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**JULIUS STONE - AN INTELLECTUAL LIFE**

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**FOREWORD**

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## FOREWORD

Michael Kirby\*

I shall begin, as the author does, with the funeral. I can still hear Jonathan Stone's moving testament to his father. The angry poem of Dylan Thomas shattered the quiet of the ancient religious ceremony of the Jewish tradition. The poem arrested the attention of the breathing, human assembly collected in the presence of the family and the undecorated coffin containing the body of a remarkable teacher:

*"Do not go gentle into that good night,  
Old age should burn and rave at close of day;  
Rage, rage against the dying of the light."*

I was one of Julius Stone's students. Just one. There were 8015 of them by his count - in four continents and over nearly sixty years. Know a life story, sense its triumphs and its cruel stings, and you will see into the soul and understand a person's motivations. For me, when I met him first as teacher, then as supervisor, later as friend, Jules was a venerable figure with an extremely strong personality and an international reputation. It is sobering to realize, as I now put this pen to paper that when I first came under

his spell, he was no older than I am now. He seemed so very old, grave and wise.

I worked with him, as Dr Star recounts, as one of the large team of researchers recruited to help in the preparation of one chapter of the Trilogy which was to succeed his celebrated *The Province and Function of Law*. This appointment, the "reward" for good marks in jurisprudence and public international law at the Sydney University Law School, attracted a puny stipend but the privilege of close encounters with the Great Man - "Big Julie" as I never dared to call him to his face. I can see, vividly, the study in his home at Lindfield where he and Recca Stone brought up their family. In front of us was a desk piled high with books and manuscripts. Above us, looking down, was a handsome reproduction of one of Rembrandt's better known pieces. I think it was *de Staalmeesters*. I can still see the warm dark colours of the portrait: the red carpet spread over the comfortable table of the worthy Dutch denizens of the Golden Age.

Up and down Jules would move - pacing here and there, pipe ever aglow. He challenged my draft. He attacked my ideas. He questioned my work. Only in the end did he pronounce himself satisfied. The tiny segment of the Trilogy assigned to me was the Marxist theory of the withering away of the State under perfect communism. My task was to analyse piles of translations of Soviet legal scholars, elaborating this dogma. For Stone, the notion that the Soviet product of this most statist "philosophy" would ever voluntarily effect its own demise was self-evidently ridiculous. If an angel had alighted in our presence in that smoke-filled room and

had predicted the actual withering away of the Soviet State but thirty years later, we would have both fallen about in merry disbelief.

So the chapter on Marxist theories of law was written by Stone. It drew on my work and I was acknowledged, with other students, in the author's preface. Stone encouraged me to further studies in law. His book was my first port of call when, a few years later, I was appointed first chairman of the new Australian Law Reform Commission.

Elsewhere, I have written about the way Stone, borrowing from his colleague Roscoe Pound (who remarkably enough attended his wedding in Leeds), developed an institutional notion of the ongoing, orderly reform of the law.<sup>1</sup> Stone's writings foreshadowed the creation of permanent law reform bodies two decades before that idea was translated into practice in England and Australia.<sup>2</sup> Perhaps more importantly, his work as Professor of Jurisprudence and International Law at Sydney readied generations of Australian lawyers for the realisation that "the law in action" involved inescapable obligations of choice. By his instruction, he helped to demystify law. He looked behind its words to the reality. As described by former New South Wales Premier Neville Wran, one of many students quoted by Dr Star, Stone took his classes on the intellectual journey from the Carbolic Smoke Bomb case to Hans Kelsen's basic norm and showed how the images of the law are often concealed behind its language. Thus, Stone educated generations of his students to prepare them for a life "ministering to justice" by the choices which they made.

Stone's encounter with me as Chairman of the Law Reform

Commission was typical of the man. He invited me to join in a seminar at the University of New South Wales Law School where, by then, he was continuing his odyssey of law teaching. What were the basic principles by which this new Federal body would go about the task of reform? What was "reform" anyway? How would we decide that a change was "for the better"?

For a moment I stumbled over Stone's searching treatment. We would certainly not pause to become philosophers of law, I said. Our job was to get Federal laws improved, and as quickly as possible. People were suffering from the injustices of unreformed laws. If we tarried to debate philosophy, they would continue to suffer. The urgency of reform's requirements outranked the obligations of ethical speculation.

Stone fixed me with a gaze, doubtless reminiscent of the one described by Dr Star when he turned upon James Williams after the latter asked for his resignation. "Well, you go about your task. Do your best. One day, perhaps, we will have a head of law reform in Australia who realises the paramountcy of principle over short-term repairs."

To be so denounced by one's patron and teacher in the presence of many scholars and in such sharp terms left its mark. It was the angry, opinionated Stone at work. But the sting had its desired effect. Stone was simply making the point, in the context of institutional law reform, which he never ceased to make in the context of the appellate decision-making of the courts of common law. Law-makers have choices. True, in some cases the result may be plain. But very often it is not. The notion that the law lies in some

Alladin's cave, simply awaiting declaration, is a fairy story denounced as such by Lord Reid.<sup>3</sup> But once a choice is acknowledged, the decision-maker - legislator, administrator, judge or law reformer - must be made aware of the criteria for the choice. He or she, if honest, must expose for criticism the criteria preferred. It was Stone's teaching of this simple and apparently self-evident truth that won him a large band of intellectual supporters and admirers. It also attracted stern critics in the legal establishment which, at first, clung desperately to the declaratory theory that "the law" was to be found in the words of what had gone before lest otherwise its profession should have no meaning.<sup>4</sup>

Scattered through this book, which is no uncritical review, are many instances of Stone, the angry man who refused to go gently and who often burned and raved against perceived error. The key to understanding why this was so throughout his entire life is told in the early chapters of this book. Stone's family migrated to Leeds from Tsarist oppression in Lithuania. His father, a cabinet-maker, had little sympathy for his son's talent in education. Only hard-won scholarships rescued Stone from work in the cavernous factories of Leeds at the age of thirteen. With modesty that was becoming (and rather rare) Stone attributed his success not to his high intelligence but to his enormous energy. But why such energy? The answer emerges clearly from these pages. It was only by such energy that Stone could escape the poverty of a Jewish ghetto in Leeds. It was only that energy that took him to a first at Oxford and later to the Harvard Law School. Relentlessly, the spectre of his past played upon Stone's consciousness. It never let him

be. It drove him remorselessly into a torrent of writing. And lest anyone should overlook the depths of his intellectual reservoir, it obliged him to append footnotes of truly prodigious length to virtually every work. Everywhere was displayed his fantastic assembly of source materials with the brilliant addition of synthesis and analysis that was his own contribution.

This is not, of course, the only way to write on jurisprudence or other legal subjects. It produced mighty plaudits. But also critics who saw his dense writing as impenetrable and unreasonably difficult. Other scholars urged upon him the larger expression of his own views rather than the relentless collection of the views of others. These suggestions were to have their effect when Stone set down to write the successor volumes to *The Province*. Everywhere in his study as he worked on the Trilogy, were manuscripts with the sobering injunction "Re-think". Not a bad motto for judges and other lawyers to adopt.

Perhaps it was because of this angry energy that Stone made enemies and upset people wherever he went. The egocentric Felix Frankfurter did not warm to Stone, seeing perhaps too many similar characteristics. At first Stone found it difficult to secure an appointment as a law teacher in England. He was pursued in the racist pre-War mood of those days by suspicion about his Jewish ethnicity and his unhidden Zionist sympathies. His temperament, his ambition and craving for recognition strictly limited the circle of people who were true friends. Yet, despite these personal characteristics (upsetting to some) his shining intellect could never be ignored.

Ultimately that intellect secured for him the appointment to the Auckland Law School from whence the passage across the Tasman to Sydney, although rocky, followed naturally enough.

Both at his coming in and going out of the Sydney Law School Stone was a figure of controversy, as Dr Star describes. It is difficult now to contemplate the high influence of the judicial establishment in the academic affairs of the University which propelled Stone's appointment to be a matter of high public debate. But they are far away times. And they were unusual times, because a war was raging and brave candidates for appointment were at the Front. Stone's later battles with James Williams, also appointed from New Zealand, are recorded in all of their ferocious detail. Behind the personality clashes were two visions of what the teaching of law, and indeed law itself, was all about. It is ironic that it was only after Stone's death that the final decision was taken to move the Sydney Law School from its city venue, part-hostage to the practising profession, to the campus where it could flourish as a place of scholarship, fully worthy of a University.

Recorded here is the way in which Stone was ostracised by his legal colleagues soon after his arrival in Sydney. And how he pressed on indefatigably, something of a brooding exile of jurisprudence in the shabby building of the old Law School where I first saw him. There he was surrounded by a ceaseless parade of scholars from all corners of the world who came to his provincial Antipodean city, attracted by his luminous reputation. There too he had the constant support of Zena Sachs who sometimes succeeded in softening the sharp



treatment which Stone frequently meted out to his students and colleagues. There, Ilmar Tammelo, Tony Blackshield and other colleagues flourished. There too, selected students were ushered into his presence. If they passed the test and stood up to him, they became his trusted disciples. Now they are scattered throughout the world in positions of legal and other prominence.

Tales of the meanness of academe are woven through this book. Meetings called on days of strict religious observance. Jealousy and backbiting in personal comments. Racial prejudice and religious intolerance amongst the highly educated. The petty refusal to provide a room for study to a retired professor of world renown. The need to find a haven in another institution freed from the divisive battles of yesteryear. Anthony Trollope would make much of this material. But to go beyond Dr Star's treatment of it would have distracted from her purpose to display Stone's intellectual life.

Stone's life had many disappointments. Indeed, it represented many lost opportunities. What if he had been appointed Pound's successor at Harvard, as he almost was then barely thirty years of age? What if he had accepted one of the many invitations to lead law schools and universities in the United States? What if he, and not Sir Percy Spender, had been appointed Judge of the International Court of Justice when Australia's turn came? What if he had written less and concentrated, as Alf Ross urged him, upon the larger expression of his *own* thoughts? What if his personality had been softer, so that the distracting fights that surrounded his life in Sydney University had not assumed the

proportions of an interminable saga by Anthony Trollope? These questions now present as idle speculation. For the hand has writ and Dr Star has recorded and presented what occurred.

Stone loved honours. He thirsted to be recognised and appreciated. Surely, an inevitable legacy of those days in the back streets of Leeds. Stone's profound interest in the fortunes of Israel, as Geoffrey Sawyer suggested, often coloured his approach to international law wherever Israel's cause intervened. Stone had faults and Dr Star has not let them pass. She has identified them, whilst never allowing them to distort our perspective of the great canvas of his most interesting life.

The measure of Stone's impact can be seen in the fact that this book was written at all. How many books are written on the lives of judges and lawyers in Australia? Still fewer are there on the lives of professors and public intellectuals. This is because such lives, precious to their families and close friends, do not, for the most part, take on the colour, variety and sheer breathless energy that accompanied Julius Stone through his long years as a law teacher, writer and public figure. Those who sat in his classrooms and saw him prod the air with his pipe, hurling the legal and ethical quandaries about, cannot forget the stimulus of an extraordinary pedagogue. But his work had a far greater influence. It has come to full flower in the release of Australia's judicial institutions from their dependance on the law of England, expressed by the Privy Council. Now, our legal system stands alone. It can look to England and elsewhere but only as a source of comparative

law. Our judges, led by the High Court of Australia, must look into legal principle for guidance. They must daily struggle to construe the ambiguities thrown up by the endless torrent of legislation. It was Stone who profoundly influenced the conception which the new generations of Australian lawyers would have of their role. It was he who held the light up to the choices they faced.

It has been said that Stone sometimes understated the constraints of rules upon the legal decision-maker. Law without rules would be tyranny. Rules exist. Often they constrain a particular result, leaving the judge who adheres to their obligations, complaining about the consequence and drawing their injustice to the notice of Parliament. Often, there is but one result to a legal problem which is perfectly clear and which forbids a contrary conclusion. To reject that result is not to pursue a judge's privilege of choice. It is to reject the rule of law itself. An over-concentration upon "leeways for choice" might mislead the unwary - even on an appellate court - into the belief that the decision of every case is unpredictable and that the law, as rules, speaks always with a muted voice. Stone realised that it was not so. But if Patrick Atiyah has usefully provided the corrective to pure pragmatism,<sup>6</sup> Stone's abiding contribution was, and remains, to lay the ghost of the declaratory theory of law in Australia and to illustrate from the cases, both the opportunities and the obligations of legal choice.

In their search for the law, judges and other lawyers no longer deceive themselves that the answer is there, if only they have the password to open the cave. Now they

realise that they have choices to make. This greater realism on the part of all lawyers is not the handywork of Stone alone. He was heir to the work of Pound and companion to others who had gone before and since. But Stone's influence is writ large in the collective thinking of the lawyers of Australia today. That is the special privilege of teachers. As Kipling wrote of his teachers:

*"For their work continueth  
And their work continueth  
Broad and deep continueth  
Great beyond their knowing.*

What, then, is the significance of Stone for the citizen of the 21st century in Australia? It is the new focus of attention which he gave to the enduring techniques of the common law. This peculiar legal system, which flourishes in the four corners of the world, is largely in the hands of private lawyers and independent judges. It is the crucible in which are played the interwoven harmonies of continuity and creativity in our law. It is its abiding creativity which Stone emphasised. In times of great change, it is that capacity which gives the common law its special quality of adaptability and persistence. Stone's lesson therefore needs to be re-taught to succeeding generations. I hope that Dr Star's glimpse of his life will stimulate a continuing interest in his writing and ideas. That is all that Stone himself would have asked.

And so I sat with other pupils of this unusual mentor to pay my respects to his memory and to reflect upon his life at the Chevra Kadisha in Sydney in September 1985. All around me were leaders of the Australian legal profession and community. Only in death had Julius Stone's promethean

energy been finally stilled. Only then did his urgent voice succumb to silence. And across the congregation came the measured words of Dylan Thomas's poem:

*"Grave men, near death, who see with blinding sight  
Blind eyes could blaze like meteors and be gay,  
Rage, rage against the dying of the light.  
And you, my father, there on the sad height,  
Curse, bless, me now with your fierce tears, I pray.  
Do not go gentle into that dark night.  
Rage, rage against the dying of the light.*

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18 March 1992

- \* Hon Justice Michael Kirby AC CMG. President of the Court of Appeal, Supreme Court of New South Wales. Chairman of the Executive Committee of the International Commission of Jurists.

### ENDNOTES

1. See M D Kirby, "Law Reform as 'Ministering to Justice'" in A R Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone*, Butterworths, 1983, 201.
2. J Stone, *The Province and Function of Law*, Maitland, Sydney, 1946, 406. Cf J Stone, *Social Dimensions of Law and Justice*, Maitland, Sydney, 1966, 71. See also R Pound, "The Scope and Purpose of Sociological Jurisprudence" 24 *Harvard L Rev* 591 (1911).
3. Lord Reid, "The Judge as Law-Maker" (1972) 12 *Journal*

*of Public Teachers of Law* 22.

4. Chief Justice Dixon, "Speech on Swearing-in as Chief Justice" (1951) 85 CLR xiv.
5. See *Cook v Cook* (1986) 162 CLR 376, 390.
6. P S Atiyah, "From Principles to Pragmatism: Changes in the Function of the Judicial Process of the Law", 1978. Cf J Stone "From Principles to Principles" (1981) 97 LQR 224, 228. See also J Stone, *Precedent and Law: Dynamics of Common Law Growth*, Butterworths, Sydney, 1985, 244.