The History and Theory of Legal Practice in China

Toward a Historical-Social Jurisprudence

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CHAPTER 13

Reconstructing Max Weber's "Sociology of Law": The Power of Idealism and the Limits of Objectivity

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Abstract

The conceptual system of legal ideal-types in Max Weber's essay "Sociology of Law"—"formal/~~substantial~~ irrationality" and "formal/~~substantial~~ rationality"—is to some degree related to Kantianism. It is this relationship that tends to make Weber's four-dimensional conceptual system of law's "rationality" into what is actually a stark dualism of "formal rationality" and "~~substantial~~ irrationality." An examination of Weber's own texts demonstrates this. Consequently, in Weber's narrative the core tension in modern law is in fact a conflict between "formal rationality" and "~~substantial~~ irrationality." Since Weber's "central question" and even "highest value" in "Sociology of Law" is modern capitalism, and since he presumed an "elective affinity" between modern capitalism and "formally rational" law, he personally favored "formal rationality," and mainly attributed the "~~substantially~~ irrational" legal demands of his time to the labor movement. The reality of the capitalist economy, however, demonstrates that the connection between capitalism and "formally rational" law is not unconditional. In many cases, the "social scientist" Max Weber tends to assign priority to concepts and ideas over empirical evidence, and these concepts and ideas are to a great extent influenced by Weber's own value judgments. All this means that Weber deviated from the "objectivity" of social science which he himself advocated.

Keywords

form – substance – rationality – capitalism

The writing style of the essay "Sociology of Law" in Max Weber's *Economy and Society* has undoubtedly impressed people as dull and confused. As a German scholar declares, Weber's words "[satisfy] in an ideal-typical way (*in idealtypischer Weise*) both absolute prerequisites for being a great German academic from Hegel to Luhmann: the style is miserable and the argumentation is vague"

(Rehbinder, 1987: 127). A more serious problem is that *Economy and Society* is in fact an uncompleted work. Shortly after Weber's death, Marianne Weber edited several disconnected manuscripts, applying her own understanding, and published them as a "book" in the early 1920s. After the Second World War, through several new editions, Johannes Winckelmann undertook the difficult task of reediting the manuscripts. In some cases he added other of Weber's writings to Marianne's edition in order to make the work more "complete." In other instances he reorganized Marianne's edition, relying on his more "correct" understanding. It was said that these adjustments would result in a text that is both closer to what Weber intended and more readable. But the truth is that these new editions are still to a great extent incomprehensible. Indeed, so far no scholar has been able to provide a thoroughly valid and complete framework for understanding any of these old and new editions.

Thus, there have been scholars who have advocated "saying good-bye to *Economy and Society*." Weber's more mature ideas are contained in *Gesammelte Aufsätze zur Religionssoziologie* (Collected Essays on the Sociology of Religion), in particular three crucial essays therein, namely, "Vorbemerkung" (Author's Introduction), "Die Wirtschaftsethik der Weltreligionen: Einleitung" (Economic Ethics of World Religions: Introduction) and "Die Wirtschaftsethik der Weltreligionen: Zwischenbetrachtung" (Economic Ethics of World Religions: Intermediate Reflections) (Tenbruck, 1989). Since we have these mature writings, do we still have to waste time and energy on struggling with the immature and incomplete manuscripts? Yet such a proposal was made by Friedrich H. Tenbruck in the 1970s, something that seemed appealing enough, but did not receive an enthusiastic response from other scholars at the time. Since then, however, scholars all over the world have repeatedly proposed new understandings of *Economy and Society* and especially one of its chapters, "Sociology of Law." Decoding Max Weber still seems to fascinate. Perhaps scholars all along have believed that beneath his rambling words, there must lie Weber's most profound concerns over modern society, modern law, and modern human beings. There must be, in short, some unexcavated "secrets."

In the field of legal scholarship after the Second World War, the mainstream of the discourse on Weber was once dominated by the "law and development movement," which was later superseded by critical legal studies and other, similar trends. Obviously, the early discourse on Weber dominated by Talcott Parsons's theory is to a great extent a simplification of Weber's complicated ideas, and thus obliterates the paradoxical meaning ubiquitous in Weber's original writings. In these interpretations, Max Weber becomes an expert on modernization theories, and "formulas" extracted from these secondhand writings become blueprints for economic, political, and legal development

in Third World countries (see Thomas, 2006; Trubek, 1972). No later than the 1980s, however, while continental European scholars still treated Weber as an optimistic supporter of legal modernization and rationalization (see Freund, 1987; Rossi, 1987), scholars in the English-speaking world with a more critical consciousness began to take note of Weber's more complex attitudes toward modern law. This complexity they described as "vagueness," "ambivalence," "tension," "conflict," "antinomy," "tragedy," and "pessimism." Anthony T. Kronman even resorted to the term "schizophrenia" (Kronman, 1983: 185; see also Trubek, 1985: 935). In a word, it is now believed that Weber's legal thought, particularly in his attitude toward modern law, embodies a dualistic logic.

To be precise, this dualistic logic of Weber's is supposed to exist in the conflict between the "formal rationality" and "substantive rationality" of law (see e.g. Hunt, 1978: 106; Cotterrel, 1995: 145; Boucock, 2000: 11, 17, 66). Relying on its abstractness, preciseness, and predictability, modern "formally rational" law promotes capitalism. But these ice-cold legal characteristics undeniably exclude law's moral facets, which results in disadvantaged groups, e.g., the proletariat, being denied substantial protection from modern law: for workers, who have no choice but to survive by working in factories and accepting exploitation, legal provisions on freedom of contract are almost a dead letter. In view of this, therefore, scholars have almost unanimously asserted that there is a conflict between the two types of "rationality." Undeniably, different scholars have responded to this conflict in different ways. To "defend" Weber's academic (and to some degree political-practical) authority, Weber experts in Germany, such as Wolfgang Schluchter, have been doing a job of "lubrication." Schluchter has admitted the existence of two types of legal "rationality," yet he proposes a "dialectic of formal and substantive legal rationalization," hoping to demonstrate not only that in Weber's legal thought the two types of "rationality" do not conflict with each other, but also that the two support and supplement each other, and the law thus always develops through a harmonious "dialectic" (Schluchter, 1981: 107–18; see also Sither, 1995). If all the conflicts in Weber's thought can be reconciled in this way, the unintelligible parts in his texts should have been clarified long ago. But the reality is the opposite. Inexplicability and conflict remain. Most scholars have admitted the irresolvability of the conflict between the two types of "rationality." Note that the expression to describe the two facets of modern law, whether by Schluchter or others and whether the conflict can be resolved or not, is "two types of rationality."

In this article, I will reconsider this understanding of Weber's legal thought. I do not deny that there is a dualistic logic in Weber's thinking. Nevertheless, I also believe that most scholars have (consciously or unconsciously) "softened" the tension in this dualism, although they have recognized the existence of the

tension. In my view, if we honestly follow Weber's own thinking and language, we will discover that the core conflict in modern law is between law's "formal rationality" and "substantive irrationality." Duncan Kennedy is conscious of this original logic of Weber's. In his view, the reason Weber "dismisses" several "anti-formal" tendencies of modern law is that in Weber's theory such "substantive" legal requirements will result in "irrational" judicial judgments (Kennedy, 2004: 1052–55). Therefore, it seems that in Weber's own thinking "substantive" is connected with "irrational" even in modern law. While there are countless studies on Weber, I believe the space for interpreting his work is not yet exhausted. Moreover, reconstructing Weber's concepts is not simply a word game. Rather, through a detailed reading of "Sociology of Law" and other, related texts, through an examination of the philosophical history of key concepts, and through a representation of the texts' context, we will discover a "new" world. In this world, we will be one step closer to Weber's "secrets," and will more clearly understand the practical implications and limitations of Weber's concepts, narratives, and positions.

Reconstructing Concepts: "Form/Substance"

The Categories of "Legal Thinking"

Almost all writings on Weber's legal thought start with his four-part typology of law. Near the end of the first section of "Sociology of Law," Weber proposes that all law in human history can be defined and measured through the four categories: 1) "formally irrational," in which lawmaking and lawfinding (*Rechtsschöpfung und Rechtsfindung*, corresponding roughly to "legislation" and "justice") rely on means beyond the control of human reason, such as oracles; 2) "substantively irrational," in which legal practice resorts to concrete facts, ethics, emotions, and political factors rather than general norms to make decisions in concrete cases; 3) "formally rational," which further consists of two sub-types: one, in which law considers only factual characteristics of a tangible nature, e.g., a signature, and the other, in which law processes facts in a logical way, forms explicit and abstract legal concepts, and then creates general legal rules and even complete legal systems; and 4) "substantively rational," in which law is no longer characterized by case-by-case arbitrariness, but instead has rules to follow, yet such rules come from ethical, utilitarian, or political maxims rather than purely legal elements (Weber, 1964: 507).

Weber then asserts that the fundamental feature of modern law lies in its "formal rationality," in particular in the aforementioned second sense. In his

view, only through "the meaning-interpreting abstraction" (*die sinndeutende Abstraktion*) of this type of "formally rational" legal thinking can all legal rules be collected and rationalized into an "internally consistent complex of abstract legal theses" (Weber, 1964: 507). Weber took the Pandectist school, prevalent in the latter half of the nineteenth century in Germany, as a typical representative of this legal thinking. He enumerates the features of this school, such as a clear distinction between law and facts, law's overall coverage of social life, and law's "gapless" character (Weber, 1964: 507–8).

Another crucial occasion where the four concepts appear in the text is the last section (section 8) of "Sociology of Law." Here, Weber tries to construct an "ideal type" of the "developmental stages" of law. He first points out that "the general development of law and procedure" passes through "charismatic legal revelation," "empirical lawmaking and lawfinding by legal honoratiores," "imposition of law" by secular or theocratic powers, and (finally) "systematic elaboration of law" and "administration of law" based on "documentary and formal logical education." Correspondingly, Weber asserts that the development of "formal qualities of law," namely, the development of legal thinking, also goes through phases: "formal irrationality," originating from magic and revelations; "substantive rationality" in theocracy or patrimonialism; and finally juristic and logical "rationality" and systematicity, namely, "formal rationality" (Weber, 1964: 645).

Reinhard Bendix declares that these passages provide us with a "bird's-eye view" of the process of law's "rationalization" (Bendix, 1977: 423). Likewise, Julien Freund attempts to rely on these categories or "stages" to reorganize materials in "Sociology of Law." While Freund is clearly aware that Weber's construction is an "ideal type" rather than reality, his reconstruction of Weber's text still reveals a particular tendency: since the developmental stage of this or that law corresponds to this or that form of legal thinking, the development of law passes through the four stages: "formal irrationality," "substantive irrationality," "substantive rationality," and "formal rationality" (Freund, 1968: 257–66).

Later scholars have not been so optimistic, and even have been unwilling to undertake the task of reconstructing Weber's version of the "developmental history of law."[1] In fact, the so-called theory of the "four stages" of law's development is not consistent with the narrative framework of Weber's "Sociology of Law." In the first section of the chapter, Weber discusses categories and

1 The works of David M. Trubek, Alan Hunt, Anthony T. Kronman, and Duncan Kennedy do not focus on the clarification of the "stages" of law's development, which to some degree reveals that these scholars have realized the intractability of the question.

standards that can be used for the classification of law. In his view, none of the typologies in modern legal science, such as public/private, criminal/civil, lawmaking/lawfinding, and substantive/procedural, is valid for various premodern legal phenomena. Thus he advocates his more "universal" standard, namely, the aforementioned four concepts related to the degrees and types of the "rationality" of law. In the second section, he explores the history of "subjective rights," particularly that of freedom of contract, which is supposed to be the crucial condition for modern capitalism. In the third section, Weber begins to discuss the history of "objective law." He first takes up laws in primitive and early "cultivated" societies in section 3, which contained a strong measure of charisma and thus showed "formally irrational" characteristics. In the fourth section, however, Weber does not directly progress to a statement of "substantively irrational" law, but instead discusses crucial roles played by various types of legal practitioners in the making of various types of legal thinking. Weber argues that this is the most fundamental factor in determining the approach and fate of law's "rationalization." Here, Weber discusses multifarious tendencies of legal thinking, including English law, which, dominated by lawyers, was "irrational" in both "form" and "substance"; partially "substantively rational" legal education influenced by theology; the legal thinking of continental European "legal honoratiores," which had a transitional nature; and ancient Roman law supported by jurists and bureaucrats. Subsequently, in the fifth and sixth sections, Weber attempts to elaborate on the influence of theocracy and patrimonialism on the character of law. Because both these two political forms tried to inject religious or ethical norms into law, such phenomena seem connected with law's "substantive rationality." The seventh section deals with the law of nature. In Weber's view, it was doctrines of natural law prevalent in the seventeenth and eighteenth centuries that greatly promoted the "formal rationalization" of Western law. In the eighth section, Weber deals with some deviations from "formal rationality" in his time.

Thus, it can be seen that Weber does not strictly follow his own concepts and logic in constructing the narrative of "Sociology of Law." When presenting his version of legal history, he does not strictly observe the so-called paradigm of "four stages," but rather talks now and then about other crucial topics when he feels it necessary. This is especially the case in the fourth section. Weber even separately discusses the process of the development of freedom of contract. Also, after the terminal point he originally set for the development of law, he adds several new and heterogeneous trends in modern law. Therefore, Weber's "ideal types" of "legal thinking" and legal development, albeit crucial for every study on "Sociology of Law," do not elucidate the text as a whole.

"Substantive Rationality"

Yet other problems exist. Even if we admit that Weber only constructs a series of "ideal types," and even if we admit that law in practice does not necessarily develop according to this hierarchy of "rationality," "Sociology of Law" as a text is still confusing. In particular, some concepts in these "ideal types" can hardly find reliable equivalents in narratives of practical materials in this chapter. Weber declares that "ideal types" are not products of pure ideas. Rather, they are the "enhancement" (*Steigerung*) of certain elements of reality (Weber, 1968: 190). Thus, "ideal types" have to find their prototypes in reality, no matter how unrefined these prototypes are. Unfortunately, a highly confusing concept, "substantive rationality," tends to self-destruct in Weber's vague statements.

"Substantively rational" law is alleged to be a type of legal thinking that is rule-oriented and to some degree systematic. Therefore, in its "rational" aspect, it resembles "formally rational" law. But the "rational" rules of this type of law come from sources outside law, such as religion, ethics, utility, and political ideals. Thus, with respect to the origin of "rationality," this type of law is different from "formally rational" law, which is composed of autonomous legal rules. According to how Weber frames things, "substantively rational" law should be discussed under the topics of religious law and patrimonial law, since these two types of law both tend to bring religious dogmas or ideas about welfare and justice into the law. Moreover, with the rise of the stratum of priests in theocracies and literati-bureaucrats in monarchies in the Middle Ages, the operation of these "substantive" elements in the law could probably be described as "rational." Weber's synopsis in the beginning of the fifth section indicates that he will deal with the phenomenon of the "substantive rationalization" of religious law (Weber, 1964: 599). In the sixth section, which deals with the law of patrimonial monarchies, Weber also mentions that the General State Law for Prussian States (*das Allgemeine Landrecht für die Preußischen Staaten*), a typical example of the law of monarchal "welfare states," can be regarded as representative of "substantive rationalism" (Weber, 1964: 632, 633).

But let us first look closely at Weber's discussion of *legal education* under theocracy in the fourth section of "Sociology of Law." Here, Weber mentions that because of the existence of abstract concepts religious law can consist of "rational systematic legal doctrines." This is most obvious in India's Laws of Manu. Nevertheless, while "rational" trends did exist in education in religious law, such trends were restrained by charismatic traditions inherent in religion. Additionally, education in religious law often led to casuistry, which in Weber's view contained some elements of "rationality" yet was not the type of "rationality" he values (Weber, 1964: 587–90; on Weber's attitude toward casuistry,

see Weber, 1964: 506–7). The more fundamental problem is that the core and focus of "Sociology of Law" consist of legal practice rather than legal education (though the latter is indirectly related to the former), in particular "law-finding," which directly involves decision-making. While "formal irrationality," "substantive irrationality," and "formal rationality" all have their equivalents in legal practice in Weber's work (namely, legal revelation of primitive charismatic law, justice and administration under patrimonial monarchs, and legal positivism which was dominant in German judicial circles in the latter half of the nineteenth century), Weber's incomplete description of "substantive rationality" is only limited to the aspect of legal education.

In a more obvious way, Weber's discussion of legal practice under theocracy or patrimonial monarchs deviates from the concept of "substantive rationality." In the fifth section, he discusses almost all well-known examples of religious law, including Indian law, Islamic law, Jewish law, and medieval canonic law. But the results of his discussion are surprising: some "magical elements" remained in Indian law, the arbitrariness of "kadi justice" in Islamic law is well-known, and Jewish law too possessed "irrational components." Only canonic law occupied a special position with its higher level of "rationality." Yet such "rationality" was not "substantive rationality." Instead, it was "formal rationality": "it was first to a great extent essentially more rational and more formally juristic than the other sacred laws" (Weber, 1964: 614). Canonic law even played a crucial role in promoting secular law's "formal rationalization." In other words, in the field of religious law, law either led to complete "irrationality" like "kadi justice" or moved toward "formal rationalization" as in canonic law. Either way, there was no space for "substantive rationality" in Weber's religious legal world.

In the sixth section, Weber emphasizes that judicial organs in patrimonial regimes tend to have the character of administration. Judgments were "made according to discretion, expediency and political viewpoints, and legal empowerment was considered no more than arbitrary favors or privileges in individual cases." Weber declares that "all kinds of patrimonial monarchal justice have in themselves the tendency to move in this path." To demonstrate that patrimonial legal practice in all times and in all regions have this "irrational" character, Weber enumerates various examples from medieval England, ancient Rome, medieval France, ancient China, and primitive African tribes (Weber, 1964: 621–23). The General State Law for Prussian States also belonged to this camp: in this code, consideration of various relationships in practical life "tore up" the discussion of legal institutions. As a result, "although it pursued clarity, it in fact produced vagueness" (Weber, 1964: 632–33). When Weber attempts to deal with the "rationalization" of patrimonial law, however,

he starts with "formal rationality": in the view of monarchs, in order to triumph in the struggle against the nobility and to expand their own power, they needed to rely on "formally rational" laws and bureaucracies, which also met the interests of the bourgeoisie and often induced them to ally with monarchs (Weber, 1964: 623–24). Therefore, like the situation in religious law, in secular and patrimonial states, legal practice either stayed at the "irrational" stage or moved along the path toward "formal rationality." But the stage of true "substantive rationality" is not yet to be found.

The Power of Dualism: Form/Materie

Weber's discussion of "substantive rational" law is to a great extent blurry. This fact hints at a potential conflict between Weber's conceptual framework and the empirical reality he describes. To resolve this conflict, there are two possible solutions. The first is to explore new materials on legal history beyond those provided by Weber himself and thus to test the validity of his concepts on a firmer basis of empirical studies. The second is to reexamine the whole conceptual system that Weber uses to grasp his materials. If Weber was simply an "empirical researcher," then the first solution is sufficient for further understanding, improving, or criticizing Weber's works. But Weber's role was not limited to that of a "social scientist." Instead, as Karl Jaspers suggested, Weber was also a "philosopher" (Jaspers, 1989: 1–27). It was the meanings and energy of concepts that dominated Weber's thinking and writing. Of these concepts, the most powerful are "form" and "substance" in his "Sociology of Law," which have been cited by generations of scholars but so far have not been clarified *philosophically*.

This pair of concepts originates in ancient Greek philosophy. In Weber's time, however, its meaning was dominated by Kantianism. Considering that Weber had a close relationship with Neo-Kantian philosophers at the time, it can scarcely be said that Weber was unfamiliar with these two fundamental concepts of Kantianism (see Turner, 1992). In Kant's epistemological system, the combination of *Form* and *Materie* (the latter, translated as "substance" in the English version of "Sociology of Law"), which also appears in Weber's work, contributes to human beings' full understanding of the world. In the *Critique of Pure Reason, Form* refers to a series of faculties of organizing and molding perceptual phenomena that humans have experienced, including the sense of time and space, concepts, judgments, deductions, rules and even systematizations. These abilities are the bases of intuition and thinking and are of an a priori nature. In other words, they all show pure elements of "rationality." By contrast, *Materie* refers to the part of appearance corresponding to sensation, sometimes also to the appearance itself. It pertains to an a posteriori

experience and is in a state of manifoldness. Only through the faculty of *Form* by the subject can such manifoldness and even chaos achieve unity and order. In other words, in human cognition, "rationality" only belongs to *Form*, and thus *Materie* is assigned an "irrational" role (Caygill, 1995: 204; Kant, 1998: B 34, B 78, B 106, B 118, B 171–72, B 288, B 305–6, B 309, B 322–24).

Kant's doctrines of ethics also bear a similar feature. To the subject, the reason guiding moral actions and the reason used to cognize the world are the same: *Vernunft* (reason). Therefore, various rules applied to various fields, namely, various *Formen*, are bound to have the same characteristics since they spring from the same reason. More concretely speaking, *Form* in Kant's moral philosophy means the self-legislation of the rational and moral subject relying on a universal thinking structure. Reason, will, freedom, autonomy, regularity, (moral) laws, and universality are almost synonyms. The purest *Form* of human morality can be summed up in a single "categorical imperative": "act only according to that maxim whereby you can at the same time will that it should become a universal law," a maxim supposedly applicable to everyone. By contrast, *Materie* in Kant's ethics is particular goals, values, and effects that are pursued by the subject, which are subjective, arbitrary, and impulse-based, and thus without any regularity. Therefore, *Form* and *Materie* here correspond to a great extent to Weber's "rationality" and "irrationality" respectively (Caygill, 1995: 288; Kant, 1993: 1, 30, 35, 36, 38).

Weber's epistemological and ethical systems are also similar to Kant's. Like the subject in Kant's epistemology, the "personality" designed by Weber is an absolutely rational being, one whose actions are "determined through clearly known and desired 'purposes' with clear knowledge about their 'means'" (Weber, 1968: 127). In his "methodological" writings, the incarnation of this type of "personality" is the social scientist. In the face of reality, the social scientist applies the tool of "purposive rationality" to analyzing and judging concrete actions. This "rational" method can also clarify purposes and "ideas" people are pursuing when they are taking actions, and can evaluate actual blueprints of actions at the formal-logical level (Weber, 1968: 149–51). Weber asserts that his methodology "must even be acknowledged by a Chinese as correct" (Weber, 1968: 155–56). On the other hand, the research object of social science, namely, empirical reality, does not contain "rational" elements. Rather, such reality is the "meaningless infiniteness of world events"; it is "irrational" and consists of "tremendous, chaotic streams" (Weber, 1968: 180, 213–14). Thus, "irrational" reality needs to be selected, organized, and represented by "rational" social science.

In the field of the *Materie* in Weber's ethics or his "value philosophy," Weber also draws the most extreme conclusion from Kant's doctrines about

"irrationality" of goals and values. The following of his expressions are well-known: since the world has been "disenchanted," no value can have self-evident legitimacy at the level of reason, and "polytheism" becomes a reality in daily life; thus, "the numerous old gods ascend from their graves" and "begin again their perpetual struggle against one another" (Weber, 1968: 603–5, 612). In Kant's ethics, there is still a fixed *Form* in moral practice, namely, "categorical imperatives," which has the highest value in the practice of reason. Yet for Weber these imperatives are no exception in face of the "irrationality" of all moral orientations, and become only one of the contentious gods: "beside it [Kant's normative ethics] also exist other value spheres" (Weber, 1968: 504). Thus Weber does not admit any "rationality" in the field of ethics.

The antithesis of *Form* and *Materie* also appears in Weber's discussion of law. To be sure, the *Vernunft* in Kant's subject philosophy is not the same thing as Weber's legal "ontological" *Rationalität* used to describe external empirical objects. To borrow Donald V. Levine's terms, it may be proper to call the "reason" in Kant's epistemology and ethics "subjective rationality," and to consider Weber's "rationality" in his "Sociology of Law" "objective rationality" (see Levine, 1981: 10–11). Nevertheless, it is also undeniable that the two concepts share substantial similarities with regard to patterns of thinking: regularity, universality, necessity, and so on. Therefore, in the end, *Form* and "reason" are essentially quite close to Weber's "rationality," and *Materie*, whether in the sense of empirical facts or ethical values, is apt to move toward "irrationality." As a result, the four-dimensional conceptual framework of "legal thinking" (the term "thinking" also indicates a potential connection between "Sociology of Law" and epistemology) has an inherent impulse to transform into a sharper dualistic form of "formal rationality/substantive rationality." The latter is precisely the essence and soul of modern thought.

"Formally rational" law can simply be regarded as a product of applying the a priori faculty of reason to the field of law. Through logical thinking, law is constructed into a perfect system of clear and abstract concepts and rules. Since there is no "substance" in such a legal system, it looks much like Hans Kelsen's "pure theory of law." Coincidently, Kelsen also uses epistemological terms in his representative work in which he declares that the hierarchy of legal norms he established belongs to the "transcendental category" (Kelsen, 1981: 21–24).

Once "substance" plays the role of shaping the law, the outcomes of legal judgments can be entirely different. Since the individual facts that legal practice has to face are manifold, and since ethics or values cited in individual cases conflict with one another, lawmaking becomes concrete judgments on a case-by-case basis and necessarily lacks rule orientation, predictability, and systematicity. Adjudication then consists of decisions in concrete cases, and

has to face value conflicts among different parties or even among parties and adjudicators. Thus, such a value-weighing and decision-making process is not restrained by "rational" rules and cannot legitimize itself with any definite standard. Therefore, "substance" easily becomes "irrationality" in the field of law, in particular in the area of justice.

This fundamental thinking of Weber's guaranteed that there would be internal conflicts within the two concepts of "substantive rationality" and "formal irrationality." Power and conflicts of concepts dominated Weber's narratives of materials. Legal practice of "substantive rationality" is suppressed by conflicts inside concepts, and thus it can hardly appear in Weber's grand narrative of legal history. Weber links "value philosophy," essentially a modern Neo-Kantian doctrine, with premodern law. This makes him unwilling to believe that premodern humans who have not been "disenchanted" could construct a relatively rational legal complex based on religious or ethical viewpoints which were commonly considered supreme purposes. He also does not believe that this set of ethicized legal rules can be observed by legal practitioners or even members of society who share the same religious or ethical thinking (otherwise how could "totalitarianism" be possible?). Weber seems to have forgotten that these people have not been "disenchanted." He instead treats them as modern humans and understands their actions related to values as value choices varying from person to person. Therefore, justice under traditional China's patrimonialism was necessarily arbitrary "kadi justice" (Weber, 1964: 606, 622). Such a view of Chinese law ignores at least three factors: the trend toward the rationalization of Confucianism after the Tang dynasty (618–907), imperial China's huge scholar-official system, and criminal codes through various dynasties that demonstrated some degree of "rationality" (see Huang, 1996: 223–38; Gui, 2013: 17–22). As for "formal irrationality," Weber saves this concept by escaping from Kantianism. Here, "form" is no longer rational, abstract and logical *Form*, but is instead rites like magic and trial by ordeal, which are beyond the control of human reason. Here Weber achieves his objective of extracting "ideal types" from empirical reality. Yet this makes his conceptual system of legal "rationality" more fragmented: of the four concepts, only two remain valid in their original sense, one of the other two is nullified, and the last deviates from the original logic.

"The Anti-Formal Tendencies in Modern Legal Development"

Weber's conceptual system collapses from within. Likewise, because of the conflicts within concepts, Weber encountered tremendous difficulties when applying these concepts to organizing the content of "Sociology of Law." By the time of his death, he had not completed the writing of this part of *Economy*

and Society. "Sociology of Law" might also be one of the most immature chapters in that magnum opus.[2] If we put this often confusing and complex conceptual system into a dualistic framework as above suggested, however, it becomes easier to understand what Weber actually means when he mentions "the anti-formal tendencies in modern legal development" in the last section of "Sociology of Law."

In the eighth section, Weber deals with several new trends in the development of law and legal ideas of his time. After the Pandectist school's decades of domination of German legal thought and practice, new phenomena emerged, which were not covered by Weber's "ideal type" of the law's development. This was particularly the case concerning several trends countering legal formalism. They all involved powerful critiques of the over-formalization and over-specialization of modern law, since rigid legal positivism often contradicts demands from practical economy, life, and ethics. Therefore, voices from various directions advocated that law take account of these demands, namely, law's "substantiation." Weber enumerates the main forces supporting this movement: 1) an assertion of entrepreneurs in the economical field (the title used by Weber is "the interested parties of law," *Rechtsinteressenten*) that law should be more responsive to economic needs, 2) a demand of the working class and their intellectual supporters that law achieve more substantive justice, 3) the welfare policies of monarchal bureaucracies, 4) ordinary laymen's demand to participate in justice in the context of mass democracy, 5) a proposal for greater discretion by judges since they were increasingly dissatisfied with their assigned role as legal "automats" outputting decisions mechanically through previously set programs, and 6) new legal doctrines corresponding to the aforementioned new facts, for example, the "free law" movement and the "living law" advocated by Eugen Ehrlich (Weber, 1964: 646–56). In view of these voices, as Weber found at the time ("Sociology of Law" was written in the 1910s), the decisions of the German judicial system tended to exceed to a great extent the limits of positive law: "court practice, even that of the German Imperial Court of Justice for example, just after the coming into force of the Civil Code, often established entirely new legal principles, sometimes in ways outside of law, sometimes against law" (Weber, 1964: 649–50).

In contrast to the assertion of later scholars, Weber does not say that there is a conflict between "formal rationality" and "substantive rationality" in this new stage of legal development. Indeed, he admits the existence of a conflict, but he uses a different terminology to describe it. While most scholars today

2 The many uncorrected typos in the manuscript of "Sociology of Law" are evidence of its immaturity (see Winckelmann, 1960: 40–41).

researching Weber's "Sociology of Law" have some connection with critical legal studies, perhaps due to their "modernist" instinct they still lack the courage to recognize Weber's own words and are unwilling to believe modern law has "irrational" elements. But this is Weber's own logic. It can be inferred that the aforementioned philosophical implications of "form" and "substance" causes Weber consciously or unconsciously to worry that once concrete elements of "substance" are introduced into legal thinking, modern law would probably regress into "irrationality." His own words demonstrate this worry. He declares that including ethical factors in legal practice will "fundamentally call into question the formalism of law." The reason is "because of the inevitability of value compromises, [judicature] must allow the total disregard of those abstract norms and allow at least in cases of conflict totally concrete evaluations, namely, not only informal but also irrational lawfindings." As a result, "juristic precision will be fundamentally threatened," leading to "kadi justice" (Weber, 1964: 648, 649, 654, 655).

Weber is most vigilant against the second force of the aforementioned "anti-formal" tendencies, namely, the labor movement's demand for law's "substantiation." In the sixth section, which deals with natural law, Weber devotes much time to discussing the history of "socialist natural law." These doctrines of natural law and natural rights had originated from the natural law of peasants. In Weber's view, both kinds of natural law were essentially a retrogression. Moreover, the natural law doctrines of the working class were internally self-contradictory, and a great portion of them were almost "fully unrealizable" in modern society. In a society where the value of all commodities is determined by their exchange value in market dealings, the so-called right of claim on "labor yields" will "totally no longer exist." Thus, lacking the possibility of becoming a legal reality, socialist natural law could only remain forever in the mind of the working class and some intellectuals. Moreover, it quickly lost its position in intellectual circles. Inside the socialist camp, it was eliminated by Marxist evolutionism. Outside that camp, it was replaced by Comte's sociology and the developmental theory of historicist-organism (Weber, 1964: 639–42). After natural law doctrines were eliminated, socialist movements focused on positive law. Yet Weber has strong words to describe this new appeal. It is such an appeal that "fundamentally calls in question the formalism of law." This appeal concerning "substantive justice" is "neither juristic nor conventional nor traditional" and threatens law's "formal rationality" (Weber, 1964: 648). In short, beyond a purely conceptual instinct, we find another instinct in Weber's text, an instinct to combine concepts with some aspects of reality and to equate the legal demands of the working class with "irrationality." This instinct also leads Weber to assert that it is the working class that will most likely destroy

"formal rationality" in modern law. To understand this instinct, we need to enter a broader and more practical world.

Reconstructing the Theses: Law and Capitalism

Weber's Hypotheses

The chapter related to law in *Economy and Society* in fact lacks a title in the manuscripts. It was Marianne Weber who added the title "Sociology of Law" (Winckelmann, 1960: 38–39). In 1922, when she published *Economy and Society*, the title "Sociology of Law" was supplemented with several words in brackets: "economy and law," whether in the table of contents or the text (Weber, 1922b: x, 386). Marianne Weber's editing reveals that in her view the content of this chapter should be considered as the relationship between law and economy. Some words in "Sociology of Law" bear out her judgment. Weber emphasizes in the first section that the parts of law with which the chapter is going to deal are related to economics, in particular capitalism. Thus, the fields of "private law" and "civil procedure" are the core focuses of the chapter. In the narratives of various phenomena in legal history that follow, Weber repeatedly considers the question of the extent to which this or that legal phenomenon promoted or impeded the development of capitalist economy (Weber, 1964: 504, 505, 521, 546, 610, 613–14, 616). All this indicates that in *Economy and Society*, "Sociology of Law" belongs to the book's first half involving the issue of economy and thus can be distinguished from the latter half, which is mainly "sociology of domination" or Weber's "political theory."

Obviously, the question with which Weber grappled is how the legal prerequisite for the development of modern capitalism, namely, law's "rationality," came into being. He ceaselessly searches for "rational" elements in the phenomena of legal history and meditates on how these concretely promoted modern capitalism. When he can find only "irrational" components in some legal phenomena, Weber resorts to a reversed analysis: how they impeded the emergence of modern capitalism. In other words, Weber confirms that there is an "elective affinity" between modern capitalism and law's "rationality." The mission of "Sociology of Law" is to trace the development of this "holy kinship."

There is only one true type of "rationality" in law, namely, "formal rationality." Weber assumes there is a "substantive" type of "rational law," and this concept has indeed been helpful to later legal historians and comparative lawyers. But Weber himself bears a heavy burden from German classical philosophy in using this concept. As a result, when he brings the conceptual tension, which might be superfluous for legal research, into his investigation,

"substance" naturally conflicts with "rationality," and there seems no longer any possibility of connections between the two. Thus, the only concept that can undertake the mission of "rationalization" is "form." Only this type of law could lead to modern capitalism. In a passage that most clearly demonstrates Weber's attitude toward the relation between law and modern capitalism, he asserts that the "*rationalization* and *systematization* of law" mean "increased *calculability* in the functioning of justice," which is "the most important precondition for the continuous operation of [capitalistic] economy" since it ensures "transaction security" (Weber, 1964: 646, italics mine). This passage is located at the beginning of the part on "the anti-formal tendencies in modern legal development," which reveals Weber's motive: if we indulge these "tendencies," then not only law's "rationality" but also the fate of all of modern Western capitalism will be endangered.

Weber's Anxiety and Decision

Of course, Weber was not an absolute advocate of modern capitalism and the "formally rational" law which seemingly matches the former. Otherwise, his works would hardly have attracted the interest of so many scholars. The metaphor of the "iron cage" in *The Protestant Ethic and the Spirit of Capitalism*, well-known even to laymen, reveals Weber's "anxiety" about modern capitalism and broader modern "rationalism." As mentioned above, scholars have resorted to a series of similar terms to depict this "anxiety." In "Sociology of Law," this "anxiety" most prominently appears in Weber's discussion of freedom of contract. In the second section, he spends a great deal of time on the "evolution" of freedom of contract, which is essential for modern capitalism. In his narrative, objective (*sachliche*) "purposive contracts" freely signed among market subjects increasingly prevailed over "status contracts" colored with status law and hierarchy, and cleared the way for the development of modern capitalism, which seemingly meant "progress" in law and freedom. Toward the end of the section, however, Weber suddenly turns to emphasize the discrepancy between formal freedom of contract and de facto freedom, which was of special import for laborers: while theoretically laborers can sign any employment contract with any content and with any entrepreneur, they actually are rarely able to bargain effectively since they have to survive in a market where workers are highly disadvantaged vis-à-vis managers, who possess all sorts of resources. Thus, "the result of freedom of contract is at first the opening of a chance for people who are good at utilizing goods in the market to obtain power over others in a manner unrestrained by [unreasonable] law" (Weber, 1964: 562). Ostensible freedom of contract cannot conceal the coercive force of the market. This abstract, anonymous, impassive capitalistic economic and legal

network can even make entrepreneurs feel compelled to obey its logic: anyone who does not obey economic "laws" will "totally lose the possibility of economic existence" (Weber, 1964: 563). Consequently, formal freedom smothers true freedom, and modern capitalism, originating in free will, ultimately forges an inescapable "iron cage."

It is in the last section, on "the anti-formal tendencies in modern legal development," that Weber further points out the "inevitable" and "insoluble" "conflict" between "form" and "substance" in modern legal thinking (Weber, 1964: 648, 654–55). Modern capitalism requires "formal" law, but the needs of practical life, the pursuit of substantive justice by disadvantaged groups, and ordinary people's demand to participate in justice all require emphasis on the "substantive" aspect of law. The paradox is eternal: "without the entire renunciation of that formal character immanent in a jurist, he or she can never fully satisfy [substantive] expectation" (Weber, 1964: 648).

Weber describes the relation between "form" and "substance" as conflictual, not dialectical. A dialectical relationship implies the possibility of reconciliation, but the resolution of conflict requires making a decision between options. The latter relationship is consistent with Weber's own "value philosophy": in the face of struggle among the gods, every truly modern human needs to choose his or her own god. Although Weber is troubled by the consequences of modernity, and although his concern is reflected in his vague literal presentations, his final choice in the field of private law is still identifiable. His theme and questions reveal that modern capitalism, which plays the role of "value relevance," is the core concern of "Sociology of Law." The more appealing issue of the "fate" or "freedom" of modern humans, albeit appearing to a greater extent in his other works, is not an urgent topic here. Modern capitalism, possessing "universal significance and value," was worth the lifelong attention of Max Weber, a "son of the modern European cultural world" (Weber, 1922a: 1). Only "formally rational" law, matching modern capitalism, is true "rational" law; other types of law are only imperfectly "rational" or are simply "irrational." When Weber speaks of "substantive" legal demands taking into account concrete situations and ethical elements, "irrationality," a "value judgment," thus emerges. It is noteworthy that concrete, equitable, and substantive legal claims could perhaps have been the "reason" in works of ancient philosophers.

Weber was a product of the bourgeois economy and culture of nineteenth-century Germany. Weber's grandfather was a linen dealer in Bielefeld, and the whole family had belonged to the commercial upper class for generations (Marianne Weber, 1988: 24). Weber's father was a lawyer and later an important leader of a bourgeois political party, the National Liberal Party (Marianne Weber, 1988: 26, 39–40). Weber's *Weltanschauung* grew out of such a world.

Of course, Weber was also a patriot who expected the Second German empire to become a "master nation" (*Herrenvolk*) (Weber, 1921: 258). Yet the economic path to realize this dream was the development of the country's capitalism. In his political-economic schema, the working class should give up their pursuit of class struggle and cooperate with the bourgeoisie in constructing a strong and capitalistic industrial-commercial great power and promoting and ensuring Germany's international status. Workers who were not conscious of this, in Weber's view, lacked "political maturity" (Weber, 1921: 28–29). Thus we can clearly understand why Weber was worried about the labor movement.

No matter how much sympathy Weber showed for the misfortunes of the working class in the German empire, in his fundamental *Weltanschauung* the thinking of this class was the opposite of the economic and legal "rationality" of the bourgeoisie. In other words, in "Sociology of Law," Weber "actualizes" the antithesis of "form" and "substance" into the struggle between the two main classes. If the bourgeoisie on one side of the antithesis represents "rationality," then "irrationality" has to be assigned to the proletariat on the other side. In Weber's "value philosophy," the two classes, driven by their own gods, are locked in a life-and-death struggle. Thus, concepts and "reality" perfectly accord with each other. This is undoubtedly a result of the application of dualistic thinking.

Yet reality does not have the symmetrical beauty of logos. In classical Marxist writings, since law belongs to the "superstructure," which does not play a decisive role in social development, it was to some degree neglected by Marxist authors. Nevertheless, Marxist writings on political economics and philosophy, especially as compared with Romanticism, the "superman" doctrine, the philosophy of struggle, and the life philosophy popular in bourgeois circles at the time, seem closer to the "systematicity" and "scientificity" that Weber pursued. In addition, the writings of the *Kathedasozialisten* (academic socialists), who belonged to the broad camp of socialism, do have a focus on law. For example, Anton Menger's work, which proposes a new system of civil law composed of the general part, family law, property law, obligation law, and succession law, relying on legal principles more consistent with the interests of the proletariat, seems to contradict Weber's supposition that socialist legal demands lacked rule-orientation and systematicity (see Menger, 1908). Even after the Second World War, the famous legal historian Franz Wieacker had to admit that "Menger's analysis was unanswerable as things were at the time" (Wieacker, 1995: 361).

What is more, no matter whether these socialist legal demands were "rational" or "irrational," they were almost impossible to achieve in the political structure of Weber's time, the later Second Empire. In this respect, Franz Wieacker

is honest to history: "in the nineteenth century the power structures of state and society saw to it that their immediate effect on legal scholarship and practice was very slight" (Wieacker, 1995: 355). The words of Kaiser Wilhelm II were more candid: "Socialist workers did not belong to the Fatherland" (Neumann, 1986: 263). In a historical background where the Social Democratic Party was unable (and to some degree unwilling) to work effectively in the parliament and the German judicial system was by and large dominated by bourgeois judges, it was unimaginable that the working class would be able to "manipulate" justice or even legislation and realize its "attempt" to "destroy" bourgeois legal "rationality." The reality was as follows: in the field of civil justice, the proletariat was prevented from advancing themselves through freedom of contract and association, means inherent in the legal system itself (Wieacker, 1995: 361); in criminal justice, "class justice" was even more prevalent, and judges used clauses on "extortion" and "disorderly conduct" (*grober Unfug*) to deal with strikes (Kroeschell, 1992: 35–37).

A Reconstruction of the Relation between Law, Capitalism, and "Rationality"

Political power in the Second German Empire was shared by the Hohenzollern dynasty, the imperial army, Junkers, the Catholic Church, industrial and financial tycoons, and the middle class. All these strata attempted to have a finger in the political and legal pie of the empire to satisfy their respective economic and political interests. Thus whatever change might have occurred in legal practice in Weber's time could only be the result of a change in the interests of these groups. Considering that the economy was mainly the arena of the bourgeoisie, it is reasonable to surmise that if at that time there were several changes in the practice of private law (which was highly related to the economy), they were perhaps the result of the development of capitalism itself.

Undeniably, in the first two or three decades of the twentieth century many new trends appeared in the practice of German civil law. The German Imperial Court of Justice (*Reichsgericht*) played a crucial role here. Through a series of judgments, the court broke through formal stipulations of the German Civil Code (the highest accomplishment of "formally rational" law at the time), and created a series of new rules and institutions in response to the enormous transformations in the economy and society. Simply enumerating these innovations, which were also discussed in Wieacker's work, clarifies whose interests were behind them: apparent authority, indirect representation, subordinated obligations in contracts and pre-contract obligations, faults in the conclusion of contracts, continuous and repetitive obligations, the relation between contracts and third parties, constructive transfers with retention of possession,

assignments of claims (*Vindikationszession*), the "relaxation of the abstractness of conveyances of property," and so on (Wieacker, 1995: 409–20).

All this happened within the horizon of capitalism. In fact, as previously mentioned, in "The Anti-Formal Tendencies in Modern Legal Development," Weber is aware of the "expectations" of some "interested parties of law" regarding legal practice. But he does not fully discuss these "expectations," nor does he observe whether such "expectations" had been realized in judicial practice or not. He finishes his discussion quickly and is even unwilling to tell us that these "interested parties" were actually the bourgeoisie. It is here that Weber finds a theoretical hole related to his *Weltanschauung*, one that would be difficult to fill once clarified: how is it possible that these "irrational," concrete, and interest-weighing legal demands came from the bourgeoisie, who in Weber's view are inherently in perfect accord with law's "rationality" and "systematicity?" Nevertheless, the legal reality of German capitalism did break up the Pandectist system. Law then existed in cases so that "it was impossible . . . to infer from the text of the Code what the law actually was, especially as regards general theory and the law of obligations" (Wieacker, 1995: 409–10).

Reality thus played a joke on Weber. But there is an even bigger joke: the "English law" problem. In Weber's view, English law was essentially "irrational." On the one hand, it was "formally irrational," since its concepts were not "abstract concepts which were formed through abstraction of the visible, through logical interpretation of meanings and through generalization and subsumption, and were not those which were syllogistically applied as norms," but were instead constructed through "certain and tangible facts which can easily be perceived in daily life." Also, since its practice and doctrines were completed "from one individual [case] to another individual [case]," there could never be any "system." On the other hand, English law was "substantively irrational" in Weber's view due to the wide use of the jury system and the tendency toward "kadi justice" by "justices of the peace" (Weber, 1964: 585, 653). It was under such doubly "irrational" law, however, that vigorous modern capitalism arose. Weber even has to admit that modern "rational" continental law could not rival its "irrational" counterpart: "by contrast, where both types of justice and lawmaking had a chance to compete with each other, the Anglo-Saxon way prevailed over and expelled the other way with which we were more familiar" (Weber, 1964: 653–54). Max Weber's academic honesty in the end exposed his theoretical gap.

But all this can still be remedied within Weber's own conceptual framework. In fact, in the text of "Sociology of Law," there are two sets of concepts concerning law's "rationality." The first is the system of "form" and "substance." The second is not so famous. In the first section of "Society of Law," when Weber

mentions law's "rationality," he does not directly propose the well-known four concepts, but firstly spells out in the clearest way wherein law's "rationality" lies. This conceptual system of law's "rationality" can also be seen as a further division of the concept of "formal rationality." Weber points out three directions or stages of law's "rationality." The first is generalization, or analysis, which means generalizing standardized reasons of judgments into legal theses, namely, explicit, calculable, and predictable legal rules. The second is "synthesization," namely the construction of complete legal relationships, which means combining legal rules into internally consistent but concrete legal institutions. The last step is to integrate all legal theses and institutions into a logical, internally consistent, and gapless legal system, namely, systematization (Weber, 1964: 507–8). These concepts also appear in Weber's analysis later in "Sociology of Law." For example, when he talks of the "rationalization" of ancient Roman law, his analytical standard is not "rationality" of "form" or "substance," but is clearly a system composed of analysis, synthesization, and systematization (Weber, 1964: 592–98).

Capitalism, at least "modern capitalism" as defined by Weber, does not require all the components of this "new" standard of law's "rationality." As early as 1972, David M. Trubek, who was then a loyal exponent of the law and development movement, faced the "English law" problem in Weber's text when considering the relation between law and capitalism. While today certain of Trubek's views seem out of date, he at least realized that Weber's conceptual system of "types of legal thinking" creates confusion rather than clarity. To solve the "English law" problem, Trubek gave up the concept of "logical formal rationality," and turned to more precisely emphasize that "predictability" or "calculability," which can be achieved in both continental and English law, is one of the crucial preconditions for the development of capitalism (Trubek, 1972: 736–48, 752). Trubek's intuition is right. Weber's fundamental definition of modern capitalism is "the pursuit of *profits* in the continuous, rational capitalistic enterprise (*Betrieb*): pursuing eternally renewed profits: pursuing *profitability*." Moreover, he repeatedly emphasizes that such capital accumulation is based on the "*calculability*" of technical factors. Thus, to ensure such calculability, "calculable law" is an external guarantee of modern capitalism (Weber, 1922a: 4, 10, 11, italics in the original). As long as the outcome of law is calculable and predictable, it can be included in the cost-benefit calculation of entrepreneurs, and can thus prevent the calculability in modern capitalism from the inference of "irrational" administration and justice. In this way, "calculable" law ensures the continuity of modern capitalism.

Such calculability can be fully achieved through the first and (partially) the second stages of the aforementioned system of law's "rationality." As long as

there are legal rules that are clear and fixed and various legal institutions that correspond to various realities of the capitalist economy, the accumulation of capital can start. This economic machine does not need to wait for the emergence of the German legal vendor in order to function. Capitalism does not pursue a pure system. Logical, internally consistent, gapless, and systematic law, representing the fullest achievement of "formal rationality," emerged only because of the attraction of logos for jurists who by nature had a tendency toward intellectualism, and to some degree because of the need of the absolutist monarchal states in early modern Europe to establish centralized bureaucracies, rather than because of the real needs of capitalism. Capitalism even conflicts with this system. As far as economic reality is concerned, new fields of investment, new transaction modes, new types of business operations, and new types of risks all require law to break free from its originally formal and even rigid framework and thus to substantively ensure such new social facts. This means "damage" to a seemingly perfect legal system. Yet it is such "damage" that endows the bourgeoisie with the impetus to seek profits in all corners of the world. Regarding this point, Weber himself admits that it is through the rejection of systematic continental legal thinking that English law shows its "'practical' adaptability" and "'practical' character" (Weber, 1964: 652).

Therefore, "rationality" in a "weak" sense, namely, rule-orientation, predictability, and calculability, is sufficient to guarantee the development of modern capitalism. As mentioned above, when Weber describes modern Western capitalism as having "universal significance and value" in the "Author's Introduction" of *Collected Essays on the Sociology of Religion*, he can clearly define the actual relationship between law and modern capitalism. Yet in "Sociology of Law," he raises this relationship to a level far beyond reality. He declares that the "rationalization and systematization of law" promote "calculability" and the "transaction security" of the capitalistic enterprise, but he does not provide any explication of how the former *exactly* and *necessarily* promotes the latter. Such a blind spot arises from a conceptual aestheticism: "rationality" flows simultaneously in various fields of social life, and it should at least exist in "ideal types" even if it is impossible in reality. Thus, in both modern capitalism and modern law, there must be the same degree of perfect "formal rationality." Capitalists and jurists hand in hand create a perfect human society. But Weber does not prove this assumption. On the one hand, he spent a great deal of energy on showing that the "Protestant Ethic" is the spiritual driving force behind modern capitalism, and we have to say that his argument is convincing. On the other hand, he hoarded his ink when it came to explicating the exact relationship between "formally rational" law and modern capitalism. This is because the relationship is difficult to substantiate. It is indeed an appealing

conceptual supposition, but also a kind of metaphysics. When this metaphysics faces the challenge of reality, Weber admits the tension between them and admits his own confusion. While he does not overcome metaphysics, what he has done here does reveal his virtue as a scholar.

The story is not over yet, since changes in legal practice in Weber's time were not limited to those listed by Wieacker. These "extra" changes were also determined by a new feature of capitalistic development: monopoly capitalism. German economic history after 1850 was a history of the increasing cartelization and centralization of capitalism. In almost all economic branches, but especially in particular fields like coal, steel, sugar, and the chemical industry, German entrepreneurs established large or small monopoly organizations through cartels, syndicates, amalgamations, the expansion of fields of investment, and other methods. In doing so, entrepreneurs attempted to achieve various goals including eliminating competition, controlling prices and output, uniting the purchase of raw materials, uniting sales of products, and dividing the market. Under such circumstances, middle and small enterprises were increasingly squeezed, and industrial and financial giants came into being. In 1915, the number of enterprises in the Coal Syndicate of the Rhineland and Westphalia was only 57, but the production quota assigned to each member was 1,600,000 tons. This syndicate, along with several other counterparts, enjoyed an 80 to 90 percent share of the nationwide market for coal. Likewise, enterprises became much bigger. At the beginning of the First World War, the number of workers employed by Krupp and the Gelsenkirchen Mining Corporation stood at 80,000 and 30,000 respectively (Mathias and Postan, 1978: 557, 560).

These new economic phenomena demanded legal recognition. In 1897, the Imperial Court of Justice for the first time recognized the legal status of cartels. But cartels wanted more. What is noteworthy here is the relation between these new phenomena and law's "rationality."[3] Of course, the emergence of monopoly capitalism led to increased "rationalization" inside these large enterprises. In the field of "sociology of domination" or "political thought," Weber notes this point and worries that such new bureaucracies would suppress human "freedom" just like bureaucracies in the modern state (Weber, 1921: 139–152). Outside monopoly organizations, that is, among (not inside) monopoly enterprises, however, more interesting changes in law were taking place. When the "market" no longer consisted of innumerable small and medium-sized entrepreneurs with nearly equal amounts of wealth, but instead consisted of dozens

3 My analysis here is stimulated by works of Neumann and Unger (see Neumann, 1986: 266–85; Unger, 1976: 181–92, 216–20).

of oligarchs, the new economic nobility considered general "rules" meaningless. Each agreement concerning production, sales, or division of the market no longer relied on abstract rules, but rather on the arbitrary cutting up of the profit cake. Oligarchs did not need abstract and neutral legal rules to protect their interests. Rather, through close connections with the state machine, they could easily manipulate and even impair legislation and justice, and could thus more directly achieve their interests. If the state attempted to regulate monopoly capital, abstract legal rules would lose their original meaning in the face of the handful of economic subjects. Hence, the classical and liberal concept of *Rechtsstaat* was challenged. The most obvious example of this challenge was that during all of the Weimar Republic, the birth of which Weber witnessed a year before his death, using the emergency right (*Notrecht*) stipulated in Article 48 of the constitution, the Weimar presidents issued innumerous ordinances (*Verordnungen*) that interfered in various fields including the economy, society, finance, and politics (Schmitt, 2006: 211–57; Schmitt, 2004). These ordinances were alleged to have the validity of positive law, but most of them were in fact orders directed against concrete persons, organizations, and property, and thus were not rules. The discretionary power of judges was also expanded drastically. Instead of relying on specific rules of the Civil Code, judges now resorted to general principles like good faith and good morals, and were inclined to make highly concretized decisions based on case-by-case interpretations of these principles (Unger, 1976: 216–17). It was thus unsurprising that Carl Schmitt, active in this period, was "enlightened" by this judicial practice, and declared that all law is "situational law" (Schmitt, 1985: 13), or not "law" at all.

In Weber's time, free market capitalism developed its own antithesis, and this antithesis exhausted the "rationality" pursued by Weber. The internal rules of cartels destroyed the unified systems of "legal science" and the Civil Code. Moreover, for the remaining few "market subjects" (i.e., monopoly organizations) after brutal annexation wars, their acts and interests did not need the guarantee of general rules, but could instead be promoted through concrete compromises and decisions varying from case to case. At the same time, both legislation and justice, whether attempting to cater to or regulate the situation, walked in the path of concretization and de-rule-orientation. Certainly, some sort of "predictability" did remain, since big capitalists manipulating the parliament and the courts knew exactly what they could gain from "law." Yet for other "market subjects" (if there were any), it was almost impossible to "predict" anything with certainty in view of erratic legal practice. The time of law's "rationality" had passed, and systematization, rule-orientation, calculability, and predictability had nothing to do with the new "law." Consequently,

within the horizon of capitalism, true "irrationality" (even in Weber's sense) came into being. Weber remained silent in the face of these new phenomena, since they were something that his metaphysics of "rationality" could hardly confront.

Conclusion

Nearly four decades ago Alan Hunt pointed out that Weber "never broke consistently with the idealist tradition." To demonstrate this, Hunt took Weber's writings on "methodology" as an example, and pointed out that whether in his "methodological individualism," his "value-free" doctrine, or his "ideal types," there are transcendental elements throughout. Once Weber applies this "methodology" to empirical studies, his achievement in the aspect of "objectivity" of social science is inevitably undercut (Hunt, 1978: 97, 99–101). Around the same time, Maureen Cain traced the idealist components in Weber's "Sociology of Law." In her article, she especially emphasizes the "ideological" elements in Weber's statement about the relation between law and capitalism. In her view, Weber draws his definition of capitalism from classical liberal political economics, which impels him to consider "market rationality" the fundamental element of the ideal type of capitalism. Starting from here, in Weber's theory, "rationality" gradually becomes the key bridge linking capitalism with other fields of social life. Weber then became increasingly confident that both modern capitalism and modern law (as well as other fields of modern society) enjoy the same degree of "rationality." When faced with the "English law" problem, Weber could only regard it as a "deviant case," and he was unable to clarify it theoretically (Cain, 1980: 79–82).

To a great extent, the present article is a continuation of these two studies. Through clarification of key concepts in Weber's "Sociology of Law," namely, the types of "legal thinking," this article has sought to reveal how key concepts in German idealist philosophy deeply influenced Weber's thinking and writing. This ingrained influence even turned Weber's supposed empirically based conceptual system into an almost purely idealist system. This philosophical thinking in turn affects Weber's selection, analysis, and judgment of materials in legal history. The tool of idealism is even used by Weber to describe and define practical class struggle. In the end, Weber's ultimate position both in theory and practice is determined by his fundamental economic faith.

Basically, as Cain pointed out, it is Weber's construction of the ideal type of "capitalism" that reveals his being and his limits. In Weber's *Weltanschauung*, "capitalism" is perfect and lofty: countless entrepreneurs with almost the same

degree of intelligence and capital, motivated by the "Protestant Ethic," abandon the constraints and temptations of "hedonism" and "traditionalism," and turn to diligently accumulating capital for the purpose of obtaining the grace of God. Entrepreneurs are an incarnation of "rationality," and a market composed of entrepreneurs necessarily contains a high degree of "rationality." The law corresponding to this situation is bound to possess the highest level of "rationality." Since this ideal type in essence describes capitalism at the time of Adam Smith, it can rarely take into account subsequent capitalistic phenomena. Moreover, whether in *The Protestant Ethic*, in *Economy and Society*, or in *General Economic History* (*Wirtschaftsgeschichte*), Weber, a "political economist," does not clearly construct an ideal type of monopoly capitalism, not to mention types of domination and law corresponding to this new type of capitalism. All this renders Weber unable (or unwilling) to consider the fundamental origin of the "anti-formal" and "irrational" trends in the legal practice of his time. That Weber's understanding of "capitalism" is limited to that of the Smithian free market reveals his fundamental *Weltanschauung* and class stand. Although Weber expresses concern about the expansion of modernity to many other fields of society (e.g., bureaucracies), on the question of capitalism and private law he inevitably prefers to surrender to the "iron cage" of modern law. It is exactly here that Weber uses the most typical weapon of his camp to defend his position: "rationalist" idealism (see Lukács, 1971: 110–49).

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