

**Remarks of the Hon. Marilyn Warren AC
Chief Justice of Victoria
at the International Commission of Jurists
Opening of the Legal Year
Monday 3 February 2014**

The Rule of Law

There is a lot of talk these days about the law. Politicians take a keen interest in law and order. Everyone has an opinion. Judges are portrayed as tough and just – take the Jill Meagher case – then, uncontrolled and unaccountable – take the Malaysia Solution case. Judges and lawyers are complained about as hiding behind ‘rule of law talk’ – that is, the conversation where judges and lawyers supposedly try to befuddle the public by putting judges over democracy. The discussion twists and turns and becomes: the judges versus the people. The judges’ answer ‘without us there is no rule of law and without it there will be no democracy’.

So what is this thing, the rule of law? For centuries eminent people have tried to explain. From Oxford to Harvard to Melbourne, the words have flowed. Let me have a try.

The rule of law is the pre-determined set of known rules under which the society operates, that bind equally the Government and the citizens. The set of rules are the only rules on which the courts decide disputes and, always, effectively, consistently and fairly. So far, so good. But what does this really mean? Some examples.

Someone right now, is driving a car too fast somewhere in Victoria and being detected – on the Geelong Road, the Monash, the Hume, maybe right here in William Street. They will be fined under the traffic laws. Those laws were made before the driver breached the law and will be known to that person. The driver will receive a notice and be fined. If he or she thinks they did not breach the law they can be heard by an independent court which will decide the case.

Such a simple example. Every day the rule of law is played out in our society at all levels. From the weekend just past here in the CBD, assaults, acts of violence, sexual assaults, public misbehaviour and all sorts of conduct will be crossing the desks of police, prosecutors, lawyers, magistrates, judges and corrections officers. There will be individuals appearing in the Magistrates' Court in a few minutes time to be remanded in custody or bailed until their case comes on. Upstairs in this building,

the County Court, individuals will face trial for serious criminal behaviours. Again, in the Supreme Court today, individuals will face trial for murder, drug trafficking and commercial fraud.

The rule of law is not only about controlling citizens' behaviour, it also deals with disputes between citizens and between citizens and the Government. Today in the Supreme Court *Tabcorp* will start its multi-million dollar civil trial against the Victorian Government in a commercial dispute. In another courtroom, the *Kilmore East Bushfire* trial (after Black Saturday) will continue where a group of citizens are suing a power company and the State Government and others. In the County Court, injured workers and accident victims will have their claims heard involving the TAC and WorkCover. Each party will be treated equally – there is no advantage to a Government in litigation.

In Australia, mostly people accept and comply with the laws. If we need any reminder we need only watch the SBS or ABC news most evenings to observe the lawless events being played out in Eastern Europe, the Middle East and Africa. In Australia, opponents of government or supporters of human rights are not jailed and tortured. Imagine if the high rise public housing buildings across Melbourne (in Carlton, Collingwood, Richmond,

Flemington and elsewhere) were reduced to rubble during fights between government and rebel groups. Overseas tragedies reinforce the value of the rule of law to our society. In those places governments and groups do not accept the rule of law.

Often, the courts get in the way of governments. All governments are bound by the rule of law. When courts remind governments of this judges sometimes find themselves pushed aside. This has happened close by and recently. Some examples:

- In Pakistan an attempt was made to place the Chief Justice under house arrest and stop him from deciding cases.
- In Fiji, the Chief Justice was sacked and removed from his Court by armed guards.
- In Sri Lanka, the Chief Justice declared some laws unconstitutional and then found herself removed from office.
- In Zimbabwe, the Chief Justice ruled some government land seizures illegal and faced an attempted sacking.
- In Papua New Guinea the police entered the courtroom to arrest the Chief Justice on the orders of the Prime Minister – he managed to escape.

To us these events are shocking. We might tut-tut, shrug and say they were a long way away. But then, what about our neighbour and supporter of Australia, Nauru? In the last month, the Chief Justice has been unable to return to the country, to his Court, to perform his judicial duties. The judge, a former senior Victorian Supreme Court judge, had issued injunctions against the President and others stopping the deportation of a magistrate because of doubt over the legal basis of the deportation and, presumably, to give the magistrate a chance to be heard in an open and impartial court. The injunction was ignored and the deportation proceeded followed by the barring of the Chief Justice. The Chief Justice under the Nauruan Constitution may only be impeached (sacked) by a majority of the Nauruan Parliament. This has not occurred. The President of Nauru later issued a statement saying that the country had the same right as other countries 'to decide who holds key positions and who is allowed to work in the country'.

Chief Justice Eames has been supported and defended by the Australian Bars (including the Victorian Bar), the Judicial Conference of Australia, the Law Council of Australia, LawAsia, the New Zealand Law Society and the South Pacific Lawyers' Association.

The International Commission of Jurors has spoken forcefully in support of the rule of law in Nauru. I doubt there would be a Chief Justice, judge or magistrate in Australia who would not empathise with Chief Justice Eames and support his vigilance in protecting the rule of law in his jurisdiction. It is important that we do not let events in Nauru slip by: initial protest and criticism that subsides into acquiescence. We should maintain our support of Chief Justice Eames and urge the Australian Government to do all in its power to support his Honour and the rule of law in this historical neighbour.

These international events demonstrate how vulnerable the rule of law is and the risk if it is abused.

The rule of law is fulfilled by the rich structure built upon it. The rule of law not only controls society but also informs society.

When robust discussions on sentencing, legal aid, the Human Rights Charter, courts' independence and judges' decisions flow in society, the fact the law can do so much matters.

There has been a lot said about single-punch attacks. Mandatory sentences are being called for. The journalist, John Silvester, wrote last Saturday:

“These tough laws are based on the flawed premise that muscled morons, whose personality defects are inflamed by drugs and drink, have the capacity to make reasoned decisions the offender is unlikely to think, ‘new mandatory sentences will mean my lawyer will not be able to plea bargain if I kill this guy so perhaps I should desist from my present course of action’.”

Judges and magistrates apply the law. In sentencing they address deterrence for the individual but also deterrence in society. The solution by society of criminal behaviour is complex.

Essential to the rule of law is that judges decide cases efficiently, consistently and fairly in each case. Judicial discretion needs to be moulded to suit the individual case. As Victoria’s most senior judge and the longest-serving in the Supreme Court, in my experience the rule of law is best served by leaving judges to do their job. If they make a mistake there is an appeal process to deal with the mistake. Mandatory

sentences in any form undermine the capacity of judges to decide their cases efficiently, consistently and fairly.

The rule of law is a marvellously stimulating thing to talk about. Maybe later today, try writing down in one or two sentences your definition. Perhaps reflect on examples about how the rule of law plays out in our society on a daily basis. The rule of law is something we know is vital and precious but what exactly does it mean to you? If we can articulate what the rule of law means, we are more able to understand and appreciate why society must have it and why it should not be eroded.

Today is a magnificent community event. It is a highlight of the legal year. I congratulate the International Commission of Jurists, Justice Lasry, the participants and the organisers for their contributions. I thank the ICJ for the privilege of speaking.