

Part III

Legal Tradition: The Western Law and Its Transplantation in China

Introduction

Probing the Western legal tradition, by scrutinizing the roots of its socio-historical and spiritual dimensions in comparison with the Chinese legal tradition, constituted a very important part of Liang Shu-ming's legal scholarship. Unlike the earlier stereotyped mould made up by his rebutters, Liang Shu-ming was not only a champion of China's national tradition, but also very much an intellectual, a man of letters. He was a man of our times in terms of questing for the paradox of modernity itself, including "legal modernization" which has been longed for by Chinese lawyers intensely throughout this century.

Do the Chinese hold different presumptions and expectations towards law from the West? Do these differences affect their attitudes towards law? Have these originated in the fact that different groups of the human population shape their own way of life, bound by time and place, and adopt their own philosophy about humanity itself? Why and how might this have happened? These are the crucial questions, as mentioned partly in part I of this book, that the Chinese jurists cannot evade the need to answer in pursuit of the quest of solving their personal identity as Chinese, and the identity of the Chinese-nation as well. The irony here, which the Chinese lawyers have had to face, however, is that the answers to these questions, at least partially, lie in what they could understand about their Western counterparts through their theoretical abstraction, comparative historical learning and philosophical speculation. The West, as an overwhelming macro context of the discourse for all *The Other*, including China and its own public intellectuals, forms an indispensable and vibrant irresistible source of meaning, in the form of a reverse version, in solving the Chinese jurists' own identity and orientation.¹ It is the basic background for Liang Shu-ming's construction of the Western legal tradition as well as for his rebutters, no matter whether liberal or communist, or professional lawyers or socio-cultural investigators.

¹1. For this point see the detailed discussion in the Conclusion of this Part.

Being a very special player, the New-Confucianists provide a unique view about the characteristics and the spiritual dimensions of the Western legal tradition, both social-historical and cultural. In comparing this with China, they focused their minds on the issues of (i) how the legal rules together composed a coherent whole, embodied within the Western society in terms of Holmes' much quoted aphorism, "The life of the law has not been logic, it has been experience";² (ii) how the law serves human life, or how *Physis* accommodates *Nomos* or visa versa; and of (iii) what makes the triumphant uniting of the intellectual tradition with practical life in the legal realm throughout the historical process in Western society. By inquiring into the possibility of legal transplantation, they proved to be serviceable well beyond the circle of lawyer-jurists, and suggested not just a temporal form or chronological explanation, but an empirical base for Chinese people to manage their own lives. It is these points that professional lawyers often tend to ignore, and the naive advocates for wholesale Westernization were incompetent to learn understanding with passionate sympathy, in the words of Max Weber, a *verstehen*. However, the commentaries and expositions on this aspect contributed from the New-Confucianists, including Liang Shu-ming, unfortunately, have not been reviewed so far, albeit the translation of them, from my perspective, is crucially important for the historical process linking with, and restoring, China's own tradition, which has been distorted too long.

From this point of view, on one level, in general, this part aims to synthesis and recapitulate Liang Shu-ming's comparative historical speculation on "Western law" and its philosophy, which he regarded as, respectively, an original convention in managing the life of a certain sort of people, and a framework functioning as a kind of art in interpreting their minds. In describing his perceptions about, and his approaches to, the socio-cultural roots of this "law", this part will go further to explain his legal philosophical conceptual reach, to which he gave his own characteristic twist, in the realm of cultural blending. On another level, in particular, by pursuing the same purpose as did Liang Shu-ming, this part will try to explore the possibility and predicament of transplanting Western conceptual and institutional legal arrangements into China by reviewing Liang Shu-ming's considerations. In doing so, this process involves not only a consideration of what a particular writer consciously relied upon as the foundation for his theory, but also a close analysis of the assumptions which are associated with the way we perceive and engage with the world. In detail, the inquiry explores the expectancy about what kind of ideal law we ought and should pursue, and, going further, what kind of ideal life for ourselves we should and could seek in today's busy world, where control of the means of forming public opinion is concentrated in a few hands.

Put simply, this part aims to demonstrate three themes: (1) The Western legal spirit: an observation from the perspective of Confucianism; (2) the socio-historical roots of Western legal tradition; and (3) Western law in China: transplantation or transformation?

²2.Oliver Wendell Holmes, Jr., *The Common Law*, at 1.