

The Confucian Misgivings—Liang Shu-ming's Narrative About Law

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 Springer

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ISBN 978-981-10-4529-5 ISBN 978-981-10-4530-1 (eBook)
DOI 10.1007/978-981-10-4530-1

Library of Congress Control Number: 2017937273

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Printed on acid-free paper

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The registered company is Springer Nature Singapore Pte Ltd.
The registered company address is: 152 Beach Road, #21-01/04 Gateway East, Singapore 189721, Singapore

Preface

My own initial entanglement with Liang Shu-ming was a slight tragicomedy. In 1977, for the first time in my life, I learnt there was someone called Liang Shu-ming in China, but I could not affirm definitely whether he was still alive or not. In that year, all of us teenage middle school students were required to read the newly published fifth volume of the *Selected Works of Mao Ze-dong* for at least one hour a day, and to take one page of notes each day during the semester. It is in his speech on Liang, which is included in this volume, that Mao burst forth “I think you stink!” The editor’s footnote described Liang as a “reactionary scholar” (反动文人), something akin to poisonous weeds in the socialist garden or a witch in peoples’ images in the Dark Age. Anyway, that is all I learnt about Liang Shu-ming for quite a long time. I made a mental note to find out more about why this scholar had provoked such a strong reaction from Mao.

Skepticism remained in my heart. As time went on, I came to know more of Liang Shu-ming as an advocate of Confucianism, which the official ideology was attacking as the spiritual symbolism of the “feudalism” of the “horse and buggy” days. While “Marxism-Leninism and Mao’s thoughts” were propagated in China as the most advanced “world outlook and methodology”, Liang Shu-ming’s views were thought to be synonymous with an iron-clad backwardness. He was not only a *persona non grata*, but also an anachronism. With few exceptions, this stereotyped portrait of Liang Shu-ming still remains among Chinese intellectual circles today, perpetuated by critics of both Marxist persuasion and those who profess themselves to be of a liberal persuasion. My book questions this stereotype, based upon an intensive analysis of Liang Shu-ming’s scholarship.

But the basic question is still unresolved. Has “Marxism-Leninism and Mao’s thoughts” saved China and brought it to the Communist Heaven as proclaimed by the Communists? Is it possible that the people who live their life in a seamless (the words of Maitland) web of history can escape from it? If not, henceforth, can groups of humans who were bounded with home-grown traditions survive by totally shifting to those of others, after they have destroyed their own traditions? Specifically, can the Chinese construct their ideal new life by placing it upon a

ruined site? If the answer is no, what is the correct path? What is the way forward, and how can we achieve national rejuvenation?

It is for these concerns that I cannot dissuade myself from an appreciation that Liang Shu-ming is a truly intellectual figure and a great human being. His basic concerns, his intellectual and emotional response to his historical situation, are vitally related to our own present concerns and problems. And it is also for these concerns and problems that the efforts at constructing a new ideal life in China, as times have already shown us, cannot be as successful as expected if the legacy of Confucianism and its modern wave New-Confucianism is cast away in an iconoclastic way culturally. This basic personal motive impels me to undertake this task. This is also my personal belief resulting from the general theme of his writings and a personal response to that bitter experience of reading Mao's denunciation of him twenty two years ago.

In the book *A Letter to Greco*, the Greek writer Niko Kazantzakis mentioned a story: during a dream, a grandson asks his grandfather: "Please, give me an order and I will obey". The old man, putting his hand on the child's head, said: "Try to reach as far as you can, my son!" The boy was not particularly impressed, so he insisted: "Please, give me a more difficult task", and the elder gentleman, after a while, said: "well! Try to reach farther away, above and beyond your own possibilities... !" And the boy awakened terrified... !¹ This precisely expressed what I have had to do during the last four years under the impelling presence of Liang Shu-ming's great life. As is said by a French Maxim, *Vogue la galere* ! I completed this book with gritted teeth. During this journey I often could not help imaging what *Hierodule* laboured with. For the book presented here, neither arguments nor conclusions are likely to escape criticism. I believe that if the descriptions and analysis of this dissertation succeed in accomplishing nothing more than to focus the attention of scholarship on this fact: that the mind always accommodates a certain sort of life, that *Nomos* originates in *Physis*, a locality of people's popular attitudes towards, and their presumptions and expectations about, life of a certain kind in the context of human self-cultivation and self-transformation, as speculated upon by Liang Shu-ming, then, I will have served an useful purpose.

Nearly two hundred years ago, Edmund Burke said: "Nothing tends more to the corruption of science than to suffer it to stagnate. These waters must be troubled before they can exert their virtues. A man ... though he may be wrong himself, yet he clears the way for others, and may chance to make even his errors subservient to the cause of truth."² In the light of this observation, I hope my argumentation, even possibly errors, will contribute to the cause of finding the truth: what kind of life the Chinese have already had, and will and could have in the realm of law. Although this book is not to display myself, but to examine Liang Shu-ming, I have grappled

¹Cited from Israel Drapkin, "Victimology: The Jewish and the German People", in Hans Joachim Schneider (ed.), *The Victim in International Perspective*, at 9.

²Edmund Burke, *A Philosophical Inquiry into the Origin of Our Ideas of the Sublime and Beautiful* (1823), at 71.

with Liang Shu-ming partly as a means towards learning the truth for myself, because my whole self belongs to that land—my motherland.

“The great stream of time and earthly things will sweep on just the same in spite of us”, said W.G. Sumner. “Every one of us is a child of his age and cannot get out of it. He is in the stream and is swept along with it. All his science and philosophy come to him out of it. Therefore the tide will not be changed by us. It will swallow upon both us and our experiments. ... That is why it is the greatest folly of which a man can be capable to sit down with a slate and pencil to plan out a new social world.”³—As a child who cannot escape from his age, Liang Shu-ming has already been regarded as the Knight of the Rueful Countenance, or the last Confucian. Is it new evidence of folly that I laboured myself for four years in writing this book about him?!

Beijing, China

Zhangrun Xu

³William Graham Sumner, “The Absurd Effort to Make the World Over”, quote in Hofstadter, *Social Darwinism in American Thoughts*, at 60–61.

Acknowledgements

I wish to thank many friends and family members who supported me at various times during this project. Among them, the major debts arising from this book are due to my Ph.D. supervisor, late Professor Malcolm Smith. Without his incessant encouragement, responsible and conscientious guidance, inspiring remarks and valuable assistance, the study could not have been accomplished. His painstaking help in modifying my writing both in content and linguistically have greatly improved the presentation of the subject. In addition, it was with his assistance that I benefited from using one of the attic rooms in Old Quadrangle where the Faculty of Law is located, which greatly facilitated the project.

In the past years, I have benefited greatly from the illuminating discussions with Professor Michael Dutton, Dr. Bob Semmens and Professor Sean Cooney. They were helpful in giving time to read and comment on, and in suggesting ways to revise the initial manuscript of certain chapters, and from all of whom I learned much.

Grateful acknowledgment also must be made for the help and encouragement afforded by Professor Sarah Biddulph, Ms. Sandy Cook, Mr. David Glass, Dr. Allen Brother and Dr. Chen Jianfu. Their friendships and kindness contributed to a happy sojourn in Melbourne where this project undertaken.

I wish to express my sincere thanks to the support of *AusAid*, and the Eastern Asian Collection of the Baillieu Library of the University of Melbourne. I also would like to thank Ms. Susan Mckeag and Ms. Kathryn Taylor for their assistance when they were employed as administrative officers at the Asian Law Centre, Faculty of Law, the University of Melbourne.

Special gratitude and appreciation are due to my personal friends and colleagues who are always excellent and helpful advisers, critics, and readers of my works. The regular “academic” exchange between us by mail has constituted an important part of my life over the years from 1994–1999.

I have splendid cooperation from Ms. Wang Lei, whose deeply engaged and skillful efforts improved this book immeasurably. Also I am very grateful for the

extraordinary devotion, help of Dr. Wu Zitong whose friendship, talents and warmth make life beautiful.

Finally, I am deeply indebted to my wife, Xu Ping, and my daughter, Xu Zhuang-si, for their patience, love and care. For years, Xu Ping has always been the first reader and the severest critic of my works. The companionship we share has helped us through from the peaceful, and the lonely days as well, while the project has been undertaken.

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Abstract

This book is about Liang Shu-ming (梁漱溟, 1893–1988), a figure of deep spiritual meaning in the realm of Chinese legal thinking. It aims to explore his thinking concerning law, in particular, his reworking of the traditional Chinese legal ideas in terms of the New-Confucianism.

The major intellectual interest throughout this book is to offer a study on China's legal legacy, through Liang Shu-ming's eyes. I follow the formula of the parallel between *Life* and *Mind* (人生与人心), *Physis* and *Nomos*. I will compare Liang Shu-ming's narrative with his own practical orientation and with the theories of other interlocutors. I will put Liang Shu-ming into the social context of modern Chinese history, in particular, the context of the unprecedented crisis of meaning in the legal realm and the collapse of a transcendental source for Chinese cultural identity in the light of modernity. The evaluation provided by my book could be helpful in clarifying the deep structures and significance of the present Chinese legal system through historically exploring Liang Shu-ming's misgivings.

This book consists of three parts. Part I will present Liang Shu-ming's theoretical concerns about the concept of law, the source and meaning of law in Chinese socio-cultural contextualisations, the interaction between humanity and law, and in particular, *Nomos* and the underlying presumptions about the ideal human life and human order. This examination will support the book that the necessity of rethinking our legal tradition is derived from the urgency of getting an undistorted understanding about our own way of life itself.

Part II will present an analysis of his understandings about constitutionalism, in particular, his critical articulations on the predicaments China has had to face in modifying and transplanting Western models. In order to explain my subject's various characteristics, a comparative analysis of Liang Shu-ming and his contemporaries, in both China and the West, will then be used to clarify the nature of constitutionalism, as a foreign body, in a place like China.

In Part III, Liang Shu-ming's comparative insight about the Western legal tradition and spirit, and his attitude to and rationale for the conceptual and institutional transplantation of Western law in China, will be articulated. Here Liang Shu-ming unveiled a paradox beneath the process of so-called modernization by drawing

inspiration from the West in modernizing China. That is to say, China has been facing a dilemma: either the refusal to imitate or the merely horizontal transplantation. He argued neither of them would be healthy for China. While refusal would result in something definitely worse, a simple horizontal transplantation would also be harmful. The intrinsic tension underlying this dilemma has consequently perplexed the legal shaping process in modern China.

In the Conclusion, the creative tension between life and mind, *Nomos* and *Physis* as symbolism and substance will again be reflected in China's quest for the "new law". If a conclusion could suggest itself, however, it would be, "A Code is not at once a history and a system", but, "Our history is our code."

Introduction

This book is about Liang Shu-ming (梁漱溟, 1893–1988), an “oracular spokesman”⁴ of Chinese culture and a figure of great spiritual significance in Chinese legal thinking. Indeed, in terms of Confucian philosophy, Liang could be described as one of the most powerful and original Confucian minds this century. This work aims to explore his legal thinking and focuses upon his reworking of traditional Chinese legal ideas in terms of the New-Confucianism, which has not been reviewed so far in any literature.

Why Liang Shu-ming?

Since the Opium Wars, China has witnessed an unprecedented social and cultural crisis that has included a crisis in the meaning and the legitimacy of the country’s legal system and culture. This crisis has caused a metaphysical disorientation in the cultural identity that threatened the self-sufficiency and unity of the country. This

⁴In *Commentaries on the Laws of England* (vol. 1, at 68–70), Blackstone described judges as “living oracles” of the law, and mouthpieces of the law. This appellation has been employed by Oliver Wendell Holmes, Jr., in his *The Path of the Law*:

The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law.

In a same way Robert W. Gordon says that Holmes is one of their own, in short, but one accorded exceptional authority and responsibility and a major role in the culture at large as oracular spokesman.

For details about Holmes’s lecture see 8 *Harvard Law Review* (1897), at 457–478. For Gordon’s comments see fn.36, *infra*. The details about the date and publication of books I cited in this book will be indicated in *Bibliography* attached.

disorientation was a response to the “wholesale Westernization” which was advocated by radical Chinese intellectuals, both liberals and Communists. Some Chinese intellectuals reacted by continuous efforts to reconstruct Chinese culture in the spirit of Confucianism in order to oppose the universal claims of Western culture and its radical ideological wing: Communism. Among the Chinese intellectuals, many promoted the so-called conservative alternative which asserted that best, if not the only, way to achieve national rejuvenation was for China to become “modern”. To enable Chinese culture to cope with the needs of this new social matrix and the challenges thrown up by the outside world, the country needed nothing less than a “revival of Chinese culture itself”. This revival included the reconstruction of legal institutions and their legitimating sources within culture. This could only be achieved by promoting a way of life that emphasised local Chinese society and history.

Liang Shu-ming, the pioneer of the New-Confucianism movement in modern Chinese history, appeared at this time and became well-known for his systematic defense of Confucianism and the restoration and reinterpreting of Chinese traditional values and concepts. His ability to “champion Confucian moral values and to arouse the Chinese to a degree seldom seen in the contemporary world”⁵ throughout his life so as “to exemplify the ‘superior man’ extolled by his Confucian sage”,⁶ was but one example of these efforts. It was designed to sensitize the Chinese and to raise their national historic-cultural awareness. If it is true that the history of the world is but the biography of great men,⁷ then Liang Shu-ming’s thinking on law, which is revealed through his life, socio-political practice and cultural manifestations, should be regarded as the history of the identification and the recapitulated incarnation of the modern Chinese soul in the realm of law. His perceptions on law, in particular, the interactions between a legal system and a way of life, the legitimacy and the “spirit of the people” (*minzu jingsheng*, 民族精神), offer a concept not unlike F.K. von Savigny’s idea of *Volksgeist*. His revelations and expositions

⁵See Wing-tsit Chan, *A Source Book in Chinese Philosophy*, at 743.

⁶See Wen-shun Chi, *Ideological Conflicts in Modern China: Democracy and Authoritarianism*, at 194. In this concluding paragraph, Chi highly praises Liang.

among the Chinese, wherever they may be, the image of Liang is still clear and distinct. He is an ardent advocate of China’s traditional culture who believes that the revival of Confucian virtues will make the world a more humane place. He stands for Confucian morality, for the social responsibility of the intellectuals, and the need for their personal involvement in solving China’s basic problems in the rural villages. And all this, he resolutely insists, can accomplish a sweeping but nonviolent revolution. His career can be said to exemplify the “superior man” extolled by his Confucian sage. He might be dismissed as idealistic, visionary and impractical. But his views and efforts have been a tangle force in the intellectual currents of twentieth-century China.

⁷In his outstanding book “*The Last Confucian: Liang Shu-ming and the Chinese Dilemma of Modernity*”, Guy S. Alitto went further by pointing out that “My own judgment of Liang Shu-ming—and my ultimate motive for writing—is that, his great importance in modern Chinese history aside, he was a profoundly significant human being. His basic concerns, his intellectual and emotional responses to his historical situation, and his life, I believe, have vital relevance to our own present concerns and problems.” For details see at xv.

on the spiritual dimension of Chinese legal tradition, its predicament, and its extrication from the transplantation of the Western legal conceptual and institutional elements, including constitutionalism, in modern China, showed that he himself hoped to be the one to provide, or at least initiate, the necessary rethinking to act as the saviour of Chinese thought in the realm of law.

To be more specific, Liang Shu-ming's work is relevant for at least four reasons. First, the necessity of reexamining Liang Shu-ming's narrative about law is due to the continuous critical scrutiny of Chinese society, tradition, and intellectuality for more than one hundred years. As if China's defeat at the hands of Western powers was not bad enough, China was also beaten by Japan, which, in the Chinese eyes, had always been under its cultural suzerainty and influence. Indeed, one could go so far as to suggest that modern Chinese history began with a period of comprehensive critical reflection of its own traditions, including its legal tradition. In doing so, especially in comparing itself with modern Western culture and society, the series of defeats produced revealed not only a number of "problems of China" (中国问题), but more importantly perhaps, the "problems of life" (人生问题).⁸ In the words of Charlotte Furth, "the impact of the 'West' upon China under the broader rubric of the impact of 'modernity'".⁹ The holistic crisis of the Chinese cultural identity led to a search for self-salvation and to a deep sense of soul-searching. In the words of Hao Chang:

The distinctiveness of the spiritual disorientation in modern China, however, lay not so much in the emergence of any one of these disorientations as in the coincidence and

⁸In Liang Shu-ming's pedigree of knowledge, the "problems of China" referred to the predicament and the dilemma of both China's self-salvation from the Western powers' challenge and the modernity of Chinese society itself. The former as an external factor reflected the crisis of the latter as an internal one; by the "problems of life" was meant the identity crisis of the Chinese traditional way of life and the popular attitudes towards life, in particular, its metaphysical symbolism, in the face of the Western wisdom. As related in Liang Shu-ming's own words, these two issues/questions, being *locus classicus*, occupied his lifelong soul-searching journey. Cf. Liang Shu-ming's autobiographical essays: "An Account in My Own Words"(1934), 2:1–34, in particular, at 15; "My Brief History of Self-education"(1942–1987), 2:661–699; "My Exertion and Reflection"(1952), 6: 950 infra; "The Changes of My Cognitive Representations on the Human Mentality"(1965), 7:130–137; "My Accounts on the Changes I Have Undergone During the Earlier of My Life"(1969), 7:177–185. For the academic illustrations on these two "problems", cf., "The Resolution to the Problems of China"(1930), 5:206–220; "On Constitutional Government in China"(1944), 6:493; *Essential Meanings of Chinese Culture* (1949), 3:4–7. All quotations cited from the eight-volumes *Collected Works of Liang Shu-ming*, are hereinafter referred to sequentially by author (abbreviated as LSM), title, followed by the year of it was first published, or written if it is a posthumous work, and the numbers of the volume and page, *sic passim*. A large number of quotations have been included in the text so that Liang Shu-ming might speak for himself. Translations are my own unless otherwise noted. The other materials in Chinese cited in this book will be noted in English translation while their original title and so on can be found in the bibliography in accordance with the sequence of the Chinese Phonetic Alphabet of author's family name. Again, translations are my own unless otherwise noted. The conclusion of the Part One of this book will detail Liang Shu-ming's two devoted aspirations discussed above.

⁹Charlotte Furth, "Preface", in her *The Limits of Change: Essays on Conservative Alternatives in Republican China*, at v.

merging of the three together—the moral, the existential, and the metaphysical. It is the fusion of these three kinds of disorientation which lies at the root of the modern Chinese crisis of meaning.¹⁰

In this century-long search for identity, the work of Liang Shu-ming constitutes a vocal part of the cantata, which is vitally relevant, I believe, to the existing present history that “we Chinese legal learners” are still living in now, which therefore still of vital concern to those who are students of Chinese law.

Second, and more generally, the utter refuting and negation of Chinese tradition and culture was central to any reflections he made. Those cultural iconoclasts who advocated this wished to construct a “modern China”, and attach a “modern legal system” to the ruins of all traditional Chinese conceptual and institutional traditions, including the legal tradition, which had been destroyed completely. Moreover, the criteria for judging whether an idea was “modern” or not, were totally “Western”, whether of the Euro-American variety or later Soviet. In all cases they explicitly excluded China’s own tradition. As a result, a radical version of the Soviet style of socialism, being the most radical piece in the contemporary Chinese intellectual mosaic, took shape and finally triumphed in mainland China. Because of the ideological demands for orthodoxy a Soviet style Marxist-Leninist jurisprudence and legal institutional form predominated in China and this, in turn, forced a change in the attitudes and ways of life of ordinary Chinese. Quite a few generations experienced indoctrination and brain-washing with this *variae lectiones*. Putting aside the unavoidable intrinsic tension of modern Chinese history during this social-cultural transition, it may be said that the value-orientation this “wholesale Westernization” generated alongside one dimensional thinking, contributed in part to this manifold maladjustment.

It is in this context that Liang Shu-ming started rethinking the role of Chinese traditional society and culture and what sort of “modern China” Chinese people should be developing. To ensure that his ideas fell on fertile soil his theorisation worked from “what law China already had” and “what laws China ought and could have”. Like the German Romantic historicists and the jurists of historical jurisprudence, Liang Shu-ming passionately insisted on the culturally unique and particular. As Mu Zong-san (牟宗三, 1909–1995), a significant second generation New-Confucianist thinker, has pointed out, Liang “brought Confucius back to life through his own life”.¹¹ For Mu, Liang’s scholarship “re-connected with the wisdom of Chinese cultural life”.¹² Mu’s thesis suggests that Liang crosses the abyss

¹⁰Hao Chang, “New Confucianism and the Intellectual Crisis of Contemporary China”, *op. cit.*, *ibid.*, *The Limits of Change*, at 282. Aside from these three levels, I would add that *the epistemological crisis of knowledge*, which shocked meaningful existence by destroying its cognitive world view at first, also contributed to this holistic crisis.

¹¹Mu Zong-san, “The Religious Trends in Current China”, reprinted in his *Significance of Life*, at 112–3.

¹²Mu Zong-san, *The Recorded Lectures on Humanity*, at 12. Also cf. a remarkable comment from Cai Ren-hou, “The Reflection and Rebirth of Chinese Philosophy”, in *Selected Works on Modern New-Confucianism* (I), at 22.

that divides cultural blending and transformation, and he is thus able to bridge the gap between the old and the new. Liang's work therefore offers a striking example of the power of thought. If it is true that English legal learners "have to turn to Austin ... for a systematic exposition of the methods of English jurisprudence" because "nobody has replaced him," then so too "Chinese legal learners" have to turn to Liang. This is because, only by turning to him can the cultural bridge be crossed. In this sense, "nobody has replaced Liang Shu-ming".¹³ This was not always widely accepted. Indeed, until recently it was clearly open to question. Back in 1970, with the power of Mao Ze-dong all too apparent Wen-shun Chi could still pose the question:

Despite the strength of the attachment [from Maoists to Liang Shu-ming], it remains to be seen whether the ideas of Mao, the revolutionary, or Liang, the gradualist, will predominate and be accepted as the best road to China's social reconstruction.¹⁴

This, I think no longer needs to be seen. With the wholesale rejection of Maoism and naive even slavish process of Westernization, the answer now seems clear. Despite this, it must also be admitted that the efforts in terms of legislation and the judiciary are far from satisfactory. Thus, there is a new urgency in rereading Liang Shu-ming for it now constitutes an important political task of the time.

Third, for the majority of so-called developing countries there is now a need to rethink the question of identity. Like China, these countries have all, to varying degrees undergone "Westernization", they have all felt the cold winds of globalization and they have all suffered from the cultural proselytism of "Americanization". Being buffeted by such powerful forces has pushed many 'third world' scholars to critically reflect upon this process of "Westernization" or "Americanization" and this includes the legal realm. After all, as Antonio Manuel Hespanha makes clear, in the contemporary West there is no longer a reliance upon tradition to legitimate law. As a result, he adds, legal history has lost its function as an absolute means of testing the national spirit.

Nevertheless, even Hespanha is forced to admit that in the non-West, the situation is quite different. "In the East, from Iran to Singapore and on to China, the efforts of liberating legal theory from the alienation of the Western concepts tends to be entrusted to history and tradition. These two things play an important role in bringing forth a national character to the law."¹⁵ Indeed, for those who have been "othered" by the process of Westernization and cultural imperialism, such a task is

¹³In talking about John Austin, Sir Carleton Kemp Allen observes that "For a systematic exposition of the methods of English jurisprudence, we still have to turn to Austin. Nobody has replaced him. Austinian jurisprudence ... so far maintains its influence that it may still be described as the characteristic jurisprudence of England". For the details see his *Law in the Making*, at 7.

¹⁴Wen-shun Chi, "Liang Shu-ming and Chinese Communism", in 41 *The China Quarterly* (Jan-March, 1970), at 82.

¹⁵Antonio Manuel Hespanha, *Introduction to History of European Jurisprudence*. Here the quotation is a "restated" one from its Chinese translation because the original Portuguese version is still unpublished. See 9 *Nanjing University Law Review* (1998), at 20.

of critical importance and is in fact unavoidable. Without undertaking this task their own identity long distorted by Western cultural imperialism and ethnocentrism, cannot be overcome. J.C. Smith undertook a comparative study of what he described the “primitive and archaic” with classical Roman and modern Western laws. From this study he suggests the “primitive and archaic” law is clearly distorted when interpreted and through the technical constructs of modern Western law. At the same time, however, he argues that the meaning of the legal constructs of modern Western law in being reduced to mere empirical entities and terms, similarly distorts their nature.¹⁶ For Smith then, there is equivalence here. It is, however, a false equivalence for the non-West is constantly in the position of disadvantage. It is in pointing this out that, Liang Shu-ming’s reflections on law which after such a lengthy period of neglect could be described as being almost archaeological discoveries prove inspirational.

Fourth, facing the contemporary world, China as a non-Western culture also shoulders the historical mission of contributing to a better future world. So the issue is not just about national salvation and the value of its own tradition therein. Rather Liang shows, China has an historic mission that includes working toward a better legal future. In this regard China could provide a possibly unique path for others to follow. Along with Kang You-wei (康有为, 1858–1927),¹⁷ Liang yearned for a better world for all humanity. Therefore, the eternal question posed by Liang and reformulated by Van Slyke was always to be:

Whether or not Chinese culture had any survival value—and, since Liang consistently thought in universalistic terms, whether or not its guiding spirit could inspire a world culture.¹⁸

On this point, in the light of a better human existence framed partly by and based upon better legal rules, as possible alternatives which would be different from the existing models, Liang Shu-ming informs us about many of our more pressing contemporary concerns and problems.¹⁹

Following the insight on practical reason put forward by Aristotle, Thomas Aquinas once presented a penetrating view of the world which differentiated between speculative and practical reason. He said:

A theoretical or speculative inquiry is distinguished from a practical inquiry in that the former is directed towards discovering the truth of claims considered in themselves. The

¹⁶J.C. Smith, “The Unique Nature of the Concepts of Western Law”, in 2, XLVI *The Canadian Bar Review* (1968), at 221–222. Also it could be relevant here if we take an observation from the counterpart’s view by quoting from Professor Thomas A. Metzger. In “*Modern Chinese Utopianism and the Western Concept of the Civil Society*”, he pointed out that “To be sure, especially in Western circles, scholars worry that etic categories imported from a foreign culture may lead to a distorted view of the native culture, which, some suggest, can be understood only in emic terms.” At 309.

¹⁷Cf., in general, Kung-Chuan Hsiao, *A Modern China and A New World*.

¹⁸Lyman P. Van Slyke, “Liang Shu-ming and the Rural Reconstruction Movement”, in vol. XVIII *Journal of Asian Studies* (1959), at 459.

¹⁹Cf., the discussion in the last two paragraphs of Chapter XI of the thesis.

latter, to the contrary, is directed towards the doing of something. Thus, the purpose of speculative inquiry is truth, while the purpose of practical inquiry is an action, in the area of action in our capacity to undertake. The goal of a speculative inquiry is not about determining means to ends—actions to be undertaken.²⁰

Here I would use this dichotomy to express my own personal concerns. Through Liang Shu-ming's eyes, I want to contribute to the process of carrying forward speculative reason. While this is therefore intended as a contribution to "knowing" I would also like to link this to practical reason. That is, I also see this work as contributing not just to a "way of knowing" but also a "way of doing". Ultimately, I hope that this will in no small measure help orient the current reconstruction of the Chinese legal system and culture.

Paradoxically, Liang Shu-ming was not a professional jurist or lawyer, and it also seems that the legal arena was not his focus of attention. This may partially explain why his seminal contribution to legal thinking has not been comprehensively analyzed until now. While writings on his legal thinking have been minimal interest in him more generally has been great. As will later be shown, both in West and in China commentary has been numerous. Indeed, since his debut in the early 1920s until now, with the exception the twenty five-years after 1953 when he disappeared from the scene in mainland China the writing has been more or less continuous.²¹ But his concerns and thoughts on legitimacy and the sources of law, as well as on the letter and spirit of the law, coupled with the history system, authority and reason of the Chinese legal tradition, contributed much to the survival of this cultural entity. Thus, while they could hardly be described as an epistemological breakthrough the importance of his works to legal construction cannot be underestimated.

Vico once named of Grotius the "jurisconsult of the human race"²² and if I can use this to authorize my own commentary on China I would propose calling Liang Shu-ming the "jurisconsult of the Chinese people". This is because for generations he has cast a long shadow over law and offered a new kind of jurisprudence which includes a "knowledge of things divine and human."²³ This work is designed to do

²⁰For details see Thomas Aquinas' comments on *Opuscula* (XVI, *De Trinitate*, 5. I.) in *Summa Theologiae*. Here I quoted it from Anthony J. Lisska, *Aquinas' Theory of Natural Law: An Analytical Reconstruction*, at 3. The expressions of "piece of knowing" and "piece of doing" in my text also are quoted from same source.

²¹Cf., Okazaki Fumio, "Mr. Liang Shu-ming's Book *Eastern and Western Cultures and Their Philosophies*", in 2.9 *China Studies* (May 1922), at 697–701; Frank R. Millican, "Liang Shou-ming Sees It Through", in 18.10 *The Chinese Recorder* (October 1926), at 698–705; Clarence Burton Day, *The Philosophers of China*, at 323–327; S.J.O. Briere, *Fifty Years of Chinese Philosophy (1898–1950)*, at 27 sq., (translated from the French by Laurence G. Thompson). For the studies on Liang Shu-ming and other New-Confucianists in North America, cf., Shi Zhong-lian, *Studies on Modern New Confucianism in America*, in particular, at 77–88.

²²Vico, *Diritto Universale*, 97; Cf. Vico, *Autobiografia*, ed. B. Croce and F. Nicolini, in *Opere*, V (Bari, 1929), 7ff.

²³Vico, *De studio ratione*, *Opere*, I, 101, and *Diritto Universale*, 5. This and the footnote above are quoted from Donald R. Kelly, *The Human Measure: Social Thought in the Western Legal Tradition*, at 236.

little more than justify this assertion by an extensive elaboration of Liang Shu-ming's legal scholarship and, in so doing, analysis his place in Chinese thought.

What Is the New-Confucianism ?

In “*Human Purpose and Natural Law*”, Fuller points out:

It is difficult to achieve effective communication in any discussion of a term that bears as many meanings as does ‘natural law’. An adequate semantic analysis of this term would not only have to discriminate among such distinct meanings as can be discerned, but would also have to undertake something much more difficult, that is, to trace the complicated overlapping among these meanings that make them appear to have some sort of family resemblance.²⁴

I would like to suggest that the same thing could be said of Confucianism. Just as the terminology of “natural law” has many meanings so too does “Confucianism” or “New-Confucianism”. Indeed, they have many overlapping implications in the context of non-romantic cultural tension in contemporary China. They may be many things to many people.²⁵ Speaking generally, the term “New-Confucianism”, as synthesized by Yu Ying-shi (余英时),²⁶ is used in at least three different ways.

First, and in the broadest sense, it refers to a strand of academic scholarship. As a phenomenon of thought in twentieth-century China, it consists of Chinese academics who conduct research on Confucianism as part of their career. They regard it with sympathy rather than as a cultural iconoclasm. Second, somewhat more narrowly, it refers to those who are attracted to Confucianism. These people have been involved in the development of new philosophical insights about Confucianism. Among these scholars are Xiong Shi-li (熊十力, 1885–1968), Zhang Jun-mai (Carson Chang, 张君勱, 1887–1969), Feng You-lan (冯友兰, 1895–1990), and He lin (贺麟, 1902–1987). Ironically, Yu questioned whether or not Liang Shu-ming could be so classified given his own commitment to Buddhism. Even Qian Mu (钱穆, 1895–1990), Yu's mentor and one of the best-known defenders of Confucianism, was part of this group according to Yu. Third, and in the narrowest sense, “New-Confucianism” means the learning and scholarly attachments stemming from Xiong Shi-li and carried on by his disciples and

²⁴Lon L. Fuller, “Human Purpose and Natural Law”, in 58 *Journal of Philosophy* (1956), at 679.

²⁵On the New-Confucianism as an intellectual discipline and tradition in modern China, cf., in general, Zheng Jia-dong, *Introduction to the Modern New-Confucianism*; Song Zhong-fu et al, *Confucianism in Modern China*; Fang Ke-li and Li Jing-quan, “Forewords” of *The Biographical Studies on Modern New-Confucianists*, at 3–52 .

²⁶For details see Yu Ying-shi, “Qian Mu and New-Confucianism”, in his *Qian Mu and Chinese Culture*, at 53–55.

followers. As Hao Chang notes the importance of Xiong cannot be underestimated because he

...was more influential than any other of the first generation of New Confucianists in shaping the minds of those active in the post-1949 intellectual scene...

and his philosophical writings

...may be seen as the single most important spiritual link between the early New Confucianists and those still active today in Hong Kong and Taiwan.²⁷

For Yu Ying-shi “New Confucianism” is only to this third group of scholars.²⁸

In contrast, I would argue that all those who take Confucianism as the compass orientating their vocation could be regarded as New-Confucianists. To them, Confucianism is the main spiritual source of meaning to supply a definitive solution to “the problems of China”. One must be broader in definition for even Hao Cheng acknowledged that the eternal “problems of life” even when reinterpreted through the Chinese intellectual heritage have to accommodate modern Western values such as democracy and science.²⁹

Hence, not only Xiong Shi-li and his followers, but also the second and even some of the first group, could be included in the New-Confucianism school. This inclusive approach is consistent with the syncretic tradition of Confucianism, which has itself blended elements of Taoism and Buddhism over the centuries into its own forms. Indeed so syncretic has this tradition been that “to trace the complicated overlapping gives them a kind of family resemblance”.

Even those who take Confucianism as their spiritual compass, it does not imply that other traditions have nothing to offer. On the contrary, their spiritual compass points in a certain direction but, along the way they also encompass other schools of thought. In this *locus modernus* of cultural blending, one may say, New-Confucianists can be described as involving those committed to traditional Chinese values and thoughts, but who also want to integrate this with other sources to develop a means to cope with the problems of both China and life since late last century. I will therefore concentrate on those meanings and arguments which have seemed to me to be of most importance to the analysis of my subject.

An Accumulated Wisdom

The writings on Liang Shu-ming and the interpretations of his thought are as kaleidoscopic as his own work. Numerous scholars, Western and Eastern, have contributed to this exposition for many years, although from widely different perspectives. On the one hand, many commentators have dealt with him in terms of a

²⁷Hao Chang, *op. cit.*, at 284.

²⁸See Yu Ying-shi, *op. cit.*

²⁹Hao Chang, *op. cit.*, at 279.

die-hard who intended to turn back the clock of time or something to that effect.³⁰ Chow Tse-tsung claimed, for instance, that

Liang Shu-ming's theory was essentially a reaction to the new thought of the May Fourth period. In spite of advocating the acceptance of certain aspects of Western civilization in these lectures (he refers to *Eastern and Western Cultures and Their Philosophies*), he later rejected other Western ideas including both democracy and socialism. In his defense of Confucianism and traditional civilisation, he actually deprecated Western learning and advocated in effect a sort of "Eastward Ho!"³¹

On the other hand, however, other observers have regarded him as a pioneer of New-Confucianism in terms of a "cultural conservationist"³², or even a "reformer"³³, or "liberal"³⁴. As a matter of fact, Liang Shu-ming was widely called "the last Confucian", the same as Lin Mou-sheng described Kang You-wei³⁵. Some have found his ideas hopelessly contradictory, but their argumentation itself could yet be *ignoratio elenchi*, whilst others have claimed that in his works are the key that unlocks all mysteries.

There are, however, some serious doubts to be raised about examining his work on law. Much of it has been lost.³⁶ A possible explanation for the ignorance about his legal scholarship for such a long period could be that while he was well-known as a Confucian philosopher, his writings on law were significantly fewer and scattered among his philosophical and cultural works, and therefore, were overshadowed by his commitment to Confucianism. On the other hand, the narrow and formalist bias in the works of Chinese language pronounced by lawyers also contributed to this disregard of Liang's work. In China, the "Black-letter Law" tradition has produced a narrow isolated and isolating mentality. The historical and

³⁰A personal incident Liang Shu-ming encountered was illustrative of this point. In the summer of 1929, Liang lodged temporarily at Tsinghua (清华) University campus to concentrate on writing his *The Future of Chinese People*. One day, when he went back to his house after a walk, he saw three students passing in front of his house. One of them pointed her finger at the door of his house: "There is a Mr. Backward who wants to reverse the trend of history." The second responded that "Where does he intend to go?" The third said "India possibly". Liang told us he also fell into laughter following after their hearty laugh. For a detailed narrative see his "Preamble" (1941), 6: 118.

³¹Chow Tse-tsung, *The May Fourth Movement: Intellectual Revolution in Modern China*, at 330.

³²Guy A. Alitto, "The Conservative as Sage: Liang Shu-ming", in Charlotte Furth, *op. cit.*, at 213–241.

³³Harry J. Lamley, *Liang Shu-ming: The Thought and Action of a Reformer*. While Kung-Chuan Hsiao repeated that Liang Shu-ming was "leader of the Rural Reconstruction movement and a reformer in his own right" he voiced Liang was "one of the staunchest defenders of Chinese culture", in Hsiao, *A Modern China and A New World*, at 123, 219.

³⁴See Guy S. Alitto, *The Last Confucian*, *op. cit.*, footnote 3 at 182, no.19 at 198, 279, 310.

³⁵Lin Mou-sheng, *Men and Ideas: An Informal History of Chinese Political Thought*, at 215ff.

³⁶The only previous treatise about his legal learning was "The Chinese Philosophy of Life and Legal Reality: Liang Shu-ming's Case", which I presented to the *Conference on Law and Chinese Outside China*, Faculty of Law, Australian National University, Canberra, Australia, 7–9 July, 1998. The revised version of this paper was published in 6 *Beijing University Law Journal* (1998), at 17–29.

cultural dimension of law has, therefore, often been ignored by lawyers the world over.³⁷

While the “black-letter” tradition is one factor it is not the most important one. By far the most important and substantial reason is the preponderance of work that argues that “legal modernisation” in the light of legal transplantation from the West to the East in modern China was the basis of legal invention. Except for the period of 1949–1976, in modern Chinese history, the regime of formal legality as construed by Max Weber, has occupied a position as the dominant ideology. This provides an institutional dimension for the reconstruction of the legal regime and culture, supported by lawyers and non-professional legalists who have often been self-opinionated. Only a few descriptive pieces within that tradition mention the legal work of Liang Shu-ming. Indeed it occupies no more than one or two pages in the various biographies of Liang and commentary therein is usually critical of him as a bad example.³⁸ Hence it is no wonder that these cultural iconoclasts did not have a comprehensive understanding of Liang from the perspective of their journey in search of meaning. Unlike Max Weber, Henry S. Maine and Montesquieu who have remained favourites of the legal theory fraternity and who have been cited in an often perversely uncritical fashion, in recent decades, the “the last Confucian” has tended to sound like the last of the *Mochicans*, “one of the almost-vanished species of public intellectual.”³⁹ For Joseph Levenson this was the source of some regret:

The orthodox Confucianists, standing still, had been moving towards oblivion. In the beginning, their idea was a force, the product and the intellectual prop of a living society. In the end it was a shade, living only in the minds of many, treasured in the mind for its own

³⁷Cf., in general, R.H. Helmholz, “*Continental Law and Common Law: Historical Strangers or Companies?*” W.T. Murphy, “*The Oldest Social Science? The Epistemic Properties of the Common Law Tradition*”; Li Gui-lian, *Law Studies in China during Twenty Century*, especially, at 1–66.

³⁸Hua You-gen accused Liang Shu-ming of opposing constitutional government by embracing the “feudal *lizhi*” (封建礼治), for instance, which implies something backward or undeveloped from the horse and buggy age from his viewpoint. In his *The History of Modern Chinese Legal Thoughts* (at 67–68) he, condescendingly, provides one page on Liang. In the two biographical descriptions of Liang Shu-ming, one provided only two pages to recount his involvement in the discussion of constitution drafting in the early 1970s, the other contained only three pages about him in the 1940s. See Ma Dong-yu, *Biography of Liang Shu-ming*, at 270–271; Ma Yong, *A Critical Biography of Liang Shu-ming*, at 347–349. Also cf. Xu Ji-lin, “Liang Shu-ming: the Anti-modern Utopia of a Cultural Nationalist”, in 15 *The Twenty-first Century* bimonthly (1993), at 50–54; a rebuttal paper from Liang Shu-ming’s son Liang Pei-shu, “*Objection to a Distorted Picture of Liang Shu-ming*”, *ibid.*, 26 (1994), at 132–137.

³⁹In a general evaluation about the legacy of Oliver Wendell Holmes, Jr., Robert W. Gordon wrote,

For intellectuals, at the same time, he is another kind of heroic exemplar, one of the almost-vanished species of the public intellectual, a specialist who ranges beyond the insular boundaries of his specialty and profession to influence general public opinion. He is one of their own, in short, but one accorded exceptional authority and responsibility and a major role in the culture at large as oracular spokesman.

See Robert W. Gordon (ed.), *The Legacy of Oliver Wendell Holmes, Jr.*, at 5.

sake after the society which had produced it and which needed it had begun to dissolve away.⁴⁰

My argument is that the way revealed by Liang and other Confucian intelligentsia in modern China is “the way out” through “the way back”.⁴¹ This back door includes the pathway leading to the rule of law and democracy which ought to be the intrinsic elements for constructing “modern China”. My research also indicates that the search for this way has continued from generation to generation in the light of the self-cultivation and self-transformation qualities of Confucian humanism. One may argue that Liang Shu-ming was but a “Knight of the Rueful Countenance”, but the key issue for him is that “If you cannot make things good, at least you can minimize evil.” As Thomas More contemplated: “It is impossible that everything be good, unless all men are good.”⁴² Liang Shu-ming’s profound narrative about the legitimacy of law in light of seeking an ideal human life, becomes the inspiration for “we Chinese legal learners” searching for such a new way forward. In this sense, Liang Shu-ming could well be considered the *foremost* figure among the New-Confucianism but he is definitely not the *last* Confucian.⁴³ This book is, I hope, a new testimony to the on-going fascination contemporary scholars have for Liang’s work. The light of Confucian humanism, I believe, is a new light for both the legality and legitimacy that Chinese people would take as their guide, the creed that affirms their own grounded sense of self, rather than something imposed from outside.

Aims, Presumptions and Methods

The major intellectual interest throughout this work is to offer a study on the Chinese legal legacy, through Liang Shu-ming’s eyes, within the formula of the parallel *Life* and *Mind* (人生与人心), *Physis* and *Nomos*. The former is Liang Shu-ming’s conceptual configuration while the latter is a pair of “sibling rivals for the legacy of human wisdom.”⁴⁴ The terminology of *Physis* here, quoting from the Western intellectual tradition, articulates not only the original application, but also the social-historical-cultural overlapping contexts vested in *Nomos*. To use the language of contemporary theory one could say that it operates in a fashion akin to the Habermasian notion of “facts”.⁴⁵ Thus, principally, in the light of Confucian

⁴⁰Joseph R. Levenson, *Confucian China and its Modern Fate: A Trilogy*, at ix–x.

⁴¹Cf. Tu Wei-ming, *Hsiung Shih-li’s Quest for Authentic Existence*, in *op. cit.*, Charlotte Furth, at 244.

⁴²Thomas More, *Utopia*, at 63.

⁴³Cf. Cai Ren-hong, “Mourn with Deep Grief and Respect to Mr. Liang Shu-ming”.

⁴⁴Donald R. Kelly, *The Human Measure*, *op. cit.*, at 1. I owe a very particular debt of gratitude to Professor Kelly for his work inspired me greatly in the initial process of constructing my book.

⁴⁵Cf., in general, Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Also cf. Barbara Shapiro, “The Concept ‘Fact’: Legal Origins

humanism, this book will concentrate on an examination of Liang's legal philosophy, although other aspects of his learning, where they are relevant to his legal philosophy, will also be discussed. As his legal thinking is outlined in his many works on culture and philosophy, it is part of my task to reconstruct Liang's argument and conclusion to make them as coherent as possible, and to clarify the reasoning underlying his argumentation. Here I follow the formulation of Hugh T. Scogin, Jr. who has argued that:

The life of the past can only be made intelligible to modern readers in terms of a frame of reference that is somehow meaningful to them...understanding the historically contingent function and meaning of those institutions in the past illuminates our understanding of their role in the present.⁴⁶

This is true not only because there would be no present at all if the past were lost, but also because the present cannot be justified if it lacks a past dimension. When the term "civilisation" is used here, it refers to a creative humanity, which in *spatio-temporal* terms transcends the individual. The idea underpinning this excavation of Liang's thought is to help clarify the deep structure and significance of the present Chinese legal system by historically exploring Liang's misgivings about it. In doing this a more comprehensive understanding of Liang Shu-ming can help student of Chinese law avoid the traditional isolationist methods of lawyers, and offer a stronger contribution to the dialogue between law and the humanities. Through this dialogue, the fragmented history of Chinese law and its tradition could be re-connected and reconstructed as a source of meaning for legitimacy and function. If it is able to this it will also function as a scheme of interpretation for legality in contemporary China.

This is not always a simple matter. Liang's intellectual enthusiasm for law is shown in the tendency to repeatedly return to the issue. The result is that his thoughts on law emerge throughout his many writings. These issues, therefore, span more than seventy years of scholarship and appear in strikingly different social contexts, as well as in a variety of political and cultural worlds. The conceptual reach of Liang's legal philosophy is as broad as it was deep. Not only did it plumb the depths of the sources of law in the spiritual dimension, especially Chinese tradition, but it also tried to cover the entire legal civilisation. In the terms of Confucianist hermeneutics, I attempt to allow Liang to speak for himself as much as possible. There are two important caveats to this. First, Liang's narrative is examined in relation to his own practical orientation and alongside this it includes a discussion of those with whom he was an interlocutor. "Juxtaposing deeds and words" is a crucial aspect in interpreting thinkers in the Chinese tradition. The theoretical orientation could be belittled if the deeds of a philosopher are not

(Footnote 45 continued)

and Cultural Diffusion", which is a Presidential Address given at the annual meeting of the North American Conference on British Studies, Montreal, Quebec, October 1993.

⁴⁶For details see Hugh T. Scogin, "Civil Law in Traditional China: History and Theory", in Kathryn Bernhardt and Philip C.C. Huang (eds.), *Civil Law in Qing and Republican China*, at 24.

consistent with his own words. In this regard, in contemporary China, Liang is a good example while Feng You-lan,⁴⁷ who yielded his integrity in the *Cultural Revolution* (1966–1976), is a negative one. In terms of externals, many of Liang’s arguments were contextual comments in concrete debates with his peers. On the other hand, the Western sources, such as Montesquieu, John Mill and others, came to constitute very important parts in his argumentation. Hence this thesis compares them, compares the Chinese rebuttals of his work. It examines their Western inspirations, and compares these with Liang’s own position. Hence, the task of how to construct and present my own argument is formidable as it means this work is both descriptive as well as being evaluative, not only of Liang but of his important interpreters.

Second, I will put Liang Shu-ming into the social context of modern Chinese history. In particular, I will examine the unprecedented crisis of meaning in the legal realm and the loss of a transcendental source for Chinese cultural identity in light of China’s crisis of modernity. I will do this by expounding his concerns and attempting to understand the role he played in dealing with these contextual issues. By this light, we may obtain a profound insight about Liang Shu-ming whom we have called a New-Confucian. Edward Shils states that, in doing so:

“Intellectual disciplines often benefit from drawing into themselves traditions hitherto remote from them. When this happens, it is perfectly reasonable that the scholars who generated or sustained the newly assimilated tradition should take their place in the ancestral pantheon.”⁴⁸

I hope my pilgrimage to the ancestral pantheon will not be interpreted as an attempt to gain residential status there. All I want to do is simply clarify the contribution of Liang in the development of New-Confucianism. In doing this, I will focus upon those aspects of modern Confucian legal culture which helps to unveil the mask of legitimacy afforded the Communist Party in China.

As pointed out by Octave Paz, “when we learn to speak, we are learning to translate”. In explaining the task of a translator, Octave Paz likens the process to child rearing. We are forced, he says, back to a “simple language”. But as Paz goes on to note, even “simple words” are inadequate when it comes to cross cultural readings. Crossing culture, he notes, still leaves an “inexorable foreignness” to the text even in the best translation.⁴⁹ At least part of the reason for this, I would suggest, is because a translation cannot carry the etymological trail that informs the meaning of the original word, into the new language. This being the case, any attempt to define Liang in matters of legal thought will be a notoriously hazardous

⁴⁷In fact, Feng You-lan contributed at least one of papers for the campaign against “feudal remnants and bourgeois”, which were organized by ideological machine and aimed to attacked Liang Shu-ming and Hu Shi in 1955. See his “Critique of Mr. Liang Shu-ming’s View on Culture and his Theory of Village Self-government”, in *People’s Daily* (11 May, 1955).

⁴⁸Edward Shils, “Henry Sumner Maine in the Tradition of the Analysis of Society”, in Alan Diamond (ed.), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, at 143.

⁴⁹Octave Paz, Translation: Literature and Letter, see Rainer Schlte and John Bignenet (eds.), *Theories of Translation*, at 152–3.

journey. This is because the interpretation of this tradition into another language that is not his narrative voice. In this regard, when I have to be compelled to translate Liang literally and metaphorically “into English” and remain faithful to his meaning I have had to find appropriate English language phrases to express his unique and difficult classical style Chinese. In this process of translation I have often encountered a feeling that there is a loss of meaning. Needless to say in the translation of languages, the language itself, a web of significance, contains a high risk of distorting context by words, not by deeds. For accuracy and to avoid the danger of distortion, therefore, my method involves critical analysis as well as evaluation. This is the reverse of Octave Paz, “when I learn to translate, I am learning to speak”. Speaking for accuracy, speaking for “the other”, speaking for “transvaluation of all values” relating to humanity and law in the China, is to speak for a peaceful and harmonious world which generations of Chinese have been yearning for. In so doing, description, critical analysis, a comparative framework and an historical dimension are all devices used to reveal neither *ignotum per ignotius* hopefully nor, in the meantime, *de mortuis nil nisi bonum* definitely.

In this light, this work consists of three parts. Part I of this work will present an elucidation of Liang’s theoretical concerns about the concept of law, the sources and meaning of law in a Chinese socio-cultural context. The interaction between humanity and the law, the *Nomos* and *Physis*, and, in particular, legal rule and the underlying presumptions about the ideal human life and human order will all be addressed. By comparison, this part will show that Liang’s assertions about the interactions of *facts* and *norms* in the historical-cultural context are unique to classical Confucian jurists and the new faces who are bound by the Westernized legal conceptual sources. This examination will support the book that the necessity of rethinking our legal tradition is derived from the urgency of getting an undistorted image about our own Chinese way of life.

In Part II, it will be shown that Liang Shu-ming’s conceptual understanding about constitutionalism is unique amongst his contemporaries. By firstly offering a summary outlining of all of his main beliefs and his changing attitudes towards constitutional government in China, the thesis will present an analysis of his understandings about constitutionalism. In particular, it will examine his critical articulations on the predicament China has had to face in modifying and transplanting Western models. As well as this, the approach and the lessons to be learned from the various attempts to set up constitutional government in China over more than one century will be reflected upon critically. In order to explain my subject’s various characteristics, comparative analysis of Liang and his contemporaries, both in China and the West, will then be used again to clarify the nature of constitutionalism, as a foreign body, that was transplanted into China.

In Part III, Liang Shu-ming’s comparative insight about the Western legal tradition and spirit, and his attitude to and rationale for the conceptual and institutional transplantation of the Western law in China, will be articulated. Here the most striking phenomenon Liang unveiled is closely examined. Here, the paradox underlying his belief in the process of modernisation by drawing inspiration from the West in modern China. That is to say, China has been faced with an unenviable

dilemma: either refuse to imitate or simply transplant, neither of these options would be healthy for China. While refusal would result in something definitely worse, the simple transplantation of ideas would also be quite harmful. The intrinsic tension underlying this dilemma has consequently perplexed the legal construction process in modern China. Hence, my analysis is but a journey, through Liang's eyes, into unresolved questions that are still the source of tension.

In the Conclusion, suggestions will be made, based on the formula of Liang's legal philosophy from the perspective of Confucian humanism and hermeneutics. Highlighted by the above mentioned analysis, the creative tension between life and mind, *Nomos* and *Physis* as symbolism and substance will then again be reflected upon in relation to China's quest for "new law". Often Chinese people regard this as a panacea to cure the "problems of China". If one thing did suggest itself, however, it would be, in the light of the Western historical lessons, "a Code is not at once a history and a system", but, "our history is our code."⁵⁰

⁵⁰In *The Human Measure*, Professor Kelly shown us a very interesting historic scene in relation to the "Code" and "our history". As he quoted, "Our history is not our code," a revolutionary idea declared at the end of the eighteenth century by Rabaut Saint-Etienne. But the reverse did not hold: "A Code is at once a history and a system," as Eugene Lerminier wrote a century later. Here I would like to explain my subject by using this case. For details see Kelly, *op. cit.*, at 233.