BOOK REVIEWS

Legal Change: Essays in Honour of Julius Stone, A. R. Blackshield (ed.), on behalf of the Committee to Honour Professor Julius Stone, O.B.E., with an Introduction by His Excellency Sir Zelman Cowen. Sydney, Butterworths, 1983. 367 pp.+introductory notes. $35.00.

In the course of the twenty-first of the twenty-two original essays which comprise this *Festschrift* Charles Boasson observes:

> Where able and dedicated scholars commit themselves to a far-flung collective enterprise, the results are never likely to be *all* good or *all* bad (p. 302).

Boasson was not writing of the collective enterprise to which his is an admirable contribution. Sound as his observation is in general, this particular collection is an exception. The remarkable thing about it is that it is *all* so *very* good.

The enterprise is, in Boasson's words, "far-flung". It ranges over topics in the philosophy of law, the interpretation of religious law, criminology, the sociology of law, legal education and technological change, law and social structure, constitutionality, law reform, and international law. The breadth of topics covered is more than an indication, significant though that is, of the range of interests and areas of expertise of the many former pupils, colleagues, and other scholars of major international repute who count themselves intellectually indebted to Julius Stone. It is also an indication of the range of areas of human learning to which Professor Stone has himself made an original contribution of continuing value. A glance at the Bibliography of Julius Stone's published writings — a valuable inclusion in this book — testifies to the range. The 123 items listed include no less than 33 books, treatises, and monographs. In addition to the listed items there are innumerable book reviews in learned journals as well as major contributions to public understanding and debate through newspaper and other more popular outlets.

The title *Legal Change* tells us little about what to expect between the covers of this book, and one can only sympathise with the editor in having to try and find a title which gives unity to the collection. Many of the pieces are not except in a most extended sense about legal change at all. In a way, the only thing that gives unity to the collection is the man in whose honour it has been assembled! This is the paradox which is common to *Festschriften*: those whose achievements warrant such a collection tend to be people who have been so prolific and seminal in a wide variety of significant areas that the areas to which they have contributed have, as a result of their influence, proceeded to develop in new and independent directions.

I have already indicated that the essays in this collection are of a remarkably high quality. It is indicative of Professor Stone's stature that the contributors have not only generally given of their best — something which, sadly, cannot always be assumed when opening a *Festschrift* — but they have done so in ways which consistently demonstrate an admirable degree of scholarly rigour. Julius Stone has often remarked on the importance, indeed the scholarly obligation, of building upon the achievements of one's predecessors. One of the great dangers of "fads" and fashions in the intellectual, as in other areas is that of discontinuity. Self-proclaimed radical and wholly innovatory approaches are rarely quite what they claim to be. More importantly the scholar who prides himself on his totally fresh approach can too easily waste his energies and expertise in "reinventing the wheel".

None of the contributors can be criticised on this score. Each essay is supplemented with a wealth of documentation. No reader, with the possible exception of Julius Stone himself, is likely to have expertise in all of the fields traversed in this collection. Yet every essay is intelligible to the patient reader, and contains sufficient citations and references to enable those who wish to take the subject further to find their way. One cannot help thinking that it is of the greatest credit to Professor Stone that the thought that he would be reading their contributions put all of them on their best scholarly behaviour!

The essays earlier in the book come closer than the others to the meaning of the book's title. Chaim Perelman, in a very useful essay on three different "legal ontologies", attempts to provide support for the general thesis that, in the event of a collision between ideology (as embodied in law) and the felt needs of the community at a particular period in time as reflected in their sense of fairness or justice, judges will compromise (not his word) the teleological component in order to reason their way to a result acceptable to the community within which their jurisdiction operates. Haim H. Cohn follows with a discussion of "legal change in unchangeable law", a beautiful account of some of the processes whereby what today we would call law reform have been accomplished in talmudical law. Next is a discussion of the "travails of *Stare Decisis* in India" by Upendra Baxi; a sad tale of the ways in which a method understood as bringing consistency and certainty to adjudication and the understanding of legal principles has, in the overloaded Indian appellate jurisdictions, turned into the very opposite. For example:

> There has been at least one instance of a leading case being completely misquoted and misunderstood by a succession of Supreme Court justices — introducing, in the process, incorrigible distortions of a matter no less vital than the scope of fundamental rights. Moreover, there is growing evidence of pure inadvertance. Quite often, differently constituted benches of the Court simply *overlook* prior relevant decisions: a kind of collective judicial amnesia overwhelms the bench and bar (p. 38. Italics in original).

Baxi continues:

> As if this were not enough, over a period of time the Court has developed certain specific techniques subverting the notions inherent in stare decisis. These involve techniques of retroactive dissents; retroactive clarification and amplification; reliance on concessions made by counsel; contradictory concurrences; conversion of advisory opinions into "binding" law; and "summaries" (p. 38).

The subject of certainty in law is taken up again by Michael Coper in an interesting discussion of constitutional interpretation. He emphasises the importance of generalisability, consistency, and the giving of reasons as planks which prevent judicial creativity from lapsing into expediency, populism, or crude social pragmatism. It is therefore appropriate, Coper argues, that in giving our own critical appraisals of the efforts of particular judges, we rest on the same planks, especially that of consistency, for that is at least the mark of intellectual honesty.

Julius Stone was aware of the value of genuinely interdisciplinary enquiries long before "interdisciplinary courses" became academically in vogue, and in weaker hands degenerated into unscholarly and consumerist "non-disciplinary" courses. Many of the papers in this collection represent the best that can be achieved in interdisciplinary investigation. Two that are exemplary are Geoffrey MacCormack's " 'Gift', 'Exchange' and 'Contract' " and Eugene Kamenka and Alice Erh-Soon Tay's "The Sociology of Justice". MacCormack's paper emphasises the relationship between social facts and linguistic usage, and raises the question of whether "an evolutionary relationship can be established between 'gift', 'exchange' and 'contract'; and in particular whether 'contract' has evolved from either 'gift' or 'exchange' or both" (p. 79). This may, the author suggests, in turn bear on the correctness or otherwise of what Julius Stone called Sir Henry Maine's "pioneering hypothesis", that the movement of progressive societies has been a movement from status to contract as the basis of institutionalised relationships.

Kamenka and Tay take further their conceptions of *Gemeinschaft, Gesellschaft* and the bureaucratic-administrative paradigms of legal arrangements and legal ideologies, stressing that they are paradigms, and that in any complex real society there will of course be features of all three. One of the questions that concerns them about the growth of legal systems which accord to the bureaucratic-administrative paradigm is "one aspect of justice which seems at a remarkable discount today: its intellectual character, the distinction between real and reliable public justice and the equity of the heart and deed" (p. 119).

> . . . in both Western democratic and authoritarian centralised societies, the concern with "social and economic rights" has for its main thrust the further elevation of the state as the provider, guarantor and protector of rights, and the consequent constant extension of bureaucratic-administrative arrangements, values and attitudes. The

bureaucratic-administrative state, and especially the communist state, has a theory of legal correctness, of "socialist legality". It recognises no formal independent institutions of justice outside its own policies and arrangements (p. 119).

It is the aspect of justice which they believe has been "discounted" which Kamenka and Tay re-stressed. They emphasise that justice is "an activity and a tradition — a way of doing things", rather than an idea or ideal. It is intellectual but not formal, substantial but not partial. In doing so they sense an affinity with Stone's phrase "the judgment of justice" and its implied occasional creative leap which the formalist and logicist repudiate.

Legal education has been one of Julius Stone's lifelong concerns, as it has of Sir Zelman Cowen who introduces the collection. In a provocative — in the best sense — paper raising issues which really must be addressed as a matter of urgency by legal educators C. G. Weeramantry points out the painful implications of our almost complete failure to get to grips with the relationship between a legal education and the possession of mathematical, technological, and scientific knowledge and skills. There was once a time when many law schools insisted on Latin as a pre-requisite. Is there today a case for insisting on at least modest competence in the mathematical and physical sciences as a pre-requisite? In a way the reasons are comparable with the reasons once offered (and valid, at least then) for Latin. Those reasons were the methodological gains (the ability to organize one's thought logically, clearly, and systematically) for the student, coupled with the fact that Latin was the language of learning. If we substitute science and technology for Latin we have something of a parallel. In addition, we have the growth in the range of disputes that involve arguments about responsibility for technically complex effects which are unintelligible to the technologically illiterate. Furthermore, if lawyers do not wish to be displaced from their important public roles in planning and helping to shape corporate and government policies and in advising on matters of public concern, the ignorance must be remedied and there seems to be no way of doing this short of a complete rethinking of the curriculum and its assumptions.

Two essays are devoted to law reform. Mr. Justice Michael Kirby argues, with his usual clarity that:

> . . . the Australian model differs in significant respects from institutional developments overseas (and) the impact of Stone's teachings must, for good or ill, be cited as an important reason why law reform in Australia has taken a particular course (p. 206).

He believes that Stone's prediction that the idea of approaching law reform through a special all purpose Ministry of Justice would never gain general acceptance not only turned out to be correct, but probably proved correct for the reasons Stone originally advanced.

Ronald Sackville reminds us that law reform is not a novel phenomenon, and in England systematic efforts of a recognizably law reform type go back at least as far as Francis Bacon in the late sixteenth

century. His discussion of the relationship between (special) "interest groups" and law reform is particularly useful. He illustrates his thesis with economic interest groups, and their impact on proposals regarding accident compensation, and the more difficult to identify "moral" interest groups (in such areas as drugs and human relationships) as well as the relatively well-defined union groups, in matters to do with police and prison officers. This has inevitably brought law reformers more closely into the political arena.

It is impossible even to state the areas of interest of more than a score of papers, and those I have not mentioned, including a particularly careful piece by the editor himself on interests, principles, and justice, the many contributions which reflect Stone's interest in international law and internationalism, and a quite juicy essay (because of the case study it details!) by Erwin Griswold on entrapment, have the very high qualities of care and scholarship those I have discussed or cited possess.

It is also refreshing to be able to comment that any misprints or typographical errors in this book certainly escaped my detection, which I hope means that there were none. It should not be necessary to compliment those associated with a publication on such an achievement, but the quality of production of much recent learned literature makes it appropriate to do so. My only reservation on the production side concerned slight changes in the heaviness of the print, which at times were sufficiently noticeable to make the reader wonder whether the paragraph in question was being given special emphasis. I suspect this is a feature of modern printing processes which it may be beyond the power of any editor or author to control.

In sum, those associated with the production of this book deserve our gratitude for producing a book worthy of the man in whose honour it has been prepared.

LAUCHLAN CHIPMAN*

---

* Professor of Philosophy, University of Wollongong; Visiting Professor, Department of Jurisprudence, Faculty of Law, University of Sydney.