SPEECH TO LAUNCH VOL 20(1) OF THE *UNSWLJ*

THE HON JUSTICE RONALD SACKVILLE*

I was delighted to receive an invitation to launch this very stimulating and varied volume of the *University of New South Wales Law Journal*. Usually invitations of this kind come without any explanation of the motives of the inviter. However, on this occasion, the editor, Tracy Francis, who has done such an admirable job of editing a diverse set of articles for this issue, was good enough to confess that she thought a little of what she described as "judicial authoritativeness" would be appropriate.

Flattery normally works very well with me. But when Tracy extended the invitation, I doubt that she realised just how authoritative my judicial rulings are. I am shortly to determine whether God exists and, if so, whether she has kept Noah's Ark in good shape for the last 5,700 years.

Had I received and read my copy of the *Journal* before the hearing of the Noah's Ark case, I would have been able to perform my role as the presiding judge in a much more impressive fashion. During the hearing I displayed my virtuosity by referring to Karl Popper's notion of falsification as a description of scientific methodology. This appeared to impress the reporter for the *Sydney Morning Herald*, who described me as "seriously learned". I thought at the time that this was an unusually perspicacious observation. However, I now realise that, had I really been "seriously learned", I would have known that there are serious difficulties with Popper's attempt to identify a universal scientific method. This I would have learned from the article by Gary Edmond and David Mercer, catchily entitled "Keeping 'Junk' History, Philosophy and Sociology of Science out of the Courtroom: Problems with the Reception of *Daubert v Merrill Dow Pharmaceuticals Inc*". I think the article is essential reading for anybody specialising in the Noachian Flood.

One of the themes of Volume 20(1) of the *Journal* is a remembrance of the legacy of Professor Julius Stone. As the articles by Tony Blackshield, Michael Coper, Jack Goldring and Michael Kirby remind us, Julius made a lasting contribution to legal scholarship and to the development of legal reasoning, not

* Judge of the Federal Court of Australia.

merely in Australia, but throughout the community of nations. I was privileged to know Julius very well during those productive autumn years he spent at the University of New South Wales, in an environment that I think he found both congénial and stimulating.

I was therefore moved to read in Tony Blackshield's tribute a reference to the Talmudic saying that "it is not for thee to finish the task; neither art thou free to desist from it". That saying is often recited at Jewish funeral services. One of the enduring memories I have of Julius in his last years was his unwavering dedication to the task of scholarship, his enthusiasm undiminished in the face of the knowledge that his own days were numbered.

In my discussions with Julius, I formed a strong view that one of the great motivating forces driving him as a legal scholar was his crystal clear recollection of the anti-Semitism he had experienced in Leeds and elsewhere in his early days. Those experiences sharpened his determination to prove himself, continually, far beyond the time at which any proof was conceivably necessary. Perhaps this demonstrates that, sometimes, prejudice can lead to unexpected bonuses. More often, however, prejudice produces divisiveness, hatred, hardship and despair - and, not infrequently, as this century attests, catastrophe. At a time when some of Australia's leaders have lacked the courage or insight to tackle the scourge of racism head on, it is well to remind ourselves that prejudice and hatred leave a bitter legacy for generations yet unborn.

It is appropriate that Julius Stone's life should be celebrated again in an issue of the *University of New South Wales Law Journal.* Among his many achievements, he made a lasting contribution to the intellectual development of the Law Faculty of the University of New South Wales and, in particular, to its tradition of tolerance for starkly divergent opinions. At a more general level, one of Julius' great contributions, as Tony Blackshield has shown, was to demonstrate that the use of apparently authoritative legal materials simply obscures the fact that judges, especially at appellate level, are often required to make choices based on policy considerations. It follows that judges, however formalistic the language they may utilise, necessarily make decisions that reflect their own values, and thereby make new law.

It is fashionable in some quarters to express yearning for the days when judges did not make law but merely gave effect to pre-existing, albeit undiscovered, rules. Like so many simplistic slogans, this view of the judicial process - particularly the appellate process - is not merely incomplete, but wrong and harmful. The slogan is harmful because it can be and is employed to accuse the courts of exceeding their legitimate functions when, in truth, judicial law-making lies at the very heart of that function.

Of course, accepting the legitimacy of judicial law-making does not answer the more difficult question; namely, how far the court should go in making new law and at what point deference should be shown to the democratically elected parliament. These are all areas for fertile debate in Australia. Some of that debate is reflected in the pages of this issue of the *Journal.* However, attacks on courts, or on particular decisions, that rely merely on the assertion that courts should not make new law lack even the semblance of an intellectual foundation.

The effect of such attacks, whatever their motivation, is to undermine the legitimacy of the judicial decision-making process and, ultimately, the role of the courts in our system of government.

In recent times, there has been considerable discussion about the concept of judicial independence. Most recently, this has been stimulated by the pronouncement of the Council of Chief Justices, adopting principles relating to the appointment of judges of State and Territory courts. The concept of judicial independence is indeed fundamental to our system of government. However, I think there have been occasions in the past when courts and judges have stretched the concept too far, thereby arousing or at least increasing cynicism in some quarters about the value of the very concept itself. It is very important that the significance of the concept of judicial independence be better understood in the wider community. Unfortunately, I doubt that the recent pronouncement of the Chief Justice will achieve this result. While the pronouncement raised interesting questions, it did not identify any specific threat to judicial independence in Australia and did not explain why the concept is so critical to our society.

The great irony is that the traditional role of the courts is genuinely under threat; the need to promote and explain judicial independence has rarely been more pressing. One critical function performed by the courts is to articulate and promote values regarded as fundamental to a free and democratic society. Those values include, for example, protecting individuals from unlawful search, seizure and interrogation; ensuring that persons accused of criminal offences receive a fair trial; and requiring governments to accord procedural fairness to those affected by administrative decisions. There has always been a tension between the role of the courts as guardians of these fundamental values and the imperatives of the political process, simply because fundamental values often conflict with immediate public and political concerns. Governments and political parties, as we all know, are often concerned with the immediate and emotional impact of events, rather than with the maintenance of fundamental principles that protect the civil liberties of individuals.

For this reason, players in the political process are too readily tempted to pander to emotional responses in the community, rather than to address the broader issues to which particular cases give rise. All too often, court decisions, for example rejecting apparently incriminating evidence because it has been obtained illegally, or accepting a claim to refugee status in the face of strenuous departmental opposition, are characterised as clear failures of the legal system. The yearning for simple and indeed simplistic solutions is understandable; to develop it into an officially sanctioned art form is dangerous to the core values underlying our system of government.

Recent examples readily come to mind of the tension between the role of the courts and political imperatives. In New South Wales a decision declaring invalid search warrants issued on the application of the Wood Royal Commission attracts an immediate Governmental response, promising to consider retrospective legislation resurrecting the unlawful warrants. Attacks are made in some quarters on the High Court's decision in *Wik* that go beyond

robust criticism of the Court's reasoning processes and conclusion, and amount to attempts to undermine the authority of the Court as an institution. The Commonwealth seeks to curtail yet further the limited rights of judicial review of decisions in immigration cases, its aspirations being thwarted only by s 75(v) of the *Constitution* (which, by preserving the jurisdiction of the High Court in cases where mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, may prove to be the most important guarantee of individual liberty in our *Constitution*).

I do not suggest that these recent developments are without historical parallel. But I think the tension to which I have referred will become increasingly apparent and present a considerable challenge to the courts and the legal system. As the current issue demonstrates, the *Journal* has an important role to play in providing a forum for scholarly debate about important issues confronting the legal system. It has discharged that role admirably. I congratulate the editor and the Editorial Board, the authors and all who have assisted in its publication.