The Arc of the Moral Universe Is Long, But…

Rosalie Silberman Abella

Keynote Address

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This is a group I've admired for decades. And what I've admired is the recognition, right in the name Law and Society, that law only matters in context. Otherwise, it's just rules. Because I've always seen justice as the aspirational application of law to life, I see Associations like this as representing a constant search to align law, life, and justice, a search to see how to make sure the arc of the moral universe bends always towards justice for the public.

I'm guided in my choice of themes in this lecture by the moral legacies I take from several anniversaries—the deaths fifty years ago of Martin Luther King and Bobby Kennedy, the creation of the Universal Declaration of Human Rights and Genocide Convention seventy years ago, and D-Day's anniversary yesterday. They all form the backdrop to three areas in which I see the arc bending out of shape: in the way we deliver justice to the public; in the way some countries are playing fast and loose with judicial independence; and in the way the world is not only bending the wrong way, in too many places it's upending the moral universal, leaving justice in the dust.

The last two topics are in fact two facets of a bigger problem, namely, what's happening to democracy as we knew and know it. But let's start first with something less metaphysical—delivering justice to the public. And from there, we'll go global.

What unites all these themes, I hope, is that they're areas of interest—and possible relevance—to all of you.

When I was in first year university, everyone told me to take Philosophy with Professor Marcus Long. In the very first class, he asked the proverbial: "If a tree falls in the middle of a forest and no one hears it, does it make noise?" I turned to my best friend Sharon and said, "I'm outta here. Who cares?!"

Now that I'm older and don't have the answers to everything the way I thought I did when I was eighteen, I realize what a wonderfully instructive metaphor Marcus Long's question is. If you can't hear something, you don't know about it, and if you don't know about it, then it possibly doesn't exist for you. And if it doesn't exist for you, there's no need to do anything about it.

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But that doesn't mean the tree didn't fall and make noise. And it doesn't necessarily mean we can ignore it. It may have caused a lot of damage, and the longer you leave that damage, the harder it'll be to fix. And what's the noise we can't afford to ignore? The sound of a very angry public.

And it's a public that's been mad for a long, long time. Like the character from the movie Network, I'm not sure they're going to take it anymore. And frankly, I'm not sure they should.

I'm talking of course about access to justice. But I'm not talking about fees, or billings, or legal aid, or even *pro bono*. Those are our beloved old standards in the "access to justice" repertoire, and I'm sure all of you know those tunes very well. I have a more fundamental concern: I cannot for the life of me understand why we still resolve civil disputes the way we did more than a century ago.

In a speech to the American Bar Association called "The Causes of Popular Dissatisfaction with the Administration of Justice," Roscoe Pound criticized the civil justice system's trials for being overly fixated on procedure, overly adversarial, too expensive, too long, and too out of date. The year was 1906.

1906 was three years after the Wright Brothers' maiden flight at Kitty Hawk, ten years after *Plessy v. Ferguson* told blacks that segregation was constitutional, eight years before the most cataclysmic war the world had ever fought, a generation before rural North America became urbanized, and two generations before its governments became decidedly distributive.

But consider what's happened to the rest of our North American reality since then: The horse and the buggy of 1906 have been replaced by cars and planes; morphine for medical anaesthetics and the surgical knife by the laser; *caveat emptor* has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced by Spotify; the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones.

And yet, with all these profound changes over the last 112 years in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, *we still conduct civil trials almost exactly the same way we did in 1906.* Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Can we say that about any other profession?

If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal system in conscience resist experimenting with justice in order to find better ways to deliver it?

Justice may be blind, but the public is not. And the public doesn't think it should take years and several thousands of dollars to decide where their children should live, whether their employer should have fired them, or whether their accident was compensable. They want their day in court, not their years.

We can't keep telling the public that this increasingly incomprehensible complicated process is in their interests and for their benefit, because they're not buying it any more. When we say, "It can't be done," and the public asks, "Why not?", they want a better reason than "Because we've always done it this way."

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We can't talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people. Process is the map, law is the highway, and justice is the destination. If, much of the time, the public can't get there because the maps are too complicated, then, as Gertrude Stein said, "There's no there there." And if there's no "there there," what's the point of having a whole system to get to where almost no one can afford to go.

So let's be bold and acknowledge that the public has judged our relationship with incremental change to have been largely Sisyphean. The tinkering at the edges, with reforms like mediation and arbitration, may have been a necessary rehearsal, but it hasn't exactly been the hit with the public we thought it would be.

I think it's finally time—again—to think about designing a whole new way to deliver justice to ordinary people with ordinary disputes and ordinary bank accounts. That's what real access to justice needs and that's what the public is entitled to get. Justice must be seen to be believed. And getting people to believe in justice is what the legal system is supposed to do.

Let's move to the global risks to the judiciary and the first part of my democratic anxiety attack—the confusion over the role of independent courts in a democracy.

Let's start our conversation with the term "Rule of Law," the Holy Grail of "democratic discourse" today, and the one everyone invokes to justify the legitimacy of their views. I confess that I have always wondered about the use of the term Rule of Law as an organizing principle. Beyond students of scholars like Joseph Raz, H. L. A. Hart, and Ronald Dworkin, I think the debate between positivists who see the rule of law as a procedural concept, and those who see it as one with moral substance, is lost on most lawyers let alone members of the public. Universal principles to which most of us are expected to give aspirational loyalty should not be shackled with semantic ambiguity. After all, this generation has seen the Rule of Law impose apartheid, segregation, and genocidal discrimination. It frankly makes me wonder why we cling so tenaciously to the label.

So what are we really talking about? We're talking, I think, about some universal goals—ensuring limitations on arbitrary state power, protection against rule by whim, and about our belief in law as an instrument of procedural and substantive justice. If I'm right that that's what we're really talking about when we talk about a *just* Rule of Law, doesn't that mean that what we're talking about is what we've come to see as the indispensable instruments of democracy: due process; an independent bar and judiciary; protection for minorities; a free press; and rights of association, religion, and expression, for example? Those are core democratic values and I for one am not the least bit embarrassed to trumpet them, because when we trumpet those core democratic values, we trumpet the instruments of justice. And justice is what laws are supposed to promote.

And I think we need to emphasize that when we talk about democracy, we're not just talking about elections. To say democracy is only about elections is like saying you don't need the whole building if you have the door. Elections tell democracy it's welcome to come in, but elections are only the entrance. Without a home, democracy can't settle down. It needs an edifice of rules and rights and respect to grow up healthy and secure.

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So shouldn't we be out there promoting the universalism of democratic values, the instruments of justice which emerged triumphant from World War II, instead of a euphemism like the Rule of Law. We need the Rule of Justice, not just the Rule of Law. I know democratic values are no guarantee, but they're the best goals because without democracy there are no rights, without rights there's no tolerance, without tolerance there's no justice, and without justice there's no hope.

What kind of rights are we talking about? Two kinds—human rights and civil liberties, both crucial mainstays of our democratic catechism, and both at risk from neglect. What's the difference between them?

Civil liberties are about treating everyone the same; human rights are about acknowledging people's differences so that they can be treated as equals; civil liberties are only about the individual; human rights are about how individuals are treated because they are members of a group. The notion of civil liberties is a concept of rights that requires the state *not* to interfere with our liberties; human rights, on the other hand, cannot be realized *without* the state's intervention.

But we have to start at the beginning of the story. The rights story in North America, like many of our legal stories, started in England, The rampant religious, feudal, and monarchical repression in the seventeenth century in England inspired new political philosophies like those of Hobbes, Locke, Hume, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments. These were the theories of civil liberties which came to dominate the "rights" discussion for the next 300 years.

They were also the theories which journeyed across the Atlantic Ocean and found themselves firmly planted in American soil, receiving confirmation in the Declaration of Independence guaranteeing that every "man" enjoyed the right to life, liberty, and the pursuit of happiness, and that the government existed only to bring about the best conditions for the preservation of those rights.

Thus was born the essence of social justice for *Americans*—the belief that every individual American had the same right as every other American individual to be free from government intervention. To be equal was to have this same right. No differences. Neutrality. Leading, as we saw in *Masterpiece Cakeshop Ltd.*, to approaching the right of a baker to refuse to bake a wedding cake for a same-sex marriage the same way as the right of a baker refusing to put homophobic biblical messages on a cake. Or, as Anatole France wryly observed, leading to the rich and the poor having the same right to sleep under bridges and steal bread…

Unlike the United States, we in Canada were never concerned only with the rights of individuals. Our historical roots involved, as well, a constitutional appreciation that the two cultural groups at the constitutional bargaining table, the French and the English, could remain distinct and unassimilated, and yet theoretically of equal worth and entitlement. That is, unlike the United States, whose individualism promoted assimilation, we in Canada have always conceded that the right to integrate, based on differences, has as much legal and political integrity as the right to assimilate.

Where for others pluralism and diversity are fragmenting magnets, for Canadians they are unifying. Where for others assimilation is the social goal, for us it represents the inequitable obliteration of the identities that define us. Where

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for others treating everyone the same is the dominant governing principle, for us it takes its place alongside the principle that treating everyone the same can result in ignoring the differences that need to be respected if we are to be a truly inclusive society.

Integration based on difference, equality based on inclusion despite difference, and compassion based on respect and fairness. These are the principles that, to me, form the moral core of Canada's national values and the values that make us the most successful practitioners of multiculturalism in the world. But I digress…

In any event, the individualism at the core of the political philosophy of rights articulated in the American constitution ascribing equal civil, political, and legal rights to every individual *regardless* of differences, became America's most significant international export and the exclusive rights barometer for countries in the Western world. Concern for the rights of the individual monopolized the remedial endeavours of the pursuers of justice all over the world. It was formal equality, it was Diceyan, it ignored group identities and realities and, indeed, regarded collective interests as subversive of true rights. It was a theory that saw no distinction between yelling "fire" in a crowded theatre and yelling "theatre" in a crowded fire station.

It was not until 1945 that we came to the realization that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind, namely, the rights of individuals in different groups to retain their different identities without fear of the loss of life, liberty, or the pursuit of happiness.

It was the Second World War which jolted us permanently from our complacent belief that the only way to protect rights was to keep governments at a distance and protect each individual individually. What jolted us was the horrifying spectacle of group destruction, a spectacle so far removed from what we thought were the limits of rights violations in civilized societies that we found our entire vocabulary and remedial arsenal inadequate. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of, but because of their differences, and started to formulate ways to protect the rights of the group in addition to those of the individual.

We had, in short, come to see the brutal role of discrimination, and we invented the term "human rights" to confront it. So we blasted away over the next several decades at the conceptual wall that had kept us from understanding the inhibiting role group differences played, and extended the prospect of full socio-economic participation to women, non-whites, indigenous peoples, persons with disabilities, and those with different linguistic and sexual preferences. And, most significantly, we offered this full participation and accommodation *based on* and notwithstanding group differences.

Civil liberties had given us the universal right to be equally free from an intrusive state, regardless of group identity; human rights had given us the universal right to be equally free from discrimination *based* on group identity. We need both.

But then we seemed to stall as the last century was winding down. What we appeared to do, having watched the dazzling success of so many individuals in so

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many of the groups we had previously excluded, is conclude that the battle with discrimination had been won and that we could, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted, and educated in droves; having permitted parades to demonstrate gay and lesbian pride; having started to recognize our shameful treatment of indigenous people; and having constructed hundreds of ramps for persons with disabilities, many were no longer persuaded that the diversity theory of rights was still relevant, and sought to return to the simpler rights theory in which everyone was treated the same. So we started to dismissively call a differences-based approach political correctness, or an insult to the goodwill of the majority and to the talents of minorities, or a violation of the merit principle.

Somehow, as the twentieth century ended, we started to let those who had enough, say "enough is enough," allowing them to set the agenda while they accused everyone else of having an "agenda," and leaving millions wondering where the human rights they were promised are—and why so many who already had them thought the rest of the country didn't need them.

The essence of their message was that there was an anti-democratic, socially hazardous turbulence in the air, most notably during judicial flights.

The critics made their arguments skilfully. They called the good news of an independent judiciary the bad news of judicial autocracy. They called minorities seeking the right to be free from discrimination special interest groups seeking to jump the queue. They called efforts to reverse discrimination "reverse discrimination." They trumpeted the rights of the majority and ignored the fact that minorities are people who want rights too. They said courts should only interpret, not make law, thereby ignoring the entire history of common law. They called advocates for equality and human rights "biased," and defenders of the status quo "impartial." They said judges who strike down legislation are activists, unless they disagreed with the legislation. They claimed a monopoly of truth, frequently used invectives to assert it, then accused their detractors of personalizing the debate.

Significantly, they wanted judges to be directly responsive to public opinion—particularly theirs—without understanding that when we speak of an independent judiciary we are talking about a judiciary free from precisely this kind of influence.

Public opinion, in its splendid indeterminacy, is not evidence and it is not law. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion and susceptible to wild mood swings. In framing its opinions, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said of judges.

There is no doubt that the public's views have—and should have—a seat at the justice system's table. What they do not have—and should not have—is a veto. Judges who do their job properly in a democracy not only have the right to disregard the majority's opinion, they have a *duty* to do so if it conflicts with basic legal and democratic principles. Independent judges who are not politically compliant are not anti-democratic, they are doing their job.

Time, not public opinion, will always be the ultimate judge of how well judges fulfilled their duty in protecting rights. And time too will judge the governments of the day for their willingness—or unwillingness—to contribute to public respect

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for the judiciary's independent responsibility to patrol the borders between legislative action and the public's rights to rights.

People elect legislators who enact the laws they think the majority of their constituents want them to enact and who appoint judges who are expected to be independent from those legislators and the majority, and impartial in determining whether the legislature's actions meet the requisite standards. That is why they are judges. And if judges don't do their job fearlessly, neither human rights nor the democracies they serve have a chance.

Yet here we are in 2018, trapped in many parts of the western world in a frenetically fluid, intellectually sclerotic, rhetorically tempestuous, ideologically polarized, and economically myopic discourse that is clamouring for our attention. It includes, notably, an intense verbal whirlpool about judges and constitutions and rights, a conversation in which loaded phrases are perpetually spun and important concepts are conveniently disregarded. The most basic of the central concepts we need back in the conversation is that democracy is not—and never was—just about the wishes of the majority. What pumps oxygen no less forcefully through vibrant democratic veins is the protection of rights, through courts, notwithstanding the wishes of the majority. It is this second, crucial aspect of democratic values which has been submerged by the swirling discourse.

Why should we care?

Because if we don't, too many children will never get to grow up, period, let alone grow up in a moral universe that bends towards justice.

And that brings me to the final part of my talk, what I see as the fragility of democracy in too many parts of the world, where democratic institutions and values are thrown under the bus, victims of political expediency and global indifference.

It was not always so. After 1945, the global community demonstrated an enormous capacity for constructing legal systems and institutions to enhance and advance international human rights law. Through the UN Charter, the "peoples of the United Nations" determined to "reaffirm" faith in "fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." It was created for the purpose of achieving international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all. But the human rights revolution that started after—and because of—World War II, seems to have too few disciples in the countries that need it the most.

Compare this state of affairs with the revolution in international trade law. Like international law generally, international economic law has witnessed an institutional proliferation of organizations, like the OECD, the ILO, the United Nations Commission on International Trade Law, and, of course, the IMF, the World Bank, and GATT.

Then in 1994, the *Marrakesh Agreement* established the World Trade Organization (WTO), which came into being on January 1, 1995, dramatically extending the reach of trade regulation and creating a comprehensive international legal and institutional framework for international trade.

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After just over twenty years in operation, the WTO is, in essence, international law's child prodigy. Like the United Nations, the WTO struggles with reconciling the interests of the most powerful states and the least, as is obvious from the tumultuous (and ongoing) multi-year saga of the Doha Development Round of negotiations. Yet despite occasional criticism, the WTO, and its dispute settlement mechanism in particular, are regarded as legitimate, effective, and influential in international relations.

So you can see that international trade law has, like international human rights law, constructed a complex network of institutions and norms to regulate state conduct. But *unlike* international human rights law, states *comply* with international trade law and, in the event of non-compliance, an effective dispute settlement mechanism is available to resolve disputes. In other words, what states have been unable to achieve in seventy years of international human rights law is up and running after only about twenty years of international trade regulation.

If we examine international trade and international human rights law in parallel, we can make a number of discouraging observations. First, unlike the UN, the WTO is extremely difficult to join. That means that the global community feels that obtaining membership in a trade organization should be more onerous than obtaining membership in an organization responsible for saving humanity from inhumanity. And second, the global community agrees on the principles underlying international trade law. In contrast, the global community cannot agree on the principles underlying international law generally, so sovereignty and human rights continue to conflict.

I find this dissonance stark and unsettling.

What's wrong with this picture, and what does it tell us about our global priorities?

Our generation has seen the most sophisticated development of international laws, treaties, and conventions the world has ever known, all stating that human rights abuses will not be tolerated.

But we've also had, among others, the genocide in Rwanda, the massacres in Bosnia and the Congo, the repression in Chechnya, the child soldiers in Sudan, Zimbabwe, China, Myanmar, Pakistan, Syria, Iran, Russia, Darfur, Hungary, Poland, Turkey, and the refugees dying by the hundreds as they seek refuge from the wrath of national conflicts, among many, many others.

What's going on, and what do we need to think about to fix it? And fix it we must, because unless we pay attention to intolerance, the world's fastest growth industry, we risk losing the civilizing sinews that flexed the world's muscles after World War II.

The human rights abuses occurring in some parts of the world are putting the rest of the world in danger because intolerance, in its hegemonic insularity, seeks to impose its intolerant truth on others. Yet for some reason we're incredibly reluctant to call to account the intolerant countries who abuse their citizens, and instead hide behind silencing concepts like cultural relativism, domestic sovereignty, or root causes.

These are concepts that excuse intolerance. Silence in the face of intolerance means that intolerance wins.

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What has happened to the miraculous regeneration and luminous moral vision that brought us the Universal Declaration of Human Rights, the Genocide Convention, and the Nuremberg Trials, those phoenixes that rose from the ashes of Auschwitz and roared their outrage.

The world was supposed to have learned three indelible lessons from the concentration camps of Europe:

1. Indifference is injustice's incubator;
2. It's not just what you stand for, it's what you stand up for; and
3. We must never forget how the world looks to those who are vulnerable.

All this because, as Robert Jackson said, in his opening address at the Nuremberg trials, "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."

To me, this is not just theory.

I am the child of survivors. My parents spent four years in concentration camps. Their two-and-a-half-year-old son, my brother, and my father's parents and three younger brothers were all killed at Treblinka.

My father was the only person in his family to survive the war. He was thirty-five when the war ended; my mother was twenty-eight. As I reached each of those ages, I tried to imagine how they felt when they faced an unknown future as survivors of an unimaginable past. And as each of my two sons reached the age my brother had been when he was killed, I tried to imagine my parents' pain in losing a two-and-a-half-year-old child. I couldn't.

After the war, my parents went to Germany, where my father, a lawyer, taught himself English. The Americans hired him as a defense counsel for Displaced Persons in the Allied Zone in Southwest Germany. In an act that seems to me to be almost incomprehensible in its breathtaking optimism, my parents transcended the inhumanity they had experienced and decided to have more children. I was born in Stuttgart on July 1, 1946, a few months after the Nuremberg Trials started, and came to Canada with my family in 1950, a few months after the trials ended. My father was not allowed to practise law because he was not a citizen. That's when I decided to become a lawyer. I was four years old.

I never asked my parents whether they took any comfort from the Nuremberg trials, which were going on for four of the five years we were in Germany until we got permission to come to Canada in 1950. I have no idea whether they got any consolation from the conviction of dozens of the worst offenders. But of this I'm sure: they would have preferred, by far, that the sense of outrage that inspired the Allies to establish the Military Tribunal of Nuremberg had been aroused many years earlier, before the events that lead to the Nuremberg Tribunal ever took place: the 1933 Reichstag Fire Decree suspending whole portions of the Weimar Constitution; the expulsion of Jewish lawyers and judges from their professions that same year; the 1935 Nuremberg laws prohibiting social contact with Jews; or the brutal rampage of Kristallnacht in 1938—they would have preferred that world

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reaction to any one of these events, let alone all of them, would have been, at the very least, public censure.

But there was no such world reaction. By the time World War II officially started on September 3, 1939, the day my parents got married, it was too late.

And so, the vitriolic language and venal rights abuses, unrestrained by anyone, turned into the ultimate rights abuse: genocide. And millions died.

And seventy years later, we still haven't learned the most important justice lesson of all—to try to prevent the abuses in the first place. All over the world, in the name of religion, national interest, economic exigency, or sheer arrogance, men, women, and children are being murdered, abused, imprisoned, tortured, and exploited. With impunity.

So, Lesson #1 not yet learned, Indifference is Injustice's Incubator.

The gap between the values the international community articulates and the values it enforces is so wide that almost any country that wants to can push its abuses through it. No national abuser seems to worry whether there will be a "Nuremberg" trial later, because usually there isn't, and in any event, by the time there is, all the damage that was sought to be done has already been done. Does this raise questions about the effectiveness of the United Nations as a deliberative body? Frankly, it should.

We have to first acknowledge that many of the United Nations' agencies have achieved great success in areas like peacekeeping, shelter and relief to refugees, and the World Health Organization. But the UN was the institution the world set up to implement "Never Again." Its historical tutor was the Holocaust. Yet it hardly seems to be an eager pupil. What was never supposed to happen again, has. Again and again.

Over ninety years ago, we created the League of Nations to prevent another world war. It failed and we replaced it with the United Nations. The UN had four objectives: to protect future generations from war, to protect human rights, to foster universal justice, and to promote social progress. Its assigned responsibility was to establish norms of international behaviour. Since then, forty million people have died as a result of conflicts in the world. Shouldn't that make us wonder whether we've come to the point where we need to discuss whether the UN is where the League of Nations was when the UN took over? I waited for years to hear what the UN had to say about Syria. Wasn't that magisterial silence a thunderous answer to those who say things would be a lot worse without the UN? Worse how? How many more shocking images of needlessly bewildered, wounded, and murdered children do we have to see before our conscience kicks in. Isn't that what World War II was fought to end once and for all? I know the UN is all we have, but does that mean it's the best we can do?

Lesson #2, not yet learned: It's not just what you stand for, it's what you stand *up* for.

In a world so often seeming to be on the verge of spinning out of control, can we afford to be complacent about the absence of multi-lateral leadership making sure the compass stays pointed in the most rights-oriented direction?

Nations debate, people die. Nations dissemble, people die. Nations defy, people die.

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Lesson #3, not yet learned: We must never forget how the world looks to those who are vulnerable.

Those are the three lessons the world forgot in World War II. And what do those three lessons represent? Democracy, human rights, and justice. And what does forgetting them risk? Nothing less than our humanity.

My father died a month before I finished law school, but not before he taught me why democracy matters. My life started in a country where there had been no democracy, no rights, no justice. No one with this history does not feel lucky to be alive and free. No one with this history takes anything for granted. And no one with this history does not feel that we have a particular duty to wear our identities with pride, and to promise our children that we will do everything humanly possible to keep the world safer for them than it was for their grandparents, a world where *all* children, regardless of race, colour, religion, or gender, can wear their identities with dignity, pride and in peace. A world, in other words, where the moral arc of the universe always bends towards justice.

Justice Rosalie Silberman Abella
Supreme Court of Canada, Ottawa, Ontario
RAbella@scc-csc.ca

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