

JOHN BRAY MEMORIAL ORATION

“Rule of Law Under Siege: Some Perspectives from the Third World”

By Graham Leung

University of Adelaide

Monday, 13th September 2010

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

. . . [W]hensoever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.

—American Declaration of Independence (1776)

Mr Chancellor, Distinguished guests, Ladies and Gentlemen

I am deeply honored to have been asked to deliver the John Bray Memorial Oration tonight, at this great University, my alma mater. I graduated from Adelaide University 30 years and so it is a great pleasure to be back on this campus. The old pond outside the Law School is no longer, but Adelaide remains reassuringly unchanged. The memories, although receding, remain warm and enduring.

The former Chief Justice of South Australia needs no introduction. He was probably the most distinguished lawyer of his generation. He was also an anti-establishment intellectual, a poet, humanitarian and a bohemian. When John Bray was appointed South Australia’s Chief Justice in February 1967, it apparently shocked the Adelaide establishment to the core. He preferred reading poetry and engaging in long discourses about morals, politics, the arts and the law, sometimes with his contemporary Dame Roma Mitchell. Given events in the world today, I am sure John Bray would be dismayed about the increasing perversion of the rule of law.

Tonight I intend to share a few observations with you on a matter close to my heart – the rule of law, not just as it relates to my troubled country, but its role in an increasingly complex and frightening world. I also want to recount my personal experience of what it means to be a human rights defender in a country where the rule of law is under siege.

For the majority of the world’s poorest however, the rule of law is but a hollow aphorism. It means very little to people who are struggling to put bread on the table. Or to people who cannot raise their voices in dissent about the conduct of their government. Or to those who are denied access to justice.

2. WHAT IS THE RULE OF LAW?

Contrary to popular belief, the rule of law is not a contemporary idea but one steeped in antiquity. As far back as 350BC the ancient Greek philosopher Plato said:

“Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”¹

While there are many permutations of what constitutes the ROL, its elements may be summarized as follows.

First it is about the degree to which there is political will and institutional capacity to ensure accountable government. Second it implicates the capacity of the state to protect and deliver the basic human rights of its citizens. And finally it concerns the state’s ability to uniformly enforce the law and afford protection to its citizens.

The ROL is a safeguard of men and women against themselves and their excesses.

A wise man once said:

“If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

James Madison, Federalist Paper No. 51 (1788)

The concept of a “government of laws and not of men” is almost as old as civilization itself. Much of the Babylonian King Hammurabi’s code might seem by today’s standards, a trifle draconian. However, they represent the rudimentary beginning of an attempt to codify principles of justice. In one form or another and in varying degrees, almost every human society since then has developed and refined what might be regarded as one of the earliest attempts to establish the ROL— these concepts later morphed over the centuries into legal protection for the poor; restraints on the powerful, so they cannot oppress the weak—laws publicly enacted, and known to all. Hammurabi’s code was a landmark in mankind’s struggle to build an order where, instead of might making right, right would make might.

Many of these principles are reflected in the Charter of the United Nations. In the words of the Secretary General:

“For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”²

¹ Cooper, John et al. *Complete Works by Plato*, page 1402 (Hackett Publishing, 1997).

² “What is the Rule of Law?”, United Nations Rule of Law, Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies ([S/2004/616](#))

These are but words. The demand for accountability must however extend beyond the familiar territory of redress for killings or torture, to the denial of basic human rights to food, education, housing and health. It will require political will and steadfastness to achieve these goals.

In recent years, veneration of the Rule of Law has become very fashionable. Even in some countries where democratic space and civil liberties are severely circumscribed, its leaders extol its virtues. They preach the mantra of the ROL never mind that they have no intention of practicing its virtues. A growing number of major aid donor countries and international financial institutions such as the World Bank have also conditioned their support on the willingness of recipient countries to effect reforms aimed at strengthening the Rule of Law. There are a host of reasons which animate these developments, including a desire to foster greater accountability and good governance. Post September 11, security concerns have also featured as an underlying factor driving these changes. I will return to how the global response to these concerns, constitute a threat to civil liberties.

3.WHY IS RULE OF LAW IMPORTANT?

The maintenance and promotion of the ROL is of fundamental importance for the human dignity and well-being of people everywhere, providing the foundations for a functioning economy and a civilized society. Its relevance extends across a wide range in the affairs of people and states: in the laws of armed conflict, terrorism and in national security; in laws outlawing corruption and governing constitutional affairs; the democratic process and the independence of the judiciary; in energy and environmental protection; privacy and other human rights; and in the respective roles and powers of the various arms of government and its instrumentalities at both national and international levels.

The ROL is analogous to a three legged stool comprising freedom, democracy and human rights. When all three legs are strong, there is true freedom, but where one of the three is weak, the other two will never develop their full potential and might even perish.

Much of what we take for granted in our global community presupposes adherence and respect for the ROL. For example the World Trade Organization has developed multilateral rules that govern trade among the nations and trading blocs, and upholds and enforces them. These rules are animated by a spirit of fairness and restrains the instinct of states to behave arbitrarily. Likewise, international environmental law which has contributed to making the planet more sustainable is founded upon a complex and interlocking set of multilateral environment conventions which set minimum standards and impose accountability and order in the way nations behave. These are just two examples but they illustrate the importance of the rule of law in the international arena.

To quote Lord Phillips, “That is just how important the rule of law is. Without a universal commitment to the ultimate authority of the law; founded on principle and administered through independent, stable and respected judicial systems, the world as we know it is not going to survive.”³

The anecdotal evidence suggests that countries that respect democratic practices have made measured and sustainable progress in long term economic development. The ROL has assisted by facilitating legal and institutional efficiency, predictability and efficiency in ways that lubricate

³ “The Rule of Law in a Global Context”, Rt Hon Lord Phillips of Worth Matravers, Senior Law Lord. The Qatar Law Forum, 30th May 2009, page 6.

the workings of the modern market economy. Some policy makers believe that where the ROL is well grounded, it serves to mitigate corruption and crime. The advent of globalization has also added to the growing respectability of the ROL. As countries have clamored for a greater share of the increasing flow of capital and goods across borders, they have discovered that weak rule of law systems are an impediment to progress and development. Countries that have strong, effective and transparent legal systems and judiciaries are more likely to render protection for foreign investors than countries where such systems are lacking.

4. RULE OF LAW AT THE INTERNATIONAL LEVEL

The promotion of the rule of law at the national and international levels is essential for the sustainable resolution of conflict and building a just society. A start has been made with the internationalization of criminal law but there is still a long way to go. Cable television brings tensions on the Korean Peninsula, Darfur and Bangkok into our living rooms. The ROL is our best guarantee that these theatres of tension will be resolved peaceably.

The young discipline of international criminal law should be strengthened and extended for it offers the hope of stemming the tide of lawlessness and impunity in many countries which constitute a threat to the ROL. Consideration needs to be given to widening the ambit of the Rome Statute of the International Criminal Court to include coups d'état where ever and whenever they occur. Such a development could establish a credible deterrent to restrain those who commit this crime. Rather than demonizing the ICC, its detractors should consider at the very least, supporting its underlying principles and values.

It is only with greater universalization of the Rome Statute and a more concerted effort by member states of the UN to enforce international criminal law at the national level will we see the strengthening of a culture of universal justice.

National legal systems are often unable to deal with extra-legal usurpations of constitutional authority. Fiji provides a good example of a country which has recently struggled to uphold the principle of judicial independence following the overthrow of the elected government in 2006. The resulting hiatus means that citizens are often unable to obtain redress for violations of their rights. Assaults on democratic government also become more difficult to resist under those circumstances.

Removing a government at gunpoint is an act of terror and should be recognized as such by the international community, including the United Nations. It is a violation of the political rights of citizens and a denial of their human right to elect a government of their choice. The criminalization of the unlawful removal by force of an elected government will assist the eradication of a culture of impunity in those countries where coups have become common. It is a matter of regret therefore that the United Nations continues to allow usurpers of constitutional authority to address its hallowed chambers. By permitting this practice the UN lends legitimacy to unlawful regimes and contradicts the very principles upon which it is founded.

Terrorism in all its forms and manifestations is an evil that must be defeated. It represents a grave threat to the rule of law. There is little to distinguish a domestic terrorist from one whose craft crosses national borders. The challenge is to ensure that in seeking to defeat the terrorist, we do not in turn do not subvert the ROL.

The codification and development of international law is a fundamental pillar of the rule of law. Greater respect for international law must be encouraged. The principle of the primacy of international law and the obligation for all the organs of the State to ensure within the limits of their competence, that national law is in line with the obligations of international law should not be a matter of contention. It is a given. International law is the best instrument to ensure peace, development and the rule of law.

How each country treats its citizens and its supreme law should no longer be a matter for national concern only. It is the business of the international community. The Universal Declaration of Human Rights (1948) underscores this important principle. The Preamble to the Universal Declaration is a powerful expression of the place of the ROL in our society.

The old ideology that respect for national sovereignty should be the sole factor governing relations between states is outmoded and must be re-examined.

The rule of law demands that States respect the UN Charter. The Security Council should set an example for how the rule of law is maintained in international relations. Violations of international law are still too frequent, mechanisms of accountability too few and the political will to ensure compliance often weak and ambivalent.

The UN must make greater efforts in supporting changes that result in the betterment of peoples' lives through equal protection under the law and the attainment of justice for in doing so it will strengthen the rule of law. Ultimately, the equal protection of the law as to the means to achieve freedom from fear and freedom from want is the most sustainable form of protection. (see UN doc A/63/226-page 3).

The basic tenets of criminal responsibility and justice should be applied at national and international levels as a method of upholding the rule of law and guaranteeing due process.

At the international level, all States—strong and weak, big and small—need a framework of uniform and fair rules, which each can be confident that others will obey. The UN Charter establishes such a framework. From aviation to fisheries to trafficking in humans, member states of UN have established a vast body of principles and laws. At the same time, it has a long way to go.

Despite its achievements, the UN is in many respects dysfunctional and suffers from paralysis and inaction. While it can take much of the credit for lawmaking at the international level, there are gaps and weaknesses of enforcement in many of its standards. Too often it they are applied selectively and enforced arbitrarily. It lacks the teeth that to translate an impressive inventory of laws into an effective legal system.

Where enforcement capacity does exist, as in the Security Council, many observers believe it is not always used fairly or effectively. Where rule of law is most earnestly invoked, as in the predecessor to the current Human Rights Council, those invoking it do not always practice what they preach. .

And we must not forget the role of multinational corporations in undermining the rights of people. Some corporations carry out some of the most horrific human rights abuses of modern times, but it is increasingly difficult to hold them to account because of the corporate veil. Economic globalization and the rise of transnational corporate power have created a favorable

climate for corporate human rights abusers, which are governed principally by the codes of supply and demand and show genuine loyalty only to their shareholders.

There is a growing body of evidence which lists some powerful corporations as amongst the world's worst abusers, implicated in torture, kidnapping, environmental degradation and repressing political rights.

As citizens of the world, I believe that nurturing and safeguarding the rule of law is part of our collective obligation to make the world a better place. The morally and intellectually lazy might suggest that this is a task vested solely with those that are schooled in the law: jurists, judges, police and academics. That however is a misconceived and myopic vision. Indeed it is no vision at all.

RULE OF LAW AT RISK

There is little doubt that rule of law is at risk in many places around the world today. And somewhat paradoxically, it is threatened by some of the very states who were founded on the very principles of which it is constituted.

The last decade has seen a global decline in freedom. New threats, including heightened attacks on human rights defenders, increased limits on press freedom and attacks on journalists, and significant restrictions on freedom of association have been seen in nearly every corner of the globe from Burma to Uzbekistan; from Eritrea to Cuba. Harassment, surveillance, house arrest, and imprisonment of human rights defenders are on the rise, and censorship of the internet and other media has grown.

Too often in too many places, we are witnessing a shameful culture of impunity where the human rights of many people are systematically undermined and ignored. And nations which have been able to influence events in countries whose citizens live under the yoke of oppression have turned a blind eye to these conditions and looked the other way.

In Pakistan, Iraq and Afghanistan, we continue to observe civilians massacred in cold blood, while aid workers, journalists and other non-combatants are taken hostage and put to death in the most barbarous fashion. At the same time, we have seen Iraqi prisoners disgracefully abused. In Darfur, we see whole populations displaced, and their homes destroyed, while rape is used as a deliberate strategy. In Tanzania we have witnessed the deliberate killing of those suffering from albinism.

In Israel, we see civilians, including children, deliberately targeted by Palestinian suicide bombers. And in the occupied West Bank, we see homes destroyed, lands seized and needless civilian casualties caused by Israel's excessive use of force. Time and again the world has borne witness to hate speech aimed at Jews, at Muslims, against blacks, against anyone who can be identified as different from one's own group.

No cause, no grievance, however legitimate in itself, can begin to justify such acts. They put all of us to shame. Their prevalence reflects our collective failure to uphold the rule of law and to instill respect for it in our fellow men and women. We all have a duty to do whatever we can to restore that respect.

To do so, we must start from the principle that no one is above the law and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad,

and every nation that insists on it abroad must enforce it at home. The rule of law starts at home. But in too many places it remains elusive. Intolerance, xenophobia, hatred, corruption, violence and exclusion thrive and go without redress. The vulnerable lack effective recourse, while the powerful manipulate laws to retain power and accumulate wealth. At times, even the necessary fight against terrorism is allowed to encroach unnecessarily on civil liberties.

It may come as something of a surprise to civil libertarians but the FBI is able to conduct a "threat assessment" -- an investigation -- on any American without a judicial warrant or any articulable suspicion of criminal activity. It is a frightening reminder that the ghosts of J Edgar Hoover have come back to haunt the USA. The Fourth Amendment of the American Constitution protects "right of the people to be secure against unreasonable searches and seizures" and it is worrying that this practice will make inroads into the rights of all US citizens.

All the major democracies have in the name of promoting 'security', introduced laws that compromise our civil liberties, hard-won over five centuries.

But I believe we would be making a terrible mistake if we consider that the rule of law can be parked to one side because fighting terrorism is the more worthy objective. This is a decision that will one day come back to haunt us. It is not only terrorism itself but our responses to it which conjointly threaten our liberty. All of us have a duty to resist the temptation to sideline the ROL in times of crisis. It is precisely during those times that it is more sorely needed. Those who seek to bestow legitimacy must themselves embody it, and those who invoke international law must themselves submit to it. Regrettably, we have become prisoners of demagogues and those who would prefer a closed society. We would do well to remember that sometimes the greatest threats to democracy emanate from those who profess to champion it.

We would do well to remember that "The rule of law is never negotiable. It is not a luxury item that can be put away in the cellar in times of emergency, to be brought out again when things get better."⁴

Just as, within a country, respect for the law depends on the sense that all have a say in making and implementing it, so it is in our global community. No nation must feel excluded. All must feel that international law belongs to them and protects their legitimate interests.

The Rule of law as a mere concept is not enough. Laws must be put into practice and permeate the fabric of our lives.

It is by strengthening and implementing disarmament treaties, including their verification provisions, that we can best defend ourselves against the proliferation—and potential use—of weapons of mass destruction.

It is by applying the law that we can deny financial resources and safe havens to terrorists—an essential element in any strategy for defeating terrorism. It is only by a profound respect for the ROL, and commitment to its impartial application, that we can begin to rebuild and renew communities torn asunder by conflict.

It is the law, including Security Council resolutions, which offers the best foundation for resolving prolonged conflicts—in the Middle East, in Iraq, and around the world. And it is by rigorously upholding international law that we can, and must, fulfill our responsibility to protect

⁴ Lord Morris ditto page 8.

innocent civilians from genocide, crimes against humanity and war crimes. I for one do not subscribe to the belief that national sovereignty can properly be invoked as a justification for violating international law.

The Bush Doctrine of 'Preventive War' has steadily undermined respect for the rule of law in the international arena. In 2002 he declared that the United States will act against "emerging threats before they are fully formed."

The concept implied that the United States was prepared to act unilaterally beyond the constraints of international law and even beyond limits it has observed in the past. According to a Brookings Institute report: "The concept is not limited to the traditional definition of preemption—striking an enemy as it prepares an attack—but also includes prevention—striking an enemy even in the absence of specific evidence of a coming attack." The notion was aimed at terrorist groups as well as extremist or "rogue" nation states and was part of the US war on terror.

I believe that the international community is at a crossroads. The guarantees of international peace and security and the resolve to avoid the scourge of war following the dismantling of the League of Nations and the establishment of the United Nations have been sorely tested, even undermined by the use of military force under the Bush doctrine of 'preventive war' and the invasion of Iraq.

Authoritative opinion suggests that the doctrine of preemptive self defence contradicts the cardinal principle of the modern international legal order and the primary rationale for the founding of the UN after World War II - the prohibition of the unilateral use of force to settle disputes.

While no one would take issue with the contention that the nature of contemporary wars and terrorism has caused a fundamental shift in the way states must seek to defend their national interests, there are real threats to the integrity of the international legal order (and arguably the ROL) by the entrenchment and spread of the Bush doctrine for it represents a rejection of multilateralism. It heralds a return to the use of force as opposed to peaceable settlement of disputes under international law. Weakening or even abandonment of the rule of law and undermining the prohibition on the use of force which has been the product of not only the international consensus to avoid war following two world wars but decades of consensus may not be the solution. The danger of setting a precedent for the use of force by other states is self evident.

The US invasion of Iraq demonstrates a disturbing lack of respect for the ROL. An impressive body of international lawyers were of the opinion that the use of military force by the US against Iraq without specific, Security Council authorization was a violation of international law. No country, however mighty, has the prerogative to position itself above international law, or to apply it selectively with double standards. It is a view with which I concur. I wonder what John Bray the lawyer and scholar would have thought about the argument that a just war is being waged in Iraq.

I fully concur with views of the Nobel Laureate Archbishop Desmond Tutu who once suggested that President Bush and Tony Blair should apologise for the disaster in Iraq. Delivering the Longford Lecture in February 2004 he said and I quote:

"How wonderful if politicians could bring themselves to admit they are only fallible human creatures and not God and thus by definition can make mistakes. Unfortunately, they seem to think that such an admission is a sign of weakness. Weak and insecure people hardly ever say 'sorry'.

"It is large-hearted and courageous people who are not diminished by saying: 'I made a mistake'."

It is time for the Obama administration to re-engage with the rule of law and to translate its precepts into practical action. Twenty one months after his much anticipated inauguration, Guantanamo remains open. The world has waited in hope but change has yet to come. So far there is disappointment.

It is a sad fact that too many world leaders consider that greater aggression and belligerence will lead to greater peace and security. Call me naïve or what you will but I for one do not share those sentiments. At the risk of being judgmental, I consider this view to be misguided.

There needs to be renewed efforts that will see all countries rededicate themselves to purposes and principles of the United Nations Charter. In this manner only will the rule of law prevail in international relations, among and between all nations, averting the risk of large scale conflict and war.

There has to be a complete cessation of the use of torture including water boarding, "enhanced interrogation techniques" and renditions- the practice of transferring suspected terrorists to countries known to practice torture. It is a crying shame that some countries have engaged in this barbaric practice. These incidents stain the reputation of states that practice them and constitute a gross violation of human rights. They are an indictment on us all. We are all diminished by these acts of depravity. One is compelled to ask: "How is it that a country that champions democracy and human dignity has allowed itself to be reduced to the level of its detractors? "

It is an opportune time for the US to provide greater moral leadership and assist strengthen the rule of law by adhering to its basic tenets at home and abroad. The rhetoric of supporting the ROL is the easy part. It remains to be seen whether the rhetoric will be matched with action in the coming months.

Unilateralism in international affairs poses a grave risk to world peace and harmony and increases the risk of conflict. It places in jeopardy the carefully crafted fabric and matrix of a raft of international legal and other institutions which form the bedrock of the global community of nations and the United Nations itself. The choices are between multilateralism, the rule of law, and respect for international law, treaties and institutions unilateralism where States pursue their own interests, irrespective of the will of the world community, and accept the rule of economic and military power.

5. THE FIJI SITUATION: THE RULE OF LAW UNDER SIEGE

I want to now turn to the situation in my country.

Much of what is going on in Fiji which is eroding constitutional governance, not to mention the economy, is invisible and subtle. It is not readily apparent even to most people who live in the country. The situation is compounded by the fact that the media is heavily censored and free

speech is all but dead. Many shadowy figures who are orchestrating events on the margins, are not publicly seen or known. As a result, a largely ignorant public is generally unaware of the extent to which their human rights are being stolen and diminished. What is additionally troubling is that a sense of hopeless resignation and acquiescence has begun to set in. There is little sense of anyone or any one institution that has the courage or determination to stand up to the machinery of authoritarianism which has been allowed to take root.

Not surprisingly, the ROL has deteriorated since 5th December 2006. On 10th April 2009, the President dismissed the entire judiciary and abrogated the 1997 Constitution, a day after the Court of Appeal ruled that the December coup was unconstitutional. Since April last year the interim regime has ruled by executive decree. Over the last 4 years there has been a significant erosion of the ROL and weakening of the institutional independence of the judiciary. Public Emergency regulations have been in force continually since April 2009 severely restricting the exercise of human rights, including freedom of expression and association.

Under these Regulations government censors must approve all print media stories before they are published. Groups wishing to organize a meeting of 3 or more people must first obtain a permit to do so. They also permit the discretionary use of force by security officials, while providing for civil and criminal immunity even where the use of such force causes harm or death. A series of decrees have been issued preventing any legal challenges to any decrees made by the President since April 2009. In consequence, judicial review of executive and administrative action has been removed.

A new Media Industry Development Decree has been recently enacted. It requires all organizations that disseminate information to the public to adhere to strict content guidelines, and if required by the executive, to gain government approval prior to publication. Publication of information not in the public or national interest or which creates “communal discord” is prohibited and information may be censored prior to publication on the basis it may give rise to “disorder”, promote “disaffection or public alarm” or “undermine the Government and the State.” The Australian owned Fiji Times has been given until the end of September to sell its interests in the country. Under the decree, all media outlets and directors and 90% of its shareholders must be either citizens of Fiji or permanent residents. Many observers believe that this Murdoch owned newspaper is being punished for refusing to accord the military backed regime any kind of recognition or legitimacy. But these changes to the law demonstrates the extent to which the country’s rulers are prepared to stifle criticism and dissent.

Extended categories of sedition offences under a new Crimes Decree are punishable by up to seven years’ imprisonment. It extends to bringing into hatred or contempt or to excite disaffection against the administration of justice, raising discontent or disaffection amongst the people or promoting feelings of ill-will and hostility between different classes of the population of Fiji.

The printing, publication or distribution of any seditious publication is also established as a criminal offence, the penalty for which is imprisonment for 7 years. The breadth of these laws would have rendered it difficult if not impossible for me to have made an address such as this in my country. There would be a serious risk of my being jailed for “raising discontent”. It is a real worry when free speech is being eroded in the manner it has been in Fiji. For without it, none of the other freedoms can be claimed or defended. History has demonstrated time and again that societies where free speech is repressed are retarded and tend to gradually wither away.

There is no question that these laws will have a chilling effect on free speech and leave no space for democratic dissent, reducing even further freedom of speech and expression.

You might well ask: So how is it that the people of Fiji have allowed their rights to be derogated and their democracy whittled away? There are complex reasons rooted in the country's culture and history which explains the situation. But at its simplest, subversion of the rule of law has largely occurred because of a complacent and inattentive attitude by the citizenry. It has been aided by a judiciary regarded as having compromised its core principles as well a legal profession that lacked the courage, resoluteness and indignation that should have accompanied naked attempts at dismantling the country's democratic institutions. This was compounded by the absence of a national consciousness that recognized the need to uphold and protect the rule of law when it was under siege. The absence of vigilance by the population has allowed the forces of tyranny to undermine these institutions.

Should Australians care about what is happening in Fiji? I believe so. Fiji is one of Australia's largest Pacific island neighbors and is therefore of strategic importance. It is not in Australia's interests to have an unstable Fiji which could be the trigger for an unstable Pacific. Canberra has struggled to craft a policy which does not punish the people of Fiji but which at the same time withholds recognition and legitimacy from its de facto rulers. That policy has been strongly criticized from some quarters on the ground that Australia should 'engage' with the Fijian regime.

While isolating Fiji might not be the answer, neither is the idea of giving comfort to an administration which has shown scant respect for the rule of law. Both Australia and Fiji are subscribers to the Biketawa Declaration which commits members of the Pacific Islands Forum to upholding democratic processes and institutions including the peaceful transfer of power and the rule of law. The message that usurpers must not be rewarded is one that cannot be diluted. I do not profess to have the answers to Australia's current foreign policy predicament vis-à-vis Fiji. But contrary to popular belief, I do not believe that Australia's policies on Fiji have failed. The fact that those policies continue to be denigrated by the regime suggests they are succeeding.

Australia's interests aside, I believe that people everywhere have a moral obligation to stand up against tyranny and to support the rule of law where ever and whenever it has been and is being violated. More fundamentally, injustices in Fiji pose a threat to justice everywhere, including Australia.

The collapse of the rule of law in Fiji has repercussions for respect for the rule of law across the Pacific region and beyond. At a wider philosophical level, I have the conviction that all people must use their collective wisdom and strength to assist those peoples whose human rights and freedoms have been abused. I would go as far as saying that you have a positive duty as a country which enjoys a vibrant democracy, to support the rule of law and to denounce every occasion where it is violated especially if it happens in your proverbial neighborhood. It is when good people are silent that tyranny has one foot in the door.

6. MY STORY

Permit me to share with you my story of the trials which I have faced in my journey as a human rights defender and advocate for the ROL. I tell this not as a story of my heroism but as one example of the challenges faced by lawyers in places where the rule of law is threatened.

I grew up in a small town in rural Fiji in the early 1960s. My father was a butcher. I was the first and only member of my family to go to university. No one in my home would have heard or known the meaning of a coup d'état. I doubt very much anyone in my family had heard of the expression 'human rights defender'.

In May 1987, Colonel Sitiveni Rabuka the third highest ranking officer in the Fiji military staged a *coup d'état*. He and selected troops stormed the country's parliament and removed the elected government. That singular event was a watershed, forever changing Fiji's destiny. A deluge of water has since passed under the bridge of Rabuka's coup.

My first brush with Fiji's current crop of coup makers did not start with a confrontation with an armed soldier. I had heard rumors that I was on the army's radar after the December 2006 coup. For several months I had been speaking out against it both publicly and privately. In Fiji and at conferences abroad – Kenya, London, Jamaica, Malaysia to name just a few places, pretty much as I am speaking to you today.

In May 2007, the coup leader issued a written instruction to the public service that the law firm I then owned (and that of another whose principal had been equally outspoken about the rule of law and human rights) was not to be given any further commercial work by any government department or statutory corporation. It was a stark reminder that the stakes were high and that my advocacy in support of democracy and the rule of law would come at a price.

In July 2007, I tried to leave Fiji to travel overseas. There were murmurings beforehand that I could be stopped from leaving the country, but I dismissed them. With my boarding pass in hand, I made my way through immigration control. In normal circumstances, what should have been a fairly uneventful process turned out to be a nightmare. I was stopped by an officious bureaucrat at the airport. He turned to his computer and said there was a directive preventing me from travel. No further explanation was given.

Within days of being prevented from leaving the country, the military leader made a statement on national radio that I wasn't going anywhere and that the only way I could leave Fiji was to stowaway. Two days after being stopped from travelling I filed papers in the High Court challenging the ban against me. The ban that prevented me from leaving Fiji was eventually lifted and the matter settled out of court.

I have been variously accused of lying, being unpatriotic, misleading the public, cowardice, lacking integrity, seeking to undermine the judiciary etc. I have lost count of the misdeeds of which I stand accused by the regime. For a time, the country's self appointed head of government would publicly berate me. On radio. On TV. Sometimes in English. At other times, in the vernacular Fijian language. The regime's Attorney General also jumped on the bandwagon in his criticisms of me.

In April 2008, while at work I received an anonymous letter. It was racially offensive. At the time, I was representing a high profile defendant who was charged with conspiring with others, to kill Fiji's military leader.

In part the letter read: "Chinaman, Is this the kind of person you represent. Shame on you and whatever principals (sic) you claim to have because as far as we are concerned you and your kind don't belong to this country!!!!"

The harassment and intimidation continued. It is a balmy Friday night in July 2008. The phone rings. I receive an anonymous phone call. I immediately recognize the number from the caller ID, having been a judge in a military court martial in another life. The call is from the military barracks.

The tone of the voice sends shivers down my spine. It is menacing. This was the same military that had staged the coup in December 2006. It was the same military that stands accused of murdering five of its own in November 2000, when trying to quell a rebellion within its ranks. I slam the receiver down. The incident is reported nationally. People ask me “What did the man say?” I tell them “What’s more worrying is what the man didn’t say”.

That night I hired paid security to protect me. In the months that followed, I was constantly looking over my shoulders. I took more care to whom I spoke and what I said, especially if it was against the regime or its policies. I began to distrust people.

I have continued speaking out to anyone who cares to listen and against the advice of my family and friends. Many have counseled me to give up. I was told that I was an embarrassment for speaking out. At the time I ran my own law firm, my position on democracy became a source of tension and I probably scared away some commercial clients because of it.

One of my siblings who lives in Brisbane sent me an email seeking to discourage me from speaking out. In part it read: “I just wanted to remind you again not to be bothered to keep going after the interim government. You keep going against the government and this will affect your business. You never hear about any other lawyers stand up for the rights of people, they just do their work and go home. You have a business to run and in the end people will not go to you because you are too embroiled in politics.”

Last year the military backed regime amended the Legal Practitioners Act removing the power to license lawyers from the Law Society and vesting it in the hands of the Chief Registrar of the High Court. The incumbent was then a military officer. The authorities decreed that all lawyers had to “renew” their licenses with the registrar.

I was faced with a real dilemma. I did not recognize the regime much less its power to make new laws. What should I do? The choices were stark. I believed that if I were to choose to renew my PC I would be effectively recognizing that a new legal order was in place. If I did not, what would happen to my career in the law? Finally, after much soul searching, I decided I would not apply for a license to practice law in Fiji. Effectively this brought to an end a 30 year career. I have spent the best part of the last year working in Africa as a legal consultant. In effect, it has amounted to self imposed exile from the country of my birth. It has not been easy living thousands of miles away from my home and family. Now that my sojourn in Africa has ended, I am looking for full time employment.

Do I have any regrets over the position I have taken? The short answer is no. I took these actions because it was the right thing to do. I would do the same thing again if placed in the same situation. Has the price been heavy? Absolutely.

For fleeting moments I have wondered whether my life would have been a lot easier if I was a farmer and not a lawyer. But as a lawyer who has been taught the importance of constitutionalism and the rule of law, I did not have the luxury of choice when faced with the dilemma of how I should react to a regime which had usurped political authority. My profession had already made the choice for me. I would be lying if I said the choices before me were easy. It

has required steadfastness and a sense of self belief. At the end of the day, it is about doing what is right. It can never be about doing what is expedient.

Many people have questioned me about the wisdom of my path. Some have asked me: “Aren’t you venturing into politics and not law?” “Why are you speaking when the majority of people have said nothing?” “Shouldn’t you concentrate on your legal career?”

To paraphrase Martin Luther King: “And when I hear them, though I often understand the source of their concern, I am nevertheless greatly saddened, for such questions mean that the inquirers have not really known me, my commitment or my calling. Indeed, their questions suggest that they do not know the world in which I live.”

The words “coup” and “tyranny” are the antithesis of who I am and what I believe in as a human being and as a lawyer. If I had ceased protesting against the creeping authoritarianism and erosion of freedom in my country, it would mean that the last 3 decades in my life as a legal practitioner would have been total hypocrisy.

The last few 4 years have been stressful, occasionally frightening but mainly depressing. I have been spared the overt violence of my car being smashed or being summoned to the army barracks. Others have not been so lucky. This treatment has been meted out to many others who have tried to stand up for democracy and the rule of law. When tempted to despair, I have been sustained by my faith and spiritual convictions.

In comparison to what has occurred to others in many other parts of the world, my experience have amounted to no more than minor irritations. It is nothing compared to what the many other defenders of human rights have suffered around the globe.

In my own small way, I have tried in my small country, to promote the rule of law and stand up for human rights. It is the ordinary man and woman whom I sometimes meet in passing, who have given me the courage to continue. By a nod here or a comment, there they tell me that they too have a dream of returning Fiji to democratic governance.

The struggle for democracy is one that I have no intention of abandoning. I have a vision of a Fiji which fully respects the rule of law and which recognizes that the challenge of building a non discriminatory society cannot be achieved by coercion, fear or the force of arms.

One day, a Fiji which respects the universality and inalienability of human rights will return to its place of respectability in the international community. But the people of Fiji have to earn their freedom by reclaiming it. It will not be delivered to them on a silver platter.

Lawyers have a duty outside the context of serving clients to advance the cause of freedom. Sadly there has been an almost deafening silence by lawyers to speak out against the egregious breaches of human rights that have overshadowed Fiji in recent years. While the right to practice law confers great privileges, it confers even greater responsibilities to humanity as a whole. Human rights abuses might seem an abstraction to many, especially in so called first world countries, but in Fiji the challenges of building a culture which respects human rights and the rule of law, are very real. Australians just do not realize how lucky they are to have a robust, functioning democracy with all the rights and privileges that accompany it.

To those living under the dark shadows of authoritarian rule, where ever you live I have a simple message: do not give in to a spirit of defeat and complacency nor lose the will to fight against the

forces of tyranny and dictatorship. No government can deny you your human rights. A thousand guns cannot deny your God given freedoms. One day they will be silenced. The practitioners of despotism will not have the last word.

7. CONCLUDING REMARKS

Today, more than ever, the world needs an effective mechanism through which to seek common solutions to common problems. While the United Nations is not perfect, all countries must support it and aim to resolve conflict through the UN system and its organs. That is the *raison d'être* of the United Nations. With all its imperfections and dysfunctionality, it represents the best opportunity for countries to peaceably resolve conflict and to achieve international peace and security. Let us not imagine that, if we fail to make good use of it, we will find any more effective instrument.

We have reached a fork in the road. It is time for our political leaders to arrive at a global consensus on how to move forward. If they fail in this undertaking, history will take the decisions for them and posterity will be their judge. Ultimately those decisions must be made against the framework of the rule of law in each country and in the world. There is no alternative.

Despite evidence of growing support for democratic principles, the rule of law and fundamental human rights in some countries, an equally large number of states have embraced tyranny and dictatorship, and shown a scornful disdain for civil liberties. Our failure to address human rights problems the world over is an indictment on us all, and we cannot simply blithely sit back and abdicate responsibility for action. In this regard, I believe Australia has special responsibilities that come from being a mature and established democracy. They include a more pro-active role in assisting the restoration of democracy in countries where it has been threatened or removed.

It is also up to the United Nations, the international community and all men and women who cherish the ideal of freedom to take urgent measures to ensure that practitioners of tyranny and the enemies of democracy can no longer carry out their craft with impunity.

Our common humanity as global citizens behooves us to act, to challenge and to move beyond the temptations of expediency, self interest and pragmatism. The real proof of our commitment to the high and glorious ideals enshrined in the Charter of the UN will be tested in the coming months. It will require that we muster the courage to speak out, but more importantly to act. We must not let the voiceless in this world down. We cannot afford to fail. If we do, would have let ourselves down. Worse still, we would have abdicated our responsibility to a future generation of the world's unborn children.

As a man who had a deep and abiding love of the law and justice, I am sure John Bray would abhor the corrosion of the ROL that is occurring in many parts of the world today. And I think he would not wish us to be mere bystanders in the face of attempts to weaken it.

Each generation has its part to play in the age-long struggle to strengthen the quest for a just society and the rule of law for all, which alone can guarantee freedom for all. Let our generation not be found wanting.

Thank you for giving me the privilege of delivering this year's John Bray Oration.