

**FESTSCHRIFT FOR
JULIUS STONE**

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

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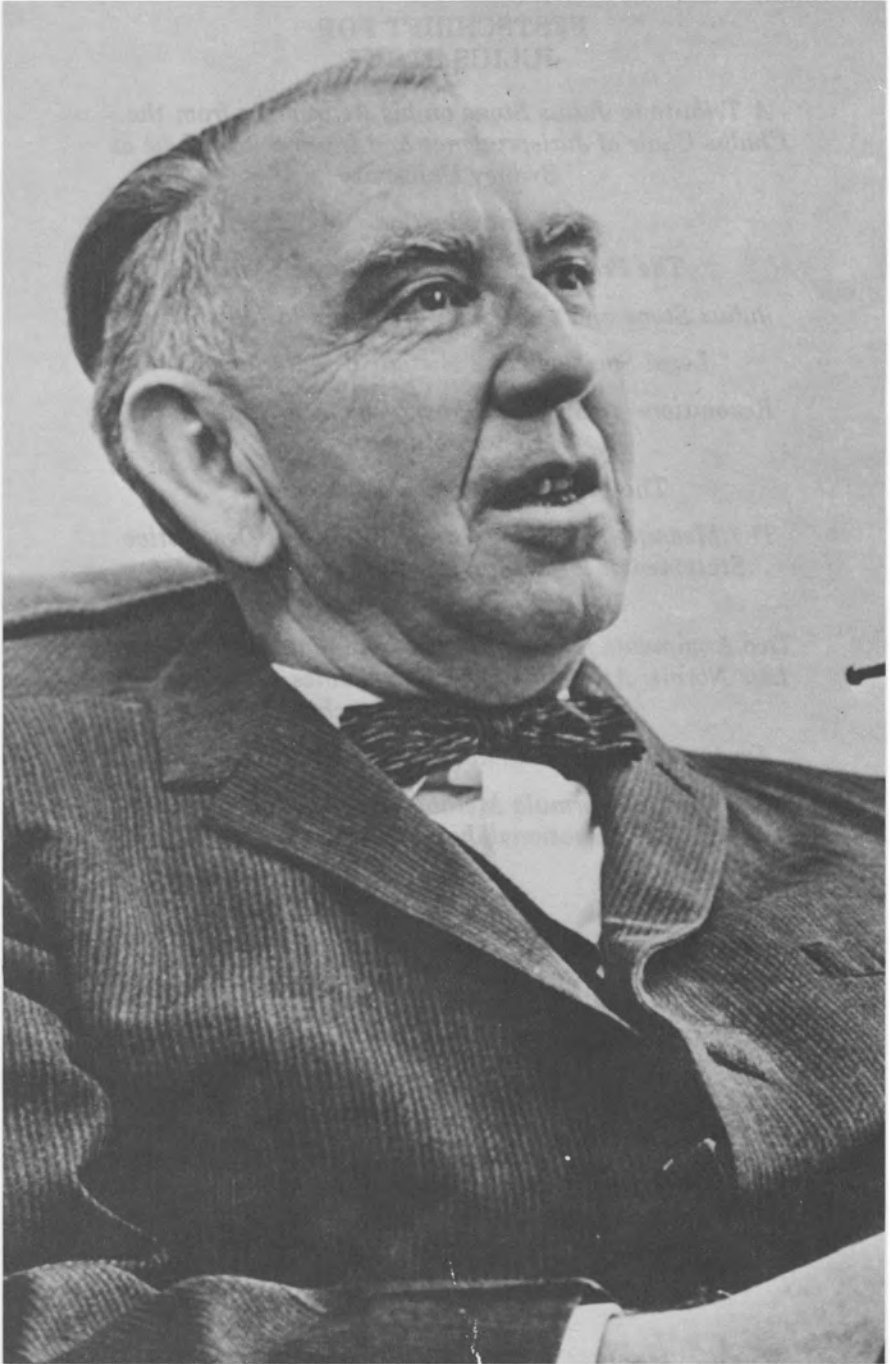
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THE PRAGMATIC REALISM OF JULIUS STONE

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I.

Quoting Machiavelli, Reinhold Niebuhr has said that the purpose of the realist is "to follow the truth of the matter rather than the imagination of it; for many have pictures of republics and principalities which have never been seen." The idealist, on the other hand, thinks of himself as one who is loyal to moral norms and ideals.¹ The idealist, said Niebuhr, may be defined as the person "who seeks to bring self-interest under the discipline of a more universal law and in harmony with a more universal good."² Niebuhr refused to identify himself with either position unqualifiedly and exclusively. He saw the "relevance" of realism and at the same time the "relevance" of "an impossible ideal." On the one hand, he saw the central fact of power. "The historical realists know," he wrote—and he meant to include himself among them—"that history is not a simple rational process but a vital one. All human societies are organizations of diverse vitalities and interests. Some balance of power is the basis of whatever justice is achieved in human relations. Where the disproportion of power is too great and where an equilibrium of social forces is lacking, no mere rational or moral demands can achieve justice."³ On the other hand, he saw as universal the disposition "to hide self-interest behind the facade of pretended devotion to values, transcending self-interest . . ." Man, he added, is a curious creature with so strong a sense of obligation to his fellows "that he cannot pursue his own interests without pretending to serve his fellow men. The definitions of 'realists' and 'idealists' emphasize disposition, rather than doctrines . . ."⁴

If realism and impossible ideals are both relevant for judgment, if one sees all the ironies and ambiguities in the wills and actions of men and nations and yet refuses to accept the actual or historical as normative, how does one find an adequate rubric to do justice to

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1. R. NIEBUHR, *CHRISTIAN REALISM AND POLITICAL PROBLEMS* 119-20 (1953).
2. R. NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 9-10 (1945).
3. Niebuhr, *Plans for World Reorganization*, 2 *CHRISTIANITY AND CRISIS* 3 (Oct. 19, 1942).
4. R. NIEBUHR, *CHRISTIAN REALISM AND POLITICAL PROBLEMS* 120 (1953).

such a dialectical position? It is a position which transcends the either/or law of contradiction. "The finest task of achieving justice," Niebuhr wrote, "will be done neither by the Utopians who dream dreams of perfect brotherhood nor yet by the cynics who believe that the self-interest of nations cannot be overcome. It must be done by the realists who understand that nations are selfish and will be so to the end of history, but that none of us, no matter how selfish we may be, can be only selfish."⁵

Here we see a realism that is without cynicism; a realism that incorporates into itself a realm of values, ideals and norms by which the past and present can be judged; a realism without illusions, yet with a sense of prophetic vision. "It is a terrible heresy to suggest that," wrote Niebuhr, "because the world is sinful, we have a right to construct a Machiavellian politics or a Darwinian sociology as normative" The historic, he went on to say, is *not* normative. "Man may be, as Thomas Hobbes observed, a wolf to his fellowman. But this is not his essential nature."⁶

It is this Niebuhrian realism that, I believe, best defines the disposition of Julius Stone. One can see it in the philosophical underpinnings of *Law and Society* (1948),⁷ especially the second book, *Law in Modern Democratic Society*, which has been seminal in its influence on legal education, legal thought, legislation and judicial decisions. It can be seen in *The Province and Function of Law* (1946),⁸ in which he examined the nature and basic conceptions of law under three rubrics — "Law and Logic," "Law and Justice" and "Law and Society," a jurisprudential division and synthesis that has become well-nigh conventional. And it can be seen in his monumental reworking of the field of jurisprudence in his more recent three volumes: *Legal System and Lawyers' Reasoning* (1964), *Human Law and Human Justice* (1965) and *Social Dimensions of Law and Justice* (1966)—which present his earlier scholarship and thought on a much wider canvas. These three books, together with the earlier work out of which they have developed, when seen as interlocking one with the other, present in a masterly fashion the dialectic interdependence and intertwining in the law, of logic, justice and society—the analytic separation and conceptual fusion of fact and value, of reality and ideal.

5. N.Y. Times, June 2, 1971, at 1, col. 2, 45, col. 1.

6. R. NIEBUHR, CHRISTIANITY AND POWER POLITICS 214-16 (1940).

7. S. SIMPSON & J. STONE, CASES AND READINGS ON LAW AND SOCIETY (1948).

8. J. STONE, THE PROVINCE AND FUNCTION OF LAW (1946).

The same Niebuhrian disposition of idealistic realism can also be seen in Stone's notable work in the field of international law, in *Legal Controls of International Conflict* (1954), *Aggression and World Order* (1958), *International Court and World Crisis* (1962) and *Of Law and Nations: Between Power and Human Hopes* (1974).

Indeed, I believe that his basic disposition comes out best in some of his writings on international law, where he is at times compelled to bring to bear on a specific question a combination of his insights and attitudes as a unified intellectual force. What can be philosophically or analytically broken down into separate considerations of logic, justice and society needs to be somehow synthesized when a specific problem is under consideration and when a decision is to be reached. In his concern with contemporary challenges in international affairs, Stone knows that he is facing life and death issues. In such an exigency, the crucible of creation forces analysis into a secondary place, and the thinker's basic disposition comes to the fore, exposed and recognized for what it is. In his towering works on jurisprudence, Stone remembers the thousands of books and articles he has read—*e.g.*, a single chapter, chosen at random, of *Legal System and Lawyers' Reasoning* contains 318 footnotes. But Stone's *Quest for Survival: The Role of Law and Foreign Policy* (1961) has only a single citation—and that, significantly, is of Niebuhr's *The Structure of Nations and Empires*. *Quest for Survival* is the text of lectures that Julius Stone delivered over the national radio network of the Australian Broadcasting Commission; it was not a work written for scholars. In it, a famous scholar speaks responsibly to his fellow citizens who wanted to know what insights he could bring to bear on momentous questions that agitated them and the rest of humanity. This was no occasion when one might be tempted to substitute learning for wisdom, or analysis for concretion and insight. He had to think as a philosopher but speak as one who had the right to decide and command.

II.

In the first several pages of *Quest for Survival*, Stone considers the question of whether or not the rule of law is operative between nations today, and what conditions would be essential for the establishment of its operation.

Stone points out that in England—the cradle of the rule of law ideal—the rule of law is a protection against executive power, but “in the last resort” is no protection against the supreme power of

Parliament. Does the rule of law in England have, then, only a partial and narrow meaning and reach? In answering this question in the negative, as he does, Stone goes outside the realm of lawyers' law to society. He finds the essence of the rule of law "in the supremacy of certain ethical convictions, certain rules of decency prevalent in the community, and in the psychological fact that those who are at the apex of power share those convictions and feel bound to conform to them. A duly enacted statute to liquidate H. M.'s Opposition would violate 'the rule of law,' not because it would not be lawyers' 'law,' but because it isn't Britishers' 'cricket.'"⁹ The rule of law, then, is indeed a far-reaching ideal which does not rest exclusively on lawyers' law but presupposes a certain moral climate in the community, of which the rulers are aware and which they share.

For its operation, the rule of law has additional requirements that must be met: there must be a legislature that is "constantly overhauling the substantive law to keep it in tune with the demands of the time", and the legislature must be subject to the check of periodic elections and the check of publicity of its proceedings.¹⁰

The application of these propositions to international relations was easily made by Stone. Nations cannot be expected to submit themselves to the rule of law by allowing their disputes to be settled by binding decisions of an international court when legal rights are not subject to adjustment by laws which are themselves constantly reviewed and changed to reflect new conditions and new demands. How long would Englishmen or Americans venerate the ideal of the rule of law if the law by which they were ruled were, like that of the Medes and the Persians, one "which altereth not?"¹¹ The principle of the rule of law implies, then, the existence of a legislative power, which functions to make new laws to meet the evolving needs of the people—whether of a nation or of the international community. If, in the absence of such a legislative power, "we tried to clamp the 'rule of law' on States . . . this would freeze vested rights as they now are, and make it even more difficult to adjust legal rights to rapidly changing conditions. There is obviously not the slightest hope that States will agree to this."¹²

But why is there no hope that States will agree to instituting a

9. J. STONE, *QUEST FOR SURVIVAL: THE ROLE OF LAW AND FOREIGN POLICY* 4 (1961) (hereinafter cited as *QUEST FOR SURVIVAL*).

10. *Id.*

11. *Daniel* 6:12.

12. *QUEST FOR SURVIVAL*, *supra* note 9, at 5.

program for changing the law and for enforcing it as it changes? "The feasibility of this in the international as in a national community turns," says Stone, "on whether the community as a whole . . . shares certain common ethical convictions as to the basic principles of decency between man and man. But clearly in the relation of States such shared convictions are the exception. Indeed, some of the main war-provoking cleavages of today . . . turn precisely on bitter divergencies of ethical convictions underlying the conflicts of interest."¹³

Stone concludes this discussion with the judgment that proposals for the establishment of the rule of law among nations not only do no good, but can do harm. "For the illusory simplicity of the phrase 'rule of law' obscures the present handicaps of international law" as a basis for conflict management. And Stone follows this statement with a quotation from Reinhold Niebuhr: Men, wrote Niebuhr, are dangerous, not only "because they have . . . unlimited yearning for power, but because they are creatures of dreams; and their extravagant dreams turn into nightmares if they seek to realize them in history."¹⁴

III.

That this realism was not invoked only as an evasion of a complex problem but reflects deep insights and convictions with respect to the nature of law and its functions, can be seen in *Social Dimensions of Law and Justice*, published five years after *Quest for Survival*. Stone rejects the Austinian notion that power is the only component of law. In a democracy, the power-holders consider vital not only the element of coercion but also the people's sense of ethical obligation and conviction. The heart of the doctrine of the rule of law, says Stone, lies in the recognition by those in power "that their power is wielded and tolerated only subject to the restraints of shared socio-ethical convictions," and he notes that this ethical component, as distinct from mere legality, "seems sometimes to be regrettably lost from sight in the enthusiasms of 'world law' and 'rule of law' campaigns."¹⁵

Quite a number of significant truths follow from the recognition of the ethical import of the rule of law notion, and Stone explicates them, but for our purposes we will select only several. First is that

13. *Id.*

14. *Id.* at 8-9, quoting R. NIEBUHR, *THE STRUCTURE OF NATIONS AND EMPIRES* 293 (1959).

15. J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 619 (1966).

the rule of law cannot be indifferent to the substantive contents of law. It cannot operate on the basis of a maxim such as, "It is the law, right or wrong." Second, there must be in existence and functioning a responsible legislature, which has respect for the dignity of all persons; for if the law is to rule, it must be a living law, reflecting and responding to the needs and pressures of living men and women — or nations, if we think of international law. "This substantive reference," says Stone, "imports both a minimal justness of rules, and a dynamic responsiveness of substantive law to the needs of social and economic development."¹⁶ As if recalling what he had said years before in his radio lectures, Stone added that a vital insight from this analysis is:

that mere conformity to law *in the lawyer's sense* is not sufficient for conformity to a meaningful ideal of 'the rule of law'. In *merely* the lawyer's sense it is not inconceivable that the unitary and supreme English Parliament might enact a law for the liquidation of opposition leaders. Such a law would obviously contradict an important part of whatever we can mean by 'the rule of law'.¹⁷

Stone thus effectively shatters the coziness of the rule of law doctrine as a simplistic shibboleth by bringing a down-to-earth realism to our understanding of the doctrine. But it is a realism that does not bring us to the edge of despair by a corroding cynicism. It is a realism that points to ideal elements which can be found in only a few parts of the world today. Yet they are sufficient to provide a standard for judgment within a nation and within the world community. For much of mankind, however, the rule of law is, and for the foreseeable future unfortunately will remain, an impossible yet relevant ideal.

While its relevance will continue, the opinion may be offered that its impossibility has taken on aggravated force by the harm done to it by the United Nations and some of its agencies, especially in the last few years. When Florence Nightingale observed the deplorable conditions of hospitals, she is reported to have said that the least that one might expect from hospitals is that they would not spread disease. So one might say that the least we had a right to expect from the United Nations is that it would not spread injustice, inequality and disorder. There are more than enough of these in the world without the United Nations making it even worse. Yet what

16. *Id.* at 620.

17. *Id.* at 621.

a careful observer of the work of the United Nations has recently said about it is tragically true:

In the United Nations, as in the League, a perfect paradox was created: an institution that would proclaim standards only to undermine them; that would profess beneficence while condoning — actively, or by silence, or through inconclusive debate — every form of barbarism. These apostasies were enclosed in an aura of righteousness in total contrast to the realities dictating them¹⁸

There is less consensus on respect of basic ethical values in the world of the 1970's than there was when Julius Stone delivered the Australian Broadcasting Commission lectures in 1960. It is not simply that the world is divided into various camps, and that each side openly and honestly proclaims what it stands for, what it believes and what it demands, and there is no way of reconciling their differences. The trouble is that parties try to cover their real purposes by proclaiming principles and positions that they do not really believe. This vice was touched on by W. Tapley Bennett, Jr., Deputy Permanent United States Representative to the United Nations, when he defined the United States' position as it abstained from the vote on the General Assembly resolution that expressed "deepest concern of reports of constant flagrant violations of basic human rights and fundamental freedoms in Chile." Ambassador Bennett said:

I feel called on to make one more observation. We should not close our eyes to the fact that there is an element of hypocrisy involved in the discussions . . . on human rights in Chile. What we have heard here in the last few days shows the existence of a double standard toward human rights and . . . democracy.

We appreciate the genuine concern of most of the cosponsors of the resolutions before us. However, some of the cosponsors have denounced reported violations of human rights in Chile in the strongest terms while many of these same rights do not exist in their own countries. For example, do all of the cosponsors of the resolution allow members of the free press to circulate throughout their country and report without censorship? How many political dissidents, writers, or others who dare express themselves contrary to the official line of their government wind up in jail, indeed suffer a worse fate? Even more elementary, how many of the cosponsors of this

18. Hazzard, *The United Nations: Where Governments Go To Church*, 172 NEW REPUBLIC 11 (Mar. 1, 1975). See also S. HAZZARD, *DEFEAT OF AN IDEAL* (1973).

19. U.S. Dept. of State, U.S. Positions at 29th U.N. General Assembly, Special Report

resolution allow free movement of their citizens into and out of their national territories?"¹⁹

It is, of course, true that, as La Rochefoucauld observed three centuries ago, hypocrisy is the homage which vice renders to virtue. But La Rochefoucauld was a philosopher who allowed his realism to take him into the abyss of cynicism. Julius Stone, however, like Reinhold Niebuhr, has not allowed this to happen to himself. He, on the contrary, has the saving grace to live with the hope that the time will yet come when the hypocrites will live up to their hypocrisies. On the other hand, his strong sense of reality has kept Stone from the pitfall of cant.

It may be that Stone shares with Herder the belief that hypocrisy in the international arena is itself a notable mark of progress, for until modern times nations, states and tribes went to war only because they hated their neighbors, hated and feared strangers or coveted what their enemies possessed, and they made no effort to throw a veil over their base desires and ambitions. Herder noted that in modern Europe, governments at least made grand ethical professions and claims as they led their peoples into schemes of murder, robbery and plunder. "Gross infringements of international law," wrote Herder in 1774, "now are so much more publicly apparent and have to be camouflaged by governments in terms of truth, justice and humanity—a thing which previously was both unheard of and uncalled for . . ." ²⁰ This discovery did not make Herder into a believer in inevitable progress. His name cannot be bracketed with those of Fontenelle, the Abbe de Saint-Pierre, and Condorcet, who believed in the inevitable march of humanity toward social perfection. Herder waived, allowed himself ambiguities and compromises, yet never hesitated to associate himself with struggles against ignorance, cruelty and prejudice. Had Herder known the maxim of Rabbi Tarphon, as quoted in the Mishnah, he would have been proud to have quoted and have adopted it—as has, indeed, been done by Julius Stone:²¹ "It is not thy duty to complete the work, but neither art thou free to desist from it."²²

The philosophy of Julius Stone reflects the pragmatic spirit of

No. 13, at 18 (1975).

20. J.G. HERDER ON SOCIAL AND POLITICAL CULTURE 244 (F. Barnard ed. 1969).

21. QUEST FOR SURVIVAL, *supra* note 9, at 81.

22. 4 MISHNAYOTH—ORDER NEZIKIN, *Tractate Ethics of the Fathers* 2:16.

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William James, who rejected both optimism and pessimism in favor of a belief in the mere possibility of amelioration. "We must learn," says Stone, "to bear . . . responsibilities, even as we learn to acknowledge the finite limits of our capacity to meet them. The unavoidable frustrations of history must not weaken the search for feasible next steps, nor self-righteousness [to weaken] our will to understand and accommodate, nor dreams and yearnings [to weaken] our patience and will to wait."²³

23. QUEST FOR SURVIVAL, *supra* note 9, at 86.