Chinese Synthetic Jurisprudence and Its View on the American Policy-oriented Legal Theory

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I. Introductory: the Recent Tendency in World Legal Thought

Generally speaking, the tendency in world legal thought to-day is still just like Dr. John C. H. Wu put it well forty years ago that we are in the midst of a transition from mechnical to functional jurisprudence, from static to dynamic jurisprudence, from absolute to relativist jurisprudence, from "jurisprudence of conceptions" to "jurisprudence of realities", from individualist jurisprudence to sociological jurisprudence. (1) From another point of view, the tendency also signifies the transition from juridical monism to pluralism. In a sense, the latter has rather demonstrated more recent development in the field of legal thought which has been aptly summarized by Professor Felix S. Cohen as follows:

"There are many signs to-day that the pattern of complacency towards the familiar and of mistrust towards all unfamiliar accounts and ideas is doomed, that the era of classificatory caricatures in jurisprudence is drawing to a close, and that the value of multi-dimensional perspective upon legal realities and legal ideals is gradually winning acceptance." (2)

Up to the present, quite a few contributions have been made to this development in world legal study. Some of them have developed into remarkable theoretical systems, although none of them may be said to be absolutly perfect without defects. (3) Now I would like only to mention two as examples: one is Professor Jerome Hall's "Integrative Jurisprudence" and the other is "Policy-oriented Jurisprudence" initiated and developed by Professors Myres S. McDougal and Harold D. Lasswell.

Professor Hall published his "Integrative Jurisprudence" in the "Interpretations of Modern Legal Philosophy" edited by Paul Sayre in 1947. The main object of Integrative Jurisprudence is to correct the "particularistic fallacy in legal schools." "The most serious fallacy in modern jurisprudence," says Hall, "(is) the product of a sophisticated separation of value, fact and idea (form). This fallacy is manifested in the particularism of prevailing legal philosophies, i. e. in their restriction to one of the above spheres of significance, with consequent exaggeration and error." (4) He holds that the measure of a legal philosophy is its adequacy, as determined by its ultimacy, comprehensiveness, and consistency. On the one hand, he argues that the modern natural law philosophers deserve criticism because of their separating idea from the fact. On the other hand, he also considers that the American realism is particularistic for its over-concentration upon facts and ignoring concept. Thus, Professor Hall admits: "I have tried to join legal realism and natural law philosophy in a viable union, after freeing the former of anti-intellectualist tendencies and the latter of neglect of empirical knowledge." (5)

My interest in Professor Hall's Integrative Jurisprudence is due to the fact that I had the

idea to give the same title to my own legal theory of "Synthetic Jurisprudence" without knowing the name of Hall's legal theory. And I initiated my legal theory almost at the same time when Professor Hall published his above-mentioned article. I wrote an article "On the Reformation of the Chinese Jurisprudence Based on Dr. Wu's Chinese Neo-analytical Legal Theory" which was published in the "Symposium of Constitutioinalism", a supplement of *Nanking Hoping Daily News* issued on July 18 and 25, 1948. I suggested my preliminary idea of Synthetic Jurisprudence by developing Dr. Wu's legal theory of "Three Dimensions of Law."(6) Again, in 1955, I wrote another essay "On the Reconstruction of Chinese Jurisprudence," and had it published on vol. 21, nos. 7 and 8, *Cheung-young University Law Review*. This was the first time I used this term for the legal theory which was developed on the basis of my former article. After I published this essay, however, I felt that I would rather change the name of my legal theory into "Configurative Jurisprudece" or "Integrative Jurisprudence" in order to show that the basic idea of my Synthetic Jurisprudence is configurative and integrative in its approach to law.(7) In fact, I did not notice Professor Hall's legal theory until I wrote my article "On Synthetic Jurisprudence and Integrative Jurisprudence" which made a brief comparision of these two legal theories in 1961, and had it published on No.6, *Journal of National Cheng-chi University* which was issued in Decmbeer 1962.

As to the "Policy-oriented Jurisprudence" or the "Policy-making Legal Theory" initiated and developed by Professors McDougal and Lasswell, it seems to me that it is also a kind of pluralistic legal theory. I strongly feel that it has achieved a great deal in studying law from the multi-dimensional perspective, and that it may be rightly regarded as the most comprehensive, if not perfect, legal theoretical system. At the same time, I found that there it has some points in common with my synthetic jurisprudence, at least in spirit if not in the logical sequences .This gave me the idea of writing this paper.

Another motive of mine precipitating this writing is that it was interesting for me to hear from Professor Lasswell when I talked with him about my legal theory in the spring of 1964 that in India there also has been a legal theory holding exactly the same title as mine. It is the Indian Synthetic Jurisprudence initiated and developed by Dr. M. J. Sethna. The inception of the title of the Indian School of Synthetic Jurisprudence, according to Sethna, was in 1955.(8) It was the same year that I initiated the name of my synthetic jurisprudence (although the basic idea had been explored in my first article eight years before.) The central idea of the Indian Synthetic Jurisprudence is to amalgamate all methods of different types of jurisprudence, and above all, to find the connecting links and compromises or reconciliations. So, "by analysis", Jays Sethna; "we understand the meaning and significance of the legal concepts, taking cognisance of the components that make those concepts; in sociological jurisprudence, we examine the law and the legal system, in the light of human needs and social wants; in philosophical jurisprudence, we enter a discussion of the normative aspects of law; in historical jurisprudence, we trace the historical base, the original growth of law and legal concepts and ideas."(9) Judging from this description, Sethna's synthetic jurisprudence seems to be essentially a mere synthesis of methodology in studying law.

The so-called Indian Synthetic Jurisprudence, strictly speaking, does not have its own legal theoretical system despite the fact that the methodology in studying law is undeniably very important. Dean Roscoe Pound, however, appreciated Sethna's jurisprudence to a considerable degree although

he asserts that "an assured critique of his (Sethna's) doctrine,..... must come from the east, not from the west."(10) In contrast, my synthetic jurisprudence had not been introduced to the Western world until I came to the United States in 1963-64 as Visiting Scholar at Columbia University Law School, Yale University Law School and Harvard University Law School. The main purpose of this paper is to try to introduce the essence of my legal theory to the English-speaking world. In order to avoid any confusion with Sethna's Indian Synthetic Jurisprudence, I have changed the title of my legal theory into the "Chinese Synthetic Jurisprudence". At the same time, I will make a brief comparison between my legal theory and the American Policy-oriented Jurisprudence in this paper so as to show how the common tendency in legal thought has been developed in different areas resulting in similar conclusions irrespective of their different starting points.

(1) John C. H. Wu, *Judicial Essays and Studies* (Shanghai: The Commercial Press, Ltd., 1928) p. 143.

(2) Morris R. Cohen and Felix S. Cohen, *Readings in Jurisprudence and Legal Philosophy* (New York: Prentice Hall Inc. 1951) Preface p. 5.

(3) In addition to those legal theories mentioned in this paper, I would like at least to add Dean Pound's sociological jurisprudence, Justice Cardozo's "Via media" between the rigid analysis of the nineteen century and the free will Neo-realists, Prof. M. R. Cohen's "principle of polarity of Law", Prof. E. W. Patterson's "eclectic philosophy of law". According to Prof. H. G. Reuschlein, even Prof. L. L. Fuller's legal theory, Prof. N. Cahn's "anthropocentric view of law" based on "the sense of injustice" and H. Cairn's legal theory; all are included in the field of Integrative Jurisprudence. (See his *Jurisporudence-Its American Prophets*, 1951, pp. 404-458.) In a sense, G. Radbruch's Legal Relativism may also be considered as one of multidimensional legal theories. Cf. discussion in Prof. W. Friedman's *Legal Theory* (London: Stevens & Sons Ltd., 1960) Ch. 15, pp. 143-48.

(4) Hall, "Integrative Jurisprudence", in *Interpretations of Modern Legal philosophy* (edited by Sayre, 1947) p. 313.

(5) Hall, "The Perspective of Integrative Jurisprudence" in *Contributions to Synthetic Jurisprudence* (edited by Sethna, Bombay, N. M. Fripathi Private Ltd. 1962). p. 49.

(6) Wu, *op. cit.* Ch. 1.

(7) The Author, *Modern Jurisprudence* (in Chinese, 1960 1st ed.) p. 263

(8) Sethna, *Synthetic Jurisprudence*, Preface, p. 5

(9) *Ibid.* pp. 5-6

(10) *Ibid.*, p. 7, quoting Pound, "Synthetic Jurisprudence"

II. The essentials of Chinese Synthetic Jurisprudence

The necessity for synthesis of different approaches to law, and its possibility, was clearly pointed out by Dean Roscoe Pound more than thirty years ago in 1931 as follows:

"In the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work. If the time and energy expended on polemics were devoted to that work, jurisprudence would be more nearly abreast of its tasks."

"There are many approaches to juristic truth and that each is significant with respect to particular problems of the legal order; hence a valuing of these approaches, not absolutely or with reference to some one assumed necessary psychological or philosophical basis of jurisprudence

but with reference to how far they aid the law matter, or judge, or jurists in making law and the science of law effective." (11)

Based on this point of view, Dean Pound considered that the evolution of jurisprudence is a process of synthesis, and that sociological jurisprudence itself has also passed a synthetic process to enter the present stage of unification. (12)

Felix Cohen stated more explicitly that different people who used the word "law" are not necessarily talking about the same thing or answering the same questions. He also held that the home of jurisprudence has many mansions. (13) Taking as an example the fable of the six blind men of Hindustan who judge the shape of the elephant only from the parts they touched respectively, Cohen made a very excellent synthesis about the nature of law by puting thirteen jurist's definitions of law to-gether. (14) I have also made use of the same idea, as Prof. Felix Cohen did, of taking the fable of the Indian blind men as a metaphor for explaining the Chinese synthetic theory of law. (15)

The Chinese synthetic jurisprudence is based on the criticism of Dr. Wu's legal theory of "Three Dimensions of Law", the main points of which may be summarized as follows: (16)

First, law in "abstracto", as assumed by the jurists, has never existed at any point in time and space; so in the actual world, there is "this" or "that" particular law, but there is no "law".

Second, every particular law has three dimensions, namely:

1. The dimension of "time" —all laws have a temporal attribute. Time is an omnipresent guest. Willynilly, he will enter into the mansion of law; so he might gnaw into the statute and suck all spirit out of it.

2. The dimension of the "scope of validity" —all laws prevail over a certain territory or over certain persons as in the case of nomadic people. But, there can be no law where scope of validity is universal, or whose jurisdiction is unlimited.

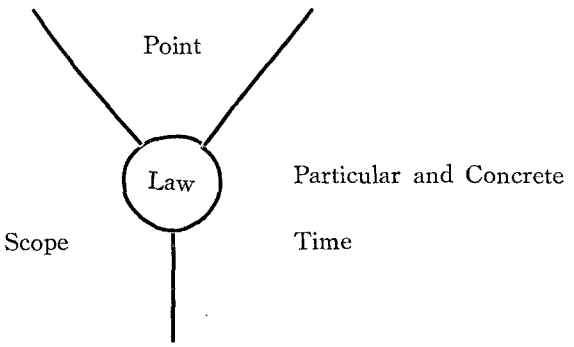
3. The dimension of "point" —that is, every law governs a set or sets of circumstances. The facts, whether actual or hypothetical, therefore, form a dimension of law.

The theory of three-dimensional law, according to Wu, has two logical consequences. On the one hand, it ceases to be a formal science, and becomes an inductive science. On the other hand, since all laws are relative to facts, no two cases can be exactly identical with each other. One cannot, therefore, deduce a law from the decision of a prior case because the method of analogy does not give us absolute certainty. Law is a matter of prediction rather than that of logical deduction.

Based on the above brief description of Wu's legal theory, we can see that the so-called three-dimensional law is, roughly speaking, derived from Mr. Justice Holmes' famous notion: "Law is a prediction of what the court will do in fact." (17) The three dimensions are used as coordinates for such prediction. In methodology, Wu's theory is a development of the Austinian traditional analytical school. The proponents of that school, according to Wu, are not analytical enough because they seem to think that a jurisprudence will have performed its task when it has analysed the few and simple concepts into their irreducible elements. He, therefore, maintains that it should not only analyse these more or less crystallized concepts, but should also analyse the living process of law especially the judicial process. (18) He points out explicitly that this

conception is neo-analytical rather than anti-analytical.[19]

Wu's legal theory may be shown by a chart:



By this chart, we can see not only the static aspect of law, but its dynamic aspect also. This is its contribution to legal theory. In a sense, it may be regarded as a synthesis of the theories of the analytical school, the reformed dimension of the point of law, the historical school so far as the dimension of time is concerned, and the sociological school in its connection with the dimension of the scope of the validity of law.

Analytical jurisprudence, as Rudolf Stammler criticized, depends solely upon the analysis, so it overlooks the necessary presupposition of an underlying synthesis. "We would never be able to analyse it without first having a synthesis." Stammler thus held that he asserts with perfect right that the essential nature of law must be sought in the whole of our consciousness. But the fundamental question is: What is law? He deemed that the critical grounded answer can be divided into two parts: it is both conceptual (logical or a priori) and perceptual (psychological or empirical). While conceding that Wu is perfectly right in bringing out the point that the study of the positive or empirical elements of the historically existing law must be carried on in a psychological way, he, nevertheless, considered that Holmes' idea that "the life of law has not been logic: it has been experience" is a hidden error.[21]

From Stammler's standpoint, in short, a legal theory would not be perfect if it could not include the natural law idea in it. It seems to me that Dr. Wu excluded the natural law idea on purpose because of his classification of legal science and legal philosophy.[22] However, what are the terminals to which the lines of the dimensions go? What are the directions which the dimensions are moving along? Before all these problems are settled right, the prediction of law is evidently still a formal analysis.

Wu's legal theory has been regarded by some Chinese jurists as the Chinese Neo-analytical School. One of them, Mr. Chu Sun, holds that the central idea of Wu's theory has its embryo in Confucius' "rule of propriety", because the propriety or "Li" (禮) in Chinese is a living norm derived from current social environment and people's psychological condition. The "rules of propriety", therefore, more or less correspond to the three dimensions of law.[23] This point of view seems to be correct in view of the similarity between the literal implications of the rule of propriety ard Wu's idea of the dimensions of law. They are, however, quite different from each other in spirit.

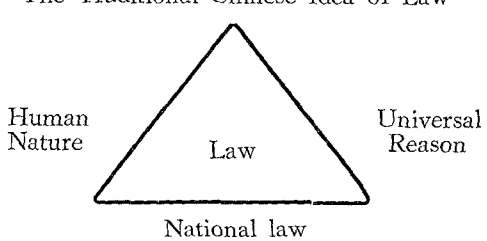
The idea of natural law, as indicated above, does not exist in Wu's legal theory, at least in his theory of three-dimensional law. But, Confucius' idea of the rules of propriety is definitely congenial to the natural law idea, if not identical with it.[24] Furthermore, the traditional legal thought in Chinese history is usually attributed only to the Legalists. For instance, Han Fei-Tzu, a well-known authority among the Legalists, held that "law is the order promulgated by the government agencies."[25] How this sounds like Austin's notion that law is the command of the sovereign. However, if one sees further into the traditional Chinese legal thought, he will find that not only the Legalists' idea of law had not been rooted out since the so-called "Confucianization of law" or "the Institutionalized Rule of Propriety for Law"[26] adopted during the Han Dynasty about two thousand years ago; he will also find that in addition to the unification of idea of law of the Legalists and that of propriety of the Confucians, the legal theory of the Taoists was also amalgamated in traditional Chinese legal thought.

The schools of legal thought in China before the Ch'in Dynasty may be roughly divided into the following three categories: the Confucians, the Legalists, and the Taoists.[27] Their theories in law may be digested into three propositions: the Taoist treats law as the "universal reason" or "logos"; the Confucians regard law as something in connection with "human nature"; the Legalists hold law as the "order of the government". What is called "universal reason or logos" is the "Tao" or the "Way" which the law should follow in the legal theory of Taoism.[28] In the legal theory of Confucianism, the propriety is institutionalized in accordance with the human nature; it is, therefore, the way leading to the "Wang Tao", the way of the rule of a real prince.[27] As to the Legalists, it is obvious that they only pay attention to the positive law and completely neglect the natural law just like the Austinans, their counterparts two thousand years later in the West.

These theories were developed respectively before the Ch'in Dynasty. They, however, have been gradually melted into an integrative traditional Chinese legal thought in keeping with the development of the Confucianization of law since the Han Dynasty. The Chinese people usually say "national law is something in connection with the universal reason and the human nature" or "the national law is not beyond universal reason and human nature". This is the real Chinese traditional legal thought deeply rooted in the Chinese people. It is not merely a school of legal theories, but also an important aspect of Chinese cultural tradition.

In short, traditional Chinese legal thought is not only a blend of Confucian rule of propriety based on the human nature and the universal reason of Taoism, but also a synthesis of the natural law theory of both Confucianism and Taoism and the positive theory of Legalism. In contrast, the structure of the traditional Chinese synthetic legal thought is different from Wu's idea of law. It may be clearly shown by the following chart:

"The Traditional Chinese Idea of Law"



According to the traditional Chinese idea of law, as indicated in the chart, the national law of the positive law is regarded as the form of law, with universal reason and human nature combined being its content or background. Thus, in traditonal Chinese legal thought, the dimensions of law are not used for the analysis of law as done by Wu.—this is the primitive theory of the Chinese traditional synthetic jurisprudence. However, in this chart, we cannot see whether the law is changeable and if it is, how it changes; In other words, we can only see the static aspect of law, but we cannot see its dynamic side. The very defect of the natural law theory—that the content of natural law is of a permanent and unchangeable nature by and large—exists also in the traditional Chinese synthetic idea of law. (30) This is the key issue for the revival of the natural law theory. It is also the basic problem in reconstructing the traditional Chinese jurisprudence to bring it up to date

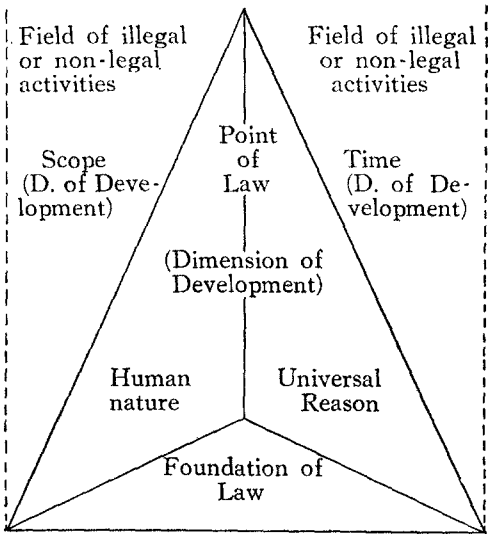
In order to remedy the defect of traditional natural law with unchangeable content, Stammler declared that his neo-natural law theory is to find a natural law of universal logical validity. In other words, it is only a universally-valid formal norm, so it is a "natural law with changing content." The use of the universally-valid formal norm is for the "just law" by which it means justice through law, not according to law as in the past natural law theory. From this, he derives his four famous maxims of just law as follows: (31)

A. Principles of respect.
   1. No one's volition must be subject to the arbitary desire of another;
   2. Any legal demand must be of such a nature that the addressee can be his own neighbour;

B. Maxims of participation.
   3. No member of a legal community must be arbitarily excluded from the community;
   4. A legal power may be exclusive only in so far as the excluded person can still be his own neighbour.

Stammler's four maxims of just law, broadly speaking, are still something in connection with what is called universal reason and human nature in the Chinese traditional idea of law. The point at issue is that we must go one step further to find out by which way the content of law is changing, how the content changes, and to what extent the content of law changes, so that we can see not only the static condition of law but also the dynamic activity of law. It, then, may be more qualified as a synthetic jurisprudence. At this juncture, a new chart indicates this comprensive synthesis of law;

"The Functional Structure of Law"



Forms of Law

This chart, evidently, is a synthesis of the traditional Chinese idea of law and Wu's three dimensional law but it is drawn on a developmental model.[32] The implications of this chart may be summarized as follows:

(1) By this chart, we can see the form of law on the surface, which is in a sense something corresponding to the idea of positive law of the analytical school, but in which more forms of law may be included such as: customs, precedents, interpretations, even principles of reason and right and so on, all being treated as law. In this sense, the forms of law are not restricted to the written law. Any forms of law, however, must be at the present stage subject to the authority of the state, either by explicit provisions or by implicit recognition. We may, therefore, call it national law as a symbol of representation of law at the present time, although it will eventually develop into a world law (law without national soverign, so different from the current international law). The national law, then, will be in the position of the present municipal ordinances. Consequently, in this respect, not only the idea of the positive law of the traditional analytical school has been combined with the idea of the judicial process of the realists, but also the customary law of the historical school and the institution as law of the sociological school are unified in the forms of law.

(II) All the forms of law are backgrounded by universal reason and human nature or rooted by these two factors so as to form the foundation of law. In other words, these three lines are the boundaries of law by which we can see the static structure of law. Also it shows the synthesis of the form and the content of law. This, however, is only the primary unification of positive law and natural law. From the dynamic point of view, these three lines are used at the same time to circumscribe the field of the activity of law; in other words, they form the foundation of dynamic law. Thus, any form of law or legal activity out of this field, is in our

idea of law not law or is only illegal or non-legal activity. Consequently, we have put what law is and what law should be in a synthetic idea of law.

By when we call it not law or illegal or non-legal activity, we mean that they are not real law because they cannot really be put into force or they are not actually observed by the regulated though they take the forms of law. Contrary to any analytical school which considers that the bad law is still positive law, we deem it not real law. On the other hand, any other forms of law, even if they were not produced by the command of the sovereign but in coincidence with universal reason and human nature, would be in fact followed by the people, so they are also law in our terms.

(III) With regard to the dynamic aspect of law, we can see by this chart the operation of law or law in action. In static condition, the law takes its form as written or unwritten law; in other words, as sets of rules or principles explicitly or implicitly expressed. However, when they are operating or in action, the actual law, using. Dr. Wu's term, is only this or that point of law which is operating within the dimensions of time and scope. To be sure, this is the dynamic condition of law. But it shows only one phase of the activities of law, that is the dynamic of the forms of law.

From the more realistic point of view, the activities of the dimensions of time and scope must be based on the foundation of law. In other words, they must be in coincidence with universal reason and human nature; otherwise, they would be out of the field of real law. Then, it is not the dynamic of law; instead, it is in the field of illegal or non-legal activities. In other words, though this or that point of law takes the form of law, it is not real law.

From this point of view, we can only see the probability of law. However, when we judge the probability of law in action, we have to put it on the foundation of law, so that the perspective of law is not restricted to the superficial form of the law. Consequently, we would not go astray into the field of illegal or non-legal activities. By doing this, we can see by this chart, a comprehensive synthesis not only of what the law is and what the law ought to be in its static condition, but also of what the law has been and what the law would be in its dynamic condition.

Because the starting point of this synthetic idea of law is based on the traditional Chinese idea of law, it may be called the reconstruction of Chinese jurisprudence; and it may also be called in a sense the Chinese Synthetic Jurisprudence. In fact, it aims to synthesize the Chinese traditional jurisprudence and the various schools of Western jurisprudence.(33)

One thing more should be made clear: one may argue that what could be implied in this chart, strictly or logically speaking, seems to be all formal references. Then, what is the actual content of law? Or, how can we decide the content of universal reason and human nature? In this connection, I would like only to point out that it depends on the achievements of the scientific inquiry about human nature and universal reason. For example, Hall holds that the uniformity of human nature has been refuted by anthropology and history, and that natural law, according to anthropological studies, did not precede positive law.(34) However, if the "state of nature" held by the natural law lawyer does not refer to the historical fact but denotes a state which exists or would exist apart from civil authority, in other words, if it is only a working hypothesis for the structure of theory, then, the attack does not hit the fatal point.(35)

Furthermore, recent anthropological studies of private property, as Felix Cohen indicated, has shown that it exists in all primitive societies so that it may relieve the theories of natural law, natural rights, and universal human ideals from the opprorium to which a more superficial anthropology once subjected them.(36) Under this context, we found that universal reason and human nature have developed their new implications. Therefore, Hall admits that it is untenable to set law against morality which he regards as an experienced fact, and that legal experience is a moral experience which is intrinsically valuable. While Hall also looks at law as valuation, he considers that the ultimate political valuation of our time is the democratic ideal, which consequently is included in the essence of our positive law. This is the fundamental correction which must, according to Hall, be made in the traditional natural law theories of positive law. (37) From this example, we can see how the criteria are applied to the solid situations.

In addition, I would like to extend the application of this theory as a whole to the observing and understanding of law, to the making of law, and to the practicing of law as an effective instrument. I agree with Josef Kohler at this point that "materialism is dead; the philosophy of spirit still lives"(38), though his theoretical system and mine are not identical. Also I share his point of view that law is the product of culture, but, at the same time, that culture will be pushed on by the task of law. The application of the Chinese Synthetic Jurisprudence, again, is in common with Kohler's assertion that "in legal tendencies, there often leads to a schism, between the masses, on the one hand struggling for a legal system that will be corresponding to their own uncultured state, and in opposition, far-sighted minds try to bring about a change." Therefore, Kohler said: "The far-sighted legislator can mitigate much here; even if the whole mood must be struggled through to the end, yet the philosopher of life,..... can soften the pathological tendencies and help out in one way or another..... That will be the correct attitude of the legislator if he is a philosopher of law....."(39) In a sense, this is also a footnote of the spirit of the application of the synthetic jurisprudence.

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(11) Pound, "The call for a Realist Jurisprudence" (44 *Harvard Law Riew*, 1931) pp. 697,711.

(12) *cf.* Pound, "Scope and Purpose of Sociological Jurisprudence" (H. L. R., 1912)

(13) Cohen and Cohen, *op. cit.* p. 370.

(14) *Ibid.* pp. 699-705. In addition, F. Cohen himself developed a "field theory of law", which is based on the analogy from the new concept, the "Field", i. e., the field in the space between the charges and the particles in physics to indicate the "value field" of law. He thinks that this concept of field can be used to refine the "hunch" or "tuition" theory of legal realists. Thus, "many conflicting schools of jurisprudence may all be true and valid in differing and limited perspectives and regions." In this sense, the "field theory of law" may also be considered as a multi-dimensional legal legal theory. In detail, see his "Field Theory and Judicial Logics" (*Yale Law Journal* 238, 1950), pp. 265-266.

(15) See my article "On the reformation of the Chinese Jurisprudence" (1948).

(16) Wu, *op. cit.* ch. I. According to L.L. Fuller, the "Jurisprudence of Interest", dereloped by p. Heck is also "a kind of three dimensional perspective", See his *Selected writings of the Jurisprudence of Intrest'* p. 25.

(17) Holmes, *Collected Legal Papers* (1920) p. 173. *cf.* Cardozo, *The Growth of The Law* (1924), lecture 11, for an excellent discussion.

(18) Wu, "The Province of Jurisprudence Redetermind" in *op. cit.* pp. 10,11.

(19) *Ibid.* p. 14.

(20) Stammler, "On the Question and Method of Juristic Philosophy" in Wu's book, *op. cit.* p. 247.

(21) *Ibid.* pp. 253, 257.

(22) See Wu, "The Province of Jurisprudence Redetermind", especially section 5. In this article, Wu holds that the difference between legal science and legal philosophy is one of subject matter. (p. 24) So, he says: "It (jurisprudence) does not discuss the ideal or ideals towards which the legal order should be made to approach"; and he explicitly expressed that what is the Law of Nature is one of the juristic-philosophical problems. (pp.20-21) This reminds me that the same classification was made by Kelsen in his *General Theory of Law and State* (1949).

(23) Chu Sun, "On Chinese Neo-analytical Jurisprudence" (No. 6, *Law Quarterly of Soochow Law School* Vol. 4).

(24) According to Joseph Needham, the conception of the laws of nature did not develop from Chinese conceptions of law in general. See his *Human Law and the Laws of Nature in China and the West* (London, Oxford University Press, 1951) But, it seems that at least the thought of the "Identity or unification of the Cosmos and the Man" envisaged by Chung-shu Tung in the Han Dynasty is an example of exploring the law of nature by Confucians. Another argument may be found in Jean Escarra, *Chinese Law* (English translation by Gertrude R. Brone, Harvard mimeograph) Part I, ch. I. In fact, the "LI" in the history of Chinese legal system, has been not only natural law, but also positive law. See my "Modern Jurisprudence" (In Chinese, 2 ed. 1962) ch. 4.

(25) Han, Fei-tzu, "On the enactment of Law".

(26) See T'ung-tsu Ch'u, *Law and Society in Traditional China* (Paris Monton & Co. La Hayc 1961). A general idea about the "Confucianization of Law" is made in ch. 4, sect. 2.)

(27) *cf.* Wu, *op. cit.* p. 206: "In the field of law, ancient China produced a law of Nature School, with Lao-tze as its founder; a Humanistic School, with Confucius as its head, and Emperor Wen as its patron; a Positivist School, with Shang Yang for its leader; and lastly, the Historical School, represented by Pan Koo."

(28) Lao-tze said: "Man takes 'Tao' as his law; 'Tao' follows the way of heaven; and Heaven follows the law of nature."

(29) According to Ssu-ma, Chien, "the 'li' is enacted in accordance with the human nature; consequently, it is communicable with the 'Wang Tao'". (Preface of his *Shih Chi*, or *Chronicles*) *cf.* Wu, *The Art of Law* (Commercial Press, Shanghai, 1936) pp. 186-92.

(30) There are, however, some of propositions initiated by Confucians, Taoists, and Legalists, which imply the idea of dynamics of law communicable with Stammler's "natural law with changing content." Detailed references have been made in my *Modern Jurisprudence, op. cit.* ch. 4. See also Chu Sun, *op. cit.*

(31) Cited from W. Friedman, *op. cit.* p. 133.

(32) D. Lerner and H. D. Lasswell, *The Policy Sciences* (Stanford University Press, 1951). pp. 27-8. *cf.* H. Eulau, "H. D. Lasswell's Developmental Analysis" (*Western Political Quarterly* 11, 1958) pp. 229-242.

(33) There is another more complicated chart to show how the law operates in connection with Kelsen's theory of "hierarchy of norm", It is omitted in this paper because this is only a primary introduction to the Chinese synthetic jurisprudence. In contrast, Dr. Wu's three-dimensional legal theory may also be regarded as the synthesis of some of Western legal schools. In addition, Professor Friedman has made a good contribution to the synthesis of Anglo-American and Continental jurisprudence from the practieal point of view. (See his *Legal Theory*, ch. 32.) It seems advisable to go further to synthesize the jurisprudence of Occident and that of Orient, practically and theoretically.

(34) Hall, *op. cit.* p. 316.

(35) cf. M. Cohen, "Natural Rights and Positive Law" in his *Reason and Nature* (1931)

(36) Cohen and Cohen, *op. cit.* p.786. and cf. pp. 811-822

(37) cf. Hall, *Living Law of Democratic Society* (1949)

(38) Josef Kohler, *Philosophy of Law* (English translation by A. Albrecht, The Macmillan Co. New York, 1921), the author's preface p. 44.

(39) Kohler, *ibid.* pp. 58, 41.

III. The American Policy-oriented Jurisprudence and Some views on It from the Standpoint of Chinese Synthetic Jurisprudence

The legal theory initiated and developed by Professors McDougal and Lasswell, is called "a Policy-oriented Approach to Legal Study".(40) The appearance of this legal theory, as Professor F. S. C. Northrop rightly puts, is due to the fact that a new and unique society has emerged accompanied by the following three factors which need the support of a new jurisprudence: (41)

(1) The release of atomic energy calls for a shift of tremendous magnitude of law. During the nineteenth century, we saw legal cases and codes pushed into the arms of the social sciences; today we must be ready to direct the social sciences and techniques toward the experimently-verified theories of contemporary mathematical physics.

(2) With the shift of the political focus of the world from western Europe toward Asia, there must be a serious synthesis of Oriental and Occidental law and institutions. Therefore, the "underlying living laws" exhibited by cultural anthropology and cultural sociology must be studied. According to Northrop, philosophy is nothing but a name for the basic concepts which a person or people uses to conceptualize the facts of experience; so "an adequate contemporary jurisprudenece must ground itself in the basic concepts, that is, in the philosophy, of the world's cultures."

(3) With the inescapably ideological character of both democratic and international social problems, the ideological conflict between the basic concepts and values of the East and the West naturally became inescapable.—Therefore, how to put together the quite different ideological and cultural values of the varied world legal institutions appears to be the major problem of our time.

Based on the above facts, Northrop holds that "law which meets the greatest social need of the contemporary world must be one which puts forth all the reflection and research of which we are capable to create a truly effective legal world order". Then, how shall we provide the new jurisprudence which our world requires? He tells us that maybe a combination of the scientifically-exact method and the theory of law of Under hill Moore (42) and the policy-forming law of Professors McDougal and Lasswell (43) may do the trick.

It seems to me that the original purpose of the theory of policy—making law is legal education, in other words, the training of policy-makers. Professors McDougal and Lasswell recognize the fact that efforts have been made in the past to integrate law and other social sciences, but that such efforts have resulted in failure because of lack of clarity about what is being integrated, how, and for what purpose. Therefore, they hold that effective policy-making is dependent on a "clear connection of goal, accurate calculation of probabilities, and adept application of knowledge of ways and means." The ultimate goal to be achieved is the attainment of democratic values.

Under this premise, the legal theory of Professors McDougal and Lasswell is naturally focused

on the policy-oriented approach. Professor McDougal made it clear later that the time has come for legal realism to yield predominant emphasis to policy science in the world community and all its constituent communities because of the call for the creation of a law appropriate to the atomic era, people ascribes to law not only the primitive function of maintaining order, but also a positive instrument for promoting and securing all the basic values of the community. This new jurisprudence has been made possible because of the achievements of scientific studies, especially in the field of psychology and social sciences, and the necessary intellectual skills and enlightment put at the disposal of any school that wishes to take advantage of its opportunities. (44) The latter factor can only be present in a free society, so their theory is also titled "the jurisprudence of a free society." (45)

The main points of the policy-oriented jurisprudence may be roughly put into the following items: (46)

(I) *"The conception of law"*, instead of a mere body of rules is considered a process of authoritative decision in accordance with community expectation. This conception of law is based on the fact that the law as rules, as past jurists have generally held, must act through ordinary human beings so that the law in action is actually a whole process of decision which takes place within the context of, and as a response to, a larger community process.

What is called "community process" is the social process occurring in any community where participants seek values through institutions using resources. Any specific decision or flow of decisions is located in the context of relevant events. The values sought cover the whole gamut of human demand, which are categorized under eight headings: power, wealth, enlightment, respect, well-being, skill, rectitude, and affection. What are called "institutions" are the detailed patterns of practices by which values are pursued. Any particular value process may be described in terms of the "participants" in the process, the "situtions" or "arenas" of interaction in which the value is at stake, the "bases of power" brought to bear by different participants to effect outcomes in such situations, the particular "practices" of persuasion and coercion or other modality employed by participants, and the "effects" of the specific outcomes of interaction upon the various values of the participants and others. The totality of community process, world or less, might thus be described in terms of a value process, with the power process (including both authority and control) being affected and in turn affecting all of the other process. Thus, in a sense, law may be defined as a form of the power value.

The power policies of any group in the arena are made and executed within a framework of "authority" which is called formal power, and of "control", which is called effective power. When decisions are controlling though not authoritative, they are "naked powers"; when they are authoritative but not controlling, they are "pretended power". Therefore, law is a power relationship. (47)

The types of decisions or authority functions may be classified in terms of intelligencing, recommending (or promoting), prescribing, invoking, applying, appraising, and terminating. Thus, decision is defined in terms of both perspective and operation.

In short, the conception of law as a decision-making process means a process in which the decision-makers are influenced by many variables; in other words, the process of decision-making

is one of continual redefinition of doctrine in the formation and application of policy to ever-changing facts in ever-changing contexts.

(II) Based on the above conception of law, the policy-oriented legal theory must be related to the following "*five intellectual tasks*" in the study of decisions, the same as in the other policy sciences. (48)

1. *Clarification of goals.* Goals clarified by postulation not by derivation, have the value of a public order of human dignity, namely, a public order which is designed to promote the greatest production and widest sharing of all values and which, in its power process, in particular, is oriented towards a minimum of coercion and a maximum of persuasion. In other words, it is the democratic value.

2. *Description of trends* in past decisions, made according to their conformity to the goals.

3. *Analysis of conditions or fatcors* affecting decisions. The above description clarified events as "consistent" or "inconsistent" with the definitions of goals; the present analysis studies the variables which affects decisions, including the "feedback" effect. It is also essential for predicting or controlling the future of our preferred forms of public order.

4. *Projection of future trends.* By projection, trends both favorable and unfavorable to the clarified goals will be made, and the probable presence or absence of the factors and contributions of factors necessary to support various alternatives among the trends will be also carefully assesed.

5. *Invention and evalution of policy alternatives* The procedures will be established for every phase of the decision-making pocess, with opportunities to intervene with innovations which may influence decision in greater conformity with clarified goals as well as techniques for increasing creativity. The proposed alternatives of consequences for all values will also be carefully assessed.

All these intellectual tasks are relevant to the special functions of both the detached disinterested observer and the participating decision-makers. It is, therefore, a comprehensive guiding theory and a technique for the policy-oriented approach to legal study.

(III) The "*defects of the traditional legal theories*" rest first upon their failure to distinguish the "theories of law" from "that about law," or in other words, between the different perspectives of the detached observer or the scholarly inquirer and the authoritative decision maker. Their different references, thus, are confused and ambiguous. The peculiar ambiguity is their "normative-ambiguity" which means they seek in a single confused statement to perform multiple intellectual tasks. The common defect of all the legal schools on the other aspect, is their over-emphasis on perspectives (with the exception of the American Realists) and neglect of operations. (Conversely, the American realists overemphasize operation at the expense of perspectives.)

With regard to the defects of the different schools, they may be summarized as follows:

1. "The Natural Law School" has made contributions to goal-thinking and the relevance of values, but it has got lost in overreliance on derivational modes of thinking, so that it has emphasized authority too much without differentiation from control, made no clarification of the process of decision, and neglected the social process.

2. "The Analytical School" has contributed to the identification of authoritative decision, but has not made good distinction between authority and control. It has also failed to escape from the

normative-ambiguity because of its overemphasis on derivational thinking so as to attempt an impossible divorce of myth from power and other social process, as Kelsen and his disciples have done. It again has failed to focus on the variables that affect decision, and neglected attention to community effects and value clarification.

3. "The Historical School" is adequate in its emphasis on the importance of conditions and location in community context, so it has contributed to the exploitation of trend thinking. But it is incapable of making a clear distinction between authority and control. Its members also imported mystical and fatalistic notions into their study because of their failure to employ scientific thinking, and, consequently, with little consideration of alternatives.

4. "The Sociological School" has stressed both goals and conditions and the notion of community. It has employed scientific mode of thinking, but it has offered few techniques for performing intellectual tasks other than prescriptions, and it has also failed to relate specific goals to explicit value clarification. Its idea of living law is still mysterious.

5. "The Legal Realists" have contributed in rejection of emphasis upon the technical formula of authoritative myth, and in demand of goal, and scientific thinking. Their inadequacies are that they have failed to achieve a comprehensive mode of decision-making or community process, or to relate goals to comprehensive preferences of a free society because of a reliance upon inadequate conception of scientific method without employing developmental thinking.

The new framework of policy-oriented legal theory, therefore, is built upon a synthesis of the success of the various schools, by avoiding their defects.

* * * * *

From the standpoint of the Chinese Synthetic Jurisprudence, some views on this new policy-making theory, may be briefly stated as follows:

First, policy-oriented legal theory, in a sense, seems also to be a kind of synthetic jurisprudence. The synthesis made by this theory might be the most comprehensive, if not the most perfect, among all synthetic legal theories. Its greatest contribution, I think, would rather rest upon its dynamic aspect, i.e., the process of decision-making which is something new to the traditional jurists, and is an important development of sociological jurisprudence and legal realism. Only on the basis of this achievement could the theory and technique of law be put together tightly so that not only can we understand the static construction of law but also we are able to grasp the dynamic dimension of law. In other words, by this synthesis the perspective and operation of law are combined in a water-tight system of legal theory with the purpose of creating law in the future. Under this system, the old problems of what law is, what law ought to be, what law has been, and how law operates or what law would be are simultaneously melted into a logical and practical sequence without any contradications among them. I, therefore, think highly of this legal theory, and deem it the most advanced systhesis of legal theories in keeping with the latest scientific achievements.

Second, in contrasting the Chinese synthetic jurisprudence with the Chinese natural law idea to-gether with the Legalists' positive law as forms of law to be the foundation of law activities, it is very interesting for me to see that the value of human dignity has been adopted by the policy-oriented jurisprudence as its goal. The goal value of human dignity is treated as a postulation.

This postulation is taken as a hypothesis in order to frame the theoretical system. [49] To them, the idea of the foundation of law in the Chinese Synthetic Jurisprudence might be considered as a derivational one because of its natural law background which combined human nature and universal reason. To me, the reorganized natural law in the framework of the synthetic legal theory is no less scientific because its content, as indicated above, is subject to the "present state of scientific knowledge".

Furthermore, the distinction between the field of legal activity and that of illegal or non-legal activity is emphasized in the Chinese Synthetic legal theory, while it is not noted in the policy-oriented jurisprudence. Consequently, it is not entirely unreasonable that the policy-making legal theory be misunderstood as totalitarian because the totalitarian law is also recognized as law in general by the former. It seems to result in theoretical logical confusion, though it may not be considered as normative-ambiguity.

The above point reminds me that Kelsen's pure theory of law has been diversely considered as for a contradictory political purpose because of its impossible attempt to sever law from social process. Conversely, the misunderstanding of the goal of the policy-oriented law, it seems to me, arose from its attempt not to make distinction between law and non-law as a scientific logical reference. In this connection, I found some of Professor Hall's notion to be helpful. He holds that the advent of modern democratic society calls for a fundamental correction in the traditional natural law theories of positive law and that the assertion that democratic law to-day must partake not only of a valid ethic principle but it must partake also of the distinctive and pecular values of the democratic process, including the "consent of the governed", carries with it a heavy indictment against the instrumentalists' viewpoint toward law. [50] Of course, policy-oriented legal theory pays attention to the perspectives and operations of law at the same time, so it is not one of instrumentalism. In short, at this point it seems to be safe to say that the three legal theories—the policy-making law theory, the integrative jurisprudence, and the Chinese synthetic jurisprudence—are at least basically in common with one another in spirit.

One more thing I foundm in the policy-oriented legal theory is that it is even in common with the legal theory of Confucianism, and is therefore logically acceptable to the Chinese synthetic jurisprudence That is, the long controversial issue in the history of Chinese legal thought on "government by man" or "government by law", in other words, the "ruling man" or the "ruling regulation". The former is emphasized by the Confucians, while the latter is alleged by the Legalists. One of the greatest successors of Confucius, Hsu-tzu, said: "Law cannot stand alone, and regulation cannot be exercised by itself.....Therefore, by having the great man in control, although the law is incomplete, it will be sufficient to cover everything. Without a great man, even if the law is complete, the sequence of its spplication will be in disorder." [51] This notion, I think, is congenial to idea of decison-maker; so it would be logical to consider law as a policy-decision although the decision-making process had never been noted by the Confucians.

Moreover, on account of the emphasis of the function of the ruling man in government by Confucians, behavioral sciences as a foundation of policy-making law in a sense, [52] seems to be congenial to the tradition of Chinese legal thought. [53] There was, however, another great successor of Confucius, Mencius, who made an eclectic point of view in this connection. He said:

"Virtue (of the decision-makers) is not sufficient for the exercise of government; laws alone cannot carry themselves into practice." (54) By this notion, he simply meant that the decision-making process alone cannot be used to expound the operation of law. This leads us to the last view on policy-making legal theory about the basic conception of law from the standpoint of the Chinese synthetic jurisprudence.

The conception of law. as indicated above, is according to the policy-oriented jurisprudence considered as the authoritative decision instead of as a body of rules; but the decision must be made in accordance with the community expectation by which the authority is conjoined with the effective control. Law, thus, does not appear as dead rules; it is something constantly changing with the policies. This conception of law, plainly speaking, is the "law in action," indefinitely shaping itself in time and space. It is made possible only through the interpretation of the rules of law when the implications of the rules are of normative-ambiguity. It seems impossible to establish the rules of law so clear-cut that no other references can be derived from them. Under this understanding, the rules of law may also be regarded as the static condition of law; while the authoritative decision appears as the dynamic condition of law. They are, in reality, two in one which can not be separated. In other words, the decision made must have something to do with the rules no matter what decision it may be.

Of course, any kind of authoritative decision, according to the policy-making legal theory, is considered as law; it is not restricted to the decision of the court. But, the rules of law may also not be restricted to the rules enforced by the court. Any kind of rules, even the underlying rules, which may be in a sense equivalent to the living law of sociological jurisprudence and which will have empirical references under this condition, may be regarded as the static condition of law. The call for a return to the "stare decisis" by the policy-making jurisprudence provides a negative recognition of the function of the rules of law in connection with the operation of decision-making. From the point of view of the Chinese synthetic jurisprudence, therefore, the rules of law are treated as the forms of law, and decision-making may be regarded as an expression of the operation of law.

In conclusion, the basic characteristic of policy-making law, as made crystal clear, is the preference for positive action and for prompt empirical specification of values, which stem from the nurture in the Western civilization. (55) Although it may be regarded as a kind of synthetic jurispudence, there is still something different from Chinese synthetic legal theory, which is characterized by the principle of "golden mean" nourished in the Chinese culture.

How to make a new synthesis of the Western jurisprudence and the Oriental jurisprudence nevertheless, is another step in the study of law.

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(40) See M. S. McDougal, "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study." (*Natural Law Forum*, Notre Dame Law School, Vol. I. No.1, 1956).

(41) *cf.* Northrop, *Jurisprudence* in the *Law School Curriculum* (I Journal of Legal Education, 1949) cited by Reuschlein, *op. cit.* pp. 393-98. Also see Northrop, *The Taming of Nations* (1152); and *Ideological Differenes and World Order* (ed. 1949).

(42) Concerning Moore, see his "My Philosophy of Law", 206 (1941) and "Rational basis of Legal

institutions" (23 Columbia Law Review 609, 1923) *cf.* Northrop, "Underhill Moore's Legal Science: Its Nature and Significance" (59 *Yale* Law Journal, 196, 1950).

(43) See Lasswell and McDougall, "Legal Education and Public Policy; Professional Training in the Public Interest." in McDougal, *Studies in World Order* (Yale Uni. Press. 1960), pp. 42-154.

(44) *cf.* McDougal, "The law school of the Future: from Legal realism to Policy Science in the World Community" (*Yale* Law. Journal Sept. 1974). This article is so persuasively written in a special style that I had the feeling that it sounds like a manifesto of the birth of a new legal theory.

(45) It is the Title of the "studies in Law, Science, and Policy" (mimeograph of Yale Law School, 1962).

(46) The summary is mainly made on the basis of Professor McDougal's "Law as a Process of Decision" *op. cit.*, "Some Basic Theoretical Concepts about International Law: A Policy-oriented Framework of Inquiry" (Vol. 4, No. 3, Journal of *Conflict Resolution*, Sept., 1960), and "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order" (*Yale* Law Journal Vol. 61, No. 6, 1951), in addition to the mimeographed materials of *Law, Science, and Policy*, Also see Professor Lasswell, *Power and Society* (with A. Kaplan, Yale Uni. Press, 1950) and *The Future of Political Science* (Atherton Press, 1963).

(47) In detail, see Mimeograph, Part II, ch. I. p. 39 et seq.

(48) According to Professor McDougal, emphasis upon a policy-oriented approach to decision-making is perhaps more marked in other field than in legal study. See his "Law as a Process of Decision" *op. cit.* note 18.

(49) *cf.* Mimeograph, Part III, Ch. 2, "A note on Derivation."

(50) *cf.* Hall, *Living law of Democratic Society.*

(51) Cited from T'ung-Tsu Ch'u, *op. cit.*, p. 257.

(52) However, according to Professor McDougal, the widely heralded books in behavioral sciences, such as: *Toward a General Theory of Action* (Parsons Shils eds., 1951), and Parsons, *The Social System* (1951), seem to lack sufficient orientation in power process and to take too little account of predispositional variables to be of direct use to legal scholars. See note 38 in his "The Comparative Study of Law for Policy purpose" *op. cit.* p. 927.

Concerning the foundation or starting point of policy-making legal theory, the knowledge of sociology developed by Max Weber is of course one of them.

(53) Because of the Confucian emphasis on government by man rather than by law, Escarra sees that the Chinese courts have placed equity and social justice above the letter of the law. (Escarra, *Le Droit Chinois*, p. 79) This sounds like the application of the policy-oriented legal theory in old China. Again, H. G. Creel also holds that the traditional trial in a Chinese court which was in theory an investigation by the court into the facts of the case, including every mitigating or aggravating circumstance, followed by a decision rendered in the light of law, custom, and all the circumstances is comparable to the personal probation officers recently added to many of the Western courts. (See his *Chinese Thought*, Mentor Books, 1960, pp. 127-8), It seems to be also one example of the same kind.

(54) Meng-tzu Chu-su, 7A, I b; Legge, *Chinese Classics*, II, 165.

(55) Mimeograph, Part III, ch. 2, pp. 2-3.

中國綜合法學及其對美國政策導向法學的看法

涂 懷 瑩

本文主旨，在指陳現代法學的多元綜合趨勢中，著者本人基於中國的傳統法學而倡議的「綜合法學」，與美國的耶魯學派的「政策導向法學」，有殊途同歸之處。

所謂「綜合法學」，乃以中國古代儒、道、法三家說法之要義，歸之於「人情、天理、國法」三者統一的綜合法的觀念。而以吳經熊所創立的「法律三向說」，其中所涵蘊的「時、空、法律點」的概念，實爲西方歷史法說、社會法說與分析法說三者的綜合觀，然而却缺少一自然法的涵蘊。中國的傳統法律觀，則爲自然法與現實法的統一理論，如以之爲法之基礎，而益以吳說爲法之動向的觀察，則合二者當可得一新的法律綜合觀，是爲「綜合法學」之要義。

從綜合法學的觀點來看政策導向法學，二者至少有以下三點可茲比較：

（1）綜合法學與政策導向法學，均爲現代法學共同趨勢中的「多邊觀點」的法學理論。政策導向法學運用最新科學方法，對法律動向研究，尤著貢獻。

（2）政策導向法學以「人類的尊嚴的價值」爲其理論的「目標」，與綜合法學以「天理、國法、人情」爲法之基礎的理論，有相通之處，但綜合法學强調「法與非法」之分，而政策導向法學則不注意此點。

（3）指導政策法學的決策理論，與中國儒家的「人治」思想，精神亦屬相通。然政策導向法學「否認法律爲一套規則」，綜合法學基於孟子之「徒善不足以爲政，徒法不足以自行」的觀點，認爲法律規則爲一種法律的靜態，而決策過程則爲一種法律的動態。

Chinese Synthetic Jurisprudence and Its View on the American Policy-oriented Legal Theory

Horace H. Y. Too

The main interest of this paper is to demonstrate that in the recent tendency from juridical monism to pluralism, there are some points in coincidance between the Chinese Synthetic Jurisprudence initiated and developed on the basis of traditional Chinese Jurisprudence and the American Policy-oriented Jurisprudence.

The basic idea of Chinese Synthetic Jurisprudence is founded on the conception of national law combined with human nature and universal reason. In ancient China, the Legalists developed the positive law idea as national law; the Confucians regarded law as something in connection with human nature, that is, the "Rules of Propriety" or "Li" (禮); the Taoists considered law as "Universal reason" or "Logos".——These legal theories were developed respecetively before Ch'in Dynasty. But they have been gradually melted into the above integrative traditional Chinese legal thought since then.

Again, Dr. John C. H. Wu's legal theory of "Three Dimensions of Law" also signifies a synthesis of the legal theories of the analytical school so far as its reformed dimension of the point of law is concerned, the historical school which may be corresponding to its dimension of time, and

the sociological school in its connection with the dimension of the scope of the validity of law. Wu's legal theory, however, seems not to include the natural law idea in it, although it contributed to the dynamic perspective of law.

By contrast, the traditional Chinese synthetic law idea contributed to the blend of positive law and natural law. Therefore, if a new synthesis of Wu's legal theory and the traditional Chinese Jurisprudence be made, it will be a more perfect synthetic Jurisprudence.—This is what this paper has suggested.

From the point of view of the policy-oriented jurisprudence, all the other legal schools have their defects respectively. Their common defects are: (1) failure to distinguish the "theory of law" from "that about law", so signifing their "normative-ambiguity"; (2) over-emphasis of perspective and neglect of operation (conversely, the legal realists over-emphasis the operation at the expense of perspective). Accordingly, the policy-oriented legal theory is a comprehensive study of the perspective and operation of law at the same time.

A comparision between Chinese Synthetic Jurisprudence and the American Policy-oriented Jurisprudence may be made as follows:

First, both of them are legal theories by a multi-dimensional method of legal study. The Policy-oriented Jurisprudence especially contributed much to the study of the dynamic aspect of law, the decision making process, due to its employment of the latest scientific achievement.

Second, the value of human dignity has been adopted by the policy-oriented legal theory as its goal. It is congenial to the Chinese Synthetic Jurisprudence based on the idea of national law combined with universal reason and human nature. However, the distinction between the field of legal activity and that of illegal or non-legal activity is emphasized in Chinese Synthetic Jurisprudence, while it is not noted in the policy-oriented legal theory.

Third, the decision-making law idea is comparable to the Confucian's legal thought of "government by man". But, the former denied the law as a body of rules, while the Chinese Synthetic Jurisprudence, based its idea of law on Mencius notion that "virture (of the decision-makers) is not sufficient for the exercise of government; laws alone cannot carry themselves into practice", regards the rules of law as the static condition of law, and the authoritative decision as the dynamic condition of law.