

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

JULIUS STONE AND THE HIGH COURT OF AUSTRALIA

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I. A GREAT TEACHER REMEMBERED

My contribution to this symposium is described as a commentary on the paper by Professor AR Blackshield. But as that paper did not exist, except in the author's mind, before it was presented, I was unable to prepare a comment on it. Instead, I had to set out on a journey of my own.

That journey took me once again to a reflection on my good fortune at being one of the students of Julius Stone and, in a small way, one of his collaborators. I have previously recounted something of that privilege in an essay in honour of Julius Stone¹ and in a review of the splendid biography written by Leonie Star.²

* Justice of the High Court of Australia. 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 AR Blackshield, *Legal Change: Essays in Honour of Julius Stone*, Butterworths (1983).

2 L Star, "Julius Stone: An Intellectual Life Reviewed" (1993) 67 ALJ 74.

Nobody who was taught by Julius Stone could forget the experience. His style was different, more questioning. His methodology involved the sharp interrogation of hapless students distracted by their pressing duties as articled clerks. I was a student in classes in public international law and jurisprudence. As my law course (at the University of Sydney) drew to its conclusion I was challenged by him in these two disciplines which were to become abiding interests of my life. Little did I suspect then that public international law would come to be of acute practical importance to me in a number of activities for the United Nations. Little did I imagine, as we studied Stone's theories of precedent and of how appellate courts operate, that one day this humble acolyte would serve on the High Court of Australia, whose works he repeatedly analysed. I imagine that the only person who thought less of my chances in that respect at the time was Stone himself.

Following my graduation from the undergraduate course, I decided to pursue a Master's Degree in Law within Sydney University. The University had just introduced the degree by coursework. Under the stimulating guidance of Tony Blackshield and of that gentle, insightful teacher Ilmar Tammelo, and supported by Stone's marvellous Graduate Assistant, Zena Sachs, I chose as the topic of my special study, and essay, the Marxist doctrine of the withering away of the state and its practical and theoretical prospects in the then Union of Soviet Socialist Republics. At that time, nobody imagined that the Soviet Union would indeed wither away, and so quickly. Indeed, the main point of my study was to contrast Marx's rather naive doctrine and the *Realpolitik* of the political autocracy and command economy of the Soviet Union. Ilmar Tammelo had supplied me with countless articles of theoretical and political posturing by communist leaders and university academicians in the Soviet Union, all dutifully translated into English from original Russians texts. Although derivative, my work on these essays was therefore, relatively original. It caught Stone's attention. He was then in the midst of writing the successor volumes to *Province and Function of Law*.

So it was that I became a minor collaborator in that great trilogy. On memorable weekends I, a young solicitor, would visit the professor in his home on the North Shore of Sydney. There, sitting in his study under the watchful eye of Rembrandt's *Staalmeesters*, warmly encouraged by Mrs Reka Stone, I expounded, reasoned, argued, defended and finally satisfied Professor Stone on the products of my research and their utility to his own analysis of Marx's theory and Soviet practice. He agreed wholeheartedly with my view that between the theory and the reality was a great gulf. It was unlikely to be reduced so long as the Soviet Union and its power elite survived.

My third encounter with this great teacher came when he was so happily, even lovingly, welcomed into the Law Faculty of the University of New South Wales, soon after its establishment. His time at the Sydney Law School had not been entirely happy. It is pointless to explore the reasons for this. Some of the blame undoubtedly falls on the shoulders of Julius Stone himself. He was, as I discovered, not always the easiest man to get along with.

Stone came to this Law School in 1973. At the end of 1974 I was appointed to the Australian Conciliation and Arbitration Commission. Soon afterwards, in

1975, at the age of 35, I found myself the foundation Chairman of the Australian Law Reform Commission. Stone quizzed me, publicly, at a function in this Law School concerning my plans and hopes for the new Commission. When he found that my answers betrayed, for him, an unhappily large concentration on practical achievements and actual law-making, he responded with noticeable despair mixed with a healthy serving of disappointment. He urged that it was not the role of the Law Reform Commission to second-guess the politicians or the federal bureaucrats. Its task was to analyse the defects in the law and to put forward the best consideration available in the country for the reform and improvement of the law. Typically, his opinion was strongly put. Of course, it had elements of principle and wisdom. It was a healthy corrective to my own ambitious desire to prove that the Law Reform Commission was useful to the Federal Parliament and productive in its service. Stone terminated his interrogatories with the melancholy comment: "One day, perhaps, the Commission will have a chairman who sees its role in a more challenging way. Alas, that will not be you."

Stung by this reproof by so honoured a teacher, I was naturally propelled into a deeper reflection upon the relationship between the Law Reform Commission and Parliament and the resolution of the tension between practical utility and conceptual boldness. Stone's harsh words were timely for me. Whilst institutional law reform must strive for practical utility in order to survive - escaping the abolition which soon descended upon the Canadian Commission - it must also cherish its independence and offer a product different from that which can be given to the Government and the Parliament, more quickly and economically, by the Departments of State. This was the truth which Stone was determined that I should perceive. He succeeded.

II. HIGH COURT CITATIONS

A. Rewriting History?

Professor Blackshield has suggested that an analysis of some of the decisions of Chief Justice Dixon will reveal not only the impact of Stone's exposition of the judicial method in appellate courts, but even of the language by which Stone explained the "leeways for choice" and the "categories of indeterminate reference" or "illusory reference" which await the judge seeking to apply to new circumstances statutes or past decisional authority which do not quite fit the facts as found.³

Of course, Chief Justice Dixon, like all of the Justices who served during the long period in which Stone was a law teacher and public commentator in Australia, could scarcely have missed exposure to his ideas, however apparently antithetical they were to the then current orthodoxy about judicial decision-making. At the time, the declaratory theory of the judicial function reigned. It lasted for a long time in the countries of the common law. This was so notwithstanding the fact that English lawyers, who grew up with familiarity of equitable doctrines were

3 See for example J Stone, *Social Dimensions of Law and Justice*, Maitland Publications (1966) pp 649-50.

fully aware that these were “established from time to time, altered, improved, and refined from time to time”.⁴ Sir Anthony Mason has recently commented that “equity judges were not subscribers to the quaint common law fiction that the rules of law had survived from time immemorial and that judges merely defined and declared the pre-existing law”.⁵ Yet Dixon repeatedly asserted that, were the law not pre-existing, its discipline would, for him, have lost its meaning and integrity.⁶ Personally, I find it unlikely that the great Dixon, or the other Justices who embraced the declaratory doctrine, would have consciously accepted the then rather heretical views which Stone advanced.

Let us not make the mistake, which has appeared in other intellectual quarters of late, of rewriting history, even Australian jurisprudential history. Who can tell whether Dixon, in his private reflections, pondered the schismatic doctrines of Stone which so challenged Dixon’s own exposition of the judicial function? Because Dixon and other judges of the time actually cited Stone, and because they were far from intellectually dishonest in the attribution of materials used by them, I think it is safer, and more realistic, to derive instruction about the use of Stone’s writing from an analysis of the citations in the *Commonwealth Law Reports* rather than speculation as to what might have been affecting the unrevealed subconsciousness of judges whose conscious minds and public utterances ostensibly rejected the approach which Stone was teaching to his students.

In fact, if an explanation for the fundamental changes of approach in the High Court of Australia between the days of Dixon and Stone and the days closer at hand is sought, the explanations are complex. But they include the advent to the Court of Justices who had actually been taught by Julius Stone; the removal of the supervision of the Judicial Committee of the Privy Council which tied the High Court to English jurisprudence and doctrine; the ascendancy in the High Court of lawyers with a deep understanding of the history and principles of equity which has never accepted the declaratory fiction; and the historical changes which made plain our unique obligation, and opportunity, to fashion a legal system suitable to a continental country with special needs and great opportunities.

With the aid of computer technology it is now relatively simple to discover, by scanning the text, all references to Julius Stone in the reported decisions of the High Court of Australia. I do not pretend to have conducted an exhaustive analysis. But such examination of the citations as I have made tends to show that the use of Stone’s materials, directly acknowledged in the text of the opinions of the Justices, can be divided fairly neatly into the three categories into which I believe it is also possible conveniently to divide Stone’s published writings. I refer to his writings on particular areas of substantive and procedural law; his exposition of public international law; and his analysis of jurisprudential theory, with particular reference to his notions about the way appellate courts respond to precedent and ambiguous statutes, performing their creative function within a framework of established intellectual constraints.

4 *Re Hallett’s Estate* (1879) 13 Ch D 696 at 710, per Sir George Jessel MR.

5 AF Mason, “Foreword” in P Parkinson (ed), *The Principles of Equity*, LBC (1996) p v at vi.

6 Sir Owen Dixon, “Address on Swearing in as Chief Justice” (1952) 85 CLR xi at xiv.

B. Substantive Law Analysis

In order to make good this proposition, let me isolate, first, a series of decisions of the High Court in which Stone's particular writings were cited. It will be remembered that Stone was always interested in the law of evidence. In the early stages of his academic career, in particular, he published several well regarded articles on that topic. In *Hall v Braybrook*, Justice Kitto in 1956 was grappling with the problem of when reference might lawfully be made to the prior convictions of the accused following a reflection by the accused on witnesses for the prosecution.⁷ Justice Kitto referred to Stone's article⁸ to assist in the exposition of the accepted rule. In *Dawson v The Queen*, Chief Justice Dixon was considering the same topic.⁹ He cited with approval an even earlier article in which Stone had expounded the "profound obscurities" of the law.¹⁰ Two years later, in *Ramsay v Watson* the Full Court drew with approval on an article by Stone on the *res gestae* exception to the hearsay rule.¹¹ These express references to Stone's writings indicate that they were far from ignored by the Court. But at that time, the 1950s and 1960s, the writing by Stone which the Court respected appears to have been limited to his writing on particular topics of 'hard' law. This would be entirely consistent with the Court's then adherence to the declaratory theory of the judicial function.

By the 1970s, Justices of the Court were citing substantive articles by Stone with greater alacrity. None was more willing to do so than Justice Murphy. In *Buck v Bavone* he referred to the criticism of the Court's approach to the interpretation of s 92 of the Constitution ventured by Professor Stone.¹² In due course of time, that criticism was to bear fruit.¹³

In 1977, Justice Aickin cited two of Stone's "interesting articles" on the question of character evidence and cross-examination.¹⁴ But he noted that Stone's views "must be taken not to have obtained acceptance". In *Jaensch v Coffey*, Justice Deane,¹⁵ like Stone's other pupil Justice Murphy, referred to his criticism of the development of the law of negligence.¹⁶ However, for once, the pupil preferred another teacher, Professor WL Morison. He rejected Stone's suggestion that the requirement of proximity involved no more than the notion of foreseeability.

Justice Murphy, in 1978, returned to this issue in *Jackson v Harrison*.¹⁷ Referring to *Legal System and Lawyers' Reasonings*,¹⁸ he embraced the "defects in

7 (1956) 95 CLR 620 at 657.

8 J Stone, "Further Problems in the Interpretation of Criminal Evidence" (1942) 58 LQR 369.

9 (1961) 106 CLR 1 at 10.

10 J Stone, "Cross-Examination by the Prosecution at Common Law and Under the Evidence Act, 1898: A Commentary on *Maxwell v Director of Public Prosecutions*" (1935) 51 LQR 443 at 466.

11 (1963) 108 CLR 642 at 648. See J Stone, "*Res Gesta Reagitata*" (1939) 55 LQR 66.

12 (1950) 25 NYUL Rev 451. See *Buck v Bavone* (1976) 135 CLR 100 at 134.

13 *Cole v Whitfield* (1988) 165 CLR 360.

14 See note 8 *supra*; note 10 *supra*.

15 (1984) 155 CLR 549 at 580.

16 J Stone, *The Province and Function of Law*, Maitland Publications (1946) pp 181-182.

17 (1978) 138 CLR 438 at 461.

the concept of duty of care” which had been exposed by Stone. He did so again in *Wyong Shire Council v Shirt*.¹⁹

In later decisions, Justices who were not specifically pupils of Stone have invoked his writings on specific legal issues.²⁰ Thus, in those areas where Stone contributed writings of an orthodox and comparatively narrow kind, dealing with particular topics of substantive and criminal law, his writings are quite often referred to. Whether his opinions were accepted or not, their influence was acknowledged and their reasoning was respected.

C. International Law

The second category of Stone’s writings is in the field of public international law. Here too, the Court has expressly referred to his instruction. Thus, on the contentious issue of the external affairs power under the Constitution²¹ and the proper approach to its construction, Justice Stephen in *Koowarta v Bjelke-Petersen* observed:

Turning back to the specific cases before the Court, I have already mentioned in passing the remarkable post-war growth in consensual international law. As Julius Stone expressed it as early as 1954 in his *Legal Controls of International Conflict*, ‘One modern year’s “international legislation”, that is, State-agreed regulation of new problems by multilateral instruments, exceeds that of a whole century of old’ (p 23). The present relevance of this is its effect upon the content of the external affairs power. It is like the defence power; it is ‘a fixed concept with a changing content’.²²

Stone was foremost in Australia at the time in teaching the growing influence and importance of international law. Not only did he teach law students but he was a tireless public commentator on the subject. He explained the role, functions and potentiality of the United Nations. His exposition clearly influenced the thinking of Justices of the Court and was expressly acknowledged by Justice Stephen in his critical decision in *Koowarta*. There are other like references.

D. Appellate Decision-Making

The third category of Stone’s writing concerns his exposition of jurisprudential theory, and his particular attention to the doctrine of precedent and the approach taken by judges in appellate courts where the answer is not clear. In *Gala v Preston* Justice Toohey accepted Stone’s explanation of how courts find the ratio decidendi of a case.²³ In other cases before and since Justices, who have included Stone’s pupils, have referred to the problems before them as including the delineation of “categories of competing reference” (as in *Waterford v The Commonwealth*²⁴) and “categories of indeterminate reference” (as in *McGinty &*

18 J Stone, *Legal System and Lawyers’ Reasonings*, Maitland (1964).

19 (1980) 146 CLR 40 at 49.

20 See for example *Gala v Preston* (1991) 172 CLR 243 at 284, per Toohey J.

21 Constitution, s 51(xxix).

22 (1982) 155 CLR 168.

23 Note 20 *supra*.

24 (1987) 163 CLR 54 at 63, per Mason and Wilson JJ.

*Ors v Western Australia*²⁵). By 1996 there is a frank acknowledgment of Stone's views on the "leeways for choice" and the policy problems which face appellate judges striving to give candid reasons for choosing one path over another. Justice Deane in *Oceanic Sun Line Shipping Company v Fay* put it quite bluntly:

Where past authority does not provide the solution, an appellate court, particularly a final court of appeal, is bound to derive the solution by analogous reasons from past legal authority and consideration of relevant matters of legal principle and legal policy.²⁶

This exposition of the judicial technique is a clear restatement of what Stone had taught. It is not that the appellate judge is free to follow his or her unstructured whim and idiosyncratic opinion. The judge remains a judge, working within the constraints of the law. But the task is better and more honestly done if the "leeways for choice" are acknowledged. Doing so will assist in an understanding of the difficulties which the judge faces. It will promote techniques of advocacy and reasoning which assist in the resolution of those difficulties. It will encourage the giving of reasons which more honestly state the considerations that have led the judge to one conclusion rather than another. Stone would ask, and expect, no more; but no less.

IV. CONCLUSIONS

We can speculate, if we like, upon the subconscious and unacknowledged influence of Stone's writings upon the Justices of the High Court of his day. For my own part, I believe that it is safer by far to examine the record, particularly when most of the public utterances by the Justices, and much of their technique, bore witness to the settled acceptance of the declaratory theory of the judicial function that reigned in those days, regarded by later Justices as "quaint". We may look back with astonishment at the long survival of this theory. But in my view we make a mistake if we attempt to rewrite history or to suggest that those who then adhered to it did so cynically, fully aware that they were engaged in deception by a fiction.

When the actual record of the opinions of the High Court is examined, it tends to bear out what commonsense would suggest. For the first decades after his arrival in Australia, Stone was controversial. His early, and even some later, analysis of substantive and procedural law, written within the paradigm of the declaratory theory, were easily digestible and even useful. So they were used. Within his particular specialty of public international law, it could also be accepted that he was a respected and orthodox scholar. But in his descriptions of the judicial method, his notions of the leeways for judicial choice and of the categories of indeterminate, illusory and competing reference were challenging to the then accepted orthodoxy. It was necessary to await a new generation of

25 (1996) 134 ALR 289 at 374, per Gummow J.

26 (1988) 165 CLR 197 at 252.

Justices (many of them Stone's pupils) to see not only the use of Stone's expressions but also the techniques which he described and explained.

This is a more natural, and historically understandable description of the impact of Stone's writings on the opinions of the Justices of the High Court of Australia. It is borne out by the record. The fact that occasionally Chief Justices and Justices before the enlightenment were forced by the lack of clear authority to redress the leeways of choice is no more than an illustration of the weaknesses of the declaratory theory which they nevertheless steadfastly embraced. But it would be a mistake, in my view, to suggest that it illustrates an acceptance, however grudging and unacknowledged, of Stone's exposition. For the contemporary Justices, that exposition was heretical. The enlightenment of Stone's instruction was still to come.