BOOK REVIEWS


Democracy is an improbable thing. In this book, Anne Twomey takes us back to its roots and discusses the conventions and norms upon which Westminster democracy is grounded.

Writers in other fields tell us that the feature that differentiates homo sapiens from other animals is our ability to achieve cooperation between large numbers. For the great apes, the limit on group cooperation is about 150; for humans, it is limitless: Harari, Sapiens (2014). Our unique ability to unite large groups of people in joint imagined enterprises has enabled us to fight world wars, communicate through the Internet and take man to the moon.

But perhaps our greatest achievement is to govern ourselves collectively in an enterprise we call democracy. That millions – sometimes hundreds of millions – of people can cooperate in a system of governance to achieve common goals is amazing. It is all the more amazing in view of the diverse ethnic, cultural and religious views of the citizenry that makes up a democracy. In the influential Democracy and its Discontents, published amid the Watergate episode of 1974, Daniel Boorstein wrote that democracy was “one of man’s most amazing and surprising achievements on this earth”. He did not exaggerate.

What makes cooperation between people with different views and alliances in the project of democracy possible is a fundamental agreement, seldom fully articulated, on the terms by which people all, regardless of their differences, accept to be governed.

The great political question has always been how to secure the cooperation of the citizenry on how the country should be ruled. One answer – the obvious and most ancient one – is rule by supreme leader (or sometimes co-leaders). The leader achieves power by conquest, heredity, cabal or a combination of these; and rules through fear, reverence, favour, clique or custom. The other answer, dating to the ancient Greeks and taking its name from them, is rule by the citizens themselves – in a word, democracy.

Democracy is a much more complex and sophisticated enterprise than rule by a supreme leader. It depends on everyone, or almost everyone, metaphorically agreeing, tacitly or expressly, to a common set of rules of governance. Such sets of rules are called constitutions. Constitutions may be written or unwritten. Most modern countries have written constitutions. Some, like the United Kingdom, do not.

Whether countries write down their constitutions or choose not to, the reality is that more than words on paper is required for democracy to function. Even countries with elaborate written constitutions cannot capture the totality of the rules and traditions that allow democracy to work. Outside the text of the constitution lie understandings and conventions of how the rules should be applied in particular situations, and what is required to make them work. Thus, Steven Levitsky and Daniel Ziblatt warn in How Democracies Die (2018) that the erosion of unwritten norms of governance like tolerance of different political views – what they call “the guard rails of American Democracy” – may undermine effective democratic governance in the US. And in Canada, which boasts a written constitution, the reality is that governance would be impossible without unwritten norms and conventions. The Canadian Constitution does not contain the words “prime minister” or...
“cabinet” or refer to ministerial responsibility. Yet these concepts are fundamental to the country’s governance. In countries without written constitutions, these norms or “conventions” assume primordial importance.

The historic backdrop of democracies based on the Westminster model was the struggle of Parliament to wrest from the monarch the right to make laws. Yet Parliament’s rout of the monarchy was incomplete; the monarch or her designated colonial governor continued to hold “prerogative” or “reserve” powers. These are vestigial remnants of absolute monarchy that the Glorious Revolution left behind. They remain part of the fundamental agreement of the people on how they will be ruled, and hence vital to a functioning democracy.

Although the prerogative powers in the Head of State of Westminster democracies have never been codified, a broad understanding exists of what they are and how they should be exercised. Most people know that the Queen opens Parliament and signs bills duly passed by Parliament, for example. Yet seldom have the residual powers and their application throughout the world been fully articulated.

Anne Twomey’s book, The Veiled Sceptre, seeks to remedy this deficiency. Without purporting to offer a code — certainty is not possible and codes cannot predict all situations — Twomey describes the prerogative powers and discusses their historical application in England and countries around the world. These powers, based on custom and capable of evolution, are the elastic glue that allows Westminster-style democracy to function.

Twomey outlines the prerogative powers of the Monarch or Head of State, which include appointment of a chief or “prime” minister, summoning or proroguing Parliament, giving royal assent to bills, signing into law orders-in-council or letters patent, making treaties, waging wars, recognising states, issuing passports conferring honours, making certain appointments and appointing Royal Commissions.

Twomey then discusses the principles that animate the prerogative powers of their exercise: the principles of the rule of law, the separation of powers, necessity, representative government, responsible government, ministerial responsibility to Parliament, that there must always be a government in place, and that the Head of State acts upon the advice of responsible ministers.

Twomey goes on to articulate 10 constitutional conventions that have arisen from the principles that govern the exercise of the prerogative powers: (1) the Head of State acts on the advice of elected representative members of Parliament; (2) the Head of State appoints the chief minister as the prime minister; (3) the Head of State appoints or removes ministers on the advice of the chief minister; (4) ministers are collectively and independently responsible to Parliament; (5) a chief minister who has lost the confidence of Parliament must secure dissolution or resign; (6) the Head of State may dismiss the chief minister who has lost Parliament’s confidence if he or she does not dissolve the house or resign within a reasonable period; (7) government actions are limited to acts of ordinary administration until a responsible government is formed; (8) the Head of State may intervene after loss of confidence in the capacity of a caretaker; (9) the resignation of the chief minister entails the resignation of all ministers; and (10) in the case of a hung election, the Government that last held Parliament’s confidence is entitled to remain in power until facing the house and determining where confidence lies.

Having set out the powers, the principles that animate them, and the constitutional conventions that flow from them, Twomey discusses how they have been applied in England and other Westminster democracies around the world. Advice to and from the Head of State, the appointment of a prime minister, the dismissal of a government, the dissolution of Parliament, caretaker conventions, summoning Parliament, prorogation, royal assent, rejection of advice to act illegally or unconstitutionally,
and the appointment and dismissal of vice-regal officers – each of these is given its own chapter. Drawing on a vast range of previously unpublished archival and primary material, Twomey brings new perspectives to old problems.

The powers of a Head of State in Westminster democracy are often seen as symbolic. But they are much more; they are essential to the continued functioning of democracy. The title metaphor of the veiled sceptre captures this: the sceptre may be veiled, but it is nevertheless present. The symbolic is given substance by the continuance of the prerogative powers.

The prerogative powers have served Westminster democracies well; so well that politicians and scholars tend to take them for granted. We are called to consider them only when crises arise. Such crises are rare: the King-Bing affair in Canada in 1926, the dismissal of the Whitlam Government by the Governor-General of Australia in 1975, and the contested demand by Canadian Prime Minister Stephen Harper to the Governor-General to prorogue Parliament in 2008. Yet when they do arise, these crises have the power to shake democracy to its roots.

Anne Twomey’s treatment of the prerogative powers, and the conventions that bind their exercise, is deep and masterful. It is also novel, insofar as it is based on much previously unseen archival material. For the same reason, it is eminently useful. Finally, the treatment is thoughtful; the insights and judgments drawn from this material are reasoned and sound.

The Veiled Sceptre is an important contribution to constitutional scholarship. But it also is important for practical reasons. It reminds us that democracy is fragile, maintained only by adherence to the customs and conventions that have built it and brought it safely through the struggles of the past. And it offers reassurance that these customs, grounded in principle and inherently flexible, will sustain the improbable venture we call democracy through future trials. Scholars, judges, public servants, politicians, lawyers and everyone involved in the administration of systems of responsible democratic government, will profit from this important contribution to the constitutional repository.

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While no book ought to be judged by its cover – nor its title, back cover, blurb or preface – The Choice Theory of Contract invites strong early impressions. The title intrigued first, with the sheer breadth of theoretical appropriation it communicates. The centrality of ideas of voluntariness and free choice in the ethos, theory and doctrinal study of contract law is such that any broad, more or less mainstream contribution to the topic, in the liberal or even non-liberal tradition, could plausibly be labelled “the choice theory of contract”. Turn the title page, and any sense that the authors may have set out to offer a mere survey of the full spectrum of theoretical approaches to their subject, or that they have forgone in advance any claim to originality, is dispelled. The book describes itself as a “landmark in law and jurisprudence” and, in a boast which must test the limits of collegiality in an established and rather crowded field, as “the first coherent, liberal account of contract law”. The blurb departs further from academic publishing convention by providing evaluative