Part III
Conclusion

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"The West is now everywhere," stated Ashis Nandy, "within the West and outside; in structures and in minds."[1] Indeed, in the West only the professionals or specialists would be involved or entangle themselves with so-called "comparative cultural studies". In Comparison, in the past more than one and a half centuries, almost all Chinese intellectuals, no matter whether they are professional laborers in the specialty of Western studies or not, have had to place their own research topics into a macro framework of "Chinese-Western cultures". They have had to study Western history and society when questing for answers about matters Chinese.

Through this process a theoretical reflection, an historical comparative abstraction or a practical conclusion seemed possibly to gain its convincingness and distinctiveness. On the one hand, it has been a fatal predestination for Chinese

[1]The complete passage is:

> It is now time to turn to the second form of colonization, the one which at least six generations of the Third World have learnt to view as a prerequisite for their liberation. This colonialism colonizes minds in addition to bodies and it release forces within the colonized societies to alter their cultural priorities once for all. In the process, it helps generalize the concept of the modern West from a geographical and temporal entity to a psychological category. The West is now everywhere, within the West and outside; in structures and in minds.

In the following pages, Nandy Continued that

> It is also possible today to opt for a non-West which itself is a construction of the West. … The West has not merely produced modern colonialism, it informs most interpretations of colonialism. It colours even this interpretation of interpretation.

For a detailed analysis see her *The Intimate Enemy: Loss and Recovery of Self under Colonialism,* at xi–xii.

intellectuals; On the other hand, the West, in fact, offered a very clear image as well as an ambiguous concept in their perception, a concept which could be either West European, American or East European-Slav, or a copy version, Japan. Nevertheless, the West, for the whole of the Chinese intelligentsia since the middle of last century, has been really not only "a geographical and temporal entity", but also "a psychological category" everywhere: in life and mind, in*Physis*and*Nomos*.

Liang Shu-ming's case, at one and the same time a very special case but a common case as well, joined numerous existing examples and demonstrated again this home truth, and proved that this "psychological category" is something from which "the other" could not be broken away and to which it has been bounded strictly. All this pre-established a context for all discourses about the modernity of China which has been signified in the sense of a state and society as well. Also, this situated a setting for Chinese intellectual players who have performed a tragedy for the majority of the time on the stage of Chinese history during the past one and a half centuries. In addition, the mental complexity and twisted characteristics of modern Chinese intellectuals could be explained by detecting this same clue.

As has been seen above, the perceptions which underlay Liang Shu-ming's view of Western law and its socio-cultural roots represented an understanding in the eyes of Chinese Confucianism. From the viewpoint of Black-letter-law, one could claim that Liang Shu-ming had not made a great contribution to understanding in the field of Western legal scholarship. It is true. As a matter of fact, in talking about the transplanted application of the Western procedural law in China in the early years of the*Republic*, he described himself in this way: "I am so nonprofessional in law that I dare not talk about it too much. I just know there are plenty of problems behind all this, and those problems must be studied thoroughly."[2]

To be sure, according to my examination, his philosophical speculation and historical comparison about the spirit and tradition of Western law aimed to gain a clear insight about Chinese law and its legacies. Through this approach he wished to find a way out of the holistic crisis for his homeland, to establish a home for the mind by creating a new life for the Chinese people and Chinese society where*Physis*could hopefully accommodate*Nomos*compatibly and competently; where the transcendent source of meaning and humane feeling, founding upon a new basis, could be reintegrated and reflected into rules of law as a whole. It is for this point that, I would suggest, as chanted by an ancient Chinese poet, Liang Shu-ming's narrative on this subject, "like an echo in the void, and colour in a form, the moon reflected in water, and an image in a mirror, the words come to an end, but the meaning is inexhaustible." And also for this point, he articulated not only the differences of law between the West and China, but rather, somewhat, the deviations and discrepancies of life and mind.

As a representative of New-Confucianism this century, on the one hand, Liang Shu-ming was inspired a lot by the sources of the Western metaphysical and

[2]*The First Road that Will Not Work for Us—the European Road of Modern Political Democracy*" (1930), 5: 166, see fn. 1.

epistemological world, sometimes from a correct insight and sometimes from a misreading. Montesquieu's *The Spirit of Laws*, for instance, seemed to tug at Liang Shu-ming's heartstrings, and contributed considerably to his own argumentation.[3] But, in retrospect, the points he appreciated very much could be totally wrong, in both the senses of black-letter-law and legal sociology. Because the discussion about this issue seems to be too far beyond my book' subject, I would like to specify here four points that need further discussion and reconsideration.

First, personally I am of the opinion that in spite of a certain amount of shuffling, Liang Shu-ming was totally ignorant of the concept of property, in particular, the concept of private-ownership by individuals, when he approached his discourse of the "spirit of Western law" in terms of*public*and*private*, which I discussed in Chap.10of this book. This is a central notion of private law, which, as said by Bacon, 揑t is a true and received division of law into*Ius Publicum and Ius Privatum*, the one being the sinews of property, and the other of government."[4] Without this cognition, Liang Shu-ming's perception of Western law in terms of*Public* and *Private*was not thoroughgoing, and had not hit the right nail on the head. It seems to be that he did not understand that early political and legal theory seeks to dissociate power from property while the nineteenth-century social philosophy ties politics firmly to economics. Hence, "the spirit of the laws," as writes Simon-Nicolas Linguet, "is property." That is to say,

> The laws are geared to the securing of property. And since one can take much more from those who have much than from those who have nothing, the laws are of course a means for protecting the rich from the poor. … Therein lies their true spirit; it may or may not be a shortcoming, but it is inseparable from their existence.[5]

Can individual freedom and personal liberty therefore be tenable and sustainable without the support of the ownership of private property? The true controversy beneath this issue, however, which was disclosed by Liang Shu-ming's "negligence" on the issue, was more serious. That is, Liang Shu-ming adopted a very Confucian attitude towards the private ownership of property in spite of whether or not he opposed the private ownership of property. In*The Theory of Rural Reconstruction*, Liang Shu-ming hints that in the traditional Chinese society

> Property was never considered the possession of an individual but rather of the whole family, and the boundaries of this family group were flexible, including not only members such as parents and brothers, but also often clansmen and relatives. …Communism did not exist in Chinese society before only because the techniques and means of production were limited and simple; therefore, the scope of the productive unit was small. …It was for this

[3]The quotations Liang Shu-ming drew from *The Spirit of Laws* were quite frequently. In *The Theory of Rural Reconstruction* (1937), *Essential Meanings of the Chinese Culture*(1949) *and* "*The First Road that Will Not Work for Us Politically*" (1930), there are examples at: 2: 184; 3: 23, 58, 85, 121, 224, 225–226; 5: 159, 162–163.

[4]Bacon, "Preparation Towards the Union of Laws",*Works*, vii at 711.

[5]Simon-Nicolas Linguet,*Traite des lois civiles* (1774), 2 vols., at 1: 7. Quoted from Blandine Kriegel, *The State and The Rule of Law* (tr., by Marc A. Lepain and Jeffrey C. Cohen), at 27.

> technical reason, rather than because there was some element in Chinese tradition that was antagonistic to socialisation of production.[6]

As an inalienable part of individual freedom, the sacredness and inviolability of ownership of private property constituted a firm foundation for personal liberty in modern Western society. Even if traditional Confucianism was not antagonistic to private ownership, the fact that private ownership of property had been often encroached upon was an irrefutable reality in China, historically and presently. Hence, while Liang Shu-ming's "negligence" unveiled an epistemological scotoma on this issue the practical violation could have really happened too.

Putting the other elements of the spiritual dimension aside, Liang Shu-ming fails to recognise the key roles reason (human reason or natural reason) in law and the rationalization of law play in the modern Western legal tradition. This is another epistemological scotoma which Liang Shu-ming had not taken seriously while he was approaching the spirit of law in the Western tradition. Here I would like to quote two representative statements in order to explain this issue. Firstly, as stated by Thomas Hobbes, in quoting from Sir Edward Coke,

> Reason is the Soul of the Law. … nothing is Law that is against Reason: and that Reason is the life of the Law, nay the Common Law itself is nothing else but Reason. … Equity is a certain perfect Reason that interpreteth and amendeth the Law as written, itself being unwritten, and consisting in nothing else but right Reason.[7]

Secondly, as pointed out by Max Weber

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[6]LSM, at 2: 302–303.

[7]Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, at 54. In the "Introduction" to this*Dialogue*, editor Joseph Cropsey presents an illustrative elucidation concerning law in terms of reason, which I think is very helpful in understanding Hobbes' reason in relation to law in order to compare the failure involved in Liang's "neglect". The complete passage is:

> For the present, however, and notwithstanding any provisional or superficial concessions, his point is simply that the reduction of law to reason opens the way to disobedience on the part of every man (and there can be many) who claims to be more fully reasonable than is the law itself. Thus the hard case is put: if law is reason and reason alone generates law, then law gains greatly in dignity but loses its own nature; for it is of the nature of law to command, and it is of the nature of command that it comport with obedience; but a command whose authoritativeness begins and ends with the reasonableness of the command will not, by its nature, procure obedience, for it is of the nature of reason to be always open to question. Therefore the dignity of law conflicts with the efficacy and therefore with the nature of law. Worse yet, if the reasonableness of law is in fact the justness of the law, then not merely its dignity but its justness is in conflict with its efficacy or its nature. But is not the justness of the law at least as much because of the nature of law as it is the efficacy of law or its capacity to perform its function of procuring obedience? If it is so, as it seems to be, then law itself is a paradox, for its nature to be just conflicts with its nature as a command.
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> For a detailed explanation see at 15–16.

> Our modern occidental rationalization of law has been the product of two forces operating side by side. On the one hand, capitalism is interested in strictly formal law and legal procedure. … On the other hand, the rationalism of officialdom in absolutist states led to the interest in codified systems and in homogeneous law. … No modern law has emerged when one of these two forces has been lacking.[8]

Human reason and intellectual calculation, as I mentioned in Chap. III of the book, were two conceptual instruments Liang Shu-ming employed in perceiving cultures. His neglect on this aspect could be due to the fact he was "so nonprofessional in law" that he "dare not talk about it too much." But on the other hand, it is true that "there are plenty of problems behind all this, and those problems must be studied thoroughly" for Chinese and Chinese society. Thus this neglect inevitably damages the logic of his own reasoning concerning this issue, and going further, deconstructs the convincingness of his own argumentation on this issue too.

Third, we could not categorically declare Liang Shu-ming was totally without grounds when he postulated that Western politics can be summed up as a "desirous politics" or "politics of desires". But, just as he did in relation to the discussion of the role of reason in law in the Western legal tradition, this uncomplimentary comment would be a lopsided view if it was not accompanied with a discussion about the deep insight of human nature and secular politics contributed by the Christian tradition. As a transcendental source and a critical reflection on the contemporary secular world, Christianity established another pole of*nous*, in Thomas Aquinas' word, "the unmoved mover", to balance this world, and it nourished the spirituality and mentality of the people and their Nomos, including law, in that localized way of life. It would be unimaginable and unthinkable for today's Western world, from the spiritual to the institutional level, including the aspect of law, if there were not those two poles that oppose each other and yet also supplement and complement each other, to enrich their life and mind. Quite*nil admirari*, I felt, sometimes, in reading Liang Shu-ming's works, that he seemed to regard the modern West as a*nouveau riche*with, somewhat, a*nouvelle vague*style on the one hand; meanwhile he considerably appreciated, with small reservations, the Western theoretical presumptions about human nature and the ideal life on the other hand. This controversy, I would suggest, simply exhibited, and could also have resulted from, a complex embodied within some Chinese intellectuals' attitudes towards the modern West,*i.e.*, epistemological appreciation about its splendid civilisation while yet holding a strong sentimental detestation of its aggressive universal claims.

Fourth, as I previous mentioned, it is true that law and morality, as an integrated whole at the spiritual level in the Chinese social context, are inseparable. Throughout this century until the present day, distinguishing morality from law is a dominant inclination in modern Chinese legal scholarship. This was said to be a scientific outlook by them, while the inner spiritual linkages have been totally disregarded. For this reason, we can say that Liang Shu-ming redresses a balance.

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[8]Marx Weber, *The Religion of China*, at 149.

Nevertheless, with a focus on Case two, the questions remained. That is to say, Liang Shu-ming neglected again to distinguish moralities between "new" and "old", and the "social value" which is beneath the morality and the "deeply engrained standards" that "encapsulate the aspirations of individuals and societies", from the Social attitude".[9] It was those differences that allow a leeway to choose for lawyers.

In talking of judicial reasoning and social value or community values, Justice Brennan of the Australian High Court offered a very good account:

> The common law has been created by the courts and the genius of the common law system consists in the ability of the courts to mould the law to correspond with the contemporary values of society. Had the courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time. …legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community. …The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group.[10]

Rather, they are the relatively permanent values of a specific community. It is in the light of this view, I would say that Case two suggested Liang Shu-ming's failure in connecting morality with law in searching for a new source of meaning for law. Because this case articulated an urgent calling for "the we Chinese legal learners" to consider the "contemporary" values of Chinese community in identifying legal reasoning. At that "contemporary" level, the equality of all human beings had became a consensual social value, one that "encapsulate(s) the aspirations of individuals and societies". Liang Shu-ming's opposite attitude simply demonstrated one of his failures in reintegrating law and morality at the spiritual level in the sense of modernity from a multi-dimensional view.

In short, anyway, all legal arrangements are reflections of a localized way of life and mind, and deposit as the part of the wisdom, practically and spiritually, for survival and betterment of whether a people who are always bounded by a certain

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[9]Here I drew this distinction between values and attitudes inspired by Professor John Braithwaite. In "*Community Values and Australian Jurisprudence*", Professor Braithwaite introduced a critical distinction between community values and community attitudes. It is community values and not community attitudes which ought to be the foundation of judicial deliberation about sustaining contemporary relevant law. According to this distinction, for instance, when the courts supported the abolition of slavery, they correctly applied community values about which there was substantial consensus. The key values at issue were freedom and equal respect for human beings. From consensually held *values*, they derived judgments which flew in the face of dissensus in community *attitudes* toward slavery. Hence, according to Braithwaite, the moral progress in the *Mabo* decision was enabled by the near-universal acceptance of the underlying "principle of non-discrimination", which is among the "fundamental values of our common law" that Brennan, a Justice of the Australian High Court, found to be trampled upon by the doctrine of *terra nullius*. For a detailed rational see his paper in 17 *Sydney Law Review* (1995), at 351–372, in particular, Sect. 2.

[10]Dietrich v R (1992) 109*ALR*385, at 402–403.

place, no matter whether they are aware of it or not. For the issue at present, what Liang Shu-ming inspired us greatly is not something only concerning Case two, but rather, his way of thinking and orientation of his misgivings. That is, around the "problems of China" and the "problems of life", facing today's eventful world, "the we Chinese legal learners" could and should make our*Nomos*for our life in accordance with our mind and*Physis*. Starting from the first generation of Liang Shu-ming's scholarship, through the second and third generations of New-Confucianism, the work of adopting and integrating the rule of law and democracy into Chinese conceptual sources had already been done as a matter of speculative reason, which has already lead to, and will go further to, provide an impetus to practical reason, or so I hope and believe.[11]

[11]On the speculative reason and practical reason, cf., my narration in *Introduction* of the book, at 11.