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Book Reviews

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LEGAL SYSTEM AND LAWYERS' REASONINGS, by Julius Stone. Stanford: Stanford University Press, 1964. Pp. 454, $10.00.

The proliferation of jurisprudential writing in the contemporary period tends to inspire skepticism at the appearance of new jurisprudential works. This is because a number of such efforts have proved to be rehashings of materials and positions already thoroughly analyzed, and the variations offered by the new work as to vocabulary and analytical approach are too superficial to justify the effort required to follow the author's particular line of analysis. Such works are undoubtedly a very beneficial exercise for the author, and indeed, from the standpoint of progress in the field of legal philosophy as a whole it is undoubtedly salutary to have as many legal scholars as possible interesting themselves in such efforts. But it does not follow from this that all such works profitably absorb the time of the reading public. But if in that sense we may suffer from some surfeit of jurisprudential writings that find outlet in publication, suffice it to say that Julius Stone's contribution forms no part of it. While his work is not original in the sense that it reiterates philosophical positions already extensively expounded elsewhere, his exposition has real value in the depth and organization of scholarship he brings to bear, and in the linkage he demonstrates between jurisprudence and fundamental principles of general philosophy and logic; unlike many of our jurisprudents, he seems to be no amateur philosopher.

The jurisprudential position that Mr. Stone represents is the legal facet of what is widely known as the English school of linguistic analytical positivism. It is a school in more or less direct line of descent from Austin in that it utilizes his theory of a logical and analytical method, though without building on the particular doctrines he expounded. In conformity with the fashion prevalent in the *haut monde* of jurisprudence, this school eschews the crudities of the bombasts between the basic positions of legal positivism and natural law. It is rather disarming and seductive in this respect, and somewhat like the sociological school of jurisprudence attempts to rise above the quarrel by demonstrating that both of these opposing positions have their legitimate spheres of operation, but without either of them having the right to occupy the juris-

prudential throne. The positivists should be satisfied with their allotment of that facet of the totality of the law concerned with logical analysis, the natural law adherents with justice, and both should admit the sociological school into the triumvirate that truly heads the entire domain of jurisprudence. But, as so often happens, the "compromise candidate" merely becomes himself an added contender for power, rather than bringing about the resignation of the old opponents and the cessation of their inconclusive contendings. But whether this purportedly neutral stance is illusory or not, there is much to be said in favor of a jurisprudential presentation that is not overtly directed toward the partisan polemics that are so frequently aired.

Mr. Stone, in essaying the entire field of jurisprudence, makes a triune division of it in accordance with this theory. In 1946 he had set forth his full jurisprudential thought in one volume in *THE PROVINCE AND FUNCTION OF LAW*. He is now in the process of expanding and refining his work up to the moment in a three volume project, of which this is the first volume. This deals with "analytical jurisprudence" on the theory that this is only one of the three principal phases of the totality of jurisprudence. The two other volumes, dealing with the other two phases, are appearing in 1965 under the respective titles of *HUMAN LAW AND HUMAN JUSTICE* and *SOCIAL DIMENSIONS OF LAW AND JUSTICE*. The present volume, then, is a partial rather than complete exposition of a point of view. Implicit in this total position is of course the proposition that it is possible meaningfully to dissect jurisprudence in this fashion, and it is precisely at this fundamental premise that Mr. Stone and his colleagues can find themselves embroiled in the classic controversy of jurisprudence, howevermuch they may feel abused at such disregard of the sanctuary they have sought to construct for themselves.

This book carries forward very effectively the primary mission of this school of analytical positivism especially in the analysis offered on the fundamental relationships between language and law and logic and law. This has as its main purpose the clarifying of juristic thinking and to give awareness of the proper uses and limitation for the law of the great intellectual implements of logic and language. The inevitable "multisignation" of words is analyzed, as well as fatuity in which we too often indulge of supposing we can reduce a word to any one objective and stable meaning ("unisignation"); but on the other hand, there are outer limits to the range of meanings that a word may have. And although logic is a valuable and indispensable procedure for the jurist, there are limits to its proper use, but it is subject to being employed in an abusive and excessive manner in juristic concerns, and also its purported

use may be illusory. Logic can only operate on the basis of given premises that are submitted to its ministrations, but logic may have nothing to do with the selection of the premises themselves; hence a judicial decision purporting to be "logically" compelled on the basis of antecedent authorities may represent only a logical structure based on the premises the court selected, but no logic may have been involved (or could have been involved) in the selection of these premises. The background of the average Anglo-American jurist is such that this book will afford him some fresh insights and invite a re-examination of some of his most hallowed assumptions. In such ways Mr. Stone shows himself as a particularly faithful and effective disciple of the school of thought to which he adheres in presenting its most valuable contributions to the juristic world.

Extensive chapters are specifically devoted to analyses of the systems of Austin, Kelsen, and Hohfeld. This, of course, has been a favorite jurisprudential exercise for some time, but is done well here, even though this may not be one of the primary values of the book. Perhaps the greatest and most original value of the book is the pervasive one of linking jurisprudence with the more general underlying systems of formal philosophy and logic. Most of our jurisprudential writings do not consciously base themselves on formal techniques of philosophy, and indeed, there is resistance to considering "jurisprudence" as the equivalent of "philosophy of law." But, whether or not a foundation of jurisprudence in the formal techniques of general philosophy is properly necessary, it is clearly desirable and enriching for the jurisprudent to be thus fortified. This more technical philosophical content may sometimes make the reading rather "heavy going," but the potential results are well worth the effort.

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POLITICS AND LAW, by Gerhard Leibholz.** Leyden: A. W. Sythoff, 1965. Pp. 339.

Politics and Law is not, as the title might suggest, a systematic inquiry into the intriguing relationship between political power and the realm of law, but rather a collection of selected essays and lectures which the author had published previously. The previous

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publication of most of the essays and lectures took place during the 1940's; however, a few of the essays are of more recent date. None of the articles in the collection has undergone any significant change or has been brought up to date because, in the author's opinion, "his analysis of the basic concepts and the political views put forward at that time still largely holds good today."[1]

In keeping with the author's professional background as a legal scholar, political scientist, and since 1951 an Associate Justice of the German Federal Constitution Court, the essays and lectures are grouped under three headings: Political Science, Politics, and Law. Within these groupings the offerings are far-ranging in scope, reflect the scholarly mind of the author, and are evidence of his intellectual depth. However, the content of the selections is at times repetitive and the arrangement of the articles under the three categories is not always methodical.

In the part of the book dealing with Political Science, Professor Leibholz examines primarily the essence of politics, the nature and various forms of democracy, and the problems of national character. It is particularly in this section that this reviewer strongly disagrees with the author that his essays need not be updated. Political theory has made tremendous strides in the last twenty years. Political scientists have concentrated their efforts and spilled much ink on reconceptualizing and defining terms, constructing theoretical frameworks for a more rigorous explanation of political phenomena, and in general making political science more "scientific" in the sense of approaching the methodology employed by the natural sciences. A serious consideration of the essence of politics cannot afford to neglect the searching contributions that have been made during this period by such men as David Easton, Arnold Brecht, Robert Dahl, Carl J. Friedrich and Leslie Lipson.[2] For example Leibholz states:

> A relationship to the State becomes political when, in one way or another, the fundamental ideological principles upon which the State rests and which determines its specific character are affected. Those questions are political which in some way or other touch upon the essential common interests and the supreme aims of the State. Those decisions are political which seek to preserve the existence of the State, to further its unity or aim at the integration of the social organism which we call the nation.[3]

This rambling characterization of what is political may well

1. Pp. 9, 10. All page numbers, unless otherwise noted, refer to the book under review.

2. See, BRECHT, POLITICAL THEORY (1959); DAHL, MODERN POLITICAL ANALYSIS (1963); EASTON, THE POLITICAL SYSTEM (1953); FRIEDRICH, MAN AND HIS GOVERNMENT (1963); and LIPSON, THE DEMOCRATIC CIVILIZATION (1964).

3. P. 15.

have been sharpened and refined if the author had re-examined his conceptualization in the light of Dahl's bold definition that a political system is "any persistent pattern of human relationships that involves, to a significant extent, power, rule, or authority"[4] or by taking into consideration Friedrich's perceptive statement that "it is the essence of politics, in a way, to argue about justice, that is to say, to argue about who may be compared with for what treatment."[5] With regard to the term political science Leibholz asserts that "the will of the nation as a whole forms the crux of modern political science."[6] While one may agree that the formation of the national will, be it the work of a leading elite or a party or a dynasty and its servants, is indeed an important subject of concern for political science, it suggests a very narrow definition. Professor Easton's characterization of political science appears to be more rigorous and profound when he states that it is "concerned with every way in which values are allocated for a society, whether formally enunciated in a law or lodged in the consequences of a practice."[7]

An interesting distinction is made by Professor Leibholz between representative and what he calls "plebiscitary" democracy. The term representative democracy is to be applied where the general will of a sovereign people is formed by means of the political principle of representation. The representative authorities may be parliamentary bodies, committees, or even single persons. In the plebiscitary democracy the representative principle plays no part in the formation of the common will. An example of this system, according to Leibholz, is the modern mass-democratic party-state. There the freedom of the members of parliamentary and other "representative" bodies has been lost through a more or less extensive dependence on the party organizations and groups whose leaders exercise a decisive influence over the speeches and votes of popular representatives. In view of the development of this type of democracy, Leibholz suggests that the usual schematic division into direct and indirect democracy is in need of revision. According to the traditional division the party state is a form of indirect democracy. The author claims, however, that it is in fact a democracy which is structurally related to direct democracy and consequently should be treated systematically in political theory under the latter category.[8]

In much of the book Professor Leibholz strikes a strong religious note which is revealed in the second essay of the collection, en-

4. DAHL, MODERN POLITICAL ANALYSIS, *op. cit. supra* note 2, at 6.
5. FRIEDRICH, MAN AND HIS GOVERNMENT, *op. cit. supra* note 2, at 256.
6. P. 79
7. EASTON, THE POLITICAL SYSTEM, *op. cit. supra* note 2, at 131.
8. Pp. 33-36.

titled "Politics and Natural Law." In this essay Leibholz asserts that:

> . . .[T]heonomic thinking requires that political power be brought into the service of God to fulfill His purposes. Only then is a formally established power legitimate. Only then does it possess the genuine authority, *i.e.* the title to be obeyed. . . .The most important purpose and the fundamental value which power has to serve is to guard right and to serve justice. . . .[9]

At the same time, Leibholz observes that the principles of natural law must not be "separated from their dependence on the eternal and sacred justice which has been revealed by God." the majority of contemporary political scientists is likely to question this close tie between political power and religion and may object to the essentially religious content of natural law, but for the author these are the core concepts of his philosophy.

The religious *leitmotiv* is resumed by Leibholz with vigor in the essays and lectures grouped under the heading of Politics in which he deals primarily with various problems of Nazi Germany, with her relationship to the world, and with the future of Europe. From 1938 to 1951 the author lived in England and it seems to be then that he developed his thesis of the militant Christian Church, which itself must be political and whose task it is "powerfully and repeatedly to press into national and international life Christian principles such as the sacredness of the human personality, the sovereignty of God above all nations, the universal brotherhood of men, the Christian power of love and forgiveness and the existence of universal moral laws."[10] Specifically, Leibholz advocated the employment of what he calls Christian "totalitarianism" in the battle against anti-Christian totalitarian states such as Nazi Germany and the Soviet Union. Fearing that liberal democracy may not possess the spiritual thrust to overcome the political problems existing in many parts of the world because "liberalism has only developed where a solid, well-defined traditional structure of political values was already present,"[11] the author maintains that Christianity is the only real hope of a stricken and suffering world. Although these words were part of a lecture delivered in 1942, Leibholz has pointed perceptively to a characteristic of liberal democracy which today renders its adoption by the new states of Africa and Asia so difficult.

With regard to Allied policy toward Germany during World War II, Leibholz questioned the wisdom of the demand for unconditional surrender and advocated a careful distinction between the

9. P. 20.
10. Pp. 94, 95.
11. P. 128.

Hitler government and the German people. He discusses in some detail the opposition movements to Hitler prior and during the War and argues with skill and knowledge against the thesis often heard and generally accepted by this reviewer that Nazism should be regarded as the natural culmination of German historical and cultural development during the previous 150 years.

In his discussion of European unity Professor Leibholz focuses on the problem of sovereignty and on the transition from the age of the nation-state to the age of ideology. He raises the question whether the concept of sovereignty with its insistence on comprehensiveness, indivisibility, and perpetuality is not outmoded today when it is apparent that certain sovereign powers of the member states of the European Community have been transferred to "supranational" institutions. Considering sovereignty essentially a political and not a legal concept, Leibholz holds that it remains valid as long as a state retains the capacity to say the final decisive word on the political plane. The loss of such capacity, however, entails the state's reduction to satellite status which deprives it of its sovereignty. With respect to the transfer of powers by the member states to the Community institutions, the author believes that the states remain today (1960) still in a position to cut loose from the supranational Communities by invoking the *clausula rebus suc stantibus*. Since the Communities are unable to prevent the secession of one of their members by means of sanctions, he holds that the sovereignty of the member states has not been impaired. In this connection one should read the very recent decision of the Court of Justice of the European Communities in the E.N.E.L. case in which the Court declared:

> Contrary to other international treaties, the Treaty instituting the E.E.C. has created its own legal order which was integrated with the national order of the member States the moment the Treaty came into force and which the domestic courts have to take into account; as such it is binding upon them. . . [T]he integration, with the laws of each member State, of provisions having a Community source, and more particularly the terms and spirit of the Treaty, have as a corollary the impossibility, for the member States, to give precedence to a unilateral and subsequent measure which is inconsistent with it against a legal order accepted by them upon a basis of reciprocity.[12]

While Leibholz maintains that sovereignty as a political concept retains its validity today, he raises the question whether, in a world divided along ideological lines, the principle of sovereignty does not in fact become a vehicle by which primarily ideological

12. Vol. 2, No. 2 COMMON MARKET LAW REVIEW 197, 197-198 (1964).

aims rather than national aims are pursued. He also observes that in the event of a conflict between nation-state loyalty and common ideological and political beliefs, the duties arising from citizenship in a given nation may no longer automatically take preference over belief in an ideology that transcends the realm of the nation-state.[13] Although undoubtedly the transition from the age of the nation-state to the age of ideology would open up an interesting vista of shifting loyalties—even the development of a European ideology is not inconceivable—the expectation of such a shift may be somewhat premature. The often bitter conflicts among the members of the Communist bloc and the recent manifestations of re-emerging nationalism in Western Europe furnish clear evidence that the days of the Nation-state are far from numbered.

The section of the book entitled Law begins with an examination of the foundations of justice and law in which the author again strongly argues for his belief that only the Christian doctrine of man is the one sure foundation of justice.

Most of the remaining essays deal with various aspects of the Federal Constitutional Court of Germany. The most interesting point in these essays is the similarity of problems besetting both that Court and the U. S. Supreme Court. Charges of judicial activism and "government by judges" hurled against the German Court have a familiar ring in the United States. The issue of "equality before the law" has repeatedly taxed the ingenuity of the German justices, but their approach to this issue has oftentimes been more aggressive than that of the Supreme Court, at least prior to *Baker v. Carr*.[14] Professor Leibholz acknowledges with approval that under the German Constitution of 1949 (Basic Law) the Court has been incorporated into the State's policy making process; however, he fully recognizes that the Court cannot substitute its own concrete political considerations for the concrete political considerations of the legislature. Experience has taught the American public that the line between permissible and non-permissible judicial policy making is blurred and often difficult to determine, and it seems that the German Constitutional Court has also been wrestling from the very beginning with the solution of this problem.[15]

What Professor Leibholz has possibly overlooked in his book is that not only constitutional courts or a supreme court may be engaged in policy making, but that also lower courts may under certain circumstances become policy makers. Such courts also meet demands, settle disputes, and resolve arguments in the political system. Examples are: groups seeking to resist civil rights

13. Pp. 225-230.
14. 369 U.S. 186 (1962).
15. See Leibholz's detailed discussion of the "Southwest" case. Pp. 286-295.

appealing to state courts for an injunction; or individuals finding themselves defeated at the polls may turn to the courts; or minorities may seek refuge in the courts from majority-dominated legislatures or governors. Finally, a taxpayer may obtain standing before a court and ask for an injunction or other remedy if expenditure of public monies is involved.[16] It is this kind of relationship between politics and law that needs a thorough, systematic exploration, possibly on a comparative basis, which in this reviewer's opinion might yield fascinating insights and lead to a better understanding of the political system.

To conclude the review of Professor Leibholz's book, there can be little doubt that his essays and lectures are highly stimulating and most challenging, even though some of them have now no more than historical value. They are written with great perception and skill and reflect the author's profound historical and legal knowledge. One may not agree with parts or all of his legal and political philosophy, but one must admire the forcefulness and the deep conviction with which the author argues for his beliefs.

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16. See, Jacob & Vines, *The Role of the Judiciary in American State Politics*, in JUDICIAL DECISION-MAKING 245-256 (Schubert ed. 1963).

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