VICTORIA UNIVERSITY OF WELLINGTON

SEMINAR, 28 APRIL 1981, 2 P.M.

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SOCIOLOGICAL JURISPRUDENCE: ROSCOE POUND AND JULIUS STONE

One of the many links between Australian and New Zealand lawyers is our shared claim to part of the career of one of the most important writers in 20th century common law jurisprudence: Professor Julius Stone. Stone was born in England in 1907. He was educated at the Universities of Oxford, Leeds and Harvard. He was a scholarship boy and whether for that reason, suggested anti-semitism or other reasons, the fact is that in 1938 he repaired to the Antipodes, accepting appointment as Dean of the Auckland Law School. He held this post until 1942 when he was appointed Challis Professor of International Law and Jurisprudence in the University of Sydney. He held that post until 1972. Like Lord Denning, he manifests all the Judeo-Christian virtues save retirement. He was appointed Visiting Professor of Law of the University of New South Wales, a post he still holds. His output of scholarly writings on jurisprudence and sociology have not abated. In this very month, the Law Quarterly Review will publish his rebuttal of the important piece by Professor P.S. Atiyah, 'From Principles to Pragmatism'.[1] It is exactly a month since the University of Sydney, to whom he devoted the great part of his professional life, honoured him with a Doctor's Degree honoris causa. It was in New Zealand that he was first appointed to a Chair of Law. He taught me and many of the lawyers who now hold positions of influence in the law and public life of Australia.

Stone was in turn profoundly influenced by Dean Roscoe Pound of the Harvard Law School, under whom Stone had taken his S.J.D. and with whom he taught between 1933 and 1936. Pound's influence on Stone was profound and was handsomely acknowledged. Through Stone, Pound's practical and realistic approach to jurisprudence — an approach entirely compatible with the spirit of the common law of England — found acceptance amongst young lawyers of Australia and New Zealand in the 1940s, 1950s, 1960s and beyond. It is only today that the full impact of Stone's jurisprudential writings upon lawyers in this part of the world is coming to full flower.

Roscoe Pound's earnest concern was to turn a thorough understanding of the science of the law to practical account. He expressed this concern in a book review of Stone's effort to survey the field of modern jurisprudence, The Province and Function of Law.[2] In his book review, Pound expounded his practical approach to jurisprudence:

> I have always doubted whether the science of law can wait for ... ultimate theoretical problems to be settled, in the meantime holding up its practical task of finding how to adjust relations and order conduct in view of the conflicts and overlappings of interests presented to it in controversies demanding speedy settlement'.[3]

In 1912 in the Harvard Law Review, Pound had listed a number of practical objectives for a sociological jurisprudence in common law countries.[4] When in 1946 Stone wrote Province, he asserted that these objectives remained 'urgent and, regrettably, for the most part, unexecuted'.[5]

Today, nearly 70 years on, Pound's objectives still remain fresh and relevant for us in Australia and New Zealand. Among them was the call for a study of the actual social effects of legal institutions, legal precepts and legal doctrines of the 'law in action' as distinct from the 'law in the books'. In Pound's view, sociological study was an essential preliminary step to the preparation of sound lawmaking. In 1946 Stone explained this approach to lawmaking in terms that are still apt:

> 'A mere guess of politicians combined with the skills of a legal draftsman, was not an adequate basis of law reform, nor was a mere armchair analytical legal study of existing or alternative rules. The kind of preliminary exploration of social facts made by Departmental Committees and Royal Commissions in British countries on special occasions ought in this view to be a regular part of the legislative process'.[6]

Among Pound's objectives, two are of the greatest importance for my present purposes. These call for the establishment of a government department with functions and expert personnel, adequate to take a full share in the programme of law improvement and for a jurisdic study of the more effective achievement of the identified processes of law. Stone explained that the proposal:

> 'was related in particular to the need for adequate social inquiries prior to legislation, and to the evil effects of one-sided lobbying in the absence of such machinery. It would provide not only a body of experts for long-range investigation, but a clearing house for day-to-day grievances concerning the actual operation of law, and for proposals for its improvement'.[7]

Between 1964 and 1966 Julius Stone published the successor volumes to Province. In Social Dimensions of Law and Justice[8], he expanded the notion of routine 'ministering to justice' into a chapter which addressed the way in which, institutionally, a reconciliation of the law and the perceived needs of justice could be secured. Various efforts had been made in England to this end. Bacon, for example, had urged at the end of the 16th century the appointment of six commissioners, whose duties it would be to investigate obsolete and contradictory laws and to report regularly to Parliament. In the middle of the 19th century, a series of Common Law Commissioners, Real Property Commissioners and Ecclesiastical Court Commissioners developed reports to codify and simplify great areas of the English law.[9] We in Australia and New Zealand have inherited the post-Benthamite efforts at codification which marked the later period of the 19th century. Part-time law reform bodies were established in earnest during the 20th century. In Britain, Australia and New Zealand, some of these are still functioning.[10] However, by the mid 1960s, following the elevation of Lord Chancellor Gardiner, we saw the development of new institutions, full-time law reform bodies with tasks for the comprehensive overhaul of the legal system. Although New Zealand has adhered to part-time committees, most other countries of the Commonwealth of Nations, and most jurisdictions in federal countries such as Australia and Canada, now have permanent full-time law reforming agencies.

In 1966, in Social Dimensions, Julius Stone turned, with new urgency, to the need for the provision of permanent institutions which could minister to law and justice, but in a way sensitive to community perceptions of justice:

> 'The functions demanding fulfilment have, if anything, become clearer as the unsolved problems of the past are compounded with emergent new problems. Adequate organisation and personnel are necessary to keep under review, on its professional, judicial and administrative sides, the working of the legal order towards community-approved ends; to conduct adequate research prior to legislative action, ... to build up expertise for these tasks and also for more long-range continuing investigations; and to provide a clearing house for day-to-day grievances of the citizen affecting the actual operation of law, which may in turn reveal defects calling for reform'.[11]

Stone referred to the problem of the growing bulk of the law. He allowed the possible use of public opinion polls to discern grievances and citizen perceptions of justice.[12] He accurately predicted the spread of the Ombudsman idea, after its acceptance in New Zealand.[13] He emphasised again the need for a regular, routine and less ad hoc approach to the tasks of law reform:

> 'A different kind of organ, the full-time standing law revision commission, has sometimes been charged with continuing overhaul of legislative output, not necessarily limited to pruning and consolidation. The New York Commission has a most notable record. That such tasks can no longer be left, as formerly, to secular (or even millennial) purges seems clear enough'.[14]

But he then noted the importance of expanding law reform agencies by reference to the tenets of the realistic and sociological jurisprudence which was his hallmark:

> 'A variety of Law Revision or Law Reform Committees in British countries has been charged with making recommendations as to changes in the law on particular matters. Consisting of Judges, practitioners and an occasional academic lawyer, such committees, though in a sense standing bodies for law reform, remain essentially part-time and ad hoc in their efforts, and only legal in expertise. The notable series of legal amendments which they have promoted has been on matters which mainly trouble the lawyers or which lawyers think worry businessmen, making less impact on general problems of law reform. Functionally, indeed, there may be a real distinction between legal deficiencies in the former sense, and social deficiencies of law which are of more general (sometimes called 'political') concerns'.[15]

In short, Stone's vision for institutional law reform in common law countries, as written in 1966, has proved most percipient. He concedes it as an institution which, together with the Ombudsmen, would receive complaints about perceived unfairness and injustice in the operation of current laws and practices. It would generalise those complaints to achieve directions for reform and improvement. It would, however, search for improvement by the light shed not simply by a study of the verbal analyses of ethics and the law. It would also search out facts concerning the current operation of the law 'in action' and it would do so with the benefit of statistical, economic and other knowledge gleaned from the social sciences. It would seek to be released from the perceptions and priorities fixed by lawyers alone, not contented by a study only of the 'law in the books' but determined also to find out about 'the law in action'.[16] In essence, this is the principal rationale for taking law reform proposals out to the people. It is necessary to do so because the law is the people's business. It is neither appropriate nor safe to leave the reform of the law containing the slightest scintilla of policy to lawyers only. Pockets of 'last-ditch resistance' to the 'invasion of extra-legal concerns' are listed by Stone.[17] But 'even in British countries',

he asserted, 'we have at least passed well beyond the stage when the concern of lawyers was social purposes and social effects were largely dismissed as "too allusive"'.[18] Above all, Stone preached Pound's doctrine that law reform, if it was to last, would need to be grounded not merely in the rumination of a body of 'experts', and moreover of legal experts only, but in the activities of institutions alive to the need for adequate social inquiries as the basis for determining, in the first place, what, if anything, was the problem, and, in the second place, what, if anything, could be done worthy of the name 'reform'.

This conception of institutional law reform has profoundly affected the direction of law reforming agencies in Australia, particularly, at a federal level, in the Australian Law Reform Commission. It must be admitted that the Australian model differs in significant respects from institutional developments elsewhere, including in New Zealand. For good or ill, the impact of Stone's jurisprudential teaching and the message of Pound's common law sociological jurisprudence, must be cited as an important reason why law reform in Australia has taken its particular course.

THE SOCIOLOGY OF MODERN LAW REFORM

There is no doubt that the establishment of permanent law reforming agencies in most of the jurisdictions of the Commonwealth of Nations represents a remarkable development. The establishment of the permanent New South Wales Law Reform Commission in 1965 was followed by the creation of permanent law reforming agencies in Queensland in 1968[19], in South Australia in the same year[20], in the Australian Capital Territory in 1971[21], in Western Australia in 1972[22], in Victoria in 1973[23], in Tasmania in 1974[24] and in the Northern Territory of Australia in 1976.[25] The Commonwealth Act to establish a federal law reform commission was approved by the Australian Parliament in 1973, although the first members of the Australian Law Reform Commission were not appointed until 1975.

The developments in Australia and Britain had been reflected by similar developments in all parts of the Commonwealth of Nations. Law commissions have been created in most jurisdictions of Canada, in India and Sri Lanka, in the islands of the West Indies, in Papua New Guinea, Fiji and Tonga, and throughout the continent of Africa. In part, this explosion of law reform may reflect nothing more than the pursuit of the fashionable. In part it may even follow realisation by some politicians that difficult issues can occasionally be defused for a time by the ready availability of a permanent law reform institution. In part, it may represent political tokenism: the creation of a small ill-funded, under-staffed body almost as a placebo for citizen complaints about defects in the law's rules and procedures.[26]

Another interpretation of the 'booming industry'[27] of law reform institutions is that lawmakers recognised the proliferation in number and complexity of the problems of adjusting the law to a time of rapid change. Coinciding with this realisation is an appreciation of the incompetence or unwillingness of present lawmaking institutions (the Parliament, the Executive Government and the courts) adequately to meet the needs of legal modernisation and revision. The permanent law reform agencies have been created to fill the resultant institutional vacuum.[28] This is not the occasion to review the failure of the other institutions: the distraction of Parliament and the Executive by a 'continuous and elementary election campaign'[29] and the inability or disinclination of judges to adapt the forensic medium to the needs for radical legal change and modernisation. It is sufficient to note that Parliament and the Executive Government, unaided, are not attending to the many needs for law reform. Moreover, a series of decisions of the High Court of Australia, especially during the past two years, has underlined the view of the majority that the courts, at least in Australia, are not well adapted, nor the judges necessarily the right persons, to effect comprehensive legal reforms. Similar considerations doubtless exist in New Zealand courts:

> '[T]here are more powerful reasons why the Court should be reluctant to engage in [moulding the common law to meet new conditions and circumstances]. The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not and cannot carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community, and whether they command popular assent. Nor can the Court call for and examine submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments that are made by governments and law reform agencies as desirable, if not essential, preliminaries to the enactment of legislation by an elected legislature. These considerations must deter a Court from departing too readily from a settled rule of the common law and by replacing it with a new rule'.[30]

These words of Mr. Justice Mason, himself a graduate of Julius Stone's instruction, reflect Stone's view that law reform, and indeed, so far as possible, legislation generally, should be based upon thorough investigations, a consideration of citizen and other complaints and wide-ranging inquiries directed to the current and proposed operation of the law. They also reflect, and indeed it is later spelt out in terms, Stone's 'open eyed' recognition of the judicial role in law making.[31] The fact remains that in this case, as in other Australian cases, the High Court of Australia has asserted the limited function of the Court in developing new rules, even of the common law, in the face of well-established authority.[32]

The 'wide-ranging inquiries and assessments' to which Mr. Justice Mason referred in the passage just cited have become the hallmark of law reform technique as it has been developed in Australia. Certainly from the outset of its work, the Australian Law Reform Commission has sought to broaden the procedures of consultation traditionally adopted by committees of inquiry in Britain, Australia and New Zealand. Its efforts have now taken it well beyond the 'working paper' as it was developed by the English Law Commission.[33] Working papers of most law reform bodies are clearly aimed largely at a legal audience. In their availability, mode of express, language and approach, they are usually addressed to lawyers and are not very effective ways of communicating with the public at large.[34]

Lord Scarman, the first Chairman of the English Law Commission, described the importance of the procedure of consultation in words which point the way beyond consultation limited to the legal community only:

> [It] is a lengthy and time-consuming business. Though it imposes delay, it is the key to quality and acceptability. Consultation, wide enough to embrace all interests and deep enough to expose all the problems, may take a long time: but it can and usually does mean a swift passage through Parliament of a non-controversial Bill to give effect to a law reform proposal. At the very least, it will ensure that controversy is limited to genuine issues upon which a policy decision has to be taken'.[35]

In these comments are reflected the problems of taking law reform beyond the legal expert and indeed beyond the expert to the community as a whole.

CASTING A WIDER NET

Interdisciplinary consultations. Oliver Wendell Holmes suggested that the constructive lawyer of the future would be the 'man of statistics and the master of economics'.[36] The first procedure to fulfil this prognostication in the area of institutional law reform has been the special effort made by the Australian Law Reform Commission to secure in all of its tasks a number of consultans from disciplines outside the law, relevant to the task in hand. Because all, save one, of the Commissioners of the Australian Law Reform Commission are lawyers, and because many of the projects referred to the Commission for report involve non-legal expertise, an effort is made at the outset of every project to secure as consultants persons, lawyers and non-lawyers, who will have relevant expertise to offer as the project develops. In choosing consultants, the Commission has looked to a number of criteria. The first consideration is the possession of special related knowledge and information. Another is the desirability of securing consultants from different parts of the country. The Commission has also sought to balance competing attitudes and interests. Thus, in the project on introduction of class actions in Australia, the President of the Australian Consumers Association sits down with representatives of business and industry. In the project on improvement of debt recovery laws, the Executive Director of the Australian Finance Conference takes part, with persons experienced in helping and counselling poor debtors. In the project on the laws governing human tissue transplantation, medical experts of differing surgical disciplines were joined by a professor of philosophy, a Catholic theologian and the Dean of a Protestant College of Divinity. In the reform of police procedures, legal academics and civil liberties spokesmen debate with senior police officers and other Crown representatives. For the reform of defamation laws, no fewer than 30 consultants were appointed, including journalists in the printed media, radio and television, newspaper editors and managers, legal academics, experienced barristers, lecturers in journalism and an Anglican divine.

The end result of these procedures is a remarkable collection of interdisciplinary expertise which has greatly enriched the thinking of the law commissioners. Consultants attend meetings with commissioners, review in-house publications and generally add their knowledge and perspectives to the development of law reform proposals. They are in the nature of a chorus, cajoling, reminding, insisting and usually, finally, harmonising in the development of reform proposals. On some points, consensus cannot be achieved. Reports of the Commission make it plain that the responsibility for recommendations is that of the commissioners only. However, there is no doubt that this interdisciplinary team has profoundly affected the reports of the Australian Law Reform Commission. The bias of lawyers, their perceptions of law reform proposals — and what Stone calls 'what lawyers think' are the

problems of law reform — are exposed to a constant process of interdisciplinary exchange. The needs for such exchange are readily apparent in many of the tasks given to the Australian Law Reform Commission. A large proportion of these, chosen by responsive politicians[37] have been addressed to controversial social questions upon which lawyers, plainly, do not have a special claim to expertise. Reform of child welfare laws, for example, requires the participation of medical practitioners, psychiatrists, police and other expertise.[38] Development of a law on privacy requires, nowadays, the close participation of computer and communications experts.[39] The issue of whether Aboriginal customary laws should be recognised in Australia requires anthropological and philosophical expertise as much as it does legal.[40]

The layman's discussion paper. The second development aimed to secure the involvement of non-lawyers in the process of law reform in Australia has been the development of the brief discussion paper. Brevity is a discipline that does not always come easily to lawyers, including law reformers. The traditional working paper was often too long, too complex and too boring to secure the very aim in target, namely widespread consultation. For this reason, the Australian Law Reform Commission, and lately some of the State commissions in Australia, have produced, in addition to detailed papers, short discussion papers and pamphlet summaries of interim proposals. These state briefly the policy issues being posed for professional and public comment. By arrangements with law publishers, the Australian Law Reform Commission's discussion papers are now distributed with the Australian Law Journal and other periodicals, thereby reaching most of the lawyers of Australia. The result has not always been the desired flood of professional comment and experience. However, there has been some response from lawyers in all parts of the country, in a way that would simply not occur in response to a detailed working paper of limited distribution.

Discussion papers of the Australian Law Reform Commission are now widely distributed to other interested groups outside the law. Copies of summary pamphlets are reprinted in or distributed with professional journals in disciplines related to the issues under consideration. In the case of the discussion paper on Aboriginal customary laws, a new procedure has been adopted, involving the distribution of cassette tapes, summarising in simple language the problems and proposals. Translations into principal Aboriginal languages have been concluded. These cassettes are now being circulated for use in the far-flung Aboriginal communities of Australia. They will permit and indeed promote discussion and response in a way that no printed pamphlet could ever do.

Public hearings. The third innovation to escape the dangerous concentration on what 'lawyers think worry' citizens, has been the public hearing. Before any report of the Australian Law Reform Commission is written, public hearings are held in all capital cities of the country. Lately they are also being held in provincial centres. In connection with the inquiry into Aboriginal customary laws, they will be held in outback towns and Aboriginal communities. Public hearings have not been held in England.[41] A fear has been expressed that they might descend into 'many irrelevant time-wasting suggestions'.[42] This fear reflects the lawyer's assurance that he can always accurately judge what is relevant. Although it is true that in the public hearings of the Australian Law Reform Commission, time is occasionally lost by reason of irrelevant submissions, the overwhelming majority of participants in public hearings have proved helpful, thoughtful and constructive. In addition to public advertisement, specific letters of invitation are now sent to all those who have made submissions during the course of the inquiry up to the date of the hearing. Although hearings had a shaky start, for Australians are not accustomed to such participation in law making, they are now increasingly successful, if success is judged by numbers attending and the utility in the provision of information and opinion. Many of the hearings proceed late into the night. Evidence and submissions are taken by the commissioners, usually required by an inexorable airline timetable, to join an early morning flight to another centre. In recent public hearings conducted into Aboriginal customary laws, literally hundreds of Aboriginals converged on remote hearing centres in order to listen and to participate: presenting very great logistic problems for an institutional body of small resources.

The notion of conducting public hearings was suggested many years ago by Professor Geoffrey Sawer of the Australian National University. He drew attention to the legislative committees of the United States of America and the utility in gathering information and opinion, involving the community, as well as the expert, in the process of legislative change.[43] The hearings have several uses. They bring forward the lobby groups and those with special interests, including the legal profession itself. They require an open presentation and justification of arguments about the future of the law under study. They encourage ordinary citizens to come forward and to 'personalise' the problems which hitherto may have been seen in abstract only. In a number of inquiries of the Australian Law Reform Commission, notably those on human tissue transplants[44] and compulsory land acquisition[45], the personal case histories help the Commission to identify the lacunae or injustices in the law needing correction. Quite frequently, problems are called to attention which have simply not been considered. Defects in tentative proposals come to notice and can then be attended to. The media attention which typically accompanies the series of public hearings and the companion industry of professional seminars, has itself a utility which cannot be under-estimated.

It raises community expectations of reform action. It placates those community groups which rightly insist on having their say. It ensures that when politicans receive the report proposing law reform, it has been put through a filter of argumentation in the community to which they are electorally responsible. There is also a point of principle. Both in Province and in Social Dimensions, Stone cautioned about the danger of 'one side lobbying' in the absence of adequate social inquiries prior to legislation.[46] The public hearings of the Australian Law Reform Commission, as they have developed, provide a forum for the articulate business interest and the well briefed government administrator. But they also provide the opportunity for the poor, the deprived, the under-privileged and the disaffected or their representatives to come forward and, in informal circumstances, to offer their perception of the law in operation and their notion of relevant injustice and unfairness. In point of principle, it is important that ordinary citizens should be encouraged to have their say in the review of important laws which affect them. There is an increasing awareness that the theoretical 'say' through the ballot box is not always adequate. New machinery is needed which at the one time acknowledges realistically the impossibility of hearing everybody's opinion, but encourages those who wish to voice their grievances and to share their knowledge to come forward and to do so in a setting which is not over-formal or intimidating.

Use of the public media. A fourth relevant innovation of the Australian Law Reform Commission has been the use of the public media: the newspapers, radio stations and television, to raise awareness of law reform issues in a far greater community than would ever be achieved by the cold print of legal publications. The public media have attendant dangers. They tend to sensationalise, to personalise and trivialise information. A five minute television interview, or even a half hour 'talk back' radio programme, scarcely provides the perfect forum for identifying the problems which law reformers are tackling. For all this, a serious attempt to involve society in the process of law improvement must involve a utilisation of the modern mass media of communication. In Australia, the technique of discussing law reform projects in the media is now a commonplace, both at a federal and state level. The Prime Minister of Australia[47] has described the process in terms of approbation as 'participatory law reform'. The Governor-General of Australia has referred to the important mix of 'great intellectual capacity with a flair for publicising the issues of law reform' and attracting 'public interest to a degree unparallelled'.[48]

The need to face up to the reality that a good idea needs more than to be put forward to be acted upon and to reject the 'intellectual snobbery' of the retreat to lawyers only or to experts only was recently stressed in Britain by Professor Michael Zander.[49] But years before, it was underlined by Stone in his warning that lawyers were not always the best people to identify the problems of law reform, particularly the social deficiencies of the law which are of general community concern.[50]

Surveys, polls and questionnaires. A fifth innovation of law reform technique is specifically relevant to Stone's call for the involvement of non-legal expertise in the business of law reform.[51] This is the utilisation of surveys and questionnaires in the development of law reform proposals. The idea of using surveys for the purposes of law reform consultation is not new. Calls for the greater use of surveys in England[52] and elsewhere tended to fall on deaf ears. By and large, lawyers have a well developed aversion to the social sciences generally and empirical research and statistics in particular.[53] The English Law Commission resorted to a social survey in developing its proposals on matrimonial property. They are expensive and take a lot of time. But they represent a practical endeavour to 'harness the social sciences to law reform'.[54] A recent report by the Joint Select Committee on the Family Law Act in Australia urged a review of the law relating to matrimonial property by the Australian Law Reform Commission.[55] Significantly, it proposed, as a prerequisite, the conduct of a social survey to gauge community opinion.[56]

Already, the work of Australian law reform bodies has involved the use of surveys of opinion, the assistance of social science techniques and the utilisation of the analysis only possible because of the development of computers. For example, in a project on the reform of debt recovery laws, the Australian Law Reform Commission is collaborating with colleagues in the states. Specifically, with the assistance of the New South Wales Law Reform Commission, it is scrutinising, with the aid of computers, returns on a survey conducted concerning all debt recovery process in New South Wales courts over a period of a year. Both the Australian and New South Wales Commissions came to the conclusion that sound law reform in this area could only be proposed upon a thorough appreciation of the actual operation of current laws. This required a detailed study of the way in which the debt recovery process was currently operating. That study is now drawing to its conclusion and will form the basis of the reform reports. The Scottish Law Commission, in its work on a related topic, also conducted a survey of a similar kind.[57]

In the Australian Law Reform Commission's project on the reform of child welfare laws, a survey was administered to police in respect of all matters involving children and young persons over a given period. The aim was to isolate the considerations which lead to some children being charged and others being cautioned or warned. Examination of court files over a period of a year and questionnaires administered to children in institutions and those coming before the courts sought out the perceptions of the child welfare process as seen by the 'consumers'. Such persons are unlikely to attend public hearings or seminars, whatever efforts may be made to make them informal and congenial. Yet their perceptions may be vitally important for identifying elements of injustice and for pointing the way to reforms which will actually address the problems of 'the law on the ground', as distinct from verbal speculation about the 'law in the books'.[58] Statistics and social surveys can provide a means by which inarticulate and disadvantaged groups can speak to law makers.

The gathering of facts by surveys is not now very controversial. Holmes' prediction has come about: the constructive lawyer is already the 'man of statistics'. More controversial is the collection of opinion by procedures of surveys. The extent of the controversy was discovered by the Australian Law Reform Commission when it conducted a unique national survey of Australian judges and magistrates involved in the sentencing of federal offenders. The details of the survey, its purposes, methodology and findings are to be found in the Commission's interim report of that title.[59] The survey was voluntary and anonymous. Its completion would have taken, on average, about an hour and a half of the time of extremely busy and supposedly conservative professionals. Notwithstanding scepticism about the value of surveys generally and the usefulness of the sentencing survey in particular, it is reassuring, and perhaps a sign of the times, that the response rate was equivalent to 74% of the judicial officers sampled. In a vigorous defence of basing law reform on empirical findings, the officers who conducted it pointed out, in language reminiscent of Pound and Stone, that legal research in Australia, in the tradition of English jurisprudence, had until now been 'predominantly positivist and analytical rather than purposive or sociological'.[60] Resistance to an analysis of sentencing by the techniques (and partly in the language) of sociology, was evident in some quarters, especially in the judiciary in Victoria. The participation of the latter was much lower than the national average.[61] Reporting on this, the commentators on the survey responded in terms which, one suspects, would have quickened Pound's heart:

> 'The original aim of establishing Law Reform Commissions included the provision of a bridge between the judiciary and other arms of government by which the Judges could, without compromising their independence, bring to the attention of other law makers the defects in the laws they administered. From the point of view of the Australian Law Reform Commission, this approach to the judiciary was entirely orthodox. With regard to the criticism that the survey deals with matters of sociology ... the individual sentencer plays a crucial role in the sentencing process. Sentencing is not simply the application of abstract rules and principles to specific situations. It is an inherently dynamic and essentially personal process. If this observation is a mere 'matter of sociology', then it would appear to be shared by other lawyers, defendants and by a number of judicial officers as well. The process of sentencing is not exclusively one of syllogistic legal reasoning. That is why some of the questions raise issues which have fairly been described as sociological and others seek to identify relevant personal values of judicial officers'.[62]

In addition to the survey of the judiciary, the Law Reform Commission conducted surveys of federal prosecutors[63], and prisoners[64] and public opinion. As well, with the assistance of newspapers and others engaged in public opinion sampling, the Commission has been able to include questions relating to public perceptions in national surveys of public opinion. In every case, the questions are designed by properly qualified specialists in public opinion sampling. So far, it has been possible to submit the questions, on issues such as criminal punishment and privacy, without cost to the Commission. Although we are a long way from surrendering recommendations and action on law reform to the vagaries of transient opinion polls, suggestions for reform, particularly in a volatile political climate, are better made against a clear understanding of public opinion, as scientifically shown by the procedures now available for its discovery. This is yet another procedure foreshadowed by Stone.[65]

Consulting special groups. There are other initiatives which could be described to demonstrate the way in which institutional law reform today is seeking out a thorough understanding of legal problems as perceived by consumers and participants, as well as by lawyers. For example, in the project on child welfare laws, care has been taken to conduct informal discussion at schools and at children's shelters, with the young people of the relevant jurisdiction. The discussions are conducted in an unstructured way and at public, private and church schools, schools in richer and poorer suburbs and schools run according to unorthodox as well as orthodox teaching traditions. The results may not be particularly scientific. But it provides a corrective to an adults-only perception of children's

involvement with the law. Likewise, a large minority in Australian society, migrants, non English-speaking residents, are consulted in every project. Through ethnic newspapers, radio and television, and through representatives and institutional spokesmen, efforts are made to secure the special perceptions they have of the operation of a legal order which in so many of its institutions, rules and procedures, is profoundly different from those of their countries of origin. To heed Holmes' warning that the constructive lawyer should be a 'master of economics' care is being taken in a number of projects to weigh and express the competing costs and benefits of a particular reform. In the past this equation has been unexpressed and ill-defined. In the future we are sure to see more of it in judicial reform[66], in administrative reform[67] and in the work of permanent law reform bodies. In the inquiry into class actions, for example, the Australian Law Reform Commission has initiated discussions with the Centre for Policy Studies at Monash University, specifically to identify the criteria which should be weighed in judging whether a class action procedure could be warranted in Australia on orthodox cost/benefit analysis. Consideration of the costs of alternatives was a major factor identified to justify the Commission's recent proposals concerning the regulation of insurance intermediaries in Australia.[68]

CONCLUSIONS

This essay is a case study on the application to legal institutions of the writings of two great law teachers of this century: one of whom, Julius Stone, has an important link with New Zealand. Although, so far, permanent, full-time law reforming machinery has not been established in New Zealand, the setting up of such bodies in so many jurisdictions of the English-speaking world reflects a common theme. This is the importance of consultation to procure information and opinion concerning the direction for the improvement of the law and the administration of justice in a time when society is changing rapidly.

To the consultative working paper of the English Law Commission, the weekend university seminar, scholarly articles and lectures and dialogue within the legal profession, the Australian Law Reform Commission and now other law reform agencies in Australia, have added a number of new procedures of consultation which follow logically from the rationale of consultation. These new methods include the appointment of a team of interdisciplinary consultants, the widespread, free distribution of discussion papers and pamphlets outlining in a brief and interesting way proposals for reform, the conduct of public hearings and special group seminars in all parts of the country, and the use of the printed and electronic media to bring law reform 'into the living rooms of the nation'. More recently experiments have been conducted with new procedures of

consultation, including surveys, questionnaires and public opinion polls. Special efforts are now being made to reach out to particular groups which may be affected by proposals for reform, including young persons, Aborigines, prisoners and ethnic or linguistic minorities.

If there is a justification for the establishment of independent law reform commissions to help reconcile the law and justice, it lies principally in the capacity of such bodies to do a better job than other agencies because they can consult more widely and involve the relevant, interested audience in the business of improving the law. Because they are independent of government, they will not embarrass political leaders by the appearance of either commitment or indecision on their part. But they will ensure that controversial, difficult issues are properly discussed in the community before reformed laws are proposed. The last word remains with the elected representatives in the Executive Government and in the Parliament.

The exhaustive efforts to take law reform proposals beyond the lawyers and beyond the experts to the community at large can be readily justified. They permit the gathering of factual information, particularly expert information. They secure a statement of relevant experiences, notably experiences which illustrate and individualise the defects of the law. They procure a practical bias in law reform proposals, because they must be submitted to the scrutiny of those who can say how much the reforms will cost and whether or not they will work. They gather commentary on tentative ideas which allow the Commissioners to confirm, modify or abandon their tentative views, if shown to be wrong. They aid in the clearer public articulation of issues and arguments for and against reform. Furthermore, the whole process raises the public debate about reform of the law. It ensures that antagonists get to know each other and, usually, to come to an understanding and respect for each other's views.[69] They raise community expectations of reform of the law both in specific improvements to the legal system and routine, ongoing consideration of law reform generally. Expectations of the latter may well promote the devotion of more resources for legal renewal than has been the case in the past either in Australia or New Zealand.

But quite beyond these practical advantages, there are certain long-run effects which the procedures of consultation may have advantageous to the law and to its practitioners. In a sense the greater willingness to contemplate fuller public debate about social policy behind the law mirrors the advance in openness of government, lawmaking and public administration occurring in most Western societies, including Australia[70] and New Zealand.[71] This, in turn, is a reflection of populations with higher standards of general education and better facilities of knowledge and information. Procedures for a

more open public consultation about the policy of the law permits a more public statement and examination of competing vested interests. They tend to 'flush out' the competing lobbies and to bring into the open the social values which the law is seeking to defend and protect.

Taking law reform proposals to the community at large may also have indirect effects which are beneficial. The social education which is involved in explaining the defects of the law may help to generate a perception of the injustices which will otherwise be shrugged off, overlooked or not even perceived. A discussion, over a number of years in a thoroughly public way, of alleged unfairness in this or that law or practice, tends, in a liberal society to promote general acceptance of the need to remove a proved injustice repeatedly and publicly called to attention.

Beyond the arguments of utility, both for the law reforming agency and for society as a whole, there is the point of principle to which Pound addressed our attention 70 years ago, and to which Julius Stone reverted many times. The obligation to reconcile the law with modern perceptions of justice cannot be attempted by a 'mere armchair analytical legal study of existing alternative rules'[72], political hunches or playing with legislative words. Whilst law reform remains the concern of lawyers only, it will inevitably tend to be confined to narrow tasks, non-controversial and technical, which do not represent the areas of urgency which would be identified by ordinary citizens.[73] But when we go beyond the safe backwaters of so-called 'lawyers' law', it is essential to acknowledge the sociology, statistics and economics of the law, to broaden the base of our research and to cast more widely the net of expert and community consultation.

FOOTNOTES

* This essay is a shortened and modified version of a chapter, 'Law Reform as "Ministering to Justice"', to be published in A.R. Blackshield (ed), Volume to Honour Professor Julius Stone, UNSW Press, 1981, forthcoming.

1. Reprinted, 55 Iowa Law Rev, 1249 (1980). See [1981] Reform 13. For Julius Stone critique see J. Stone, 'From Principles to Principles', (1981) 90 ??? LQR, April 1981, forthcoming.

2. J. Stone, 'The Province and Function of Law', Sydney, 1946 (hereafter 'Province').

3. id. 737.

4. 25 Harvard L.Rev 513 (1912).

5. Province, 406.

6. Province, 408-9.

7. id., 412.

8. J. Stone, Social Dimensions of Law and Justice, Sydney, 1966 (hereafter 'Social Dimensions').

9. (1957) 31 ALJ 340.

10. Those still functioning include the Criminal Law Revision Committee (England), the Law Reform Committee (England), the Victorian Chief Justice's Committee and the Victorian Statute Law Revision Committee, and the New Zealand Law Reform Committees. On the New Zealand Committees, see G. Orr, 'Law Reform and the Legislative Process', (1980) 10 VUWL Rev. 391. Cf. D.L. Matheson [1978] NZLJ 442 and [1981] Reform, 25.

11. Social Dimensions, 73.

12. Social Dimensions, 73, n. 283.

13. id., 75-6.

14. id., 74.

15. loc cit., 74. Cf. H.E. Zelling (1969) 43 ALJ 526.

16. id., 62.

17. id., 71, n. 272.

18. id., 71.

19. Law Reform Commission Act 1968-72 (Qld). See ALRC 3, 16.

20. Proclamation, SA Government Gazette, 19 September 1968, 853 (clause 3). See ALRC 3, 17.

21. Law Reform Commission Ordinance 1971 (ACT). See ALRC 3, 23.

22. Law Reform Commission Act 1972 (WA). See ALRC 3, 19.

23. Law Reform Act 1973 (Vic) (No. 8483). See ALRC 3, 16.

24. Law Reform Commission Act 1974 (Tas). See ALRC 3, 20.

25. The Northern Territory Law Review Committee was established on a part-time basis in April 1976. In May 1979 a full-time Executive Member was appointed. See [1980] Reform 28.

26. P.S. Wilenski, 'Political Problems of Administrative Responsibility and Reform', (1979) 38 Australian Journal of Public Administration, 347.

27. B. Shtein, 'Law Reform — A Booming Industry', (1970) 2 Australian Current Law Rev, 18.

28. M.D. Kirby, 'Law Reform: Filling the Institutional Vacuum?', Investigator Lecture 1980, Flinders University (SA), mimeo, 24 July 1980.

29. G.S. Reid, 'The Changing Political Framework', Quadrant (Jan-Feb 1980), 7.

30. Mason J in 'State Government Insurance Commission v. Trigwell and Ors' (1979) 53 ALJR 656, 661; (1979) 26 ALR 67, 78. See to similar effect Scarman LJ (as he then was) in Farrell v. Alexander [1976] 1 QB 345, 371.

31. See Mason J in Trigwell, (1979) 53 ALJR 656, 659; (1979) 26 ALR 67, 75.

32. Barwick CJ in Trigwell, op cit, n.70, 70.

33. A. Diamond, 'Law Reform and the Legal Profession' (1977) 51 ALJ, 396, 405.

34. id., 405.

35. Lord Scarman, The Jawaharlal Nehru Memorial Lectures, 1979 'Law Reform — The British Experience', mimeo, Lecture 2, 3-4.

36. O.W. Holmes, 'Path of the Law', 461, cited in Social Dimensions, 78.

37. Under the Law Reform Commission Act 1973 (Cwlth), the Australian Law Reform Commission is confined to work 'in pursuance of references to the Commission made by the Attorney-General, whether on the suggestion of the Commission or otherwise'. See s.6(1) of that Act.

38. Australian Law Reform Commission, Discussion Paper No. 9, 'Child Welfare — Children in Trouble', 1979; Australian Law Reform Commission, Discussion Paper No. 12, 'Child Welfare: Child Abuse and Day Care', 1980.

39. Australian Law Reform Commission, Discussion Paper No. 13, Privacy and Intrusions, 1980; Australian Law Reform Commission, Discussion Paper No. 14, Privacy and Personal Information, 1980.

40. Australian Law Reform Commission, Discussion Paper No. 17, Aboriginal Customary Law — Recognition?, 1980.

41. Scarman, 4.

42. N. Marsh, 'Law Reform in the United Kingdom: A New Institutional Approach', 13 William and Mary L.Rev, 263, 276 (1971).

43. G. Sawer, 'The Legal Theory of Law Reform', (1970) 20 Uni Toronto LJ 183, 194. For a discussion of the methodology of United States Congressional inquiries as a medium of law reform, see S. Breyer, 'Analysing Regulatory Failure, Mismatches, Less Restrictive Alternatives and Reform', 92 Harvard L.Rev 549, at 607 (1970). ('The ... function served by the hearing was as a drama, which helped mobilise public and political support for regulatory reform. To analogise a legislative hearing to a judicial or fact finding hearing is to miss an essential difference: the legislative hearing has an educational objective and a political purpose. ...').

44. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), 1977.

45. Australian Law Reform Commission, Lands Acquisition and Compensation (ALRC 14), 1979.

46. Province, 412; Social Dimensions, 73.

47. J.M. Fraser, Speech at the Opening of the Australian Legal Convention, (1977) 51 ALJ 343.

48. Sir Zelman Cowen, Speech at the Opening of the International Bar Association Meeting, Sydney, September 1978, cited [1978] Reform 63.

49. M. Zander, 'Promoting Change in the Legal System', (1979) 42 Modern L.Rev 489.

50. Social Dimensions, 74.

51. id., 78.

52. J.H. Farrar, 'Law Reform and the Law Commission', 1974, 125.

53. Cf. the writings of J. Baldwin and M. McConville, e.g. 'Allegations against Lawyers' [1978] Crim LR 741. See also M.D. Kirby, 'Sentencing Reform: Help in the 'Most Painful' and 'Unrewarding' of Judicial Tasks' (1980) 54 ALJ 732, 735, citing J. Hogarth, 'Sentencing as a Human Process', 1971 ('Until recently a student of the judicial process could roam freely through the literature and only an occasional statistic would mar an otherwise serene landscape of rhetoric. He now faces a very different situation. ...')

54. Diamond, 46. The reference to harnessing the social sciences is from the 7th Annual Report of the Law Commission of England and Wales, 1971-2, para. 2; Cf. 11th Annual Report of the Law Commission, 1975-6, para. 6-8.

55. Australian Parliament, Report of the Joint Select Committee on the Family Law Act, 1980, Vol. I, para. 5.155.

56. ibid.

57. Scottish Law Reform Commission, Annual Report 1977-8, para. 37.

58. Social Dimensions, 62.

59. ALRC 15, 1980. See especially Appendix B, (A National Survey of Judges and Magistrates: Preliminary Report), id., 341-503.

60. id., 502.

61. id., 483 (Table 15A).

62. Preliminary Report, op cit, n.107, 499.

63. id., 504, Appendix C, (Federal Prosecutor Survey).

64. id., 509, Appendix D, (National Survey of Offenders).

65. Social Dimensions, 73, n. 283.

66. See e.g. Mathews v. Eldridge, 424 US 319 (1976). Cf. J.L. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 Uni of Chicago Law Rev 28 (1976).

67. Administrative Review Council, Second Annual Report 1978, para.9; Fourth Annual Report, 1980, para.43.

68. Australian Law Reform Commission, Insurance Agents and Brokers (ALRC 16) 1980, 82.

69. Zander, 506.

70. Report of the Australian Senate Committee on Constitutional and Legal Affairs, Freedom of Information, 1979.

71. New Zealand, Committee on Official Information, Towards Open Government, General Report, 1980 (Sir Alan Danks, Chairman).

72. Province, 408.

73. Mr. Justice H.E. Zelling, quoted (1969) 43 ALJ 526. See ALRC 1, 44 (para. 90). Cf. D. Whalan, Comment [1981] Reform 26.