives. As with Canadian prorogation in 2008, the Australian crisis of 1975 is the stand-out exception where sharp disagreements about the way conventions should have operated in that instance continue. Nevertheless, the more routine processes of forming governments, including the minority Gillard Labor government in 2010, and changing prime ministers, from Gillard to Rudd in 2010 and back to Rudd just before the 2013 election, continue on. Despite the 1975 crisis, Barry and Miragliotta conclude in Chapter 11 that there is broad consensus on constitutional conventions and little enthusiasm for their codification in Australia.

The more customary or administrative conventions are the ones that facilitate and expedite executive decision making, structure legislative process and facilitate government transitions. Across all of these aspects of government, there are well-recognised formalities and practices that give a certain dignity to proceedings while at the same time allowing for flexibility and robust political behaviour. For example, parliaments have elaborate standing orders and formal processes, but these can be readily suspended to expedite government business, as J. R. Nethercote brings out in Chapter 7. Cabinet conventions that structure the collective decision making of government are broadly comparable in all four countries, yet differ in detail and are adjusted and changed to suit prime ministerial preference. They are also changed to accommodate new arrangements for minority and multi-party government that Scott Brenton details in Chapter 6. Cabinet practices of secrecy and solidarity are examples of established practices that facilitate executive decision making but can

be changed. Secrecy could be reversed and replaced with full disclosure of proceedings, according to Marshall (1984: 7), without any violation of 'constitutional morality'. While that might enhance public accountability, it would inhibit frank discussion so secrecy is maintained. Solidarity, however, has been modified to accommodate multi-party government.

Conventions can change in all sorts of ways, and can be articulated and codified in various forms by executive, legislative and judicial instruments. Andrew Blick in Chapter 14 points out the various forms that reforming conventions can take, and the consequences that can be either advantageous or limiting. As Blick comments, conventions are a vital part of any constitution, but often go unnoticed. Such opaqueness causes a serious democratic deficit, according to Peter Russell in Chapter 13, which was evident in Canada's 2008 prorogation crisis and could best be remedied through codification. Unlike laws, however, conventions can lack precision and their practical application can remain contentious even when codified. Authors can vary in their approach to conventions, as the following chapters show, even if there is broad consensus on key conventions.

New Zealand and the United Kingdom have been leaders in the codification stakes for somewhat different reasons. Both lack written constitutions like those of Canada and Australia, so there is more scope and perhaps greater need for codification. Both have experienced major political changes to their constitutional systems: New Zealand in adopting mixed-member proportional (MMP) voting that often ensures multi-party government, and the United Kingdom in updating arcane practices and granting devolution. With entrenched written constitutions, Canada and Australia have far more extensive codification of the legislature, the federal division of powers between national and provincial or state governments and aspects of the executive, so there is more limited scope and need for further codification.

Codification in its various forms captures and records rather than creates conventions and conventional change. Conventional change often occurs under the mantle of continuity. Cabinet manuals are obvious examples: they spell out the accepted procedures of operation, but are adjusted by successive governments to accommodate changes. The New Zealand Cabinet Manual that has become something of a model for codification advocates is approved at the first cabinet meeting of a new government, and is varied to suit the needs of that government. For example, the novel Labour–Alliance coalition that Prime Minister

Helen Clark put together in 1999 allowed for the minor partner to express publicly a differing view on certain matters to allow for 'party distinction'. As Duncan points out in Chapter 12, the New Zealand Cabinet Manual was amended accordingly. Weller in Chapter 4 gives the example of Prime Minister Bob Hawke having his department secretary revise the definition of collective responsibility to allow a left-wing minister opposed to the mining and export of uranium to debate the issue in party caucus while remaining a minister but not a cabinet minister. Hazell in Chapter 9 documents the flurry of conventional documentation that has occurred in tracking the myriad of conventional changes in UK government.

Caretaker conventions facilitate government transitions, ensuring that important policy decisions and appointments are not made around election time when the new or continuing government has not been determined. Although much of the detail of caretaker conventions is administrative in character, and often formulated by senior officials, these conventions give effect to the underlying democratic principle of government having the confidence of the house that represents the will of people. During the election period when this is not known, the old government is quite properly restrained in what it can do, as Menzies and Tiernan document in Chapter 5. As in other areas, there is both continuity and change in constitutional conventions that operate during this waiting period. The basic rule is that new policies not be implemented or important decisions made until the outcome is clear with the new or renewed government having a supportive mandate reflected by its having the confidence of the newly elected lower house of parliament.

Conventions are essential to all constitutional systems, but especially Westminster ones. They vary in form, with some being fundamental for democratic government and others adopted for administrative facility. They are political in character, and even if codified in various ways provide flexible institutions for ensuring continuity but allowing for change in constitutional arrangements. We trust our book will make this better known and appreciated.

References

Brady, Alexander 1947. *Democracy in the Dominions*. Toronto University Press.

Butler, David and Low, D.A. (eds.) 1991. *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth*. London: Macmillan.

Evatt, H.V. 1936. *The King and His Dominion Governors*. Oxford University Press.

Forsey, Eugene A. 1943. *The Royal Power of Dissolution of Parliament in the British Commonwealth*. Oxford University Press.

Marshall, Geoffrey 1984. *Constitutional Conventions*. Oxford: Clarendon Press.

Rhodes, R.A.W., Wanna, John and Weller, Patrick 2009. *Comparing Westminster*. Oxford University Press.

1

Constitutional conventions

BRIAN GALLIGAN AND SCOTT BRENTON

This opening chapter addresses the foundational questions of what is a convention, what gives a convention its legitimacy and how conventions remain stable yet adaptable. Conventions are often defined negatively, in terms of not being law, or in political terms with the implication that they are inferior to law. We contend that conventions occupy a more fundamental realm: government and the rules for forming government precede law and make law-making possible. In other words, conventions are more fundamental than laws; they govern the formation and basic functioning of government overall and in its key parts, and governments set up the law-making institutions that make, interpret and enforce laws. Hence it is not appropriate to go backwards, as it were, and view conventions from the more precise lens of law, which has been a strong tendency since the nineteenth century.

Hence our starting point is consideration of the origins of systems of government and law, and why they are supported and obeyed. We propose a political approach to explain how conventions derive from fundamental political principles that inform practice. After all, conventions are basic political rules affecting the structure and powers of government that are not enforceable in courts of law, so not amenable to jurisprudential treatment that purports to view them as quasi-laws. While for the most part conventions are not formally codified as laws are, they are broadly accepted as binding by government actors and citizens. They shape government practice albeit with flexibility that allows for development and change.

As a crucial part of Westminster-derived constitutional systems, conventions govern the institutions and operation of most aspects of parliament and responsible government: the offices of prime minister and cabinet, the rules for forming government, the dissolution of parliament, the appointment and removal of ministers, the role of the Queen and vice-regal representatives, doctrines of collective and individual ministerial responsibilities, the transaction of parliamentary business,

caretaker government, the independence of the judiciary, relationships with and between the public service, the executive and the legislature and the chain of accountability involving public servants. Conventions are crucially important in countries with 'unwritten' constitutions like those of the United Kingdom and New Zealand, and define the executive parts of partly written constitutions such as those of Canada and Australia.

Conventions attracted more attention in the late nineteenth and early twentieth centuries when parliamentary politics were more fluid and vice-regal offices in Westminster dominions, as they were then termed (Evatt 1936), were filled by UK appointees who played a more active role. The rise and dominance of disciplined party politics for much of the twentieth century usually produced clear electoral outcomes with the vice-regal office, now filled by prominent domestic appointees, becoming more formal. In recent years, however, all four countries have experienced coalition and minority governments with multi-party cabinets, while Canada has a long history of minority government despite a majoritarian electoral system.

Australia has been home to many non-traditional Westminster experimentations, most notably the powerful Senate, and independents and minor party parliamentarians have served in state cabinets. New Zealand, once described as 'more Westminster than Westminster', has radically changed its electoral system and fostered more consensus-style government. There are continuing calls for democratic reform in the United Kingdom and Canada, particularly in the upper house, while both countries also grapple with how to accommodate nationalist and separatist movements. Democratic reform, at least for some (Marsh and Miller 2012), requires a multi-party system to better represent today's more complex postmodern society.

While the United States adopted a republican form of government, with a full separation of powers, codified constitutional limitations and democratic mandates for executive and legislative institutions and actors, the United Kingdom and subsequently Canada, Australia and New Zealand relied on conventions to perform similar functions. Conventions were used to curtail executive power, formally the prerogative of the monarch, and to regulate executive–legislative relations. In recent decades there have been consistent calls for greater democratisation and enhanced oversight and scrutiny of the executive in all four countries. Implicit is a critique of responsible *party* government, with the major political parties, traditionally the guardians of the 'rules of the game', being challenged by new political actors.

The United Kingdom and New Zealand, with unitary systems of government and without entrenched written constitutions, have been leading the charge. New Zealand adopted a new system of voting, MMP, that produces multi-party government, and has pioneered the development of a comprehensive Cabinet Manual to explain how conventions are adapted to its consequences, as Grant Duncan explains in Chapter 12. The United Kingdom has been undergoing a 'twenty-year constitutional revolution', according to Robert Hazell in Chapter 9, that has entailed 'the creation of new conventions; the modification of old conventions; the codification of many conventions; and the demise of conventions rendered obsolete.' The intensity of discussion and development of conventions has been more subdued in Canada and Australia, except for flash points such as Canada's prorogation crisis in 2008 and Australia's constitutional crisis of 1975. In these two countries, written federal constitutions, combined with judicial review, structure and oversee legislative and executive power to a far greater extent.

Despite different trajectories, the four countries under consideration have experienced common changes. The most significant changes have been driven by the challenges of forming governments and achieving executive unity sufficient to ensure confidence while allowing for differences. Where governments have been formed through formal agreements, there has also been a steady extension in the scope of policy commitments and significant budget implications. The 'logic of appropriateness' has guided this process, and there is an expectation that judgements, actions and decisions will have to be justified to others (*see* March and Olsen 1989). This historical institutionalist account helps to explain why many conventions have remained so stable. Political actors have responded to various situations in what they considered was most appropriate with regard to their position and responsibilities (Koeble 1995). The most appropriate response in a liberal democracy is generally the one that ensures political stability, but also takes into account the will of the people. For example, the major parties will look for a response that preserves their dominant position while also acknowledging changed political circumstances. Many scholars have described the cartel-like behaviour that major political parties have engaged in (*see* Katz and Mair 1995), with the longer term objective of alternating in government.

While aspects of all of these have been considered by various authors, the field as a whole is relatively neglected: the last authoritative book was Geoffrey Marshall's *Constitutional Conventions* (1984). Most commentary on conventions is by constitutional lawyers who typically work from