

0925

THE AUSTRALIAN LAW JOURNAL

BOOK REVIEWS

LONGER REVIEWS

JULIUS STONE - AN INTELLECTUAL LIFE by Leonie Star. Preface i-xii, text 1-264, notes 265-279, list of major publications 280-286, publications cited 287-291, index 292-300. Sydney University Press in association with Oxford University Press Australia, Melbourne. Price hardback \$49.95.

THE AUSTRALIAN LAW JOURNAL

BOOK REVIEWS

LONGER REVIEWS

JULIUS STONE - AN INTELLECTUAL LIFE by Leonie Star. Preface i-xii, text 1-264, notes 265-279, list of major publications 280-286, publications cited 287-291, index 292-300. Sydney University Press in association with Oxford University Press Australia, Melbourne. Price hardback \$49.95.

Biographies of law professors are extremely rare. Yet some of those professors have an impact upon future generations of lawyers - and upon the very direction of the law - more enduring than that of other actors in the law's drama. Julius Stone was one such person. In a sense, the growing realism and self-confidence of the Australian courts represents an important legacy of his forty years of teaching law to students in Sydney. In this context, this splendid biography of such a notable scholar and teacher is to be welcomed. It is an impeccable work, beautifully produced with attention to detail, endnotes and bibliographical material which Stone himself would have cherished. There are also a number of haunting photographs of Stone at various ages, showing that direct stare which the privileged students who worked closely with him knew only too well.

Stone's fields were jurisprudence and international law. Most of his forty years in Sydney were spent in the then somewhat disharmonious atmosphere of the Faculty of Law at Sydney University. It was, I should say, a disharmony to which the restless, uncompromising Stone would make his own contribution. In his autumn years, he spent a happier decade at the University of New South Wales Law School.

Throughout it all, he kept in contact with his intellectual origins in England and the law schools of the United States where he was a major figure and a recognised successor to Roscoe Pound.

It was Stone who, in Australia, against the whole weight of the received doctrine of the declaratory theory of the common law, insisted that judges - particularly appellate judges - have choices which they must make honestly exposing for analysis the considerations which they have preferred in reaching their conclusions. It was this teaching of such a simple and apparently self-evident truth that won Stone a large band of intellectual supporters and admirers. Their number grew with the years. But it also attracted stern critics in the legal establishment as Dr Star points out.

Scattered through this book, which is no uncritical review, are many instances of Stone, the angry man. 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 also 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 which 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 an 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 in Dr Star's book 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 stream 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 his assistant, Zena Sachs, who sometimes succeeded in softening the sharp treatment which Stone 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 allegedly 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 her from the purpose of displaying 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 a 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 which surrounded his life in Sydney University had not assumed the proportions of an interminable saga? 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 Sawer 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 which 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 to legal principle for guidance. They must struggle daily 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 the 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 in 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, 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. During the recent controversies about *Mabo* and the electoral advertising decision of the High Court, I had a feeling that, somewhere, Stone's spirit was smiling.

What, then, is the significance of Stone for the citizen of the 21st century in Australia which this book brings out? 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. They play the interwoven harmonies of continuity and creativity in our law. But it is the abiding creativity of the common law which Stone emphasised. In times of great change, it is that capacity which gives the system 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.

An excellent and interesting book about a major influence upon Australian legal thinking, whose impact actually gathers momentum with the passing years.

MDK