

Chapter 13

The Rule of Law as the Key for Effective Governance: The Dilemma of Post-Communism

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The Functional Analysis of Law

Julius Stone has secured a firm place for sociological jurisprudence in the academic universe or, at least, in the curriculum of legal education at the University of Sydney. He has not, however, made the actual epistemological place of sociological jurisprudence any clearer. Sociological jurisprudence remains largely a euphemism for the addition of some, primarily sociological, argument to a more or less exclusively legal debate. Such an understanding falls considerably short of that which Eugen Ehrlich had already achieved half a century before Stone's work. Ehrlich argued convincingly that what lawyers called law was a practice, not a science, and that the subject matter of their practice – law – actually happened in society, not in their offices, chambers and courts. According to Ehrlich, debate about law was not enough: lawyers needed to explore society's law scientifically and they could not do this without studying sociology.

The present chapter, however, is not about the place of sociological jurisprudence in epistemology. It is about the objective of the exercise: the knowledge of law – with its 'centre of gravity' firmly placed in society¹ – that is achieved by sociological science rather than legal debate. By understanding sociological jurisprudence in this way, we can indeed build on the achievements of Julius Stone, who widened the knowledge of the functioning of law to society in motion, domestically and, especially, internationally. His international applications, in particular, allow us to draw a direct line

1 This is a reference to the famous foreword in Eugen Ehrlich's pioneering work *Grundlegung der Soziologie des Rechts* (trans Moll WL, 1913; *The Fundamental Principles of the Sociology of Law*, Harvard University Press, Cambridge, Mass, 1936; reprint, Transaction Publishers, New Brunswick and London, 2002), in which he summarises the book in the one sentence (on p lix): 'At the present as well at as any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself'.

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