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The Idea of a Constitution

1.1 Meanings of 'Constitution'

Every state in the world claims to have a constitution, but not all of them have constitutional government. Constitutional government, as understood in political philosophy, requires a certain type of constitution: one that limits the powers of political authorities and is not susceptible to easy modification or abrogation by transient holders of political power.

The term 'constitution' has acquired at least three different meanings. In the most common sense, it means a text that has the force of the paramount law: it prevails over every other law that is in conflict with it. In a second sense the 'constitution' means the actual system of government in a country at a given time in history. This is the 'living' as opposed to the paper constitution. It is ascertained not simply by reading the paramount text, but also by consulting supplementary legislation, conventions and relevant judicial precedents, and by studying the less formal political, economic, moral and cultural constraints that shape the system of government. In philosophical literature, we find a third meaning of 'constitution': the idea of a government subject to limitations that have the capacity to withstand momentary currents of opinion or political will through a combination of internal mechanisms, supporting institutions and culture. In that sense, a constitution represents the realisation of a value or ideal identified by the terms 'constitutionalism' and 'constitutional government'. Thus only a certain kind of constitution could be regarded as a constitution in the philosophical sense.

Constitutionalism as an ideal can never be fully realised, but neither can it be wholly rejected in a liberal society. Some constitutions stand closer to the ideal than others.

It is evident from Australia's constitutional documents, its institutions and its political culture that the nation not only has a constitution in the descriptive sense but, relative to other countries, also has strong constitutional government. As well as being subject to formal constitutional and legal constraints, those with political power in Australia are subject to a complex web of less formal constraints including the etiquette of political discourse, the traditions of judicial, journalistic and academic independence, and a wide range of active political, economic and cultural organisations.

This chapter amplifies the ideal of constitutionalism, explains the reasons why it is regarded as worthy of emulation, and demonstrates its importance to the understanding of the fundamental features of the Australian Constitution. The theoretical propositions developed will be considered further in relation to their application to specific features of the Australian constitutional system throughout this book. But before discussing the philosophical idea of a constitution, it is necessary to make some clarifications about constitutions in the first two senses.

1.2 Constitution as Paramount Law

The word 'constitution' is derived from the Latin *constitutio* (a royal statute) as opposed to *consuetudo* (ancient custom). The early use of the term related to particular enactments as opposed to the legal framework of government. The first use of *constitutio* in the sense of a legal framework was by Cicero in *De Re Publica*, in commending the system of mixed government.[1] It does not seem to have entered English usage until the early seventeenth century.[2] The idea of a constitution as paramount law is even more modern, being first established by the US Constitution. A constitution that is the paramount law is of the highest significance, as it overrides every other law that is in conflict with it. Such a constitution is almost invariably found in a written form. Some constitutions are general and brief while others are written in great detail. The detailed constitutions typically designate the key branches of the government such as the legislature, the executive and the judiciary, lay down the methods of determining their composition, define their powers, prescribe procedures for their exercise, set out, where relevant, the constitutionally protected rights and freedoms of the citizen, and state the way the constitution itself may be changed.

If a constitutional text is to serve as the paramount law having overriding effect over other laws, it should not be amenable to repeal or modification by an ordinary law. If it is susceptible to such change, it will not be paramount, but simply another law in force for the time being. Hence, constitutions in this sense contain provisions restricting the ways they can be changed. These restrictions usually take the form of requirements such as special legislative majorities, approval at referenda, approval by a specified proportion of the legislatures of constituent states within a federation, or combinations of such

1 Marcus Tullius Cicero, *Cicero on the Commonwealth*, GH Sabine and SB Smith (tr), Ohio State University Press, Columbus, 1929, pp 129–132.

2 CH McIlwain, *Constitutionalism Ancient and Modern*, Cornell University Press, Ithaca, NY, 1940, p 27.

conditions. The Constitution of the Federal Republic of Germany in fact seeks to place its most fundamental features—the federal structure and the guarantee of basic rights—beyond amendment altogether,[3] and the Supreme Court of India has held that the fundamental structure of the Indian Constitution is not amenable to alteration even by recourse to the special procedures prescribed for constitutional amendment.[4]

Federal systems of government are usually established on the basis of a paramount law. A federal system distributes political authority between a central entity on the one hand and a number of territorial entities on the other hand. The distribution is made in terms of subject matter and territorial limits of jurisdiction. In the absence of a paramount law, such a distribution will be effected by ordinary legislation enacted by the central legislature, which therefore can abrogate or modify the scheme unilaterally by another ordinary law. Indeed, this is the way local government is created and regulated. A federal system can guarantee territorial autonomy only if the division of authority is clearly stated in a constitution that has paramount force.

1.3 Constitution as the System of Government

Whether or not a constitutional text serves as paramount law, it provides a partial description of the system of government, as that government exists at a given moment in its history. It is only a partial description because no constitutional text, however elaborate, can provide a complete or perfectly accurate account of the system of government. The meaning of constitutional texts often must be sought in judicial decisions interpreting or applying particular provisions. In countries where courts have the power to review legislation and executive actions for constitutionality, judicial precedents are a major source of constitutional law. Written constitutions are edited and augmented by conventions and traditions that form during the course of constitutional history. In Australia, the most important political office, that of the Prime Minister, finds no mention in the Constitution and is established by convention. In fact, written constitutions that seek to implement the Westminster model of parliamentary government leave unstated many of the conventions upon which the system depends for its operation.

There are more serious problems in understanding the nature of a political system as distinguished from its official description. If we examine constitutional documents without regard to their institutional and cultural backgrounds, we can be left with very misleading impressions. History is littered with the shreds of splendid constitutions that were trampled by military might. Even today, the forcible overthrow of constitutions is an ever-present threat in some countries. Yet, in other countries, constitutional stability is taken for granted. Indeed, in some countries, the state of constitutional government is much stronger than is suggested by the constitutional documents, while in others the lofty standards prescribed in the constitution remain largely unrealised. The United Kingdom and New Zealand are examples of nations that enjoy constitutional

3 Article 79(3) read with arts 1 and 20.

4 *Indira Nehru Gandhi v Raj Narain* (1975) ASC 2299.

government to a much greater extent than is apparent from their formal constitutional documents and unwritten doctrines. In the United Kingdom, which has no official constitutional document, the Parliament—consisting of the monarch, the House of Lords and the House of Commons—is said to be supreme and subject to no limits.[5] In the case of New Zealand, since 1947 the Parliament (House of Representatives and the Governor-General) has possessed plenary legislative and constituent power that includes the power to change the *Constitution Act* from which Parliament derives its power. In theory, the New Zealand Parliament, by a simple majority of one vote, can extend its own life, abolish courts, proscribe the opposition parties, authorise torture, permit indefinite detention of persons without trial, close down media companies, criminalise criticism of government, and outlaw all forms of private property. However, it is hard even to imagine that any of this would come to pass in New Zealand—and it would be a brave and foolish constitutional lawyer who would stake his or her reputation on Parliament's capacity to do so. Regrettably, at the other end of the spectrum we find nations whose governments have done all these things, and more, in the face of express constitutional prohibitions.

How do we explain this paradox? Close readings of the constitutional law of those nations may provide partial explanations by revealing serious flaws in the constitution itself or in supplementary legislation required for its due operation. For example, a constitution that, on its face, establishes a democratic form of government may not achieve that result if laws governing the conduct of elections (including provisions for recognition of political parties, nomination of candidates, voter registration and procedures for casting and counting votes) are not fair. Likewise, enforcement of constitutional limitations and protection of constitutional freedoms may be aborted if the independence of the courts is undermined by lack of security of tenure, or absence of protection against official and private intimidation. In some constitutions, the fatal flaw lies in the capacity of the executive to suspend the constitution or critical parts of it on the grounds of emergency, with the courts having no jurisdiction to question the presence of the state of emergency.

Even if a constitution is free from such defects, there are no guarantees of its effectiveness or longevity. A constitution, in the formal sense, has no intrinsic capacity to maintain itself. A constitution is sustained by outside forces: the complex web of formal and informal constraints that make up a people's political culture. The characteristics of a constitution—particularly the way it disperses power territorially and according to function, and the degree of difficulty involved in formally amending it—are crucial determinants of its stability. However, like all other constitutional dictates, these features are maintained not by the magical quality of the language of the constitution but by the behaviour of the elements that comprise the political community. This behaviour is shaped by a whole range of formal and informal constraints, of which the formal constitution is but one. Other constraints include habits, customs, moral codes, attitudes, ideologies, economic conditions, and even genetic predispositions. In the literature of

5 Although this situation may have changed, for the moment at least, owing to the weight Parliament and courts are now giving to the law of the European Community.

economics, these constraints, together with the higher-order rules such as constitutional provisions, are known as institutions. Institutions provide the framework of rules within which the game of social life is played out.

1.3.1 Flexible Constitutions

History demonstrates that a constitution—in the sense of the system of government—may exist in the absence of a paramount text. The Roman Republic at its zenith did not have a paramount law. The United Kingdom does not have a written constitution that serves as paramount law. The great organs of government—the Parliament, the superior courts, the executive (Prime Minister and Cabinet) and the monarchy—derive their composition, powers, privileges and their basic procedures from ancient custom and common law, conventional practice, and a few historic and defining statutes. These are *Magna Carta 1215*, the *Petition of Right 1628*, the *Bill of Rights 1689* (and its Scottish version the *Claim of Right 1689*), the *Act of Settlement 1701*, the *Act of Union with Scotland 1707*, the Parliament Acts of 1911 and 1949, the *Statute of Westminster 1931*, the *Reform Act 1832* (and subsequent statutes extending the franchise), the *Crown Proceedings Act 1947* and the *European Communities Act 1972*. To determine the law relating to the prerogatives of the Crown, or the basic rights and liberties of the citizen, British lawyers turn to judicial precedent rather than to a written constitution.

The most fundamental rule of the Constitution—the one that bestows validity on all Acts of Parliament—is nowhere to be found except in the determination of the courts never to refuse the application of relevant Acts to the cases before them and never to recognise or enforce any rule or command of any other person or body that contravenes or derogates from an Act of Parliament. Where courts do appear to recognise or enforce the laws of other bodies—such as the law of the European Union—British lawyers would argue that they do so under the authority of Parliament. This judicial attitude was unequivocally established only after the Glorious Revolution of 1688. Before that event, it was a real possibility that an Act of Parliament would be invalidated for being against 'common right and reason' enshrined in the common law, as Chief Justice Coke asserted in Dr Bonham's Case.[6] The consequence of this attitude is the so-called supremacy of Parliament, which confers a theoretically unlimited power to make law on any subject and to any effect whatsoever. In practice, the legislative power of Parliament is exercised by the majority party in the House of Commons, which is usually elected by a minority of voters under Britain's 'first past the post' election system.

Since the Parliament Acts of 1911 and 1949, the House of Lords has not been able to veto money bills, and it may only delay other public bills (except bills to prolong the life of Parliament) for one year. The third component of Parliament, the monarch, by convention does not deny assent to any bill passed by the two houses or by the Commons alone in the circumstances set out in the Parliament Acts. The authority of Parliament conceivably includes the power to abrogate the most basic rights and

6 (1610) 8 Co Rep 113b at 118a.

freedoms of the citizens—and even to disempower or abolish the courts themselves, though we will not know the full extent of this authority until we observe the reaction of the courts to such extreme parliamentary measures, if and when they come to pass. What we do know is that the chances of the British Parliament enacting such measures are slender, given the strength of the formal and informal constraints placed upon it by the institutions and culture that make up the British political system. The connections between these constraints and constitutionalism will presently be considered further.

The United Kingdom is not the only country that has achieved a high degree of constitutional government without the aid of a paramount law. As already observed, the powers of the New Zealand Parliament are similar to those of the British Parliament. Though New Zealand has a Constitution Act, its provisions are alterable by ordinary legislation. Yet that country ranks high among the nations that have achieved constitutional government. The State of Israel also does not have a paramount law. Though Israel's Declaration of Independence called on the Knesset to adopt a paramount constitution, the task remains unaccomplished. Instead, the Knesset has adopted a series of Basic Laws, and is in the process of preparing several more, which together will ultimately form a constitutional document. Even so, until the 1995 judgment in *Bank Mizrahi v Migdal Cooperative Village* discussed in the next chapter, these Basic Laws had no paramount status and were derogable by any Act that clearly intends to have that effect. Despite this, Israel has maintained a robust constitutional democracy that has withstood the tremendous pressures of military conflict and insecurity.

In many countries with parliamentary (as opposed to presidential) systems of government, the constitution is a written document that nonetheless leaves unexpressed some of the most crucial elements of the constitution. In the Commonwealth of Australia, the rule that a government that loses the confidence of the House of Representatives should resign (to allow the formation of an alternative government, or to allow the nation to elect another parliament) is not found in the written Constitution. The Australian Constitution expressly vests executive power in the Queen, to be exercised on her behalf by the Governor-General.[7] Yet it is kindergarten knowledge that executive power is, by convention, exercised by the Prime Minister and other ministers. The institutions of the Prime Minister and the Cabinet—arguably the most powerful political agents in the country—are not recognised in the written Constitution but exist by convention. The Governor-General by convention grants assent to every bill passed by the two Houses of Parliament.

All these examples demonstrate that the living constitution (in the sense of the living system of government) will deviate often from the formal constitution (in the sense of the official description of the system of government). To ascertain the 'real' constitution, we have to examine the ways officials and citizens behave in the conduct of government.

7 Section 61.

1.4 Constitution in the Philosophical Sense

A constitution in the philosophical sense is a constitution of a particular type. It limits the powers of rulers by subordinating them to enduring rules that they themselves cannot abrogate. Such a constitution is inextricably associated with the ideal of the rule of law, which seeks to ensure that people are not at the mercy of the momentary will of a ruler or a ruling group, but enjoy stability of life, liberty and property.

The need for a constitution in the philosophical sense arises as a consequence of the rise of the state. In the evolution of social groups, a point is inevitably reached at which common needs arise that can be met most efficiently by collective action. Collective action can be effected through the agreement of group members. This is the way various types of social clubs, trading corporations and private charities attain their goals. However, for certain types of ends—such as the defence of the group from external threats, the maintenance of internal peace, the protection of the person and property of individuals, and the provision of other public goods such as highways, ports and irrigation systems—the selected means is almost always the coercive state. It seems that the difficulties of coordinating and performing these tasks, including the problems posed by free riding, are not easy to solve through entirely voluntary private arrangements. Whatever may be the reasons, the coercive state is ubiquitous. The problem is that, once established, coercive authority is difficult to control. Like all possessors of valuable assets, the wielders of coercive authority tend to employ their power in the service of their own private ends. This is the principle of human nature that Lord Acton, echoing William Pitt the Elder and Lord Brougham before him, hyperbolised in his famous line: 'Power tends to corrupt, and absolute power corrupts absolutely.' Since private ends are ever-changing, the exercise of power becomes not only corrupt, but also arbitrary. The arbitrariness of rulers destabilises people's rights, destroys personal autonomy and diminishes the capacity for self-fulfilment. Here we have the perennial problem of the state: how do we simultaneously create authority and prevent its abuse? Throughout the recorded history of Western civilisation, philosophers and statesmen have been attracted to the idea of the 'constitution' as the solution to this problem.

The crucial realisation of constitutionalists was that the cure for the abuse of power was not the establishment of even greater power, nor the replacement of one arbitrary power-holder with another. Greater uncontrolled power poses greater danger. We may gain transient relief by replacing a villainous despot with a benevolent one, but in the absence of restraints we cannot prevent the relapse into tyranny. An assumption implicit in authoritarian political theory is that there is good and bad arbitrary power, and that bad arbitrary power may be controlled by good arbitrary power. This is a logical and empirical fallacy. It is like saying that fire can be extinguished by more fire, or that moisture may be removed by more moisture. Arbitrary power can be tamed only by its opposite, the absence of arbitrary power, or by the presence of regularity. Of course, arbitrariness cannot be altogether eliminated from human affairs, but it can be reduced in the hands of governments by the supremacy of general rules. The essence of the constitution in the philosophical sense is thus the limitation of power and the prevention of its arbitrary exercise by the rule of law.

1.5 Objections to the Rule of Law

The ideal of the constitution as a system of governance according to law is, understandably, always under threat. Power is a perennial temptation to the human mind, owing to the enormous rewards it bestows on its holders. This is too obvious a fact for us to argue about. However, there are many serious thinkers who object to the rule of law for intellectual reasons. The threat to the rule of law from intellectual thought intensified even as the threat from temptation to seek reward from power diminished. The intellectual objections to the rule of law fall into three main categories: that the rule of law is inefficient; that the rule of law is oppressive; and that the rule of law is not possible. They are all, in our view, equally untenable.

1.5.1 Objection 1: The Rule of Law is Inefficient as Compared with the Rule of Persons

Ever since Aristotle posed his celebrated question whether it is better to be ruled by the best laws or by the best people, opponents of the rule of law have sought to demonstrate that the rule of men is more sensible than the rule of law for reasons of efficiency. From ancient times people have found it counterintuitive that rules should be allowed to get in the way of wise judgment. As Aristotle himself reported, the argument made by advocates of absolute royalty was that 'the laws speak only in general terms, and cannot provide for circumstances; and that for any science, to abide by written rules is absurd … a government acting according to written laws is plainly not the best'.[8] Aristotle rejected this view, stating that '[h]e is a better ruler who is free from passion than he who is passionate. Whereas the law is passionless, passion must ever sway the heart of man.'[9]

The common belief then, as it is now, was that, all else being equal, the ruler who is free to tailor his or her actions to meet the requirements of the moment is more likely to get it right than the ruler whose actions are controlled by general rules. This belief is at the heart of the thinking that justifies the proliferation of wide discretionary powers to officials on the ground that such powers are needed to achieve the economic and social goals of government. How can the rulers ensure that the workers are paid what they deserve, or that particular groups are hired in particular numbers, or that capital is invested in the public interest, or that language does not offend particular groups, or that traders do not sell substandard goods, or that only the deserving are allowed to trade, or that the public is not exposed to harmful messages on the television, if they are bound to rule by general laws? These goals can be achieved only by continually adjusting, in myriad ways, people's legal rights and duties.

However, we should notice the difference between the attitudes of absolute despots and proponents of the modern welfare state with respect to the rule of law. Absolute despotism tends to reject the supremacy of both substantive law and procedural law. It is likely to claim not only the power to be above the substantive law, but also immunity

8 Aristotle, *Politics*, B Jowett (tr), Oxford University Press, Oxford, 1916, p 136.
9 Ibid.

from any requirements of due process. For example, such a regime may grant itself power to forcibly transfer the property of one citizen to another without legal authorisation and without affording the owner the benefit of a hearing. The act of transferring will, in itself, provide the grounds for its validity. In contrast, the proponent of the welfare state might insist that any transfer of property should be done only under the authority of a law duly enacted and after providing a fair hearing. Thus social democrats are likely to espouse the supremacy of the law while claiming the right to subordinate the substantive law to the discretion of officials where necessary to achieve public policy goals or social justice aims. The reader will notice that there is a tension between the claims for legal flexibility and the demand of the rule of law. Discretions are often granted in terms that make judicial review very difficult. The capacity of courts to restrain officials by recourse to the traditional grounds of exceeding powers or failing to observe natural justice or procedural fairness are diminished when powers are granted in unguided form, allowing officials to tailor the law for the individual case. The wider the discretion with respect to the making of substantive law, the narrower is the capacity of courts to maintain the supremacy of due process.

Mass democracy encouraged the belief that free and fair elections provided a sufficient guarantee that the public interest would prevail over the personal ambitions of rulers. Certainly, democracy diminished the incidence of personal abuse of power. Yet, during this period, the extent of arbitrary powers of government dramatically increased as elected governments sought to reshape society and to create entitlements to goods in exchange for votes. The general and impersonal rules concerning the ownership of property, the binding effect of contract, and fault-based liability for tort were displaced piecemeal by statutory discretions.

In the last two decades, there has been a noticeable trend worldwide for governments to be less interventionist in economic matters, though not necessarily on moral and social issues.

1.5.2 Objection 2: The Rule of Law is Oppressive

The second common objection to the rule of law—and hence also to constitutionalism—is that it is intrinsically oppressive. More often than not these critics also consider that the substantive content of the law found everywhere is unjust. But they claim their objection extends beyond the complaint that particular laws are bad. If so, we can make them better. However, these critics argue that the very idea of the supremacy of the law is objectionable. There are a number of variants of this theme, the best known being the Marxist critique.

In Marxist analysis, the social order has a base or substructure representing the actual material conditions of life and the forces of production in the economy. The State and the law make up society's superstructure. Initially, in the conditions of surplus, there is no private property, and there are no laws—just a natural community. Law develops concurrently with private property, signalling the disintegration of natural community. As the means of production changes through the feudal and capitalist phases of history, so do law and legal ideology. The ideal of the rule of law is a manifestation of the capitalist

modes of production based on the exploitation of workers. Karl Marx and his followers realised that it was the rule of law that made private property, and hence capitalism, possible. Law and capitalism were inseparable. The end of one entailed the end of the other. The proletarian dictatorship would abolish private property, end exploitation, and usher in the utopian communist era. Marx and his followers theorised that when there is no private property and no exploitative modes of production, the law's purpose will be at an end, and law together with its enforcer, the State, will wither away. History has not vindicated this prophecy.

Variants of this theme recur in radical postmodern and group-centred legal theory. In Michel Foucault's thinking, law as a system of right provides polymorphous techniques of subjugation and domination.[10] In radical feminist thought, the values associated with traditional legal methodologies such as rationality, autonomy, objectivity and neutrality are male oriented, and hence cause the legal system to overlook or trivialise the concerns of women.[11] Similar and parallel reasoning occurs in critical race theory and other forms of group-centred jurisprudence.[12] The objection to the rule of law from these schools of thought can be seen at two levels. At one level, they complain that the methodological demands of the ideal—such as autonomy, impartiality and rationality—disadvantage groups that are culturally unattuned to such values. A group that is accustomed to more informal and conciliatory legal relations may claim to be alienated by a system that enthrones impersonal laws and indifferent adjudication. At another level, this jurisprudence claims that the rule of law operates at such a degree of generality that it fails to recognise or respect the particularities of groups and their aspirations. It is claimed, for example, by feminist legal theorists that the rules concerning the defences of provocation and self-defence in criminal law and the test of the reasonable person in tort law are based on universal standards that take no account of the special position of women.

These objections may be met on a number of planes. First, they are based on exaggerated complaints. The problem of over-generalisation does crop up from time to time in the general rules of law, but the courts and legislatures in developed legal systems cope with these rules reasonably well, though often controversially. Also, as modern commercial practice of alternative dispute resolution shows, informal and conciliatory modes of dispute resolution can actually flourish in law-governed communities. Second, many of the complaints amount to no more than objections to specific general rules. In order to establish that the rule of law as an ideal is oppressive, these critics have to demonstrate that its methodologies are inherently incapable of producing reasonable and workable categories. Third, the critics overlook the social value of law: its capacity to facilitate the coordination of the activities of persons and groups while enabling them to pursue their own different ends. In this sense, there is really no alternative to the ideal of the rule of law.

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10 M Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, C Gordon (ed), Pantheon Books, New York, 1980, p 96.

11 M Davies, *Asking the Law Question*, Law Book Company, Sydney, 1994, p 168.

12 For further discussion of these schools of jurisprudence, see J Crowe, *Legal Theory*, Thomson Reuters, Sydney, 2009, Chapter 5; S Ratnapala, *Jurisprudence*, Cambridge University Press, Melbourne, 2009, Chapter 8.

1.5.3 Objection 3: The Rule of Law is not Possible

The assertion that the rule of law is not possible is mainly associated with postmodern critical theory. The rule of law presupposes first that the law is ascertainable and second that the law is capable of being applied to objectively established factual situations. The postmodern critique challenges both assertions. Lawyers readily admit that the law is often difficult to ascertain, as are the facts to which the law needs to be applied. After all, if questions of law and fact are always easily determined, there will be much less work for lawyers! However, the postmodern challenge is far more radical. It asserts that law, like all texts, has no privileged interpretation—and furthermore that our knowledge of the world is either entirely subjective or socially constructed. Hence, the rule of law is a fiction.

Language game theorists, for example, treat knowledge as something legitimated by the conventions of the relevant speech community. According to them, knowledge questions are not 'undecidable'. Indeed, on this question Richard Rorty, a postmodern champion of rhetoric against philosophy, accuses Jacques Derrida of succumbing 'to nostalgia, to the lure of philosophical system building, and specifically that of constructing yet another transcendental idealism'.[13] According to language game theorists, knowledge, though lacking a transcendent foundation, is not a matter of unbridled subjectivism. These theorists try to show that the standards we develop for such matters as justice and truth are the products of specific language games, conventions, shared normative understandings or community practices, due to change when new contingencies arise from whatever source, including pure happenstance.[14] According to language game theory, knowledge is anchored in a contingent 'reality'. However, this 'reality' consists not of unsubsumable singularities, as Derrida alleges, but of understandings that are in harmony with the conventions of the relevant community. As Jean-François Lyotard sees it, truth is that which conforms to the 'relevant criteria … accepted in the social circle of the knower's interlocutors'.[15] According to Stanley Fish, this makes the individual a 'situated subject … who is always constrained by the local or community standards and criteria of which his judgment is an extension'.[16] Language game theory's concession to a relatively stable though contingent form of communal knowledge appears to accommodate the rule of law, at least in a limited way. It means that rules can have stable meanings such that they are capable of guiding human action in the context of a given community.[17]

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13 R Rorty, *Consequences of Pragmatism*, University of Minnesota Press, Minneapolis, 1982, p 89.

14 A Wolfe, 'Algorithmic Justice', in D Cornell, M Rosenfeld and DG Carlson (eds), *Deconstruction and the Possibility of Justice*, Routledge, New York, p 361. Compare S Fish, *Doing What Comes Naturally*, Duke University Press, Durham, NC, 1989, p 323.

15 F Lyotard, *The Postmodern Condition*, University of Minnesota, Minneapolis, 1984, p 19.

16 S Fish, *Doing What Comes Naturally*, Duke University Press, Durham, NC, 1989, p 323.

17 For further discussion of postmodernism and law, see Crowe, above n 12, pp 97–105; Ratnapala, above n 12, pp 223–233.

1.6 Advantages of the Rule of Law and Constitutionalism

As against the previously outlined objections the rule of law has many advantages. Lon Fuller observed that eight desirable qualities made up law's inner morality, and claimed that to the extent that legislators fail to endow law with these qualities, they fail to make law. The qualities are (1) generality; (2) prospectivity; (3) promulgation; (4) clarity; (5) consistency (within and among laws); (6) constancy (infrequency of rule changes); (7) possibility of compliance; and (8) congruence between proclamation and enforcement.[18] H L A Hart and other critics fiercely dispute the notion that these are moral qualities.[19] Moral or not, it is clear that laws endowed with these qualities have great advantages over laws lacking them. Laws that are applied without pattern from case to case, or are unannounced, or penalise past lawful conduct, or are incomprehensible, contradictory and ever-changing, or are impossible to observe, or are arbitrarily enforced by officials, have little capacity to guide human behaviour or to facilitate coordination among members of a society. In contrast, laws that are blessed with Fuller's eight qualities bestow three great advantages on human communities.

The first advantage is that we have much more knowledge about the likely effect upon us of such laws than about the effect of laws authorising the making of end-specific decrees. A general law applies to all persons or an indefinite number of unknown persons, but one could reasonably predict beforehand which kinds of persons or actions would attract its force. The general rule that prohibits the sale of heroin tells us that if we sell heroin we are liable to the prescribed punishment. But if legislation prohibits trade in any substance that has not been approved by a government agency, it is not easy to predict who will be advantaged, and who disadvantaged, by the law. This means that laws of general application, when consensually determined, are likely to embody more knowledge than laws whose content is determined from case to case at the will of an authority at a particular time. Since we have greater knowledge of the way general laws affect us, we also have greater ability to evaluate their operation through the democratic process and to repeal them or modify them where they prove harmful.

The consequences of laws that fail to prescribe rules, but provide for patternless official interventions in the lives of individuals and in the order of society, are difficult to track and to correct. Legislators who enact these laws always justify them with reference to some theory of the social good or some moral standard. However, since the law applicable to one person is not the law applicable to another, and because we also have no knowledge of the facts relevant to each case, it is difficult to determine whether official actions advance or impede the aims of the statute, either in the individual case or cumulatively. It is true that with respect to some kinds of discretionary powers, official actions are not entirely unpredictable, as decision making tends to settle into certain patterns dictated by the policy and the philosophy of the statute. However, this kind of regularity is very different from the regularity of general rules that exist independently of

18 L Fuller, *The Morality of Law*, revised edition, Yale University Press, New Haven, Conn, 1964, Chapter 2.
19 See Crowe, above n 12, pp 58–66; Ratnapala, above n 12, pp 161–173.

anyone's momentary will. The regularities of official behaviour exist as a matter of official convenience, and hence do not create binding rules or enforceable expectations. All of this indicates that it is much easier for a community to agree on general rules of conduct than to agree on the way an open-ended statute should operate in the individual case.

The second advantage of laws that possess Fuller's qualities arises from their greater predictability. Human beings live in an uncertain world. They survive by their ability to cope with their environment. In addition to their physical environment, humans have created for themselves a complex cultural environment which, in many ways, has reduced the uncertainties of the physical environment. To take the two most obvious examples: as a result of culture, we have protection from the elements and a degree of control over disease. However, culture can create its own uncertainties, as we observe in the field of law. Laws that do not announce their normative content beforehand, but empower officials to determine rights and duties in the individual case, introduce a new source of uncertainty that makes our task of survival harder.

The third advantage is closely related to the second, but is distinguishable. Rules that possess the eight qualities not only make the environment less unpredictable, but they also leave individuals much greater scope to utilise knowledge that they alone possess and thus adapt better to their own conditions. This is because they leave wide areas of autonomy within which individuals may arrange their own affairs. The use of this knowledge improves the adaptiveness of the social order as a whole.

The value of constitutionalism, in this context, lies in its potential to constrain legislators and other power holders by exposing their decisions to broad public scrutiny. Constitutions, to the degree that they reduce arbitrariness of official actions, compel rulers to adopt and observe standards that are capable of being tested in the arena of public debate and choice. The wider aim of this book is the study of the ways, and the extent to which, the Australian constitutional system achieves this end.