

and insight going beyond what has been previously bestowed on the matter, Llewellyn was able to list fourteen "clusters" of such operating factors. For instance, he says, the members of appellate courts are all law-trained and therefore law-conditioned. They *see* things and significances "through law spectacles"; and they *think* like lawyers. Further, they are conditioned not merely to law, but to the particular legal tradition of their own country. Again, it is accepted that "the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine", including not only its rules but its "concepts, ideals, tendencies and pervading principles"; and decision strives for consonance "with the language and also with the spirit of some part of that body of doctrine". Moreover, "the doctrinal materials are properly to be worked with only by way of a limited number of recognised correct techniques"—"recognised" both consciously and unconsciously. And overall there is "an ingrained deep-felt need, duty, and responsibility for bringing out a result which is just". At least these four if Llewellyn's fourteen "steadying" factors are relevant not only for *predicting* judicial reasoning (for which he offered them) but also as a guide to wisdom in judgment, even when they do not compel.

If these are among the factors which govern and regulate the constant choices between alternative courses which are being made in appellate courts then, indeed, the ground is not so unsure as is often feared. At the very least it must be rather surer than efforts to find the path for legal development by *mere* operations of logic on existing legal rules.

K. S. JACOBS*

HUMAN LAW AND HUMAN JUSTICE¹

Julius Stone's new work on law and justice is an elaboration of 176 pages in his widely acclaimed *The Province and Function of the Law*. This magistral work has, since its appearance in 1946, achieved a solid and permanent place among the jurisprudential masterworks of this century. Supported by an imposing learnedness, as was its predecessor, the present work constitutes, in the author's intention, the second in a trilogy of which the third, *Social Dimensions of Law and Justice* is described as seeking "to illuminate, from the standpoint of the social sciences . . . the full complexity of problems which confront modern democratic governments in seeking to use law as an instrument of social control orientated (sic) towards the achievement of justice . . ."; in short, a large part of the field of political science, theory and philosophy. The present book by contrast is concerned with what this writer prefers to call "philosophy of law". Indeed, the book follows a pattern

* The Honourable Mr. Justice Jacobs is a Judge of Appeal of the Supreme Court of New South Wales.

¹ Sydney, Maitland Publications Pty. Ltd., 1965, xxiii and 415 pp. (\$8.00 in Australia). The work is provided with a bibliographical index, an index of names and one of subjects (called a general index and very well done), as well as a long list of abbreviations. There is some divergence between this list and the bibliographical index; for example, the writer's *The Philosophy of Law in Historical Perspective* is listed in the former, but does not occur in the latter, so that the latter cannot be relied upon for tracing all the references to a particular author; it is, however, a small defect in comparison to the great help which these several indexes provide. That help is further reinforced by an elaborate analytical table of contents (7 pages) which enables the reader to orient himself quickly and to find particular topics.

similar to that which I used in my *Philosophy of Law* in that it first discusses in nine chapters the historical evolution of ideas of justice in relation to law and then presents the author's own position in the two concluding chapters 10 and 11 which discuss "Theories of Justice and Meaning of Justice" and "Justice in Idea and Justice in History".

It would far exceed the available space to discuss adequately, or even cursorily the author's historical studies, but it seems desirable to indicate the general direction and pattern. In a first chapter on Early Horizons of Justice, Stone deals primarily with mythology, Greek philosophy and the Hebrew doctrines. This, it seems to me, is splendid in view of the powerful formative influence of the Old Testament. The second chapter entitled "Early voyages of justice—the Good Vessel Natural Law" takes in the entire sweep of natural law, from the Romans to the Utilitarians, concluding with general observations the tenor of which appears from three paragraphs which suggest that the demonstrations of natural law are inadequate, its alleged "self-evidence" relative to time and place, and its social importance independent of the degree of its demonstrability.² For the last point, he cites none other than Pareto;³ one is reminded of the arguments in favour of religion by the Machiavellians. The next chapter discusses what Stone calls "metaphysical individualism". Here Kant is the central focus. The chapter does not aim at a comprehensive account of Kant's theories⁴ such as is embraced in the recent scholarship of Paton, Friedrich, Lall and Beck, but is a just corrective of Kelsen's one-sided interpretation of Kant's concerns. It testifies to the author's lively concern to have written:

It is perhaps the driest jest of all legal philosophy that even as Kelsen rests his whole "pure" theory of law on a "basic norm" such as Kant foreshadowed and called "natural law", he also denounced all natural law ideas.

This leads the author to say that Kelsen, in denouncing all natural law ideas, repudiated Kant as decisively as Stammler followed him.⁵ He would probably question Stone's assumption as to his (Kelsen's) basic norm which, he would say, was closer to a positive constitutional conception than to natural law. The second part of this important chapter is concerned with natural rights and concludes with a telling critique of the ambiguities contained in the concept of the free-willing individual, including the Kantian formula. That the recognition of inequalities may be an important feature of justice is part of this critique of liberty.

Chapter Four addresses itself to Hedonist Utilitarianism. Divided into five sections, it provides a broad and insightful evaluation of the Benthamite approach to law and justice. So central is the concern of the author with this phase of the history that he even offers a brief sketch of Bentham's life and character. Against that background, his doctrine is seen in the three perspectives of a reaction to natural law, a utilitarian ethics and a hedonist calculus. Exploring then the background, intellectual and other, of Bentham's ideas and their usefulness for the law, Stone in an elaborate criticism⁶ lays the basis for his qualified rejection of a "revival". Building much on David Baumgardt's *Bentham and the Ethics of Today*, 1952, whom he considers "not equal to the task of philosophical rehabilitation", Stone concludes that the basic conflicts of our century are not likely "to melt away" at the magic touch of the Utilitarian wand. In the brief chapter that follows,

² Pp. 80-81.

³ I. *The Mind and Society* (1916), ed. and transl. Livingstone *et al.* (4 vols. 1935), 264, § 445.

⁴ See p. 82, n. 2.

⁵ P. 85.

⁶ At 131 ff.

Stone confronts utilitarianism with social solidarity, especially Duguit's version of it, and finds it likewise wanting.

Chapter Six deals with the neo-Kantians and neo-Hegelians (Stammler, Kohler) under the heading of "Social Ideal or Civilisation as Criteria of Justice". In the following chapter he considers the revival of natural law and seeks to determine whether there might be possible a "creative co-existence" of positivism and natural law doctrines. At considerable length he discusses Lon Fuller and his "eunomics" as an attempt to get along without considering ultimate ends, yet merge the "is" and the "ought". These and other "deep contradictions" make him sceptical of Fuller's position, "yet it is important that all thoughtful men should continue along this road" of finding a basis of real continuing communication between positivism and jusnaturalism. More on this in a moment.

Chapters Eight and Nine deal with relativism and pragmatism in modern theories of justice. Discriminating remarks are made on Llewellyn, Pound, James, Dewey and others. Despite the criticisms of Roscoe Pound's work there does emerge a deep and abiding admiration for Pound whose life, the author believes, "will stand as a model of human aspiration to master the tasks of justice".

The two concluding chapters are devoted to a discussion of the overall issues and certain contemporary strands. They are permeated by a deep sense of the problematic value of all theories of justice for the practising lawyer and a contrasting sense of the ineluctable need of continuing the search. In reviewing the long history of theories of justice, Stone rightly remarks that most of them have some value because they "draw attention to important aspects of justice". With equal justification he notes that "there is no one of them which we can hail as adequate for the second half of our century".⁷ He sees each of these theories as representing "at a particular time and place", "a certain equilibrium achieved" by the particular thinker.⁸ He reviews in broad critical appraisal the portent of natural law views and rejects—rightly we believe—the pretension of jusnaturalists that justice is their exclusive preserve.⁹ Duly stressing the empiricist basis of law in action, he insists that "the significance of a particular theory of justice . . . is often a function of the social context, rather of the intellectual tenability . . ."¹⁰ a field of inquiry to which the work on the social dimensions of the law, above referred to, is more particularly devoted. Critically disposing of linguistic and psychological approaches after saying that neither "offers an analysis of 'justice' on strictly empirical functions" (Sect. II and III of ch. 10), Stone concludes that "the central human task is rather to create the understanding and self-control" than to presuppose it.

The last chapter struggles with the problem commonly formulated as that of "relative" versus "absolute" standards of justice—in the reviewer's opinion a false issue. Stone quotes and seems to accept throughout most of the work the writer's opinion that "justice is never given; it is always a task to be achieved. . . ." This view is based upon the broader notion that general propositions are always both relative and absolute, depending upon the framework; for the word "absolute" always calls for an answer to the question: "absolute", that is *losgeloest*, from what?

The author's final formulation of his position at the end of his magistral effort seems to point in that direction. He would formulate his general propositions only "for men of the industrialized West at the present stage of history". They have emerged from an interplay of man's nature with his

⁷ At 287.

⁸ At 288.

⁹ At 295.

¹⁰ At 299.

environment, and are stated as a series of nine directives. Perhaps the entire review should have been devoted to their discussion; one is tempted to say that the book might have been. For much of it is prolegomena to this set of propositions. But let them speak for themselves:

I. Social arrangements must leave everyone free to form and assert his own interests, treating every adult moral person as autonomous.

II. The adjustments 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 upon an actor to discover with maximum possible accuracy all aspects of the situation in which he acts or fails to act. . . .

It may be that these three will do to reveal the author's bent of thought; for these highly normative sentences surely are a creed rather than a description of behaviour; for where is the actor, whether industrial man or other, that has ever been able to proceed according to III? There may be exceptional situations of vital concern, where some of us may at some time do so, but most of the time men move along in established grooves of habit, custom and established valuation, and tend to think that to do so is just—and this includes lawyers and even law professors. But then, the author considers them "ideals" which constitute "quasi-absolute precepts". Having critically examined and put aside as too "formal" the positions of Perelman, Rawls, Fried and Selznick, *inter alia*, Stone properly stresses the need for substantive (a better term than "material") content of the idea of justice. He is surely right when he—with a sigh, it seems—concludes "that it is not given to any generation of men to complete the tasks of human improvement or redemption; but no generation is free", he adds, "to desist from them". To participate in these tasks is the noble purpose to which Stone's pages are dedicated.

C. J. FRIEDRICH*

SOCIAL DIMENSIONS OF LAW AND JUSTICE¹

The late Dean Roscoe Pound hailed Professor Stone's *Province and Function of Law* as "a book which will find a place among the master works".² With this massive volume, twice the size of the *Law and Society* part of the *Province and Function of Law*, the trilogy that is successor to the earlier work is completed. Now Dean Pound's encomium is triply justified.

The best advertisement—even for a book—is a personal testimonial. I began to teach law shortly after the Australian edition of the *Province and Function of Law* first appeared. This work and the successor books have been my constant companions. I have profited from everything Professor Stone has written—whether in the field of jurisprudence or international law—and my writings attest to this indebtedness.

Professor Stone also manages to write the best reviews of his own books by way of the prefaces. So he tells us that the present volume attempts "to state in orderly fashion the contexts and the range of tasks confronting modern democratic governments in using law as an instrument of social control, and

* Eaton Professor of the Science of Government, Harvard University.

¹ Sydney, Maitland Publications Pty. Ltd., 1966, xxxv and 933 pp. (\$13.50 in Australia).

² Pound, General Introduction to Simpson and Stone, *Law and Society* xvi (3 vols., West Publishing Co., 1949).