BOOK REVIEW

ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND. Ed. by Ralph A. Newman. Indianapolis: The Bobbs-Merrill Co. Inc., 1962. Pp. xxiii, 670. $12.00.

This book, prepared by the American Society for Legal History under the editorship of Ralph A. Newman of the Washington School of Law, American University, consists of contributions made by several jurists, many of whom are the former students of Roscoe Pound. The jurists include Edgar Bodenheimer, Brendan F. Brown, José Puig Brutau, Federico Castejon, Haim Cohn, Georgio Del Vecchio, Wolfgang G. Friedmann, Sheldon Glueck, Otto Kahn-Freund, Hans Kelsen, Pierre Lepaulle, W. Müller-Freienfels, Karl H. Neumayer, Karl Olivecrona, Theodore F. T. Plucknett, Miguel Reale, Luis Recaséns-Siches, Stefan A. Riesenfeld, M. J. Sethna, Peter Stein, Julius Stone, Adam Szpunar, Wen-Yen Tsao, Haroldo T. Valladão, and W. J. Wagner. The book contains a Preface written by the editor, who places Pound in the category of the great masters of legal theory—Bentham, Gény, Jhering, and Holmes—to mention some of the names mentioned by Newman. There is also a fascinating account of the writings and contributions of Pound written by Dean Griswold of the Harvard Law School in a brief introduction to the study.[1]

It would be otiose to review in detail the individual contributions of these eminent writers. Suffice it to say that the writings contribute to sociological jurisprudence, which has been the main theme of Pound's writings for more than half a century. There could have been no better way of honoring Roscoe Pound than publishing essays in the form of a book on a subject so close to the heart of Pound, and to which he dedicated his energies and life. To say that this is a study in sociological jurisprudence is, however, not to say the whole truth about this work. It is in a sense more than sociological jurisprudence. It is probably the first time that writings of non-Western legal scholars about their legal systems have

[1] For a more elaborate as well as penetrating study of Pound's contribution to jurisprudence, see Braybrooke, *The Sociological Jurisprudence of Roscoe Pound,* 5 U.W. AUST. L.R. 288 (1961); Stone, *The Golden Age of Pound,* 4 SYDNEY L.R. 1 (1962).

been included in a work on jurisprudence. Included are essays on the Chinese, Jewish, and Indian legal systems. If only essays on the Islamic and African legal systems had been included, the study would have been full and complete. It is true that references to Islamic law are made here and there. For example, Lepaulle in his essay, "Reflections on the Sources of the Law," refers to sources of Islamic law. But his statements on Islamic law are, if anything, misleading. Thus his statement that "verses [in the Koran] having a practical legal application are no more than 20" is open to question. (p. 94). Opinions concerning the number of legal norms in the Koran no doubt vary, but so far no Islamic writer has put this number as low as twenty. It is especially to remove misconceptions of this kind that a contribution from an expert on Islamic law should have been included. Be that as it may, this book breaks new ground in several ways; by including essays on the non-Western legal systems, the editor has enriched sociological jurisprudence and has indeed added a new dimension to it. It is this particular orientation that makes this study unique, and it is for this reason we have said earlier that it is more than sociological jurisprudence. However, some of the essays fall far below the expectations raised by their titles. For example, one would expect from the essay of Sethna, "The True Nature and Province of Jurisprudence from the Viewpoint of Indian Philosophy," some analysis and description of Indian law—whether of the Hindus or of Moslems or of the "common law"—but the writer has not much to say, and what he does say is said in such generalities that it is hardly of any use to any serious student. Likewise, the essay of Del Vecchio, "On the Functions and Aims of the State," is disappointing. The writer only expresses the common place in modern legal theory when he says that the "functions of the State . . . are . . . application and enforcement of the idea of justice, which . . . must not be considered only in its general and abstract aspect, but also in its specific and concrete expressions, such as constitutional or political justice, justice for social security and relief, economic justice, education and schools, rewards, compensation or penalties professional or trade unions and international ones." (p. 150).

Some insights gleaned from the essays of Tsao and Cohn, "Equity in Chinese Customary Law" and "Prolegomena to the Theory and History of Jewish Law" respectively, may be of particular interest

to civil and common law students. It is rightly said that the Chinese legal system—of what period it is not made clear by the writer—did not distinguish civil and criminal proceedings, and consequently, "any attempt to distinguish equity in its narrow and technical sense from the Chinese customary law would be futile." (p. 22). Referring to the theory of divinity of Jewish law, Cohn writes: "The argument might well be advanced that, in the circumstances here described, the 'divinity' of Oral Law was in reality a legal fiction . . . ." (p. 55). Probably the same can be said of any legal system which seeks to derive its validity from the theory of divinity. To this class belong the Hindu and Islamic legal systems and probably a few others also. The role of the theory of divinity, as well as its validity in the twentieth century, is a fit subject for sociological inquiry especially when the societies governed by these legal systems are rapidly changing. At this point we may refer to the essay of Olivecrona, "Legal Language and Reality," as it has an important message for researchers of law. "The Realist movement in the United States," says Olivecrona, "recognizes that our legal language is loaded with a heavy burden of metaphysical notions. Its aim is to get rid of these and put legal science on a really scientific basis. Legal science has to concern itself with facts, not with metaphysical entities." (p. 156). That these observations apply with equal force to the non-Western legal systems needs no emphasizing. Also of some interest here is the summary of Olivecrona in which he describes the essence of his essay thus: "If legal language is taken at its face value, it will be interpreted as mirroring reality. But this reality will not be a part of the world of hard facts known to us through our senses, through memory and induction. It will be a reality of a higher order." (p. 190). This observation may appear to be mystical, but it does convey a point, namely, that the purpose of legal language is something more than reflecting reality. What is it? It is, in the words of the writer, "to shape reality." Evidently, this is no mysticism.

Then follows an essay by Luis Recaséns-Siches of the Ibero-American University, "The Logic of the Reasonable as Differentiated from the Logic of the Rational (Human Reason in the Making and Interpretation of the Law)," in which the writer expounds the well-known dictum of Holmes that "The life of law has not been

logic, it has been experience."[2] Comparativists may be tempted to say here that civil law is not without its equivalent of common law aphorisms. Probably similar will be the reaction to the following description of the interrelations between law and power in the essay of another Latin American jurist, Miguel Reale, "Law and Power and their Correlation." Reale says: "[L]aw divested of power is impotent; it becomes a mere *desideratum* or logical affirmation without the possibility of *accomplishment* (and 'accomplishment' belongs to the essence of the law, as Ihering [*sic* Jhering] admirably stated); on the other hand, power deprived of juridicial or law reference or not confined to objective limits, becomes pure strength or arbitrariness." (p. 251).

Friedmann's essay, "Some Reflections on Status and Freedom," is both provocative and original. It seeks to prove how one of the celebrated formulations of Sir Henry Maine on legal history and philosophy—that the movement of the progressive societies has hitherto been a movement from Status to Contract—has gone wrong in modern legal theory. He refers to various developments in Anglo-American jurisprudence, especially in the domain of public law, to prove this point.

Stone's essay, "Two Theories of the Institution," is, like his other writings, both scholarly and thought-provoking. He critically examines the contributions of Haurio, Renard, and Romano to the theory of institutionalism, and also relates them to Duguit's doctrine of *la règle de droit* based on *la solidarité Sociale.* He writes: "Both involve (the institutionalists explicitly, Duguit implicitly) that principles of law and justice are basically principles of social organisation. Both attack the preoccupations of traditional thought, for instance, with rights, and will, and rules, and contracts, and the distinction between public and private law, as obstructing an adequate account of social organisation." (p. 304). Whether or not there is much future for the Institutional Theory, it has undoubtedly an element of dynamism which may help in enriching jurisprudence. Again, its relevance to international law and other legal systems, such as the United Nations, are questions of deep significance to twentieth century world of law. Stone has indeed provided some valuable perceptions on the "relations" of international law and institutional law. (pp. 326-30).

[2] HOLMES, THE COMMON LAW 1 (1881).

Of some interest to students of international law especially is the essay of the Brazilian scholar, Vallado, "International and Internal Law—The Primacy of the Higher Juridicial Order." In this essay, the dualist theory of international law is questioned by the writer, among others, on the ground that: "it is no longer possible to proclaim, with the dualists, that international law is concerned only with relations between coordinate states. This opinion is no longer current; it regulates also relations involving individuals and other entities, as well as those of the states with a higher authority, *e.g.*, the U.N.O., which can decide between states." (p. 590). This is too bald a statement. It may also be doubted whether such a change has taken place, in modern law of nations, as to throw in doubt the validity of the dualist theory. Article 110 (1) of the United Nations Charter which states that "the present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes" hardly supports such an inference. Likewise, the position taken by some American courts[3] that human rights provisions of the Charter are not self-executory raises doubts whether the author is treading safe ground.

In conclusion, we may repeat what we have said earlier, that this book is unique in that contributions from several legal systems, especially non-Western, have been included, perhaps for the first time, in a work of major significance, thus proving that the world of law can no more be provincial than can the world of science. This is a book which must be read by all serious students of jurisprudence.

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[3] See Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952); Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L LAW 62 (1951).

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