

# The Requirements of a Constitutional Culture: Playing By the Rules

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In late 1975, Australia endured what at the time was referred to as a ‘constitutional crisis’. In this paper I want to use this episode as a vehicle for making a number of points about what some of the pre-conditions for democracy might be. This strategy seems to me appropriate, because the capacity to withstand political “crises” of various forms is a necessary condition for the stability of any political order – including specifically democratic ones. In other words, an exploration of what it is that makes a democracy robust to shocks is a plausible point of departure in understanding the pre-conditions of democracy more generally. And although the focus on a particular Australian example may seem somewhat eccentric and self-indulgent, there are some important features of the Australian political experience that make this example, in my view, of more than purely local relevance. I want to begin by mentioning these features – partly by way of self-justification and partly in order to set the stage for the discussion that follows.

First, Australia is among the older recognisable “democracies” in the world, now celebrating over a century of continued democratic rule. Second, Australia was, at least in its early years, a genuine institutional innovator. With the possible exception of New Zealand, Australia was the first country in the world to have universal suffrage (including specifically votes for women); and the secret ballot; and experiments in proportional representation. The Australian voting system exhibits some unusual features that Australians at least are inclined to regard as significantly ‘democratic’ – specifically, compulsory voting, and a form of transferable vote. It has had an essentially stable federal system throughout (unlike the US whose ‘federalism’ had to endure a civil war) and a strong ‘democratic’ bicameralism (unlike the UK, where the Upper House is undemocratic and possesses only modest powers). Taken together, all these features mean that Australian political institutions are distinctive, and arguably distinctively democratic, and can therefore

make some claim to be of general interest. However small and incidental the country may be in many ways, Australia has a political/institutional history that deserves greater recognition (inside as well as outside the country). In that sense, the 1975 ‘incident’ is perhaps not as quaint a case study as it might at first appear.

In order to make that incident intelligible, it is necessary to say a little more about how the system operates in practice. The Australian central government system is parliamentary, in the sense that the government of the day is formed by the party (or coalition) that holds a majority of the seats in the Lower House. Seats in that Lower House are contested as single member electoral districts. In these respects, the Australian system resembles the British model, reflecting something of our colonial heritage. However, the Upper House in the bicameral structure more resembles the US Senate than it does the House of Lords. Specifically, the Australian “Senate” has extensive powers, including more or less the power to veto proposals for legislation that receive majority support in the Lower House. Because the Senate is elected on the basis of proportional representation within the six States (with some representation for the two “territories”) – a procedure that has been in place only for the last fifty years or so – that House typically has a larger number of parties than in the Lower House and a different party composition from the Lower House. In particular, it is unusual for the party (or coalition) that forms government in the Lower House to hold a majority in the Upper House as well. Senators are elected for two electoral cycles, on the basis of overlapping terms; so in the normal course of events only half the Senators are up for election when the full Lower House election occurs.

The powers of the Senate to reject bills passed in the Lower House are somewhat inhibited by the fact that the Lower House can, on the basis of any piece of rejected legislation, declare a “double dissolution” election under which *all* the members of both Houses have to “face the people”. This is a possibility that the parties in the Senate are somewhat reluctant to invoke. A double dissolution election tends to increase the number of parties in the Senate and thereby to reduce the power of the existing ones. And of course some of the existing Senators (including some who still have a double term to run) are likely to lose their seats. In this sense, the threat of double dissolution tends to discourage the Senate from frivolous or purely obstructionist tactics.

Nevertheless, the structure effectively creates the bi-cameral divide as a major locus of political contestation. The different party compositions together with the considerable powers of the Upper House constitute

a genuine restriction on the powers of the prevailing government and establish an ongoing tension between the two Houses. The political history of Australia since World War II has been characterised by extensive use of the double dissolution provision – but the consensus is that the system has worked tolerably well overall as a blend of effective and responsible government.

This entire system is presided over by the Governor-General, who is formally the Queen's representative in Australia. Technically the Governor-General is "appointed by the Queen" under advice from her ministers in Australia – but the "advice" in question is more to be understood as "instruction". The formal powers of the Governor-General (as the Queen's formal agent) are very extensive. But as is typical in constitutional monarchies, these powers are, at least under normal circumstances, purely formal. In the current climate, monarchs lack the kind of popular support that would be necessary to justify any exercise of genuine power, and so are normally admirably self-effacing in the political arena. So, in practice, and under normal circumstances, the Governor-General's main functions are symbolic and ceremonial. The trappings of Constitutional Monarchy are present, just as in the British case. But the political reality is that the Prime Minister and the Cabinet are free to govern without interference – at least, in the 'normal course of events'. Still, the prevailing government must remain aware that it exercises Constitutional authority only by virtue of a kind of vice-regal self-restraint, and that the definition of what is the 'normal course of events' is itself a matter of possible contention.

Accordingly, there is, in the formal Constitutions of this kind, a certain *ambiguity*. Prevailing practices and the formal Constitutional provisions are somewhat at odds. The ambiguity in question is not by any means entirely a weakness<sup>1</sup>. If the result is a system in which those who possess power are not totally sure as to the extent of the powers they possess and hence exercise that power with a certain caution, that is no bad thing. But the forces that make for such caution, also make for the possibility of occasional Constitutional crisis.

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1 Godel famously remarked during his naturalisation ceremonies that the US Constitution was hopelessly inconsistent – a view his friend Oscar Morgenstern managed to explain away to the prevailing officials! What Godel clearly did not appreciate was that logical clarity in political arrangements is not always a virtue.

In particular, a necessary restraint on the exercise of de facto powers by elected governments is a recognition that such formal powers could in principle be invoked if the course of events is deemed *abnormal* – and specifically if the government of the day does not or cannot operate “properly”. In that sense, the Governor-General could be thought of as a kind of distant umpire of proceedings.

In 1975, the Governor-General *did* exercise an ‘umpiring’ role – in circumstances that remain a matter of controversy and tender feeling even thirty years later. At the time, a more or less standard bicameral battle was in the offing. The unusual feature in this case was that the legislation in question was budgetary and the (Lower House) government needed such legislation passed in order to continue to meet its financial liabilities (pay the salaries of bureaucrats and meet similar commitments). In cases of budgetary bills, there is a convention that the Senate veto will not be exercised, whatever the state of party rivalries on other matters. And in the peculiar circumstances of 1975, it is not clear that this convention would not have prevailed. However, the minority (Liberal) party in the Lower House had an effective majority in the Senate and it had settled on the device of simply “not considering” the legislation; and time was running out. In these circumstances, the Governor-General might have instructed the Senate that they had to consider the legislation, leaving the way open for rejection and a double dissolution or for Opposition Senators to behave as the convention dictates and pass the legislation. But that was not the course the Governor-General chose. Instead, he deposed the Labor Party Government of the day, and call on the Liberal Party to form a “caretaker” government in the Lower House until a general (double dissolution) election could be call – this, on the condition that the budgetary provisions were immediately passed in the Senate. In this way, the Liberals went to the polls as the prevailing government – perhaps of some symbolic advantage – and the financial liabilities were met.

The spectacle of an unelected official sacking the democratically elected government of the day struck many people at the time as nothing short of outrageous. It certainly struck members of the sacked Labor government and its ideological supporters that way – and they were not slow to pronounce dire reckonings for the Governor-General personally, and perhaps for the prevailing Constitutional arrangements. The “dismissal” – as this episode has come to be called – has certainly been a force in fuelling republican sentiment in Australia, even if our most recent formal exploration of republican possibilities ended in a retention of the status quo.

The point I wish to focus on in this episode, however, is not so much what happened as what did *not*. The incumbent Prime Minister, furious and outraged as he clearly was, did not dispute the sacking. He might, for example, have instructed the Labor party Senators to vote *against* the budgetary bills when put by Liberals. This would have left the liabilities standing and confounded the Governor-General's scheme. Alternatively, as the "democratically elected" Prime Minister, he might conceivably have simply refused to leave office. Or, in his role as *de facto* head of the armed forces, he may have sought to use the military to defend 'democratic processes' and have the Governor-General arrested. Perhaps he was moderated in his response by the conviction – which he is reported to have held at the time – that the Australian people would not tolerate such a contravention of democratic principle and that he would be duly elected to office in the forthcoming election on a wave of popular outrage. As it happened, in this he was mistaken. It seems that many voters thought that the Governor-General must have had good reasons for sacking the incumbent government, even if they did not quite understand what those reasons were. Constitutional niceties aside, the Government had not been distinguished for its economic management skills, had become involved in a number of dubious deals in relation to international borrowing and had stood quite low in the opinion polls for much of the year. Conceivably, the 'dismissed' Prime Minister and his Labor party were indeed assisted in the ensuing election by a certain 'democratic outrage' factor: they may well have achieved a larger number of seats than they otherwise might have. But in the upshot, the Liberals (the newly incumbent caretaker government) were duly elected and held office for the three succeeding elections. That party was eventually ousted by a totally recast Labor Government – one in which few of the protagonists in the 1975 government remained.

It is interesting to speculate just how big the chances were that something seriously ugly might have transpired in 1975. Conceivably, with other players the worst imaginable possibilities may have been more likely. If that is so, we should regard it as a matter of moral heroism on the part of the dismissed Prime Minister that these prospects did not eventuate. Just what the counterfactuals were and how likely they might have been under other circumstances, it is really impossible to judge. But it *is* worth considering what it is about the practice of Australian democracy that may have discouraged any of the more catastrophic possibilities from being realised.

It is, after all, one of the characteristic features of democratic rule that it routinely manages transfers of power between successive governments

*peacefully*. In normal circumstances, that transfer is secured in a characteristically ‘democratic’ way, via the expressed “will of the people”. But of course defeated governments will normally quit office *reluctantly*. Ousted incumbents will have become used to the perks of office including the public attention and esteem that attaches. They will doubtless believe that the new order will be disastrous for the nation, will adopt all kinds of perverse policies, will set back all that the good things that they themselves have laboured to achieve, and so on. But such reluctance notwithstanding, they typically abide by the rules of the game and accept the vagaries of the electoral process with as much good grace as they can muster (which is often enough a surprisingly large amount). At the very least, they *do* vacate office, as democratic rules require.

Of course, *any* stable political order (democratic or otherwise) requires a certain propensity of people to abide by the ‘rules of the game’. But democracy seems to be more demanding in this respect than other political forms. It is more demanding in at least three ways:

- because when all citizens are engaged in political processes, the number of persons who have to “play the game” is a much larger proportion of the population.
- because there will always be a significant body of citizens (conceivably more than half in a system of geographically defined electorates like Australia’s) who explicitly supported the defeated party.
- And because transitions of power are a more explicit feature of democratic rule than for other kinds of regimes.

It may be worth elaborating on these claims a little.

Any regime, even the most autocratic, is going to require that certain people abide by rules of one kind or another. No autocrat can control a regime without assistance. Although, as Hume remarks, it is an interesting fact that the many can be (and routinely were in Hume’s time) governed by the few, nevertheless those few have to be prepared to operate within the terms of the regime. Democratic order is distinctive, however, in the sense that the whole populace is enrolled in the exercise of sovereignty – or at least, this is the theory. One might wonder whether, as a matter of fact, the role of the ordinary citizen in contemporary democracy has much changed since Hume’s day. A rather perfunctory appearance at the polls every three years or so – or perhaps a decision not to appear – in order to select which group among the political elite is to govern for the next little while, may seem a fair distance from the ideals of citizen self-rule. Perhaps the requirements of democracy for the average citizen

are more concerned with not breaking the laws than with making them. Certainly, citizens have to be rule followers, but arguably not in any sense significantly different from that applying in eighteenth century Britain or contemporary China. Political order is, on this view, still a business of elites “managing” collective affairs, whether those elites are born to office, selected by other members of the elite, or elected by the general populace. Nevertheless, one good reason why incumbents who fail to be re-elected relinquish office willingly is that those incumbents doubt that any significant proportion of the populace would support them were they to do otherwise. It is one thing to support a particular party for government by voting for it and another entirely to support it by taking to the streets if it does not win! Precisely because the populace has participated in the rituals of the party’s (non-)election, failed candidates might expect that the most members of that populace (even their electoral supporters) would regard them just as “failed candidates” and less than totally worthy of any kind of further, non-electoral support, were they to urge such.

What is clearly true of democracy is that the possibility of changes of government is a much more routine feature of the conduct of politics than under other regime types. Under some descriptions the threat of removal by withdrawal of popular support is the primary feature of democratic order and the primary means by which political agents are disciplined. How often that threat is formally posed may differ somewhat from place to place, but there are few recognisably “democratic” cases in which the electoral cycle is greater than five years. There is always a contest; and circumstances are such that the contest is often associated with strong rhetoric. Getting one’s supporters to the polls is often a matter of persuading them that the stakes in this election are huge; and both sides tend to elevate the rhetorical stakes by portraying opposing candidates/parties as “unfit to govern” or as liable to impose “reckless policies that will leave virtually everyone worse off”. Indeed, it seems that this kind of ‘negative rhetoric’ is often more effective in stimulating electoral support for oneself than declaring one’s own virtues – perhaps because it is easier to expose the vices of one’s opponent than it is to display one’s own strengths. In any event, emotions will often run high on both sides. And this, despite the fact that partisans on all sides have heard it all only a few years before. Put another way, specifically democratic political processes characteristically *foreground* electoral rivalry. The associated rhetoric is conducive to the development of strong antipathies, and to reasonably widespread mistrust towards whoever is successful (given the substantial minority who voted against them).

This problem is arguably exacerbated in parliamentary systems by the fact that the ‘opposition’ is maintained as an ongoing piece of the political system. The opposition is always present in parliamentary debate, always keen to expose the errors and inadequacies of the government. Thus, in parliamentary systems, the antagonistic rhetoric is not restricted to periodic elections: it is present throughout the life of parliament and indeed becomes a more or less permanent feature of political processes. In this sense, parliamentary democracy serves to make salient the gladiatorial element in political disagreements – to exacerbate cleavages that might already exist within the polity, to provide rich rhetorical resources for their expression not just inside parliament but outside, and to stimulate a view of politics as irredeemably adversarial. Political scientists may extol the virtues of deliberation and democratic discussion – but the actual practice of politics seems a long way from any such ideals. The reality is nasty, waspish and arguably all too long!

On the other hand, and precisely for this reason, it is worth noting that giving the opposition a permanent institutional presence in ongoing parliamentary practices serves to *reduce* the stakes at issue in the election – for the political parties, if not for the individual candidates. Even if a party loses the election, it does not lose *everything*. It still has representatives in parliament – representatives who have offices and staff and travelling allowances and ongoing public recognition. In parliamentary systems, we might say, the electoral race at the party level is not a “winner-take-all” race, just a “winner-take-most” one. The party who comes second, who forms “Her Majesty’s Loyal Opposition” in the Anglo-Australian terminology, still gets a share of the political rents. So from the point of view of the political elites, the two-party adversarial system is really less adversarial than the participants’ rhetoric would suggest.

And in the same spirit, the frequency of electoral contests means that losers get a chance to win next time around. The higher those chances are, the more relaxed the loser is likely to be about her lack of success. So, although the two-party adversarial party system of democracy in Australia encourages adversarial rhetoric and although parliamentary processes are often characterised by a highly gladiatorial spirit, the real intensity of rival political interests at the level of the political elites themselves is almost certainly less than meets the eye. Parliament itself becomes a kind of political theatre, which the institutional arrangements certainly encourage but which the players themselves equally certainly do not take too seriously.

To refer back to the ‘dismissal’ incident, the fact that the ignominiously dismissed Prime Minister thought he would win the forthcoming

election and the fact that the party recognised that even if that was not the outcome they would get a further chance in three years' time gave them all a stake of a kind in the continuation of the prevailing rules. In much the same way as with a general election called under conventional rules, the dismissal did not deprive anyone of the prospect of popular endorsement; nor did it create a situation in which the loser stood to lose everything.

Of course, the electoral loss proved pretty disastrous for the 'dismissed' Prime Minister when his party was subsequently defeated; and it would probably have been no less disastrous for the then Leader of the Liberal party, who had been complicit in the dismissal process. In that sense, the stakes for the individual protagonists were quite high. But it is doubtful whether either leader could have enlisted his fellow parliamentarians in widespread political violence. In an ultimate sense, the party leaders are the creatures of the parties, not the other way around. And it is worth noting that the stakes for the *parties* are not the same as the stakes for the particular party leaders. [Indeed, it is not infrequently the case that other senior players within the parties might stand to gain if the existing leader falls on political misfortune.]

In the event, the 1975 'crisis' played itself out peaceably enough. The budgetary bills were passed; the election was duly held; the result (though hardly to everyone's taste) was accepted as decisive by the players; the new Government got on with the business of governing with only a very slight sense of triumphalism; and the new Opposition took up its role with some distinct sense of bitterness, but clearly without any inclination to dispute the electoral result itself. The Ex-Prime Minister soon stood down as Leader of the Opposition and retired from parliament, moving into relative obscurity in the admirable way that retiring parliamentarians at all levels have tended to do in the Australian system. The incumbent Governor-General left office earlier than would otherwise have been required – within almost exactly two years – a departure apparently un lamented by anybody, even the people whose political interests he had promoted. Few of the main characters in the drama perhaps emerged "smelling like roses" – but what might have been a major crisis, and conceivably even a catastrophe, turned out to be just an especially engaging piece of political theatre.

There are several broad lessons that this episode suggests, and I want to draw the ends of this little saga together by underlining what I see them to be. Some of them are simply reminders of the features of democracy itself. Some of them are, however, morals of a more normative cast concerning institutional design/reform.

First, then, some observations about democracy:

1. It is a significant defining feature of democratic rule that it arranges for the peaceable transition of power among potential ruling groups. It is worth making this point because other aspects of democratic processes are often fore-grounded in the analysis of democracy as a political system – say, democracy’s instantiation of principles of popular sovereignty; or the incentives it creates among would-be office-holders (including, specifically, current incumbents) to attend to citizen-voter interests; or the manner in which large scale elections select for certain kinds of (maximally election-compatible) candidates.

2. Electoral processes are by their nature ‘rivalrous’ in a manner that makes for conflict. In referring to “rivalry” here I do not mean merely that electoral processes are “competitive” in the sense that they give voters the opportunity to choose among candidates. I mean instead that, in competing for electoral support, candidates are engaged in a highly conflictual rhetorical exercise that involves them in deprecating their opposition, overstating the differences between themselves and other candidates, and appealing to significant divides in the population (sometimes implicitly, since to be seen to foment trouble explicitly might itself be electorally unpopular). Electoral processes make the natural rivalry for office an intrinsic and indeed conspicuous part of the operation of politics.

3. Some variants of democracy make this rivalry more salient than others. Parliamentary democracy with strong parties (especially if there are only two dominant ones) and with a formal ongoing role for the “opposition” is a notable example. Contrast for example the British and the US systems. In the US system, unsuccessful contenders for Presidential office largely disappear once the election is over. It would be unconventional (and probably perceived as “bad form”) if a defeated presidential candidate were to continue in the public eye, criticising the incumbent and the new administration’s policy decisions as a routine part of ongoing politics, after the election were over. But in the British parliamentary system, this adversarial role is a formal and expected part of ongoing democratic process: the “opposition” has a critical role (“critical” in both senses) in the practice of democracy on every issue and every vote. The Australian variant is like the British in this respect – and indeed, the rhetorical style “down under” is less restrained than its UK counterpart. Of course, the resultant gladiatorial aspects make for quite engaging theatre and therefore get the most media coverage. So whereas some conceptions of democratic process focus on “discussion” (of a kind modelled it seems on the academic seminar) and others

focus on “brokerage” – by which I mean the securing of compromise via vote-trading – the Australian and British systems are explicitly adversarial. The major parties are placed in an advocacy role, with the general electorate as a kind of ongoing jury.

4. There are, however, two features of this strong-party adversarial democracy model that somewhat ameliorate its rivalrous character – at the level of practice if not rhetoric. One of these is the fact that electoral competition is not an ‘all-or-nothing’ affair. Because the Opposition gets a share of the rents available from office, the stakes for the parties in losing are not so high. Further, in a (potentially) multi-party system, because each party can look to two possible prizes – one from coming first, and one from coming second – any party faces an extra dimension of competition. Each must look to minimising its chances of losing the race for second prize as well as the race for first, and this additional level of competition induces policy strategies that tend to eliminate the rise of extremist alternatives.

5. The other ameliorative feature relates to the role played by party organization as such. The presence of parties is often a lamented feature of actual democratic process: commentators often view party considerations as interfering in the exercise of independent judgement by representatives in a manner that is not conducive to “getting the right answer”. But electoral competition between *parties* has some distinctive and highly attractive features. Parties have longer horizons than individual candidates. Party leaders typically have more at stake in any electoral episode than do the parties themselves: a defeated party leader often loses the role of party leader. But the party is routinely there to contest the next election, and there always seems to be an array of ambitious aspirants only too happy to have the opportunity to be the *new* party-leader. In short, the stakes for the *party* in any one election are rather less than the stakes for any *individual candidate*. Elections in systems in which parties are not part of the political establishment but simply build around charismatic characters in an ad hoc way are much more “do-or-die” matters: and the intensity of politics usually reflects that fact.

These institutional factors create a context within which democratic politics lives out its ongoing life. Well-designed institutions will encourage a general preparedness to “play by the rules”. The institutional challenge involves walking a tightrope between having the stakes in politics high enough and not having them so high that the players’ incentives to play by the rules will be excessively strained. In the final analysis, however, the players’ dispositions as well as the stakes must

play a role. And among the set of “players” here we need to include not only the ambitious, charismatic leaders that parties have chosen in order to maximise their electoral chances, but also the ordinary citizens whose commitments to the rules of the game would make most of them draw back from supporting an otherwise admired ‘leader’ in any non-democratic adventurism.

Consider, to return to the point of departure, the calculus of the deposed Prime Minister in the ‘dismissal’ affair. He was a charismatic and ambitious person and the stakes for him personally in the whole business were very considerable – nothing less than his future political career. Perhaps the possibility of something beyond just letting the democratic electoral process take its course occurred to him. Or perhaps that ‘something beyond’ was for him totally *unthinkable*. But among the factors that would have made it *more* unthinkable would surely have figured matters such as: how many of his party colleagues he could have carried with him in any such move; and how many of the bureaucrats and army officers and ultimately ordinary citizens would support anything other than simply fighting the ensuing election. If those numbers were small (as I believe they were, and as I believe he *thought* they were), that fact would have made for stability.

For, however contestable the circumstances that invoked the election, and however questionable the actions of the Senate Opposition and the Governor-General, there can be no doubt that the appeal to the general populace for support *through a general election* was seen by everyone as the ultimate way of dealing with the situation. And the deposed Prime Minister must have reckoned that this was as good a chance as he had for public vindication. But encouraging that kind of reckoning is part of the special genius of democracy. Democracy is agonistic in the sense that it replaces warfare by contests that stand in for warfare: elections are the political equivalent to athletic races and verbal contests. And substituting such games for other more direct forms of confrontation is a major political institutional accomplishment – and not the least among democratic virtues.

I have referred to that particular ‘virtue’ as calling for a kind of “constitutional culture” but I do not necessarily mean by this any sort of appeal to foundational documents. I mean rather an obedience to the authority of established conventions – and especially conventions for the settling of political disputes. Politics is ultimately about disputes of one kind or another. Conflicts of interests, conflicts of values, conflicts of judgments, are inevitable in a well-functioning social order.

Such conflicts might be suppressed under some political forms – but democracy makes them a central feature of its ongoing political process. To my taste, that is democracy’s strength. But democracy does sometimes call for a special kind of commitment to the game itself – and to playing by the rules of that game. That commitment was for a moment under challenge in Australia in 1975. As it happened, Australian democracy met that challenge and the moment passed. That was a tribute to the players involved, and not least to the deposed Prime Minister. But the outcome also reflects, I believe, those factors present in the Australian institutional set-up that discouraged him from contemplating alternative, more violent, possibilities. It is therefore relevant to ask whether those factors might possibly offer useful, more general suggestions for the design of democratic political institutions. As I believe they do.

