REVIEW ESSAY

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AUSTRALIAN CONSTITUTIONAL LAW – FOUNDATIONS AND THEORY

By Suri Ratnapala
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Ratnapala is a federalist but one who is strongly committed to the rule of law. He argues that one of the major purposes of a Constitution, if not the major purpose, is to establish the rule of law. For him, the rule of law is the theory that societies are best governed by means of a set of general rules which govern individual relations in the market place. His ideal of the good society is one in which general rules enable strangers to enter transactions with each other in the reasonable expectation that the other will perform his or her side of the transaction. Although this theory of the rule of law is powerful and popular, it is not in my opinion, completely consistent with Ratnapala's pro-federalist stance.

Federal systems are inconsistent with the rule of law seen as a set of general rules enabling strangers in distant places to deal with each other in the expectation that each will perform his or her bargain. To the extent that they provide for different legal systems in different localities, they undermine the shared expectations essential to such transactions. Also, a federalist theory of the Constitution requires the courts to make political judgments in accordance with general principles in a

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way that is at odds with Ratnapala's vision of the rule of law as government according to general rules.

Ratnapala does little to reconcile his federalism with his theory of the rule of law. This is a pity because they are the major recurring themes of this otherwise excellent book. The author does an very good job of reducing the mass of Australian Constitutional Law to a comprehensible and manageable set of principles. As the name indicates, this book does not pretend to be a comprehensive text which analyses everything of any importance which the High Court has ever said about the Constitution. Instead, it focuses on basic constitutional doctrines and the way in which they have been worked out in practice in the Australian context.

As a result of its concern with the foundations of Constitutional Law, the book devotes little space to some of the issues which fill standard constitutional law texts. In particular, it makes no attempt to deal comprehensively with the limits on the scope of the legislative powers of the Commonwealth, a subject which takes up the bulk of the space in most standard texts. It touches on the interpretation of the defence power, the external affairs power, the trade power, the corporations power and the tax power, but only in order to make other general points about constitutional law.

The focus of the first chapter is on constitutionalism as a philosophical doctrine and on related doctrines such as the rule of law. This chapter provides many of the theoretical foundations for the rest of the book, so it is worth examining in some detail. For Ratnapala, the basic purpose of a constitution is to restrain the exercise of the power of the State. Once societies reach a certain level of complexity, there are a range of goods and services, such as defence, the maintenance of order, the protection of persons and property and the provision of pubic works, such as roads, ports and irrigation systems, which it becomes impossible to provide through voluntary private arrangements. The coercive state has developed to fill the gap. Once the state develops, it becomes a threat to its citizens. In particular, the people who control the power of the state are constantly tempted to use that power for their own private ends rather than the public good. The major issue in political science for thousands of years has been to devise mechanisms to prevent those in power from abusing their power.

Liberal constitutionalists such as Ratnapala argue that the best way to do this is to impose legal restraints on the exercise of public power, the doctrine of the rule of law. For Ratnapala, the rule of law, that is the doctrine that the State should govern by means of impartially applied general rules, is essential to good and efficient government. Hence he is almost as critical of social democrats, who advocate the giving of broad discretions to officials to be exercised according to principles of

procedural justice, as he is of autocrats whose exercise of power is not subject to any substantive or procedural constraints.

Ratnapala does not offer a full defence of his theory of the rule of law. This is a pity because he does not see it as one value to be balanced against other important values such as that of substantive justice but regards it as the *sine qua non* of a well- governed society. He does deal with some of the standard objections to the rule of law such as the objections that it is inefficient when compared with the rule of officials vested with discretionary powers, that it is oppressive and that it is impossible.

His treatment of these objections, which are intended to be no more than thumbnail sketches, is interesting for what it reveals of his preconceptions rather than for the arguments which he makes. In answering these objections, Ratnapala adopts the position of liberal individualism. For him, the most efficient government is the one which enables as many individuals as possible to satisfy their own ends. Officials delude themselves when they believe that they should be given discretionary powers to govern in the public interest because the public interest is no more and no less than the interest which members of the public have in institutions which enables them to meet their own ends as determined by themselves. It is not some community interest distinct from the individual interests of the members of the community; nor is it the continually changing and essentially undiscoverable sum of those individual interests. According to Ratnapala, the rule of law and free markets which flourish in a milieu of general laws are the best institutions for enabling individuals to pursue their own ends. Hence, they are the most efficient way of ordering society and they are in the public interest.

Ratnapala deals with the argument that the rule of law is oppressive in similar vein. He recognises that most of the claims that the rule of law is oppressive have originated with theorists opposed to the individualism that he espouses and representatives of groups who claim to be disadvantaged by the rule of law. He argues that no disadvantaged group has succeeded in showing that it is disadvantaged by the rule of law as such, only by particular laws. Change those laws and they have no reasonable ground for objecting. Besides, a systematic objection to the rule of law would have to show that every attempt to generate legal categories and to govern by means of general rules is doomed to failure as unreasonable and oppressive, something which he argues that they have failed to do.

Ratnapala uses his theory of law to argue for a strong doctrine of the separation of powers. He prefers the United States system, in which the executive is separate from the legislature, to our system of responsible government in which the effective

executive is chosen from the legislature, on the grounds that the US system is both more democratic and more consistent with the rule of law. It is more democratic because it allows citizens to have more influence over the process of law making. It is more consistent with the rule of law because it places greater limits on the scope of law making powers which can be conferred on the executive and hence limits the ability of the executive to make law in and for the particular case at the point of application.

First, Ratnapala argues that responsible government in Australia is not as democratic as the US system because it gives the individual less opportunity to influence the law making process and hence the content of the laws. He argues that an inevitable consequence of responsible government is that the executive will capture the legislature and as a result, will completely control the law-making agenda, making it difficult for any individual to have any input. Laws sponsored by the executive are almost certain to pass while laws which do not have the support of the executive are unlikely even to be considered. In a system of responsible government where the legislature has the power to dismiss the executive, stable government requires that the executive be able to rely on the support of the legislature for long periods of time. To do this effectively, the executive must be able to control its supporters in the legislature. It has achieved this control by means of highly disciplined political parties intent on capturing and retaining government. The political system itself selects parties able to impose rigid discipline on their members because any dissent threatens a party's grip on government. As a result of this rigid discipline, the executive has guaranteed support for its legislative programme as well as for its continuation in government.

On the other hand, the US system allows the individual member of Congress greater freedom to ignore the party line because a vote against the party line does not affect the stability of the government. Ratnapala assumes that this gives members of the public greater input into the legislative process. That is not necessarily the case. In a legislature whose members are free agents, it may be easier to influence one or two members. However, to influence the legislative process, a person must influence large numbers of members. The transaction costs of doing that on an individual basis will be very high. In Australia, it may be more difficult to persuade individual members to support a proposal because of their limited independence. However, because of the disciplined party system, the transaction costs of dealing with the large numbers of members needed to enact legislation will be much lower. The citizen may only need to deal with the party rather than the individual member. Hence both systems have disadvantages and it is not clear which provides the citizen with better access to the legislative process.

Given his concerns with the extent to which the executive has gained control of the legislature in Australia, it is surprising that Ratnapala does not mention the threat which the burgeoning system of uniform legislation poses to the independence of Australian parliaments. This legislation, which is proliferating, is often drafted by councils formed of ministers and their advisers from each Australian government, Commonwealth, State and Territory.[1] Once a uniform draft is agreed upon, it is presented to all of the Australian parliaments for their approval. It is difficult for any parliament to insist upon major changes because to do so undermines the compromise worked out by the ministers concerned. Hence, the role of all parliaments in the process is little more than a formality in which they simply approve legislation adopted elsewhere by joint executive committees. Not the least of the problems which a parliament faces in amending such legislation is that it is not clear that the body which drafted the legislation, a council of all Australian governments, is responsible to it. Therefore it is not clear that it has any right to control that body or to reject its proposals.

Nor are there any obvious ways of making such councils accountable to parliaments. Separating the executive from the legislature would weaken the position of such councils by decreasing the extent of the control each executive has over each parliament. However, it would also probably undermine the system of Commonwealth–State co-operation which produces such legislation. If executives lost control of legislatures to the extent that they could not predict how legislatures would react to draft uniform bills, the whole process would be pointless. What is needed is a process which ensures legislative input into the drafting of uniform bills before they are agreed to and finalised by the relevant Commonwealth and State ministers. That may require some creative rethinking of the ways in which parliaments around Australia relate to executive governments and to each other.

Some of the ministerial councils have the power to enact subordinate legislation. For example, the National Environment Protection Council, which consists of a minister from each of the Commonwealth, the States and the Territories and is constituted under the *National Environment Protection Council Act* 1994 (Cth) and equivalent State legislation, has the power to enact National Environment

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1 The Council of Australian Governments (COAG) is the most important of these councils. However, there are many others. For a current list of the councils, their functions and modus operandi, see *Commonwealth-State Ministerial Councils – A Compendium*, The Department of Prime Minister and Cabinet, June 2002; available on the net at www.dpmc.gov.au/pdfs/Compendium.pdf. A few of the councils are established by legislation or exercise statutory powers, but most are established by intergovernmental agreement. There are now guidelines for the creation of new councils; see *The Compendium*, p 6.

Protection Measures.[2] It is even more difficult to ensure that the ministers are accountable to their parliaments for this legislation. The uniform *National Environment Protection Council Acts* attempt to deal with the problem by making the Council responsible to the Commonwealth parliament in the exercise of its law making powers; National Environment Protection Measures are disallowable instruments for the purposes of the *Acts Interpretation Act* 1901 (Cth) and hence may be disallowed by resolution of either house of the Commonwealth Parliament.[3] Although this introduces a degree of accountability, it is hardly a satisfactory solution because it allows State ministers to take part in law-making activities over which State Parliaments have no control. Unless some joint accountability mechanism is devised, the only other way of ensuring some accountability may be to give each State and Territory parliament a power of disallowance and to allow a State or Territory to opt out of a measure if its parliament exercised that power.

Ratanapala's second reason for preferring the US system is that by limiting the extent to which law-making powers can be conferred on the executive, it gives greater protection to the rule of law. Ratnapala believes that the greatest danger to the rule of law in Australia and in many other democracies is the tendency to vest broad law-making powers and discretions in the executive. He argues that that tendency is most dangerous when the two are combined to give the executive broad powers to make law for the particular case at the point of application. When the executive only has the power to legislate in the form of general rules, it is bound by those rules. Parliament and the courts can control such a law-making power relatively effectively by disallowing the rules or invalidating them if they exceed the scope of the rule making power.

It is more difficult to control the exercise of broad discretions which give an official the power to make law for the particular case at the point of application. In Australia, much has been done to expand the scope of judicial review and to provide systems of tribunals which can review such decisions on the merits. However, Ratnapala argues that this does not address the central problem which arises from giving executive authorities the power to make and apply the law to the individual case. He argues that such a practice undermines the rule of law and prevents effective review because, if the executive can make the law to be applied to the case before it, there is often nothing for the courts to review. In such cases, the citizen is not subject to the law but to the caprice of an executive officer. Hence we retain the form of a system in which the executive is subject to the law and to independent courts, but not the substance.

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2 The *National Environment Protection Council Act* 1994 (Cth), s 21, and s 21 of the corresponding State Acts.

3 Ibid, and the *Acts Interpretation Act* 1901 (Cth), s 48.

Ratnapala's solution is to reverse the decision in *Dignan's Case*.[4] Ratnapala argues that the doctrine of separation of powers could have been used to prevent the executive acquiring such powers. He points out that the decision in *Dignan* to allow the legislature to confer very broad law-making powers on the executive is not required by the system of responsible government. A doctrine which imposes limits on the extent of the law-making powers which Parliament can give to the executive is perfectly consistent with the system in which the executive must have the confidence of the legislature in order to govern. In fact, as Ratnapala notes, the United Kingdom Parliamentary Committee on Ministers' Powers of 1932 reported that it was not constitutional practice for the United Kingdom Parliament to confer power on the executive to legislate on matters of principle, to legislate without limits or to impose taxes, suggesting that even in the United Kingdom there were limits on Parliament's power to confer legislative powers on the executive.[5]

Whatever the practice may have been in the United Kingdom, there are no enforceable limits in that country on Parliament's power to delegate legislative powers to the executive. Such limits as there were were conventional and hence were not legally binding or enforceable in the courts. However, that is not necessarily the case in Australia where the Constitution, in section 1, vests the legislative power of the Commonwealth in the Parliament and in section 61, vests the executive power in the Queen. Taken at face value, as Ratnapala points out, the language of section 1 and section 61 supports the view that the Constitution intends to separate legislative from executive power. If this is correct, there are constitutional and hence enforceable limits on the extent to which the Commonwealth Parliament can confer legislative powers on the executive.

Dignan and cases which have followed it rejected the view that the words of the Constitution require limits on the extent to which the Commonwealth Parliament may confer legislative power on the executive. The High Court held that regardless of its words, the Constitution did not intend to separate the executive and the legislative powers. Instead, it intended to adopt the English practice in which there are no enforceable limits on the extent to which parliament may delegate legislative power to the executive. The Court in *Dignan* was also concerned about the practical consequences of limiting the scope of the legislative power which could be conferred on the executive. Ratnapala argues that these concerns were exaggerated, pointing to the position in Germany and the US, where constitutional limits on the extent to which the legislature may confer legislative powers on the executive work effectively.

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4 *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 73.

5 S Ratnapala, *Australian Constitutional Law – Foundations and Theory* (Oxford University Press, Oxford, 2002), pp 105–6.

Ratnapala's criticisms of *Dignan* are warranted. There is a danger in using English conventions as a guide to the interpretation of the Constitution, especially when the conventions are ones which impose limits on the way in which the United Kingdom parliament uses its powers. These conventions, such as the conventional limitations on the extent to which parliament delegates legislative powers to ministers identified by the Parliamentary Committee on Ministers' Powers, do not of course, limit the legal power of the United Kingdom Parliament. Hence, if the United Kingdom Constitution is used as a guide, it is easy to conclude that our Constitution does not place any limits on the powers of the Commonwealth Parliament in these areas. Such a conclusion is not justified because it ignores that the Constitution codified many of the British conventions and gave them the status of paramount law. It has done so in the area of the separation of powers. Although the independence of the British courts is guaranteed by statute, there are only conventional barriers in the way of Parliament taking away that independence. The Commonwealth Constitution transforms these conventional barriers into fundamental law, section 72 guaranteeing the independence of the judiciary.

It is hard to resist the conclusion that sections 1 and 61 give similar constitutional status to the separation of the executive and the legislature, especially as there are arguments of principle in favour of limiting the extent to which the executive can exercise legislative power. Under the system of responsible government, Parliament has the responsibility to supervise the executive. Allowing the executive to exercise broad law-making powers weakens Parliament's ability to carry out that supervision because few regulations are subject to much scrutiny. It also weakens the executive's accountability to the public because the public is far less aware of executive law making than it is of parliamentary law-making.

Ratnapala argues that the main objection to executive law-making is that it weakens the rule of law, in particular, that it increases the ability of the executive to make law for the particular case at the point of application. I think that this objection is overstated. Limiting the extent to which the legislature may confer broad law-making powers on the executive is not likely to have a great impact on the scope of the discretions vested in officials. All that we can reasonably ask is that the legislature define the criteria by reference to which discretions can be exercised, not that the legislature abolish discretionary powers.

We cannot expect the legislature to abolish discretionary powers and to establish Ratnapala's ideal of government by general rules because discretions are too useful. Government by general rules means very limited government. As far back as Aristotle, thinkers have realised that discretions, what Aristotle called equity, have a role in government. They may have been overused during the twentieth century, but they will always have an important role to play in law and government.

Even Ratnapala is committed to broad discretions in Constitutional Law. Ratnapala is a federalist but does not recognise the extent to which federalism is inconsistent with his theory of the rule of law and the free market regime which is its corollary. As Ratnapala points out, the rule of law can be said to create a community without borders in that it enables persons who do not know each other and who are unlikely ever to meet, such as a seller in Brisbane and a buyer in Melbourne, to deal with each other in the confidence that each will perform his or her side of the bargain. This borderless community can only exist if there are general rules of law governing such transactions, because without those general rules, neither party would have any guarantee that the other party shared his or her expectations. Hence, even with the best will in the world, neither would have any reason to believe that the other would perform.

Many communitarians object to the type of community which the rule of law and free markets create. It is a community in which people are connected by contract, a form of social tie in which people deal with each other at arms length and which is dissolved when the contractual obligations are performed. Communitarians want stronger ties than these, they want a community which is more than an aggregate of individuals pursuing their own ends. Federal systems and indeed the nation-state itself are attempts to create communities with a stronger sense of identity than the community of the market.

The logic of the rule of law when it is seen as the corollary of free markets, is hostile both to federalism and indeed to the nation-state, implying that there should only be one community and one market sharing the one set of rules. The aim of the rule of law, as defined by Ratnapala, is to provide a set of clear rules which individuals can know and use in their dealings one with another. He argues that our complex social world works best on a handful of such simple rules. As supporters of globalisation and the World Trade Organisation understand, this ideal will be most fully realised if the one set of rules applies to everyone in the world, regardless of the country in which they live and of their culture. Then they will be able to enter into contractual relations with anyone else in the world in the expectation that the other person will share their expectations and perform their part of the contract. Supporters of this view argue for the weakening of the nation state and the dissolving of national boundaries as they are obstacles to trade and to freedom of contract.

Applied to Australia, the same principles have anti-federalist implications. States, with their separate legal systems and differing rules relating to aspects of contract, place obstacles in the way of contracting. They add to the transaction costs which individuals face in doing business with each other across state lines, making it more expensive to discover all the rules that govern a particular transaction. They also

increase the likelihood that different persons, living under different legal systems will have different expectations, thus making satisfactory performance of the contract less likely.

Ratnapala is aware that federal systems can create barriers to the growth of national markets and argues that successful federations are those which succeed in establishing common markets and integrating the economies of their regions while allowing the regions sufficient autonomy to determine matters which are more efficiently and democratically determined at the regional level. To achieve this balance, a federation must allow free movement of goods, capital and people across State borders, give the central government the power to regulate interstate commerce and give the State governments the power to regulate trade within the States. For Ratnapala, the free movement condition is of central importance, and must prevail over the powers of the Federal and State governments over trade. Hence he argues for a broad interpretation of section 92, which he sees as giving individuals the right to trade across state lines.[6]

A broad interpretation of section 92 is unable to solve many of the problems which a federal system creates for the growth of markets, such as the problem of controlling monopolies and other restrictive trade practices. The most effective way of controlling these is through central government regulation of the whole economy, not just the interstate parts. Although he believes that federal control of inter-state trade is essential in a federation, Ratnapala appears to be opposed to reducing federal barriers to effective market regulation by expanding Commonwealth power to impose uniform regulation. Hence he is opposed to the *Engineers*[7] approach to constitutional interpretation.

Ratnapala's opposition to the formalistic approach to constitutional interpretation adopted in the *Engineers Case* is surprising because it appears to be the interpretation which is most consistent with his theory of the rule of law as an aid to private ordering based on contract. The federalist doctrines of the Griffith High Court were inconsistent with this theory of the rule of law in at least three ways. First, the doctrine of implied immunity of instrumentalities when applied to government businesses, whether Commonwealth or State, had the potential to give them an immunity from laws binding their private enterprise competitors. Thus it undermined the level playing field between government and citizen which is fundamental to a market economy based on the rule of law. Secondly, the doctrine of reserve powers preserved State control over their own economies, so that the rules governing particular classes of transactions differed from State to State, adding to transaction costs and defeating expectations. Thirdly, the difficulty of

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6 Ibid 223–25.

7 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 LR 129.

applying some of the early doctrines, such as the immunities doctrine and the pith and substance test for characterising laws, led to the suspicion that the court was making and applying standards on a case-by-case basis, rather than developing and applying general rules.[8]

The *Engineers Case* and later cases which followed its basic approach simplified the federal system and favoured a market economy governed by the same general rules over the particularism and discretionary nature of the earlier doctrines. First, narrowing the scope of the implied immunities doctrine did much to end the privileged position which government businesses had under the earlier doctrines and subjected them to the general law of the market place.[9] Secondly, the decision to abandon the reserve powers doctrine and to interpret Commonwealth powers broadly combined with later decisions giving a broad scope to section 109, allowed the Commonwealth to impose uniform regulations across many areas of economic activity, thus facilitating the development of national markets. Thirdly, the decision to interpret all Commonwealth powers without reference to their impact on State powers and the decision to abandon the search for the true subject matter of Commonwealth laws when characterising them helped reduce Constitutional law to a set of reasonably predictable rules and has reduced both the need and the capacity of the High Court to develop constitutional rules at the point of application on a case-by-case basis.

Ratnapala is a federalist and disagrees with the *Engineers* approach to constitutional interpretation. However, he does not explain how he reconciles his federalism with the anti-federalist implications of his theory of the rule of law. As noted above, Ratnapala believes that a complex society such as ours works best on a handful of simple rules. That theory suggests that we should adopt a system of government which is less complex than federalism with its overlapping and ill-defined jurisdictions. It may seem that the complexity associated with federalism is limited to intergovernmental relations and does not flow through to the rules which

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8 Ratnapala is most critical of discretions vested in officials which allow them to make and apply a standard in the particular case as a major infringement of the rule of law; see above n 5, pp 102–111. Yet he does not consider whether federalist doctrines are by their very nature so loosely defined that they vest in the courts this power to make law at the point of application.

9 Although the implied immunities doctrine has been revived to a limited extent since the *Engineers Case*, it has been done in a way which gives no protection to State Government businesses from laws of the Commonwealth which regulate them in the same way as privately owned businesses. State Government businesses only receive protection from Commonwealth laws which discriminate against them, treating them differently from other businesses; see, for example, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

govern the lives of citizens. However, such a claim is not consistent with the Australian experience. Federalism has added greatly to the complexity of the regime governing business in this country. Two good examples are the tortuous attempts to set up an effective system of company law and the constitutional limits which constrain the jurisdiction of the Federal Court in commercial matters.[10]

For these reasons, one might expect Ratnapala to support the formalistic and literalistic approach to interpretation espoused by the *Engineers Case* and its progeny.[11] He does not do so because he believes it is an unreasonable approach to the interpretation of a written Constitution, which cannot hope to spell out every constitutional rule and provide the necessary legal protection for all of the structures and institutions which the Constitution creates. It is easy to agree with these sentiments. However, to defend them, it is necessary to develop a much more nuanced theory of the rule of law and its relation to constitutionalism than that which Ratnapala offers. In particular, it is necessary to consider whether the rule of law can be used to create and defend types of community other than that based on contract from the claims of the contract model itself. That issue is fundamental, not just for federations such as Australia but for national governments around the world as they make claims for continuing national sovereignty in the face of pressure to establish one global market governed by uniform rules.

The stakes are high in this debate. If, as Ratnapala initially argues, the main virtue of the rule of law is that it enables people to contract with strangers and thus encourages the growth of free markets, every opponent of the expansion of global free markets and of the loss of national sovereignty to which it could lead, is by necessity an opponent of the rule of law. If that is the case, it enables authoritarians to argue that they are the only true defenders of national sovereignty and forms of community other than those created by contract, thus hijacking one side of the debate over globalisation. To prevent that happening, we need to give those who wish to defend national sovereignty against globalisation (and State autonomy against the Commonwealth) reasons to support the rule of law.

The way to do this is to locate the rule of law in a broader theory of individual autonomy and self-government. A part, but not the whole, of such a theory is the

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10 Attempts to overcome these limits by vesting the Federal Court with State jurisdiction failed recently: *ReWakim* (1999) 193 CLR 346.

11 These include the approach to characterisation which holds that if a law changes rights and obligations with respect to the subject matter of a power, it is a law with respect to that subject matter regardless of what else it does; see for example, *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 6–7 (Kitto J), and *Murphyores v Commonwealth* (1976) 136 CLR 1, 11–12, 18–23 (Stephen and Mason JJ).

rule of law which aims to increase individual autonomy by providing a background of stable rules which individuals can use to order their lives. Equally important is a theory of democratic community which aims to give people the opportunity to participate in a self-governing community and to influence the content of the rules by which they are governed.[12] There are tensions between the different parts of such a theory. Some types of governmental arrangements give greater weight to one part of the theory than to another. Federalism may advance democratic self-government. By creating regional governments it brings government closer to the people and gives them more opportunities to participate in their own government. However, it does so at a cost to the rule of law seen as a uniform set of rules governing the market.

Constitutions are attempts to create institutions that allow individual autonomy and self-government. As Ratnapala makes clear, they can to a greater or lesser extent establish institutions which advance the rule of law. They also embody other values which may not be completely consistent with that value, such as democracy and community self-government in a federal system. Ratnapala is also committed to some of these values, such as the values inherent in federalism and representative democracy. However, the weakness of the book is that he is not always aware of the tensions between them and does not integrate them into a coherent whole.

12 A complete theory would also contain a theory of distributive justice designed to ensure that everyone has the opportunity to participate in their democratic community and in the markets established under the rule of law.