

**FESTSCHRIFT FOR
JULIUS STONE**

*A Tribute to Julius Stone on his Retirement from the
Challis Chair of Jurisprudence and International Law at
Sydney University*

Introduction

The Pragmatic Realism of Julius Stone

Julius Stone and the Adventure of the Idea of Justice

Legal Sociology and Historical Materialism

*Revolution—A Spiritual Phenomenon: A Study in the
History of Ideas*

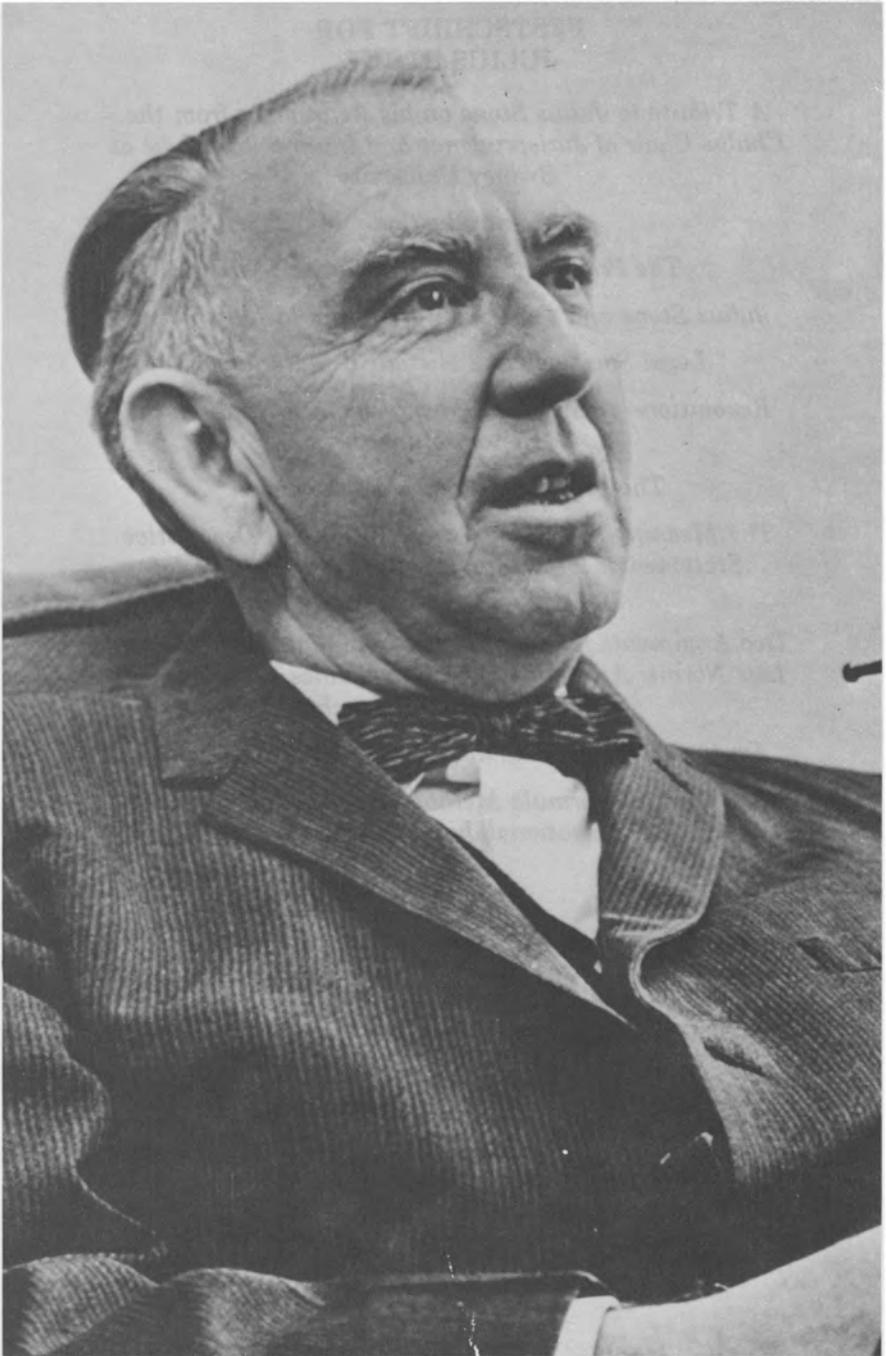
The State as a Secular Phenomenon

*The Meaning and Role of Prescriptive and Descriptive
Statements: Particularly in the Legal Universe of
Discourse*

*Two Arguments for an Empirical Foundation of Natural-
Law Norms: An Explanation of Johannes Messner's and
Victor Kraft's Approaches*

On the Objective Foundation of Natural-Law Norms

*The Counter-Formula Method and its Applications in
International Judicial Reasoning*



INTRODUCTION

Edward McWhinney*

It is fitting in a collection of essays in honor of Julius Stone, perhaps the greatest living exponent of the Anglo-Saxon School of Sociological Jurisprudence,¹ founded by Stone's own great teacher and mentor, Dean Roscoe Pound of the Harvard Law School,² that we should concentrate upon the judicial process, the creative opportunities for judicial policy-making, and the very real limitations upon the Court's exercise of a legislative *rôle* in the elaboration of the "new" international law of our own particular era of transition and rapid change in the World Community. Stone, in his seminal writings on Philosophy of Law,³ was among the first to point out and demonstrate in any systematic, scientific-empirical way, the limitations of traditional legal logic as applied to the judicial process, and the many ambiguities inherent in the conventional legal categories⁴ which open the way for what Cardozo called interstitial judicial legislation.⁵ Stone has also, because of his commitment to Sociology of Law, always been keenly aware of the symbiotic relation between Law and Society—between the formalized norms of statutes, court decisions and other positive law texts, as written, and the basic societal facts and conditions of the community in respect to which that positive law is to operate.⁶ The societal facts necessarily operate to condition and to limit, and if not properly taken into account by the official decision-maker, to frustrate, the positive law prescriptions, as originally written. This is, of course, one of the basic truths of Sociological Jurisprudence—the all too frequent gap between the Law-in-Books and the Law-in-Action. Stone's lesson, here, was to preach the socio-ethical limitations to effective legal action.⁷ This was a counsel of

* Queen's Counsel; Barrister and Solicitor; Professor of International Law and Relations, Simon Fraser University, Vancouver, Canada; Membre de l'Institut de Droit International.

1. As to international law, see Stone, *Problems Confronting Sociological Enquiries Concerning International Law*, 89 RECUEIL DES COURS 65 (1956).

2. See, e.g., R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1930); R. POUND, SOCIAL CONTROL THROUGH LAW (1942).

3. See especially Stone's magnum opus, THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE, AND SOCIAL CONTROL (1946) [hereinafter cited as THE PROVINCE AND FUNCTION OF LAW].

4. J. STONE, *Fallacies of the Logical Form in Legal Reasoning*, THE PROVINCE AND FUNCTION OF LAW 149 *et. seq.* (1946).

5. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

6. STONE, *Law and Society*, THE PROVINCE AND FUNCTION OF LAW 391 *et. seq.* (1946).

7. *Id.* at 673 *et. seq.*; see also Stone, *What Price Effectiveness?* [1956] PROC. AM. SOC. INT'L L. 198.

prudence, directed to judicial decision-makers among others, about the dangers of trying to jump too far ahead of the society in which the decision-makers must operate, lest an overly ambitious or premature venture in community policy-making on the part of the judges should turn out to be counter-productive and so delay or even frustrate altogether the cause of fundamental legal change.⁸ Finally, Stone recognized what Mr. Justice Frankfurter has designated as the "rôles and missions" in law and the law-making processes⁹—that at any particular time and in respect to particular social problems, some agencies of government may be more suited to community policy-making than other agencies of government; and that, as a general principle and especially for the more highly politicized problems, the courts may often be rather less effective in community problem-solving than the other, more overtly and avowedly, political organs of government.¹⁰

These three (and other) aspects of Julius Stone's work are amply developed in the following *Festschrift* commemorating his retirement. The majority of the articles are written by colleagues and former students of Stone. They include excellent illustrations of contemporary European approaches to jurisprudence. This collection of articles, both European and American, thus constitutes a testimony to the immense influence Julius Stone has had upon what is, in United Nations terms, fittingly described as the progressive development of International Law.

8. Stone, *Of the Feasibility of Tasks in Problems Confronting Sociological Enquiries Concerning International Law*, 89 RECEUIL DES COURS 65, 138 (1956).

9. See Freund, *Mr. Justice Frankfurter*, 16 U. CHICAGO L. R. 205, 213 (1959).

10. . . . Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution. *Sherrer v. Sherrer*, 334 U.S. 343, 365-6 (1948) (Frankfurter, J., dissenting opinion).