

## 傳統法曹倫理形象 - - 以清代官箴與規範為核心

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近年來隨著各法曹倫理規範與相關法規的頒定以及法律倫理學討論的勃興，台灣其實正經歷著一次屬於法律倫理學的繼受。而在這樣一種求新求變的繼受浪潮下，其實也正是重新檢視「自我」的契機。因為面對繼受所帶來的變局與挑戰，本文堅信在吸收外來新事物的同時，必須更加仔細的檢視固有。惟有對於自我的透徹理解，才更有可能掌握他者的脈絡，進而摸索出未來發展的方向。

深入思考倫理議題之性質，可發現倫理判斷與相應行為模式的選擇乃具體情狀與時空下所作出的價值抉擇，有其獨特的「背景文化脈絡」，而法律專業倫理所致力探討者，無非是法律專業人士如何完善並促進其於社會角色中的責任。所以一切倫理議題之本源，為一文化性問題，而有其歷史的澱積與思想的軌跡。故本文以文化考古的方式，選擇從傳統素材入手，歷經清代官箴書、法規範等各面的爬梳，描繪出傳統社會脈絡下司法官倫理的一方剪影，以整體勾勒出傳統司法官的倫理形象。

而在重建「自我」以與西方對話的過程中，首先必須形塑傳統「法律專業」與「司法官」等概念。無論是「專業」還是「司法官」，皆係特定歷史脈絡所發展而成的「專有名詞」，故難用於傳統中國法文化脈絡的探討上。但相對地，經由傳統治理制度與思想的爬梳，可從中定位法律專業的文化座標，發現傳統意義下的司法官存在脈絡。在這當中，便交織成一種專屬傳統中國法文化的「特殊性」，且註定使西方專業化理論視角無法詮釋傳統中國法律職業乃至專業倫理的歷史。

在「特殊性」的描繪下，可進一步看到清代權威官箴《學治臆說》所表現出的司法官形象與價值特點：在「父母斯民」的使命下，凡事皆須「盡心」但卻又孤立無援而必須孤獨奮鬥是倫理州縣官的最佳寫照。汪輝祖所揭示「官須自做」、「以勤為上」的官箴哲學，其背後實承載著沉重的倫理責任。同樣地，經由當時官箴文獻與法規範面交互映證所呈現出的倫理難題中，可看到「才識」與「妥速審判」之倫理要求係無論清朝或是現代政府皆納入政策之一環而予以編入司法官倫理責任的體系之中。不過由整體政治環境、思想傳承、社會人際網絡等背景所交織而成的「特殊性」，使得傳統中國在這兩項議題上所面臨的倫理危機與其所呈現的脈絡與現代迥然。從中可看到，依違於「官」與「吏」之間的責任拉鋸與職務定位，使關於「才識」的討論容有灰色地帶而讓職責疏闊的州縣官得有喘息的空間。又以中央集權等概念為出發點，披上倫理責任外衣的高壓職權管制與究責機制，否定了各下級地方司法官員自主與彈性審理事務之可能。故為避免被動地居於被彈壓之地位，各種規避處分之惡習便於實務上油然而生，整體上這便代表著倫理責任體制的崩潰。

面對如此前車之鑑，本文試從「回應社會」的觀點進行反思：倫理責任與社會是處於一種相互影響的關係，任何形式的倫理訴求不光是在這個社會背景中運作，且是被構成這個社會背景的互動形式所影響與形塑。從君王（上層統治階級）- - 地方官吏 - - 民人之三階社會結構以觀，清代司法官倫理概念的共識形塑集中於中階的地方官吏，而從上層統治階級而來的，以《處分則例》

為代表的種種司法官倫理規範，並不是一種「互動的語言」、「人際交往的成果」，更非「穩定的相互期待」。身處中階的地方司法官僅能於嚴苛的規制下掙扎，以德相尚、以勤自勵，努力維繫危在旦夕的倫理秩序，但終告崩潰並讓始終難以參與討論的民人階層受傷最重。所以社會中應有維持並保護溝通管道整全之機制，國家法律應予「自發性法律」發展的空間，實質的法律判斷、價值、倫理抉擇應盡量留給人民經由自律規範作出。這便是本文對於當今法律專業倫理繼受浪潮所提出的反思。

## The Judicial Ethics in the Official Handbooks and the Law during the Ch'ing Period

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In recent years, by the discussion and the promulgation of the rules of professional conduct for the lawyers and the judicial system, Taiwan experienced a movement of the reception of legal ethics. In this tide of seeking change and new theory, we should review our tradition and society carefully so that we could know the social and historical context and the future of our legal system.

Considering the nature of the ethical issues, the judgment of right and wrong or choosing between alternatives with ethical awareness is always based on a specific social context. And the subject of the ethics of the legal profession is: what is the social role and duty of the legal profession and how to facilitate it? This thesis presents an effort of cultural study in order to explore the history and thoughts of legal ethics. Through the review of the official handbooks and the regulations about the ethical conduct and duty of the judiciary during Ch'ing period in imperial China, the thesis presents an image of "good" under the traditional context in Chinese society.

In order to communicate with the West, the first thing to do is reconstructing the meaning of the traditional "legal profession" and "the judiciary". The modern meaning of the words originated from the European history so it is hard to use this kind of words in the discussion of tradition China. Instead, through the description of the traditional governmental institution and thoughts, we can find the existence of traditional legal profession, the traditional meaning of the judiciary and the most important - the particularity.

Through the process of describing the particularity, the character of the professional image of the judiciary is "treating the people as your child". Having to do the best in whatever you should do but you have no one to help you is the best description of the working environment of the traditional judiciary. The actual meaning of Hui-Zu Wang (汪輝祖)'s philosophy of the administration of local government is the reflection on the overloaded professional responsibility. Similarly, the demands for abilities and a judgment without undue delay are the common ethical rules for both traditional China and modern countries. But the particularity of traditional China makes the related context different from the modern - The competition for power between KUAN (官) and LI (吏), the strict responsibility from the order of the emperor in order to protect his benefit. All of this elements contributed to the collapse of ethical order in late imperial

China.

At the end of the thesis, a reflection on the failure of the traditional ethical rules is presented. The ethics of legal profession should be constructed on the basis of "reflexive law" . An efficient legal system of legal ethics should be a system of expectancy which is consists of language of interaction. To achieve this, not only the upper class, the members of the entire society should communicate with others so that a reasonable standard of ethical conducts for the legal profession could be born in near future.