

WASHINGTON UNIVERSITY  
**LAW QUARTERLY**

---

Volume 1960

April, 1960

Number 2

---

THE INFLUENCE OF PHILOSOPHY ON LAW  
AND POLITICS IN WESTERN CIVILIZATION\*

GRAY L. DORSEY†

In Western civilization, philosophy has had an influence upon the norms of law and politics and upon attitudes toward legal and political questions and problems. The basic influence, as might be expected, occurred early in the course of Western civilization. It produced a central tradition of natural law and humanism that has had setbacks and various interpretations, but has continued to serve as the guide for law and politics in the Western countries except for the Communists, and for a time, the Germans.<sup>1</sup> However, one of the characteristic attitudes has no present justification, is dangerous, and needs to be changed.

I. THE INFLUENCE UPON NORMS

In the last century of the Roman Republic and continuing into the Empire, a social revolution of first magnitude occurred. C. H. McIlwain has said of this change in Roman life, "There is probably no other social revolution in recorded history so important, so complete, so continuous over so long a period. . . ."<sup>2</sup> McIlwain noted the transformation in every branch of Roman private law: property, marriage, testamentary succession, contracts, etc. These are the working-to-

---

\* Text and summary of resulting discussion of a paper presented by Professor Dorsey at the Third East-West Philosophers' Conference held at the University of Hawaii, Honolulu, June 22 to July 31, 1959. The purpose of the Conference was, "To consider the practical implications of comparative philosophy for cultural institutions as a basis for world understanding and co-operation." *The Law Quarterly* wishes to thank The University of Hawaii Press, which will publish a book containing the full proceedings, for permission to publish this part of the proceedings of the Conference.

† Professor of Law, Washington University, St. Louis.

1. Troeltsch, *The Ideas of Natural Law and Humanity in World Politics*, in Gierke, *Natural Law and the Theory of Society* (Barker transl. 1950).

2. McIlwain, *Constitutionalism, Ancient and Modern* 54 (1940).

gether and living-together relations of a society, and are political in the sense that they constitute the way in which the *polis* is organized for action. Why should such a complete change occur? We shall look first at the life and ideas of the earlier period and then at the life and ideas of the later period, and see if the reason for the change does not appear.

Life in the early city-state of Rome (and in the early Greek city-states) is best seen through the pages of Fustel de Coulanges' *The Ancient City*.<sup>3</sup> Fustel, with what is today generally recognized as remarkable insight, stressed the importance of religion in the life of the family and of the city-state. The head of the family, *paterfamilias*, had the sole right to carry on the family religion. It was his responsibility to see that the sacred fire on the hearth was never extinguished, or profaned by the presence of strangers. This fire was the constant symbol of the living soul of the original *paterfamilias* surviving in his descendants, partaking of the "immortality of generation."<sup>4</sup> The *paterfamilias* was also the lawgiver and judge, the economic manager, the leader in war.<sup>5</sup> When cities were formed by amalgamation of gens and tribes of families, it was thought necessary to establish a hearth and a sacred fire for the city.<sup>6</sup> Indeed, community was only possible on the basis of community of worship. Gods were local and exclusive.<sup>7</sup> Rights and duties existed only between those who had the same gods. Each family was autonomous until it joined with others in a gens, tribe or city, which then shared a common worship.<sup>8</sup> In the face of threatened destruction Athens could not extend her defensive league beyond the cities linked by common worship in the amphictyony of Delos.<sup>9</sup> The normal state of relations between the cities of Greece was war, and community of worship was the basis of such cooperation as they achieved.<sup>10</sup>

The significance for our purposes of these facts about life in the early Roman and Greek city-states will become apparent when an implicit premise is stated and compared with one resulting from Greek natural philosophy. The latter premise would be, "The universe is rational." The earlier, implied premise was, "The universe is whimsical." Events were not related by cause and effect. Events occurred, or did not occur, at the whim of the appropriate god. We speak of the

---

3. Fustel de Coulanges, *The Ancient City* (7th ed. Small transl. 1889).

4. 2 Plato, *Laws*, in *Dialogues* 492 (Jowett transl. 1937).

5. 3 Westrup, *Introduction to Early Roman Law* 148 (1939).

6. Nilsson, *Greek Piety* 6 (Rose transl. 1948).

7. Fustel, *op. cit. supra* note 3, at 162-63; Greenidge, *A Handbook of Greek Constitutional History* 6-7 (1896); Nilsson, *op. cit. supra* note 6, at 10.

8. 3 Westrup, *op. cit. supra* note 5, at 143.

9. Greenidge, *op. cit. supra* note 7, at 48-51, 202.

10. *Id.* at 46, 60.

mythical gods of ancient Greece and Rome. But they were not mythical then. They controlled events. In such a world the only way to plan ahead was to consult the gods. The only wise men were those who could consult the gods—and these were the heads of families, gens, tribes and city-states who had responsibility for the religion of the groups they headed.

It was common sense that authority should belong to the paterfamilias, or his counterparts in the city-state. Therefore, they were the judges, economic managers, and war leaders. It would be foolish to have decisions made by anyone else. Rostovtzeff has said, "The public life of Rome was inseparable from religion: every action of the state began and ended in a religious ceremony . . . . The *imperium* or executive power of the magistrate was closely connected with his exclusive right of ascertaining the will of the gods by auspices, of soliciting, in the name of the community, their protection, and lastly of propitiating them. . . ."<sup>11</sup>

The Stoic philosophers were the first to formulate the full implications of a rational universe for law and politics. Plato and Aristotle had believed that only the best men could know the rational order in the universe, and that other men were by nature fit only for lesser jobs than knowing the good and planning community affairs wisely. The Stoics taught in their physics that the universe is ruled by absolute rational law and that the essential nature of man is reason.<sup>12</sup> The implication of this was that all men are rational creatures. And when the Stoics in their ethics taught men to "live according to nature," they were building acceptance for their idea of a single Cosmopolis in which all men are equal because reason makes them equally able to know what justice requires in every relation of life and intercourse.

Stoicism began to be taught in Rome a little less than a century before the fall of the Republic.<sup>13</sup> Ehrlich, one of the great students of Roman legal history, has said that the main root of the Roman law is the juristic law, and he claimed credit for having shown in his *Beiträge zur Theorie der Rechtsquellen* that the Roman jurists created their law independently, and not by interpretation of the earlier statutes and edicts.<sup>14</sup> About thirty years after Stoicism was first taught in Rome, the first of the great Roman jurists, Q. Mucius Scaevola (a Stoic), wrote the eighteen volumes on civil law which earned him recognition as the founder of Roman law.<sup>15</sup> Of fourteen jurists whom

11. 2 Rostovtzeff, *A History of the Ancient World* 53-54 (Duff transl. 1927).

12. Stace, *A Critical History of Greek Philosophy* 349 (1934).

13. Arnold, *Roman Stoicism* chs. 12-15 (1911).

14. Ehrlich, *Fundamental Principles of the Sociology of Law* 260-61 (Moll transl. 1936).

15. Sohm, *Institutes of Roman Law* 90-91 (Ledlie transl. 1907).

Jolowicz lists as laying the foundation for and developing Roman juristic science during the Republic, at least eleven can be found by perusal of Arnold's *Roman Stoicism* to have been Stoics.<sup>16</sup>

The Greek philosophers destroyed the world of whimsy. They posited a world of reason, and their evidence was so convincing that the gods who controlled events gradually faded from reality to myth. With them went community consensus in support of centering authority in men who had charge of the religious auspices. The resulting changes can be traced in Roman private law as McIlwain suggested.<sup>17</sup>

In the early city-states all property belonged to the family—conceived of as the continuity of generations, not as a community of living persons. The current paterfamilias could not alienate family property. He could not disinherit the son. The son could not refuse an inheritance that was a net liability. In fact the paterfamilias possessed and passed on, not the property itself, but only the authority to act with respect to the property. Daughters, who could never become the family head, could not inherit. With the influx of Greek thought, the idea of legal personality was divorced from religious authority. Family heads could alienate some of the family property. Sons could hold property and make contracts in their own right during their father's lifetime. Daughters could inherit. Sons could be disinherited, or could refuse an inheritance.<sup>18</sup> In short, the control by the succession of paterfamilii over all property from which members of the family derived benefit was completely broken through. The control of the paterfamilias over the persons of family members and even slaves was restricted.<sup>19</sup> Thus, it can be seen that the change in the content of the norms of the Roman *polis* was very great.

The change in the structure of norms was also great. The subjects of rights and duties are no longer men as understood in a common sense way, but conceptual entities defined within the hierarchically ordered body of norms covering all human relationships. Roman law had been a series of legal rules, such as one finds in the Code of Hammurabi. Suddenly it had the logical structure that caused Cuq to say "the Romans have fixed for all times the categories of juristic thought."<sup>20</sup> This logical structure first appeared in the treatise of the Stoic, Q. Mucius Scaevola, referred to above. Sohm has said that Scaevola "was the first to determine, in clear outline, the nature of legal institutions (will, legacy, guardianship, partnership, sale, hiring,

16. Jolowicz, *Historical Introduction to the Study of Roman Law* 90-91 (1932).

17. McIlwain, *op. cit. supra* note 2.

18. Sohm, *op. cit. supra* note 15, at 177-78, 186-93, 449-50, 482-88, 501-05.

19. *Id.* at 165-84.

20. 1 Cuq, *Les Institutions Juridiques des Romains* xxiv (1904).

&c.), and their various kinds (genera)."<sup>21</sup> For the first time there was a juristic science. Sohm succinctly states the significance of such a science:

A scientific exposition, for example, would never run as follows: If a thing has been delivered to you under a contract of sale, you have a right to keep it, and a third party into whose possession it comes is bound to hand it over to you. [This is the kind of language you will find in Hammurabi's Code.] The scientific exposition would be in this fashion. First, ownership is a right, unlimited in its contents, to exercise control over a thing. Thus we get the conception of ownership. Secondly, ownership can be acquired by *traditio*, *occupatio*, *usucapio*, &c. (each of these terms being defined). Thus in place of a series of legal rules we have a number of abstract conceptions. . . .<sup>22</sup>

The change with respect to the source of norms was equally great. With respect to private transactions, the change was from ritualistic formulas to formless juristic acts. With respect to public law—government—it was a change from the authority of those in charge of the auspices to the authority of the people. In private transactions the actual articles, such as cattle or grain (or symbols representing them), had been passed from hand to hand as the appropriate ritual was recited. If the ritual was faulty in any small detail the transaction was not accomplished. With the change in Roman law, concepts rather than physical articles were manipulated. The modern transaction of mortgage replaced a physical exchange of land and money for a period of years. Ritual was replaced by the intent of the parties. Not the will of the gods, invoked through ritual, but the will of rational men in a rational world, was decisive as to whether the transaction was completed.<sup>23</sup>

The changes outlined above were some of the practical consequences of an idea that provided a basis for community beyond the community of worship. All men could enter into reciprocal rights and duties and receive justice with respect to their relationships because justice did not lie with any man's gods, but was in the hands of professional jurists sworn to uphold the impersonal, universal law before which all men were equal. Men did not deal with one another *qua* men, but transactions were carried out between "seller" and "purchaser," "pledgor" and "pledgee," "mortagor" and "mortgagee," etc., all of whom had definite, specific rights and duties set down in the hierarchically ordered body of legal norms.

Not only could the community become larger, but also it could become much more complex. Since man as a legal person was not com-

---

21. Sohm, *op. cit.* supra note 15, at 91.

22. *Id.* at 32-33.

23. *Id.* at 69.

mon sense man, but legal concept man, it was perceived that artificial legal persons could be created.<sup>24</sup> This is the basis for the modern corporation, so important today in accumulating the vast capital needed in modern economic enterprise.

Most important of all, here was the basis for the institutions of private property and free contract as the means of distributing the decision-making about the allocation and use of the natural resources of a society. Each person who has met the requirements to be recognized as the "owner" of property has the right to make the decisions about the use to which that property will be put. He uses it by contracting with others who have other property, or their own personal skills or labor. This method of distributing decision-making makes no sense at all unless man generally—any who may acquire property by this indiscriminant method—can be expected to make decisions about his piece of the resources that in the long run will be wise from the standpoint of the community as well as from the standpoint of personal gain. Society cannot allow a man with no access to the gods to control a grain field if a god controls the productivity of that field. Society can allow a man who can learn about soil treatment and grain fertility to control a grain field if these matters affect the production of grain (and if the operation of the market will induce him to produce).

Naturally, the legal and political implementation of these basic ideas has had many ups and downs and curious twists of interpretation. One of the most ironical was the immediate result for public law in Rome. The people prevailed over the patricians in the Senate.<sup>25</sup> But recognition of the authority of the people to govern was little more than a formality. The Emperors seldom conducted themselves as representatives. Any legal and political consequences of the rational faculty in man were subordinated for centuries to the official reason and revelation of the Church; and then of Kings. The rational approach has prevailed in periods when new institutions and political values were being created, such as the time of the creation of the modern nation-states. The analytic approach has prevailed in periods of comparative social calm, as in England in the last century, and has made institutions more efficient and law less confusing and contradictory. The sociological approach has prevailed in periods when social change has out-run legal and political institutions, and it has secured reinterpretation of established principles in the light of their current social result, as in England and the United States after the industrial revolution. But, underlying all, Western law and politics still assume a rational uni-

---

24. *Id.* at 195-203.

25. McIlwain, *op. cit.* supra note 2, at ch. 3.

verse and rational men trying to make their way about in it.<sup>26</sup> The conceptions of Greek natural philosophy provided the ideas for the basic legal institutions of private property, contract, rights in the person, and the right to have social institutions act to protect these rights; and also, for the basic political institutions of representative government and of constitutionally limited government.

## II. THE INFLUENCE UPON ATTITUDES

Northrop has called attention to the universalness, the absoluteness and the determinateness of the legal and political norms engendered by the type of concepts that Greek natural philosophy produced. He has pointed out that, because of these attributes in its norms, Western society expects, demands, and uses police power to get a high degree of explicitness of behavior. He has pointed out that what the West would approve as "sticking up for one's rights," would be regarded in Asian societies as "trouble-making"; and that some of the actions which the West would approve as "law enforcement," (especially in the international sphere), would be viewed by members of Asian societies as unjustified resort to armed force which will not help to settle disputes.<sup>27</sup>

I would agree completely with this characterization of Western legal and political norms. And there can be no question that such attitudes are generally held in the West. I believe, further, that the attitude of "sticking up for one's rights" is a likely and probably necessary result of the nature of the system of knowing from which the norms stem. Greek science examined objects as discrete entities having predicates of their own. This carried over into legal and political norms in the form of individual legal and political rights. Legal machinery for the protection of these rights is provided, but the machinery must be activated by complaint of an injured party. Justice will not be done if the injured person does not set the machinery in motion. This is to a considerable extent true even with respect to criminal justice because of the vital importance of the evidence given by the "complaining witness" (the victim of the criminal act). "Sticking up for one's right"

---

26. In Mellwain, *The Growth of Political Thought in the West* (1932), the author takes the rational nature of man as the main thread of the history of Western political thought. In his introductory paragraph he says:

Dominion if it is to be justified at all must be "a condition of rational nature" as Wycliffe defined it, and in reason permanent government must have a justification sufficient to explain the historical fact of its continuous existence among rational beings. . . . [W]here does "rational nature" require that the dominant power be lodged . . . . [H]ow does this "rational nature" prescribe that this power shall be exercised, wherever lodged? *Id.* at 1-2.

27. Northrop, *The Taming of the Nations* chs. 2, 3, 7, 10 (1954).

is, therefore, necessary to the successful operation of a Western society.

I want to suggest, however, that resort to force in the cause of justice is, in certain instances, not justified by the nature of Western norms and way of knowing. I believe that to some extent the attitude of approving resort to force for justice is a holdover from the view of life held prior to Greek science. This would seem to be an area of study in which significance more easily becomes apparent by comparison. I will, therefore, compare the early thought in the West with thought about the same questions in ancient China.

The very early lover of wisdom observed (as would a truly naive observer today) a sensed world of movement, changing colors, alternating periods of light and more or less absence of light, revolving seasons, opposition, communion, reproduction, growth, death. Some vital power must animate and order this activity. To know the source and nature of this power could mean the difference between survival and death. The early inhabitants of the valleys of the Tigris, Euphrates, and Nile rivers, and the shores of the Aegean sea, generally ascribed as anthropomorphic source to this animating and ordering power.<sup>28</sup> The early Chinese generally did not.<sup>29</sup>

It is fascinating to speculate on why the early peoples in these two regions accepted different answers to this basic question, but the answer remains inconclusive. Possibly the geographical and ecological environment focused attention on different factors in experience. Chiang Yee says that China developed its civilization in the interior, under relatively easy conditions, which allowed isolated small groups to meet subsistence requirements, did not place a particular emphasis upon the unusually capable man, or create a need for close cooperation to meet the rigors of sea voyages and coastal storms. By contrast, he says that "sea-civilizations" were created in Egypt and Greece.<sup>30</sup> On the other hand, Toynbee says the challenges of geography and ecology were the same in the two areas. He says the "Egyptiac and Sumeric and Sinic civilizations were responses to the challenges of drought and flood and swamp and thicket. . . ."<sup>31</sup> Maspero takes a middle position, saying that despite the similar fluvial orientation the "two worlds" were "entirely different," "the soil, the climate, the flora, the fauna have nothing in common."<sup>32</sup>

---

28. 3 Westrup *op. cit. supra* note 5, at 216-17; Myres, *The Background of Greek Science*, 16 *U. Calif. Chronicle* 396 (1914).

29. Chiang, *The Philosophical Basis of Chinese Painting, in Ideological Differences and World Order* 35 (Northrop ed. 1949); Dickinson, *An Essay on the Civilizations of India, China and Japan* 46 (1914).

30. Chiang, *op. cit. supra* note 29, at 36.

31. 1 Toynbee, *A Study of History* 321 (1934).

32. Maspero, *La Chine Antique* 8 (1927).

Whatever the reason for the difference, the fact of the difference had remarkable consequences—certainly upon attitudes toward human actions, and probably upon the development of systems of knowing and consequent social norms. The anthropomorphic interpretation of the animating and ordering power directed thought to (1) men as semi-autonomous entities, and (2) *control* of physical events. The non-anthropomorphic interpretation resulted in a system of knowing in which (1) man is merely one attribute of the only entity, the universe, and (2) attention is directed to preserving and promoting the natural harmony of the universe.

The personalizing of the animating and ordering power is seen in the concepts of the Roman *genius*, the Greek *daimon*, the Persian *fravashi*, and the Egyptian *ka*.<sup>33</sup> Certain resourceful, powerful, practically wise men were thought to be filled with the animating and ordering power to a higher degree than others. When such a "demi-god" died, it was conceived, his soul lived on as a companion and protector to his descendants. Such a man was the founder of a family. He was the Greek eponymous hero, the Roman original paterfamilias. The hearth fire was the symbol of the continued presence of his living soul, and it burned upon "the hearth, the seat of the household gods, under the foundation stone of which the house-father had once been buried."<sup>34</sup> Not only did the genius of the original house-father remain near his grave to assist, guard and guide those who supplicated it properly, but also his active power, or *mana*, was passed through the continuity of generations.<sup>35</sup> When the peoples ascribed personalized gods to natural events, these became family *manes*, and were as local and exclusive as the founding house-father, or eponymous hero.<sup>36</sup>

The beliefs just recited were the basis for the way of life and the legal and political norms of the early city-states described in Part I of this paper. At the moment we are interested in their influence upon the system of knowing developed by the Greeks, and upon attitudes toward the use of force for justice. But first, because we are comparing, we must look at the corresponding beliefs in early China.<sup>37</sup> If

33. 3 Westrup, op. cit. supra note 5, at 216-17.

34. Id. at 219.

35. 2 Plato, op. cit. supra note 4.

36. Fustel, op. cit. supra note 3, at 162-63; Greenidge, op. cit. supra note 7; Nilsson, op. cit. supra note 6, at 10.

37. This is an uncertain enterprise because the Chinese system of knowing did not give rise to the kind of logical analysis produced by the Greek system of knowing. Accordingly, ancient records must be interpreted in the light of the Chinese concepts that analysis shows were implicit in early Chinese thought before valid comparison can be made with early Western conceptions. Marcel Granet has attempted such an analytical statement of Chinese concepts in his *La Pensée Chinoise* (1934). It is not possible, of course, for one who is not a sinologist to

Granet is correct about early life and thought in China, it would appear that the most significant fact of experience for the Chinese was the feeling of oneness with the universe experienced at the festivals and hierogamies. This seemed to contain the efficacy that produced the different orders of life for men and women which alternated with the periods of communion at the festivals and hierogamies, and corresponded with the rhythm of the seasons.<sup>38</sup> Time and space were immediately apprehended, yet were public (or, more accurately, *social*, because it was a group experience) and also normative. Time was composed of bits of the universal order of compartments that occurred in the proper sequence. Space was composed of bits of the universal order of compartments that occurred in the right geometrical distribution with respect to each other. Time was weak or strong depending upon whether or not it was composed of bits of compartment that restored the sensed experience of universal solidarity. "Duration is truly itself, entire and dense, only at occasions enriched by life in common which mark illustrious events and seem to establish time."<sup>39</sup> The festivals and hierogamies restored the vitality of time, renewed the rhythm of the universe. Space was full or diluted depending upon whether the correct distribution of compartments occurred within it. Beyond the area of the civilizing influence of the proper order of compartments there existed only an "uncultivated space which supports only some imperfect beings."<sup>40</sup> Space and time, it will be noticed, contained not just the compartments, but the proper *order* (sequence or distribution) of those compartments. "Time and space are always imagined as an ensemble of groupings, concrete and diverse, of *sites* and *occasions*" where and when it is proper for compartments to occur.<sup>41</sup>

The concepts of time and space show quite clearly that the source of the animating and ordering power was believed to be either in the sites and occasions where and when the universal oneness was experienced, or else in the total order that was only partially immanent in these particular events. The main stream of Chinese civilization has always centered attention on the social and the immediate, not upon withdrawing from this world in order to experience the timeless. Therefore the latter is ruled out and makes it quite probable that the

---

make definitive judgment as to the success of Granet's attempt. However, a strong inference that he is mainly correct can be drawn from the fact that if he is correct then many aspects of traditional Chinese society are seen as sensible implications of basic beliefs, whereas if he is not correct these aspects are inexplicable or are explained away as mystical foolishness—as many modern investigators, both Western and Chinese, have done.

38. Granet, *op. cit.* supra note 37, bk. 2.

39. *Id.* at 107.

40. *Id.* at 92.

41. *Id.* at 89.

Chinese thought of the sites and occasions when universal oneness was experienced as the source of the animation and order in the universe.

We are now in a position to compare the answers of early Greek natural philosophy with the implicit answers of early Chinese thought to certain basic questions:

QUESTION	GREEK FOUNDATIONS OF WESTERN CIVILIZATION	EARLY CHINA
<i>What is Real?</i>	The Real is Stuff (Material).	The Real is Social.
<i>Is it one or many?</i>	A sensed one.	A sensed one.
<i>Divided or undivided?</i>	Divided. <sup>42</sup>	Undivided. <sup>43</sup>

These answers were to a great extent presaged by the differing answers given to the question of the source of the animating and ordering power. The answer that "Real is Stuff" is likely among a people whose attention is directed to controlling their environment. The answer that "Real is Social" is likely among a people whose attention is directed to the collective experience of sensed universal oneness. The answer that the Real is divided is almost necessary among a people who believe that the animating and ordering power over Stuff is present in high degree in particular men. The answer that the Real is undivided is quite likely among a people who have a liturgical, social theory of time and space.

In turn these answers to a very great extent presage the differences between Western civilization and Chinese civilization. When the Real is believed to be properly ordered compartments, thought is likely to be concentrated more on "categories of relationship than on categories of substance."<sup>44</sup> Most important of all, when the Real is believed to be undivided, lovers of wisdom are not driven by contradiction, as the philosophers of the West were, to posit objects other than sensed objects, or to examine objects as discrete entities with attributes of their own. If Stuff is a one and divided, the question arises whether it is infinitely divisible. Logically it should be. But Zeno's paradox shows this to be impossible. If points have extension, an infinite number of them could not be contained in a finite line. If they do not have extension an infinite number could not compose any line at all. But when it was said that the Real is a material sensed many, the contradiction of incommensurable magnitudes arose. If there are indivisibles with magnitude, and numbers refer to such objects, then every line must

---

42. Burnet, *Early Greek Philosophy* 10-11 (1892).

43. Granet, *op. cit. supra* note 37, at 147-48.

44. Hughes, *Epistemological Methods in Chinese Philosophy*, in *Essays in East-West Philosophy* 57 (Moore ed. 1951).

be composed of some whole number. Yet, it was discovered that the hypotenuses of certain right triangles cannot be expressed as whole numbers. Democritus proposed to avoid this contradiction by putting the incommensurability in the sensed world and positing a real world, known rationally, which contained the indivisibles with magnitude. Although this particular solution was soon rejected in favor of Plato's solution which accounted for arithmetic incommensurables within the real world, yet the use of postulated objects has remained as a unique feature of Western science.<sup>45</sup>

Because the Chinese never held that the Real is divided, they never met the contradictions. There is evidence that they were aware of the right triangles whose hypotenuses bothered the Greeks, though the date is questionable.<sup>46</sup> Far from being a bothersome contradiction, however, these triangles were used by the Chinese in an ingenious demonstration of the way in which the actual dimensions of the universe were adjusted to the unchanging normative dimensions, by the dimension of the Emperor used as a gnomon.<sup>47</sup> The Chinese investigation of nature that was developed on this base was brilliant for its time. In fact it was surpassed in the West only yesterday.<sup>48</sup> Its method was acute investigation of relationships between objects. I believe that Northrop is right in his characterization of the concepts of this system of knowing as being confined to the immediately sensed,<sup>49</sup> so far as objects are concerned. However, I am convinced by a thorough study of Granet's account of the basic concepts of this system of knowing that relationships that had not been observed were postulated (in rather crude ways, such as tables or correspondences, or the play of numbers representing categories of related objects) and that the usefulness of relationships so discovered was a form of verification.<sup>50</sup>

The limitation on this way of knowing is strong evidence in support of Northrop that the Chinese never went behind sensed objects to postulated objects. All of the early discoveries made by the Chinese<sup>51</sup>—and which have occasioned much speculation as to why modern science did not develop in China—will be found to be based on relationships between objects, or combinations of objects observable by the senses. The limitation of this type of system, and the contrast between it and Western science with its postulation of objects and rela-

---

45. Burnet, *op. cit.* supra note 42.

46. Granet, *op. cit.* supra note 37, at 261-62.

47. *Id.* at 263-67.

48. Needham, *Science and Society in Ancient China*, Conway Memorial Lecture (1947) (pamphlet).

49. Northrop, *The Complementary Emphases of Eastern Intuitive and Western Scientific Philosophy*, in *Philosophy East and West* 168 (Moore ed. 1946).

50. Granet, *op. cit.* supra note 37, especially bks. 2, 3.

51. 2 Needham, *Science and Civilization in China* 327 (1954-56).

tionships, is striking in the case of gunpowder. Gunpowder is a *mechanical* mixture of saltpeter, charcoal, and sulphur. By crude experimentation or accident one could discover gunpowder by dealing only with the proper comportments (proper ways, or *tao*) of sensed objects. The improved smokeless powder, or guncotton, of the West is another matter. Guncotton is "a series of cellulose nitrates, the highest and most explosive member of which may be represented by the formula  $C_{12}H_{14}O_4(NO_3)_6$ ."<sup>52</sup> Guncotton is a *chemical* compound, which can be fully understood only by knowing the *tao* of postulated objects *behind* the sensed objects.

We are now in a position to see the causes of the characteristic attitudes toward law and politics in the West and in China. From the earliest beginnings of Western civilization a central purpose of society has been *power*. All authority was put in the hands of the house-fathers because they had the active power of the original house-fathers and had access to the gods who controlled physical events. When the universe and men became rational, the central problems of law and politics became, and remain, the just distribution of power and the effective maintenance of that distribution by corrective justice, as Aristotle foresaw.<sup>53</sup> The central purpose of Chinese society was the establishment and maintenance of universal *harmony*. Law and politics as separate pursuits or disciplines were little developed because the affairs of man did not receive a sharp focus of attention. Human activities ought to harmonize with the universal order of comportments. The river has its *tao*, the same as a man.

The desire to accomplish these central purposes naturally fostered the development of attitudes calculated to aid that accomplishment. In China actions that violated norms were wrong because they disrupted the harmony of the universe. Injury caused others by such actions was not of primary concern. Therefore, the area that the West calls private law was almost non-existent. The injured person who demanded compensation and took the wrong-doer to court to get it would only be further disrupting the harmony that ought to prevail—especially if close relatives were involved, such as brothers. John C. H. Wu reports, as typical of law in traditional China, the case of the neighbors who brought to court a dispute over the ownership of a chicken. The magistrate asked each party what the chicken had been fed that morning. One said beans, the other rice. Whereupon the magistrate ordered the chicken killed, and his stomach opened. There were beans in the stomach. The man who had said rice was punished.<sup>54</sup> The fact that the proper Chinese way would have been peaceful mediation and

52. Webster, *New International Dictionary* (1st ed. 1909).

53. Aristotle, *Nichomachean Ethics* (Chase transl. 1911).

54. Wu, *The Art of Law* 50 (1936).

compromise does not mean there should have been compromise as to the norms of ownership. It was simply that a second disruption of community harmony would not restore the harmony lost by the first disruption. Not only should the harmony of human relationships be maintained, but also the harmony of human activities with events of nature. Severe punishments, especially death sentences, were not carried out in the spring, when life is awakening. They were carried out in the fall, when nature is causing "the decline and the arrest of the forces of life."<sup>55</sup>

In the West the just distribution of power is disrupted by actions that injure others. Since it is a primary purpose of law and politics to maintain this just distribution, the injury suffered by the victims of the wrong-doing is of primary concern in Western society. The logical corrective action is to restore the just distribution as nearly as possible. This is done by requiring the wrong-doer to compensate his victim in damages, or to return what he has taken, or to do certain acts that will stop or repair the injury. Because action by the society to correct the injustices must be initiated by the injured person, and because that correction is a primary purpose of the society, it is essential that an attitude of demanding justice, of "sticking up for one's rights," should prevail. Because a misuse of power has caused the injury, it is socially necessary, and appropriate, that the organized power of the society should be brought to bear upon the wrong-doer to enforce the judicial decision and compel him to correct the injustice. Therefore, an attitude of approval of the use of force *for corrective justice* is necessary to the successful operation of Western type legal and political norms. Indeed, it is the application of the organized power of the community to compel compliance with the explicit, public casuistry embodied in the legal norms that has produced man's best protection against the arbitrary use of power.

The use of force in support of distributive justice is another matter. In this area are the many difficult problems generally referred to under the rubrics of minority problems, and revolution. When force is used in support of distributive justice, the purpose is to coerce compliance with norms held by those persons whose organized power is used. But the persons coerced are not willing, as a matter of principle, to accept those norms. This is radically different from the use of force against persons who are not principled dissidents, but wrong-doers for selfish purposes.

I find nothing in the nature of the concepts resulting from Greek science that would support approval of the use of force to settle a dispute over which system of norms will be used to organize a society.

---

55. Escarra, *Le Droit Chinois* 11-12 (1936).

I do find in the older tradition of the West support for such an attitude. If personal possession of the power that animates and orders the universe and access to the gods who control physical events is determinative of who is entitled to have authority, then success in battle proves the *right* to prevail, and not just the *power* to do so. Approval of the use of force to settle disputes over distributive justice is an attitude appropriate to the earliest stage of Western civilization. It is inappropriate in a mature stage, when the premises that fostered it have been long since rejected. A change in this attitude is urgently needed at the present time because of two facts of central importance to this and possibly to succeeding generations.

*Fact One:* The instruments of force have become so efficient that settlement of distributive justice disputes by force might possibly be suicidal for mankind.

*Fact Two:* The serious disputes among states in the international community are now disputes about distributive justice. In the previous three centuries, the community of Christian, European states had a large measure of consensus on the norms of the international community. Enforcement machinery was decentralized, consisting of diplomatic actions, measures short of war, and war, by blocs of states. But there was an accepted system of distributive justice and the wrong-doing state's power to resist was affected by the wrong—in terms of its own will to fight and in terms of whether it could attract allies to its defense. There were legal principles and rules that had limited but real effect. Revolutionary, international communism, however, is a challenge to the system of distributive justice within the international community, as well as within every state. In such a dispute no common norms inhibit the motivation of moral conviction. The struggle is "total," and it cannot be allowed to take the physical form of total war because the possible consequences are unacceptable. Yet one of the most deepset attitudes of the peoples of Western civilization is to resort to physical force in such a situation.

The attitude of approving resort to force to settle disputes about distributive justice must be changed if mankind is to survive. To say this is *not* to say that force should never be used in international disputes about distributive justice. We are in a historical situation partly shaped by the attitude under examination. Positions have been taken, commitments have been made, preparations have been undertaken, present understanding retains this attitudinal focus. This historical situation cannot be changed overnight. But the attitude that the use of force may be necessary is importantly different from the attitude that the use of force is good. The latter has a tendency to induce the viewpoint that force is the *only* way to settle such disputes, and to block awareness of alternative courses of action.

## QUESTIONS AND ANSWERS

**QUESTION 1:** *Are you saying that surrender to aggressive revolutionaries is better than using military force to stop them?*

**ANSWER:** No, I am not saying that. I would say that no state or power bloc has the right to impose its wishes about the structure of the emerging world community by the use of force. Therefore, so long as any danger exists that some state or power bloc might attempt to do this, enough force must be kept in readiness to prevent it. However, absent dictatorial imposition, the structure of a community is built out of the competition of inspiring ideals and practical proposals. Any people that thinks too readily and too much about using force to overcome obstacles to the realization of its expectations, makes itself less effective in winning the cooperation of other peoples by the nobility of its ideals and the effectiveness of its programs for solving such pressing problems as relieving mass misery and making human dignity a reality for more of the earth's population. I think the West would make itself more effective in dealing with all aspects of aggressive international revolution by reconsidering its attitude toward the use of forcé. The East has much to teach the West in this respect.

**QUESTION 2:** *If the influence of philosophy on law and politics in the West has been as you have stated here, what are the implications for peoples with ancient cultures who have newly rewon political independence and for new countries experiencing political independence for the first time?*

**ANSWER:** The great advances in production and scientific uses of power in the past hundred years have made possible, for the first time in human history, a world in which the great masses of mankind need not live on the edge of starvation, disease, and early death. Until now it was not humanly possible to produce enough to relieve mass misery. It is becoming possible. The masses will demand that it be done. Therefore, in the new and newly independent countries, the power necessary to do this gigantic task will somehow be created. Arbitrary uses of that power must be prevented if tyranny is not to curse the accomplishment of plenty.

Western law and politics developed the method of preventing the arbitrary use of power by legal enforcement of legally defined rights of persons. Accumulations of power are controlled by the use of the organized power of the society exercised through law enforcement and judicial institutions in accordance with impartial, public rules established by law making institutions. The method has proved effective. The new and newly independent countries have drawn upon Western experience in law and politics—as is evident in the constitutions written in the past 15 years. However, one wonders whether legal and

political ideas borrowed from the West will have the authenticity and authority to be effective in new settings unless the philosophical ideas from which they germinated are understood, accepted, and given emphasis in the community. In countries with ancient cultures, this may involve de-emphasis or even abandonment of some traditional values. But what are the alternatives? It seems unlikely that any traditional values of ancient cultures will survive in modern states unless the power generated for the great productive effort can be controlled so that individual freedom and cultural diversity are not destroyed.

*QUESTION 3: Is your characterization of Western society as power-seeking accurate, or is it a reading back of recent history? It would seem to be true of the past two or three centuries in the West, but did the people in the early period of Western civilization think of themselves as organizing society in order to achieve the power to control their environment? And is it not a distortion to speak of "distributive justice" as being concerned only with the distribution of power? Does not this idea include the just distribution of wealth, respect, and other values?*

**ANSWER:** Let me say immediately that I was not seeking to set down an accurate summary of what Western legal and political writers have said about the nature of law and politics in the West. I wanted to confine myself to the philosophical ideas and the social ideals that captured the imaginations of enough people so that they were acted upon and therefore had substantial effects in Western societies. We are discussing the relation of philosophy to practical affairs. For this purpose philosophical ideas are irrelevant if they have never become the directing ideas in any society.

With this in mind, I believe there is reasonable accuracy in such statements, for instance, as that the West generally gave an anthropomorphic interpretation to the animating and ordering principles or forces and that China generally did not. This does not deny that contrary currents of thought existed in each instance. Of course any evaluation of such complex data is a matter of judgment, and judgments of reasonable men may differ. I think that the nature and the central importance of the auspices show that a primary purpose of earliest Western society was to make use of the greatest power over events that could be obtained. With the Greek classical writers the central importance of power appears more in the discussion of human nature than in the discussion of social organization. While Aristotle originated the concept of distributive justice and discussed it to some extent in terms of the just distribution of power among members of the community, his primary discussion is in terms of the just distribution of the powers of the individual person to take actions that reason

shows him to be right. It should be remembered, too, that Aristotle viewed Ethics and Politics as two parts of the same subject. With the Stoics, especially, but also with Aristotle, virtue (personal and political) comprises an element of will that executes the right actions learned through rational knowledge of the *summum bonum*. Power as a purpose of society was doubtless quiescent during the Dark and Middle Ages. But the fundamental conceptions of human nature and the universe that sparked Greek natural philosophy are the same ones that sparked Western law and politics. The seeds of modern science with its great potentialities for power over nature were planted by the Greeks, though they lay quiescent for centuries. I believe the same is true of Western law and politics and that a central purpose has always been—although for centuries more or less quiescent—the organization for power over natural and human events, and the development of effective controls over the power sought to be generated. For these reasons, then, I do not think the statement that a primary purpose of social organization in the West has been power is beyond the limits of inaccuracy necessarily present in any broad generalization.

As to the matter of "distributive justice" referring to the distribution of other values than power, let me just say that from the legal and political point of view the important thing is always whether persons do actually receive, use and enjoy the goods that they have a right to receive, or whether someone who has the power to interfere—but no right to interfere—prevents that reception, use or enjoyment. In this sense, all law and politics is concerned with using power to keep power within the boundaries of justice.

*QUESTION 4: We have heard much of dichotomies—the West is rational, the East is not rational; Western norms are universal, Eastern norms are particular. Is there really such a sharp contrast between traditional Chinese law and Western law?*

*ANSWER:* I believe there are fundamental differences between traditional law and Western law and that these differences stem from differences in fundamental conceptions accepted in the two instances. I am not, however, asserting such a sharp dichotomy as the question poses. I do not agree with Dr. Northrop that the norms of Chinese law were arrived at by mediation. Chinese ethics were highly developed, and their norms were taught in the home and in the school. The correct way for the son to act toward his father in a given situation was the correct way for all sons to act with respect to all fathers. If the son did not act in the way prescribed by the norm he violated the norm. Everyone knew the norm and recognized the violation. The mediation that followed was concerned with what should be done about the violation; it was not concerned with establishing the norm

for action of this son toward this father in this situation. Therefore, the norms were not mediational. They had universalness and absolute-ness within the categories to which they applied. Mediation occurred after violation because universal harmony would be disrupted a second time if litigation were resorted to. Dr. Wu has stated the same thing a little differently in saying that China had a system of duties, but not a system of rights. The father did not have a right to compel his son to obey the norm, but the son had the duty to obey the norm. Therefore, the norm was established prior to a behavior situation between a particular son and a particular father.

*QUESTION 5: Is Western law as rational as you suggest? Isn't the human element present at all?*

**ANSWER:** I think the human element operates at two stages in the legal and political process. The first stage is in the adoption of legal and political norms. I do not believe that the relation between philosophical ideas and legal or political norms is a logical relation, that the latter are deduced from the former. I believe that in a crisis situation, when things have got so bad that change has become acceptable, and someone gets the notion that a philosophical idea (which he may distort, or be only vaguely familiar with) implies or requires some new social organization or action, and the apathy for the old together with the asserted authority of the new result in its acceptance, that then a social result of a philosophical idea is born. Later, as trained persons study the philosophical idea and reach more carefully reasoned conclusions about its social implications, corrections in the social result may be made if the society has provided institutions through which community wisdom of this sort can be utilized. In this way a society, over a period of time, can be reorganized according to a radically different, technically complex system of knowing, although scholars who know the virtue of the new could never get the support of revolutionary masses, and revolutionary leaders could never fathom epistemology.

The other stage at which the human element operates in the legal and political process is in the application of legal and political norms to the affairs of daily life. In a practical sense, all law is made by humans and applied by humans. (Even "revealed" law is revealed to humans, to the best of my knowledge.) Therefore, the qualities of goodness, mercy, honesty, love, and devotion to duty that make humans better humans will make judges better judges and lawyers better lawyers. The knowledge of human fallibility is a constant ameliorator of the rational rigor of the law. Further, I believe that in Western society, or in any society, men are only rational when they have to be. A lawyer argues his case step by logical step to the judges of

the appellate court, who are trained to examine matters in this way. But the great trial lawyers talk to the jury in a seemingly rambling, disconnected way, telling anecdotes, drawing homely analogies, quoting the Bible and Shakespeare. They know that the average man is not accustomed to thinking in a logical, connected way.

There is a much more serious aspect to man's reluctance to be rational. I believe that legal and political norms are more often limits than initiating guides to the actions of men. I mean by this that the average man never thinks about the law as long as he is "doing all right" and is not made too uncomfortable about it. When injured persons or his conscience raise obstacles he has to consciously decide whether to continue that course of action or take up another one. Then his own higher good, and the common good, as well as gain, may become factors in the decision. The decision will be affected by qualities of his character, by the pressure brought upon him by persons gaining or losing by his actions, and by persons whose only interest is in seeing that the norms of the society are obeyed. It is the task of this latter group, the "forces for law and order," to hold the balance and keep society from disintegrating into the chaos of unlimited struggle for selfish gain. This disinterested group can rally and prevail only when there is consensus as to the justice of the community's norms. And it often seems that the brink of chaos must be approached before enough persons will rise to perform this civic duty. Little Rock is a recent example. Law and order have to be preserved from day to day by enough persons rising above personal gain and convenience to act or support action in accordance with the common good as rationally discovered and culturally transmitted.

*QUESTION 6: Why do you say that the common good is rationally discovered? One need not go through a process of reasoning to know that it is bad when large numbers of persons in industrial slums are starving because their wages are too low, or to know that legislation requiring minimum wages is good. What one needs is to care, not to know.*

*ANSWER:* Certainly one needs to care, but the community needs also to have possible alternative actions related to accepted fundamental principles in order to preserve other values in the community. This is another instance of the way in which legal and political norms act as limits, and not as initiating guides to community action. In exactly the situation referred to, starvation wages and miserable working conditions in the wake of the industrial revolution, the Supreme Court of the United States required that minimum wage and maximum hour laws be proved to have a real effect in protecting the health and welfare of workers and that the need for such protection was great. Only

when it was convinced that these two facts were proven did the Supreme Court hold wage and hour laws valid. Until then the Court had held these laws an unconstitutional abridgment of the fundamental right of free contract.\* Maximum hour laws for women were held constitutional in 1908 in *Muller v. Oregon*, 208 U. S. 412. Minimum wage laws, which the Court considered a more direct interference with the contract relation between employer and employee, were not held constitutional until 1937, in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379.

It may be objected that the only purpose served by the Supreme Court's rational scrutiny of the proposed legislation was to delay remedial action and let many people suffer in the meantime. To answer this objection one must call attention to the potentialities of the alternative—no responsible weighing of proposed action against authoritative first principles. English legal and political history provides an instructive instance. In the first half of the 17th century the English kings used their royal prerogative to prevent many injustices that would otherwise have resulted from the operation of the strict rules of the common law. For instance, a man ousted from his land could not plead in an action at law that the title had been got from him by fraud, so he lost it to a defrauder. But, sitting in equity, and acting on natural justice, the Chancellor would order the defrauder in the King's name not to prevent the rightful owner from retaking and using his land on penalty of fine or imprisonment. There was a great growth of equity in this period, with great benefit to the people. However, a moment's reflection will lead to the realization that the first half of the 17th century was also the period of the infamous Star Chamber in England. The kings asserted that their prerogative could override the common law. They used it to do great good. They used it to do great evil. The English decided by revolution that they would rather have limited power in the monarchy.

---

\* If it be questioned whether the principle of free contract was rationally discovered in the first place, I would say it was in the round-about way outlined in the first part of my answer to Question 5.