

# Comparative Philosophy of Comparative Law

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## THE COMPARATIVE PHILOSOPHY OF COMPARATIVE LAW\*

*F. S. C. Northrop†*

Cultural anthropology and sociological jurisprudence have shown that there is no culture or society without normative legal procedures for settling the disputes of its people. Moreover, these legal procedures vary in their normative ethical content. So different is this content from culture to culture that the anthropologist Professor E. A. Hoebel has found it necessary to introduce seven normatively different sets of postulates in order to describe the legal norms of seven so-called primitive peoples. Such facts remind us that in comparative law and philosophy it is very dangerous to use the words "good" or "just" unless we specify both the culture to which we are referring and its specific set of normative assumptions.

Professor Hoebel's studies show also that even for two different tribes of American Indians living in approximately the same geographical area of the mid-United States, so incompatible are the ethical norms of their legal codes that those of one tribe which its people accept spontaneously and happily would cause a rebellion were they applied to the other tribe.<sup>1</sup> Sociological jurisprudence explains why. This legal science investigates the relation between the positive legal statutes or codes of a given society and the spontaneous normative customs and habits of its people. The norms of the positive codes have been called by the sociological jurist, Ehrlich, the "positive law," in contradistinction to the normative customs of the people which he terms the "living law."<sup>2</sup> Studies of the imposition of positive normative codes from one culture on the different living law normative customs of the people of a different culture have led sociological jurists to the following two generalizations: (1) The sanction for the norms of the positive law is the normative customs of the living law. (2) When these norms conflict, it is the positive law that tends to fail. This failure shows itself either in a rebellion or in a corruption of the legal and political officials which turns the positive law into something even worse than a dead letter.

The reason for the latter generalization has the following anthropo-

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† See Contributors' Section, Masthead p. 722, for biographical data.

discussion in the comparative philosophy and law section of the East-West Philosophers' Conference at Honolulu in July of 1959. The present article is greatly improved by virtue of the comments of both Asian and Western philosophers and students of law who were there.

<sup>1</sup> Hoebel, *The Law of Primitive Man* (1954).

<sup>2</sup> Ehrlich, *The Fundamental Principles of the Sociology of Law* 493 (1936).

logical explanation. Professor Hoebel tells us that the specific legal norms of any culture have a quantitatively statistical character for the people of that culture because in no culture does every person behave according to the positive or living normative legal ways and rules of the majority. Otherwise there would be no need for police sanctions in the case of those whose *de facto* behavior does not conform to the ethical content of the customs and positive law of that community.<sup>3</sup> The bitter conflict concerning desegregation between (a) the positive legislative statutes and the living customs of the Southern states and (b) the unanimous positive legal decisions of the Justices of the Supreme Court of the United States is a contemporary example. Such considerations show that the words "good" and "just" do not have the same meaning for all people even in a single nation. Hence, as Professor Hoebel has indicated, and as the writer has demonstrated in his field study of the positive and living law of Western European Union,<sup>4</sup> ethical and legal norms are quantitative as well as qualitative in character. Their qualitative aspect in a particular nation or culture is given when its predominant postulate set of norms is specified. Their quantitative aspect refers to the percentage of the people who believe and practice these norms.

Notwithstanding the different meanings which the words "good" and "just" have in different cultures and even for different people in any one nation or culture, comparative law and comparative cultural philosophy have shown that the different legal procedures and normative legal postulate sets, used to settle disputes the world over and throughout human history, fall into three major types. Sir Henry S. Maine in his classic work, *Ancient Law*, described two of these three types. The writer in his Presidential Address<sup>5</sup> before the American Philosophical Association called attention to the third which is equally well known and of very ancient origin. These three major species of law are: (1) law of status, (2) law of contract and (3) mediational law. Types (1) and (2) have one characteristic in common. Both rest on the ethical assumption that the moral goodness or the legal justice of any particular act is to be determined by measuring the *de facto* character of the act against a determinate codified or codifiable rule which applies qualitatively in principle, although only statistically in fact, to all people in the culture in question. The method of carrying through this measuring process is called "litigation." Consequently in any law of status or law

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<sup>3</sup> Hoebel, *op. cit.* supra note 1.

<sup>4</sup> Northrop, *European Union and United States Foreign Policy* (1954).

<sup>5</sup> Northrop, "The Philosophy of Natural Science and Comparative Law," XXVI Proceedings and Addresses of the American Philosophical Association 5-25 (1953).

of contract society, the settling of disputes by litigation is regarded as good conduct. It was because Sir Henry Maine was concerned in his classic study only with codified or codifiable law that this study specified but two of the three major species of law.

#### MEDIATIONAL LAW

That there is a third type of ethical and legal conduct is shown by the following considerations: (a) Confucius taught that the superior or moral man does not indulge in litigation. Put concretely, this means that, according to the highest ethical and legal ideal and practice of classical Confucian Chinese society it was regarded as immoral to settle a dispute over some act by measuring the facts of the act against a determinate normative rule or principle.<sup>6</sup> To be sure, Confucian society had codified law. Examination of it shows, however, that it was of the law-of-status type. Nevertheless, subject to certain restrictions to be noted shortly, the guidance of one's personal conduct or the settling of any dispute with one's adversary by recourse to determinate normative commandments or rules was regarded as a moral "second-best." The "first-best" moral and legal way was that of mediation in which the final settlement of the normative dispute is fitted uniquely in each particular case to the existential feelings and assents of both parties to the dispute; also the final settlement is proposed and agreed upon by the parties themselves. (b) The Buddhist peacemaking of the "middle path" expresses the same ethic and type of law. (c) Another example is the lawyer Gandhi's rejection, during his South African period, of a favorable litigational victory for his client, which would have financially ruined the other party to the dispute, in favor of a mediated solution less remunerative to his client which enabled the other party to survive financially, and Gandhi's subsequent moral rebellion against litigation under the codified law of either the status or the contractual type.<sup>7</sup> (d) Recent developments in American legal practice and their legal articulation by that branch of American legal realism of which Professor Wesley A. Sturges is the leading spokesman, provide a contemporary Western illustration.<sup>8</sup> (e) Dewey's ethical emphasis on the primacy of the problematic situation is another instance.

<sup>6</sup> Chiang Monlin, *Tides from the West* (1947); Liu, Francis I., *Some Observations of Judges, Lawyers and Constitutional Administration in China*, in *National Reconstruction Journal* (1947); Liu Shih Fang, *Westernized Administration of Justice and Chinese Racial Characteristics* (Dr. Alfred Wang transl. at Yale Law Library); Chang Hsin-hai, *Letters from a Chinese Diplomat* (1948); Northrop, *The Taming of the Nations*, chs. 4, 7 (1952).

<sup>7</sup> Gandhi, *Autobiography*, 167-68 (Desai transl. 1948).

<sup>8</sup> Northrop, "The Mediatlional Approval Theory of Law in American Legal Realism," 44 *Va. L. Rev.* 347 (1958).

More and more parties to legal disputes in the United States have found that the litigational method of settling disputes by recourse to legislative statutes and to judicial decisions which appeal to precedents may be relevant to the present dispute only in a verbal and artificial way and have concluded that the litigational method of codified law is not merely unnecessarily expensive and time-consuming, dragging on often, due to successive appeals, over years, but also frequently unsatisfactory in the final verdict to all the parties concerned. Hence many American business and labor leaders have set up mutual procedural agreements in which a mediationaly agreed upon middle man is appointed to serve two functions: (i) to listen passively to the claims of both parties in the hope that the mere presentation of the rival claims to one another before a neutral observer will enable the disputants to reach a settlement themselves, and (ii) in case the latter event does not occur, to give a verdict which the parties agree ahead of time to accept.

This American example is not a pure instance of the mediational type of ethics and law, since it combines mediation with arbitration. The sign of arbitration is the decision by the middle man. In the mediational theory of ethics and law in its pure form, the mediator never gives a decision; he merely serves as a go-between for the different parties and the dispute is not settled until both parties become so psychologically and intuitively sensitive to the other party's feelings, circumstances and standpoint in the matter that they agree upon the mutual adjustment and settlement, i.e., the middle path, which meets the *esse est percipi* relativities and the existential particularity of the situation. Because a dispute is not regarded as settled until the disputants themselves agree, the mediational type of law does not require physical sanctions.

Point (i) above shows that even in the present American procedure, which combines arbitration with mediation, the pure mediational normative ideal is there as the first-best. It is hoped that the parties themselves will come to a mutually satisfactory solution of their dispute, which they themselves propose. Arbitration enters only if this fails. Item (ii) shows that in this American method, even when arbitration is required, the ethic of the middle path, i.e., of mediation, must be used by the middleman. Actual practice in concrete cases shows also that the middleman is not bound by, nor do the parties want him to be bound by, past solutions of "similar" disputes. This means that the criterion of the good and the just is broken loose entirely from the concept of a dispute as a member of a common class and from the concept of the ethically good and the legally just as identifiable with being an instance of a universal determinate code or law which is applied consistently and

sylogistically to all "similar" cases. The ideal, instead, is to get the present dispute settled as quickly as possible in the light of its unique characteristics.

Philosophically this means that the ethical ideal of the mediational type of law assumes a nominalistic, radically empirical, epistemological and an existential ontological philosophy. Each legal judgment, each moral choice, each dispute and each individual is regarded in its essential normative nature to be unique rather than an instance of a universal scientific law or a determinate normative ethical and legal commandment or rule. Expressed in terms of the pragmatic and problematic American philosophy of Dewey, this existentialism of the mediational type of law is the affirmation that the key to morality and law is to be found, not in the constancy and absoluteness of universal codes, commandments and principles which resolve the problematic situations, but in denotatively immediate, here-and-now, intuitive sensitivity to the unique particularity of the present particular problematic situation in every dimension of its human and social characteristics.

This philosophical and ethical agreement between Dewey's problematical pragmatism and the Sturges version of American legal realism is not an accident. For American legal realism (in all its diverse versions from Justice Holmes through Judges Charles E. Clark, Thurman Arnold and Jerome Frank, Professors Karl Llewellyn and the late Underhill Moore, Justices William O. Douglas and Cardozo to Professor Sturges) is the product of the American pragmatic philosophy. The difference between Professor Sturges' version and that of his predecessors is that, whereas they noted only the instrumentalism in the pragmatism of Pierce, James and Dewey, Sturges caught the ethical spirit and the practical legal consequences of Dewey's emphasis upon the primacy of the problematic situation.

The prevalent charge is erroneous, therefore, that Dewey's ethics or the mediational type of law with its ethics of compromise, or the middle path, leaves morality and law thoroughly relativistic, without any absolute criterion of the moral good and the legally just. This charge owes its prevalence to the assumption that for ethics or law to possess an absolute standard, the standard must be located in a constant, codified or codifiable universal rule. Were this the only source of an absolute criterion of the good and the just, the prevalent charge against Dewey's ethics and the mediational type of law would be valid. But clearly one's absolute criterion of the normatively good and just may be found in immediate and continuous sensitivity to the existential particularity and subtlety of each successive present problematic situation rather than

in determinate universal propositions which may in some cases have provided the solution of some previous problematic situations. Certainly, antecedent to the universally generalized codified solution to any dispute there are the existential particular facts of the particular legal cases and problems themselves. There is no reason, therefore, why intuitive sensitivity to the concrete personal moral choice and legal dispute itself rather than the codified solution of some past cases, cannot be taken as one's absolute criterion of the morally good and the legally just. It is precisely this which a consistent nominalistic epistemology, existential ontology and the mediational type of ethics and law do.

That each fact in experience and any case in law is in part unique, no one can deny. That it is wholly so, however, may be open to question. The prevalence throughout the world and its history of codified law and its litigational method forces us to take the latter possibility seriously. That this possibility is an actuality becomes evident when one notes that every culture which has embraced the mediational type of ethics and law also has codified law and a personal and social ethics of principles which cannot be compromised if one is to be a moral or a just person. Even in Professor Sturges' version of American legal realism, appeal is made to the official legal documents of the law of contract to set up the mediational procedures. Also Professor Sturges himself is an exceptionally able litigational lawyer. Dewey also argued for codified law as well as its relativity to the problematic situation which is each particular case.<sup>9</sup> We have already noted that in classical Confucian Chinese ethical philosophy and culture the mediational type of law conceived as a first-best is combined with codified law of the law-of-status type. In short, there is an ethic and law of the primacy of general principles as well as the primacy of particular problems. It appears to be the case also that the earliest codified law of any people is of the status type.

#### LAW OF STATUS

Even with the first-best ethic of Confucian societies there were certain things taken for granted and expressed in determinate rules which applied to everyone and which were not regarded as subject to mediation in either theory or practice. These universal, wholly non-nominalistic and non-changing ethical and legal principles appear in the five "proper" social relations laid down by Confucius as the requirements for a good and just society or government.

These five determinate principles are a "*proper*" relation between:

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<sup>9</sup> Dewey, "Logical Method and Law," 10 Cornell L. Q. 17 (1924).

- (1) Father and son
- (2) Husband and wife
- (3) Elder brother and younger brother
- (4) Sovereign and subject, and
- (5) Friend and friend.

Unfortunately, most scholars who translate these principles into English and comment upon them tell a non-classically Chinese person very little about what they mean, since the word "proper" is never defined.

To any anthropologist or student of comparative law who looks at a society with respect to the three types of law which it may exemplify, the meaning of the word "proper" is evident in the words chosen to state the five relations. A "proper" relation between the persons referred to is one that characterizes the joint families of a law-of-status society which is predominantly patriarchal in character.<sup>10</sup> The patriarchal character of the status type of ethic and law which Confucian ethics and culture exemplifies appears most blatantly in relation (3). Why should the question as to whether one is an elder or a younger brother have anything whatever to do with one's moral, legal or political duties? The answer is that it has no relevance unless the society is that of a law-of-status type in which the family structure is predominantly patriarchal. One legal requirement in most patriarchal societies is that in the inheritance sons are favored; whereas daughters are favored if the family is matriarchal. Also if patriarchal, the eldest brother inherits more than the younger brothers; moreover upon the death or retirement of the father, it is the eldest son's duty to take over the headship of the family. Clearly in such a society, if there is not a "proper" relation between the eldest brother and the younger brother that is grounded in this status ethic of patriarchal primogeniture, such an ethical and legal theory will not work.

Moreover, in a patriarchal law-of-status society, the head of the family legally and morally is the male and usually is the male who is the eldest son of the family head of the previous generation. A "proper" relation between elder brother and younger brother means, therefore, a willingness upon the part of the younger brothers and their families and all the sisters to accept the biological priority of birth of the eldest brother as the criterion of their legal and moral rights and duties. It means, conversely, a willingness upon the part of the eldest son, when he succeeds his father in the headship of the joint family, to accept the responsibility for properly marrying his sisters and for caring for the

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<sup>10</sup> See Hsien Chin Hu, "The Common Descent Group in China and Its Functions," 10 Viking Fund Publications in Anthropology (1948); Northrop, *op. cit.* supra note 6.



families of all his younger brothers. Socially and practically it entails what is a commonplace throughout traditional Asian cultures and what was a commonplace in ancient Greek and Roman society before the creation of Western legal science and its ethic of the law of contract—namely a society of joint families.

The characteristic of a joint family is that it is a family of families in which, if the society is patriarchal, to be the eldest son means to be the head not merely of the family of one's own wife and children, but of all the families of one's younger brothers and their children's families. It means also the moral and legal duty to care for one's father's family upon his retirement and also the families of all his younger brothers.

The import of the word "proper" as it applies to the five relations specified by Confucius is that one's moral, familial, legal and social responsibilities and duties are defined by one's biologically bred status in the patriarchal joint family. Were the joint-family society matriarchal rather than patriarchal, as was the case in the classical society of Cochin-Travancore, India, the five Confucian relations would read: (1) mother and daughter, (2) wife and husband, (3) eldest daughter and younger daughters, (4) sovereign (meaning queen) and subject, and (5) friend and friend.

The meaning of the Confucian relation (1) now becomes evident. A "proper" relation between father and son is one in which all the sons and especially the eldest accepts the responsibilities and filial piety loyalties of a predominantly patriarchal joint family. Similarly a "proper" relation between husband and wife is one in which the primary obligation of the wife is to produce a son to head the husband's family and the joint family in the next generation. So great is this obligation in a "proper" relation between husband and wife that it often becomes the moral duty in case no son is born of the first wife for the husband to take a second wife.

The Confucian relation (4) defines the moral and political criterion of political leadership. It, too, is a function of objective biological facts having nothing to do with personal choices or with popular elections. If the society is patriarchal, the political leader is normally a king; if matriarchal, normally a queen. Furthermore, if it is not to become ambiguous about which joint family is to be the royal family, the relation of the joint families in the society as a whole must be hierarchical with a privileged first family at the top of the hierarchy.

The foregoing considerations suffice to make clear what the word "status" means in any law-of-status society. The meaning is that all normative words such as "personally good," "legally just" or "politically

good" are defined in terms of natural history, biological facts having little if anything to do with the personal preferences or with the consent of the individual. "Status" means biologically bred, temporal order-of-birth status in an objectively determinable, genealogical table. It has nothing to do with the status that occurs in a law-of-contract society when certain people become more successful than others and separate into social groups. Just as the hedonistic theory of ethics and law defines the meaning of the words "good" and "just" in terms of the immediately inspected concept of pleasure of introspective psychology, so the ethics of a law-of-status society defines these words in terms of the concepts of natural history and biology. Consequently, to ask in any law-of-status society whether a given person is a "good" person is equivalent to asking for that person's pedigree.

Obviously this is an ethic and a law with a determinate and absolute content. Clearly also it expresses an essential part of the Confucian ethic and of the just law of classical Confucian Chinese society. Also it is an ethic and a law that cannot be compromised even for Confucius if a good society or the superior moral person is to exist. Hence when he asserted mediation to be the first-best ethic, he referred to cases of disputes which fall outside these joint-family laws of biological status with their ethical and legal absolutes. In all likelihood he referred to disputes between individuals in different joint families. Since in any law-of-status society—whether it be that of Shinto Japan, Confucian China, patriarchal Confucian-matriarchal Shamanist Korea, Hindu India or pre-Stoic ancient Greece and Rome—each joint family tends to be a law unto itself, the only way of handling a dispute between persons in different families is by mediation. Even then, as Hsien Chin Hu has shown<sup>11</sup> in the case of Confucian China, it is likely that the disputes will be settled by mediation not between the individuals generating the dispute, but between the heads of their respective families. Consequently, classical China, Korean, Japanese and Hindu Asian societies have a complex combination of a first-best mediational ethics, politics and law for inter-family disputes and a first-best law-of-biological-status ethics for conduct within the joint family and at the national political level. This is undoubtedly the reason for Lin Yutang's observation that the non-Westernized Chinese are very suspicious of any social idealism which places obligations upon the individual that reach very far beyond his obligations to his joint family.<sup>12</sup> In short, the primacy of filial piety in Confucian Chinese social morality is an expression of the ethic of any law-of-status society.

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<sup>11</sup> Hsien Chin Hu, *id.*

<sup>12</sup> Lin Yu-t'ang, *My Country and My People*, 172-213 (rev. ed. 1939).

It has been suggested above that the codified law of Aryan Hindu India is also of this law-of-status type. In fact the earliest and best example of codified law of the biological status type is to be found in the Aryan Hindu Laws of Manu and the subsequent recodifications by Apastamba, Gautama and others.<sup>13</sup> One of the major difficulties which the present government of Free India has had to overcome, in introducing its new liberal democratic legal and political system of the law-of-contract type, is opposition from the right-wing, orthodox Aryan Hindus to the reform and breakdown of the patriarchal joint-family system, which the ethic of Western law of contract entails with respect to marriage, property rights and inheritance.

India is not peculiar in this respect. Every society in the West was initially of the law-of-status type, as Fustel de Coulanges' *The Ancient City* and C. W. Westrup's *Introduction to Early Roman Law*<sup>14</sup> clearly demonstrate. So *almost* universal to all peoples and cultures is law of the status type that many contemporary anthropologists have concluded that the kinship relations of any people determine all the other traits of the culture such as its belief system, its economic institutions and its art forms. Many anthropologists inferred consequently that philosophy is irrelevant to the understanding of a culture. Were law of the biological status type the only species of law in the world, these anthropologists would be in major part correct.

There is, however, law of (1) the mediational and (2) the contractual type and in both of these types of law, biology of birth and breeding have little if anything to do with the norms for ordering human relations or with the normative, ethical and legal, philosophical beliefs of the people. In fact, to the extent that any culture is of the mediational or the contractual type, to behave according to the ethic of kinship relations is to be guilty of the evil of nepotism in one's political conduct and of racial and religious prejudice in one's personal moral judgments and in one's political decisions. It is, moreover, to have a society of caste, wherever there are people in any community of more than one biologically bred racial stock.

This essential connection between moral and legal goodness and race points up another characteristic of the ethic of any law-of-status society—namely the racial as well as the biological, genealogical core of its ethic and its religion. In every law-of-status society, whether it be that of classical Confucian China, Hindu India, Old-Testament Judea, Shinto

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<sup>13</sup> *The Sacred Books of the East* (Müller ed. 1902).

<sup>14</sup> Fustel de Coulanges, *The Ancient City* (1956); Westrup, *Introduction to Early Roman Law* (1939).

Japan, pre-Stoic Greece or Rome, negro tribal Africa, or the First Families of the patriarchal Christian culture of the Old South in America today, religion, ethics, law and politics are inescapably and essentially tribal. This follows from the primacy which biological breeding and purity of racial ancestry plays in any culture of the law-of-status type. Clearly if the content of one's moral, legal, political and other rights, privileges and duties are defined by one's genealogical table and the purity of one's line of descent from the patriarchal or matriarchal head of the first family of the tribe, then the tribe of one's ancestors is of the essence in morality, religion and law.

This becomes especially evident if one notes the criterion of political authority, leadership and obligation in such a society: For a patriarchal society this criterion is that the political leader is ideally the eldest son by way of all the intervening eldest sons of the patriarchal head of the first family of the tribe. Suppose, however, that there is more than one racial tribe in a given geographical area. Under such circumstances the problem of political leadership becomes more difficult to resolve. The easiest solution is to restrict the political community or nation to one of the tribes. Under this solution there are as many different nations or political communities as there are different tribes. This is why the original meaning of the word "nation" is "tribe." In short, the first nations were law-of-status nations.

The other political solution for a law-of-status society of peoples of different tribal and racial stock in the same geographical area is to order the different races hierarchically, putting at the top of the hierarchy in positions of complete political and religious leadership only the descendants of the first family of one of these tribes. The result is caste. Aryan Hindu Indian society and its positive Laws of Manu provide an instance. The theocratic, Canterburian, patriarchal, Christian, regal and aristocratic society of the political England of Hooker, Elizabeth I, Shakespeare and Sir Robert Filmer's *Patriarcha*, whose law-of-status ethic went into the southern colonies of the later United States through the Virginia Company, provides, as the contemporary British analytic philosopher and historian Mr. Peter Laslett has recently shown,<sup>15</sup> another example. It is in fact the conflict between this Christian white man's patriarchal and tribal law-of-status ethic in the living law of the Old South and the law-of-contract ethic of Locke and Jefferson that is the heart of the present legal, political and moral issue with respect to desegregation in the United States.

The Crown in Great Britain is an interesting example. Strictly speak-

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<sup>15</sup> *Patriarcha and Other Political Works of Sir Robert Filmer* (Laslett ed. 1949).

ing the King of England (and ideally because of the patriarchal character of all Western societies, the Crown should be male) is the eldest son, by way of all the intervening eldest sons, of Adam. Hence the Crown in Great Britain is a living law hangover of a Judaic-Christian patriarchal law-of-status society. To be sure, the English know very well that the pure line of specific eldest sons intervening between Queen Elizabeth II and Adam is somewhat ambiguous. But this does not bother them, for the King (or Queen, if there is no available royal son) is only King (or Queen) if he (or she) is crowned by the Christian Archbishop of Canterbury. What happens in this ceremony is that the Archbishop "invests" the recipient with the spiritual status of being the eldest son (or daughter) by way of the intervening eldest sons of Adam.

There is nothing peculiar in this British practice of investiture. It is interesting to note in the case of classical China that, when a different family or the tribe of invading foreigners usurped the throne, the usurpers invested themselves with the title of being the present son of the first Son of Heaven. The second law of sociological jurisprudence, noted at the outset of our inquiry, is at work here. This law is that any new positive act or code brought in from outside or imposed by force from above has to reckon with the old and persisting living law. This is why every conqueror tends in the long run to be conquered by the conquered people's ethic and morality.

The prevalent practice of political usurpers in law-of-status societies, of investing one's own family with a purity of biological descent from the first founder of the nation and the culture, which in fact it does not possess, is of considerable anthropological and philosophical importance. It shows that what matters is not *the fact* of one's purity of line of breeding, but *the belief* in this theory of personal, familial and political authority. This suggests that even in law-of-status societies, where kinship relations are of the essence in understanding ethics and law, the philosophical belief is the key to the *de facto* kinship and political relations; the kinship relation is not the key to the philosophical belief. This conclusion is confirmed by the additional fact that otherwise neither Western civilization with its novel ethic of the law of contract, nor the Asian mediational ethic and law conceived as a first-best, would be possible. For if the *de facto* biological kinship relation determines every belief in philosophy, ethics and law, then, since one's genetic ancestry is fixed, it would have been impossible to make the shift as did ancient Asia in part at least from status to mediation and as did the West, also only in part as yet, from status to contract.<sup>16</sup> Similarly it would be im-

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<sup>16</sup> Maine, *Ancient Law* 151 (1908).

possible for the people of Asia and Africa today to replace their old joint-familial and tribally focused ways with those prescribed by the quite different ethic of their new law-of-contract political constitutions which they have imported recently from the West.

The crucial question, therefore, arises: What is the belief system, i.e., the philosophy, which initially led practically every people on the earth's surface to find the meaning of the words "good" and "just" in the concepts of genealogical and racial biology?

#### THE PHILOSOPHY OF THE LAW OF STATUS

The answer to the foregoing question begins to appear if we ask what the ethics of the law of status assumes a moral, legal or political act to be. Clearly, the assumption is that every normative event or judgment is the act of a person whose scientific and philosophical defining properties are completely known when his biological sex, primogeniture of birth and tribal ancestry are specified. In other words, the ethic of the law of status rests upon the empirically scientific and philosophical belief that fully known man or woman is common-sense-object, biologically bred man or woman.

The word "object" in the last sentence is important for several reasons: (1) It explains why a law-of-status ethic is an absolute ethic for those who hold it. One's sex is not a matter of one's choice; nor is one's temporal order of birth. Nor is the tribe of one's ancestors. (2) The word "object" also expresses the fact that the ethic of the law of status assumes a realistic epistemology rather than a nominalistic, radically empirical epistemology.<sup>17</sup>

The tribal character of the norms of any law-of-status community gives an additional clue to the philosophy which it assumes. The initial criterion of tribal difference is immediately sensed, color-of-skin difference. Later, of course, when younger sons break off from the old joint family to set up new joint families, tribal, national differences may occur where there is identity of color of skin. It is not an accident, however, that one of the Aryan Hindu Sanskrit words for "caste" is also the word for "color." Recently the contemporary Indian scholar, Professor S. K. Chatterji, has given linguistic evidence which shows that originally the different castes were different racial groups.<sup>18</sup> It is well-known also that the original Aryans were of a lighter, Nordic color of hair and skin. These considerations indicate that the scientific criterion of differences

<sup>17</sup> Since a universal proposition does not convert simply, it does not follow, as some have assumed, that to believe in a naive realistic epistemology even when one lives in a law-of-contract community, entails belief in an ethics and law of the status type.

<sup>18</sup> Chatterji, Suniti Kumar, "Krishna Dvaipāyana Vyāsa and Krishna Vasudeva," 16 *Journal of the Royal Asiatic Society of Bengal Letters* 73-87 (1950).

in tribe originate in the empirically observable fact of differences of *sensed* color.

Consequently, a law-of-status society tends to be one in which moral and legal rights and religious and political leadership never goes to people in the community with a different color of skin from that of the founders of the society. For example, it is just as impossible socially for an African cousin of one of the American Negroes to bring a white wife into the African joint family and tribe as it would be for the son of a present First Family of Virginia to bring a wife with a black color of skin within that similarly patriarchal color-of-skin tribal home. It is quite erroneous, therefore, to suppose, as many people under the influence of the ethic of the law of contract tend to do, that the forbidding of marriage or of common educational and social relations between people of different tribal origins, or different colors of skin and castes is peculiar to Hindu India or to the Southern United States.

The point of this laboring of the essential connection between color of skin and morality in a law-of-status community is, however, to establish an epistemological rather than an anthropological point. This epistemological point is that the objective realism of the philosophy of the law of status is *naive* realism, where "realism" means that one knows objects which exist independently of their relation to the observer and "naive" means that both the objects and their defining properties are directly sensed. To use the conceptual language of the writer's *The Logic of the Sciences and the Humanities*, naive realism affirms that external objects and public substantial selves, purporting to be directly observable and to exist and persist independently of their relation to the percipient, are completely denotable or definable in terms of "concepts by intuition," where by "a concept by intuition" one means any idea the complete meaning of which refers to something naively, i.e., directly or radically empirically sensed, introspected or immediately experienced.

The foregoing reference to persisting substantial selves and external material objects reveals the dualistically ontological as well as the naively realistic epistemological philosophy of a law-of-status legal and political system. The codified law of Aryan Hindu India which because of its emphasis on the Aryan race, the patriarchal joint family, caste, sex and primogeniture of birth, is of the status type, confirms this analysis. Recently two Indian scholars, Professors P. T. Raju and D. M. Datta have shown that the codification of Aryan Hindu Indian law, as present still for us to read in the Laws of Manu and his successors, is the work of Mimamsa dualistic philosophers. They were naive realists epistemologically, and dualists ontologically, as their name indicates.

## THE COMPLEX PHILOSOPHY OF HINDU INDIAN LAW

It would be a mistake, however, to conclude that the Aryan Hindu law, which these Mimamsa dualists codified, expresses only the patriarchal joint-familial law-of-status norms of race and caste of such a philosophy. Examination of the Laws of Manu (and those of Apastamba and Gautama) shows the following things: There are four castes in society, each with its particular legal duties and privileges. Also, there are four periods of life—studentship, householder, hermit and ascetic—laid down for every Aryan Hindu and especially for every Hindu of the top castes, i.e., the Brahmans and Kshatriyas. Moreover, each of these four stages in any Hindu's life has its respective positive legal rights and duties and its concrete living customs. Study of the respective goal values and duties of the different castes and the different stages of any Hindu's life shows that the values of a law-of-status ethics or politics and its naively realistic and ontologically dualistic concept of a person and of cosmic nature applies only to the second and lower castes and even for them largely during only the householder period of their lives. During the whole of life for the top-caste Brahmans and during the studentship, hermit and ascetic periods of any second- or third-caste Hindu's life, a quite different philosophy, mentality and ethic than that of Mimamsa dualism with its racial and joint-familial law-of-status values and codes is being practiced and a quite different concept of the self is being sought and cultivated through yogic and other meditative exercises. Clearly the law which the Mimamsa dualistic philosophers codified is a compound of Mimamsa dualism and another quite different philosophy which enjoys top-caste status and defines the normative content of both the positive and the living law for the other castes during the initial and the two final periods of their lives.

Two questions immediately arise. What is this other philosophy in Aryan Hindu Indian law? Why did the Mimamsa dualists give it such a position of primary importance? We can best approach the answer to the first of these questions by way of the answer to the second.

Experience in societies unaffected by Western legal science indicates that without law of contract it is impossible to obtain political unity and authority over wide geographical areas at the national level without a racially privileged first family whose claim to political authority depends on racial purity and primogeniture of breeding and birth. This calls for a law-of-status ethic and for the definition of the political and legal duties of provincial and federal public officials in terms of the naively realistic, ontologically dualistic, philosophy of such a theory of law and politics.



The reason for this conclusion will become more evident if we compare the Laws of Manu of Aryan Hindu India with the codified law of Western legal science after its creation by the Stoic Roman lawyers. Certain contrasts are obvious. (1) The words of the former have common-sense meanings that are concrete; those of the latter have formal, technical meanings which only a lawyer trained in Western legal science can fully understand and which are for the most part emotively dull and abstract. (2) The focus of the criterion of justice in codified law of the status type is more in the concrete material substance of what the code says; in codes of the law-of-contract type, the formal and procedural properties of the codes rather than their concrete substance tends to become more and more the decisive criterion of what is just. To use the language of pure mathematics and contemporary symbolic logic, in the codes of any law-of-status society the criterion of what is just turns for the most part around the material constants in the legal sentences, whereas in those of the law-of-contract, the particular concrete person and the concrete content of the dispute tend to function merely as an instance of a variable.<sup>19</sup> The law of contract expresses this conceptually different mentality by its dictum that the law is no respecter of persons.

In the Laws of Manu what is just for a given person cannot be separated from his or her sex or primogeniture of birth in the joint family or from the tribal origins and heirarchical status, *i.e.*, caste, of his or her joint family in the society as a whole. What is just in a case which the law-of-contract would call a "trespass" is a function of the caste of the person's family or the species of animal which commits the trespass. The penalty is one thing in the case of a third-caste Sudra and another in the case of a second-caste Kshatriya; one thing in the case of a horse and, because of its sacredness for Hindus, a different thing in the case of a cow. In the law-of-contract, on the other hand, the normative ideal, still imperfectly realized, is to substitute technical, abstract words like "delict" and "trespass" for concrete, specific classes of persons or animals who commit the delict or the trespass, making the concrete object which instances what is unjust irrelevant to the criterion of goodness or justice.

Another contrast is that the law-of-status codes of different tribes and societies are exceedingly pluralistic and incompatible, varying in normative content from tribe to tribe, as our earlier references to Professor Hoebel's studies have shown, whereas in Western contractual legal science the legal words and more and more the substantive content of the

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<sup>19</sup> Lawson, *A Common Lawyer Looks at the Civil Law*, ch. 3 (1953); Northrop, *The Complexity of Legal and Ethical Experience*, ch. 17 (1959).

contractual codes of the law tend to be characterized first by formal and later by substantive universalism. A comparison of the law-of-status codes of classical China, Korea, Japan, and the predominantly Buddhist countries of Southeast Asia, reveals pluralistic diversities similar in their incompatibility to those described by Professor Hoebel. As previously noted, Hindu India had matriarchal law-of-status codes in some of its provinces as well as the patriarchal ones which are in the majority. Professor Paul Ryu has shown that Korean society differs from the Chinese notwithstanding the patriarchal Confucianism and the Buddhism common to the two countries because of the matriarchal law-of-status factor contributed by Shamanism.<sup>20</sup> The French anthropologist, Mr. Lingat, has demonstrated that all the countries of Southeast Asia have an important matriarchal law-of-status normative component.<sup>21</sup> This is combined with the patriarchal law-of-status norms of the Buddhist and Hindu components of their cultures. In Burma, for example, this results, as Dr. Khin Maung Win has shown recently, in putting many of the secular affairs of life under the practical control of the mother, while reserving to the male head of the family leadership in the Buddhist religious domain of life.<sup>22</sup> For children the remarkable result is that male and female authority cancel one another out, much after the manner in which two beams of intense light combine to produce darkness when the crest of one falls in the trough of the other. Young Burmese people were, for example, free to choose their own life mates, instead of having them chosen by the heads of the joint families as tended to be the case in Confucian China and in Hindu India.

As suggested above, however, the most notable contrast between status and contract appears in the political sphere at the federal level. The law of contract achieves provincial and federal legal and political unity by substituting (1) contractually introduced written or unwritten constitutions in which consent is of the essence of political authority and legal obligation for (2) the determination of political leadership by biology of breeding from a first family of the tribe or of the caste system of tribes. The practical significance of this contrast will become evident if we return to the difficulty in any law-of-status society of obtaining national unity over a wide geographical area when the people in the area are of different racial stocks or the cultural tradition is such that there is no religiously designated, privileged first family.

The achievement of national unity on a law-of-status basis was rela-

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<sup>20</sup> Ryu, Korean Culture and Criminal Responsibility (unpublished thesis in Yale Law School Library).

<sup>21</sup> Lingat, *1 Les Régimes Matrimoniaux du Sud-est de l'Asie* (1952).

<sup>22</sup> Win, Khin Maung, *Some Philosophical Problems in Contemporary Burma*, 1959 (unpublished Ph.D. thesis in Yale University Library).

tively easy in Japan since, for the most part, the people are of but one racial stock and the Shinto religion not merely specified the unique first family within this common stock from whom the political leader is selected by patrilineal primogeniture, but also prescribed absolute obedience of every one to the eldest son of the royal joint family in each generation. This gave each citizen a greater loyalty to the nation than to his own joint family.

In India, however, the many races made such an easy solution impossible. If national unity within the ethic of a patriarchal law-of-status procedure for determining political leadership was to be achieved, one of the tribes had to be given a higher status in the community than any other tribe. The Aryan Hindu conquerors of India acquired this social, political and religious priority for themselves first by force of conquest and later by being captured in significant part by the philosophical system of the pre-Aryan Indians' living law. Consequently the *de facto* national legal and political institutions of classical and medieval Hindu India are the synthesis of (1) the pre-Aryan Indian living law and (2) the new positive and living legal customs of the Aryan conquerors.

Without the law-of-status norms of (2) applying at the federal level to the second-caste Aryan maharaja and his patrilineal descendants, neither national law-of-status political order with its hierarchy of races and castes nor the Aryan's conquest would have been achieved initially. Moreover, without the legally codified inclusion of the philosophy of (1) which gives them primacy of place in the caste system and in the first and the last two stages of any upper-caste Hindu's life, the Aryan conquerors would not have been able to have consolidated permanently the conquest which their initial victory by means of force won for them.

To this legal synthesis of pre-Aryan and Aryan factors, the ancient Aryan conquerors brought two things: The Sanskrit language and codified law. This law was of the status type and was expressed in the Aryan language. Sanskrit has the two-term, subject-predicate syntax of all of the Aryan languages. This syntax expresses the substance-property mentality of a naively realistic epistemology and a dualistic ontology; hence, the role of Mimamsa dualistic philosophers in codifying the law of Aryan Hindu India. But to the law which they codified, the philosophy of the living law of pre-Aryan India also made its very great contribution.

The first Indians to be conquered when the Aryans moved from Afghanistan across India's northwest frontier towards the valley of the Ganges were the inhabitants of the Sind valley. Archeological excavations made at Mohenjo-daro in recent times reveal a pictographic, linguistic

symbolism and the Shiva religious symbol which was to play such a predominant role in later Aryan Hindu religious art and its field or *chit* consciousness theory of the "true self" or person.

Pictographic symbols are not bound by the syntax of the two-termed, substance-property mode of thinking of the Aryan languages. This suggests that the epistemology of pre-Aryan Indian thinking was not that of naive realism. This is confirmed by the additional fact that pictographic symbols convey the impressionistic image itself as an atomic event, rather than the notion of a substance of which the impressionistic image is a predicate. These are the marks of a radically empirical rather than a naively realistic way of thinking.

The Shiva symbol is similarly significant. In later Aryan Hindu thought it denotes the radically empirical field or *chit* consciousness, intuitively immediate self "without differences" in which Brahman (the undifferentiated cosmic field consciousness) and Atman (one's self consciousness with all differentiations eliminated) are one.

The intuitively immediate character of this self and its undifferentiated character again bespeaks a radically empirical rather than a naively realistic way of thinking. This also rules out an ontological dualism of body and mind. Because this Shivite pre-Aryan Indian intuitive, radical, empirically known component of the cosmic continuum of immediacy, which is one's own psychic self, is "without differences," the later name given by Sankara to this earliest Indian philosophy of the moral, legal and religious person is unqualified non-dualistic Vedanta. The rejection of Mimamsa dualism is explicit.

The fact noted just above that the Aryan Hindu's legal codes assign this Shivite pre-Aryan non-dualistic self and its values to top-caste status and to the domination of three of the four stages of the Aryan Hindu's life means, therefore, that the Aryan conquerors and their naively realistic, Mimamsa dualistic philosophers who codified their final law had to come to terms with the non-dualistic philosophy of the living law of the people whom they conquered. The *de facto* codified law which we find today in the Hindu law books is consequently the synthetic product of (a) naively realistic, ontologically dualistic philosophy of human nature and the ends of human existence and (b) a radically empirical, non-dualistic philosophy of the person and the meaning of human existence in which the latter of these two philosophies is given primacy of place. The latter fact shows in the following ways.

It was noted above that the Aryan conqueror's contribution to this synthesis is law of the status type codified in the Aryan Sanskrit language. This codified law assigns to the pure patrilineally bred descend-

ants of the Aryan conquerors the command of the army, the administration of the government, and the application of the codified law. However while enjoying these military, political and judicial privileges of second-caste merit, top-caste status and merit is assigned in the codified law, which the Aryan maharaja declares, to the humble guru who is both teacher and priest and who spends a considerable portion of his time in meditative exercises which remove differentiated outer and inner images from his radically empirical immediate experience, thereby enabling him to become one with the radically empirical cosmic consciousness "without differences" in which the divine, *i.e.*, cosmic consciousness (Brahman) and one's own self consciousness (Atman) are identical.

Moreover, the potential maharaja throughout the whole of his youth in the initial, or studentship, stage of his life is under the tutelage of such a top-caste guru who acquaints him, to be sure, with his Aryan duties as ruler of the state, commander of the army, and administrator of the codified law, but also makes evident to him that these Aryan Mimamsa dualistic and naively realistic ways of thinking and behaving apply only to the second or householder stage of his or any other Hindu's life and, moreover, express a philosophy of one's self and one's conduct which, although pragmatically necessary for most people, is found, when submitted to carefully, radically empirical factual examination to be false as an accurate account of either one's own self or of the meaning and goal of human existence. Furthermore, in his military, political and legal decisions, the maharaja in his second-caste functions and status must regard his guru as his superior, practice intuitive meditative exercises under the latter's tutelage and confer continuously with him even with respect to military, legal and political decisions.

Even more dramatic evidence that the Aryans consolidated their political and legal conquest of India only by giving primacy of place to the non-dualistic philosophy of the pre-Aryan Indian living law shows in what the maharaja or any other Hindu of the upper castes may in fact and must ideally do in the last two stages of the Hindu's life. The first of the last two stages begins for any maharaja or any other married Hindu at the end of his householder stage when his eldest son takes over the headship of the Hindu joint family and, if one is a maharaja, the housekeeping of the state. Then the ideal conduct for the Aryan maharaja, which occurred in fact when the writer was in India in 1950, consists in throwing aside all one's palatial material wealth and splendor of dress and breaking entirely from one's family to put on the humble loin cloth of a beggar, take up one's begging bowl and depart into the hermit stillness of the forest where by means of the guru's meditative

exercises one strips away one's Mimamsa dualistic, phantasmically projected, phenomenal self to return to one's true, timeless, undifferentiated and all-embracing, radically empirical ocean or cosmic consciousness which is Brahman, out of which one arose as a transitory sequence of perishing differentiated images at one's birth and which the constancies of nominalistic words caused one temporarily to confuse with substantial concrete entities during the householder stage of one's earthly existence.

Let no one suppose that this is mere ancient history. More than a few of the top-most statesmen in the present "secular" government of Free India arise daily before dawn to practice the humble guru's intuitive meditative exercises before turning to the secular decisions of the day. India's present Vice President, Professor Radhakrishnan, is an unequivocal proponent and practitioner of this unqualified, non-dualistic Vedantic philosophy not merely of personal life but of the true ends of India's political strength and her effective future. Gandhi's political success in carrying the hundreds of thousands of Indians, at least ninety-five percent of whom still live in the villages, in the palm of his political hand when, after the manner of the ancient Buddha, he repudiated the Mimamsa dualistic law and politics of race and caste to return Hindu India to its pre-Aryan intuitive and meditative non-dualistic self, shows also that this deeper Buddhist-Hindu philosophy is the only one that can tap the spiritual enthusiasm and the political loyalty of the masses.

The political triumph of the Buddha's teaching in ancient India and its spread north and east to capture Japan where it still persists and south and east to capture and still dominate Ceylon, Burma, Thailand and Indochina, reinforces this conclusion. The Buddha, let it be recalled, was of the second Aryan Hindu caste, the eldest son of the ruling maharaja and hence destined to be king at the end of his studentship days. Nevertheless, he rejected all these privileges even in his youth to leave both his wife and, even more telling, his newly born first son to teach his fellow Aryan Hindu Indians and most of Asian mankind that the true self and the true way of life is not that of race or of law-of-status biologically defined family ties, but that of the all-embracing self and cosmic consciousness without differences which he called "Suchness" or Nirvana. Hence Buddhism is Indian Hinduism with its Aryan Mimamsa dualistic philosophy eliminated.

That he succeeded even with Aryan Hindu Indians is demonstrated by the political fact that India achieved its first complete national unity and well-nigh its last under the Buddhist emperor Asoka. The present

seal of the government of Free India with its similar so-called secular repudiation of race, caste and sex as the criterion of political and legal rights and duties derives also from this Asoka Buddhist India. Furthermore, the Mimamsa dualistic Aryan Hindus and their Hindu political and religious leaders did not win back the majority of the Indian people to Aryan Hindu politics and religion until, in the medieval era, the Hindu philosopher Sankara wrote a fresh philosophical commentary on the Upanishads and the ancient Vedas which made it unequivocally clear that not merely Mimamsa dualism but even a qualified, naively realistic, differentiated Brahman is a false Aryan Hindu philosophy, and that the true and most ancient Aryan Hinduism is that of the unqualifiedly undifferentiated, radically empirical, cosmically conscious self which is identical, not merely with one's own undifferentiated self consciousness called Atman, but also with the Nirvana self of Buddhism. In short, only by becoming Buddhist in his concept of both his own self and the divine self did the Aryan Hindu win back religious and political control of India from the Buddhists.

Even then, the problem remained of reconciling the privileged legal, political and priestly position of the pure patrilineally-bred descendants of the Aryan conquerors and their caste system with such a Hinduism. I am indebted to Mr. Robert Rossow, Jr., former American Consul General in Madras, for first suggesting to me the way in which the Aryan Hindus of medieval Vedantic India solved this problem. Their answer is the *Bhagavad-Gita*—the most widely-read book in India even today. Its theme is the doctrine of non-attachment. One accepts the naively realistic law-of-status way of thinking and behaving as a rough and necessary mode of conduct during the householder stage of one's life, realizing, however, that this is a false philosophy and that its ways are false ways if accepted with an absolute commitment or attachment. The true philosophy and the true way is the most ancient one which has been stated with unequivocal clarity by Sankara. The problem of reconciling the Aryan Mimamsa dualistic philosophy, law and politics of Aryan racial, political and religious supremacy and caste with the democratic egalitarian philosophy of Buddhism and the unqualifiedly non-dualistic Vedantic Hinduism, in which the true selves of all people are not merely equal but even identical, is resolved, therefore, by committing one's self absolutely only to the latter of these two philosophies and accepting the former of these ways of living only during the householder stage of human existence and even then with non-attachment.

Even with this Aryan Hindu victory over Buddhism in medieval times, it was difficult politically to maintain national unity with a political

system that was based on law of the biological, joint-familial, and racially focused status type. The reason was that with the passage of time there were many Aryan Hindu joint ancestral families of the top-most castes. Furthermore, as in early 17th century Christian, patriarchally theocratic and regal England, the line of eldest sons leading back from a present eldest maharaja's son to the patriarchal father of the first Aryan joint family became ambiguous. Consequently, in Aryan Hindu India, many maharajas with many princely nations rather than one Indian nation arose. It was this development which made the later political conquest of India, first by the Muslims and more recently by the British, so easy.

THE COMPLEX PHILOSOPHY OF LAW AND POLITICS OF THE  
HINDU NATIONS OF SOUTHEAST ASIA

The problem of national, political unity in a Buddhist law-of-status society is equally interesting. Thailand provides a concrete example. The Thais came originally from China and are for the most part of one racial stock. Consequently, Thailand did not face the difficulties with respect to national political loyalty and unity that confronted India with her diversity of races. Nevertheless, their law-of-status family ethic presented the Buddhist Thais with difficulties at the national political level. The writer became aware of them in the following way.

In 1950 he and his wife were taken through the Buddhist temples of Bangkok by the joyful and devout Buddhist Princess Poon. We walked by the King's Palace within the large and aesthetically rich temple grounds that also contain the Temple of the Emerald Buddha. We were introduced to and talked with Buddhist monks in the temples. We learned of the king's vital practice of Buddhism. We saw the thousands of youth in their yellow Buddhist robes receiving their education under the monks in the temples, precisely after the manner in which American youth attend their local high schools. We marveled at the stories and the images of the Buddha, brilliant in their beauty and evident everywhere. What was our surprise, therefore, when we were taken to the spot in the Buddhist temple where the Buddhist king is crowned, to be told by Princess Poon that roughly three-quarters of the ceremony is performed by Buddhist priests in yellow robes who then withdraw in favor of Hindu Indian priests in their white robes who crown the king, giving him his regal name which is of Hindu Indian derivation. The surprise became even greater when Her Highness told us that even the present secular law-of-contract, post-revolutionary democratic government of Thailand annually contributes some tens of thousands of dollars



in order to keep these Hindu priests in their Hindu temple grounds in Bangkok for the crowning of the king; otherwise, there being relatively few Hindus in Thailand, the Hindu priests who are necessary to crown the devoutly Buddhist king would not be at hand. This brings to mind the additional fact that the codified law of Thailand, which is of the law-of-status type, is in considerable part Hindu law.

Why this Hindu Indian element in the political leadership and the codified law of a Buddhist people? Why the crowning of a devoutly Buddhist Thai king by the religious priests of a different religion and racial stock from a foreign nation? Why also the Hindu statutes in the Thai law-of-status codes?

This political combination of Buddhism and Hinduism is not peculiar to Thailand. Classical Burma was similar. Confucian-Buddhist Vietnam was called Indochina for the same reason. There is a patriarchal law-of-status Hindu federal political and legal component in the otherwise predominantly Buddhist nations of Southeast Asia. The Hindu-Buddhist architecture of Ankor Wat expresses this.

Is not the reason clear? A Buddhist law-of-status society requires something foreign to Buddhism to get the beliefs and loyalties necessary to achieve national unity. Why? The following considerations suggest the answer.

Non-Westernized societies know only the mediational and the status types of law. To them, therefore, the obtaining of national unity by means of a contractually introduced federal constitution and its popularly elected federal officials is unknown. The mediational method requires for its success that direct and easy communication exist between the parties to any dispute. Hence it is of little use as an instrument for obtaining national political unity among peoples spread over vast geographical areas or divided by a rugged terrain. In short, the mediational method is not a very practical way to obtain interpersonal and interjoint-familial political unity when applied beyond the village level. The same is true of the law of status unless there is a privileged first family. But Buddhism, due to its founder's repudiation of caste and its philosophical thesis that the true selves in all people are identical, is incompatible with a privileged first family. Consequently something foreign to Buddhism and its democratic philosophy must be introduced if national legal and political unity in Buddhist societies is to be obtained. This foreign factor was found in the Aryan Hindu Mimamsa dualistic philosophy of national law and politics and its politically privileged Aryan maharajas of Hindu India. Hence, there are the Aryan-Hindu names of the Buddhist kings of Southeast Asian Buddhist nations and the law-of-status Hindu

legal component of their federal positive law; hence, also, the aforementioned present annual authorization by the "secular" free democratic government of Thailand of some tens of thousands of dollars in order to keep the otherwise largely useless Indian Hindu priests continuously available in their temple grounds in the center of Bangkok in case the sudden demise of the king should make the crowning of his patrilineal successor an immediate necessity.

Even so, in introducing these foreign Aryan Hindu factors, the fundamental rule of sociological jurisprudence had to be reckoned with. This rule is that any new foreign positive legal and political norms will fail unless they express the high-frequency normative content of the living law. In Buddhist nations this living law is overwhelmingly Buddhist rather than Hindu. The consequence was that these nominally Hindu maharajas of the Buddhist nations, who required a Hindu priest for their crowning, were captivated by the Buddhist religion. When the writer was in Bangkok in January of 1958, the king had but a few weeks before entered a Buddhist temple, placing himself democratically beside its other members for a period of three weeks' meditation and study of the Buddha's teachings.

But even this was not enough to win the loyalty of the Buddhist peoples in the villages to such a Hindu caste concept of political leadership. Hindu living law factors had to be brought down into their hearts, minds and playful behavior just as their Buddhist democratic religion and its values were embraced joyfully by the Hindu-crowned and named king. This Hindu factor in the living law of the people is to be found in Thailand in the themes of the Thai dances of the villages, in the frescoes that confront the people every day as they throng through the temples of Bangkok or Chiang-mei and in the childhood stories taught to all the children in every village. An examination of the themes of these different aesthetic and cultural artifacts shows that in addition to the life of the Buddha, they portray the stories of the Hindu epics. In short, art has been used to incorporate Hindu political and aesthetic values as well as the Buddhist values into the minds and hearts and the social customs of the Thai people. Thus loyalty to a patriarchal law-of-status king with a Hindu tradition and name has been rooted in the hearts and the living law of an overwhelmingly Buddhist people. Because of these aesthetic influences they found it natural also to accept some of the positive legal codes of the Hindus.

These ways in which the problem of federal political and legal unity have been solved in societies which possess only the mediational or the status types of law point up the unique contribution of the law of

contract. It provides a method of achieving political unity at the federal level without recourse to a privileged race and a privileged first family. In short, it provides constitutional law in which the source of political authority is not in the biology of one's breeding or the sex and temporal priority of one's birth, and thereby makes a democratic political government possible at the provincial and federal levels as well as in Buddhist religious polity and in the village councils or Panchayats of both Hindu and Buddhist Asian societies.

Another contrast between status and contract appears if we note what happened when the Western legal science of the Stoic Roman Scaevolus and their successors made its impact upon the exceedingly patriarchal law-of-status societies of the ancient Western world:

(1) The law-of-status codes of the non-Roman tribes and ancestral joint families were given the same status under the national law as the law-of-status codes of the conquering Roman tribes. In short, the attempt to achieve national unity under codified law by setting up a privileged political and legal tribe or first joint family was rejected.

(2) Lawyers and statesmen began immediately to look for what is common to the law-of-status codes of the different tribes and different varieties of joint families as well as to the differences. Those law-of-status codes of the different tribes or joint families which were peculiar to one particular tribe they called the *jus civile*. Those law-of-status rules which were common to the different tribes they called the *jus gentium*. The history of Western law from the Scaevolus to Justinian is the story of the increasing triumph of the universalism of the *jus gentium* over the pluralism and the normative incompatibilities of the diverse examples of the *jus civile*.

(3) The process was begun of breaking the status of the individual person, before the codified law, away from the primogeniture, elder brother-younger brother relation, the male-female and brother-sister sexual criterion, and the father-son patriarchal headship status of the individual in the joint family. This had the effect of making the moral and legal person the individual person *qua* person. In other words, to use the language of the Stoic Roman philosophers and lawyers, moral and just man is transformed from joint-family and tribal man into universal or cosmopolitan man.

Point (2) concerning the *jus civile* expresses the previously noted fact that the codes of law-of-status nations and cultures are pluralistic and frequently incompatible, generating either the caste system or many nations, when the people are of different racial stocks. The *jus*

*gentium* of Roman law points up, by way of contrast, the *universalism* that characterizes the law of contract when it achieves its ideal.

Point (3) shows that this universalism involves much more than merely finding what is common to every instance of the *jus civile*. Such a cultural common denominator of the codes of the many law-of-status tribal nations would have left one with codes which were too weak to define any Western legal and political system. Moreover, this common denominator would have made slavery just, since every law-of-status society in the ancient West took for granted the moral and political justice of slavery. Clearly, therefore, a new philosophical conception of what the words "good" and "just" mean was also involved. What is this philosophy?

#### THE PHILOSOPHY OF THE LAW OF CONTRACT

The fact that codified law is retained gives part of the answer. Codified law means that the moral and legal person is conceived as an instance of a universal law. Thus existentialism and nominalism are rejected. Concepts of the person or of anything else are real rather than nominalistic universals. But the real universal which is the moral and legal person is broken free from any sensible biological or tribal criteria. This is the meaning of the Stoic Roman philosophers' thesis that moral and just man is a universal or cosmopolitan human being. When this is the belief of one's ethics and law, the individual stands before the law *qua* person, not *qua* this sensible tribal or sexual kind of person, nor *qua* the head of his joint family. In short, codified law is made, not found. And being made by men, all men are born free and equal so far as the law is concerned. It is to be noted, therefore, that the first sentence of the Declaration of Independence in the contractual constitutional law of the United States is not, as so many suppose, a proposition in biology or the comparative psychology of newly born babies; it is, instead, an axiom of contractual legal science.

The moment, however, that the person is not born to his moral, legal and political duties, rights and responsibilities, but makes them, a new procedure for specifying the laws and selecting those who administer them is necessary. This procedure is freely-assented-to contract. Hence, Sir Henry Maine's name for our third type of law. Its content, moreover, is for the parties concerned to determine. Thus substance tends to become secondary in defining the morally good and the legally just. Procedural rules instead which specify when the contracting parties have consented and who is to administer or adjudicate, in case of a dispute, what they have consented to, become of the essence. Hence

the aforementioned abstract character of the terminology of the law of contract. Hence, also, the importance of the variable rather than the material constant; also the postulational (in the sense of the formally hypothetical) character of the law of contract. And being thus procedurally hypothetical rather than categorically descriptive, there is no obligation without consent.

This emphasis upon hypothetically introduced, formal procedural rules means not merely that a formal, technical language in terms of abstract Latin nouns replaces the more common-sense concrete language of law-of-status codes, but also that sensible properties tend to be rejected in the definition of normative words. Philosophically this means that not only a nominalistic radical empirical, but also a naively realistic philosophy is being replaced in the law of contract by an epistemological philosophy of a different kind.

Two characteristics of this philosophy are evident. (1) *The concept of the moral and just individual is that of an entity which instances a universal law and is, therefore, the concept of a real* (rather than a nominalistic) *universal*, but (2) *this real universal is not defined*, as in naive realism, *in terms of directly sensed properties*.

Two questions remain: (a) Why would anyone choose to define a universal in this way? (b) How is it possible to do it, *i.e.*, how is it possible to define a realistic epistemological object of knowledge without recourse to any empirically given properties?

We shall get an answer to the first of these two questions if we note the conclusion which mediational law and the law of contract hold in common, and inquire concerning the reason. This conclusion is that the ethic of the law of status is a false ethic and law. The reason is that it assumes and requires a naively realistic epistemology for its validity and this epistemological theory of conceptual meaning is false. The following three facts make these statements evident: (1) Every people in the world at one time in their history believed in and practiced the ethic of the law of status, and most people still do in considerable part. (2) The philosophy of the law of status is naive realism. (3) Sooner or later in every culture, scientists, philosophers and sages arise who (a) demonstrate that naive realism is a false philosophy and (b) convince a statistically high percentage of their people that this is the case.

Note the cultures and their scientists, philosophers and sages in which the latter fact has been or is the case: (1) The Confucianists in their issue with the legalists in classical China. (2) The dialectic of negation in Buddhist philosophy which moves from the naively realistic, epistemological, and ontologically dualistic theory of substantial selves

and substantial material external objects to end in nihilistic Hinayana, ideational Mahayana or nihilistic Mahayana Buddhism with their rejection of both the substantial self and substantial external objects. (3) The similar development in Hindu philosophy from the material substances of the Charvakian materialists and the dualistic ontology of the Mimamsa dualists to non-dualistic Vedanta and its capture of the majority of Aryan Hindu as well as pre-Aryan Indian minds. (4) The evolution of modern British empirical philosophy from the naively realistic dualism of mental and material substances of the early Locke to the radical empiricism of the later Locke of the *Essay*, Hume, Bentham, the jurist Austin and the American lawyer Professor Wesley Sturges. The similar rejection of a naively realistic epistemological definition of scientific objects by the (5) Democritean and (6) Platonic schools of ancient Greek mathematical physics and philosophy, (7) the Stoic Roman lawyers and philosophers, (8) the Augustinian medieval Christian theologians, and by (9) Galilei and Newton, after Aristotle and the medieval St. Thomas had returned Western mathematics, physics and metaphysics to naive realism, (10) by all continental rationalistic scientific, philosophical, political and legal thinkers from Descartes through Kant to Hegel, and (11) by the recent agreement among contemporary scientists and philosophers of science, such as Einstein, Reichenbach and Professors Carnap, Feigl, Margenau, Hempel, Nagel, Philip Frank and the writer, that it is impossible to define or elucidate the concepts and laws of Western mathematical physics in terms solely of either (a) the radical empiricism of Carnap's *Logische Aufbau* and Wittgenstein's "atomic sentences" or (b) the naively realistic theory of scientific concepts of von Neurath's "physicalism."

It is to be noted that these nine groups include the three major classical cultural philosophies of Asia, three of the four major philosophies of classical Greece and Rome; one of the two major medieval Christian philosophies, and every modern Western cultural philosophy except that of Feuerbach and the Marxists. There must be a good reason why philosophical movements, originating as distant from one another in space and time, should agree that the naively realistic epistemology is a false philosophy. This reason is not hard to find and, Aristotelian Thomists and Feuerbachian Marxists to the contrary notwithstanding, is unanswerable. Empirical and logical considerations show that naive realism is a self-contradictory theory.

The empirical consideration is that careful inspection of what is known with naive, *i.e.*, radically empirical, immediacy shows all determinate events, properties, entities or relations which are known in this

way to be relative not merely to different percipients but to different sense organs of the same percipient. Berkeley established this for the material substances of Locke's early naively realistic dualistic ontology, when he (Berkeley) showed by reference to concrete images of the senses that Locke's so-called primary quantities were as relative to different percipients and to different moments of perception as were Locke's secondary and tertiary quantities. In short, for all naively given or radically, empirically known determinate items of knowledge, *to be is to be perceived*. This is the point of Democritus' thesis that data given through the senses do not refer to the public scientific objects of knowledge and hence cannot be used to define this scientific object. It is also the point of Galilei's rejection of the Aristotehan and medieval scientific theory of heat, according to which the chemical atom called "fire" was defined in terms of the direct sensation of warmth and dryness. The placing of the two hands of the same percipient, one of which comes from a cake of ice and the other from the room's ordinary temperature, in a bucket of water clearly establishes this point. Newton noted that sensed events and their sensed simultaneity are equally relative to the percipient; hence sensed time does not give the public time that is necessary for the existence of public objects. This is the point of his statement in the Scholium at the end of the eight definitions which appear at the beginning of his *Principia*. This statement is that sensed time is "apparent" and that only a mathematically constructed time can give one the scientific events and objects of a realistic epistemology for which to be is not to be perceived. This is the point also of the observation made by Einstein, which is basic to his entire theory of relativity, that the concept of the public simultaneity of spatially separated events is not given intuitively, *i.e.*, with naive radically empirical immediacy.

That such is the case the following concrete example will show: Consider two loud explosions A and B which occur four miles apart on a straight street running in an east-west direction, along which soldiers at rest are distributed equidistant from one another. Assume also that all that they or anyone else knows about these explosions is what the soldiers hear. The undeniable sensed empirical fact is that if the two explosions occur such that the soldier half way between them hears them as simultaneous, then the soldier next to explosion B will sense it as occurring earlier than explosion A and the soldier next to explosion A will sense it as earlier than B.

The empirical and logical reason why the three major philosophies of classical Asia, three of the four major philosophies of ancient Greece and classical Rome, and every modern and contemporary Western theory

of natural science, philosophy, ethics, law and politics, except that of the Feuerbachian Marxists, regard naive realism as a false philosophy should now be both clear and irrefutable. The believer in this epistemology purports to know objects and events with scientifically defined properties that exist independently of their relation to the perceiver and the particular moment of perception, yet he defines these supposedly public spatio-temporal events and objects in terms of sensed events, qualities, objects and relations of simultaneity, all of which are relative to the percipient. Since it is self-contradictory to define objects of knowledge, that purport to be independent of their relation to the percipient, in terms of items of knowledge all of which are relative to the percipient, the naive realistic concept of anything, whether it be a person or a chemical atom, is a self-contradictory and hence a false theory.

Also the ethic of the law of status which assumes and requires a naively realistic epistemology for its meaningfulness is a false theory. It is false because it confuses the accidental *esse est percipi* effects of another person upon the percipient with the essential and objective human being him- or herself.

When this self-contradictory character of the naively realistic epistemology in philosophy, natural science and law becomes evident, two alternatives are possible: (a) One can retain the naiveté, *i.e.*, the radical empiricism, and reject the realism, or (b) one can retain the realism by finding a new way to define the realistic epistemological object of knowledge, which has no recourse to sensed or introspective qualities or events, except in the operational testing of the theory.

Applied to the normative sciences, alternative (a) generates the shift from status to mediation, whereas alternative (b) creates Western legal science and initiates its "shift from status to contract." Applied to psychology, ontology and religion, alternative (a) leads to the Nirvana non-dualistic Vedantic field or *chit* consciousness theory of the self and the Divine. Applied to the natural sciences, alternative (a), by removing the belief in a realistic epistemological world, substitutes impressionistic and relativistic aesthetic and introspective psychology for physics, thereby taking the mathematical physical sciences into decline as occurred in Asia, the Middle East and medieval Europe, whereas alternative (b) caused the Western type of mathematical physics and its technology to flourish and generated, as the sequel will show, the creation of Western legal science by the Stoic Roman lawyers and philosophers.

It has been noted that Aristotle and his followers—Ibn Rust and Ibn Khaldun,<sup>23</sup> St. Thomas, the English Hooker and Sir Robert Filmer

<sup>23</sup> Ibn Khaldun, 2 The Muqaddimah 411 (Rosenthal transl. 1958).



—returned Western natural science, mathematics, philosophy, law and the three Semitic religions of the West and the Middle East to a naively realistic epistemology. However, Western natural science threw off this naive realism with Galilei and Newton. Most Western and Middle Eastern humanists and religious folk, whether Jews, Christians or Muslims, have yet to do so. The result is that Western living and positive law is an endeavor toward the ethic of the law of contract in which the *de facto* codes and customs are still filled in with old living law-of-status content.

Prime Minister Nehru's vigorous support of Free India's new contractual constitution with its rejection of caste and its revolutionary reconstruction of the joint family, and the recent unanimous decisions of the Justices of the Supreme Court of the United States in the segregation cases, are attempts to carry the ethic of the law of contract through consistently. The bitter reaction of the right-wing Hindus in India and of the older generation of Americans in the Old South indicate that this task is not easy.

If the outcome of these and other similar attempts elsewhere to introduce consistently contractual democratic constitutional law is to be successful, it is likely that everyone must have a clearer conception of the origin of the law of contract and its novel epistemological theory of the person than is now the case.

Its origin is clear. The creators of Western legal science were Stoic Roman philosophers such as the jurists of the Scaevola family who tell us that their ethics and law come from their physics.<sup>24</sup> The Romans created no physics; their physics was that of the Greeks whom they conquered. There must be something novel, therefore, in Greek physics which, when discovered and applied to the normative sciences, leads to the creation of Western legal science and the ethic of its unique law of contract.

It will help us to become clear as quickly as possible concerning what this new epistemology of Greek science is by reference to a statement which Whitehead made to the writer in the early 1920's. His statement was to the following effect: The two greatest achievements of the Western Human mind were (1) the discovery of the concept of the variable by the Greek mathematical physicists and (2) Eudoxus' use of the universally quantified variable to define equality of ratios for any relata whatever in Definition 5 of Book V of Euclid.

Let us begin with the meaning of the former discovery first. Briefly its significance is that it gives an entirely new logical, scientific and

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<sup>24</sup> See Arnold, Roman Stoicism (1911).

philosophical concept of the individual, whatever the individual may be. Previous scientific and philosophical thought had but two concepts of the individual. One was that designated by the proper name. This is the concept of the individual of a strictly nominalistic radically empirical, existential philosophy. Since the radically empirical individual is unique, only the proper name designates it in a non-misleading way. The other previous concept of the individual is that of the member of a class, the defining properties of which are given through the senses. This is the concept of the individual of a naively realistic epistemology. It is this concept of the individual which leads, for people in a society uninfluenced by the law of contract, to the ethics of the law of status.

The concept of the individual in the idea of the variable combines elements of both of the former concepts. It is like that of the nominalists' proper name in that one individual and one only is referred to. But it is like that of the naively realistic class name in that any one contained in what is called the range of the variable will do. Thus, the heart of the nature of an individual when conceived with the idea of the variable is *any-one-ness*. This is the individual in the law of contract. The law is not just, unless *any one* individual has the privileges, the rights and the duties prescribed by the content of the law.

But more also is involved. There is also the novel way in which *the range* of the *any-one-ness* is made determinate. Determinate concepts by intuition referring to sensed or introspected factors of any kind are not used; otherwise one would be back in the old naively realistic epistemology which is self-contradictory. Also the objects, the events and the laws of natural science would have lost all objectivity, and in the normative sciences one would have obtained the *for-any-one-ness* which is the heart of the ethic of the law of contract only at the cost of identifying the range of the *any-one-ness* with the naive realistically sensed color-of-skin type of definition of the ethic of the law of status. As just noted, this is precisely what occurred with Aristotle and his Middle Eastern and Western Jewish, Christian and Islamic successors with their racially privileged Patriarchs, Kings and Sultans.

Hence, if the self-contradictory, naively realistic epistemological theory of the *range* of the *any-one-ness* is to be avoided, all introspected or sensed qualities must be rejected in the specification of its determinateness. To use the language of Socrates, one must "drop all images." How is this to be done?

Those who have analyzed Western mathematical physics or who understand Russell and Frege's interpretation of Peano's Fifth postulate know the answer. The variable *qua* variable is conceived as nothing

but a relatum in an imageless, logical, or purely mathematical, formally constructed relation. Apart from this relation there is nothing to distinguish one entity-variable from another. Furthermore, if we are not to fall back in the definition of our relations or laws on sensed or introspected events, properties or objects which are relative to the percipient, the relations must not be imageful. In short, they must be defined in terms of imageless, formal, logical properties or procedural rules rather than in terms of sensed qualities, sensed relations or sensed events. This means that the concept of an individual which the discovery of the variable gives is that of an entity which has no scientific properties except as it is conceived as a relatum of a formally constructed relation with specific imageless formal properties. By laying more and more complex formal properties on these imageless relations, one can define individuals which, or who, instance imageless formal laws with any degree of specificity.

Because such an individual has no determinate meaning apart from the non-empirical, *i.e.*, imageless, formal properties of the relations or laws in which he is a relatum, it follows that such laws are universally quantifiable by definition, *i.e.*, applicable to all by virtue of the axiomatically constructed formal properties of the relations which specify their properties. One does not have to take the individuals one by one, as is the case in a radically empirical or a naively realistic epistemology, to see whether all of them have the properties which the universal law affirms.

Frege's and Russell's well-known solution to the problem of mathematical induction which was raised by Peano's Fifth postulate concerning the "natural numbers" is an example.<sup>25</sup> This postulate affirms that if one "natural number" has a given property and its "successor" has that property, then all the "natural numbers" have that property. Since one cannot inspect a class of individuals which is endless, it was difficult to see how the universal quantification of Peano's Fifth postulate for arithmetic is justified.

The difficulty arises because one persists in thinking about numbers empirically after the manner which occurs in sensing a cycle of darkness (night) and brightness (day) in the cyclical theories of time and of number. For any assertion to be true for its "successor" one has to look and see. In short, one supposes that if the concept "one" is meaningful, one can sense what it means by itself or by sensing an instance of itself, and so on for each of the other "natural numbers." This is

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<sup>25</sup> Frege, *Die Grundlagen der Arithmetik* (1884). See also Russell, *Introduction to Mathematical Philosophy* (2d ed. 1920); Northrop, *supra* note 19.

the case in a radically empirical or a naively realistic concept of any individual. But, as Hume pointed out, one does not sense any relation of necessary connection between empirically known individuals; hence knowing the properties of some tells us nothing about all.

Russell's and Frege's solution of the difficulty concerning Peano's Fifth postulate consists merely in pointing out that the radically empirical and the naively realistic epistemological concept of the individual is being confused with the quite different concept of the individual and the range of class variables in Western mathematics and mathematical physics. In the latter type of epistemological concept, the variables "zero," "one," "successor" and "natural number" are by themselves meaningless  $x$ 's or  $R$ 's with no class or other properties whatever; *i.e.*, they are incomplete symbols; instead it is the formal properties of the relation which define "successor" specified in Peano's Fifth postulate and his other four postulates which give what a (Western, non-Aristotelian) mathematician or mathematical physicist means by the natural numbers. It is also what distinguishes them from other numbers such as the "rational numbers" or the "real numbers." The natural numbers are entity-variables which are related in a relation having the formal properties of Peano's five postulates. Since to be any one natural number is to satisfy these non-empirically defined relations, it follows that the relations hold for all the natural numbers. In short, the proposition is true tautologically.

Another example of this new concept of the individual is the concept of event in modern mathematical physics. It has been noted earlier that sensed events, *i.e.*, the events of a radically empirical or a naively realistic philosophy of natural science, (1) require a cyclical theory of time and (2) do not give a public meaning for public time in the case of sensed events that are spatially separated. Newton, and Einstein following him, noted, therefore, that if science is to establish the existence of public objects in public time and space, appeal must be made to mathematically constructed space, time and scientific objects. Moreover, these mathematically constructed events, objects and laws must be such that when they send forth propagations to the bodies of different perceivers, the latter must sense their respectively different *esse est percipi* sensed events. When Newton, by the use of this formal logical concept of the individual variable and its range, found the scientific objects, events and laws which meet these requirements of a realistic epistemology which accounts for the relativistic data of a radically empirical epistemology, he found that time had to be conceived as linear rather than cyclical for the following reason. Einstein has not altered this premise of his predecessor's mathematics and physics.

The reason is that events are defined mathematically as variables  $x$ ,  $y$  and  $z$  which are related in the following formally defined relation  $R$ , where the symbol  $\sim$  means 'not':

- (1)  $(x) : \sim (x R x)$ , *i.e.*, the relation  $R$  in which the individuals are the relateds is irreflexive.
- (2)  $(x y) : \text{If } x R y, \text{ then not } y R x$ , *i.e.*, the relation is insymmetrical.
- (3)  $(x y z) : \text{If } x R y \text{ and } y R z, \text{ then } x R z$ , *i.e.*, the relation is transitive.

Postulates (2) and (3) rule out a cyclical theory of time, since on the latter theory even though  $x$  stood in the relation of  $R$  to  $y$ ,  $y$  would stand in the relation  $R$  to  $x$ . In short, an event in Newton's or Einstein's physics is not a sensed event; it is instead an entity variable which is a related in a relation or law whose formal properties define linear serial order. The point of space is defined by laying different abstract formal properties on a relational variable  $R$ , namely those formal properties which define the metric. What Einstein showed is that in an axiomatically constructed realistic epistemological physics which accounts for the radically empirical data of the Michelson-Morley experiment, the axioms which define space and those which define time are essentially connected so that only space-time remains invariant for any perceiver on any Galilean frame of reference.

Unfortunately there is no generally accepted name for this novel concept of the individual and the range of its variable. Some competent scientists and philosophers of science call them "constructs."<sup>26</sup> In the 1939 session of the East-West Philosophers' Conference, the writer called them "concepts by postulation" which "in whole or in part" are "concepts by intellection."<sup>27</sup>

Immediately, however, students of Asian philosophy and science who fail to distinguish the radically empirical or the naively realistic concept of "a mathematical scientific object" and of "intellect" from this quite different concept of these words, found "concepts by postulation which are concepts by intellection" all over the classical Oriental scientific and philosophical world, thereby confusing concepts by postulation in my defined and technical sense with the concepts and postulates of any scientific or philosophical theory whatever. The writer has examined the scientific theories of several cultures, including some of those of classical Asia. He has yet to find one, even in Professor Needham's recent volumes on Chi-

<sup>26</sup> Margenau, *The Nature of Physical Reality* (1950).

<sup>27</sup> Northrop, "The Complementary Emphases of Eastern Intuitive and Western Scientific Philosophy," in *Philosophy East and West* 168-234 (Moore ed. 1944).

nese science, that did not identify its concept of time with sense cyclical time,<sup>28</sup> its concept of space with the relativity of sensed space,<sup>29</sup> and its concept of a chemical atom with the radically empirical or the naively realistic epistemological object whose scientific definition is in terms of sensed properties such as hot, cold, wet and dry and, as Professor Needham's studies show, the five sensed colors.<sup>30</sup> Needham's quotations show also that so complete is the Chinese scientific identification of time with directly sensed cyclical time that even the chemical elements go over into one another as governed by the cycle;<sup>31</sup> also number arises from the intuitive counting of the cycles.<sup>32</sup> Thus his quotations from the sources confirm the writer's thesis.

To be sure, there is "intellect" as distinct from radically empirical fact in classical Oriental science and philosophy, in the sense of an "intellect" all of whose ideas and theories are those of a radically empirical or a naively realistic epistemology. This was never in question. Is there, however, outside of Democritean and Platonic ancient and modern Western mathematical physics and its philosophy, even in the West to say nothing about Africa, the Middle East and classical Asia, a concept of number, time, the individual and its range, and of intellect, whose epistemological meaning and ideas are those of the novel epistemological type which has been indicated just above and illustrated with Russell's and Frege's analysis of mathematical induction and Theaetetus', Eudoxus', Newton's and Einstein's concepts of space, time, and space-time? In view of the facts noted above, Professor Needham's *non sequitur* from his evidence to the contrary notwithstanding, the answer seems to be No!

In any event, four things are clear. Contemporary analysts of the theories of contemporary mathematical physics, including Professor Carnap who first believed the contrary, now agree that: (1) These theories contain what the writer in the 1939 session of the East-West Philosophers' Conference at Honolulu<sup>33</sup> called (a) "concepts by postulation" which are in *whole or part* "concepts by intellection" as well as (b) the concepts by intuition of a radically empirical or naively realistic epistemology; and (2) that (a) concepts by postulation cannot be defined away or elucidated by the reduction sentence technique in terms of concepts by intuition and their operational definitions. Also it is

<sup>28</sup> Needham, 2 *Science and Civilization in China* 192, 193, 238, 240, 243, 248-49, 254-55 (1956).

<sup>29</sup> *Id.* at 192-94.

<sup>30</sup> *Id.* at 238, 243.

<sup>31</sup> *Id.* at 238.

<sup>32</sup> *Id.* at 271-73.

<sup>33</sup> Northrop, *op. cit.* supra note 27.

agreed that (3) the relation between the relativistic events, qualities and relations, denoted by the concepts by intuition of a radically empirical way of knowing, and the public events, objects and laws designated by concepts by postulation which are concepts by intellection is not that of a predicate to its substance but that which the writer in the aforementioned Conference and in the Unity of Science Congress at Harvard immediately afterward called "epistemic correlation"<sup>34</sup> and which Professor Margenau calls "rules of correspondence"<sup>35</sup> and Reichenbach termed "Zuordnungsdefinitionen."<sup>36</sup>

Obviously this must be the case, since the properties and other data given with radically empirical immediacy, which are relative not merely to different percipients but to different sense organs or introspections of the same percipient, cannot be the predicates of scientific events, objects and relations which escape such extreme *esse est percipi* relativity. This is the reason also why Whitehead's attempt to get the constructs of Western mathematical physics from the differentiated aesthetic continuum of radically empirical immediacy by his "method of extensive abstraction"<sup>37</sup> will not work. The relatedness of *esse est percipi* events and objects simply is not isomorphic with the non-*esse est percipi* relatedness of scientific events and objects, as must be the case if the abstractive method is to succeed.<sup>38</sup> The final fact which is clear is that (4) the key to the novel type of epistemological meaning which concepts by postulation entail is the discovery by the ancient Greek mathematical physicists of the variable and the imageless purely formal way of axiomatically defining its range.

Without this concept of an individual, the problem in recent Western law of clarifying what is meant by a "corporate personality," such as the General Motors Corporation, which has baffled American legal realists with their radically empirical theory of the meaning of all legal concepts, is insoluble. Clearly the legal meaning of the General Motors Corporation is not the radically empirical images of its factories; nor is it the naively realistic personality of its former top official, the former United States Secretary of Defense, Mr. Charles E. Wilson. But if not this, what scientific meaning does this legal entity have? The answer is that it is a personality of the concept by postulation type. In other words, like one of Frege's natural numbers, the General Motors Corpora-

<sup>34</sup> Northrop, *The Logic of the Sciences and the Humanities*, ch. 7 (1947).

<sup>35</sup> Margenau, *op. cit. supra* note 26, at 60.

<sup>36</sup> Reichenbach, *Philosophie der Raum-Zeit-Lehre*, 23-29 (1928).

<sup>37</sup> Whitehead, *The Concept of Nature*, ch. 4 (1920).

<sup>38</sup> See Northrop, *op. cit. supra* note 34, at ch. 6; also Northrop, *Book Review*, 2 *Philosophy East and West* 81-84 (1952).

tion is an instance of an entity-variable in the state legislative statutes which created this legal construct and specified its legal properties. The legal philosophy of the present Regius Professor of Jurisprudence at Oxford expresses this same theory of the meaning of legal language.<sup>39</sup>

The same is true of the original theory of the moral and the just human person according to the law of contract. He or she is *qua* person a merely meaningless entity-variable, *p*, apart from the contractually constructed rules preceded by the universal quantifier, (*p*), to which implicitly or explicitly he or she gives consent. Negatively this novel epistemological concept of an individual eliminates sensed or introspected qualities from the definition of what is politically good or legally just. Positively, it gives one half but not the whole of the Roman Stoics' thesis that moral man and just man is universal or cosmopolitan man, *i.e.*, *any one* human being whatever, standing equally with any other under a common, determinate law whose authority rests in principle on consent to what is contained in the contract. Also it probably gives part at least of Kant's categorical imperative which is: Act so that the substance of one's act may be generalized for *any one*.

Needless to say, the latter Kantian statement of an imageless, formally defined ethics and law is subject to the criticisms that have been brought against it. One can put universal quantifiers before any law regardless of its substantive content. This is what Hitler did. It is what any other law of status does. At this point Whitehead's reference to Definition 5 in Book V of Euclid becomes important.

Its significance is that, so far as the writer has been able to determine, it instances the first time in human history in which the universally quantified variable was used not merely before an imageless, formally constructed relation or mathematical law, but also within the substance of the law to limit its permissible content to a specific technical meaning. What specifically occurred in Definition 5, Book V, of Euclid need not concern us. Of relevance is merely the fact that a most technical concept in Greek mathematical physics was given meaning by doing the following things: (1) Using no images or sensual qualities, (2) placing universally quantified entity variables before the formally constructed relation or law that is stated and (3) using universal quantifiers within the law to restrict its substantive content so that *any-one-ness* applies not merely to the independent variables of the law as a whole, but also to the substantive content of what the law affirms.<sup>40</sup>

My thesis is that the Stoic Roman lawyers used precisely this pro-

<sup>39</sup> Hart, "Definition and Theory in Jurisprudence," 70 L. Q. Rev., 37 (1954).

<sup>40</sup> Northrop, *op. cit.* supra note 19, at ch. 22.



cedure to define the meaning of the words "good" and "just." Kant's statement of such a formal ethic and law contains only conditions (1) and (2) above. The Stoic Romans added requirement (3). This had the following effect: For any act to be good or just, it must be an instance of a formally constructed universal law which applies to any person whatever who implicitly or explicitly assents to it, and in addition the substantive content of this law must be such that if it confers any rights, privileges or duties on one person in the community, it must confer those rights, privileges and duties on *any one*. This eliminates a universally quantified code of the law-of-status type, which gives certain rights, privileges and duties to one color-of-skin tribe in the legal system which it does not give to another, or to one person or sex in the family which it does not give to any other.

Two comments by way of supplementation are to be noted in closing. The first is that the ethic of the law of contract has further content than this paper has been able to indicate. This content derives from the additional verified scientific knowledge which the use of its epistemological concepts and scientific method gives in different fields and has been stated by the writer elsewhere.<sup>41</sup>

The second supplementary observation is that Buddhist and Hindu philosophy obtain something similar to the universalism of the law of contract in their concept of the true self which Confucius called "*jen*," the Buddhists call "Nirvana" and which the non-dualistic Vedantists call the "*chit* consciousness." As previously noted, according to his theory all human beings are not merely equal morally, but they are, strictly speaking, either identical in their true nature, as in Buddhism or non-dualistic Hinduism, or they possess a common human-heartedness as in the *jen* of Confucianism. But, being radically empirical and immediate and also indeterminate or formless, this Confucian, Buddhist and Hindu type of moral and religious universalism cannot be expressed in determinate propositions or codes and hence has to be brought forth merely existentially by yogic or other psychological exercises or by the fostering of mutual warm-heartedness in the mediational process. This is why the Confucian, Buddhist or non-dualistic Vedanta Hindu universalism takes one legally from status to mediation.

However, as noted above, most contemporary philosophers of natural science agree that a full account of any individual entity entails (1) the

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<sup>41</sup> Northrop, "Methodology and Epistemology, Oriental and Occidental," and "The Theory of Types and the Verification of Ethical Theories," in *Essays in East-West Philosophy* 151-60 and 371-82 (Moore ed. 1951); and Northrop, "Ethical Relativism in the Light of Recent Legal Science," 52 *Journal of Philosophy* 649-62 (1955); and also Northrop, *op. cit.* *supra* note 19.

concept of it as an *any-one-ness* in a universally quantified, hypothetically constructed law, the empirical confirmation of which depends upon (2) epistemological correlation with the radically empirical, concept-by-intuition, differentiated data of (3) the all-embracing aesthetic continuum of existentially experienced immediacy. The latter factor (3), which is experiencable apart from its *esse est percipi* differentia is the source of the Confucian *jen*, the Buddhist and non-dualistic Vedantic universalism of "the true self", and the effectiveness of its mediational ethic of non-attachment and the middle path for settling legal disputes. Consequently, the uncodifiable universalism of the classical Asian philosophy and the codifiable universalism of the law of contract are both empirically valid and though different, they supplement one another. Furthermore, both components of what is universal to all human beings, when carried out and applied consistently, are incompatible with the family and tribally centered ethic of biologically bred status and provide positive and living law support for democratic legal and political nations.

Also, as shown in the middle portion of this inquiry, the classical Asian radically empirical Hindu or Buddhist universalism succeeds in achieving unity at the federal political level only by introducing a privileged tribe and first family, thereby violating its most basic thesis that the true selves in all human beings are not merely equal morally and legally but even identical. It appears, therefore, that the classical Asian universalism can only express itself consistently at the federal legal and political level if it implements itself with the liberal democratic universalism of the constitutional law of the law of contract. Conversely, there are reasons, too lengthy to include here, for believing that the concept-by-postulation type of universalism of contemporary mathematical physics and the law of contract cannot give an adequate account of the existential import of its scientific objects or of the aesthetically creative character of any moral or just individual except as it accepts the radically empirical and existential universalism of the classical Orient.

#### SOME PRACTICAL IMPLICATIONS

The foregoing comparative study is of considerable contemporary practical significance. First, it shows that in introducing foreign legal and political norms into any society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society. Second, this means that the present practice of imposing purely Western secular legal and political systems on African, Middle Eastern and Asian societies, without incorporating into those systems at least some basic factors in the traditional philoso-

phy of the living law of the native people, is likely to end in failure. Recent events in Turkey and South Korea illustrate such failures. Third, the practical problem, therefore, if success is to occur, consists in finding a criterion for determining those factors in the traditional living law which are to be incorporated and synthesized with the new positive codified law of contract from the modern West, and those factors of the old living law which must go because they are incompatible with modern contractual legal and political institutions and social ways. In the case of free democratic modern contractual law and politics, the foregoing study specifies the portion of the traditional philosophy of the living law of Confucian, Buddhist and Hindu Asian societies which, though different from, is, nevertheless, compatible with the philosophical concept of the person in any free democratic contractual legal and political system. Any contemporary Asian leader whose aim is the free democratic modernization of his nation will be wise to make this portion of the living law of his people as essential and explicit a part of his legal and political system as is the new free democratic positive law and politics which he is importing from the modern West. Otherwise, the maximum support from the living law that is necessary to make his new positive legal and political reforms effective is not likely to be forthcoming.<sup>42</sup>

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<sup>42</sup> For a more detailed study of how this is to be done, see the writer's *Philosophical Anthropology and Practical Politics* (to be published by Macmillan, New York, August 1960).