THE RULE OF LAW: SMALL STEPS IN A LONG JOURNEY

Parramatta and Regional Law Society Annual Dinner

DEPUTY CHIEF MAGISTRATE THEO TSAVDARIDIS[1]

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1. My speech tonight is about the 'rule of law'. This three-word phrase has been used on many occasions and in many different ways. It has such a deep meaning and an even deeper importance for the lives of everyday people—even if they do not immediately realise it. I am not going to deliver a scholarly exposition on what the rule of law means—this has been capably done by many others. Instead, I want to talk about *our* role and how we *all* can take small steps in the long journey to achieving the ideals of the rule of law.

A Story at Little Rock in 1957

2. I begin with a story from another time and another place. It is 1957 in the city of Little Rock, Arkansas. Just three years earlier, the Supreme Court of the United States delivered the landmark decision of *Brown v Board of Education*.[2] That short but monumental judgment corrected the egregiously wrong 'separate but equal' doctrine from *Plessy v Ferguson*[3] that gave a green-light to segregated schools, provided that white and non-white schools were 'equalised' with respect to tangible factors such as buildings, curricula, and the qualifications and salaries of teachers.

3. In a bold and unanimous decision, *Brown* acknowledged a simple truth: racially 'separate educational facilities are inherently unequal'. The Court held:

> To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

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[1] Deputy Chief Magistrate, Local Court of New South Wales. I acknowledge the considerable assistance of Dane Luo, former intern, Bachelor of Laws (Hons I) and Bachelor of Commerce (Hons I), The University of Sydney; Student, Bachelor of Civil Law, Oxford University, October 2023.

[2] 347 US 483 (1954) ('*Brown*').

[3] 163 US 537 (1896). The origin of this doctrine is *Roberts v City of Boston*, 59 Mass 198, 206 (1850) where the Massachusetts Supreme Court held that school segregation did not violate the state constitution's guarantee of equality.

4. The Court recognised what should have been obvious: Segregated schools limited the ability of black children—at the most important part of their development—to study, to engage in discussions and exchange views with other students. The Court recognised that a 'sense of inferiority affects the motivation of a child to learn' and deprived children of the full potential for educational and mental development. These qualities, the Court held, were incapable of objective measurement but which make for greatness in a school. Therefore, segregated public schools were unconstitutional because they deprived non-white children the equal protection of the laws guaranteed by the Fourteenth Amendment. To put it simply: Separate is inherently unequal.

5. After *Brown*, it fell on the lower federal courts to vindicate the *Constitution*. The Supreme Court had ordered that schools desegregate 'with all deliberate speed,'[4] but this was no small task. A system of segregated schools had been developed over decades in the South. Families had not just organised their housing around the availability of schools for their children but also demographic patterns and other forms of racial segregation continued to sharply divide communities by race. Furthermore, the backlash and resistance from the South was intense. Public officials—from State Governors to school board officials—came out to condemn the Court's ruling and there was a concern of violence in certain areas.

6. This brings me to Little Rock in Arkansas. Up until *Brown*, the schools of Little Rock had been on a completely segregated basis since their creation in 1870. The Little Rock School Board, after caving into pressure from segregationists, planned to implement very limited integration at one school only—the previously all-white Little Rock Central High School ('Central High School'). Central High School was in a working-class white neighbourhood, many of whom were not receptive to racial cooperation or mixing. The school board's desegregation plan was approved by the federal district court over the objection of the National Association for the Advancement of Colored People ('NAACP') that the plan did not go far enough.[5]

7. In 1957, nine black children—supported by the NAACP—registered to attend Central High School. The integrated school was scheduled to open at last on 3 September 1957.

8. One week before, on 27 August 1957, proceedings were commenced in the state Chancery Court requesting a stay of the desegregation of Central High School. Supportive of the protesters, Arkansas Governor, Orval Faubus, gave evidence alleging that the admission of

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4 *Brown v Board of Education II*, 349 US 294 (1955).

5 *Aaron v Cooper*, 143 F Supp 855 (ED Ark, 1956). The decision was affirmed on appeal: 243 F 2d 361 (8th Cir, 1957).

black students would create violence. The state court accepted the testimony of Faubus and ordered Central High School not to carry out its plan of school integration.

9. Immediately, the children, represented by the NAACP, sought a stay in the federal district court, and on 30 August 1957, the district court granted that stay.[6]

10. The day before the school was scheduled to open, on 2 September 1957, Faubus issued a proclamation calling out the Arkansas National Guard and charging them with 'preserv[ing] the peace' by preventing 'for the time being' desegregation at Central High School because of an 'imminent danger of tumult, riot and breach of peace and the doing of violence to persons and property'. This move set off a confrontation with the district court.

11. On 3 September 1957, the school board petitioned the district court for instructions and the court ordered implementation of the desegregation plan 'immediately and without delay,'[7] but notwithstanding the orders of the Court, the National Guardsmen blocked the entrance of the nine black students on the orders of Faubus. One of the nine students, Elizabeth Eckford, described her experience as follows:

> [T]he crowd began to follow me, calling me names. I still wasn't afraid - just a little bit nervous. … Even so, I wasn't too scared, because all the time I kept thinking the [guards] would protect me. When I got in front of the school, I went up to a guard again. … He just looked straight ahead and didn't move to let me pass. I didn't know what to do ... Just then the guards let some white students through ... I walked up to the guard who had let [them] in. He too didn't move. When I tried to squeeze past him, he raised his bayonet, and then the other guards moved in and raised their bayonets ... Somebody started yelling, 'Lynch her! Lynch her!'[8]

6 The decision was affirmed on appeal: *Thomason v Cooper*, 254 F 2d 808 (8th Cir, 1958).
7 *Aaron v Cooper*, 156 F Supp 220 (ED Ark, 1957).
8 J Williams, *Eyes on the Prize – America's Civil Rights Years, 1954-1965* (1987) at 101–102.

12. Wiley Branton, the local NAACP lawyer for the nine children, called Thurgood Marshall, who had acted for the successful parties in *Brown*, to request his help at Little Rock. Branton later recalled:

> Governor Faubus had the full might of the State of Arkansas and its resources behind him in his effort to keep nine Black children from entering Central High School, but I felt as though our side was almost an equal match when Thurgood came down and joined the battle.

13. The district court judge who was overseeing the litigation was Judge Ronald N Davies. As Chief Justice Roberts would later remark, '[t]hat Judge Davies found himself in Little Rock at all, much less at a pivotal moment in history, was surprising.'[9] Born in Minnesota and educated in North Dakota, Judge Davies had began his career as a sprinter before attending law school in Washington DC and starting his own law practice. He had only been appointed to the federal judiciary for two years, based out of North Dakota, when he received a special assignment to the Eastern District of the District Court of Arkansas to fill in for the presiding judge who had fallen ill. His Honour began his service in Arkansas on 24 August 1957—just in time to be thrust into presiding over the battle involving the Little Rock Nine.

14. On 5 September 1957, Judge Davies requested the federal Justice Department to investigate the disruption of the desegregation plan. A few days later, on 9 September 1957, the report was provided to the Court and Judge Davies directed the Department to file a petition for injunction against Faubus. The matter was set down for an expedited hearing on 20 September 1957. Everything was moving swiftly. In between that time, Judge Davies rejected a request by the school board to suspend the desegregation plan.

15. At the hearing on 20 September 1957, Judge Davies did not flinch. His Honour found that there was no evidence that showed a concern for violence before 3 September 1957 to justify the Governor's actions. The injunction was granted. Judges Davies would write, years later, that:

> It was purely a question of whether the Governor of the State of Arkansas could get away with the doctrine of interposition, placing himself between the Federal Government and the people of Arkansas. The law was very clear that the schools had to be integrated. … I have a constitutional duty and obligation from which I shall not shrink. In an organized society, there can be nothing but ultimate confusion and chaos if court decrees are flaunted.

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[9] Chief Justice Roberts, '2022 Year-End Report on the Federal Judiciary (Supreme Court of the United States, 2022) <https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf>.

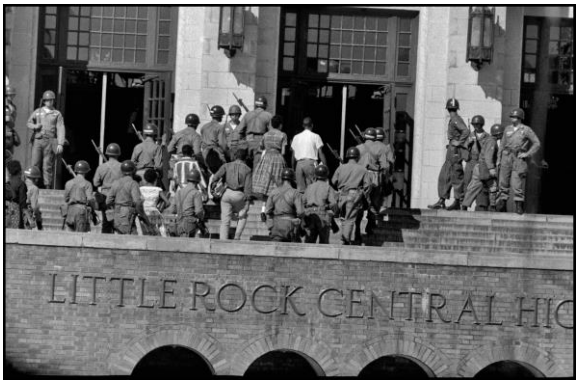
16. The Governor responded by withdrawing the guardsmen. However, come Monday 23 September 1957, when the children came back to the school, they were met with a rioting crowd encouraged by the Governor. In what was reminiscent of the US Capitol riots following the defeat of US President Donald Trump in the 2020 presidential election, the mob swelled to about a thousand people. Black journalists covering the scene, mistaken as the children's parents, were chased down the street, harassed and beaten. The photographers' equipment was smashed to the ground. The Police Chief felt compelled to quell the rioting by removing the black children from their school.[10]

17. The next day, none of the black students attended but another crowd was present. The United States President, Dwight D Eisenhower, became very troubled by the events on these two days, which had garnered national attention. It was being watched around the country and provided a model to segregationists and white supremacists on how to fight attempts to integrate schools. To Eisenhower, if the Governor can obstruct the *Constitution* and defy the orders of federal courts, then what would be left? What would stop every other pro-segregation school district and State from doing the same? What would be left of *Brown* and the federal judiciary?

18. On 24 September 1957, Eisenhower issued a national proclamation ordering 'all persons' to cease the obstruction of justice. He also federalised the 10,000 strong Arkansas National Guard

[10] J Williams, *Eyes on the Prize – America's Civil Rights Years, 1954-1965* (1987) at 105–106.

and deployed 1,200 combat-ready paratroopers from the 101st Airborne Division—the 'Screaming Eagles' out of Kentucky—to enforce the Court's order and protect the children's constitutional rights. The National Guard, who had initially denied the children entry into the school on the orders of Faubus were now their protectors on the orders of Eisenhower.



19. The troops stayed until Ernest Green became the first African-American graduate of Central High School in May 1958. Although the violence slowly quelled, there were still many attempts to prevent desegregation. Eventually, the Supreme Court ruled one year later—on 12 September 1958—that desegregation in Little Rock would not be suspended and must proceed apace.[11]

The Lessons Learnt from the Little Rock Nine

20. There were many brave people in the fight involving the 'Little Rock Nine'. The nine children, who became the centre of national attention and faced unrelenting harassment, were perhaps the bravest of them all. I think there are many lessons we can learn from other courageous people who were there.

21. Judge Davies is an exemplar of a fearless, independent judge. Davies missed his own son's wedding to see through his mission in upholding and applying the law of the land and protecting the constitutional guarantees afforded to the nine children. Judge Davies was physically threatened for following the law and his wife feared for his safety. Following a bomb threat on the Sam Peck Hotel where Judge Davies was staying across the street from the courthouse, the judge offered to the hotelier to move elsewhere. Mr Peck said, 'no Judge, you stay right here.' Today, Davies' admirable and brave legacy is celebrated with his namesake on the Ronald N. Davies Courthouse in North Dakota.

[11] *Cooper v Aaron*, 358 US 1 (1958).

22. Judges and magistrates in both the US and Australia alike make sacrifices for a career in public service. They do not get to choose their workload. For Judge Davies, his assignment to Little Rock was rather coincidental. He would have had no idea that he would be thrust into a national controversy that pitted the federal courts against the might of a State Governor within the first week of the assignment, but his Honour modelled what every good judicial officer does: quietly, diligently and faithfully discharging their duties every day of the year.

23. Those who appear before the Local Court of New South Wales and, of course, other courts of this country expect a fair judge like Judge Davies—someone who will listen and apply the law in each and every case without respect to persons. That is the oath that every judicial officer in Australia takes. I cannot guarantee anything more than that, but I can promise you absolutely nothing less.

24. The Court's readiness to expedite the hearing and give a timely judgment is also no surprise. Although the courts of this country face a very heavy workload, the courts will always strive accommodate any urgency that the parties bring to the attention of the court. The courts are ever mindful and make every effort not to allow a situation where its orders are rendered nugatory or useless because of some unreasonable delay.

25. The respect for the rule of law relies on the government to follow the orders of the courts. Courts do not have armies or police forces. All they have is trust, respect and credibility. Judicial legitimacy depends on the public maintaining a level of confidence that cases would be decided by a competent and impartial judiciary according to law without fear or favour and that their decisions will be carried out by the executive government. Courts depend on the 'reservoir of goodwill' and trust.[12]

26. In a speech to the Australian Judicial Conference in 1996, Sir Gerard Brennan echoed Alexander Hamilton when he said that 'the judiciary, the least dangerous branch of government, has public confidence as its necessary but sufficient power base' and that the judiciary 'has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom [it serves] have confidence in the exercise of the power of judgment'.[13]

[12] Krebs, Nielsen and Smyth, "What Determines the Institutional Legitimacy of the High Court of Australia?" (2020) 43(2) *Melbourne University Law Review* 605 at 607.

[13] Sir Gerard Brennan, 'Judicial Independence' (Speech, Australian Judicial Conference, 2 November 1996).

27. Public confidence in the judiciary would be significantly undermined if the government openly defies a court's clear order. That was on the verge of happening when Faubus first used the National Guardsmen and then supported a mob to stop the children from going to school in an attempt to thwart the court-approved desegregation plan and the mandate from *Brown*. Thankfully, Eisenhower's intervention ensured that the court order was complied with. It is the 'duty of the executive branch of government is to ascertain the law and obey it' and '[w]here the matter is before the court, it is the duty of the executive to assist the court to arrive at the proper and just result.'[14]

28. Courts are not majoritarian institutions. Judges and magistrates are not making decisions based on how we think the next Newspoll will go or to appease a local electorate at an upcoming election. This sometimes means that courts make some unpopular decisions. Sometimes, courts rule in favour of unpopular or notorious people, including an accused who the police allege has committed serious crimes or a party who is caught up in a scandal, but it must always be remembered that the role of judicial officers is to follow the law wherever it takes us, no matter whether we like the result or not. For a judicial officer who likes every outcome he or she might well be a bad judge, stretching for policy results he or she prefers rather than those the law compels. I worry that sometimes the distinctiveness of the judicial function is missed in everyday commentary about judicial decisions.

29. But for every decision we make, we have an expectation—it is incumbent on you, as practitioners, for so many reasons, not least of which to promote community confidence in the justice system, to support the bench from unwarranted attacks and incursions into its decision making and judicial independence, particularly by shock jocks, the uninformed and, worse still, the misinformed. It is this support and protection, and indeed a recognition of the challenges, pressures and stress under which judicial officers labour, especially in the Local Court as the 'engine room' of the judiciary within the hierarchy of courts in this State, which maintains a well-functioning, adaptive and robust system of justice which is the envy of developed and developing nations across the world.

30. This does not mean that one cannot pursue legitimate avenues of appeal or judicial review if they are aggrieved by a court's decision. Courts are also not immune from general debate about their work, but it is another thing to unduly criticise or make serious, baseless claims about courts or judicial officers or to flaunt orders of the court.

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[14] *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383.

31. Much like all of you here tonight, playing a significant role in the lives of so many for whom you appear in courts far and wide throughout your careers, the lawyers—Marshall and Branton—played an important role too in Little Rock. Branton would go on to become Dean of Howard University School of Law. Marshall, who would later become the first African-American Justice of the US Supreme Court, had devoted many years of his life for the eradication of Jim Crow-era[15] segregation. Marshall found that the courts were sometimes the only place that listened to the despised and disadvantaged—the very people that he felt went unprotected by every other organ of government and who had no other champion. For Marshall, who had become a pioneering attorney of his day, no dispute was too small or too insignificant for him. He could spend one day in the Supreme Court arguing *Brown* and the next day in a county courthouse arguing for nine children who wanted to go to school. He was a giant of the American legal system. His towering contributions as an advocate and commitment to fighting for justice serves as an inspiration to us all.

32. The fact is this: in an adversarial system, courts rely heavily on the profession. We rely on you to present your client's best case. We rely on you for assistance in legal arguments. We rely on you to explain our decisions and the law to your clients and the community. We rely on you to protect the rule of law. Whenever you come to the Local Court, and other courts, to adjudicate your client's disputes, and placing your trust in the court to hear your client's view and reach a just decision according to law, you are affirming the court's integrity, independence and impartiality. That is essential to the rule of law.

33. Earlier this year I said,[16] and I repeat again tonight, that the contribution of lawyers who work pro bono to support the weak and vulnerable in our community should be celebrated. This quiet, thankless work is no less important than the work of other legal giants—the law firm partners and principals, Senior Counsel, Professors of Law and judicial officers—because the rule of law must importantly serve everyone and the law does its most important work when it vindicates the rights of the underprivileged and the disenfranchised amongst us.

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[15] The 'Jim Crow' laws were a series of state and local laws introduced in the southern states of the US in the late 19th and early 20th centuries that enforced racial segregation, 'Jim Crow' being a pejorative term for an African American. The origin of the phrase 'Jim Crow' has often been attributed to 'Jump Jim Crow,' an offensive, cruel and insulting song-and-dance caricature of black people performed by white actor Thomas D Rice in blackface, first performed in 1828.

[16] Deputy Chief Magistrate Theo Tsavdaridis, 'Roaming Amongst Legal Giants: Perseverance, Persistence and Practice in the Law (Speech, Opening of Law Term 2023 Keynote Speech to the Coptic Orthodox Divine Liturgy, 6 February 2023).

Conclusion

34. In today's world, we celebrate *Brown* and what it has achieved and it would be remiss of us to forget about the struggle along the way to achieve equality. The rule of law requires a fearless, independent judiciary and the judiciary leans and relies on the support from the profession and the executive government of the day.

35. Had Judges Davies not done his job, had Marshall and Branton not acted for the children, had Eisenhower not deployed the troopers to enforce the orders of the district court, who knows whether the Little Rock Nine would have gone to school? If there is one break in that chain and if those nine children did not get to go safely to school, we would be all the poorer and our system of justice would be weaker. The story of the Little Rock Nine is not only a story of ending some of the ugliest forms of racial discrimination but it is a story of the rule of law, not by mob.

36. I encourage you all to reflect on how we all can take small steps in the long journey to achieving the ideals of the rule of law.

37. On behalf of the Chief Magistrate and myself, thank you for listening and for all that you do in upholding the rule of law. Your efforts never go unnoticed. I wish you all the very best in your practices and careers.