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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JULIUS STONE AND THE ADVENTURE OF THE IDEA OF JUSTICE

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As a realist, Julius Stone notes that while men may speak and write in terms of absolute or a priori justice, effective justice must be limited by historical feasibility. As an idealist, he notes the reality of justice in the lives of men and of political communities. Knowledgeable about the inwardness of the process of judicial decision, he has accepted the noncompulsive quality of legal logic. But, because he has placed limits on the "revolt against formalism," he accepts the legal order's ability to formulate its process of decision. Legal order achieves this through a creative rhetoric supplanting a barren logic. Finally, Julius Stone effectively answers the cynics who claim that judges indulge in self-deception, *cadi* justice, or the veiled exercise of repressive power.

I. THE LIMITS OF REALIST JURISPRUDENCE

The great contribution of the American Realist movement in jurisprudence was its participation in the more general "revolt against formalism"[1] which spread throughout the social sciences, but matured earliest in legal philosophy.[2] The Realists' unique insight began with Oliver Wendell Holmes's familiar but still ringing aphorisms that the "life of the law is not logic,"[3] that the law "is not a brooding omnipresence in the sky,"[4] in his recognition that the act of adjudication is creative[5] and in his perception that at least part of lawyering is the prediction of probable future official behavior.[6]

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1. M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11-13 (1949).
2. *Id.* at 15-18, 59.
3. O. W. HOLMES, THE COMMON LAW 1 (1881) [hereinafter cited as HOLMES].
4. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917).
5. *See, e.g.*, HOLMES, *supra* note 3, at 1.
6. Justice Holmes's best-known formulation of this belief was: "[T]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 173 (1920). This assertion should be read, however, in the light of Holmes's view that:

> It is not true that in practice (and I know no reason why they should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to

In tilting at the fallacy of "Bealism,"[7] the Realists tended to go beyond the strictly necessary limits of their contribution. It is empirically observable that trial courts have freedom of choice within the rules and that appellate courts have the power of reformulating old rules and developing new ones. These powers of choosing, reforming and reformulating may be written of as freedoms; they are also necessities. Society is in flux and so is law. But the flux of society is swifter than that of the law. Hence, the probability is that at any given moment of time any given portion of the law calls for re-examination. Secondly, the observable leeways in judicial decision stem from the lacunae between the inevitable particularity of the operative facts of a case and the generality of the rules which may be applied thereto. There are no rules for applying rules.

Again, the nature of what materials in the process of decision are permitted to qualify for the definition of rules, and whether they are taken to be predictive, descriptive or prescriptive, determines the kind of functions that the observer will ascribe to them. Immanuel Kant's famous aphorism about the emptiness of disembodied thought and the blindness of observation without concepts still holds true. The world we live in is one of particulars; but we cannot grasp hold of it without our generalizations.

Stone has brought to this dilemma two interrelated groups of tools. The first specifically reconciles the common-law theory of precedent with the creativity of judgment and the English judicial achievement. Through his analysis of the "fallacies" of the "logical form," he reviews both the deceptive appearances and the innovative capabilities of the "main types of categories of illusory reference."[8] The second tool is his development of "the new rhetorics."[9]

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consider the sentence in which it stands in order to decide which of those meanings it bears in the particular case.

The Theory of Legal Interpretation, in COLLECTED LEGAL PAPERS 203 (1920).

7. After Professor Joseph H. Beale who, according to Jerome Frank (a leading exponent of Realism), viewed law as "UNIFORM, GENERAL, CONTINUOUS, EQUAL, CERTAIN, PURE" and consisting of absolute, eternal and immutable principles. *See* J. FRANK, LAW AND THE MODERN MIND 48 (6th impression 1949).

8. J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 241-300 (1964) [hereinafter cited as STONE, LAWYERS' REASONINGS]. This volume is the first of a trilogy of books further developing the ideas and materials which their author first presented in THE PROVINCE AND FUNCTION OF LAW (1961) [hereinafter cited as STONE, PROVINCE]. The other two volumes of the trilogy are: HUMAN LAW AND HUMAN JUSTICE (1965) [hereinafter cited as STONE, HUMAN JUSTICE]; and SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966) [hereinafter cited as STONE, SOCIAL DIMENSIONS].

9. This is based on the work of Perelman, Olbrechts-Tyteca, and others.

Stone's "main types of categories of illusory reference" serve as devices identifying the "secret and even unconscious exercise by courts of what in the ultimate analysis is a creative choice."[10] In the task of judging creatively, the premise on which a court's opinion may be founded may not yield any one answer by syllogistic reasoning, since the court is both invited and compelled to provide "an answer based on evaluation, conscious or unconscious, of the social situation confronting it."[11] The recognition of this process justifies Stone's significant distinction between "reasoning" and "reasons."

Where formal logic ceases to be compelling, judicial decision is not, thereby, reduced to *cadi* justice. Stone gives meaning to this point by developing the implications of Karl Llewellyn's distinction[12] between the "Formal Style" and the "Grand Style," identifying the former with what he terms "legal formalism" or *Begriffsjurisprudenz*. Stone points out, however, that Llewellyn did not explicitly work through the implications of his concept of the "Grand Style" or the "Grand Manner"; nor did he identify completely how legal persuasion or justification should run within its terms. Stone remedies this shortfall by pointing out that the fuller understanding of judicial reasoning requires recognition of extra-legal criteria upon which crucial choices may depend: the first is the question of justice; and the second, the social factors which influence and condition judicial choices in concrete instances.

Stone accepts the legal reasoning of courts, in John Wisdom's terms, as being "like the legs of a chair, not the links of a chain."[13] This leads him to investigate Perelman's "new rhetorics," a system which looks to the cooperation of elements in a persuasive demonstration in which they reinforce each other. The features of rhetorical argument turn on agreement as to starting points, on persuasiveness, in terms of probability, of the theses that are developed therefrom, and on their mutual complimentarity. He writes:

> On the one hand, then, the conclusions of formal logical "proof" (as understood in modern times) may be formally valid, and yet not materially sound, since not corresponding to any external reality. . . . On the other, rhetorical, non-stringent (or "quasi-logical") "proof" produces conclusions, which even though not formally valid

10. STONE, LAWYERS' REASONINGS, *supra* note 8, at 241.
11. *Id.*
12. K. LLEWELLYN, THE COMMON LAW TRADITION (1960).
13. J. WISDOM, *Gods*, in PHILOSOPHY AND PSYCHOANALYSIS 149, 157 (1953).

may still be materially sound, in the sense of being worthy of reliance in interpreting external reality.[14]

There is, of course, far more to rhetorics than psychological manipulation. They not only persuade, they are "persuasion-worthy." The quality of persuasion-worthiness is measured by the mind of a man "capable of disciplined, reasoned, unbiased thinking, and concerned to discover what indeed should be held to be true on the given matter."[15] This leads to the central problem. Too much cannot be expected from the new rhetorics. The problem of the audience remains. These forms of argument cannot, furthermore, provide judges and counsel with new techniques to fill the lacunae which the Realists have shown formal logic to imbed in the process of judicial decision. The new rhetorics are not an anodyne. They can help clarify thought and dignify persuasion.

II. THE POWER OF JUSTICE

The purpose of resort to reasoning, whether deductive, inductive or "non-stringent," is to provide effectively persuasive argumentation. Stone points out that Perelman's "theory of argumentation leaves the essential point of when the conclusion of non-stringent reasoning is to be regarded as acceptable (or in his [Perelman's] word 'rational') in rather an impasse."[16] Perelman argues that "rationality" in his sense is measured by the worthiness of an argument to a universal audience of the totality of reasonable beings. In response to the criticism of circularity, Perelman escapes from the need to define the "universal" audience of "reasonable" men. He argues that ideas of justice arise from natural tendencies of the human mind and that this is "rational" behavior, "*requiring no other justification*" than to be behavior in accordance with "precedents."[17]

It is ironic that the philosopher would appear to rely more heavily on precedent than lawyers, and to be unable to indicate to the lawyer when precedents should not be followed at all "*because they are unjust.*"[18] Stone continues this criticism with the following telling point:

14. STONE, LAWYERS' REASONINGS, *supra* note 8, at 330.

15. *Id.* at 331.

16. STONE, HUMAN JUSTICE, *supra* note 8, at 327.

17. Perelman, *La Regle de Justice*, 14 DIALECTICA 230, 237 (1960), translated and emphasis added by Stone in STONE, HUMAN JUSTICE, *supra* note 8, at 328.

18. *Id.* at 329.

> To tell lawyers thus hungry *for justice* to keep to the rules or to the law, or to the precedents, guides them not a whit towards justice. It rather, indeed, seems to suggest that the justice *they* hunger for may be but an illusion. . . . If, indeed, the problem of justice for lawyers were one of keeping to the rules and precedents, it would be difficult to understand such views as that of Sir Patrick Devlin (as he was then) to the effect that "the just decision" always fluctuates between "the law" and the *aequum et bonum* of the case. . . .
> . . . It is, indeed, surely a commonplace for lawyers that at any given time many rules of law are not even just as *rules*. So that even when we have found an indubitable rule, the conscientious lawyer may and sometimes should ask questions about the justice of it; just as, even when a rule is indubitably agreed to be just, there may be questions to ask about the justice of applying it in a case apparently within it. Such questions, *asked by lawyers about law*, cannot be answered by telling them to adhere to a rule, or to the law, or to a precedent.[19]

The "new rhetoric" of Perelman may be helpful in developing a perceptive self-consciousness in legal analysis, and help sift out some of the unconscious biases that concerned Jerome Frank.[20] It may also explain how lawyers have always been able to persuade, while not being imprisoned in a circuity which syllogistic reasoning might impose. But it does not adequately explain the means whereby justice can be imported into the process of judicial decision.

Stone points to the weaknesses of both the modern utilitarians and John Rawls. He notes both their formalistic characters and their inability to pass from a set of individual rights to a pattern of social action which does not infringe those rights. Stone also adopts Charles Fried's criticism of Rawls; that is, if an individual "enters the situation of justice armed with (at least) this single interest, which he could not have won for himself by his own assertion, will his position in asserting any other interest for himself be defensible."[21] Stone then tells us that, whatever the relation we may think ought to be established between fairness, equality and reciprocity, and between each of these and justice, the necessary presupposition of justice, namely the respect for the moral nature of every human

19. *Id.* at 329-30 (emphasis added).

20. *See* FRANK, *supra* note 7, at 30-34, 41-45, 108-26, 158-99, 283-306.

21. Fried, *Justice and Liberty*, 6 NOMOS (JUSTICE) 127, 141 (Friedrich and Chapman eds. 1963).

personality, demands consideration of not only the objectively ascertainable claims made by each individual, but also the consequences for that individual, his fellows and the community, of the disposition of his and their claims. Modification of the principle of equality becomes unavoidable. On the one hand, equal treatment by the law operates on inequality of powers, talents and personal fortune. It would thus sanctify or intensify inequalities. On the other, the redirection of modification of factual inequalities calls for unequal treatment by the law. The dilemma hence becomes that of justifying, or even demanding for good reason, departures from equality.

Stone's contribution to the quest for justice, and to resolution of the dilemmas its varying definitions create, are his "ideals which may be regarded as quasi-absolute precepts of justice in our own time . . . which we regard as indubitable for our generation of men."[22] Because these ideals carry material content they cannot be regarded as absolutes in the Kantian sense. On the other hand, they may be experienced as absolute imperatives, insofar as "it is given to us, in our generation of humans, to know and act by absolutes".[22.1] Hence their denomination as "quasi-absolutes" in the following terms:

> I. Social arrangements must leave everyone free to form and assert his own interests, treating every adult sane person as morally autonomous.
> II. The adjustment or shifting of advantages and burdens (including rewards and punishments) for purposes of social control through law, should proceed in terms of the goods and evils of this world only.
> III. It is always incumbent on an actor to discover with maximum possible accuracy all aspects of the situation in which he acts or fails to act.
> IV. Generally all action should respect the principle of reciprocity between persons.
> V. Generally all action should respect the principle of equality between persons.
> VI. Generally any serious invasions of the socially approved distribution of advantages should be met by the grant of appropriate remedies for the persons injured.
> VII. Generally contributions to socially approved arrangements shall be acknowledged, and where appropriate shall be rewarded, by

22. STONE, HUMAN JUSTICE, *supra* note 8, at 341.
22.1. *Id.*

protective immunities or otherwise.

VIII. Generally any serious infringements of socially accepted values, or invasions of the socially approved distribution of advantages, shall be manifestly disapproved, where appropriate by the meting out of punishment.

IX. Punishment shall not always respect the human dignity of the offender, and shall in any case not exceed reasonable proportionality to the offence.[23]

Stone envisions these "quasi-absolute precepts of justice" as constituting the core values of historically won "enclaves of justice"[24] existing in particular societies at particular times. Beyond the hard-core values Stone sees a penumbral area where justice still contends with ever resurgent barbarism, cruelty, suffering, despair and nihilism. Beyond the penumbra is the outer wilderness where man is still *homo homini lupus*. The hard-won enclaves reflect a consensus of values socially, and their internalization in the minds of individual citizens. Such enclaves reflect alliances and interactions of basic values. They are constituted by complexes of attitudes, roles, expectations, values, institutional arrangements and community activities. From the standpoint of an observer, these complexes are empirically observable facts, while within the group they produce norms and are thus seen in terms of obligation. The stress, as Stone sees it, is not upon the theories of justice, but on their emanations in just conduct and institutions. Furthermore, the enclaves are not to be seen as substitutes for such theories. They (the theories of justice) may, even when competing, both explain currently held enclaves and provide the basis of the extension of the enclaves into penumbral or unstable regions.

Stone has not used the metaphor of "enclaves of justice" to offer any kind of a conclusion regarding theories of justice. Its utility is, first, to offer a perspective of Western history; second, to point to the important act of commitment to justice as a basic value; and third, to offer a connecting link between human theories and the human condition. Far from arguing a "Hegelian" thesis of the inevitable unfolding of ethics and justice, he points to the need for constantly appraising the interaction of ideas and experience. In this vein, he emphasizes the possibility of degeneration and backsliding.

Stone's metaphor of enclaves thus stresses the fragility of ideals

23. *Id.*

24. *Id.* at 344-45.

in the hurly-burly of history and the need for their constant reaffirmation and reappraisal. It also strikingly recalls A.N. Whitehead's reminder to philosophers:

> The concept of Civilization, as developed up to this stage, remains inherently incomplete. No logical argument can demonstrate this gap. Such arguments are merely subsidiary helps for the conscious realization of metaphysical intuitions — *Non in dialectica complacuit Deo salvum facere populum suum.* This saying, quoted by Cardinal Newman should be the motto of every metaphysician.[25]

III. TOWARDS AN INTERNATIONAL ENCLAVE OF JUSTICE?

Surveying the significance of the increasing economic interdependence of nations and concluding that the more developed states have an unconditional duty to help assure a minimum standard of human subsistence, Stone argues that this duty cannot be discharged simply by the ordinary processes of trade. He writes:

> If a "world economic interest" could be postulated, its pursuit would have to be largely not by trade but by the operation of a world "grants economy." And we would here make explicit the vital rider that useful directives for such a "grants economy" cannot be drawn from the notions of either "world economic interest" or "interdependence", unless we recognize the kind of justice imperative imposed by history on the relations of the more developed to most of the newer states.[26]

This "imperative" of international justice to respect claims for a general minimal subsistence would provide psychological incentives for consolidating an international "justice-constituency."[27] Such an emergent constituency has its analogies in the national justice-constituencies of the developed countries whch already provide the moral and psychological bases for the transfer of wealth domestically. There the precedent has become both effectively internalized in the individual members of the national community and democratically institutionalized in its life. Having pointed to the analogies between national and international justice-

25. A. WHITEHEAD, ADVENTURES OF IDEAS 380 (1933).

26. J. STONE, APPROACHES TO THE NOTION OF INTERNATIONAL JUSTICE 79 (Truman Center Publications, No. 4, 1970) [hereinafter cited as STONE, INTERNATIONAL JUSTICE] (footnotes omitted).

27. For a discussion of the constituencies of justice see STONE, SOCIAL DIMENSIONS, *supra* note 8, at 796-98.

constituencies, Stone marks the differences. Above all there is the directness of the mutuality of benefit and sacrifice within a national community. In the present state of world affairs this may be contrasted with the diffuse and long-term character of such a mutuality in the international community. Stone sees the growth of international justice as an enclave pioneered from the values of national constituencies. As the concern for a world-wide minimum level of subsistence grows, so the task of developing international institutions reflecting both the concern and the precept becomes a more hopeful one. An institutionalization of the precept of minimal subsistence provides a more effective basis of distributive justice than could bilateral agreements with their concerns of power politics, and a more convincing means for internalizing that precept as a transnational moral value in the consciousness of ordinary citizens.

In developing the theory of an emergent international enclave of justice, Stone seeks to suggest alternative arguments regarding assistance to the developing communities of mankind which could interrelate the mutual compassion of peoples and long-term political and economic prudence. His thesis gives concreteness to notions of what is feasible, rather than what is ideal, in international economic justice. He concludes his study with the following insight:

> Whether in warning or in hope, we need to go beyond the formulations of a merely conceivable notion of international economic justice. We need also to address ourselves, as has here been attempted, to questions of feasibility in terms of living societies of men and their leaders as we know them, and as they can be expected to develop. For by whatever approach, men can move forward only from where they are.[28]

In his insight into the emergent international constituency of justice, Stone has triumphantly steered between the Scylla of formalism, to which so many important international projects have fallen prey, and the Charybdis of subjectivism, whose power can be seen in the United Nations General Assembly.

28. STONE, INTERNATIONAL JUSTICE, *supra* note 26, at 89 (footnotes omitted).