

**SYMPOSIUM TO MARK THE 50TH ANNIVERSARY OF THE
PUBLICATION OF *PROVINCE AND FUNCTION OF LAW* BY
PROFESSOR JULIUS STONE**

**JULIUS STONE - A PERSONAL REFLECTION ON HIS
INFLUENCE TODAY**

MICHAEL COPER*

In 1946, two events of significance occurred in my life, although I am not sure in which order and I cannot claim to recall either. I was born, and Julius Stone published his monumental *Province and Function of Law*, the 50th anniversary of which is being celebrated tonight. I did not know it then, but my connection with Julius had begun even earlier, as the typing of his partisan but powerful 1944 pamphlet "Stand Up and Be Counted" had been done by my mother.

Twenty years later, in 1966, I was a first year law student at the University of Sydney and Julius, still to be Professor of Jurisprudence and International Law at the University of Sydney Law School for another six years, had commenced the publication of his three-volume metamorphosis of *Province and Function*.¹ When I came to study jurisprudence in 1969, my final year at the law school, I felt a vague unease about my understanding of the law. Although I had not fully

* Professor of Constitutional Law, Australian National University. This speech was presented at the Symposium to Mark the 50th Anniversary of the Publication of *Province and Function of Law* by Professor Julius Stone, University of New South Wales, 1 August 1996.

1 J Stone, *Province and Function of Law*, Maitland Publications (1946).

articulated the questions that were troubling me, I was struggling to comprehend how, at the same time, the judges purported to do no more than tease out the law from existing precedents, and yet, in many areas, the product of their work revealed a law that was constantly changing and adapting to new circumstances.

When I read Julius' *Legal System and Lawyers' Reasonings*,² the first of the trilogy and the analytical platform for his explorations of theories of justice and sociological jurisprudence, I was excited to discover that he, too, was driven by the desire to reconcile constancy and change in the growth of the common law. I found his "categories of illusory reference"³ to be a powerful tool for understanding the dynamics of the common law, and his brand of jurisprudence gave me an exciting sense of discovery and a deeper understanding of the corpus of law that I had accumulated over the previous three years. I remember wondering, with some exasperation, why I could not have had these insights in my first year, and despite the naivety of that view, even now I am unsure, in thinking about what is the optimum time to expose students to the big questions about the philosophy of law, of how to steer between (to use one of Julius' favourite although overworked metaphors) the Scylla of fostering in neophytes unwarranted doubt and the Charybdis of rescuing the initiated from unwarranted dogmatism.

The need to strike a balance between baseless dogmatism and paralysing doubt was itself one of Julius' major themes in his analysis of the judicial process. The "leeways of choice"⁴ open to a judge, at least to a judge of final appeal, were endemic, yet the choices were not entirely at large but were controlled by shared traditions, shared values and shared assumptions. The paradigm for judicial reasoning was not deductive logic, or at least not wholly deductive logic. Whether the reasoning was persuasive depended not merely on its internal logic but on its premises, its starting point, its 'topoi'. And, as the philosopher John Wisdom had said of the legs of a chair, although no single argument, taken by itself, might be either necessary or sufficient to support a conclusion, the arguments, in combination, could be taken to do so.

Like many good insights, Julius' analysis of the openness of judicial reasoning, of the reconciliation of constancy and change, and of the informal strictures on judicial discretion, seem obvious when conveyed in the extreme summary form in which I have recalled them. Yet it is worth remembering that when Julius developed his analysis, the dominant mode of Anglo-Australian legal thinking was that judges merely declared what the law was, and that their decisions were simply either right or wrong, depending on how skilful they were in their legal research and their application of legal principle. Julius not only challenged that view, but did so not by bare assertion, but by comprehensive demonstration, to a high degree of detail and across a wide range of diverse case-law, of how the leeways of choice for judicial decision were not merely occasional but were endemic in the operation of the judicial process. Those familiar with his work will recall the breadth and

2 J Stone, *Legal System and Lawyers' Reasonings*, Maitland Publications (1964).

3 *Ibid*, Chapter 7. See also note 1 *supra*.

4 *Ibid*.

depth of his writing and, of course, to mention one of his trademarks, the voluminous footnotes.

Julius was not the first, nor did he claim to be the first, to expose and explore the nature of judicial discretion. He built on the work of others - a perfectly defensible thing for a scholar to do, despite the odd criticism that this made his work derivative. But he believed strongly in the continuity of development of intellectual thought, and he took the insights of Holmes, Cardozo, Frank, the American Realists and scores of others and reworked them into his own model of the judicial process. That we might now think of the law-creative nature of the judicial process as the starting point for further inquiry, and even as a commonplace, is not a criticism but a tribute to his work.

I remember thinking, after immersing myself in the Stone analysis, that it was one thing to establish that the opportunities for judicial choice were endemic, but that it was another - without in any way diminishing the value of that first step - to consider how those choices should be made. I did not have in mind a simplistic search for a single right answer, as that would have sat somewhat uneasily with the very notion of the leeways of choice. I looked rather for concepts, theories, principles or any other tools that would assist in providing some guidance on how the choices should be made. Julius, I think, saw the other parts of his trilogy as filling this gap, particularly his theories of justice but also his more sociological analysis of law and society. But the issue remains, to my mind, a pressing one, especially in our modern, mature legal environment in Australia, in which the High Court is now our genuinely final court of appeal and, with even sharper focus since the reforms of 1984 that allowed the court to determine for itself which cases it will take, is right at the cutting edge of Australian law - indeed, it is the cutting edge of Australian law.

What contribution will the work of Julius Stone make as the High Court continues its robust refashioning of the law in the "post-declaratory theory of law" era, that is, post the myth of strict and complete legalism?

Julius' writings both assisted in creating the climate of awareness about the realities of judicial discretion and in stimulating thinking about the difficult issues involved in guiding the exercise of that discretion. But his influence did not come through his writing alone. Indeed, the writing itself was not always readily accessible, at least without considerable effort and concentration, and the clear line of thought could be interrupted and obscured by those voluminous footnotes. Julius was of the school, no doubt, that believed that writers should make demands of their audiences, not concessions to them. But in addition to his writings he exerted influence through his teaching, through his direct personal contact with those on whom he tested his ideas. And as some of these students have risen and continue to rise to the ranks of the senior judiciary, the Stone perspectives on the judicial task - no doubt in combination with other influences and in combination with the force of the individual's own intellect - have been directly translated into the law-making process, even blurring, perhaps, the line between art and life.

But how widely will Julius' works be read now that he is not here to make them an extension of his own teaching? How significant is his personal influence, and was it a peculiarly New South Wales phenomenon? At a seminar in Canberra last

year, Commonwealth Solicitor-General Gavan Griffith (a Melburnian) responded to a paper by Tony Blackshield which drew heavily on Julius' work by observing that:

...the problem for those of us who came up from south of the Murray is that as soon as we cross it, we are met by Julius Stone going the other way. It is an ethos that we have to try to make up later in life.⁵

So, will Julius' legacy prove to be limited by the range of his personal influence, or will it, through his writings, transcend the boundaries of place, time and personality?

Julius perhaps recognised the danger, inherent in making demands on the reader, of his work becoming ephemeral, and in his last work, *Precedent and Law*,⁶ he summarised and synthesised and made more accessible many of his earlier ideas. But civilisation advances through the force of ideas, and Julius' central ideas will endure. They will be remoulded and reworked as they interact with the product of other intellects, but that is the fate of all ideas, and those of Julius Stone will, I think, remain recognisable as such for some considerable time (even in Victoria).

In celebrating this 50th anniversary of *The Province and Function of Law*, I conclude by observing that when I resumed legal practice in 1991 with what was then Sly & Weigall, I discovered that there was a copy of *Province and Function* in the Sly & Weigall library - and this was the Canberra office, I should add, thus geographically beyond (although wholly surrounded by) New South Wales. I do not know how many other firms of solicitors or barristers' chambers stocked copies, and I have to say that I did not need to consult the Sly & Weigall copy for the purpose of any of my legal advices, but it seemed to me to be symbolic of the importance of the jurisprudence of Julius Stone in the Australian legal system. As the High Court takes the upper reaches of our law into the next millennium, it could do worse than to maintain a copy of *The Province and Function of Law* on its bookshelves.

5 G Griffith, "A Commonwealth Perspective" in M Coper and G Williams (eds), *How Many Cheers For Engineers?* (1997) 118.

6 J Stone, *Precedent and Law*, Butterworths (1985).