SURI RATNAPALA'S CONTRIBUTION TO THE UNDERSTANDING OF THE RULE OF LAW

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I INTRODUCTION

This article discusses the contributions of Suri Ratnapala to the understanding of the rule of law. As we write this, Ratnapala is Professor of Public Law at The University of Queensland and a Fellow of the Australian Academy of Law. He is a leading libertarian scholar and the author of numerous books primarily in the areas of constitutional law and legal philosophy. Although his libertarian approach amounts to a species of classical liberalism that advocates individual liberty, free markets, and limited government, all this is done not in the tradition of 'natural rights' but shaped by the evolutionary tradition of Mandeville, Hume, Smith, Ferguson, and Hayek. From this viewpoint, human rights (and rules of justice) are not God-given or 'natural' but 'artificial' in the Humean (conventional) sense; they are the products of human action, though not necessarily of human design, arising through the sedimentation of human action and experience. In the age of legislation, they are subject to deliberate revision as experience demands.

II RATNAPALA'S DEFINITION OF THE RULE OF LAW

Ratnapala supports a substantive conception of the rule of law which declares the priority of the individual over the state. According to him, the rule of law is the bedrock of every constitutional government and hence of personal freedom. Thus he associates this ideal of legality with the Western liberal tradition of individual rights and liberties. This tradition presupposes the generality of laws but does not necessarily require that laws should have universal application. Rather, the concept inheres in the recognition of general rules insofar as it generates 'a rational and non-arbitrary basis for differential treatment of individuals and groups'.[1]

Ratnapala's understanding of the rule of law is linked to the ideal of constitutional government. Although he reminds us that every state might be said to have a constitution, Ratnapala explains that the concept of *constitutional government* comes from a specific tradition of the rule of law, so it can only be applied to societies whose fundamental rules are designated to impose efficient restraints on the exercise of governmental power. As Ratnapala points out:

> Every country claims to have a constitution but not many enjoy constitutional government. By this, we mean a system of government under law where rulers are denied extensive arbitrary power by institutional checks and balances and they rule with the consent of the people. Constitutionalism refers to the commitment to this form of government. No country has achieved constitutional government in its ideal form but some countries are

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1 Suri Ratnapala, 'Securing Constitutional Government: The Perpetual Challenge' (2003) VIII(1) *The Independent Review* 9.

> closer than others. Australia has an enviable standard relative to most countries.[2]

Ratnapala also explains that constitutional government, in its more practical achievement, necessitates a 'culture of constitutionalism'. In the absence of such a culture, a government can even draft a 'good' constitution; but this, in and of itself, will not ensure that the government is under the law or that legal rights will be seriously respected. On the contrary, these rights may in actual practice be worth no more than the paper on which they are written. As such, Ratnapala concludes that constitutional government requires far more than just a well-written constitution. Essentially, Ratnapala continues:

> The best constitution is to no avail if it does not command the respect of officials and citizens. Hence this form of government is unsustainable without a proper culture of constitutionalism. Such culture depends in part on favourable historical, social and economic conditions. An inquiry about these conditions will lead us into fields of social science… However, we accept as political fact that in Australia the body of law comprising the constitutional documents and their judicial interpretations command a degree of fidelity that enables us to gain from them a reliable account of the state of constitutional government in Australia.[3]

Ratnapala recognises the inherently philosophical link between the rule of law and the concept of constitutional government. This link derives from a liberal tradition of government under the law. According to this liberal tradition, which laid the basis for the legal protection of fundamental rights against political tyranny, to be under the rule of law presupposes the existence of rules serving as an effective check on the exercise of government power. Since Ratnapala clearly interprets the rule of law in light of a broader scheme of constitutional protection, the power of the state must be subordinated to checks and balances as well as to enduring rules of law. Accordingly, as Ratnapala points out:

> 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.[4]

III THE 'CORNERSTONE OF LIBERTY'

Ratnapala views the concept of separation of powers as being 'the cornerstone of liberty under law',[5] and is well established as one of Australia's leading authorities in relation to this fundamentally important doctrine. His conception of the separation of

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2 Suri Ratnapala, Thomas John, Vanitha Karean and Cornelia Koch, *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, 2007) 4.

3 Ibid.

4 Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2002) 7.

5 Suri Ratnapala, 'Separation of Powers: The Cornerstone of Liberty under Law' in Suri Ratnapala and Gabriël Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011).

powers reflects the classical tripartite model that was outlined by Montesquieu, Locke (most notably in the *Second Treatise of Civil Government*) and Madison (most notably in *The Federalist Papers*), and which Ratnapala sees as being most closely realised in modern terms in the United States Constitution.

This tripartite separation is explained by Ratnapala in the following terms:[6]

> The removal of the executive and judicial powers from the legislative assembly is the key means by which the legislature is constrained to the making of laws in the general public interest. The independent judiciary helps to confine the legislature to its proper function and the executive that is charged with the administration of the government under the law and the execution of the laws is denied the legislative power through which it can validate its own actions.

The classical formulation of the separation of powers 'is most commonly explained in terms of its tendency to prevent tyranny by the dispersal of powers'.[7] Ratnapala observes, however, that 'the absence of tyranny is an essential but not sufficient condition of constitutional government as the democracies of the classical world discovered' and that an additional challenge for the constitutionalist seeking to protect the separation of powers is also to devise ways of protecting democracy from 'the capture of factions'.[8] Protecting against the tyranny of majorities is in this sense an important element of the protection afforded by the separation of powers doctrine in practice.

Ratnapala views the doctrine of the separation of powers as including two distinct notions, namely the 'methodological thesis' and the 'diffusion thesis'. The methodological thesis 'is about the nature of each power and the manner in which the power must be exercised' and 'holds that the legislative, executive and judicial powers each have their own character that requires the power to be exercised in a manner appropriate to that power'.[9] By contrast, the diffusion thesis 'is about the allocation of power' and provides that 'the rule of law and constitutional government is secure only when legislative, executive and judicial powers are reposed in different agencies of the state which are independent of each other to a substantial degree'.[10] Ratnapala explains that neither thesis is sufficient by itself, but rather that both are required to protect the advantages sought to be obtained through establishing a constitutionally entrenched separation of powers.

The key challenge to the classical tripartite separation of powers under modern Australian constitutional arrangements is seen by Ratnapala as being the diminution of a strict separation of powers between the Executive and Legislative arms, arising as a result of the Westminster system of government. While the separation of powers doctrine has been seen to come under severe pressure in both presidential and parliamentary systems, 'it has been most vulnerable in the parliamentary systems'.[11] The classical conception of a tripartite separation is now in practice characterised as a '20th century version of the two-fold division' with the executive-legislative division being unclear while the judicial and non-judicial separation is seen as paramount.[12] Ratnapala views the system of responsible government, and particularly the modern

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6 Suri Ratnapala, 'Sri Lanka at the Constitutional Crossroads: Gaullist Presidentialism, Westminster Democracy or Tripartite Separation of Powers' [2003/2004] *LAWASIA Journal* 33, 54.

7 Ibid 53.

8 Ibid.

9 Ratnapala, above n 5, 53-54.

10 Ibid 54.

11 Ratnapala, above n 6, 49.

12 Ratnapala, above n 5, 56.

requirement of strict party discipline, as undermining the principle of executive responsibility to Parliament and resulting in a Parliament that is effectively subservient to the Executive.

While the key virtue of the Westminster system in the classical era was its intended ability to make the Executive responsible to an elected Parliament, Ratnapala recognises that this is no longer realistically the case in either Britain or Australia. Indeed, '[t]he great virtue of Westminster democracy has become its fatal contradiction'.[13] The seeds for its demise can be seen in the transfer of executive power to the ministry and the development of the convention that a minister who lost the confidence of the Parliament would have to resign. This has resulted in the development of an increasingly strict party discipline necessary to ensure the continued survival of the government on the floor of the Parliament. Ratnapala sees merit in the observation of Professor Geoffrey Brennan that Parliament has become 'a prize awarded to the winner of an electoral competition' and 'just a piece of theatre'.[14] Indeed, Ratnapala observes:[15]

> It is one of the tremendous ironies of political history that the growth of Parliament's legal power to remove a government from office actually reduced its political power to hold a government to account. The institutional separation of the executive and legislative branches was obliterated, and the Executive regained its ascendancy over Parliament, except in the unusual instances when the government party does not have a majority in the lower House.

One way that Ratnapala sees this as manifesting itself in Australia is through the expanding volume of legislative discretions granted to the executive, which he views as being 'a bit like entrusting the sheep to the wolf'.[16] According to Ratnapala '[t]he rule against the delegation of wide law making power to the executive is a major component of the classical doctrine of the separation of powers. When officials can both legislate and execute their legislation, they have the potential to place themselves above the law, for the law is what they command'.[17] To protect against such an outcome 'parliamentary democracies rely heavily on judicial oversight of executive action'.[18] Pointing to decisions such as *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*[19] Ratnapala observes that:[20]

> In Australia, the High Court, despite having full judicial review power has declined to impose on Parliament any significant constraint in its competence to delegate its legislative power to the executive. The Court has chosen to emulate the British position on delegated legislation rather than draw a line in the sand against excessive delegation, despite the clear differences between its powers and the powers of British Courts.

This dilution of executive and legislative separation is seen as having a number of significant implications, each of which Ratnapala views as being key flaws in the modern Australian constitutional scheme. Notably, the system does not ensure popular

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13 Ratnapala, above n 6, 45.

14 Geoffrey Brennan, 'Australian Parliamentary Democracy: One Cheer for the Status Quo' (1995) 11(1) *Policy* 17, 20.

15 Suri Ratnapala, 'The Missed Opportunity' in *Upholding the Australian Constitution* (Proceedings of the Tenth Conference of The Samuel Griffith Society, Brisbane, August 1998).

16 Ratnapala, above n 6, 50.

17 Ibid 49.

18 Suri Ratnapala, above n 5, 55.

19 (1931) 46 CLR 73.

20 Ratnapala, above n 6, 49-50.

government (in terms of producing executive government that reflects the choice of the majority of the people), makes Parliament subservient to the Executive, 'reduces the capacity of public opinion to have a decisive influence on specific legislative measures',[21] 'tolerates greater arbitrariness in government owing to the fusion of legislative and executive powers'[22] and reduces the talent available to serve in the executive by requiring Ministers of State to also be Members of Parliament.[23]

The classical understanding of a distinct separation of powers between the Executive and Legislature is seen by Ratnapala as receiving greater continued protection in practice under the United States Constitution. To this end, he has previously proposed that Australia 'should seriously consider adopting a modified version of the American constitutional model',[24] primarily so as to regain the advantages of the protections originally intended under the classical tripartite conception of the separation of powers. Key reforms that he suggests may help to secure these advantages include introducing a system where the Executive is directly and separately elected by a preferential system of voting, reducing party discipline to secure a more appropriate balance between party solidarity and candidate independence, and allowing a directly elected executive President to choose an administration from a nation-wide pool of talent. While acknowledging that there is 'virtually no support for this model from political parties' Ratnapala expressed the hope that his suggestions might encourage informed discussion and debate on improving the constitutional system in Australia.[25]

To this end, throughout his writings Ratnapala has consistently advocated in favour of grasping opportunities for constitutional reforms that advance the public good, and in particular strengthen the separation of powers. For example, he viewed the 1998 Constitutional Convention and surrounding Australian republican debate as 'a missed opportunity for genuine republican reform in Australia' in the classical sense of a republic being a form of government designed to advance the *res publica* (public good).[26] Similarly, in writing about the opportunity for constitutional reform in Sri Lanka, Ratnapala has advocated the adoption of a constitutional structure entrenching a tripartite separation of powers so as to 'best meet the demands of governmental stability, democratic accountability and the protection of minority interests in this multi-ethnic and multi-religious nation'.[27] These suggestions for reform are based on the view that 'when an opportunity for substantial constitutional reform presents itself, a nation should seek to entrench a constitutional structure that is most favourable to the maintenance of the rule of law over the long term'.[28]At the same time, Ratnapala acknowledges that in Australia while '[t]he new constitutional equilibrium is an apparent negation of both the diffusion thesis and the methodological thesis of the separation of powers doctrine in so far as it concerns the executive-legislative divide ... the dire consequences for liberty and constitutional government feared by scholars have not come to pass'.[29] Ratnapala suggests that there are legal, social and economic reasons for this. In terms of legal causes, he observes that the steady expansion of

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21 Ibid. See also Suri Ratnapala, 'The Case for Adopting the American Model in an Australian Republic' (1999) 20(2) *University of Queensland Law Journal* 242.

22 Ratnapala, above n 6, 42.

23 Ibid.

24 Suri Ratnapala, 'The Case for Adopting the American Model in an Australian Republic' (1999) 20(2) *University of Queensland Law Journal* 242.

25 Ibid.

26 Ratnapala, above n 15.

27 Ratnapala, above n 6, 34.

28 Ibid 37.

29 Ratnapala, above n 5, 80.

judicial review of executive action through the growth of administrative law (and the introduction of concepts such as procedural fairness, legitimate expectations and patent unreasonableness) is a significant factor. A second suggested cause is the simplification of judicial remedies and establishment of administrative review tribunals. While not entirely ameliorating the significant consequences that attach to the modern day blurring of the executive-legislative divide, Ratnapala does observe that:[30]

> At the very least, the enactment of these laws shows that the damage to the rule of law by the steady fusion of legislative and executive functions, through delegated power has been recognised by governments, judges and legislators. This is a constitutional development of some significance.

IV THE IMPACT OF HAYEK'S THEORY

No other scholar exercises greater influence on Ratnapala's work than Friedrich A Hayek (1899–1992). This Austrian-born political philosopher and economist was a prolific writer of numerous articles and books on subjects as varied as economics, politics, philosophy and sociology. In the area of legal philosophy, Hayek's most significant contributions are *The Constitution of Liberty*, published in 1960, and *Law, Legislation and Liberty*, published in three volumes between 1973 and 1979 and described by Ratnapala as 'a masterpiece by any measure'.[31] According to Ratnapala:

> It is hard to find a more comprehensive, reasoned and compelling case for the liberal society than this. It is a profoundly important work of jurisprudence, political economy, and social philosophy. It is encyclopaedic in breadth drawing on an immense historical treasury of ideas spanning the great civilisations. The thesis is built ground upwards from a firmly laid epistemological foundation.[32]

Hayek was a liberal thinker who thought that the concept of the rule of law was structured around fundamental rights and duties of the individual. By defining the rule of law as a meta-legal doctrine or political ideal of what the law ought to be, Hayek associated this ideal of legality with 'essential conditions of liberty under the law'.[33] In *The Road to Serfdom* (1944) Hayek famously stated:

> The Rule of Law was consciously evolved only during the liberal age and is one of its greatest achievements, not only as a safeguard but as the legal embodiment of freedom. As Immanuel Kant put it … 'Man is free if he needs to obey no person but solely the laws'. As a vague ideal it has, however, existed at least since Roman times, and during the last few centuries it has never been as seriously threatened as it is today. The idea that there is no limit to the powers of the legislator is in part a result of popular sovereignty and democratic government. It has been strengthened by the belief that so long as all actions of the state are duly authorized by legislation, the Rule of Law will be preserved. But this is completely to misconceive the meaning of the Rule of Law. This has little to do with the question whether all actions of government are legal in the juridical sense. They may well be and yet not conform to the

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30 Ibid 81.

31 Suri Ratnapala, 'Law, Legislation and Liberty, Friedrich Hayek, 1973' in Chris Berg and John Roskam (eds), *100 Books of Liberty* (Institute of Public Affairs, 2010) 22.

32 Ibid.

33 F A Hayek, *The Constitution of Liberty* (Chicago University Press, 1960) 205-6.

> Rule of Law. The fact that somebody has full legal authority to act in the way he does gives no answer to the question whether the law gives him power to act arbitrarily or whether the law prescribes unequivocally how he has to act. It may well be that Hitler has obtained his unlimited powers in a strictly constitutional manner and that whatever he does is therefore legal in the juridical sense. But who would suggest for that reason that the Rule of Law still prevails in [Nazi] Germany?[34]

Hayek recognised in 'public opinion' an important element for the realisation of the rule of law. Since the rule of law amounts to a meta-legal doctrine (a doctrine about what the law ought to be), then this legal ideal cannot be realised unless it forms a part of the moral tradition of the community. As such, Hayek concludes that, to become a reality in practice and not just in theory, the ideal of the rule of law must be broadly shared by the individual members of the political community. Hence in *The Constitution of Liberty* (1960) Hayek stated:

> From the fact that the rule of law is a limitation upon all legislation, it follows that it cannot itself be a law in the same sense as the laws passed by the legislator … The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal. It will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestionably accepted by the majority. It is this fact that makes so very ominous the persistent attacks on the principle of the rule of law. The danger is all the greater because many of the applications of the rule of law are also ideals which we can hope to approach very closely but can never fully realize. If the ideal of the rule of law is a firm element of public opinion, legislation and jurisdiction tend to approach it more and more closely. But if it is represented as an impracticable and even undesirable ideal and people cease to strive for its realization, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny. This is what has been threatening during the last two or three generations throughout the Western world.[35]

Those who are more familiar with the work of Hayek know that he famously discusses the idea of 'spontaneous order' as pertaining to social affairs and social evolution. Hayek believed that the principal means of enhancing our social condition is by improving 'rules of the game' that are generated spontaneously in society, not laid down by society's legislator.[36] The assumption inspired him to perceive the spontaneous order not as the product of deliberate design, but instead as emerging as an 'unintended outcome from the mutual adjustments of individuals who are left free to pursue their own purposes, based on their own knowledge, within the constraints of a framework of general rules of conduct, rules that typically specify what they may not do, instead of telling them what they have to do'.[37]

In the second volume of *Law, Legislation and Liberty* (1978), the concepts of cosmos and taxis are introduced. These are basic forms of human organisation. *Taxis* is defined in terms of 'bottom-up' organisations by which rules are directed towards the achievement of centrally defined outcomes. By contrast, *cosmos* is defined by Hayek

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34 F A Hayek, *The Road to Serfdom* (Routledge, 1st ed 1944, 2001 ed) 85.

35 Hayek, above n 24, 205.

36 F A Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (University of Chicago Press, 1978) 124.

37 Viktor Vanberg, 'Hayek's Theory of Rules and the Modern State' in Suri Ratnapala and Gabriel Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 1996) 49.

in terms of a system of general rules (*nomoi*) not tailored to any specific objective. Such rules are not end-oriented, so they are compatible with a variety of particular objectives. Since *cosmos* is about such rules that are general and open-ended, Hayek concludes: 'These rules will achieve their intended effect of securing the formation of an abstract order of actions only through their universal application, while their application in the particular instance cannot be said to have a specific purpose distinct from the purpose of the system of rules as a whole'.[38] In liberal societies the legal system must resemble a *cosmos*. To live in a *cosmos* is therefore to enjoy liberty within a societal order that emerges spontaneously from individual action and the social consensus.

Being an evolutionary theorist Hayek believed that 'most of the rules of conduct which govern our actions, and most of the institutions which arise out of this regularity, are adaptations to the impossibility of anyone taking conscious account of all the particular facts which enter into the order of society'.[39] Thus he supported rules that allow people to be free to live as they choose so long as the liberty and security of others is not violated. He was deeply suspicious of constructivist views that ignore the extent to which, in an effort to improve laws and institutions, society needs to rely on the past experiences which are transmitted from generation to generation.[40] Such a critique of social constructivism is congenial to Hayek's liberal approach and its absolute rejection of the 'claim that man can achieve a desirable order of society by concretely arranging all its parts in full knowledge of all the relevant facts'.[41]

Hayek rejected the belief that all worthwhile institutions must have been planned by human reason, so that a better society can be achieved by simply directing human activities 'according to a single plan laid down by a central authority'.[42] According to Hayek, those who think that well-organised societies are the work of central planners suffer from *synoptic delusion*; that is, the belief that if something is well organised then someone must necessarily have planned it. Such constructivism, Hayek says, fails to acknowledge the inadequacies of central planning. It does not recognise that it is actually impossible for any human being to have access to all information necessary in order to organise complex social interactions. Such 'delusion', Hayek concludes, amounts to a grossly exaggerated view of human knowledge.

Ratnapala is a Hayekian who certainly agrees that social constructivists have an exaggerated view of human knowledge. Ratnapala himself comments that such constructivists 'fail to recognise that many of our most useful institutions, including the fundamental laws of society were not designed and are observed not for their logic but for the evolutionary advantages that they conferred on groups that followed them'.[43] Such constructivism, Ratnapala continues, obscures the acceptance of spontaneous order and promotes a misleading belief that things like morals, markets, and legal systems can be completely engineered to our satisfaction without too many unexpected repercussions.

Like Hayek, Ratnapala believes that customary morals, laws, markets and indeed languages are self-ordering complex systems. He supports the Hayekian assumption that all these things 'exist because of the actions of multitudes of individuals adapting to local stimuli'. [44] As such, 'a central controller can never have all the bits of

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38 F A Hayek, *Law, Legislation and Liberty — Volume 1: Rules and Order* (Routledge, 1973) 122.
39 Ibid 13.
40 See Vanberg, above n 5, 51.
41 F A Hayek, *Studies in Philosophy, Politics and Economics* (University of Chicago Press, 1967) 88.
42 Ibid 82.
43 Ratnapala, above n 31, 23.
44 Ibid 24-25.

knowledge scattered among millions of individuals – the knowledge special to time and place.'[45] Above all, Ratnapala wholeheartedly endorses Hayek's opinion that '[t]he dynamic spontaneous order that bears the name 'society' functions best when its individual members can use their knowledge for their own purposes subject to general and impersonal rules of conduct'.[46] This is why Ratnapala also agrees with Hayek that government policies based on command economies inevitably fail. In this context, he also reminds us that societies which are protective of personal autonomy and property rights have done far more to maximise wealth than societies which have suppressed them. As Ratnapala points out:

> Some societies in history have embraced the idea that the most efficient way is to abolish private property and instead to have a government that administers all resources for the benefit of all the people. The system involves central planning and command and control of methods of plan implementation. Most of the societies that trialled the system have abandoned it. The chief reason for its failure is the inability of a central authority to command and deploy effectively all the knowledge of resources, needs and preferences of people. The administrative option is too inefficient.[47]

Hayek's preference for law as a *cosmos* led him to favour the common law over the civil law system of countries such as France, Germany and all other nations of continental Europe. He did so by assuming that, in a common-law system, rules are changed mainly by means of judicial adaptation, not legislative change. Hayek thinks the common law assists an 'invisible hand' which, in turn, makes the entire legal system operate according to 'a self-correcting spontaneously-grown order that inures to the benefit of all while not being the intentional product of anyone'.[48]

Hayek saw the common law in terms of 'accretion of judicial decisions'. Such decisions are strictly confined to the preservation of the spontaneous order.[49] He argued that in such a legal system the judiciary must act in response to immediate situations so as to provide a natural capacity for self-adjustment which is derived from a totality of accumulated knowledge that no individual or group can ever possess. In this context, Hayek concludes, '[t]he judge tries to maintain and improve an ongoing order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody, and that is not based on the individuals doing anybody's will, but on their expectations becoming mutually adjusted'.[50] Such an approach is characterised by Ratnapala as follows:

> Hayek sees in the common law a shining example of spontaneous order. Its custom-based rules adjust gradually to the changes in the factual order of society through the process of adjudication by impartial judges. Judges, when they act as they should, maintain the ongoing order. Their job is maintenance, not construction.[51]

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45 Ibid.
46 Ibid.
47 Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 250.
48 Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 69.
49 Hayek, above n 38, 118–19.
50 Ibid.
51 Ratnapala, above n 31, 4.

But Ratnapala is not completely satisfied with Hayek's explanation of the common law. He argues that he might have 'idealised' this system too much. This idealised version of the common law, according to Ratnapala, 'is not fully borne out in legal history'. [52] Thus Ratnapala reminds us that the common law also 'evolved' in seventeenth century's England by means of a judicial activism which helped the system to break down monopolies, to limit royal legislative prerogatives, and to secure the immunity of jurors from Crown prosecution.[53] Yet, Ratnapala still regards Hayek's general points as historically valid. For the most part, Ratnapala says, 'the common law has remained a self-ordered system of generally predictable rules that secured an unprecedented degree of individual freedom'.[54]

V IDENTIFYING THE RULE OF LAW AND ITS ENEMIES

Ratnapala identifies a number of legal philosophies that are inimical to the rule of law, legal realism being just one of them. If legal realists are correct, then no appellate court judge is rendering decisions determined based on objective standards but rather is doing so according to his or her own political-moral views. According to Ratnapala, such a view of the judicial process poses a considerable threat to the rule of law. As he explains, '[i]f the law is based on a judge's view of right policy, public faith in the law and the judicial system will quickly decline … Yet the judicial method that the realists commended does not easily reconcile the opposing needs of legal adaptation and legal certainty'.[55]

The legal realist concept of indeterminacy was a precursor to the Critical Legal Studies ('CLS') theory that everything about law is politically constructed. CLS scholars were even more radical than their realist forerunners, assuming that legal analysis carries no intrinsic value of its own. As such, any decision an individual judge makes is at core subjective. According to Ratnapala, such an abandonment of legal methodology makes the legal system hopelessly indeterminate. As Ratnapala points out, once CLS scholars embrace the postmodern premise that no word can have a stable meaning, then individual judges will never find objective standards by which matters of justice and legality can be measured.[56]

Postmodern philosophy enables legal thinkers to assert that the language of the law is irremediably hostage to radical indeterminacy. As such, justice is achieved only if the members of the judicial elite abandon the attempt to discover legal objectivity and are prepared to go beyond the limits of the application of the law.[57] According to

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52 Ibid 24.

53 Ibid.

54 Ibid.

55 Ratnapala, above n 47, 100.

56 Ibid 97.

57 See: Jacques Derrida, *The Force of Law* (Routledge, 1992) 26. Jonathan Crowe writes: 'Derrida's aim here is to unsettle the conventional notion of law as a set of determinate rules. This view is only possible on the assumption that legal language has a determinate meaning and can dictate the outcomes of particular cases. At the moment of decision, however, this assumption breaks down. According to Derrida, legal reasoning is revealed at this point as a mere illusion: it cannot determine what the judge ought to do. How, then, are we to define what falls within the law and what falls outside of it? What could possibly constrain the judge and distinguish legitimate legal sanctions from illegitimate use of force? Derrida does not reject the possibility of such a distinction, but he suggests it must ultimately have a deeply "mystical" character. The limits of law are only truly revealed in the moment of decision. Law may purport to be based on purely rational calculations, but in the end both law and justice are essentially incalculable' (Jonathan Crowe, *Legal Theory* (Lawbook Co, 2009) 103).

Ratnapala, such an idea that justice is subjective and cannot depend on objective standards (but rather that law is radically unpredictable) poses a major threat to the rule of law. As Ratnapala correctly asserts:

> If language is inherently undecidable, it is difficult to see how there can be rules at all. In any case, Derrida was maintaining that the ultimate decision is uninformed by any rule. At the moment of judgement, judges are unfettered by law. What guides them at the moment of reckoning? According to Derrida, it is 'another sort of mystique'. Fortunately for those who cherish the rule of law, judges decide cases in a reasonably predictable way.[58]

Ratnapala is also deeply suspicious of feminist legal theory and its controversial approach to the rule of law. Leading feminist scholars such as Professor Kelly Weisberg argue that 'the values that flow from women's material potential for physical connection are not recognised as values by the rule of law'.[59] Weisberg thinks that, as a general concept, the rule of law is too 'patriarchal' a concept and that the laws 'we actually have are both masculine in terms of their intended beneficiary and authorship'.[60]

Such a statement poses a challenge to the legitimacy of the rule of law, which, in turn, can further compromise the protection of basic legal rights. More specifically, feminists who assert that knowledge and truth are socially contingent and expose the idea of the rule of law as a mere mask to hide social inequality, tend to ignore (or water down) the importance of the rule of law for the protection of basic rights of non-Western women who operate from a socially disadvantaged position. By placing moral relativism above the rule of law, feminists like Germaine Greer have embraced a form of social relativism which regards any interference with such heinous practices as female circumcision (i.e. genital mutilation) as a form of 'cultural imperialism'.[61] Ratnapala comments on the apparent contradiction of mainstream feminist theory and its failure to protect the basic rights of *every* woman:

> Women are subject to unspeakable oppression and cruelty in different parts of the world. In some Islamic societies women are punished for not covering their faces in public or even for being seen in public in the company of a male who is not a relative. Women in many societies are forced to marry against their wishes. Some are genitally mutilated. Women who cohabit without paternal approval are murdered in the name of family honour. The litany is endless. This kind of treatment is unlawful in liberal societies … However, the main focus of feminist jurisprudence is not on the atrocities that women endure in illiberal societies but on the condition of women in liberal societies, under liberal law.[62]

Ratnapala does not deny that unfair gender discrimination has been a serious problem in Australia's history. However, one should have the right to question whether 'affirmative action', a policy applied by some feminists in such a way as to become de facto quotas for women, is actually the best way to address the problem of gender inequality. In their book *The Illusions of Comparable Worth* (1992), Ratnapala and Moens discuss how the feminist language of 'equal opportunity' has been used to

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58 Ratnapala, above n 47, 231.

59 Kelly Weisberg, *Feminist Legal Theory Foundations* (Temple University Press, 1993) 86.

60 Ibid 87.

61 Melissa Parke, 'Female Genital Mutilation: The Limits of Cultural Relativism' (1999) 4 *Sister in Law* 7, 7.

62 Ratnapala, above n 47, 233.

advance a more controversial idea of equal outcome. The authors provide good evidence as to why affirmative-action policies (in particular those which aim at breaking down occupational segregation and the earnings gap between men and women) are fundamentally flawed. According to Ratnapala and Moens, not only do such policies unfairly discriminate against certain groups of individuals (for example, spouses who decided to become full-time mothers) but they assume that every gender gap must be caused by unreasonable discrimination, whereas this may in most cases reflect no more than particular individual choices.[63]

VI CONCLUSION

These observations about, and criticisms of, feminist legal theory are not tangential observances. Rather, they fit consistently into the broader themes of individual liberty and constitutional government that permeate through all of Ratnapala's scholarly works. Ultimately Ratnapala views doctrines such as the rule of law and the separation of powers as being central to the achievement of constitutional government, which he emphasises requires more than just a well-written constitution. To maximise the public good that can be achieved through the implementation of classical doctrines such as the rule of law and the separation of powers ultimately requires a 'culture of constitutionalism'. To this end, Ratnapala observes:[64]

> No system of government whether evolved or designed is perfect. Constitutional government as an ideal can only be achieved in approximation. It must be remembered too that the success of a constitution depends on many more factors than the written words of a constitutional instrument and that ultimately, constitutional government is sustained by a substratum of supporting institutions and a culture of constitutional behaviour on the part of officials and citizens. Yet a nation can enhance its prospects for securing a high degree of constitutional government by choosing wisely the structural features of its formal constitution.

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63 Gabriel Moens and Suri Ratnapala, *The Illusions of Comparable Worth* (Centre for Independent Studies, 1992).

64 Ratnapala, above n 6, 34.