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Max Weber's Traditional Chinese Law Revisited: A Poly-Contextuality in the Sociology of Law
韋伯論傳統中國法律之再探：法律社會學中的多元脈絡性

Duan LIN and Po-fang TSAI
林端[*]、蔡博方[**]

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* Professor, Department of Sociology, National Taiwan University.
臺灣大學社會學系教授。

** Project-Appointed Assitant Professor, Department of Sociology, National Taiwan University.
臺灣大學社會學系專案助理教授。

Abstract

German sociologist and jurist Max Weber (1864-1920) articulated his comparative sociology with three characteristics: It is a dual (intra- and inter-cultural) comparison, a multidimensional (religious-ethical and economic, political, juridical, etc.) comparison, and additionally he used intra- and intercultural comparison interchangeably. This creates a danger: the demarcation between his "heuristic Eurocentrism" and "normative Eurocentrism" becomes blurred. He equated (inadvertently but inevitably) a preliminary developmental stage of Occidental culture to the development of another culture leading in a different direction. According to Weber, the "substantive-irrational" aspect of law and an informal, patrimonial and arbitrary character of adjudication applied not only to the states of the medieval Occident, but also to Imperial China. At the conclusion of his analysis he took traditional Chinese justice as one kind of substantive-irrational "kadi justice," in contrast to the modern Western Continental, fully developed "formal-rational" justice. The authors have analyzed this comparison in detail and concluded, among other things, that Max Weber was biased by Western Continental legal culture with its rigid definitions of law, lawmaking and lawfinding. Using the conceptual device of "poly-contextuality" supported by new historical research, the research findings consequently suggest that Weber fell prey to normative Eurocentrism in his study of traditional Chinese law and justice.

摘要

韋伯（1864-1920）的比較社會學帶有三個特徵：雙元的比較（在文化之內與文化之間）、多面向性的比較（宗教倫理與經濟、政治、法律等面向）、遊走在文化之內／文化之間的交替性參照。這些特質使他混淆了「啟發性的歐洲中心主義／規範性的歐洲中心主義」之間的分野，把非西方文化的特定階段視為西方文化中較初級的階段。因此，「實質—不理性」法律（指：法律裁判中具有非正式、家產官僚制、統治者恣意等性質的法律型態）不僅用來描繪中世紀歐洲的法律，也被用來描述中國帝國時期的法律。在韋伯的看來，傳統中國的司法是一種「實質—不理性」的「卡迪審判」（Kadi justice），而非西歐大陸所高度發展出的「形式—理性」司法。本文將細緻地考察韋伯的這個比較研究，並指出韋伯受限於西歐法律文化（與其嚴格的法律概念、法律制訂、法律發現），因而對傳統中國法律有所誤解。透過近年來法律史研究的新成果與本文提出的「多元脈絡性」相互印證，本文認為，韋伯對於在傳統中國法研究之中的「規範性歐洲中心主義」可以被去除，而他在分析架構上的相關洞見則可以被保留下來。

1. Introduction

The comparative sociology of Max Weber has deeply influenced how scholars view Chinese society and culture, and we have attempted to revisit his legacy with both theoretical and empirical modifications. Focusing on the uniqueness of Western society evolving from its pre-modern to modern mode, Weber treated Chinese society at once as a contrasting element and as a traditional society. He therefore seemed to view traditional Chinese society as similar to Medieval Europe in their respective developmental stages, confusing the comparison between pre-modern and modern periods of Western societies with that between Western society and non-Western ones. Failing to distinguish inter-cultural and intra-cultural comparisons, features of the social order in traditional Chinese society—religious, legal, economic, political—were consequently considered as an underdeveloped totality, an earlier stage of modern society. Our research examines traditional Chinese law as an example which demonstrates the insufficiency of Weber's China study. At the level of methodology, we explore the limits of his "ideal type" method, which in his comparative sociology of law treats the Western legal system/Chinese legal system as a binary pair: formal rationality/substantive irrationality. At the level of empirical study, we address Weber's misunderstanding of traditional Chinese law, and demonstrate the multiple logic applied to the practice of traditional Chinese law, referring both to Shiga Shuzo (滋賀秀三, 1921-2008) and Philip Huang's (黃宗智, 1940-) recent studies of the judicial practice and civil justice of the Qing Dynasty.

The core of Weber's substantive sociology, once mentioned by Talcott Parsons (1902-1979),[1] lies neither in his economic and political sociology, nor in

1 Talcott Parsons, "Value-Freedom and Objectivity," in Otto Stammer (ed.), *Max Weber and Sociology Today* (New York: Harper & Row, 1971), pp. 27-50.

his sociology of religion, but in his sociology of law. Unlike the sociologies of economics, politics, and religion, sociology of law draws less attention in Weberian scholarship than it deserves. This lacuna may have two causes. First, Weber's body of work has long had two faces: one is dominated by the mega-work *Economy and Society*,[2] in which the substantive topics are domination modes and legal development; the other consists of serial comparative religious studies in terms of world religions and their economic ethics. Therefore, Weberian scholars interested in law may seek relevant texts in the former rather than the latter, neglecting that Weber not only compared the two different legal systems in Western societies—Civil Law and Common Law—but also studied the legal systems of non-Western societies in his comparative sociology of religion, such as in *The Religion of China*.[3] To erase the prejudice focusing on the substantive topic, we think that it is time to examine Weber's intra-cultural comparison between Civil Law and Common Law with his inter-cultural comparison of the Western legal system and the Chinese legal system;[4] we bring these problems to light by foregrounding the *Rechtssoziologie* part of *Economy and Society* and his comparative study of traditional Chinese law in *The Religion of China*.

Second, since Weber's time, there have been changes in availability of access to judicial archives around the world. Weber had some difficulty in accessing the historic archives of non-Western societies. As a comparative religious scholar, Weber read others' research on China or India, this second-hand data coming from casual travelers as well as serious scholars. By contrast, as a legal and economic historian, Weber could focus on the historic archives around Europe at a scholarly level. Without considering the judicial archives, we can

2 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, 2 vols., Guenther Roth and Claus Wittich (eds.) (Berkeley, Calif.: University of California Press, 1978).

3 Max Weber, *The Religion of China: Confucianism and Taoism*, trans. and ed. by Hans H. Gerth (Glencoe, IL: Free Press, 1951).

4 Simona Andrinia, "Max Weber's Sociology of Law as a Turning Point of His Methodological Approach," *International Review of Sociology*, 14, 2 (2004), pp. 143-150. DOI: 10.1080/03906700410001681257.

hardly tell whether the object of Weber's sociology of law in China is the actual judicial practice or merely the social image of that practice. Fortunately, since the last decade of the twentieth century, many judicial archives of China, most of them belonging to the Qing Dynasty (1644-1912), have been released to scholars for academic purposes. For example, Shuzo Shiga, a Japanese legal historian who focuses on Chinese law from the 1970s, has renewed our understanding of Chinese judicial practice and moral considerations; Philip Huang, an American economic historian at UCLA with his research team, has provided studies of judicial practice and civil justice to deepen Weber's arguments about China. We believe that recent studies based on judicial archives may be supplementary to Weber's sociology of law, especially Chinese law, but we also have to clarify the debate between two distinctive views, Shuzo Shiga's "didactic conciliation" and Philip Huang's "trial by legal codes."[5]

In the following, we first contextualize Weber's observations of traditional Chinese law in terms of his methodological devices and comparative presumptions, and then enrich the picture of juridical practice in late Imperial China by integrating recent research on the Qing Dynasty into Weber's China study. Part I includes discussion of the debates in Weberian scholarship, while Part II takes advantage of the recent historical research on late Imperial China. Arranging the paper in this way, we believe that there must be a rethinking to revive Weber's insights into relevance to contemporary study, as opposed to mere textual criticism or empirical verification of his works on China.[6]

5 Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford, Calif.: Stanford University Press, 1996); Shuzo Shiga 滋賀秀三 et al., *Mingqing shiqi de minshishenpan yu minjianqiyue* [*The Civil Trial and Folk Contract in the Ming-Qing Period*] 明清時期的民事審判與民間契約, Wang Yaxin 王亞新 et al. (eds.) (Beijing: Law Press 法律出版社, 1998).

6 Stephen Turner, "Weber, the Chinese Legal System, and Marsh's Critique," *Comparative & Historical Sociology*, 14, 2 (2002), pp. 1-21.

2. Weber's View of Traditional Chinese Law in His Comparative Sociology

According to *The Religion of China* (hereafter *RoC*), legal rules and judicial practices in traditional China operated under the "patrimonial state," whose power structure mimicked that of a family. A patrimonial ruler in Chinese history possessed absolute arbitration power (*die absolute freie Willkür*) to intervene in the jurisdiction of a judge, whether a local case or a central one. When the patrimonial ruler exercised this power, his will to provide absolute justice or "king's justice" not only seriously interfered with the consistency provided by the judges, who came from similar educational backgrounds, but also inevitably forced concessions from the existing formal statutes for extra-legal considerations, such as ethical or moral principles. Consequently, the outcomes of trials were highly unpredictable because the law was not simply a set of universally applicable rules, even if traditional Chinese law was growingly formalized in statutes and sub-statutes. In addition to ethical or moral concerns, the social status of the persons involved in the trial (*in Ansehung der Person*) took priority over the statutes. Weber bestowed the term "kadi justice" (*Kadijustiz*) on this type of legal system in traditional China. In sum, the law was intertwined with ethical and moral doctrines; legal practitioners in such a system, mainly judges and lawyers, were non-professional mandarins whose goal was to achieve a sense of substantive justice.[7]

This picture of traditional Chinese law provided by Weber in *RoC* cannot be isolated from his framework of comparative sociology, concerning both the rise of Western rationalism and the absence of rationality in non-Western societies. In his analysis of Western rationalism as represented in institutional settings, Weber adopted two important conceptual tools to deal with the complexity of history; one diachronic, the other synchronic. Therefore, to have a clear mapping of

7 Robert C. Marsh, "Weber's Misunderstanding of Traditional Chinese Law," *American Journal of Sociology*, 106, 2 (Sep., 2000), pp. 281-302. DOI: 10.1086/316966.

Weber's study of traditional Chinese law requires understanding his analytic and concrete model of Western rationalism.

As far as the developmental stages of Western law are concerned, Weber framed his analysis by proposing a two-dimensional matrix, the famous concept of "ideal types". In this matrix, one dimension is the formality of law, and the other is its rationality. Each dimension contains two antithetical variables; in the former, they are formal/substantive, and in the latter, rational/irrational. Upon this framework, Weber built his comparative model. With the help of Wolfgang Schluchter's explanation, it can be seen that Western law has experienced four transformational stages, from the revealed law (*offenbartes Recht*) in the ancient era to the traditional law (*traditionales Recht*) of medieval Europe, then the deduced law (*Naturrecht*) that prevailed after the French Revolution, to modern positive law (*positives Recht*). The crucial point of the legal development process in Western rationalization lies in the transformative functions that the traditional law and the natural law sequentially performed in the early modern age. In this development, Weber viewed the Enlightenment as a key role, in which natural legal thinking not only departed from the traditional law, but also foresaw the positive law.

With the four patterns established, Weber compared traditional Chinese law with the laws that appeared at different stages in Western history. However, we cannot find any functional equivalents or substitutes for the Enlightenment and natural legal thinking in Weber's study of non-Western societies. Rather than natural law, it is mainly traditional law that frequently appeared in Weber's observations. He presumed that traditional Chinese law is a constant continuum with few or no non-substantive changes over two millennia. In contrast to this highly stable legal tradition in China, modern Western law is formal and rational. Weber concludes that the traditional laws, both Western and Chinese, were substantive and irrational.

	Non-rational	Rational
Formal	1. Revealed law (charismatic)	4. Positive law
Substantive	2. Traditional law	3. Deduced law (natural)

* Scheme XI: Types of Law (the numbers are marked for indicating the sequential order in the four transformational stages, and this table is modified from Wolfgang Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History*, trans. by Guenther Roth [Berkeley: University of California Press, 1981], p. 89)

Regarding interdependencies between the legal order and other social orders, such as religious, economic, or political, Weber framed his analysis by proposing a multidimensional matrix (*Mehrdimensionaler Vergleich*), namely the famous concept "elective affinities" (*Wahlverwandtschaft*). Western rationalism in Weber's view is observed in the motivations behind social action. The so-called "sociological categories" proposed by Weber asserts the important propositions that social actions directed toward each other form social relations, and such social relations remaining steady consolidate as social orders.[8] Therefore, when people make choices based on their own value-evaluations, sociologists can study these decisions in the context of different social institutions. In the concrete analysis of vertical linkages, ranging from social actions through social relations to social orders, Weber emphasized the essential role of historical conjunctures in providing horizontal correlations. For example, Weber cleverly foresaw the relationship between legal fictions and economic activity in his early research on the history of medieval business organizations. In addition, Weber later concentrated on the agenda of "economic ethics of the world religions," initiated by his influential work *The Protestant Ethic and the Spirit of Capitalism*. Whether in his early or late works, Weber insisted on explaining the contingency between different social institutions in history with the conceptual device "elective affinity", rather than cause-effect relationships in a mechanical sense.[9] Hubert Treiber depicted parallel structures in Weber's

8 Max Weber, "On Some Categories of Interpretive Sociology," in Hans Henrik Bruun & Sam Whimster (eds.), *Max Weber: Collected Methodological Writings* (London; New York: Routledge, 2012).

9 Dirk Käsler, *Makesi Weibo de sheng ping, zheshu ji yingxiang* [*Max Weber: eine Einführung in*

studies of the legal and religious rationalization processes.[10] Concerning Weber's multidimensional analysis, both in the vertical and horizontal sense, it is believed that his study of traditional Chinese law is only part of the full mapping of Imperial China, in which the political, religious, economic, and legal orders are intertwined. However, there is a hidden perspective, a mono-contextual worldview, even a presumed totality, dominating Weber's diagnosis of the modern age.

With conceptual devices such as the "ideal type" tracing the development of Western law, and "elective affinity" describing the relationship between legal and other social orders, Weber successfully surmounted the complexity of the history of Western rationalism. Unfortunately, Weber's "heuristic Eurocentrism," which is based on an elegant reconciliation of theory and history, risks becoming a "normative Eurocentrism" when applied to a non-Western culture. Two shortcomings of Weber's comparative methodology became apparent when he failed to distinguish the intra-cultural comparisons in Europe from the inter-cultural comparisons among world civilizations. The first shortcoming comes from confusion and false analogies between intra-cultural and inter-cultural comparative studies, such as viewing traditional Chinese law as traditional law in the Middle Ages rather than the natural law of the Enlightenment. The second shortcoming comes from the value presupposition hidden in this confusion, which not only imposes the Western path on non-Western societies, but also attributes cultural anxieties to the former, such as the dilemmas of disenchantment and re-enchantment, to the latter.

To clarify the two problems, we have to discuss the blind spot of normative Eurocentrism, and the danger of neglecting it. Contemporary Weberian scholars

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Leben, Werk und Wirkung] 馬克斯・韋伯的生平、著述及影響, trans. by Guo Feng 郭鋒 (Beijing: Law Press 法律出版社, 2000).

10 Hubert Treiber, "'Elective Affinities' Between Weber's Sociology of Religion and Sociology of Law," *Theory and Society*, 14 (Nov., 1985), pp. 809-861. DOI: 10.1007/BF00174051.

have found that there was an ambiguity, even a conflict, in modern Western law itself—the themes and dilemmas of disenchantment and re-enchantment—notwithstanding Weber's undifferentiated treatment of medieval Western law and Chinese law. This ambiguity represents the normative Eurocentrism in Weber's comparative study. To understand how Weber's heuristic Eurocentrism became normative Eurocentrism, we have to bring the importance of his sociology of law back into his comparative sociology of world religions.

Wolfgang Schluchter has emphasized that the core concern of Weber's Western rationalism is the transformation of ethics from religion through politics to law. He argues that there is a negligence and a misunderstanding of Weber that led to the so-called dilemmas between the substantive ethic and the formal law, value-rationality and purpose-rationality, or legitimacy in natural law and legality in positive law.[11] This "either-or" viewpoint neglects the "ethics of responsibility" as differentiated from the "ethics of conviction," and then reduces the former to the latter. Thus, this outdated "ethics" traps contemporary researchers in the conflict between ethics and law.[12] On one hand, this misunderstanding confuses an intra-cultural dilemma between substantive rationality (national law, ethics of conviction) and formal rationality (positive law, ethic of responsibility), and an inter-cultural dilemma between traditional law (law-like ethics, substantive-irrational) and positive law (ethics of responsibility, formal-rational). Thus, the insight of Weber's developmental study of Western laws has been neglected, the

11 Wolfgang Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History*, trans. by Guenther Roth, pp. 101-105, 133-138.

12 Cary Boucock, *In the Grip of Freedom: Law and Modernity in Max Weber* (Toronto: University of Toronto Press, 2000); Sally Ewing, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law," *Law & Society Review*, 21, 3 (Nov., 1987), pp. 487-512. DOI: 10.2307/3053379; Alan Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978); Duncan Kennedy, "The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought," *Hasting Law Journal*, 55 (2004), pp. 1031-1076; Joyce S. Sterling & Wilbert E. Moore, "Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification," *Sociological Forum*, 2, 1 (Winter, 1987), pp. 67-89. DOI: 10.1007/BF01107894; Qian Xiang-yang, "Traditional Chinese Law v. Weberian Legal Rationality," *Max Weber Studies*, 10, 1 (Jan., 2010), pp. 29-45; Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review*, 17, 2 (1983), pp. 239-286. DOI: 10.2307/3053348.

four different stages with their respective formal/substantive and rational/irrational dimensions reduced into a binary pair, an antithetical dilemma. On the other hand, this misunderstanding also implicitly attaches the formal essence to law and the substantive essence to ethics, the two stereotypes of law and ethics, and then respectively attributes essentialist views of ethics and law to value-rationality and purpose-rationality. Therefore, we must distinguish the comparison between natural law and positive law in Western societies from the comparison between traditional law and positive law in the worldview, and avoid reducing Weber's fourfold typology for the development of laws to a binary dilemma.

Basis of evaluation	Ethics	Law	Rationality
Action	Magic ethics	Revelatory law	Formal-Irrational
Norm	Law ethics	Traditional law	Substantive-Irrational
Principle	Ethics of conviction	Natural law	Substantive-Rational
Reflexive Principle	Ethics of responsibility	Positive law	Formal-Rational

* Scheme XIII: Relationship of Ethics and Law (modified from Wolfgang Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History*, trans. by Guenther Roth, p. 102)

After Schluchter's warning, we similarly find a biased interpretation of traditional Chinese law. Some scholars have attempted to correct Weber's view of traditional Chinese law from substantive-irrational to a reconsidered viewpoint of substantive-rational law. Their research provides evidence that traditional Chinese law can be considered to be a kind of rational legal practice. Even if they cannot find most features of modern positive law in Imperial China, they still view traditional Chinese law as a substantive-rational rather than substantive-irrational. Interestingly, the reason behind this modification is similar to Weber's theme, traditional Chinese law being substantive-irrational owning to the ethical concerns intervening into legal reasoning. These scholars believe that, viewing

the dilemmas of formal law and substantive ethics in the modern age, Weber would have selected formal-rational law as the standard in his study of traditional Chinese law, and viewed the ethics of conviction as an interfering factor in Chinese legal reasoning. However, we think this interpretation not only neglects Weber's analysis of the four developmental stages in the Western societies, but also falls into the problem of the reduced dilemma critiqued by Schluchter. Unfortunately, scholars criticizing Weber's study of traditional Chinese law do not pay enough attention to these two shortcomings in comparative method on the one hand, but focus on empirical verification of Weber's work on the other. In fact, Weber's misunderstanding of Imperial China may originate from his confusion in the comparative method, and his value presupposition may predict the empirical incongruity in the details. Neglecting Weber's normative Eurocentrism provokes unnecessary arguments. Only by distinguishing the two comparisons in Weber's comparative study, the first being an intra-cultural comparison and the second an inter-cultural one, do we realize that it would be fruitless to attempt to test and empirically verify Weber's descriptions of traditional Chinese law in *RoC*.

In summary, scholars focusing on Weber's study of traditional Chinese law agree that we cannot do justice to Weber's theme regarding China without scrutinizing his interchanging of intra- and inter-cultural comparisons. Although Weber's two conceptual devices, ideal type and elective affinity, provide present-day scholars many insights into Western rationalism, there may be unnoticed shortcomings in their application to Weber's comparative study of world religions. For example, Weber made an incorrect analogy between law in the Middle Ages and law in Imperial China by failing to consider the importance of natural law in the Enlightenment Age. Weber presumed a totality of Western rationalism in his vertical and horizontal multidimensional model, replacing the narrowly defined cause-effect relationship with the historical conjuncture or contingency. As far as these problems are concerned, we find that Weber's comparative study changed from heuristic Eurocentrism to normative

Eurocentrism. Thus, the problems of Weber's normative Eurocentrism resulted from cultural confusion at the level of methodology, and cannot directly be modified by empirical data.

When we contextualize Weber's comparative study of traditional Chinese law in *RoC* within his sociology of law, we find that Weber's approach has two limitations. The first one pertains to his confusion of the two comparisons, and the second one is in mono-contextuality. If we want to repair Weber's observation of legal practices in Imperial China, we have to overcome these two limitations.[13]

First, Weber's model compares particularism to universalism, and mixes inter-cultural with intra-cultural comparisons. It aims to answer a twofold inquiry. On one hand, Weber attempts to delineate how transformations in law occurred as part of larger transformations that took place in the West, which is a historical development inquiry and an intra-cultural comparison. On the other hand, he seeks to show the similarities and differences between traditional Chinese law and modern Western law. That inquiry is typological, and the comparisons are inter-cultural. In the latter comparison, traditional Chinese law (particularism) is cited as having a pattern shared by medieval European law, but not by modern Western law (universalism). By categorizing both Chinese law and medieval European law as traditional law, Weber is able to use them as counter-types in contrast with the uniqueness of formal and rational modern Western law. His comparison of particularism and universalism that mixes inter- with intra-cultural comparisons leads Weber to falling into the trap of normative Eurocentrism, which was not intended in his study. When, however, his analysis consistently equates patterns in non-Western cultures with those in pre-modern/traditional Western cultures, Weber leaves the reader with the impression that development in non-Western societies fell behind that of the West. In doing

13 Lin Duan 林端, *Weibo lun Zhongguo chuantong falu: Weibo bijiao shehuixue de pipan* [*Max Weber on Traditional Chinese Law*] 韋伯論中國傳統法律——韋伯比較社會學的批判 (Taipei: San Min Book Co., Ltd. 三民書局, 2003), chap. 1.

so, Weber is guilty of a major departure from the heuristic Eurocentrism that he professes to uphold.

Second, Weber's observation of the first order (*Beobachtung erster Ordnung*) assumes that social systems develop in a mono-contextual world, in which all elements find their places in an antithetical binary. Everything in this mono-contextual world is subjugated to the principle of the "two-valued logic" or "binary logic" (*zweiwertige Logik*). All is either positive or negative, but cannot be both. Taking Weber's observation of traditional Chinese law and modern Western law as an example, the applicable binaries are formal/substantive, rational/irrational, predictable/unpredictable, professional legal practitioner/non-professional legal practitioner, court trial/civil justice, and so on. From Weber's point of view, these elements in the antithetical binaries are mutually exclusive in a social institution. One institution can only have one value in the binary. If a law is formal, then it cannot be substantive; if a law is rational, then there is no possibility of it having irrational elements. This "either/or" binary approach fixes all the elements under observation to mechanically symmetrical "ideal types" that rarely exist in reality. What Weber does in his comparative model is compare the ideal types that he constructs with the antithetical binary codes. The premise of this analytical model rules out the possibility that the values embedded in an institution could be antithetical but not mutually exclusive. It also rejects the notion that antithetical values could complement and/or reinforce each other. However, Chinese culture stresses that human and heaven are in harmony, and where the law takes into account human emotions, Weber's two-valued logic approach seems unable to grasp the essence of traditional Chinese law and the traditional Chinese legal system, in which *multivalued logic* is of primary importance.

Under the lens of "observation of the second order" (*Beobachtung zweiter Ordnung*), a picture that is closer to reality appears. Inspired by Niklas

Luhmann's theory,[14] we propose a method of observation of the second order that avoids Weber's shortcomings. Although such an approach will not necessarily be "superior" to Weber's observation of the first order, observation of the second order does help researchers to spot the limitations of observation of the first order. Unlike observation of the first order, which sees all elements in the world as connected in one context with geometric symmetry, observation of the second order views a world that is poly-contextual (*polykontextural*). In the poly-contextual world, the values of social institutions may not all be in the same context. From such a perspective, labeling two values in different contexts as a binary pair for comparison in the same matrix is deemed to generate an inaccurate analysis. This is why "multivalued logic" (*mehrwertige Logik*) is so essential in the poly-contextual world. When the values in seemingly antithetical binaries are, in fact, in different contexts, for those values to be antithetical yet mutually complementary is no longer impossible. In fact, this antithetical yet complementary pattern, unthinkable in the realm of observation of the first order, is totally consistent with the multivalued logic of poly-contextual settings. What is more important is that this multivalued logic is exactly the essence of traditional Chinese law and its legal system.

3. Poly-Contextuality: Recent Research on Traditional Chinese Law

In the past two decades, the fields of traditional Chinese jurisprudence and legal history have gained momentum in China and in North America.[15] Weber's legacy to the study of Chinese law has been profound; almost a century after he

14 Niklas Luhmann, "Ends, Domination and System: Fundamental Concepts and Premises in the Work of Max Weber," in *The Differentiation of Society*, trans. by Stephen Holmes and Charles Larmore (New York: Columbia University Press, 1982), pp. 20-46.

15 William P. Alford & Yuanyuan Shen, "Law, Law, What Law? Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law," *Modern China*, 23 (Oct., 1997), pp. 398-419.

finished his study of Chinese law, his work is still highly thought of by scholars in the field. For example, both Shuzo Shiga and Philip Huang engage Weber in dialogue in their studies. Scholars, such as Paul Katz, revisit Weber's study in *RoC*, from the viewpoint of the relationship between religion and law, especially popular religion or folklore. In addition to recent research on traditional Chinese law, "New Qing History", a new trend in American Qing China history studies since the 1980s, has provided a revised view of the Qing Dynasty from an ethnic-political perspective rather than the Sinocentric framework.[16] Given the access to historical archives allowed researchers since the late 1970's, the "reform and opening" period of the PRC government, recent historical studies can enrich Weber's observations of Imperial China. With access to those historical data, scholars have deepened their research on several topics, such as legal practice at the country level, legal-political management among different ethnic areas, and reform projects of the regulations concerning cooperation between central and local juridical practice. Integrating this recent research about traditional Chinese law, we propose the concept of "poly-contextuality" to illustrate the complicated nature of the traditional Chinese law and to demonstrate the dynamic in Chinese legal traditions with the example of the Qing Dynasty.

Before entering these new research areas, we have to explain some points concerning our framework for integrated study. First, we find a clue to Weber's reasoning in *RoC*, which focuses on social carriers with their cultural ethos rather than the institutional settings. Although there were discussions about political, legal, and economic aspects of Imperial China in *RoC*, Weber tried to view them as only the preconditions of his main focus. His main concern was the cultural

16 Joanna Waley-Cohen, "The New Qing History," *Radical History Review*, 88 (Winter, 2004), pp. 193-206. DOI: 10.1215/01636545-2004-88-193; James A. Millward et al. (eds.), *New Qing Imperial History: The Making of Inner Asian Empire at Qing Chengde* (London; New York: Routledge, 2004); Ping-ti Ho, "The Significance of the Ch'ing Period in Chinese History," *Journal of Asian Studies*, 26, 2 (Feb., 1967), pp. 189-195. DOI: 10.2307/2051924; Ping-ti Ho, "In Defense of Sinicization: A Rebuttal of Evelyn Rawski's 'Reenvisioning the Qing'," *Journal of Asian Studies*, 57, 1 (Feb., 1998), pp. 123-155. DOI: 10.2307/2659026; Evelyn S. Rawski, "Presidential Address: Reenvisioning the Qing: The Significance of the Qing Period in Chinese History," *Journal of Asian Studies*, 55, 4 (Nov., 1996), pp. 829-850. DOI: 10.2307/2646525.

ethos, Confucianism and Taoism, of the "mandarins" who constituted the pillars of Imperial China for over a thousand years.[17] What Weber did not investigate deeply enough, however, is the role that the magistrate performed in each local country-level court. Second, tracing this clue, we should view the magistrate, whether a Confucian or a Taoist, not only as one of the "literati" who espoused the orthodox and heterodox ideologies, but also as a judge who played a crucial role in peacekeeping at the local level. As Isher-Paul Sahni has demonstrated with his close textual analysis, there existed a centrality of judges in Weber's theory of legal rationalization, and their residual status in his sociology of law was to recapture researchers' attentions.[18] Third, when turning back to focus on the local court and the adjudication process, we might realize the uniqueness of the Qing Dynasty and its importance to the study of traditional Chinese law. The crucial point lies in the differentiation of legal practitioners, in which different legal actors pursued their own ideal interests and with their respective interpretations formed an approach that does not conform to estern ideas of serious legality.[19] In fact, the richness of legal practice at the local level provides us with a picture of "poly-contextuality," eliminating the need to choose between substantive-irrationality and substantive-rationality.

In the following, we will introduce sequentially the picture of traditional Chinese law in three contexts: from the local court, then through the intersecting zone between local society and the central government, and finally to the differentiated jurisdictions in the Imperial scope.

17 Stephen Turner, "Blind Spot? Weber's Concept of Expertise and the Perplexing Case of China," in Fanon Howell, Marisol Lopez Menendez, and David Chalcraft (eds.), *Max Weber Matters: Interweaving Past and Present* (Aldershot, UK: Ashgate Publishing, 2008), pp. 121-134.

18 Isher-Paul Sahni, "Vanished Mediators: On the Residual Status of Judges in Max Weber's 'Sociology of Law'," *Journal of Classical Sociology*, 6, 2 (June, 2006), pp. 177-194. DOI: 10.1177/1468795X06064859; and "Max Weber's Sociology of Law: Judge as Mediator," *Journal of Classical Sociology*, 9, 2 (May, 2009), pp. 205-229. DOI: 10.1177/1468795X09102123.

19 Chú, Túng-tsu, *Local Government in China under the Ch'ing* (Cambridge, Mass.: Harvard University Press, 1962).

From the viewpoint of a Qing local magistrate, there were two main concerns in legal practice: how to respond to institutional pressure from the central government and how to balance litigation and daily order. As far as the institutional pressures are concerned, a local magistrate had to face the duality of legal practice in the Qing Dynasty. First, there was a two-tiered codification in the legal system. The adjudication process in criminal law was closely supervised by the central legal officials with a hierarchical system, but for civil laws this was relatively loosely controlled. In these two distinct legal systems, the rapid expansion of sub-statutes in Qing legal statutes was a hierarchical codification of criminal laws; thus, not a product of kadi justice, but rather a result of the effort to find an equilibrium between abiding by abstract statutes and considering special circumstances. Shuzo Shiga's findings confirm that there was a growing balance between the arbitration power of the patrimonial rulers and the jurisdiction of the judges. The most significant evidence lay in the growth of the written legal codes, both statutes and sub-statutes, wherein scholars might find this two-tiered codification increasing under their governing statutes.

Moreover, from the sixteenth to the eighteenth centuries, the legal system underwent tremendous change, in which the two most important institutional reforms were the judicial ratification system (*shenzhuan* 審轉), and the regulations on ruling deadlines (*shenxian* 審限). The former replaced the conflict between the ruler's will to intervene and the decision of a local judge with a rational and stratified system of reviewing legal decisions at the local level; the latter forced judges at different levels to finalize their cases on deadlines, to avoid "delayed justice". These two legal reforms not only increased the pressure on local magistrates, but also put them at risk of being sued by the litigants for delaying. However, the most important consequence of the reforms was the outsourcing of magistrates' paperwork in the local adjudication process. Since the sixteenth century, the rise of litigation masters (*songshi* 訟師, cunning specialists in litigation) and private secretaries (*muyou* 幕友, "friends in the

chamber") deeply changed legal practice at the local level.[20] Interestingly, the litigation masters—we can consider them as traditional stylized lawyers—shared common social origins, but had many conflicts of interest at the same time with the private secretaries, the most important one of whom was the legal secretary. Although both were literati who did not pass the civil service examination and did not hold official jobs, the former was an adversary or antagonist of the magistrate, while the latter was an assistant or consultant.

Therefore, under institutional pressures, such as the two-tiered codification and the two juridical reforms, we come to understand the local adjudication process as a result of these three actors competing and cooperating in their concepts of justice and in their individual interests. Contrary to Weber's observations and negations, legal practice in late Imperial China, at least in the Qing Dynasty, was not a mono-contextual question of adjudication rational or irrational, substantive or formal, but a poly-contextual situation in which magistrate, litigation master, and private secretary interacted under the limited conditions imposed by the codification of statutes and sub-statutes, the supervising central officials, and the reformed legal institutions.

As far as practical deliberations are concerned, we find that local magistrates, as well as litigation masters and private secretaries, have to consider not only the legal codes, namely the statutes and sub-statutes, but other important

20 Li Chen, "Legal Specialists and Judicial Administration in Late Imperial China, 1651-1911," *Late Imperial China*, 33, 1 (June, 2012), pp. 1-54. DOI: 10.1353/late.2012.0000; Susumu Fuma, "Litigation Masters and the Litigation System of Ming and Qing China," *International Journal of Asian Studies*, 4, 1 (Jan., 2007), pp. 79-111. DOI: 10.1017/S1479591407000551; Melissa A. Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford, Calif.: Stanford University Press, 1998); Chiu Peng-sheng 邱澎生, "Yifaweiming: Songshi yu muyou dui mingqing falu zhixu de chongji [Force of Law: The Rise of Litigation Masters and Private Secretaries and Their Impact on Legal Norms in the Ming-Qing Period] 以法為名——訟師與幕友對明清法律秩序的衝擊," *Xin Shi Xue* [*New History*] 新史學, 15, 4 (Dec., 2004), pp. 93-148; and *Dang falu yushang jingji: Mingqing Zhongguo de shangye falu* [*When the Legal Meets the Economy: Commercial Law of the Ming and Qing China*] 當法律遇上經濟：明清中國的商業法律 (Taipei: Wu-Nan Book Inc. 五南圖書出版公司, 2008).

factors of "*qing*" (情)—meaning both the social circumstances and human emotion—and "*li*" (理)—meaning reasonable and sensible ways.[21] In short, the source of Chinese legal authority is not exclusively in the codes: circumstances/human emotion (*qing*), reason/sensibility (*li*), and statutes/sub-statutes (*fa* 法), as Shuzo Shiga has demonstrated, were equally important in the practice of Chinese legal culture. Beside the codes (*fa*) as legal authority in a formal sense, the other two important factors were part of the education of judges, especially in the formation of Chinese literati's ethos. Applied in practical legal reasoning, they were two legal authorities: one referred to social circumstances or human emotions, the other referred to common sense as understood by any layperson. Given these two cultural factors, the well-educated judges, the so-called "literati" in Imperial China, did not have an idea of "law and order" in the modern Western sense, but only an idea of harmony or peace-making. This "trinity" of practical deliberations show traditional Chinese legal teaching was part of the cultural ethos which entailed "syncretism" of Confucianism, Buddhism, and Taoism.

In this sense, we cannot understand the traditional Chinese legal adjudication process as a substantive-irrational practice combining legal factors with extra-legal ones. Rather, legal adjudication was viewed as a sort of practical deliberation in parallel with the theoretical tenets of Confucianism, Buddhism, and Taoism, whether about the ways of life or the tasks of human beings. Recent research on the didactic materials for administrators, namely official handbooks

21 Xu ZhongMing 徐忠明, *Qinggan, xunli yu Mingqing shiqi sifa shijian* [*Emotion, Model Officials and Judicatory Practice in Ming and Qing Dynasties*] 情感、循吏與明清時期司法實踐 (Shanghai: Joint Publishing House 上海三聯書店, 2009); Liang Zhiping 梁治平, *Xunqiu ziranzhixu zhong de hexie: Zhongguo chuantong falu wenhua yanjiu* [*Searching the Harmony in Natural Order: A Study of Traditional Chinese Legal Culture*] 尋求自然秩序中的和諧：中國傳統法律文化研究 (Beijing: China University of Political Science and Law Press 中國政法大學出版社, 2002); Shiga Shuzo et al., *Mingqing shiqi de minshishenpan yu minjianqiyue* [*The Civil Trial and Folk Contract in the Ming-Qing Period*] 明清時期的民事審判與民間契約, Wang Yaxin 王亞新 et al. (eds.) (Beijing: Law Press 法律出版社, 1998); Chen Li, "Legal Specialists and Judicial Administration in Late Imperial China, 1651-1911," pp. 24-31.

(*guanzhen* 官箴) and anthologies of documents (*gongdu* 公牘), have shown that a local magistrate acquired his legal training mainly from these practical texts rather than classical texts.[22] After the civil service examination, the guiding monographs concerning administrative and legal practice might be more important than the great classics, such as "The Four Books" of Neo-Confucianism, since the Song Dynasty (960-1276). The official handbooks include admonitions on the ethical and technical aspects of government; the official documents provide examples of actual government in previous dynasties.[23] In contrast, we can understand the legal training of local judges with a counter-example. Recent research on county clerks and runners who participated in local legal affairs has shown that they had different social origins from the local magistrate, litigation master and private secretary: literate enough to comprehend legal writings, yet not espousing the cultural ethos and respect for the syncretism of Confucianism, Buddhism, and Taoism.[24]

Thus, rather than viewing legal practice in late Imperial China as a mixture of legal and extra-legal factors, especially ethical deliberation, we would consider traditional Chinese law as a practical version of cultural teachings from the syncretism of Confucianism, Buddhism, and Taoism. In a local judge's deliberation, there were no clear lines between the legal factors—legal codes consisting of statutes and sub-statutes—and the extra-legal factors—social

22 Pierre-Etienne Will, *Official Handbooks and Anthologies of Imperial China: A Descriptive and Critical Bibliography* (forthcoming).

23 Haung Yuan-sheng 黃源盛, "Fali yu wencai zhijian: du *Longjinfengsuipan* [Between Jurisprudence and Literature: Reading the 'Long-Jin-Feng-Marrow' Legal Precedent] 法理與文采之間——讀《龍筋鳳髓判》," *Chengchi Law Review* 政大法學評論, 79 (June, 2004), pp. 1-52; Chen Den-wu 陳登武, "Zailun Baijuyi 'Baidaopan': yi falu tuili wei zhongxin [Appreciation and Explanation to The Tang Code of Tang's Intellectuals: A Case Study in the Legal Reasoning of Bai Jü-Yi's 'Bai-Dao Legal Precedent'] 再論白居易〈百道判〉——以法律推理為中心," *Bulletin of Historical Research* [*Tai Wan Shi Da Li Shi Xue Bao*] 臺灣師大歷史學報, 45 (June, 2011), pp. 42-73.

24 Bradly W. Reed, *Talons and Teeth: County Clerks and Runners in the Qing Dynasty* (Stanford, Calif.: Stanford University Press, 2000).

circumstances/human emotion (*qing*) and reason/sensibility (*li*)—but a tripolar context long existing in traditional Chinese legal training.

Having described legal practice in the local venue, we then face the problem of the intersecting zone between local society and central government. In other words, to what extent can the country-level legal practice influence the social order, whether as local peacekeeping or articulation between the local and the central? This also brings us to the debate between Shuzo Shiga and Philip Huang, in which the core puzzle is how we should understand the nature of a local magistrate's adjudication and its social impact.[25] Although there seems to exist antithetical arguments between Shuzo Shiga's "didactic conciliation" and Philip Huang's "trial by law," we have found that their disagreement lies not in the social impact of local adjudication, but in the magistrates' legal reasoning. Shuzo Shiga, with a theme similar to ours, argues that a magistrate would consider not only the legal codes but also the two extra-legal factors: social circumstances/ human emotion (*qing*) and reason/sensibility (*li*). Philip Huang, using local archives released in recent years, insists that a magistrate would judge according to the written legal codes, whether statutes or sub-statutes. As far as adjudication in the local court is concerned, we agree more with Philip Huang, given that our study has confirmed the co-existence of civil justice—mediation by non-government parties—and court trial—adjudication by local magistrates—in Chinese legal tradition. It reflects the contextualized universalism of Chinese culture. Regarding the social impact of local adjudication on the local order, we side with Shuzo Shiga, because recent researchers have confirmed that legal reasoning belongs to a practical part of the social teachings informed by a syncretism of Confucianism, Buddhism, and Taoism.

25 Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford, Calif.: Stanford University Press, 1996) and *Code, Custom and Legal Practice in China* (Stanford, Calif.: Stanford University Press, 2001).

However, we disagree with Philip Huang's use of the concept "third realm" to explain the intersecting zone between the local order and the central one, when moving from the question of local magistrate's adjudication to its social impact on peacekeeping. Although Philip Huang distinguishes informal mediation from court trial, he seems to overestimate the symbolic function of local magistrate's adjudication. He optimistically views the co-existence of civil justice at an intersecting zone where the local magistrate can satisfy demands from both the central power of Imperial China and the local forces of the gentry. On the contrary, we argue that there are two supplementary mechanisms accompanying the local magistrate's adjudication, and hence that a well-executed legal practice in the local court does not always directly contribute to peacekeeping demands both from the central government and local society. In fact, the dual system of Chinese legal culture was confirmed by recent scholars to be accompanied by two quasi-legal powers: one is the "celestial power" coming from all kinds of popular religions; the other is regional conventions in the governing policy of the Qing Dynasty. This is another example of poly-contextuality in traditional Chinese law.

These quasi-legal powers were practiced in two different populations: one is the majority, the Han people of the Qing Dynasty, the other is the minority, including the peoples of Mongolia, Xinjiang, Tibet, and Manchuria. To consider this differentiation, we will discuss them separately below.

In our study of the quasi-legal powers accompanying legal practice within the Han people's traditions, both celestial power and local customs played important roles in keeping justice in daily life. Celestial power, as manifested in the process of the ordeal, and secular power, as manifested in court trial or civil judgment (mediation), were both legitimate arbitration powers, and complementary in the Chinese legal tradition.[26] For example, Paul Katz shows

26 Paul J. Katz, "Ritual? What Ritual? Secularization in the Study of Chinese Legal History, from Colonial Encounters to Modern Scholarship," *Social Compass*, 56, 3 (Sept., 2009), pp. 328-

that cunning folks who lost in the local court would search for "alternative justice" in the celestial power provided in some popular religions. He finds similar patterns between the structure and practice of judicial rituals and religious ones, and argues that scholars have overlooked the importance of judicial rituals in Chinese legal culture.[27] Han people long performed many and varied judicial rituals, the most common of which were making oaths (*lishi* 立誓) and filing underworld indictments (*gao yinzhuang* 告陰狀 or *fanggao* 放告). These unofficial but popular religious rituals featured simulated adjudications, in which divine justice was provided by the leading deities of the underworld, such as the City God (*Chenghuang* 城隍爺), the Emperor of the Eastern Peak (*Dongyue dadi* 東嶽大帝), and the Bodhisattva Dizang (*Dizangwang pusa* 地藏王菩薩).

In addition to celestial power, the most important secular power in Imperial China was that of local customs, which differ from place to place.[28] In our study of legal disputes over ancestral worship property in the southeast provinces of Imperial China, we find that local customs became a crucial factor in the local magistrate's adjudication. Whether guided by social circumstances/human emotion (*qing*) or reason/sensibility (*li*), these local customs had been absorbed into the Qing codes as customary laws so that the statute, circumstances, and local customs might simultaneously affect the decision in a trial. Furthermore, the influences of local customs on local legal practice happened not only in the majority population—Han people—but also in the minority. In recent research on

344. DOI: 10.1177/0037768609338762.

27 Paul J. Katz, "Divine Justice in Late Imperial China: A Preliminary Study of Indictments, Oaths, and Ordeals," in John Lagerwey (ed.), *Religion and Chinese Society* (Hong Kong: The Chinese University Press, 2004), pp. 869-902; "Indictment Rituals and the Judicial Continuum in Late Imperial China," in Robert E. Hegel and Katherine Carlitz (ed.), *Writing and Law in Late Imperial China: Crime, Conflict, and Judgment* (Seattle: University of Washington Press, 2007), pp. 161-185; "Trial by Power: Some Preliminary Observations on the Judicial Roles of Taoist Martial Deities," *Journal of Chinese Religions*, 36 (June, 2008), pp. 54-83. DOI: 10.1179/073776908803501150.

28 Liang Zhiping 梁治平, *Qingdai xiguanfa: shehui yu guojia* [*The Customary Law in Qing Dynasty: Society and State*] 清代習慣法：社會與國家 (Beijing: China University of Political Science and Law Press, 1996).

"New Qing History," scholars have demonstrated that there were explicitly religious-ethnic politics in the Qing Dynasty.[29] Since the establishment of the Qing Empire in the seventeenth century, the founding rulers had used a distinctly religious policy as a strategy for governing ethnic groups in border regions. Observing the principle of religious tolerance (accommodating Tibetan Buddhism in Mongolia and Tibet, Islam in Xinjiang, and shamanism in Manchuria), the Qing rulers partially transferred legal jurisdiction at the local level to the regional authorities, and maintained special judicial institutions in the central government, such as *Lifan Yuan* (理藩院, the court of final appeal for minority people), for cases appealed from the frontier regions.

29 Beatrice S. Bartlett, *Monarchs and Ministers: The Grand Council in Mid-Ch'ing China* (New Haven, CT: Yale University Press, 1991); Pamela Kyle Crossley, Helen Siu & Donald S. Sutton (eds.), *Empire at the Margins: Culture, Ethnicity, and Frontier in Early Modern China* (Berkeley: University of California Press, 2006); Mark C. Elliott, *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China* (Stanford, Calif.: Stanford University Press, 2001); James A. Millward, *Beyond the Pass: Economy, Ethnicity, and Empire in Qing Central Asia, 1759-1864* (Stanford, Calif.: Stanford University Press, 1998); Peter C. Perdue, *China Marches West: The Qing Conquest of Central Eurasia, 1600-1800* (Cambridge: Harvard University Press, 2005); Evelyn S. Rawski, *The Last Emperors: A Social History of Qing Imperial Institutions* (Berkeley: University of California Press, 1998); Edward Rhoads, *Manchus and Han: Ethnic Relations and Political Power in Late Qing and Early Republican China, 1861-1928* (Seattle: University of Washington Press, 2000).

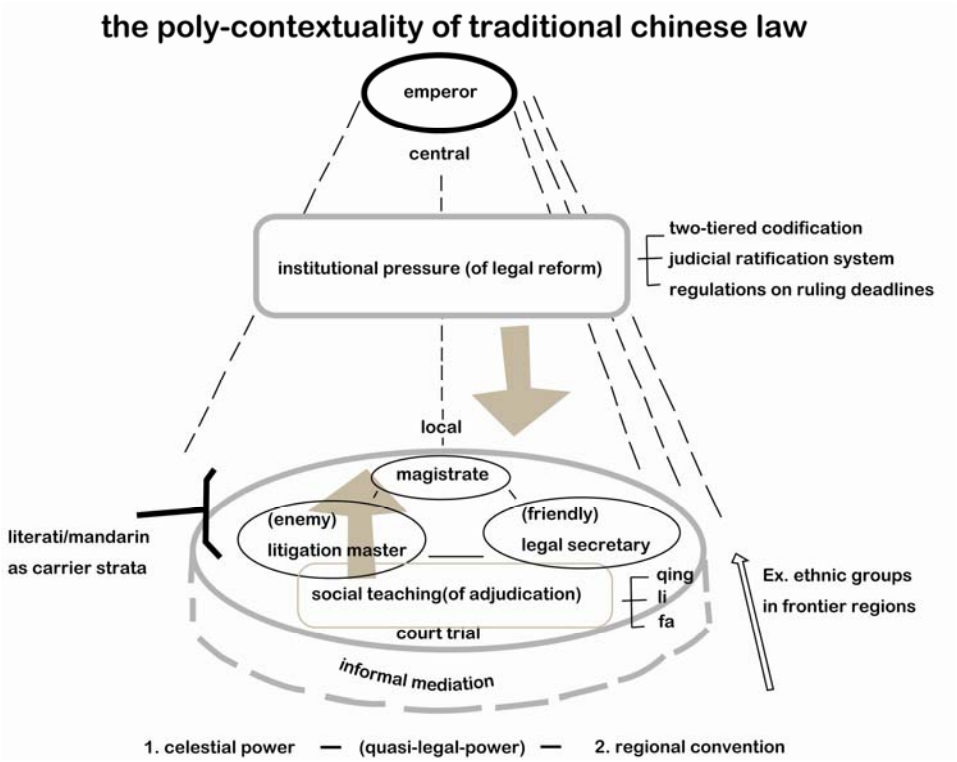

Figure: The poly-contextuality of traditional Chinese Law

Now we can provide a complete picture of traditional Chinese legal practice in three contexts: the local court scene, the intersecting zone between local society and the central government, and the differentiated jurisdictions in Imperial scope. With the help of our mapping figure, we demonstrate the poly-contextuality existing in Chinese legal practice. Starting from the adjudication process in the local court, there exists both a tripolar context for the magistrate, litigation master, and private secretary, and an institutional pressure from above. Stepping out of the local court, there is first a co-existence of civil justice, informal mediation and court trial in the Chinese legal tradition, then two quasi-legal supplementary mechanisms: celestial power (folk religions) and secular power (local customs). Seen from the Governor's viewpoint, there is a dual legal system of governing different populations: traditional Chinese law for the majority Han people and the special jurisdictions with a concentrated court (of

final appeal) for minority people in the frontiers. In sum, we emphasize the poly-contextual features of traditional Chinese law, and avoid viewing it as either substantive-irrational or substantive-rational. Only in this sense can we realize the nature of traditional Chinese law and regain its poly-contextuality.

4. Conclusion

As shown in the two parts of this study, we have attempted to make two crucial contributions to the Weberian scholarship, incorporating recent achievements in the field of Chinese legal studies and new Qing history studies.

Theoretically, our critique of Weber urges researchers to avoid the limitations of Weber's approach. The influence of Weber's model on the field has been profound, but there is the risk of normative Eurocentrism in his conceptual tools, such as ideal types and elective affinities, neglected by scholars of traditional Chinese law. For example, both Shiga and Huang's approaches were constrained by Weber's analytical model, while they made groundbreaking contributions to Qing legal history. Without considering the shortcomings of Weber's comparative study, researchers would underestimate the poly-contextuality of traditional Chinese law, especially in the Qing Dynasty. To avoid these constraints, we propose a new analytical model, emphasizing "multivalued logic" and "poly-contextual" thinking, from a fresh viewpoint. Empirically, we show how multivalued logic works practically in the Chinese legal tradition. Based on recent research, we provide a full mapping of legal practice in the Qing Dynasty. Whether in a local court, the intersecting zone between local society and central government, or the differentiated jurisdictions in the Imperial scope, different forms of poly-contextuality manifested in legal practice. We conclude that, from the point of view of multivalued logic, Chinese law and its practice are consistently poly-contextual.

As Schluchter has demonstrated that Weber's comparative study of religious rationalism cannot be measured simply by its historical accuracy in terms of today's standards, we propose another way of contextualizing and reallocating *RoC*, in order to avoid viewing Confucianism and Taoism through a lens of ascetic Protestantism or salvation religion.[30] Although Weber's observations of Imperial China contain some historical misunderstandings, his revised structure of *RoC* provided a clue for how to revive his insights. Intending to move the focus of his research to the carrier strata, Weber started Chapter Five, "The Literati," after first writing four chapters of these "sociological foundations". He then provided his main analysis of the ethos of the Chinese literati, Confucianism and Taoism. If we keep in mind Weber's emphasis of carrier strata in his historical analysis, regardless of these typologies made only for comparisons that combine the intra-cultural with the inter-cultural, a possible realignment could bring Weber's insight back into recent scholarship on Imperial China. In this study, we have shown that scrutinizing the crucial carrier strata in traditional China should turn to the analysis of legal practices first, then to the legal training implicit in social cultivation, such as Confucianism, Taoism, and Buddhism.

Following our refocus from Weber's comparative framework to his emphasis on crucial carrier strata, we provide some theoretical implications for further study. First, the main challenges to Weber's China study can be addressed. As Schluchter has maintained, Weber dealt with only the five dynasties until the Han Dynasty (206 BCE-220 AD), as well as the last one, the Qing Dynasty (1644-1912). He left the intermediate period undiscussed, which led to many criticisms concerning the neglected development between these two dynasties. For example, the famous "Three Epochs of Confucian Way" by Wei-ming Tu demonstrates the insufficiency of Weber's observations on Confucianism.[31]

30 Wolfgang Schluchter, *Rationalism, Religion, and Domination: A Weberian Perspective*, trans. by Neil Solomon (Berkeley: University of California Press, 1989).

31 Wei-ming Tu, "Confucianism," in Arvind Sharma (ed.), *Our Religions* (San Francisco: Harper Collins Publishers, 1993), pp. 139-227.

However, our analysis fills this vacuum with Weber's focus on the literati as the main carriers in Imperial China. With recent research on legal practitioners and their internal differentiation, including local magistrates, litigation masters, and private secretaries, we have argued that the literati, whether holding a place in the government or not, were a kind of practical Confucians who not only had to handle administrative affairs within the imperial bureaucracy, but also develop a syncretic (but not magical) ethics in their frequently daily contact with laypersons. In fact, it was these practical and pragmatic mandarins, not ideal Confucian scholars, who were the crucial carriers in Imperial China.

Second, reviving the importance of Weber's sociology of law in his comparative study of world religions indicates that the cultural ethos of local legal practitioners was not a mixture of Confucianism and Taoism or a tension between the orthodoxy and heterodoxy, but a pragmatic orientation to life, a positive attitude towards dealing with concrete issues. Facing the secular power of local customs as well as the celestial power of folk religions, they struggled with these quasi-legal forces while maintaining their cultivated beliefs. Viewed from Weber's ethics of conviction, they believed that it is important to keep social harmony by judicial balancing of the tripolar factors of Chinese legal culture: circumstances/human emotion, reason/sensibility, and statutes/sub-statutes. Viewed from Weber's ethics of responsibility, they had to foresee the consequence of a local adjudication, its impact on the local social order as well as its fitness in the concentrated legal system. Furthermore, it should not be forgotten that there were tensions in the internal competitions among different legal practitioners, even if they might share similar cultural backgrounds and legal training. Therefore, we can view their ethics as inner-worldly but not magical, and release ourselves from Weber's hidden framework of equating religion with salvation religion, and the disenchantment of the world with "de-magification".

In sum, we think that traditional Chinese law, including its implementation, is by no means Weber's so-called "kadi justice". We suggest revisitation of Weber's view of traditional Chinese law with the help of both contextualizing his works and integrating the recent legal history studies of the Qing Dynasty.♦

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