

Vigod Memorial Lecture
Delivered by the Honourable Bob Rae
St Thomas University
Fredericton, New Brunswick
September 26, 2018

Populism, Democracy and the Rule of Law

I want to begin by expressing my deep appreciation to the Vigod family and St. Thomas University for inviting me to deliver this lecture. Those familiar with my speaking style will know that I rarely speak from a text. However, out of respect for this lecture and in order to gather my thoughts, I have broken with tradition and am actually speaking from written notes. The Vigod family may have started a dangerous precedent.

First, let me start with some definitions. What do we mean by “populism” and democracy? Democratic and popular movements have come to a fork in the road. One direction takes us down a path that is guided by liberal ideas, federal ideas, and constitutional ideas. We can trace these back to ancient times, but most recently to the time of the American and French Revolutions, when those who believed in the “rule of the people” also believed that what the people wanted to do needed to be tempered by a respect for minority views, a concern about too much centralized power, and an understanding that power needed to be limited. The phrase of the great English liberal Lord Acton, comes to mind “power corrupts, and absolute power corrupts absolutely.”

In this tradition, the attack on the power of monarchs was done not simply in the name of “the people”, but in the name of a constitution that would define and limit the power of the state in important ways. It was not enough to overthrow the King and replace him with a demagogue or dictator who drew their strength from some mystical connection with “the people”. It was necessary to provide checks and balances, sometimes geographical, sometimes ethnic, sometimes institutional, that would ensure that no center of power would triumph over others.

That view was expressed in the famous “Federalist Papers” of the eighteenth century, in the American constitution that followed soon thereafter, in the writings of thinkers (and politicians) like Edmund Burke, James Madison, Alexis de Tocqueville, and many more who followed in their tradition.

The populist tradition that also has ancient roots - Aristotle was no fan of democracy because he saw it as a kind of “mobocracy”, a rule by an ill-informed majority that

could be whipped up to impose its will at the expense of freedoms, institutional excellence, and longer term cultural and institutional values. Cicero's famous attack on the demagogues of his time was all about his sense that demagogues like Cataline would take advantage of populist nationalism to enrich themselves and impose their will. The rule of the people meant, in fact, the rule of a populist leader whose power was based on a direct connection with "the people" always mobilized to strike down the rule of "elites", those whose education gave them a sense of their responsibility to maintain cultural and legal values that could withstand the assault of the mob.

There are populisms of the left and of the right. Popular uprisings disturbed Ancient Greece and Rome, and affected many cities in the Middle Ages. Both the Civil War in England in the seventeenth century and the French Revolution in the eighteenth involved the mobilization of political and religious movements that did not accept the compromises and half measures that were determined to calm and settle protest. Populism was later associated more with ethnic and religious movements that rejected the presence of "the other" in their midst - rural and other protests that rejected the economic and social forces that made their lives so difficult. Populism was often associated with anti-immigrant forces, and still is today in many parts of the world.

There are scholarly debates about whether populism is an economic movement or a social one, whether it is moved by a fear of dislocation and loss of status, or by resentment at immigrants or other groups who are perceived to be depriving "the people" of work and culture. In reality, it can be all of the above.

So we have two traditions, liberal and populist, that each use the word "democracy" but in fact mean very different things by it. For liberals, democracy is a necessity because without it power is based on ethnic triumph or inherited wealth or some kind of divine right. But that does not mean that democracy is to be revered as meaning that the majority is always right, or that the voice of the people is the voice of God. For populists, the trouble with liberalism is that it leads to power of the elites, that it means a group of self-appointed tribunes of "excellence" constantly looking down on the people, and that it prevents the popular will from being expressed as clearly and emphatically as it must be to keep faith with its supporters.

So, Jean Jacques Rousseau, the French philosopher of the eighteenth century, coined the famous phrase "man is born free but everywhere is in chains". By this, he meant that organized society was a kind of conspiracy against human nature, preventing people from becoming their truest and best selves, and that it would require a popular revolution to overthrow these institutions and unshackle these chains. The will of the people needed to be expressed, and should not be held back by repressive forces.

In two key revolutions, the American and the French, these ideas came into full relief. In the end, the American Revolution produced a government system that was at its heart about limiting power and limiting government. The French Revolution moved through moments of great violence and cruelty, and ended in the dictatorship of Napoleon. For some, it was the tyranny that swallowed itself, for others it was the great expression of the romantic possibilities of liberty, equality and fraternity.

Today, the words “democratic” and “democracy” have become the currency of almost every country and government in the world. Hitler came to power through an election and a series of referenda. Stalin insisted that he ruled by the will of the people, as do almost all governments today. Strong nationalist leaders in Iran, Turkey, and Russia insist that they are democratically elected, and have the ballots to provide it.

An equally critical part of political thinking around the world is tied up with the phrase “the rule of law”. But even here it is important to parse out the phrase. For many people, it simply means the common sense reality that for any society to function there needs to be order, to avoid the chaos of what the famous seventeenth century political writer Thomas Hobbes called the “war of all against all”, in which life was “nasty, brutish and short”. In order for societies to function effectively, they needed a common sovereign power, a set of rules to live by, and a legal and police structure that could ensure order was maintained and the rules were kept. In this important sense, Nazi Germany was a society of laws and rules, enforced by police and security forces and justified by judges whose rulings were used to negate any argument that this was simply a brutal tyranny.

But we use the phrase “rule of law” today to mean something quite different from the maintenance of sovereign power and order. It means a respect for principles and obligations that have their origins in a view about human personality and dignity. Whether we call it “natural law” or “moral law”, it is a view about rights that are built into our sense of what it means to be truly human. Again, we can trace these ideas back to ancient times. They are not confined to Western societies, but rather can be found in Indigenous, Middle Eastern, Asian and African societies where the path of a righteous and moral life was seen as having a meaning and reality that transcended political convenience or secular power. Wise scholars in many different traditions have found many of these ideas to be remarkable in their universality.

The point for us today is that the structures of both domestic and international law in many different parts of the world are based on the premise that while the state and governments articulate and institutionalize the law, the laws themselves are rooted in

some fundamental premises about the rights of persons and groups, and that the actions of governments must be seen to conform to these rights. Canada's adoption of the Charter of Rights and Freedoms is rightly seen as an affirmation of these ideas, but before we had a Charter we had a sense that the "rule of law" limited secular power, and indeed the Supreme Court of Canada expressed these ideas very clearly.

At the same time as many countries were undergoing profound social and technological changes, another set of forces was unleashed. National and ethnic identities emerged from the collapse of empires, over and over again. In the late eighteenth and nineteenth centuries, the age of nationalism became as well the age of imperialism as European powers saw the continents of Asia and Africa as backward and inferior cultures that were ready to be "civilized" by the arrival of armies, bureaucrats, and missionaries ready to overpower and dominate whole continents.

This was in fact just one more wave of expansionist and imperial activity. The rise of the proselytizing Christian and Islamic religions initiated wars of conquest, crusades and religious wars followed by centuries of rule in the name of one God or another. In the 14th and 15th centuries, maritime powers began to harness the science of astronomy in the cause of navigation - and with Papal blessing began to see the whole world as a legitimate place for their sense of superiority to be matched with military and political power.

When these empires met the indigenous realities of the Americas, Africa, and Asia, they saw cultures that were antiquated and ready to collapse, and people that they firmly believed were inferior and only too ready to be conquered. Of the moral superiority of Christian civilization there was not a moment's hesitation. The ruthless missionary certainties of the Crusades were transferred to continents supposedly rich in gold and diamonds, and whose people were too poor and weak to resist the force of what the anthropologist Jared Diamond has aptly termed guns, germs and steel.

Let me try and bring some of these ideas down to earth. Our current world can only be understood if we appreciate some of the powerful forces that have been unleashed, and learn something of the echoes of the past that can be found in our current debates. Canada as we know it today is a product of these forces as much as modern Myanmar, or East Africa, or the Middle East. Imperialism is not just an ideological buzzword. Two great imperial powers, the British and the French, saw Canada as just one part of the world where their ambitions for conquest and domination would be played out.

But in Canada it was not played on an empty terrain. While in legal circles in those days it was common to speak of the so-called "New World" as being a kind of "terra

nullius”, a land of no one, the Americas were deeply populated by a wide range of peoples from the Arctic to Terra del Fuego, peoples whose origins on the land dated back millennia (how many is the subject of ongoing scientific and indigenous debate), whose languages numbered in the hundreds, and whose civilizations ranged from the simplest hunter gatherer communities to the most complex of organized societies. The land was unknown and “undiscovered” to the European communities of the time, but not to the tens of millions of people who lived in the Americas. These continents were fully occupied, but were stolen by force of arms. They were not discovered.

Law is not simply the expression of moral values. It is also a system of justification. What the imperial powers brought with them was an almost breathtaking arrogance whose real basis was they had conquered, so the land and the peoples therein “belonged” to them. When the French signed the Treaty of Paris in 1763, they “ceded” much of their lands to the British. They based their title on conquest and occupation. Their might made their right. The British, in turn, assumed the same. Neither power based their claims on the “will of the majority”, because without any doubt the majority of the people at the time in what is now Canada were indigenous people who were never consulted.

This system of justification carried on for a couple of hundred years before governments who had drawn their support from wave after wave of immigrant settlers were finally confronted with the difficult reality that they might not have title to all the land they thought they “owned”. The initial conflict between the French and the British, and then between the British and the Americans, had forced both powers to attempt to bring the indigenous peoples into their economic and military systems of patronage and so sign treaties that recognized the collective rights of the indigenous people. These treaties were followed by many others as settlement spread to the north and west of Ontario and then even further west through to British Columbia.

These treaties were the ones that Pierre Trudeau agreed to recognize as having force and effect when he accepted Section 35 of the Constitution as one of the prices of building political consensus in 1981 during the debate on the patriation of the constitution. I had the good fortune to be part to those debates and discussions and I remember them well. And for those who think they are just part of our musty history, remember the passions that have been aroused in just the last few weeks by Premier Doug Ford’s decision to introduce legislation in Ontario that made use of the “notwithstanding clause” to make it clear that his determination to change the nature of a municipal election in Toronto would not be in any way affected by the existence of the Charter of Rights and Freedoms.

Just as the meaning of “rights”, “democracy” and “rule of law” is contested, so too are the meanings of treaties. One keen observer has rightly pointed out that for the Crown the treaties were really divorce papers, but for the indigenous peoples they were about a marriage. The Crown sought to limit its liabilities and ensure its collective rights to land and jurisdiction. They rely on the words of the treaties themselves, the most important being the surrender of land that was part of every written document signed since the 1830’s.

For indigenous people treaties have always been about mutual obligation, two peoples, nations, governments agreeing to treat with one another and establish a social contract based on mutual respect. All the ceremony and oral understandings that surrounded the signing of the document were even more important than the piece of paper that the colonial negotiators were so wedded to - as their successors are today. It is worth remembering that most of the elders and leaders whose marks, crosses, and signatures are at the bottom of the short treaty documents could not read or write English. They knew what they were signing, based on their own traditions and understandings. The British and Canadians knew what they were signing. It’s just that they had very different systems of knowledge to justify their thinking.

From this profound misunderstanding (and misrepresentation) much of our current controversy arises.

In the nineteenth century American society was critically divided on two issues - slavery and indigenous rights. The famous French political observer Alexis de Tocqueville’s famous work “Democracy in America” devoted a whole section of his study of this emerging democratic society on the challenge facing a settler society dealing with these two critical issues. Coming from outside, his observations are naturally reflective of his time and place in French society, but they nevertheless point to the tensions created by what he called the “tyranny of the majority”. The rights of neither group were respected by a society that saw both blacks and Indigenous people as inferior and unworthy of either respect or dignity. De Tocqueville was in America just at the moment that the Cherokees of Georgia were being forced out of their treaty lands to Oklahoma, and gives this poignant description of the Trail of Tears.

Like many observers of his time, De Tocqueville saw indigenous people as relics of another time, whose only choices were to assimilate or die. Subsequent politicians in both Canada and the United States felt even more strongly that since death and disappearance were not happening on their own, or at least not quickly enough, residential schools would have to be created to ensure that the indigenous family was destroyed for all time. They were speaking for the majority of settler citizens, and their

policies lasted for more than a hundred years. Despite the force and brutality of these policies, indigenous people have survived, and so have their cultures. They have not gone away, and governments (and majorities) are having to cope with the ongoing reality of what this really means.

Populism is terrible at protecting minority rights, because it is expressly based on the theory that the majority, the collectivity, must always triumph over the individual, and the smaller group. Andrew Jackson, the President who could be described as the first American president to embrace populism, cared not a whit about what judges thought or wrote about rights. When the Chief Justice of the United States John Marshall found that the state legislature in Georgia was in the wrong when it expropriated the treaty lands of the Cherokees, Jackson is said to have commented “the Chief Justice has made the law. Now let him enforce it”. We know what happened. Marshall was powerless to enforce his own decision. The Cherokees were forced off the land, and thousands died in the long march to Oklahoma Territory.

Jackson was a hero to his people, the settlers, whose numbers exceeded those of the indigenous people. He flouted the law. He didn't care about rights. What happened in the 1830's in the United States could be called a genocide. Canada's former Chief Justice, Beverley McLachlin, has described indigenous policy in Canada over the past hundred years as a “cultural genocide”.

Which brings me to broader issues of human rights, refugees, and the Rohingya. It might seem that they are not directly connected to Canada and our own history and current challenges, but in fact, they are very directly linked. The historical connection between Canada and Myanmar is our common colonial experience. In Myanmar's case an ancient kingdom, the Bamars, ruled much of the territory of what we now call Myanmar, or Burma, although their power did not always dominate over a multitude of other tribes and peoples living to the north, east and west of the Irrawaddy Valley. When the British concluded their long, drawn out conquest of Burma in 1884, they ruled the colony as part of the bigger Indian Empire. There was no border between Burma and India, and the unilateral power of the Bamars was severely restricted as the interests of other groups and power centres were accommodated.

It is said that when Aung San, the father of Aung San Suu Kyi, led the battle for independence at the end of the Second World War, his slogan was “Burma for the Burmese”. This meant not only that the colonial power would be eliminated, but that the rights of the majority would be enshrined and protected. Burmese independence meant that the British left, but it also meant that millions of Hindus would be sent back to India, that fighting would start again with the ethnic groups like the Chin, the

Kachin, the Shan, and the Karin, and that one particular group, the Rohingya Muslims of Rakhine State (the old Arakan kingdom that itself was subjugated by the Bamar) would increasingly be seen as an outside group (“Bengalis”) who had been brought into Rakhine by the British and who could not be seen as a legitimate part of the constitutional family.

Things got much worse in 1962 after a military coup led by General Ne Win. The efforts at finding peace within the country were set aside, and a brutally repressive regime kept up a ruthless internal battle for ethnic supremacy, military autocracy, and an isolation of the country under the battle cry of Socialism within One Country. It was a disaster for the economy, for democracy, the rule of law, and for human rights. The Rohingya were forced to flee the country on many occasions, lived as refugees in Bangladesh, and would come back but never with a right of citizenship or full participation in the life of the country.

It’s worth remembering that the end of the imperial era was marked by enormous human suffering, just as its arrival and implementation had been marked by much brutality. Ethnic conflict, slaughter, discrimination and forced departure were common in the Middle East, Africa and Asia in the years after 1945, and continue to this day. Nationalist populism has a lot to answer for.

The discrimination faced by the Rohingya is deep-seated, and like all racial and religious conflicts is stirred up by the worst of stereotypes, hate speech, and efforts to arouse, rather than resolve, tensions. Deep-seated prejudice is a terrible thing, and it is even worse when it finds support in majority populations that are not moved by arguments about rights and historical injustice. This is true in Canada, and it is true in Myanmar. The degree of the prejudice and discrimination are different, but the disease is the same.

As the world emerged from what the Charter of the United Nations calls “the scourge of war”, it was widely hoped that international law and humanitarian institutions would be able to usher in an era of greater peace and reconciliation. The optimists in the world point out that there is less conflict and hardship in the world today than in 1945, and there is certainly much objective support for these observations. But we also have to recognize that our aspirations for human rights and dignity have not always been met by real success. There are more refugees and displaced people in the world than at any time since 1945, and the plight of a million Rohingya in Bangladesh and Myanmar, stateless, not citizens in their own country, and not properly recognized as refugees, is but one example. There is terrible conflict in Syria, Yemen, South Sudan, Venezuela, eastern Ukraine, and many parts of Africa. There is repression in

innumerable countries around the world, and deep prejudice and discrimination against millions of people because of their religion, colour, or sexual orientation.

The legal architecture we have to deal with these issues is no match at the present time for the problems, and neither is the humanitarian response. We pat ourselves on the back for some acts of generosity, but if we are honest with ourselves, we have to admit that we are not doing enough. Aid budgets are frozen, and there is resistance in every wealthy country to doing more, to meeting the degree and extent of the challenge.

And we need to understand something else as well. In his recent speech yesterday at the United States, Donald Trump, who likes to see himself as the modern incarnation of Andrew Jackson, expressed most emphatically a world view that is at odds with the premises of the fragile liberal democratic architecture the world has built since 1945. He is against something he calls “globalism”, and poses instead to support something he calls “patriotism”. His comment in his inaugural speech is that his watchword will be “Always America First”. The problem with this is that it invites a similar response from every nation in the world, just as competing empires stumbled to disaster in the years leading to World War One. If all of us, all the time, only put ourselves first, then, borrowing from Rabbi Hillel, we can only ask “what are we”? Every negotiation becomes a zero sum game. Power is based on fear, not on genuine, legitimate authority. The rule of law becomes the rule of laws, with the only question being “do we have the votes to do this?”

No country more than Canada stands to lose if this view prevails. We lose because we cannot possibly compete with the United States in size or power. We can inflict some pain in a trade war, but we cannot possibly win it. We can punch above our weight, but at some point, we have to understand our deep vulnerability to what President Trump is both preaching and practicing. We know that many Americans will lose as well from a retreat to a trade war, but let there be no doubt, we stand to lose much more.

But we lose in another way as well, because the siren call of populism is not far from our own politics, and when that happens we shall all be the poorer. Minorities will suffer, as they have in the past. And as political discourse becomes more coarse and crude, we retreat into name calling and an inability to understand that there needs to be a certain dignity in our differences.

No province has had to learn these difficult lessons about celebrating our diversity more than New Brunswick. I am speaking to you from unceded land that was once the exclusive domain of Canada’s first peoples. The arrival of French and British settlers was not easy - it brought with it conflict and disease. When Britain prevailed, it carried

out a brutal, forcible deportation of the Acadian people that in modern terms would be seen as a crime against humanity. Building mutual respect between three founding peoples of the modern province is a constant work in progress, that requires careful nurturing. I shall not be commenting on New Brunswick's recent election except to say the best traditions of our parliamentary democracy, the Canadian Charter of Rights and Freedoms, including the provisions on language, and civility itself will I am sure triumph over narrower views.

It is critically important in the face of these difficulties to be true to our best selves. A populism that ignores human rights and the rule of law is a false prophet. The ideals we espouse for liberalism and democracy are the right ideals. Our problem is not in our beliefs but in the hard truth that the journey we are on is a long one, and will continue long into the future. This is not a time for us to question our faith, but to practice it with more dedication and honesty. We are frail, and what we have built is not as strong as it needs to be. But we can make it better.