A Personal Journey Through the Rule of Law in the South Pacific

W K Hastings[1]

Conceptually, the idea that the rule of law is maintained by an independent and impartial judiciary is not difficult to understand. In fact, we really only hear about "the rule of law" in the popular media when it is blatantly ignored by other branches of government. And when that happens, those branches usually leave themselves open to a back-to-basics serve from the judiciary.

Such a serve was given by the Samoa Court of Appeal recently in *Attorney General v Latu.*[2] It is a detailed judgment, but para [110] reveals its succinct and beating heart:

> [110] We see it as beyond reproach that the Supreme Court can order the Head of State to convene Parliament if that is what the Constitution requires.

Latu was but one marker in a rule-of-law saga that played out in Samoa in recent months. At issue was a very close election, maneuvering on all sides to either delay or bring on the swearing-in of the contested election's winners, and the Supreme Court's authority to order the executive branch to perform its duty under the constitution.

Some background is warranted:

Samoa's general election on 5 April 2021 resulted in a tie between the ruling Human Rights Protection Party (HRPP) and the Fa'atuatua i le Atua Samoa ua Tasi (FAST) party. An independent member of Parliament decided to support the FAST party and break the tie.

After much legal jostling, Samoa's Head of State Tuimalealiifano Va'aletoa Sualauvi II issued a proclamation on 20 May 2021 to convene the 27th Parliament on 24 May 2021 — the last day the Legislative Assembly could convene in accordance with the Constitution, and a Supreme Court order, to swear in the newly elected leaders. However, the Head of State then *suspended* that proclamation on 22 May 2021 until further notice.

FAST party leaders sought and obtained a ruling from the Supreme Court that the suspension was unconstitutional. Nevertheless, the caretaker Speaker, a member of the HRPP, proclaimed the swearing-in scheduled for 24 May 2021 was "postponed," and the doors of Parliament were locked.

On 24 May 2021, a large tent was set up beside the Parliament House, and FAST's members of Parliament gathered to swear in the new leaders, including Fiamē Naomi Mata'afa, Samoa's first woman prime minister. The next day, the caretaker Attorney General applied to the Supreme Court for a declaration that the 24 May 2021 convening of Parliament was unlawful and unconstitutional. The Supreme Court made that declaration but also confirmed the validity of the 20 May 2021 proclamation and ordered Parliament to be convened within seven days. It was not. On 4 July 2021, the Head of State proclaimed:

> … the Supreme Court has no jurisdiction to order the convening of Parliament as only I, the HEAD OF STATE of the Independent State of Samoa, have the POWERS to appoint a time and place for the meeting of the Legislative Assembly.[3]

The Court of Appeal confirmed the validity of the 20 May 2021 proclamation. It also held that the Supreme Court's ruling on the unconstitutionality of the swearing-in was based on an assumption that the holders of office would act in good faith — an assumption that, in retrospect, was unwarranted, given the 4 July 2021 proclamation. As a result, the Court of Appeal declared that the tent swearing-in *was* valid, and that in the exercise of its "duty to protect the Constitution and uphold the rule of law," the Supreme Court had jurisdiction to order the convening of the Legislative Assembly when the Head of State failed or refused to do so.[4]

Defining the rule of law

Practically, an independent and impartial judiciary's work to maintain the rule of law is often undermined by less noticeable micro-attacks, which rarely make the headlines. If these are called out, the reaction is generally that comfortable judges are complaining about their conditions. Such attacks do not appear so threatening in the moment. But their cumulative effect is to soften the ground for a headline-grabbing attack on the rule of law and the judiciary of the dramatic type that happened in Samoa.

This article will describe some of the micro-attacks (and perhaps some not so "micro") that I have encountered on my way to becoming the Chief Justice of Kiribati. Before that though, it may be useful to unpack what I mean when I talk about maintaining the rule of law.

I have found no better definition of the rule of law than that provided by the World Justice Project:

> The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers accountability, just law, open government, and accessible and impartial justice.[5]

This definition works for a number of reasons.

First, it emphasizes durability. The rule of law must prevail over external and internal stressors. The greater the stress, the more important the rule of law becomes.

Second, it emphasizes system. The rule of law is not an abstract concept. It is an assembly of parts that work well together. The more practice the parts have working together *without* stress, the more resilient the rule of law becomes *under* stress. In a democracy, the rule of law requires each of the three branches of government to exercise reciprocal restraint in the exercise of their powers.

Third, it emphasizes that the rule of law includes things other than laws, such as norms and community commitment. The rule of law is felt in the community where people want to see its benefits. The community wants to see disputes resolved quickly, offenders punished justly, commerce encouraged with clear and fair rules, and a government that is open and accountable to the people. The community will commit to the rule of law to achieve these benefits. The reference to norms includes a shared belief that any system requires its actors to work together in good faith.[6] By including "norms and community commitment" as a component of the system, this definition also recognizes variations on the central theme that are determined by things such as culture, economics, and geography.

Fourth, community commitment on the international stage requires each branch of government in one country where the rule of law is maintained by an independent and impartial judiciary to recognize the significance of the concept in other countries. Failure to do so indicates a lack of appreciation of the importance of the concept not only in the other country but also at home.

Fifth, accessible and impartial justice requires that justice is delivered in a timely manner by competent, impartial, and independent adjudicators. The adjudicators must have adequate resources, not just to do their job but to do it to a high standard. The adjudicators should also reflect the communities they serve; the more an adjudicator looks like they belong to the community and shares the community's values, the more likely the community is to trust and have confidence in the system of justice. The rule of law benefits from that confidence in the judiciary.

Finally, the definition emphasizes that the rule of law is not an end in itself. It is the means to achieve the four deliverables of accountability, just law, open government and accessible and impartial justice. Every community wants these things because they just make life better.

The first threat
Security of tenure

I witnessed several threats to the independence of the judiciary and, by extension, to the rule of law during my journey to becoming the Chief Justice of Kiribati. I will focus on three of them.

I was appointed Chief Justice of Kiribati on 5 July 2021, but because the pandemic complicated travel plans, I was not sworn in until 9 August 2021. Kiribati had been without a Chief Justice for seven months. The previous Chief Justice left at the end of his term in December 2020. A Puisne Judge of the High Court was overseas and unable to return, as was the Chief Magistrate. Although a Commissioner of the High Court was doing what he could to hold hearings, by the time I arrived, the backlog of unresolved cases had grown to 1,200. Without leadership of the judicial branch, without judges (let alone independent and impartial ones), and without an efficient process for case resolution, it is fair to say that the rule of law in Kiribati was already under threat.

I heard about the job from my head of bench, who solicited expressions of interest within our court at the end of 2020. I expressed an interest. This was no shoulder-tapping exercise. Kiribati decided to use an Australian legal recruitment firm to run the appointment process, which put the process at arm's length from the executive branch.

One of the hallmarks of an independent judiciary is that appointments are made according to clearly defined criteria and by a publicly declared process.[7] The criteria for this position set out what is essentially the job description for any Chief Justice: leading the judiciary; serving as "liaison" between the judiciary and other branches of the government; maintaining the independence of and public confidence in the judiciary; overseeing the delivery of legal training to all judicial officers; and presiding over cases effectively and impartially.

While the recruitment agency and Kiribati were determining whether I passed muster, seemingly out of the blue (or at least without notice to me), a bill was introduced to the Maneaba ni Maungatabu, the Kiribati Parliament: An Act to Amend the High Court Judges (Salaries and Allowances) Act 2017. This was the first of the three threats to the rule of law I encountered on this journey. The original 2017 Act provided in section 5 that "Pursuant to section 83(1) of the Constitution, the tenure of office for judges of the High Court shall be subject to the appointment." Section 83(1) of the Constitution states that "the office of a judge of the High Court shall become vacant upon the expiration of the period of his appointment to that office." Both sections worked together. Although neither specified the length of tenure or a mandatory retirement age, there was nothing in them that appeared to affect a judge's security of tenure during his or her appointment, and the Constitution set out a detailed, and difficult, removal process.

The amendment bill changed all that. It sought to amend section 5 so that "(t)he appointment of a judge must be made on a fixed term specified in a written contract, which may be extended where deemed necessary. This applies to new and existing judges."

The amendment bill raised two issues. The first is that it purported to put judges on contract. It did not say with whom, but the most likely other party would be the President as Head of State. Nothing in the Constitution and nothing in the 2017 Act requires a judge to be on contract; they only refer to appointments. Although it had been the practice in Kiribati for judges to sign contracts setting out the conditions of their appointment, that practice could not be said to be the best practice unless a judge's security of tenure during the appointment was protected. As the amendment bill did not proscribe the content of any contract, the potential for interference with a judge's security of tenure was evident. The potential alone is sufficient to find interference with judicial independence.

It also conflated appointment to public office with contract. A judge's independence is compromised by a contractual employment relationship. The position of a judge is better described as a public office rather than as a private law contractual relationship.

Furthermore, the bill purported to apply to *existing* judges. Retrospectively putting a judge on contract is abhorrent to judicial independence. It is also unworkable. If a judge refused to sign such a contact relying on the fact of his or her appointment as the authority to sit,

the potential for conflict with the executive — which would be relying on a statute passed procedurally correctly by the legislative branch — is significant. The bill challenged the ability of all three branches of government to work together to uphold the rule of law.

On 16 April 2021, the Commonwealth Magistrates' and Judges' Association (CMJA), the Commonwealth Legal Education Association (CLEA), and the Commonwealth Lawyers Association (CLA) issued a joint statement about the bill. Framing their statement in terms of "democratic principles including respect for the authority of an independent and impartial judiciary," they stated: "[W]e are concerned that the principles of security of tenure will be adversely affected by the provisions that all high court judges will be appointed on a contract basis."[8] The statement was silent on the retrospectivity clause.

Kiribati received advice from a number of other quarters that the bill was unconstitutional. At second reading, the contract clause was removed and replaced with a clause stating that judges are appointed for a fixed term. (Many countries do this, including New Zealand, which gives judges who have reached mandatory retirement age acting warrants to continue sitting, usually for two years.) And with these changes, the bill came into force.

The bill was better, but not ideal. I had to make a choice. If I withdrew from becoming Chief Justice, Kiribati would have to restart its process of finding a suitable appointee. I reasoned that accepting the role would enable me to influence decision-makers in Kiribati and provide the opportunity to constantly reinforce the importance of the rule of law and an independent judiciary. Being on the ground would give me the ability to implement a few ideas, including triaging and dealing with the backlog of cases with the resources at hand; encouraging the appointment of more judges, including qualified i-Kiribati from the ranks of the profession and 120 magistrates; encouraging the design of robes that look like they belong to 21st-century Kiribati instead of 18th-century England; bringing into force new rules of civil procedure; and encouraging investment in training, buildings, and systems. All of this would enhance Kiribati's commitment to the rule of law in a highly visible manner.

Not being on the ground would change nothing, and Kiribati had already addressed the Commonwealth agencies' only stated objection by removing the contract clause. I decided to accept the appointment with the support of the New Zealand heads of bench. Still, it would be another three months before I set foot in Kiribati.

Two more threats
An executive with too much authority and too little responsibility

During these three months, we had many logistical issues to address, each made worse by the pandemic. There were no commercial flights into Kiribati, which meant either chartering a plane or hitching a ride on a cargo or military plane — and at whose expense? There were uninsurable risks, including evacuation necessitated by a COVID-19 outbreak. Each week was complicated by fresh events — an outbreak in Fiji stopped the usual route to Kiribati; an outbreak in Brisbane stopped the secondary route to Kiribati. Ensuring I would not have to live out of a suitcase for the next three years put strain on the logistics of airfreight and seafreight into Kiribati. Each of these logistical issues was either overcome or the risk assumed.

Then the "Memorandum of Understanding" hove into view during the week before I was finally scheduled to travel. As I was not resigning my New Zealand warrants, the memorandum was presented in apparently final form to the New Zealand Chief District Court Judge for his perusal. It contained two clauses of concern (these are the second and third of the threats to judicial independence I referred to earlier):

> Y acknowledges and accepts that the day to day work direction of Judge Hastings will be set by the Government . . . .
>
> For the avoidance of doubt, Y *will not* fund or organize the repatriation of Judge Hastings should a COVID-19 outbreak occur in Kiribati (emphasis added).

I have deliberately not stated the parties to the Memorandum of Understanding, or which country is "Y." Both clauses, however, certainly affected the independence of the judiciary.

A judge cannot be said to be independent if his or her "day-to-day work direction" is set by a government, that is, the executive branch. The concept is rather breathtaking in its disregard of judicial independence. Perhaps the clause was meant to serve another purpose, but on its face, the idea that judges should be directed by the government fundamentally undermines the rule of law. The clause was objectionable for the same reason the Commonwealth agencies gave when they criticized the contract clause in the amendment bill — it gave the executive branch too much authority over an independent judiciary.

The second clause regarding assistance in the event of a COVID-19 outbreak was problematic for nearly opposite reasons — it allowed the government to *shirk* responsibility. A country can hardly be said to be committed to the rule of law if it does not provide at least the same support to judges as it does to members of the other two branches in an emergency.

Of course, one could understand that a developing country such as Kiribati would find it difficult to allocate any more resources to a judge than to members of the other two branches in such an emergency. And the clause made no reference to how members of other branches of government were to be treated. So, while not ideal, and provided that members of the other branches were treated the same way, the second clause was arguably unlikely to violate the minimum standard found in the Latimer House Principles, which require a legal framework that is sufficient to ensure that governments do not single out judges for disproportionate adverse treatment.[9] But not knowing if members of the other branches would be left to fend for themselves in the event of an emergency (something I doubted), I was dismayed.

The problem is not always where you think

Now might be a good time for a revelation: The parties to the Memorandum of Understanding are New Zealand government agencies, and the country of "Y" is New

Zealand, not Kiribati. Both clauses were drafted by *New Zealand officials*. Thankfully, as soon as members of the New Zealand judiciary saw those clauses, the significance of their impact on the rule of law was quickly explained. The first clause was removed entirely, and the second clause was modified to read:

> In the event of any emergency situation arising for Judge Hastings, such as under a COVID-19 outbreak in Kiribati, where evacuation and repatriation is not immediately and reasonably available to Judge Hastings under an insurance policy, the Parties will act in good faith to implement potential solutions that are reasonably practicable in the circumstances and respond effectively to the emergency situation.

Better than "will not," I thought.

As was the case with the amendment bill, the remediation of both clauses represented a measure of success against what could be considered micro-attacks on an independent and impartial judiciary's ability to maintain the rule of law. That these attacks came from such an unexpected source perhaps underscores three things:

The first is the need for vigilance. No country is immune from attacks or proposed attacks on the independence of the judiciary. Judges need to call them out in their own country even if the public might see the judges as complaining yet again about their comfortable conditions. Actors on the international stage need to call these aggressions out when they occur in other countries that share a commitment to an independent judiciary as a means of maintaining the rule of law. Failure to call them out indicates a lack of awareness of, or commitment to, the rule of law in one's own country. We cannot claim any moral high ground internationally if we allow our own commitment to the rule of law to be undermined at home.

The second is the need for good faith. The idea of good faith was inserted into the emergency clause and was also stated to be a significant constitutional principle in *AG v Latu*.[10] To paraphrase the Samoa Court of Appeal, the rule of law relies on the good faith of the relevant state actors, all of whom owe obligations to the Constitution. An independent and impartial judiciary is an important part of the machinery by which these obligations are fulfilled. Public confidence in each branch of government also requires each branch to act in good faith with respect to the others and with respect to the people they serve.

The third is perhaps more prosaic, but the occasional refresher course in fundamental constitutional principles wouldn't go amiss. The challenge is to ensure the day-to-day application of those principles. We as judges must always be aware of and pay constant attention to the basic principles that underlie the separation of powers. And, when necessary, we must remind our colleagues in the other branches of these principles.

I arrived in Kirabati, fully vaccinated, on 27 July 2021 via a Royal New Zealand Air Force flight. I was greeted from 50 metres away by a person clad head-to-toe in PPE (personal protective equipment). They gestured to me to carry my suitcase and a box of medicines I now seemed to be in charge of into an ambulance, which took me to 14 days' quarantine in

a repurposed hotel. After five negative Covid tests, I was released on the day I was to be sworn in. I was welcomed by a special sitting of the High Court, where I committed to protect the independence of the judiciary and the rule of law. And now I am engaged in the day-to-day application of those fundamental principles on the ground in Kiribati.

There are legal and constitutional challenges almost every day. There are also personal challenges. The picture below is of me sitting in Onotoa, one of the outer islands to which I've been on circuit. No Chief Justice had visited for six years. I was melting. The temperature here is always between 30 and 35 degrees Celsius. I've been to a second island, Beru, where I held court and drank algae to appease the local spirit. Soon I'm off to Christmas Island, 3,000 kilometres to the east, where one of my cases is a part-heard judge-alone murder trial.

I hope to report some success in maintaining the principles I was sworn to uphold, but that is for a future edition.

— **W.K. Hastings** is a Judge of the District Court and Court Martial of New Zealand, currently on secondment from both as the Chief Justice of Kiribati and President of its Court of Appeal.

[1] I am grateful for the advice of Imogen Little as the events described unfolded, and that of the Hon. Justice David Collins on earlier drafts of this article. The views expressed in this article are, as the title suggests, personal, and do not necessarily reflect the views of any person, bench, government agency or country.
[2] *Att'y-Gen. v Latu & Ors*, [2021] WSCA 6 (Samoa App. Ct.).
[3] *Id.* at para 38 (emphasis in original).
[4] *Id.* at paras 64, 65.
[5] *What is the Rule of Law?* WORLD JUSTICE PROJECT, https://worldjusticeproject.org/about-us/overview/what-rule-law (last visited Aug. 7, 2021).
[6] Good faith was also emphasized in *Latu* at para 107.
[7] *See, e.g.*, Commonwealth Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government art. 4, Abuja, Nigeria, 2003.
[8] Statement on the proposed High Court Judges (Salaries and Allowances) Amendment Bill 2021, COMMONWEALTH LAWYERS ASSOCIATION (Apr. 16, 2021), https://www.cmja.org/wp/wp-content/uploads/highcourtjudgeskiribati.pdf.
[9] J. VAN ZYL SMIT, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES: A COMPENDIUM AND ANALYSIS OF BEST PRACTICE (REPORT OF RESEARCH UNDERTAKEN BY BINGHAM CENTRE FOR THE RULE OF LAW) 73-79 (A. Riddell ed., British Inst. of Int'l & Comparative Law 2015).
[10] *Latu*, [2021] WSCA 6, para 107.