

**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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*The Pragmatic Realism of Julius Stone*

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*Legal Sociology and Historical Materialism*

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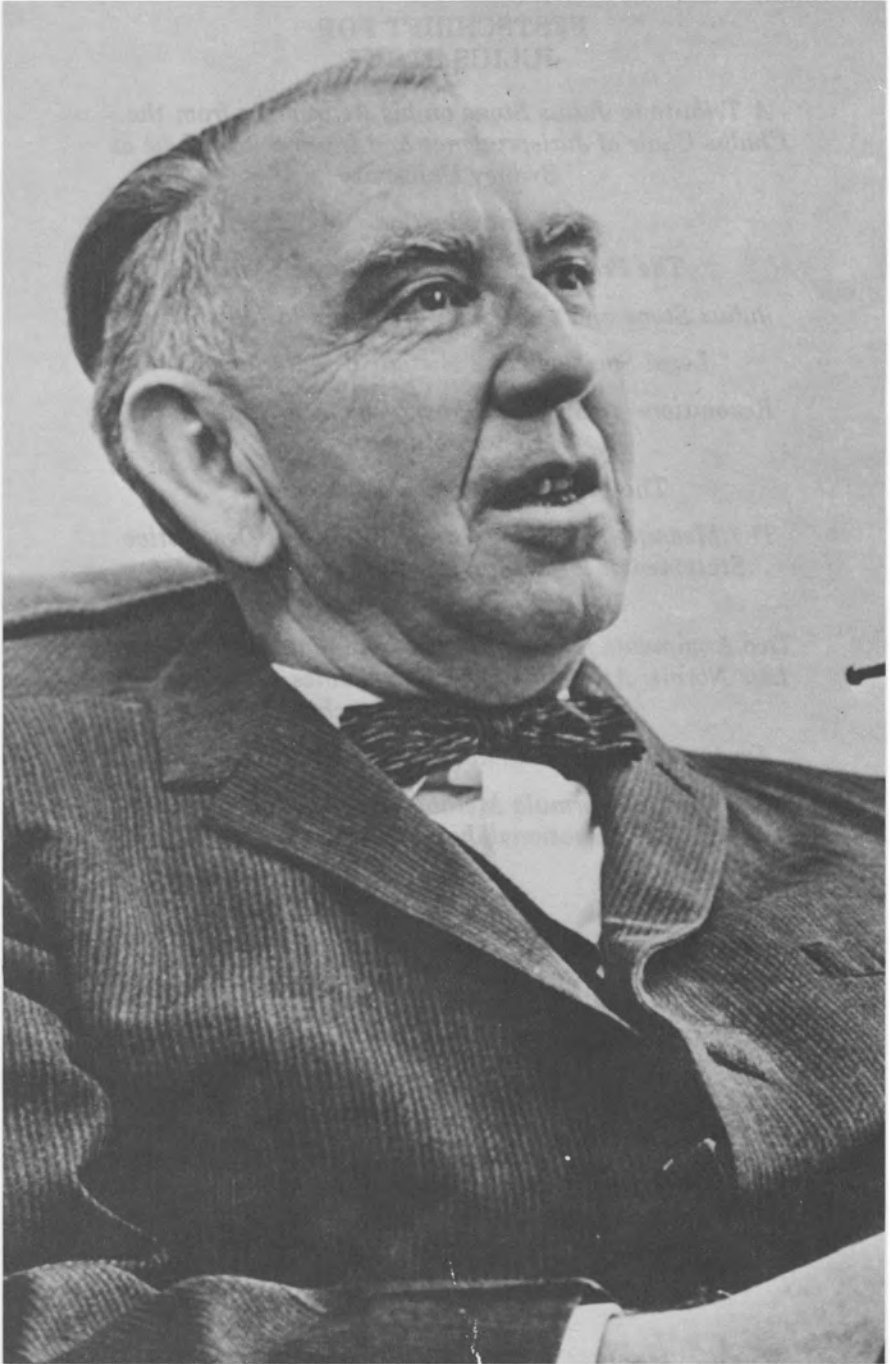
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## LEGAL SOCIOLOGY AND HISTORICAL MATERIALISM

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### I

In the science of law, legal sociology emerged as a matter of necessity. A legal system of simple conditions, characteristic of the early bourgeois society, could keep pace with the development of capitalism only by changing its nature. These changes took place in correspondence with the conditions of development of particular countries with different forms and different tempos. Whereas in the United States the "natural-law" period came to an end after the Civil War,<sup>1</sup> in Germany natural law was introduced by jurisprudence of interests and by the free-law movement.<sup>2</sup> It was interrupted by Hitlerian fascism, so that legal sociology established itself relatively late in the German universities. This development has in every case a cogency; it imports the loss of "normative autonomy,"<sup>3</sup> that is, a gradual dissolution of the entire closed order of principles, concepts and rules. Legal sociology was born out of the crisis of law, which is actually the crisis of bourgeois society.<sup>4</sup> The breakdown of a "legal world outlook"<sup>5</sup> forced legal science to occupy itself with the facts behind legal conceptions.<sup>6</sup>

The problems involved in these developments assume a central place in Julius Stone's work on legal sociology.<sup>7</sup> In his search for a link between all factors having "social dimensions" that determine

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1. See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938); N. REICH, *SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM IM RECHTSDENKEN AMERIKAS* (1967).

2. See J. EDELMANN, *DIE ENTWICKLUNG DER INTERESSENJURISPRUDENZ* (1967); K. RIEBSCHLAGER, *DIE FREIRECHTSBEWEGUNG* (1967).

3. See Hagen, *Die Desintegration von Recht und Gesellschaft*, in *ZEITSCHRIFT FÜR RECHTSPOLITIK* 81 (1971); Kramer, *Die Relevanz Gesellschaftlicher Wertungen im Obligationenrecht*, in *DIMENSIONEN DES RECHTS: GEDÄCHTNISSCHRIFT FÜR RENÉ MARCIC* 119-20 (M. Fischer ed. 1974).

4. See J. HAGEN, *SOZIOLOGIE UND JURISPRUDENZ: ZUR DIALEKTIK VON GESELLSCHAFT UND RECHT* 168 (1973).

5. See Engels & Kautsky, *Juristen-Sozialismus*, 21 K. MARX & F. ENGEL, *WERKE* 491 (1972) [series hereinafter cited as M.E.W.].

6. See P. NEDBAILO, *EINFÜHRUNG IN DIE ALLGEMEINE THEORIE DES STAATES UND DES RECHTS* 79 (1972).

7. See, e.g., inaugural lecture by J. Stone, *Law in the Modern State* (Auckland University College, 1939).

the nature of law, he could not fail to come across the conceptions of Marxism-Leninism and its theory of society—historical materialism.<sup>8</sup> Dealing with this theory was unavoidable, because the general claim of historical materialism to ascertain the comprehensive connections between society, history, economy, law and politics collides with the theoretical interests of Stone. Generally, it can be said that the essential problems are identical; they both present themselves with a certain logical and historical necessity. In answering them, however, different standpoints become manifest. Thus Stone, in spite of an essentially similar approach to the problems, could not accept the central tenets of historical materialism. It must be acknowledged that Stone has paid a great deal of attention to Marxist-Leninist conceptions of the state and law and that he has done this in a manner quite remarkable for an author of Anglo-Saxon legal background. In this article I propose to carry further his discussion on the present topic and I shall attempt to go into some further related matters. Thus, a different light may be thrown on the problems at issue.

## II

The conception of law as propounded by historical materialism requires the consideration that law is not simply an ideology of "class-society" and a mere economic reflex.<sup>9</sup> The scientific recognition of the significance of economic factors in the total societal process belongs certainly to the work of Marx and Engels. Nevertheless, it is not feasible to characterize this conception of society and history as "economic determinism."<sup>10</sup> In idealistic philosophy, which had achieved its consummation in Hegel, the conditions of human existence could be represented only as products of the unfolding of the spirit; the state and law could be explained, as it were, out of themselves. Historical materialism developed an appropriate orientation toward the relevant problems through disputations relating to these positions. The result of this process of thought is summarized by Marx in the following celebrated passage in the preface to his *Critique of Political Economy*:

Men enter into determinate necessary conditions which are independent of their will—into production-relations that correspond to

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8. See J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 475, 490-515, 579-86 (1966).

9. Cf. *id.* at 509.

10. *Id.* at 579-86.

the stage of development of the material productive forces. The totality of these production-relations constitutes the economic structure of the society, the real basis on which a legal and political superstructure rests and which corresponds to certain societal forms of consciousness. The method of production relating to material life conditions the social, political and intellectual process of life in general. It is not the consciousness of men that determines their "Being" but the other way around. The societal being determines their consciousness.<sup>11</sup>

This statement does not provide an answer to all relevant questions but only to the "basic problem of philosophy," namely, the question as to the fundamental relation between the factors of societal-historical process.<sup>12</sup> It is the task of social sciences to explore the concrete ideological, political, and legal forms in which material conditions express themselves. Engels himself has pointed out that as long as this does not happen, historical materialism is a mere phrase.

Our historical conception . . . is above all a lead-in to a study, no leader *a la* Hegel [*sic*]. The whole history must be studied anew. The conditions of different formations of society must be examined in detail before attempt is to be made to derive political, private-law, ethical, philosophical, religious and so on conceptions from them which would correspond to them.<sup>13</sup>

In this framework legal sociology, if properly understood, has an important and necessary function. The explanation of legal regulations as economic reflexes would be quite inadequate; it is necessary to analyze also their comprehensive historical, sociological, ideological and economic connections. From the standpoint of Marxism-Leninism, it is not possible to justify in this area any simplification such as the thesis of economic determinism imports. One should remember here, the short but instructive statements of Marx concerning the evolution of the right to make wills. By these statements, half a century before Eugen Erlich,<sup>14</sup> he anticipates the conception of mutual connection between family, way of life, forms of

11. 13 M.E.W. 7, 8-9 (1964).

12. See Engels, *Ludwig Feuerbach und der Ausgang der klassischen deutschen Philosophie*, 21 M.E.W. 261, 274 (1972).

13. Letter from F. Engels to Conrad Schmidt, Aug. 5, 1890, in 37 M.E.W. 435, 436-37 (1967).

14. On his ideas concerning the development of the law of succession, see E. EHRlich, *GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS* 89, 184 (3d ed. 1967).

production, societal conditions, religion and the law of succession.<sup>15</sup> It becomes plain that legal sociology based on historical materialism must recognize the principle that a production and reproduction of real life is, in the *last instance*, a determining, but not the *sole* determining factor. Otherwise the proposition that societal being determines consciousness would be an empty and abstract, indeed absurd, statement. For:

The economic situation is the basis, but different factors belonging to the superstructure—political forms of the class struggle and its result; constitutions established after the victorious class has won the battle, etc.; legal forms, especially the reflexes of the real struggle in the minds of the fighters; political, legal, philosophical theories, religious conceptions and their development into systems of dogmas—also influence the cause of historical struggles and determine, in many cases preponderantly, their *forms*. It is by interaction of all these factors, in which ultimately through all the infinite multiplicity of contingencies . . . the economic course establishes itself as a necessity.<sup>16</sup>

The thesis of an “economic determinism” ignores also the importance of dialectic in the social theory of Marxism-Leninism. Dialectical and historical materialism constitute an inseparable unity.<sup>17</sup> Scientific socialism is to be understood not only as an overhaul and as an overthrow of philosophical idealism but also of mechanical materialism oriented only to natural sciences. The transfer of progressive methods of natural sciences to the domain of society is possible only with the aid of dialectics. If social sciences should make any sense at all, they must assume that social phenomena too, follow objective regularities. However, in contrast to the laws of nature these regularities are actualized in the conduct of men.<sup>18</sup> Their cognition and recognition is a prerequisite of conscious formation of societal relations; ignoring them has the consequence that they become effective in a spontaneous manner “behind the back” of the members of society.<sup>19</sup>

Thus Engels stated in the context of the free-trade debate:

15. Letter from K. Marx to Ferdinand LaSalle, July 22, 1861, in 30 M.E.W. 613 (1964). See also Marx, *Debatten über das Holzdiebstahlggesetz*, 1 M.E.W. 109 (1972).

16. Letter from F. Engels to Joseph Bloch, Sept. 21, 1890, in 37 M.E.W. 462, 463 (1967).

17. See Muller, *Historischer Materialismus und Objektivität der ökonomischen Gesetze des Sozialismus*, in DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 930 (1973).

18. See J. HAGEN, *RATIONALES ENTSCHEIDEN* 95 (1974).

19. See Lenin, *Was sind die “Volksfreunde” und wie kämpfen sie gegen die Sozialdemokratie?*, 1 W.I. LENIN, WERKE 129 (1961).

All governments, independent as they may be, are ultimately only the executors of economic necessities of the national situation. They may make provisions for this task in various ways—well, badly, or tolerably; they may accelerate or impede the economic development and its political and legal consequences; but finally they must, nevertheless, follow them.<sup>20</sup>

Since in all developed industrial states legal norms rest on political decisions, nothing else can obtain effectiveness in the domain of law. Legal sociology also plays an important social role in the formulation of sociological premises for decisions by legislative authorities.<sup>21</sup>

### III

Stone places Marxism-Leninism on the same line with the doctrines of Comte, Spencer, Duguit and anarchism. He argues that all of them denied, in one way or another, the distinct identity of law.<sup>22</sup> This conception is consistent with the assumption of an "economic determinism." However, it requires rectification. Bourgeois legal sociology also thrives on the assumption that the legal system has no independent existence. However, as Stone aptly observes, the fact that law is socially conditioned does not exclude the recognition of its independent existence.<sup>23</sup> As for Marxism-Leninism, it proceeds from the conception of multifarious connections between social phenomena and speaks at the same time of a relative independence of law.<sup>24</sup> The divergencies concern then only the roles of the state and of law.

The ostensible inconsistency between the active role of politics and law on the one hand, and the social independence of both on the other, can be understood only dialectically. Legal norms are not only economic reflexes, or passive products of societal conditions, but in their turn exercise an effect upon the formation of these conditions. In cybernetic terms, a process of feed-back is in opera-

20. Letter from F. Engels to Nikolai Franzewitsch Danielson, July 18, 1892, in 38 M.E.W. 363, 365 (1968).

21. See Kazimirčuk, Tumanov & Štejnberg, *Law and Sociological Studies in U.S.S.R.*, in NORMS AND ACTIONS: NATIONAL REPORTS ON SOCIOLOGY OF LAW 80 (R. Treves & J. van Loon eds. 1968).

22. Stone makes a distinction between the denial of the present existence of law on the one hand, and law's necessity for the future on the other. See J. STONE, *supra* note 8, at 473.

23. *Id.* at 472-73.

24. See Bratus *et al.*, *Marxistisch-Leninistische allgemeine Theorie des Staates und des Rechts*, 1 GRUNDLEGENDE INSTITUTE UND BEGRIFFE 294 (1974).

tion. The real situation is, indeed, the *primum agens*, but the "ideal area," *e.g.*, law and legal consciousness, "exercise in their turn a reacting and a secondary influence" on the societal conditions.<sup>25</sup> The historically conditioned separation of production forces and production relations characteristic of capitalist society repeats itself in the divergence of societal and legal development. In the period of capitalism, the legal development is dominated by immanent factors which produce an illusion of a legal world of and in itself.<sup>26</sup> Engels characterizes this development as follows:

As soon as the new division of labour, which creates professional lawyers, becomes necessary, a new autonomous field is opened up—a field which, in spite of its general dependence upon production and commerce, nevertheless possesses also a special capability of reaction against these areas. In a modern State law must not only correspond to the general economic situation, must not only be its expression, but it must also be an expression *coherent in itself*, one which does not slap back into its own face because of inner contradictions. In order to manage this the reflection of economic relations ceases more and more to be a faithful one. And the more rarely it happens that a book of statutes is a crude, unmitigated, and unadulterated expression of the dominion of a class; this would itself be indeed against the "concept of law" . . . Thus the process of the "development of law" consists primarily in the attempt to remove the contradictions which result from the direct translation of economic relations into legal principles and to establish a harmonious legal system. Then, however, the influence and the compulsion of further economic development breaks down this system again and again and enwraps it in new contradictions.<sup>27</sup>

It is precisely this aprioristic "absolutization" of legal principles which produces in the minds of men a false consciousness motivating practical behaviour. This interpretation of ideological and economic factors is again illustrated by Engels with an example from the law of succession:

On the assumption of the same stage of development of the family, the law of succession has an economic foundation. Nevertheless, it is difficult to show that, for example, the absolute freedom in making wills in England and the strong limitation of making wills in

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25. Letter from F. Engels to Conrad Schmidt, June 12, 1889, in 37 M.E.W. 236 (1967).

26. See M. WEBER, RECHTSZOLOGIE 331 (1967).

27. Letter from F. Engels to Conrad Schmidt, Oct. 27, 1890, in 37 M.E.W. 488, 491 (1967).



France would have only economic reasons for all details. But in a very significant way both have in their turn an effect on the economy by influencing the distribution of property.<sup>28</sup>

It thus appears that dialectical and historical materialism and its conception of law are as far removed from "legal nihilism" as they are from the conception of normative autonomy.

The characterization of the nature of law, as well as of its place in the general social context, is of decisive significance for the content of legal science and above all for its relation to social sciences.<sup>29</sup> From the standpoint of historical materialism neither the dissolution of legal science in social science nor the establishment of legal sociology as a discipline separate from legal science is an adequate solution. Legal science conceived as a social science imports a denial of the distinct identity of law, which is inconsistent with the Marxist-Lennist conception of law. The social character of law can be realized only by preserving completely its independent role within the framework of the general theory of law. An independent legal sociology would deprive legal science of its proper content and of its theoretical foundation.<sup>30</sup> But naturally, many problems that emerge here must still remain open, and this is the reason why a continuation of a dialogue between legal sociology and historical materialism, as was here attempted, is necessary and beneficial.

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28. *Id.* at 492.

29. On this point see Sieling, *Juristenausbildung in Bremen*, in *DEMOKRATIE UND RECHT* 63 (1974).

30. P. NEDBAILO, *supra* note 6, at 81.