

## JULIUS STONE AND THE SOCIOLOGICAL APPROACH TO INTERNATIONAL LAW

EDWARD McWHINNEY\*

### I. THE JURIST AS PARTICIPANT IN THE LARGER SOCIAL PROCESS

How much are general theories of law shaped or determined by dominant societal forces and conditions of the time and place in which they arise; and how much, by comparison, can a distinguished jurist by strength of personality or sustained eloquence in the exposition of his thinking, succeed in imposing his own special philosophy of law upon a particular historical era? The question is at the core of the great early 19th century debate between the legal rationalist, Thibaut, and the legal historicist, von Savigny, over the then current project for codification of the German Civil Law — an example that Julius Stone made use of in his lectures and writings<sup>1</sup> as a paradigm or model for the examination of the utility (and limits) of use of law as a conscious instrument of social control. Elements of the basic antinomy or contradiction — the jurist on the one hand, as simply holding a mirror to society so as to record and rationalise its main policy imperatives, and on the other hand, as in Harold Lasswell's phrase *participant-observer*,<sup>2</sup> assuming the obligations of not merely refining but, ultimately of re-ordering and shaping and directing the larger intellectual currents of his own special legal community — are represented in Stone's scientific-legal work as it unfolded over a very long career of teaching and writing spent in a number of different societies. These were, successively, Great Britain of the 1920s where he undertook his

---

\*Q.C., Professor of International Law and Relations, Simon Fraser University; *Membre de l'Institut de Droit International*, Member of the Permanent Court of Arbitration.

- 1 J. Stone, *The Province and Function of Law* (1946), 421; Stone, *Social Dimensions of Law and Justice* (1966), 86. And see U. Baxi, "The travails of *Stare Decisis* in India" in A.R. Blackshield (ed.), *Legal Change. Essays in Honour of Julius Stone* (1983) 34, 35.
- 2 See e.g. H.D. Lasswell and A. Kaplan, *Power and Society: A Framework for Political Inquiry* (1950) 241; Lasswell, *The World Revolution of Our Time. A Framework for Basic Policy Research* (1951) 2.

primary legal education and his first tentative steps into the practice of law as a Solicitor; the United States, where he moved at the beginning of the 1930s, as first, a graduate student in law and then a young law professor; and finally Australia, where he arrived at the beginning of the 1940s and remained for the rest of his life. For the last decade or more, however, through special administrative arrangements that were designed and encouraged, with intellectual imagination and flexibility, by both university administrations concerned, he taught at both the University of New South Wales in Sydney, and the University of California's Hastings College of Law in San Francisco, spending, in general, one half of the year at each institution and benefiting from the best insights of both worlds. In any identification and classification, in legal-systemic and legal cultural-philosophical terms of the great jurists of the twentieth century, he must, I think, be characterised as "American" and, after Roscoe Pound, as perhaps the key theorist of the U.S.-based sociological approach to law. I do not think the old-fashioned, more comprehensive characterisation as either Common Law or even more loosely, Anglo-Saxon, has any practical utility today in view of the very great and continually widening gap as to distinctive legal methodology and even as to substantive legal ideas, separating the two sides of the Atlantic legal community. If Stone himself, in substantial recognition of this emerging truth of the fission — in regard to legal theory and, even more, public law in all its aspects — between the English and the American streams of jurisprudence, seemed consciously to distance himself from his original, very rich English legal antecedents, he was sensitive to the latter-day acquired Australian elements in his own distinctive approach to law. Having the concrete temptations offered to him, from time to time, to return permanently to the United States, or to move to other postulated *World* legal centres, so as to exercise his intellectual influence in a more continuing international legal environment, he always counselled the merits of operating as a world jurist, from a base in a lesser or "middle" state that had neither burdens of past Empire to atone for today, nor responsibilities, *qua* superpower, for engaging in Cold War-styled ideological-legal debates that ran the risk always of degenerating into mere legal polemics. Also, it is impossible, under such circumstances, to become a prisoner of intellectual-legal parochialism or to become enfeoffed to the national interest, narrowly defined, as may have happened to some of Stone's main academic contemporaries in other larger countries with more obvious foreign policy exigencies! The great French international jurist, Georges Scelle, rightly condemned that species of *dedoublement fonctionnel* manifest in the academic writings of University professors who accept salaried posts as part-time legal advisers or ad hoc special counsel to their own national foreign ministries, as a principal blight of post-World War II International Law scholarship. In contrast, as a legal scholar in his own right in his quest for legal truth, Stone was able to come close to what C. Wilfred

Jenks, in an inspired phrase called a genuine “Common Law of Mankind”.<sup>3</sup> Except for his abiding special interest in the principle of self-determination of peoples as applied in a contemporary Middle Eastern context, as to which he spoke from the heart<sup>4</sup> and which, in any case, was always subordinate to his main research preoccupations in law, Stone eschewed legal particularism and limited area, or regional studies in law. What we have, as the dominant characteristic of his legal writings throughout his life, is the striving for intellectual eclecticism, manifested at all times in inter-systemic, trans-cultural testing and synthesis.

## II. LAW AND SOCIETY, AND SOCIOLOGICAL JURISPRUDENCE

The necessary and inevitable relation and interaction between law and society is at the foundation of Stone’s general approach to law — his distinctive Philosophy of Law and distinctive Legal Methodology. The decisive event in Stone’s legal life — separating him forever from his earlier formation in classical abstract legal formalism divorced from policy at Oxford — was his pilgrimage to Harvard at the opening of the 1930s, to work with Roscoe Pound, then the long-serving Dean of the Harvard Law School and the founder of the American School of Sociological Jurisprudence.<sup>5</sup> Stone was closely associated with Pound for the next five years, first as his graduate student and then as a young Assistant Professor teaching with him at the Harvard Law School and also at the new Fletcher School of Law and Diplomacy which Pound founded at nearby Tufts College in Medford, Massachusetts. There is enough evidence of the use of empirical data in Stone’s first work and his Oxford doctoral thesis — on the actual record of the special legal regime of protection of national ethnic minorities established under the Versailles Peace Treaty of 1919<sup>6</sup> — to suggest that Pound did not initiate, but rather encouraged and developed and reinforced, these particular elements of Stone’s legal thinking which he had developed himself by application of classical historical research techniques to legal materials. Scientific empiricism — the basic tools of scientific legal enquiry — is the starting point of the American Sociological approach to law as developed by Pound. What Pound gave Stone in addition, however was the introduction to scientific relativism<sup>7</sup> and to the basic notion of law as not being a closed and static system of abstract concepts and principles inherited from some bygone historical era, and to be applied literally and unimaginatively today, but as

3 C.W. Jenks, *The Common Law of Mankind* (1958).

4 See e.g. Stone, ‘Stand Up And Be Counted!’ *An Open Letter to the Right Honourable Sir Isaac Isaacs on the Occasion of the 26th Anniversary of the Jewish National Home* (1944); Stone, *No Peace — No War in the Middle East* (1970); Stone, *Israel and Palestine: Assault on the Law of Nations* (1981).

5 See Stone’s tribute to Pound, in his obituary essay, “Roscoe Pound and Sociological Jurisprudence”, (1965) 78 *Harv L Rev* 1578.

6 Stone, *International Guarantees of Minority Rights: Procedure of the Council of the League of Nations in Theory and Practice* (1932).

7 For some latter-day reservations, see Stone, “Uncommitted Relativism in Modern Theories of Justice”, (1962) 16 *Sw L J* 171.

being rather, a continuing and dynamic process of conflict and competition of the different interests present in society,<sup>8</sup> with specific positive law rules as the end-product of that interaction of social ideas at any particular time. The long-range implication, in terms of legal methodology — not fully spelled out or even appreciated by Pound himself, but later to be made a key element in the American Legal Realists' programme and, still later, to be carried to logical conclusion in the Lasswell-McDougal "Policy Science" approach — was that law and law teaching had to be transformed into a social science, with sophisticated attention to the larger social decision-making and consensus-formation processes of which law itself was simply a part. What was the essence of Roscoe Pound's Sociology of law, however, was the explicit identification and appraisal of competing social interests and of the different societal groups sponsoring or putting them forward at any time and the construction of some sort of hierarchy of interests, in which the competing social demands could be quantified, and then ranked, according to their deemed degree of social relevance or importance, as a guide to authoritative community decision-makers (executive and legislative and also, more immediately and importantly, judicial). In terms of the science of law-making, as expressed through the ordinary constitutional, executive-legislative processes, this part of Pound's teaching found its outlet, directly in Cardozo's celebrated plea<sup>9</sup> for the establishment of professional Ministries of Justice, endowed with the necessary critical intellectual-legal spirit and also the necessary reserves of advanced professional legal talent, to make the elaboration and detailed drafting of law reform projects a rigorous exercise in applied sociology of law. This would, necessarily involve the testing of particular law-making projects or hypotheses by the extent to which, if at all, they responded to concrete societal problems and offered, on all the available scientific-empirical data, solutions that were credible and acceptable, in objective community terms. In the United States of the first half of the present century, Pound's sociological approach to law — his concept, as himself a conservative Republican, of law as a form of enlightened social engineering — found its most striking empirical demonstration in the imaginative and confident and always politically optimistic, experimentations in social and economic planning of the early "New Deal" era in the United States, inaugurated by President Franklin Roosevelt and his Democratic Party administration from 1933 onwards. In historical retrospect, it is recognised that there was a good deal of ad hoc, trial-and-error testing in the first flood of "New Deal" reform laws, and that much of the early planning legislation had to be abandoned on pragmatic experiential grounds, after the first rigorously empirical scrutiny of their actual record of achievement of their postulated objectives of national

---

<sup>8</sup> See generally, R. Pound, *An Introduction to the Philosophy of Law* (1922); Pound, *Social Control through Law* (1942).

<sup>9</sup> B.N. Cardozo, "A Ministry of Justice", (1921) 35 *Harv L Rev* 113.

industrial recovery from the catastrophic World Economic Depression of the end of the 1920s and the early 1930s. One could not, however, gainsay the larger truth that the Roosevelt “New Deal” proceeded from a substantial national consensus as to the long-range goals and directions of American society, expressed through the overwhelming electoral mandates of the first two Roosevelt presidential terms and a concomitant substantive national consensus as to the use of law and the legal processes generally as conscious instruments of social change and social betterment for the future, rather than the mere mechanical perpetuation, through time, of the dead-hand control of earlier generations, now dead, over present-day society and its emerging legal needs. The great Justice Oliver Wendell Holmes, jr., of the United States Supreme Court, summed it all up best in his celebrated aphorism that it is revolting to have offered, as justification for the application today of a claimed legal rule, that so it was laid down in the time of Henry IV.<sup>10</sup> Sociological jurisprudence, as conceived and applied in the rapidly evolving American society of the first part of the present century, with its “unfolding civilisation” agreed societal premises, was always a dynamic, reformist theory of law, dedicated to, and resulting in, the critical re-examination and up-dating, according to the test of reason, of old legal rules, institutions and processes so that they would better serve the changing needs of a changing society.

### III. SOCIOLOGICAL JURISPRUDENCE AND SOCIETIES IN TRANSITION

When one leaves the tidy and well enough defined intellectual frontiers of a particular national society, however, and proceeds to application of the tenets of sociological jurisprudence to international society, one runs into immediate and serious problems — not so much of legal methodology, though the dilemmas of identification and appraisal of competing societal interests, and their ranking or hierarchisation for purposes of concrete decision-making in international arenas become far more complex and difficult than in the case of national societies. The problem is, rather, one of ultimate values and value choice, once the antinomies of conflicting values implicit in any legal problem-situation have been clarified and identified up to the actual moment of decision-making but not (*ex hypothesi*, according to the tenets of the sociological school of jurisprudence) including the final decision itself.

Stone’s recognition of the time-dimension of juristic learning — its particular space-time relativism in sociological jurisprudential terms — led him, through Pound, and ultimately through the Continental European Civil Law jurist Kohler<sup>11</sup>, from whom this part of Pound’s distinctive legal thinking

<sup>10</sup> O.W. Holmes, jr., *Collected Legal Papers* (1920) 187.

<sup>11</sup> J. Kohler, *Lehrbuch der Rechtsphilosophie* (1908); Kohler, *Moderne Rechtsprobleme* (1913).

was derived, to identify the notion of a particular “civilisation area” or “civilisation period” as the relevant intellectual frame of reference within which notions of societal interests — the *de facto* claims present and pressing at any particular time, and the jural postulates or high-level, ordering principles extrapolated or rationalised from the mass of such claims — would be identified and legitimated for purposes of the community decision-making processes. What do you do with a society in transition, with a society that was once, by definition, monolithic in dominant ethno-cultural and legal-systemic terms and with, in consequence, its won continuing historical consensus as to philosophical ideals and long-range societal objectives, and that has now, suddenly, by the pressure of the post-World War II cataclysmic political events in the World Community, found its agreed, common *Weltanschauung* sundered and its erstwhile imposed unity given way to a plurality of different, sometimes directly competing, legal value-systems and conceptions of World public order?<sup>12</sup>

For internal, (municipal), national legal purposes, Stone and his great teacher Pound, and also the Continental European Civil Law jurists (largely social democratic, in political sympathies) from whom Pound had drawn and borrowed, had always, distrusted a priori Natural Law-style postulates as controls or guides for decision-making, for they could hardly avoid noting the extent to which such absolutist notions had been called in political aid by social and economic vested interests as last-ditch barriers against legal change, after those same vested interests had lost out in the ordinary, popularly-elected, constitutional arenas. Whether in the United States of the period when Stone was a graduate student and then a young teacher, or in the Continental Europe in which his ranking contemporaries as British and Commonwealth International Law theorists, Wolfgang Friedmann<sup>13</sup> and Georg Schwarzenberger<sup>14</sup>, had been formed as students, scientific relativism and essentially societal tests as to utility in law, were generally effective, operational instruments of legal reform and modernisation. Radbruch, the greatest of the Continental European legal relativists, was moved, in his last, post-World War II retirement years, to re-examine and, to some extent, to try retrospectively to qualify<sup>15</sup> his previous deference to societal standards as the criterion of goodness in law, this in reaction to the authoritarian era in German law through which he had just lived. A full generation earlier, Kohler had been troubled by the then largely hypothetical problem of the historically ‘retrogressive’ civilisation and civilisation-period. Even Kelsen,

12 Some of these problems are explored in the present author’s *United Nations Law Making. Cultural and Ideological Relativism and International Law Making for an Era of Transition* (1984).

13 See e.g. W. Friedmann, *Legal Theory* (1st ed. 1944).

14 See e.g. G. Schwarzenberger, *Power Politics* (1941); Schwarzenberger, *A Manual of International Law* (1947).

15 Compare in this regard, G. Radbruch, *Rechtsphilosophie* (3rd ed. 1932); and Radbruch, *Rechtsphilosophie* (8th ed. 1950), (the latter edition, by Professor Erik Wolf, published after Radbruch’s death in 1949, but with additions and revisions authorised by Radbruch). And see Stone, note 7 *supra*, 185; F. von Hippel, *Gustav Radbruch als Rechtsphilosophischer Denker* (1951).

within the comforting self-defined parameters of his “Pure Theory of Law”,<sup>16</sup> had felt compelled, post-World War II, privately to defend his earlier theories as having been predicated upon a political premise of an already in place constitutional-democratic legal system.

#### IV. SOCIOLOGICAL JURISPRUDENCE AS APPLIED TO INTERNATIONAL SOCIETY IN REVOLUTIONARY TRANSITION

The political problem of the transition of the immediate post-World War II years from the small, essentially European and European-by-extension (North American and Latin American) international special legal community of yesterday, to the plural, multi-cultural, multi-systemic (legal, and ideological-legal) World Community of today, that had emerged by the middle and late 1960's under the impact of the historical movements for decolonisation and independence and the break-up of the old European Imperial systems, has yet to be explored in its full international legal implications. The psychological-legal problem today of an orthodox, ‘classical’ International Law that is viewed, by very many states, as having essentially ‘Eurocentrist’ cultural origins<sup>17</sup> and as being rooted in the political and economic self-interest of those Western European nation-states, — the political heirs to the Westphalia settlement of 1648 — who were preoccupied with their own commercial and territorial aggrandisement in the (from the European viewpoint) ‘newly-discovered’ lands of Asia and Africa in the 18th and 19th centuries in which most of ‘classical’ International Law theory and also substantive principles emerged, has yet to be fully acknowledged by Western jurists and by Western political leaders. The latter-day recognition by Western political leaders of the disappearance by now of that erstwhile, automatic, pro-Western voting majority in the United Nations General Assembly and other main international legal arenas (including, on some views, the World Court), has prompted, in certain Western foreign ministries, a defensive ‘give-it-up’ philosophy manifested, variously, in the retreat from the principle of multilateralism, the withdrawal from specialised international agencies, the withholding or threat of withholding of one’s constitutionally-assessed budgetary contribution to specific international organisations, and the cutting back of one’s acceptance of compulsory jurisdiction in international adjudication and neutral third party dispute settlement. On any scientific Law and Society criteria, this would seem the least constructive and useful approach by national decision-makers to the new societal facts in the World Community of expansion of its representative character of a well-nigh universal basis today, in multi-cultural, legal-systemic terms.

---

16 H. Kelsen, *Reine Rechtslehre* (1934).

17 See e.g. W.G. Grewe, “Vom europäischen zum universellen Völkerrecht. Zur Frage der Revision des ‘europazentrischen’ Bildes der Völkerrechtsgeschichte”, (1982) 42 *Zeitschrift für ausländisches öffentliches Recht und völkerrecht* 449.

The time-lag in the response by International Law theorists to the new International Society of today is compounded by a general decline, of our times, in the national law schools' scientific-legal preoccupation with issues of general legal theory. While teaching and research and publication on low-level applied International Law projects — international tax law, international corporation law, foreign investment law — have never been so diligent or so well-rewarded as today, these are *Micro-International Law* studies. They lack an overall sense of historical direction and purpose in a rapidly changing International Society. In the absence of the pursuit, at the same time, of ordering general principles involving elaboration and projection of long-range historical trends and conditions in International Society, they are hardly likely by themselves, to take us safely into the next century. Ventures in *Macro-International Law* — explorations, however tentative, of new constructs of World Public Order for the post-*Detente*, post-superpower era of International Law and Relations now emerging — are all too rare today, and when they do emerge, they do not come from the pens of Western jurists. One may cite here, as examples of the new attempts at trans-cultural, inter-systemic synthesis, the pioneer essay by Third World jurist and now World Court judge, Mohammed Bedjaoui on the approach to a new international economic system,<sup>18</sup> and the imaginative excursus by Eastern European jurist and World Court judge and sometime Court President, Manfred Lachs, on the *role* of law teachers and law teaching over many different time periods and many different political-legal systems<sup>19</sup>.

Julius Stone became increasingly preoccupied, in his last years, with the challenge of *Macro-International Law*, and the elaboration of a new, more comprehensive and more representative in legal-systemic and legal-cultural terms, General Theory of International Law. Though International Law had been his first applied research field, it was not his major scientific-legal preoccupation over a lifetime of teaching and writing, having been made to yield to the conceived imperatives of general Jurisprudence. Stone's studies in International Law over the years, apart from his highly concentrated and rightly celebrated lectures to the Hague Academy of International Law in 1956 on the sociological approach to International Law<sup>20</sup> — which, as Stone himself was the first to acknowledge, were a "state of the art" exposition on the relevance and application of Sociological Jurisprudence teachings to International Law scholarship, without the attempt at projection of new substantive legal norms or principles — tended to be episodic. I think he regarded them, at first, as welcome interruptions to or diversions from his general theoretical studies, and, in any case, as applied field studies for application and testing of his more comprehensive hypotheses. Some of these applied International Law exercises, however, reveal themselves, in

---

18 M. Bedjaoui, *Pour un nouvel ordre economique international* (1979).

19 M. Lachs, *The Teacher in International Law* (1982).

20 Stone, "Problems confronting Sociological Enquiries concerning International Law", (1956) 89 *Recueil des Cours de l'Academie de la Haye* 61.



historical retrospect, as highly prophetic and well in advance of their legal time for they are demonstrations of acute political realism, and of an ability to anticipate concrete legal problems and to offer concrete and operational legal solutions, before the actual problem-situations themselves have been apprehended and certainly before they have become pathological and politically out of hand. One may offer, as an example of this prescience on Stone's part, his replication, six years before the event itself, of the scenario of the Cuban Missile crisis of October, 1962,<sup>21</sup> and his exploration, as a legal solvent therefore, of what is now referred to today, as the International Law category of anticipatory self-defence. And Stone was certainly the first — in application of the Sociological School of Law's insistence on scientific fact-finding as a pre-condition to rational legal problem-solving — to offer the suggestion of a White House-Kremlin, official emergency communication, *Hot Line* system,<sup>22</sup> as a means of avoiding irrational decisions, at the summit of World political leadership, flowing from simple misunderstanding or misinterpretation of quickly moving events in East-West inter-bloc relations.

## V. STONE AND A NEW GENERAL THEORY OF INTERNATIONAL LAW

In his *Visions of World Order*,<sup>23</sup> on whose final draft he worked in the awareness of his last, soon-to-be-fatal illness, Stone returned to a theme that he had first taken up several decades earlier, in debate with the most dynamic of the post-World War II American Legal Realist thinkers on International Law, and founder (with distinguished social scientist Harold Lasswell), of the American 'Policy Science' approach to law, Myres S. McDougal.<sup>24</sup> The debate had taken place before the Indian Law Institute in New Delhi, but, for reasons that are not now clear, was never fully published at the time. Stone's intentions to revise and expand the manuscript were delayed by other projects in other areas, and so the final version, as published in 1984, takes on something of a retrospective quality in which Stone surveys and assesses the range of Western thinking on World public order, and also the Western-based attempts to establish operational models for an effective World order system over the whole post-World War II era.

Stone, it must be acknowledged, was not a fan of the United Nations and of the U.N. Charter-based approach to international organisation generally. He was, however, too well trained in Sociology of Law and its lessons as to the

21 Stone, *Aggression and World Order. A critique of United Nations Theories of Aggression* (1958) 99-100. And see also Stone, *Legal Controls of International Conflict. A Treatise on the Dynamics of Disputes and War Law* (1954) 244, 262, 274; Stone, *Conflict through Consensus. United Nations Approaches to Aggression* (1977) 49.

22 Stone, *Quest for Survival. The Role of Law and Foreign Policy* (1961).

23 Stone, *Visions of World Order. Between State Power and Human Justice* (1984).

24 See e.g. M.S. McDougal and H.D. Lasswell, "The identification and appraisal of diverse systems of Public Order", (1959) 53 *Am J Intl L* 1 (reprinted in McDougal and Associates, *Studies in World Public Order* (1960) 3); see also McDougal, "International Law, Power and Policy: a contemporary conception" (1953) 82 *Recueil des Cours de l'Academie de la Haye* 137.

necessary relation between positive Law and societal facts to refuse to recognise the inevitable historical transition from a Western-dominated, legally Eurocentrist World public order system to a culturally and ideologically more nearly representative one, as reflected, for example, in the current United Nations General Assembly majority, and, by logical extension, in the successive benches of the World Court since the changes in the Court composition that have been effected by the constitutional use of the special, United Nations-based system of election of the judges, in the strong political reaction against the bitterly divided (single vote majority on the second tie-breaking vote of the Court President) Court decision in *South West Africa, Second Phase* in 1966<sup>25</sup>, with its seeming legal endorsement of the maintenance of the *Apartheid* regime in Southern Africa.

Stone's objections to the United Nations lay, rather, in his insistence, as a legal sociologist, on a necessary minimum relation between Law and effective Power; constitutional changes, going beyond the existing legal Veto of the original five Permanent Members of the Security Council and no doubt involving some sort of additional, weighted voting (corresponding to political, military or economic and financial power) in the General Assembly and the plenary sessions of specialised international agencies like UNESCO, might have met Stone's concerns, but these would, in constitutional machinery terms, have been virtually impossible to effect as formal amendments to the U.N. Charter and related documents. Like some other Western scholar-jurists, Stone also regretted those constitutional changes that involved a vastly augmented law-making competence for the General Assembly to fill the gap created by the Big Power legal Veto in the Security Council, and that had been effectuated through developing United Nations practice (constitutional convention) in the famous, Western-sponsored 'Uniting for Peace Resolution' of the days of the triumphant pro-Western voting majority in the General Assembly in 1950. In contradistinction to some of his Western colleagues, however, Stone did not have to offer any later-day *mea culpa* to excuse any earlier advocacy of just such a General Assembly-implied power, his training as a legal sociologist having always enjoined a prudent projection ahead, into possible alternative problem-constructs, of every new venture in constitutional law-making competence. For Stone was always aware, (as some of his professional colleagues and Foreign Ministry consultants, seemingly, were not), that the legal innovation that you sponsor jovially today because it happens to work to your advantage today, may be the rule that you will have to live with tomorrow when it does not.

Stone's distrust of abstract, a priori theories formulated without regard to tethering factual records — reflected in his criticisms of the U.N. General Assembly approach to definition of "Aggression"<sup>26</sup> and similar

---

<sup>25</sup> *South West Africa, Second Phase, Judgment*, (1966) ICJ Reports 6.

<sup>26</sup> Stone, *Legal Controls of International Conflict* (1954) 330; Stone, *Aggression and World Order* (1958).

non-functionally-oriented legal prescriptions — made him distrustful generally, of the ideal-type or ‘models’ building approach to world public order. Useless to commence with the ‘sermon on the Mount’ and yet another venture in drafting yet another World constitutional charter-in-the-abstract! His critique, in this context, of C. Wilfred Jenks’ call for a new “multicultural”, “multi-legal” approach to International Law,<sup>27</sup> is undoubtedly valid, though perhaps he under-valued the legally innovatory character of such an approach for the 1950s, and also the civil courage that it required for its distinguished British author, at that particular point in time, to insist on inter-systemic consensus (Western, Soviet, and also what we have now come to call the ‘Third World’), rather than the fact that a claimed rule may have been laid down or accepted in the past, as the elemental foundation of any contemporary, universal system of international law. Jenks was, after all, the product of an era in Western legal education in which the earlier linguistic skills of the International Lawyer had largely atrophied, and where the new, empirically-based, comparative techniques of study of law in general, and International Law in particular, had hardly developed. Stone is kinder perhaps towards Richard Falk<sup>28</sup> and his alternative world order models and constructs, though the same critique as already applied to Jenks’ ideas would appear a fortiori to apply here too.

The strongest criticisms by Stone are reserved however, for McDougal and for the Lasswell-McDougal instrumental, ‘policy-oriented’ approach to International Law<sup>29</sup>, with its emphasis on the dynamic of international law-making on law as process and not as a frozen cake of doctrine from past eras, and on the legal Values (the eight “Goal Values” in the original formulation) as a means of consciously shaping and ordering the historical unfolding of law for the future. The neo-Realist, dialectical-developmental emphasis in the Lasswell-McDougal approach, is its self-avowed principal ground of differentiation from the Sociological approach to International Law represented by Stone and other students of Roscoe Pound. It is open to the objection that the Values — once one descends from purely abstract, high-level, *primary* principles to more concrete, secondary principles that are more immediately utilisable in contemporary problem-solving — become highly impressionistic and also readily contestable in ideological and also basic ethno-cultural terms. The Lasswell-McDougal Value-oriented approach to re-making ‘classical’ International Law in a context of the new World Community societal facts, was at its most successful in the immediate post-World War II era of the late 1940s and the 1950s when there was indeed a remarkable societal consensus within the United States itself, as to the goals

<sup>27</sup> Jenks, *The Common Law of Mankind* (1958), critically analysed in Stone, *Visions of World Order* (1984) 15-19.

<sup>28</sup> See e.g. R. Falk, *A Study of Future Worlds* (1975); Falk and C.E. Black (eds) *The Future of the International Legal Order* (4 vols) (1969-72); and see the appraisal by Stone, *Visions of World Order* (1984) 33-40.

<sup>29</sup> Stone, *Visions of World Order* (1984) 20-32; 133-5.

and directions of U.S. foreign policy, and when the American vision of World public order projected itself as imaginative and optimistic and forward-looking to the U.S. political-military allies and associates around the World, and so could rally a substantial inter-systemic consensus as to its concrete meaning and application in actual problem-situations. It is far more difficult to maintain any such larger inter-systemic consensus — even a purely ‘Western’ consensus — in an era of transition and rapid change, such as the 1980s, when old political-military alliances sunder and the disagreements threaten to touch not merely issues of legal methodology, but also choice of actual substantive-legal solutions as in the *Nicaragua v U.S.* conflict before the World Court in 1984 and 1985. Stone’s objections to what he considers to be a blurring or confusion between the empirical and the non-empirical in McDougal’s thinking, and to McDougal’s “vacillations” (in Stone’s characterisation)<sup>30</sup> leading on to a highly subjective and (in contemporary U.S. national terms) relativist, Natural Law-style approach to World public order,<sup>31</sup> should be understood in this light, even if as Stone himself seems sadly to concede, the scientific relativism of Sociological jurisprudence as applied in contemporary international societal World Community terms, would hardly be likely to yield any more precise objectively verifiable result that could command any broadly-based inter-systemic consensus. Perhaps the answer lies in still more rigorous use of the comparative, inter-systemic approach and the induction of general legal principles — more or less common to several, if not all, legal and cultural systems — on a sort of new *jus Gentium* basis. John Hazard, using his expertise, for a Western legal scholar, in Soviet as well as Western-based International Law, made an important beginning in the 1950s and 1960s, to the establishment, on an empirical basis, of State practice supporting legal doctrine, of common principles of East-West (Soviet-U.S.) legal competition and interaction<sup>32</sup>; and though there has been too little attempted follow-up thereafter, in terms of widening the range of inquiry and therefore the field for useful generalisation, to other major legal systems — the Chinese Communist system as a prime example — the basic method remains well tried and tested and basically un-faulted. It would seem the next, and most logical step for a latter-day revived sociological approach to Law and to the up-dating, and progressive development in accordance with the United Nations Charter mandate, of International Law in the new, multi-cultural World Community of our times.

---

30 *Id.*, 20.

31 *Id.*, 54.

32 See e.g. J.N. Hazard, “Coexistence Codification reconsidered” (1963) 57 *Am J Intl L* 88; Hazard, “The Sixth Committee and New Law” (1963) 57 *Am J Intl L* 604; Hazard, “New personalities to create New Law” (1964) 58 *Am J Intl L* 952. On the Soviet side, see the various works of G.I. Tunkin, in particular Tunkin, “Coexistence and International Law” (1958) 95 *Recueil des Cours de l’Academie de la Haye* 59. See, generally, the present author’s ‘Peaceful Coexistence’ and soviet-Western International Law (1964); *The International Law of Detente* (1978).