STONE AND LEGAL REASONING

by Lyndel Prott[1]

In my commemoration of Julius Stone as Scholar, Teacher, Colleague and Mentor, I will concentrate on his work in the area of legal reasoning. This is an area which had a lifelong fascination for Stone representing his first published work in Jurisprudence.[2] It also represented his last.[3] That fascination he was able to pass on to many of his students who have continued to write and research on this topic, and perhaps more importantly, have brought to their professional work, as legal practitioners and judges, an acute awareness of the subtlety and sophistication of legal reasoning and have taken pains to master their craft.

The fundamental dilemma which so intrigued Stone was that of continuity and change in the Common Law. This theme was already clearly delineated in Province and Function in 1946. In a section entitled "The English judicial achivement in relation to social change and fallacies of the logical form", his first question was "Can the Common Law Theory of Precedent be Reconciled with the English Judicial Achievement?"[4] As a teacher he put the point succinctly: How could the law of a small community, based on agriculture and cottage industry, of the 16th and 17th centuries have developed the enormous complex of rules which could regulate a great commercial and industrial empire if the judges had only been drawing on pre-existing sources?

Stone's lifelong effort to answer these questions was based on the formulations already worked out in 1945 - the categories of illusory reference and the leeways of choice. In this area he set up his own terminology to establish a framework which would give an alternative explanation of the judicial process than the accepted one of logical deduction from precedent.

It is hard to measure Stone's influence in this area. It is quite clear that there has been a major shift in his lifetime away from explanations of judicial decision-making based on the ratio decidendi and

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1 Reader in International Law and Jurisprudence, University of Sydney

2 Recent Trends in English Precedent, with a Comparative Introduction on the Civil Law, Assoc. General Publications, Sydney, 1945, forming Chs. 6 and 7 of The Province and Function of Law which was first published in 1946.

3 Precedent and Law, Butterworths, Sydney, 1985.

4 The Province and Function of Law: Law as Logic, Justice, and Social Control, 1946, reprinted Harvard U.P. 1961; currently reprinted William S Hein & Co , Buffalo

syllogistic logic towards a more flexible understanding of precedents as a source for creative judicial development of the law When Stone started writing the "strict" doctrine of precedent had reached its apogee. It was in 1944 (Young v Bristol Aeroplane Co. [1944] KB 718) that the Court of Appeal finally bound itself to follow its own precedents, a step taken by the House of Lords in 1898 (London Street Tramways v London County Council [1898] A.C. 375). By 1985, when Precedent and Law was published, the arguments were as lively as ever, but in reading it one could rather wonder at the vigour of the attack; so much of the argument had become commonly accepted, that it was almost difficult to understand why so strong a case needed to be made. After all, in 1966 the House of Lords had finally done away with official endorsement of the "strict" doctrine, by the Lord Chancellor's announcement that that court would no longer necessarily regard itself as bound by its own decisions. Yet Stone was at pains to point out, in his Fullagar lecture of 1972,[5] that behind the new facade, the judges continued to wield the traditional techniques and, in some cases, to be limited by the traditional fictions.

The strict doctrine of precedent meant three things: that lower courts would follow decisions of courts superior to them in the hierarchy; that courts would follow decisions of courts of co-ordinate jurisdiction as a matter of comity; and that the superior appellate courts were bound by their own decisions. In recent years all these propositions have become untrue. From 1964 on, in a number of celebrated cases, the Court of Appeal refused to follow decisions of the House of Lords, creating a certain turbulence in the English judicial system and some alarm in the House of Lords, which saw serious consequences in the prolongation of litigation and cost to the public. The Australian High Court also showed much greater independence towards decisions of the Privy Council, though it was careful, for most of that time, to mask its independence by using the terms of "distinguishing" cases, rather than the greater verbal honesty (and consequently more disruptive approach) of Lord Denning in the Court of Appeal.

In matters of comity there was also change: the High Court in 1943 had declared its ideal of preserving the unity of the Common Law by following a decision of the House of Lords even where it meant overruling one of the High Court's own decisions (Piro v Foster 68 CLR 313). In 1963 (Parker v The Queen 111 CLR 610) the High Court expressly resiled from that view.

Finally The House of Lords, in the Practice Direction of 1966, had moved away from the strict

5 Published as "On the liberation of appellate judges: how not to do it" in (1972) 35 Modern Law Review 449-477

doctrine of following its own precedents and similar movements followed in most other superior appellate courts of the Common Law [6]

Were these events influenced by Stone's writings? It hardly matters, since they clearly helped to create the climate of opinion in which this greater honesty could arise. In some ways he may be seen as responding only to the Zeitgeist, but the first theorist who delineates some impending social change of importance is nonetheless a most significant figure, spelling out for us what may have been intuitively sensed, and making easier a transition which may in any case have been inevitable. Clearly, adaptation to the enormous social and legal changes of the second half of the twentieth century in all the Common Law systems would have been drastically hampered if the three facets of the strict doctrine of precedent had remained unchallenged. Stone's explanations of how precedent really worked enabled the doctrine to survive and provide that continuity of legal theory on which the Common Law thrives.

As a student and then a Research Assistant of Stone in the mid-1960's I was drawn to his lively treatment of these topics, then newly invigorated by the revision of those sections of Province and Function dealing with these topics for his book Legal System and Lawyers' Reasonings. Stone's Department was a marvellous source of intellectual stimulation and debate. The youngest and newest Research Assistant, if announcing a new idea, would be listened to with respect, and often a fruitful debate would be opened up with three or four others to challenge, criticize and extend. The sense of intellectual adventure which many students felt was much intensified when working with the materials in the course of a continuing project of this standard and it must be regarded as one of Stone's great qualities that he led a Department of this kind and attracted to it not only assistants, post-graduates and students but visitors of the highest calibre who added to the perpetual simmering of new ideas. [7]

During this period Stone was much engaged with the thought of Chaim Perelman with whom he had a long and fruitful colleagueship. Perelman's The New Rhetoric,

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6. For a fuller discussion of the developments on all three aspects of precedent see L.V. Prott "Refusing to Follow Precedents: Rebellious Lower Courts and the Fading Comity Doctrine" (1977) 51 ALJ 288 and "When Will a Superior Court Overrule Its Own Decision?" (1978) 52 ALJ 304.
7. Ilmar Tammelo was a long-time colleague of Stone's and a lively member of the Department; Charles Alexandrowicz was also on the staff for a time. Among the visitors I recall during my time in the Department were Ivanhoe Tebaldeschi (Italy), and Charles Boasson (Israel)

published in French in 1958, seemed to provide another framework for the explanation of how judges reasoned How did it relate to Stone's explanations? This was a central theme of discussion in the Department during some of my time there, and led to a continued interest in this area. Stone himself, though very sympathetic to Perelman's treatment, did not in the end find that it added much to the understanding of the process of precedent:

> The question whether an earlier case is a precedent for the present situation depends on an assessment of essential similarities and differences between the two, which is really not very different from the assessment which is a central concern of Perelman's new rhetorics ... So far as this kind of idea is offered to lawyers as an aid to finding justice, it seems to amount to telling them that what they need to do in order to decide problems of justice is to act as if they were lawyers ... Rarely can there have been a more dismaying adventure in interdisciplinary helpfulness![8]

The dialogue with Perelman was, however, fruitful in other directions. First, the clear recognition that Perelman's work described ways of reasoning "not essentially different from those which common law judges have actually been using for generations"[9] was an endorsement of Perelman's analysis which could not have been obtained from contemporary continental, particularly French language jurisprudence, and proved the value of that theory for new thinking about legal reasoning in continental systems. Second, it inspired further fruitful comparative work between judicial reasoning in Common Law systems and Civil Law systems, and even into International Law. I regretted that Stone had not himself followed up his analysis of reasoning into the International Court of Justice, although International Law was another important branch of his scholarship. This avenue seemed to me so interesting that I subsequently followed it up myself.[10] Characteristically, Stone wrote me a generous letter of compliment when the book appeared in English.

Stone's work in this areas has strongly influenced the establishment of a post-graduate course in Aspects of

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8 J Stone, Human Law and Human Justice, Sydney, Maitland Publications, 1965, 328-329.

9 Stone, Legal System and Lawyers' Reasonings, Sydney, Maitland, 1964, 336.

10 A doctoral dissertation for the University of Tuebingen, in German, subsequently published as "Der Internationale Richter im Spannungsfeld der Rechtskulturen", Duncker & Humblot, Berlin, 1975 and revised, in English, as The Latent Power of Culture and the International Judge, Professional Books, Abingdon, U K , 1979

Legal Reasoning which has now been taught in the Faculty of Law at Sydney for more than 10 years, and in which Chaim Perelman acted as a guest for one term a few years ago. Student pleasure in the course has often been evident, and it is fitting tribute to Stone that the skills of analysis and understanding of the art of judgment should be continually passed on in this way. One of the pleasures of taking this course is to find practitioners, some with no background in Jurisprudence, finding the course highly relevant to their work as well as intellectually challenging. Through his work on legal reasoning, as well as in other areas, Stone's activity in the Law School was an inspiration to students and colleagues oppressed by the parochialism of legal studies in Australia at that time. The citation of works in foreign languages in the normal course of scholarship, the wide range of literature and examples cited, even his intriguing Yorkshire-Harvard-Australian accent, was a stimulus to students who wanted a wider intellectual canvas on which to work. In the early 1960s England was still regarded as the only respectable place to do post-graduate work in law. It was only in the early 1960s that the great American Law Schools began to be seen as appropriate destinations for Sydney graduates, and it was, by and large, Stone's Research Assistants who were the first to go there. Going to a continental university was regarded as even less appropriate: I was most fortunate in having Stone's encouragement to work first in Brussels (where he commended me to Perelman) and then to Germany. Now that such destinations are no longer regarded as more than slightly exotic, and many more graduates have made the effort to transport themselves into another language and legal culture, it is hard to appreciate how much of an innovation the kind of broad-based legal culture that Stone represented was.

These personal notes try to show what Stone's leadership in one area meant to me as a student and junior scholar. The influence was major, but not in the sense that Stone established a "school". Like most seminal thinkers, Stone has probably not one disciple who currently represents his views exactly as he presented them. What he has left behind is a great number of scholars, jurists and judges whose own original thinking has been stimulated and inspired by his work; who have engaged their minds in areas that only first became important to them because of his input; who have carried his ideas into all sorts of other areas and thus have illustrated the fecundity of the scholarly approaches which he espoused. It seems to me that these attitudes of enquiry, analysis and above all of far-reaching, wide-ranging research constituted his most important contribution, and that lasting evidence of it could be found in the work of many jurists today. This, it seemed to me, was a more important contribution than the "categories of illusory reference", revolutionary though they were when first formulated But I recently had the salutary experience of reading a student essay, the topic

of which was a review of Stone's Precedent and Law In it the student saw as Stone's most important contribution his analysis of the categories of illusory reference. As the student concerned would not have been born when Stone was formulating this analysis, I was glad and surprised to see that the fascination of the alternative explanation as to how the common law really worked is as compelling to students today as it was to undergraduates at Sydney Law School in my day.