JULIUS STONE AND THE STUDY OF LAW AND SOCIETY IN AUSTRALIA

Julius Stone died in Sydney on 3 September 1985, after a long illness, which did not keep him from his work. A letter from him appeared in the *Sydney Morning Herald* on the day of his death.

Virtually single-handed, Stone introduced the study of Law and Society to Australia. The students he taught, over thirty years from 1942 at the University of Sydney Law School, and subsequently as a very active Visiting Professor of Law at the University of NSW, became aware, through his teaching, of the 'Social Dimensions of Law and Justice' which, in Stone's view, were an essential part of the study of jurisprudence. This awareness provided a climate of opinion which made possible the establishment of Law Schools, such as that at Macquarie University, which have chosen to focus on the study of law in a social context. The Macquarie University Law School is the home of this *Journal*, so that the *Journal* and the Law School owe a great deal to Stone: they are directly the products of his work.

Stone's arrival in Australia was not welcomed by all. In the earlier part of his career, his assertive jewishness (including strong and continued support for the state of Israel) and his approach to legal scholarship ensured oppposition. His appointment to, and continued tenure of, the Challis Chair of Jurisprudence and International Law at the University of Sydney, were made difficult by forces of both anti-semitism and conservatism, especially within some sections of the legal profession. Despite this opposition, he was able, within four years of his arrival at Sydney University, to publish his most influential work, *The Province and Function of Law* (1946). Nearly half of this book comprised a part called 'Law and Society'. He was also able to teach, and, like all law teachers, the fruits of his scholarship became apparent in the work of his students. Those who had studied under Stone have, in the last twenty years, attained positions where they have been able to influence the development of 'the legal order' (itself a phrase whose use became familiar to Stone's readers and students through his teaching and writing). Four justices of the High Court (Mason, Jacobs, Murphy, and Deane) were teachers or students of Sydney University while Stone was on the staff, as well as virtually all the judiciary of New South Wales, a significant number of influential politicians, and a substantial proportion of Australian law teachers. As Jurisprudence and Public International Law were compulsory subjects for the law degree at Sydney University students could not avoid the ideas which Stone had brought to Australia.

These ideas, it is suggested, have influenced the development of legal rules by State and Commonwealth Parliaments and Courts.

Stone's achievements as a teacher were the more significant because, while he was at Sydney University, the law courses were essentially part-time courses, and the students part-time students, working as articled clerks in solicitors' offices or as clerks in government departments. Most of the other teachers at Sydney University Law School were practitioners teaching on a part-time basis. The law degree course had a distinctly practical and professional bias, and the wider perspectives on the legal order which were so important to Stone had a relatively small place in most of the law curriculum. Law School was seen, in large measure, as a trade school, and students and teachers alike were impatient with studies that did not obviously relate directly to legal practice. Stone's ability as a teacher, his personality, and the depth and breadth of his scholarship enabled him to reach at least some of his students, and to awaken them to the wider implications of the operation of the legal order.

Stone grew up in a working-class area of industrial Yorkshire. He obtained a scholarship to Oxford, and then to Harvard, where he completed a doctorate and briefly joined the staff. At Harvard, where the main influence on his development was the then Dean, Roscoe Pound, he became aware of the American 'revolt against formalism', and developed perspectives on law which reflected not only Pound's 'sociological jurisprudence', which continued to be the main influence on him, but also the work of legal realists such as Jerome Frank, WW Cook, Herman Oliphant and Karl Llewellyn. There was no possibility that he would continue to see jurisprudence in the positivist way pioneered by Austin, which was (and has continued to be) the dominant approach in the United Kingdom and Australia at the time.

Stone's interests were wide. He was a noted international lawyer for all of his career, achieving high distinction in this area, including an award from the American Society of International Law shortly before his death. He was an ardent advocate of human rights, especially for the oppressed and disadvantaged. He was active both within the Jewish community and in Austrailan society as a whole. As this is intended as a tribute to his work in the development of the study of law and society in Australia, no more will be said about his achievements in other areas.

Even before he left Harvard, first for Auckland, and then for Sydney, his writings manisfested a generaliy critical attitude to the prevailing formalism, and emphasised the need to study law in a social context and this view became stronger over the years. When Stone revised and developed *The Province and Function of Law* in the 1960s, the largest of the three volumes which resulted was called *Social Dimensions of Law and Justice*. Meanwhile, with S P Simpson, Stone had published a three-volume collection of materials called *Law and Society* (1959-1960).

Stone was aware that the law pervaded all social activity and resulted from the operation of 'social' factors, which could not be ignored in the study of the legal order. His concern was legal theory, released from the intellectual 'hegemony of Austinianism' (1946:11). It was appropriate that the first chapter of *Province and Function* was called 'the province of jurisprudence redetermined'. This redetermination did not require the throwing out of the baby of analytical jurisprudence with the bathwater of its Austinian trappings. Stone wished to keep what was valuable. The result indeed is his *Legal System and Lawyers' Reasoning*, a substantial contribution to analytical jurisprudence. Always, however, he stressed the point made by Pound that legal

phenomena *were* social phenomena. That did not make them *less* legal. What was needed was the addition of social (including political, psychological, sociological and economic) and historical perspectives to those of the lawyer. But the lawyer's perspective was critical.

> 'Jurisprudence, then,' (Stone wrote) 'in the present hypothesis, is the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law. It is an attempt, which must always remain imperfect to fulfil for the law the object strikingly posed by the late Mr Justice Holmes of showing 'the rational convention between your fact and the frame of the Universe. To be master of any branch of knowledge you must master those which lie next to it'. . . All the major branches which are generally admittted to the halls of jurisprudence are admissible by this test. Analytical jurisprudence is admissible as essentially a critique of law in terms of logic . . . Historical jurisprudence is admissible insofar as it purports to interpret the development of law in terms of some theory of history. Also on this test sociological jurisprudence is clearly not misnamed . . . And insofar as economics, psychology, anthropology and the rest be regarded as disciplines distinct from sociology, they may each properly be credited with a respective approach to jurisprudence. The same is to be said of philosophy in its various branches, including notably the normative branches of ethics and politics' (1945:25-26).
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> However, Stone found that 'it is necessary to reject forthwith a classification of jurisprudence which would devote a separate branch to each of the external disciplines which is to be applied to the law . . . such a development could only perpetuate the game of battledone and shuttlecock between jurisprudence and other disciplines, whereby some of the gravest problems, for instance, the theory of justice, have found no resting place anyway. For the still largely esoteric nature of law and legal machinery means that only scholars with adequate legal training can appreciate the problems they raise' (1946:28-29).

Therefore he posited three main branches of jurisprudence: analytical jurisprudence, or the analysis of legal terms; sociological jurisprudence or the study of the effects of people on law and law upon people, and ethical jurisprudence, or the evaluation of the legal order in terms of what 'ought to be done'. Each of these was equally essential to his project, conceived as a whole. None of them could exist in the absence of the other. Of the three, Australian scholarship, especially legal scholarship, has been deficient in its neglect of the mutual effects of law and people on each other. Journals such as this hope to remedy that defect, but in a way that throws light on other aspects of Stone's redefined province of jurisprudence rather than for their own sake, and also that always retains the centrality of 'the legal' as the focus of scholarly attention.

It would be impossible to classify Stone simply as an 'American Legal Realist'. Typically, he read encylopaedically, not only the works of the English-speaking jurists, but also those of continental European writers working in a variety of philosophical and ideological traditions. He was rightly suspicious of grand theory, but was able to draw from his wide reading in order to isolate the strengths and weaknesses of differing views about his subject-matter and to apply them in specific areas. Though obviously devoted to Pound, and influenced through him by American pragmatist philosophy, one of his earliest publications was a critique of Pound's jurisprudence (Stone 1935). Yet he saw the importance of principle, and was always concerned, almost obsessed, with the con-

cept of justice, and with the relation of justice to positive law. This is manifest in the second part of *Province and Function* ('Law and Justice'), and the revision, *Human Law and Human Justice* (1965). As the title of the revision suggests, Stone was acutely conscious that the concept of justice was a social and cultural construct. This made it all the more important for scholars pursuing this concept to be aware of, and investigate, the social factors which led to the formation of concepts and theories of justice.

In many respects, for the common lawyer concerned with practicalities, Stone's major contribution was his examination of the methodology of the common law courts, especially of the English, and, in his later works, the Australian courts. If the American Legal Realists had been correct in pointing out that what courts decided did not flow logically and naturally from established premises, in the form of statute and case law, it was important to know precisely how advocates and judges were able to express value-preferences while maintaining the appearance of a logical system of rules, providing the degree of predictability and certainty of rules and behaviour which society demands of a rational legal system, and observing a a degree of fidelity to ascertainable and external sources of law (cf Coper 1982). In the first part of *Province and Function* ('Law and Logic', subsequently revised and expanded as *Legal System and Lawyers' Reasoning*), Stone analysed in detail a multitude of decided cases in order to isolate the methods used by lawyers and judges to achieve desired or preferred results within the constraints imposed by a body of legal principle. I have always considered Chapter VII of *Province and Function*, in which Stone develops the idea of 'categories of indeterminate reference', as essential in understanding the operation of the common law. Yet Stone saw the need not only to show that such techniques existed, but also to ask *why* such techniques were used, and this led him, again, to the 'social dimensions of law and justice'.

The *Preface* of *Province and Function* contains Stone's view that the work was both a 'revolt', against the domination of Austininian positivism in English-speaking jurisprudence, and a 'submission' to the growth in the extent and significance of the social sciences, (though he was conscious of the now common view that 'science' may be an inept description of what is done in some of these disciplines). The revolt against positivism can explain why conservative legal academics and practitioners viewed Stone's work with suspicion, if not hostility. They needed to be dragged, screaming perhaps, into the twentieth century.

Stone never lapsed completely into cynicism. He was aware of the history and traditions of legal systems, especially of the common law, and perceived in the common law traditional values which were worth fighting for and preserving because they served the quest for justice. He remained, first and foremost, a lawyer. While he realised the worth and importance of the social sciences, his scholarship led him to a detached scepticism. Part III of *Province and Function* opens with the question 'Is there a separate social science of law?' and this question is repeated at the beginning of *Social Dimensions*. Stone did not need to answer the question in absolute terms, but he did 'insist that it is at least necessary to maintain the study of law and society as an identifiable field of study under the aegis of jurisprudence, if only for practical purposes deriving from the technical nature of legal materials and the needs of legal education. First, the esoteric nature of the law means that the social scientist not trained as a lawyer is likely to encounter formidable obstacles in handling legal materials as part of the subject-matter

of his own science. Recognition of the separate field draws attention to the special difficulty of handling the materials. Second, the law by its nature cuts across almost all the conceivable subjects of social science. The 'legal' fairly infests the culture. Even more perhaps than with other social sciences the study of law as a part of the social process involves, above all, integration - a sort of specialisation in non-specialisation. Third, the need in legal education for an orderly view of the law's 'external relations' is particularly pressing so far as its social relations are concerned. From the pedagogical viewpoint, if the study of the operation of law in society as an identifiable (though not autonomous) subject did not exist, it might be justifiable to invent it.'

'What is here asserted is the practical need, in view of these considerations, to recognise a branch of study in which lawyer-expertise and social science expertise may exchange data and hypotheses, and become aware of the main movements in their related areas . . . few other social scientists are prepared to undergo the induction into legal techniques and handling of materials, without which social science essays in this area are unlikely to have much direct relevance to the practicalities of law and justice, or even to afford long-range insights. Distinguished social scientists themselves observe that they and their colleagues sometimes move into studies viewed as central to their own field, without worrying about the setting as viewed by the lawyer, and that most social scientists have not taken even a single law course. Interdisciplinary teamwork seems to be the only answer.'

'The promise even of this answer is subject to grave limits. But there seems to be no harm in affixing the word 'interdisciplinary' to the liasion of juristic and social science concerns, provided this does not stir illusions of jurisprudential grandeur. However we put it, the main point is that, like other branches of jurisprudence, the 'sociological' must finally be seen as concerned to study law in its relation with other disciplines—here the social sciences. In particular it seeks to illuminate the empirical data of law by sociological concepts, and to give reciprocal aid to the social sciences. This exchange may even extend to some of the concepts and hypotheses developed respectively in jurisprudential and social science work. Here, too, the study of law is more likely to be the gainer, though we may recall that the phenomena of limitation and diffusion of institutions became subjects of jurisprudential concern at least as early as any social science addressed itself to them. The limits of prudence are probably reached, however, before we begin speculating whether we can hope that jurisprudence and the social sciences may be able to unify their respective theoretical frameworks, and bring this unified framework to bear on the investigation of the same empirical problems' (1966:30-31).

If we examine the range of questions which Stone asked in 1946, we may be amazed by their similarity to the questions which have been raised in this *Journal*. Chapter headings such as 'Law and Social Control', 'Power and the Complexity of Law' and 'Social, Economic and Psychological Factors in Legal Stability and Change' are now commonplace among 'progressive' law teachers and legal scholars. Have we really made much progress over forty years? Have we lost sight of the objectives we seek to pursue? Have we stumbled beyond the 'limits of prudence' to which Stone refers? Have we neglected the centrality of the legal order in our studies? Stone brought to Australia the vital message that we cannot understand the legal order fully if we treat it as isolated from other elements of the social order. It has taken a long time for that message to become established: if one looks at the current state of legal scholarship, in countries

such as Canada (Arthurs 1983) and Australia, it is apparent that many lawyers, legal scholars and law teachers cannot hear, or do not want to listen to, that message. This *Journal* and the law school which is its host represent a sign that at least someone has heard it. But in our zeal to avoid the danger of treating law in a reified and abstract way, may we not endanger our scholarly activity by neglecting that there is a legal order which ought to be the central focus of our scholarly attention?

Stone's concern with the 'social dimensions of law and justice' included a concern that positive law often was an instrument of oppression which did not measure up to concepts of justice acceptable to him. Part of Chapter XXVI of *Province and Function* is devoted to hierarchies within the State. That discussion, of course, lacks the benefit of the scholarship of the intervening period, but the issues raised are recognisably the same issues, and they are raised in a context of profound scholarship, free from the theoreticism and abstraction which characterises so much of what passes for scholarship today. In Stone's discussion, the place of the legal order remains central, though he does not make the mistake of confusing legal form with substance. Nor did he make the mistake of treating the legal order merely as an instrument or agent of oppression, though clearly he was conscious that in many cases law was oppressive. It was typical of Stone that he avoided sweeping, absolute statements. His approach was to some extent the eclectic approach of the common law jurist, selecting what was good and supportive of his argument, from the widest possible range of sources and, after reasoned discussion, discarding that which he found to be unsupported or invalid. Stone was never prepared to 'trash' a theory or argument with which he did not agree. In his writing there are few unsupported assumptions, and no instances of reliance on any grand, all-encompassing theory. Rather, there is an awareness that there is usually some benefit and contribution to be gained from any scholarly work, no matter what tradition produced it. His work demonstrates an attention to detail coupled with an awareness that the legal and social orders are complex and not capable of explanation without resource to some knowledge not encompassed within their own boundaries. Stone showed how careful study of works in many disciplines could assist understanding of aspects of the legal order. These characteristics are valuable. It is worth fighting to retain them in the tradition of 'Law and Society' scholarship which Stone brought to Australia.

Stone's primary concern was always with distributive and substantive justice, and with legal form only to the extent that it aided or impeded the quest for such justice. The 'revolt against formalism' remained with him to the end. If the legal form did not measure up to his standards for the achievement of substantive justice, Stone was among the first to 'Stand up and be counted' (the title of one of his polemical writings). His example provides an illustration of how the scholar can be the public citizen, and of how scholarship makes the public role more effective. We can learn from Stone that there is no substitute for scholarship, and that argument based on the wisdom of the ages distilled in the light of practice is far more effective than mere polemic.

During his life, Julius Stone received many distinctions and honours. Undoubtedly, while he valued these, he would have treasured far more the appreciation that the agenda which he had set for the study of law and society in his adopted home was being followed, and that the tradition of scholarship in law and jurisprudence which he established and exemplified was achieving greater understanding of the legal order for which he cared so much. Stone was an amazing human being. One could, and did dis-

agree with him, for example, on Zionism or the rejection of ethical positivism (areas where I certainly differed from him). But he was always a tolerant teacher or colleague, always helpful to his colleagues, critical, and inspiring. His knowledge and wisdom were vast. Because he is no longer here to refer us to the relevant passages in his books which answered problems which we thought were new, we should not lose sight of the contribution he has made to legal scholarship. Nor should we ignore the example of his meticulous scholarship or the cautions he administered, both personally and in his writings, often as the result of his own experience.

Those of us who were Stone's students and colleagues will miss his support, encouragement and constructive criticism. However, his work and his influence remain, providing inspiration and example for us all

John Goldring

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