

**Speech Given at the Ceremonial Sitting on the Occasion of
the Opening of the Legal Year 2021
Rule of Law in a Time of Pandemic**

1 February 2021

Supreme Court of the Australian Capital Territory

Chief Justice Murrell

Aunty Violet, thank you for your Welcome to Country.

The Court acknowledges the traditional and continuing custodians of this land, and we pay our respects to their Elders—past, present and emerging. We acknowledge that sovereignty over this land was never ceded. We reflect on the fact that, over the last 40 years, 439 Aboriginal and Torres Strait Islander Australians have died in custody.¹

Attorney-General, fellow judicial officers of the ACT Magistrates Court and other courts, retired judicial officers, members of the legal profession, and other friends of the Court,

A year ago, we were gathered in one ceremonial courtroom, side by side, shaking hands, remarking on the interstate and overseas holidays that some of us had taken during the Christmas shutdown period, and bemoaning the commencement of the work year.

It is now almost a year since 11 March 2020, when the World Health Organisation declared the coronavirus outbreak to be a pandemic,² and we sit 1.5 metres apart and in two courtrooms, but we still meet as one profession and sit as one Court. We welcome the fact that we are here at all. We are happy to be surrounded by our colleagues, and that they and we have survived with our health intact.

But have our institutions survived with their health intact? Has liberal democracy survived with its health intact?

The pandemic and the rule of law in Australia

¹ Lorena Allem, et al, 'Aboriginal Deaths in Custody: Black Lives Matter Protests Referred to Our Count of 432 Deaths. It's Now 437.' (*The Guardian*, online, 9 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/09/black-lives-matter-protesters-referred-to-our-count-of-432-aboriginal-deaths-in-custody-its-now-437>>; Aaron Fernandes, 'Second Indigenous death in WA prison within past two months' (*SBS News*, online, 14 July 2020) <<https://www.sbs.com.au/news/second-indigenous-death-in-custody-at-wa-prison-within-past-two-months>>; Australian Associated Press, 'Third Aboriginal death in WA custody in two months as man dies in Roebourne prison' (*The Guardian*, online, 29 July 2020) <<https://www.theguardian.com/australia-news/2020/jul/29/third-aboriginal-death-in-wa-custody-in-two-months-as-man-dies-in-roebourne-prison>>.

² Tedros Adhanom, 'Opening Remarks at the Media Briefing on COVID-19' (Speech, World Health Organisation, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.

A year on, it is instructive to reflect on how the past year has both accelerated change in the delivery of justice and exposed the fragility of the rule of law—that pillar of liberal democracy that is so important to us as lawyers.

Unfortunately, for much of the rest of the Australian population, the concept of rule of law is apparently unknown, let alone revered. The 2019 National Assessment Program on Civics and Citizenship showed that, among Year 10 students, only 38 per cent had a proficient level of knowledge of democracy and the rights and legal obligations of Australian citizens. Only 19 per cent were capable of correctly identifying two modern-day democratic principles after being provided with a short description of the Magna Carta.³ It is difficult to appreciate and value something if you don't understand it or even know that it exists.

The rule of law is closely associated with the separation of powers. I expect that almost no Year 10 students—indeed very few adults—understand the separation of powers and how fundamental it is to the maintenance of liberal democracy. The widespread lack of understanding is illustrated by the frequency with which the Court is asked by the executive whether it will allow administrative enquiries to occur within the courthouse.

During the pandemic, if the community has not understood why it is so, at least it is understood that the courts and lawyers do provide “essential services” that must be maintained. In a climate where health and the importance of “connection” trumps all—in which many a bar, gym or nightclub owner might optimistically seek to leverage on the argument that their business is essential—the recognition that delivery of the rule of law is an “essential service” should perhaps be considered to be an achievement.

The rule of law is associated with other “rights”, such as the right to a fair and public trial and the right to be tried without unreasonable delay. Modern liberal democracies also recognise and celebrate the rights to peaceful assembly, freedom of association, and freedom of expression. In the ACT, these “rights” are recognised in the *Human Rights Act 2004* (ACT).

However, over the past 12 months, we have been able to take neither the rule of law nor these other “rights” for granted. In the name of the pandemic, these “rights” have been challenged and, in some instances, eroded.

As the New Zealand High Court stated:

[I]n times of emergency the courts' constitutional role in keeping a weather eye on the rule of law assumes particular importance.⁴

In this jurisdiction, have we succeeded in keeping our “weather eye on the rule of law”? Have we continued to deliver equal access to the law and to deal with accused persons fairly and publicly without unreasonable delay?

³ Rebecca Urban, ‘Students long way off being citizens’, *The Australian* (20 January 2021).

⁴ *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [291].

In general, we have. We have done relatively well, partly because we have had the physical resources to do so; we have had enough courtrooms and they have been large enough to enable safe spacing. They are equipped with the technology that facilitates remote or hybrid hearings—on a good day (fortunately, today seems to be one of those days). Like other courts around Australia, we have used videoconferencing, e-filing, and other electronic means to ensure that we can continue to operate. These changes had been coming anyway but coming slowly; the pressure of the pandemic accelerated the change.

There was, of course, the distraction of the expansion of judge alone trials during the period that it was not possible to run any jury trial; luckily, in this jurisdiction, it transpired that the period when no jury trial was possible was only about three months. In the week of 23 March 2020, I presided over the only jury trial then running in Australia. Shortly thereafter, the *Supreme Court Act 1933* (ACT) was amended to allow persons accused of “excluded offences” (largely, sexual offences) to elect to be tried by judge alone, and to allow the Court to order that a trial proceed before a judge alone to ensure the orderly and expeditious discharge of Court business when it was otherwise in the interests of justice to do so.

A lot of emotional energy was expended on the argument that there was a “right” to jury trial. There has never been a “right” to a jury trial; there has only ever been a right to a fair trial. The capacity to run a broader range of judge alone trials has enabled the Court to continue to deliver criminal justice fairly and publicly, without seemingly indefinite delay. For the foreseeable future, it will not be possible for the Court to conduct all trials before a jury.

Between May and October 2020, the Court presided over six judge alone trials for sexual offences. Half resulted in convictions. Of a total of 19 accused who were tried by judge alone, a little less than half were convicted. This outcome was no surprise. About half the cases tried by jury result in convictions. Juries are not more likely to acquit or convict than judges.

Of course, where reasonably possible, serious matters should be tried by jury; the jury system enables public participation in a critical justice process and promotes community understanding and support for our criminal justice system. As judges, we are grateful when we don’t have to bear the heavy burden of making decisions that will fundamentally change the lives of others.

However, as Justice Lee of the Federal Court said:

Just because one cannot have a hearing conducted in accordance with traditional practices and procedures, does not mean that the Court’s judicial function cannot be performed effectively where it is necessary to do so. As Voltaire observed, one must ensure the perfect does not become the enemy of the good.⁵

⁵ *ASIC v Getswift Limited* [2020] FCA 504 at [7].

The Court is fortunate that it has the tools that have enabled the continued effective delivery of the rule of law to Territory residents, and to do so well, if not perfectly.

Global politics and the rule of law

Globally, it has not been a good year for the rule of law. In many nominally democratic countries, politicians have used the pandemic to further their own political agenda by undermining the rule of law.

The Hungarian Parliament passed legislation titled “On Protecting Against the Coronavirus”. The law allows Prime Minister Orbán to rule by decree and override or suspend existing legislation for an indefinite period of time.⁶ It criminalises the spreading of “false” information that impedes the “successful protection” of the public and interference with the operation of government measures to combat the pandemic.⁷ These two new crimes give the public prosecutor, a firm ally of the Prime Minister, the power to detain anyone who challenges the government, in the name of “protecting against the coronavirus”.

In March 2020, India was placed in a 21-day hard lockdown with only four hours’ notice. Many labourers (including many women with children) were evicted from factories and associated accommodation and were expected to travel back to their hometowns on foot with no food.⁸ Some were still walking home 50 days after the lockdown was announced. The requirements were implemented by force.⁹ At the same time, the government used internet shutdowns to “strategically clamp down on dissent”.¹⁰

In the Philippines, President Duterte ordered the police to “shoot dead” anyone who disrupted order during the enhanced community quarantine period.¹¹ Meanwhile, he pardoned the police chief of Manila for violating quarantine rules by holding a large birthday party—and later promoted him to national police chief.¹²

⁶ Iana Fremer, ‘Hungary: National Assembly Adopts Act Giving Government Special Powers during Coronavirus Pandemic’, *Global Legal Monitor* (online, 26 May 2020) <<https://www.loc.gov/law/foreign-news/article/hungary-national-assembly-adopts-act-giving-government-special-powers-during-coronavirus-pandemic/>>.

⁷ Ibid.

⁸ Interview with Baroness Helena Kennedy QC (James Lewis, International Bar Association, 10 June 2020) <<https://www.ibanet.org/Podcasts/7549027.aspx>>; Emma Alberici and Marianne Leitch, ‘India Enforced the World’s Biggest Lockdown. But Critics Say It’s Taken a Heavy Toll’, *ABC News* (online, 19 May 2020) <<https://www.abc.net.au/news/2020-05-19/worlds-largest-coronavirus-lockdown-india-covid-19-barkha-dutt/12246746>>.

⁹ ‘Coronavirus and the Rule of Law—Has COVID-19 Infected the Rule of Law?’ (Webinar, International Association of Lawyers and LexisNexis Rule of Law Foundation, 15 May 2020) <https://www.youtube.com/watch?v=lumooSs5_nU>.

¹⁰ Nehal Johri, ‘India’s Internet Shutdowns Function Like “Invisibility Cloaks”’, *Deutsche Welle* (online, 13 November 2020) <<https://www.dw.com/en/indias-internet-shutdowns-function-like-invisibility-cloaks/a-55572554>>.

¹¹ ‘The Rule of Law at the Time of the Coronavirus’ *Law of Duterte Land* (Episode 2, Rappler, 9 April 2020) <<https://www.rappler.com/newsbreak/podcasts-videos/law-duterte-land-rule-coronavirus>>.

¹² Neil Jerome Morales, ‘Philippines’ Duterte Absolves Police Chief over Lockdown Birthday Party’, *Reuters* (online, 15 November 2020) <<https://www.reuters.com/article/us-health-coronavirus-philippines-police-idUSKBN27U0FE>>.

In Russia, after a vote that was marred with allegations of irregularities,¹³ on 3 July 2020, the Russian Constitution was amended. One amendment allows the Federation Council, on the President's proposal, to remove judges of the Constitutional and Supreme Courts.¹⁴ On 22 December 2020, Putin signed a bill giving lifetime immunity to former Russian presidents and their families.¹⁵

We all know that such attacks on the rule of law were not confined to marginal or emerging democracies. They extended to the country that calls itself the leader of the democratic world.

After a tumultuous four years in power, in November 2020, Donald Trump lost the presidential election to Joe Biden. Trump supporters filed more than 50 lawsuits alleging widespread fraud and election abuse during the election.¹⁶

But the independent judiciary was not swayed by unmeritorious legal arguments and speculative accusations that sought to disenfranchise millions of voters. The courts' response was well exemplified by the decision of the United States Court of Appeals for the Third Circuit, in which Judge Bibas wrote:

Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations, and then proof. We have neither.¹⁷

That was only one battle in a long-running war against the rule of law.¹⁸

Throughout his term, Trump impugned courts who ruled against his government, often personally denigrating judicial officers. Following successful litigation challenging a Presidential Proclamation concerning asylum policy, Trump took to Twitter to label the decision "a disgrace" and Judge John Tigar "an Obama judge".¹⁹ When questioned about the ability of the courts to uphold the Second Amendment to the United States

¹³ Andrew Roth, "It Looks Like a Gameshow": Russia's pseudo-vote on Putin's Term Limits', *The Guardian* (online, 26 June 2020) <<https://www.theguardian.com/world/2020/jun/26/it-looks-like-a-gameshow-russias-pseudo-vote-on-putins-term-limits>>; Peter Stano, 'Russia: Statement by the Spokesperson on the Nationwide Voting on Constitutional Amendments' (European Union External Action Service, 2 July 2020) <https://eeas.europa.eu/headquarters/headquarters-homepage/81978/russia-statement-spokesperson-nationwide-voting-constitutional-amendments_en>.

¹⁴ President of Russia, 'Law on Amendment to Russian Federation Constitution' (14 March 2020) <<http://en.kremlin.ru/acts/news/62988>>.

¹⁵ Agence France-Presse, 'Putin Signs Bill Granting Lifetime Immunity to Former Russian President', *The Guardian* (online, 23 December 2020) <<https://www.theguardian.com/world/2020/dec/22/putin-signs-bill-granting-lifetime-immunity-to-former-russian-presidents>>.

¹⁶ Pete Williams and Nicole Via y Rada, 'Trump's Election Fight Includes Over 50 Lawsuits. It's Not Going Well', *NBC* (Online, 11 December 2020) <<https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289>>.

¹⁷ *Donald J Trump for President Inc v Secretary Commonwealth of Pennsylvania* (3rd Cir, No. 20-3371, November 27, 2020).

¹⁸ See Peter L Strauss, 'The Trump Administration and the Rule of Law' 170 *Revue Francaise d'Administration Publique* 433; Jeffrey Toobin, 'Ending Trump's Assault on the Rule of Law' (5 October 2020) *The New Yorker: The Stakes* <<https://www.newyorker.com/magazine/2020/10/05/ending-trumps-assault-on-the-rule-of-law>>.

¹⁹ Judge Paul Friedman, *Threats to Judicial Independence and the Rule of Law* (Judge Thomas A Flannery Lecture, Washington D.C, 6 November 2019).

Constitution (the right to bear arms), he remarked, “If it’s my judges, you know how they’re going to decide.”²⁰

On 13 January 2021, the US House of Representatives voted to impeach Trump for “wilful incitement of insurrection” after a mob of his supporters stormed the Capitol building in Washington DC. Amidst the impeachment proceedings, media outlets reported that Trump was considering whether to grant a pardon to himself and his family.²¹

During his presidency, Trump did grant many pardons, including to his former national security adviser, his former campaign manager, his ex-adviser (for crimes relating to the investigation into Russian interference in the 2016 presidential election),²² and the father of his-son-in-law (for tax evasion, witness tampering, and making unlawful campaign donations).²³ Not to mention the rappers who were pardoned for firearms offences.

Perhaps surprisingly, reality TV star Tiger King Joe Exotic did not receive the expected pardon and will be required to serve out his 22-year sentence for wildlife violations and participating in an unsuccessful murder plot; this last minute decision resulted in a long and lonely wait for the limousine that was positioned outside the prison, ready to whisk the Tiger King to celebrations.²⁴

Conclusion

I am tempted to conclude as Trump concluded his presidential term, by telling you to “have a good life”—or at least a good year—before adjourning to the tune of the timeless classic “YMCA”. However, I think that a little more is required.

It is not a time for the smug parochialism that has characterised Australia over the past year. The pandemic continues to challenge liberal democracy, providing a vehicle for disrespecting the separation of powers and the rule of law—even in the bush capital, the natural home of higher education, human rights, and funky bars.

Who then will guard and defend the rule of law? If you dozed off during the earlier parts of this speech, the answer is not Donald Trump. The answer is that it is first and foremost the responsibility of lawyers to defend the rule of law—and not just to defend it, but to promote a wider understanding of what is meant by the rule of law, the separation of powers, and the human rights that are associated with those concepts.

²⁰ Ibid.

²¹ ‘Donald Trump: Could the US President Pardon Himself?’, *BBC* (online, 18 January 2021) <<https://www.bbc.com/news/world-us-canada-40693249>>.

²² ‘Donald Trump Pardons Roger Stone, Paul Manafort, Jared Kushner’s Father’, *ABC* (online, 24 December 2020) <<https://www.abc.net.au/news/2020-12-24/donald-trump-pardons-paul-manafort-charles-kushner-roger-stone/13012362>>.

²³ Ibid.

²⁴ Eden Gillespie, ‘Limo Ready for “Tiger King” Star Joe Exotic as he Hopes for Presidential Pardon’, *SBS* (online, 21 January 2021) <https://www.sbs.com.au/news/the-feed/limo-ready-for-tiger-king-star-joe-exotic-as-he-hopes-for-presidential-pardon>>.

Amid the personal challenges that, no doubt, we will all face during the second year of the pandemic, let us remind ourselves to also look outwards, to identify and confront those challenges that the pandemic poses to liberal democracy—to keep “a weather eye on the rule of law”.