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# Chinese Legal Culture: In a Western Scholar's Eyes

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Professor Robert Heuser, a well-known German sinologist and jurist, has published a book entitled *Outline of Chinese Legal Culture*. In this book, Professor Heuser describes and interprets Chinese legal culture from the perspective of a Western scholar. He offers Chinese scholars and their Western counterparts a series of instructive and challenging chapters on legal culture. The special value of the book lies in the following.

First, it seems that systematic researches like this have not been seen in the West, though there have been many studies of the Chinese legal system.

Second, in addition to his use of methods and theories accepted in the West, Professor Heuser conducted thorough research into Chinese works on legal culture in recent years. In this sense, we can say his book is also a summary of studies on Chinese legal culture in recent times.

Third, based on his experience and knowledge from years of study of the Chinese legal system, and on the latest first-hand materials he acquired through his own observations and accumulations in China, Professor Heuser offers detailed analyses of the legal culture displayed in legal norms, which makes his work profoundly convincing.

Fourth, the author has not only undertaken a long-term study of the Chinese legal system but has spent much time and energy observing the process of China's reform and opening up. He has a clear understanding of the guidelines on the rebuilding and development of the Chinese legal system, and makes a thorough analysis of the legal culture displayed in the system.

Fifth, for purposes of interpreting the sources of Chinese legal culture in history and the culture's tradition, Professor Heuser calls on his broad knowledge of historical works in this all-round, systematic analysis of the development of Chinese legal culture and its legal system. Starting from the legal concepts and thought of ancient Chinese society, he makes brief but to-the-point presentations on the evolution and development of the Chinese legal system in major historical periods, such as the pre-Qin Dynasty period and the dynasties of Qin, Han, Tang, Song, Yuan, Ming and Qing. A splendid outline of Chinese legal history is fully exhibited in this book. Though this part of the volume is relatively brief it reflects the author's high capacity and extensive research.

Sixth, to explain the Chinese legal system as a major component of Chinese legal culture, the author gives a briefing on the contemporary Chinese legal system thus making his argument on legal culture more profound and convincing.

To sum up, Professor Heuser's new book is the result of admirable research on the Chinese legal system and culture by Western scholars and can be welcomed as the best summary of research in this field. The special features of the book are as follows.

## I. Thoughtway

The first two parts of *Chinese Legal Culture*, namely the Introduction and the part dealing with components of Chinese legal culture, are the most brilliant in the whole book. In these two parts, the author provides a clear and thorough picture of the outlines and characteristics of Chinese legal culture, though with some ideas I cannot agree.

First, Professor Heuser gives a correct interpretation of the essence and connotation of legal culture and, on this basis, provides further explanations of the relations between legal culture and legal order. He holds that legal culture and legal order are two distinct concepts. Legal culture contains legal order, while paying much attention to the factual connections between regulation and system (living law) as well as their resources in the history of law. Legal order is understood as the overall body of existing laws and regulations, judicial interpretations of laws, and the building of State organs and their jurisdiction. On this point, Professor Heuser says that a "national culture is the combination of various components: historic experience, social habits, real needs and outside influence that have different degrees of strength in different times join hands in creating a national culture and its legal culture in particular." This point was also made by Lawrence Friedman who once said, "First there are the forces of society and legal rights that make or create law, and then, the law itself, finally there is the effect of the law on human behavior."

Based on this idea, Heuser sums up the components of legal culture as follows: First, legal thought, namely concepts and value judgements that arise as social phenomenon. This idea must first be observed as the legal philosophy of a concrete theory and, second as a kind of legal consciousness of social reality. Second, legal norms are a combination of the behaviour and manners expected by people. Third, the legal setting, that is, the setting for creating and realizing law, namely, legislatures, judicial organizations, procuratorial sectors, and administrative organs. Fourth, the theory of legal methods, such as legislative skills, the skills with which judges apply laws, and the skills employed in for making legal documents. Professor Heuser believes these four factors are permanent and inalienable in any legal culture, no matter which perspective is taken, from history or reality, Europe or China.

## II. Research Methods

First, the author uses the method of arguing from history and proving from reality. In other words, he makes judgements by introducing historical materials and then supports his judgements by using examples from history and reality. It must be said that this is the striking characteristic of the whole book. It is his resort to this method that yields clear-cut ideas supported by full, accurate materials. The author cites Kurt Sontheimer, a German political scientist:

"Every political culture is connected to a certain part of a tradition which came into being in history and has sustained its existence till the current time. A political culture in a particular society is usually rooted in the sustainability of historic, political consciousness and behavior manners, which have a part to play, more or less,

in history and the moment. Our interest in history firstly arises from our wish to know what has been extended from the past till the current time and to what degree we can realize their reasons in history from the contemporary phenomena.”

After reading this, we can see that the purpose of the author’s study is to lay bare the reasons for the occurrence and development of Chinese legal culture. It is obvious that he has done much research on Chinese history and culture, and on the history of the development of Chinese legal history in particular. His ability to interpret Chinese legal history reveals his impressive mastery of the relevant historical materials.

Second, the author sets out from a particular social basis to analyze a legal culture that is founded on that basis. Starting from the well-known view that “where there is society, there is law” (*ubi societas, ibi ius*) he observes the basis for the occurrence of law and legal culture by focusing on particular social situations and backgrounds.

In his analysis of the basis and background of Chinese legal culture, Professor Heuser underlines several neglected items of great significance to the understanding of Chinese society: China’s long-term tradition of small-scale peasant economy and its transition process, migrants and urbanization, the issue of capital transition from administrative control to social readjustment, special labour relations and corresponding social issues, such as population, environment, education, crime. No doubt, Chinese and Western society differ as regards all these matters.

As to the influence on its legal system or legal culture, of China’s reform and opening-up Professor Heuser, using methods of dynamic research, focuses on several key questions that have determined the development of China’s legal system in recent years. Starting from the perspectives of social and cultural development, he analyzes Chinese discussions of matters such as, “rule the State with law”, “rule by law” and “rule by man”, “State under the rule of law”, the realization of a “socialist market economy” as a new basic social value, issues involving awareness of law and education of law, and even the difference of the awareness of legal culture in China and in the West. To make clear the situation of awareness of law, he adopts first-hand materials from his social survey. In this regard, it can be said that his research takes account of the latest developments, in Chinese legal culture and its background. His text will be of value to students and officials in the West who wish to understand the basic situation of the Chinese legal system.

Third, the author analyzes the legal thoughts that determine the development of a legal system. He believes that legal thoughts are an integral part of the thoughts of the philosophy that reflects social order, relations between the ruling and the ruled, and the status of individual groups in society. Here he makes a profound interpretation of the thought background of the development of Chinese legal culture as it existed in the past and as it exists at the present time. The subjects he refers to include the legal thoughts behind the European legal systems and the idea of “transplanting Western knowledge with the Chinese one as the matrix”, by the reformers of late Qing Dynasty before 1949, those of the Soviet union, Karl Marx, Lenin and Mao Zedong after 1949, of Deng Xiaoping during the reform and opening-up period after the late 1970s, and the socialist market economy period after the mid-1990s. All this reveals the author’s remarkable knowledge of and meticulous attention to the detail of the of thoughts on Chinese legal system.

Fourth, the author offers an in-depth investigation of law awareness, which is a major part of legal culture. A nation's awareness of law is one of the main indicators of the level of development of its legal system. To understand and evaluate a nation's awareness of law, in-depth investigation and careful observation of social life are prerequisites. Professor Heuser has achieved a success in this area. As spectator and investigator, he takes advantage of his long-term involvement and observation, as well as a social survey, to make basically correct depictions and judgements about the awareness of law in Chinese society.

Fifth, the author adopts reliable comparative methods. As already mentioned, he believes the maxim "where there is society, there is law" is applicable in Chinese society. However, Chinese society and its political structures are far different from those of the West and the status and role of law are also different from their Western counterparts. Therefore, horizontal and vertical comparisons must be taken at the same time. Horizontal comparison means that when we investigate the Chinese legal system we must investigate our own legal system and legal thoughts; vertical comparison means that we should start from the perspective of history to investigate the experience of a particular Chinese legal system and its influence on a modern one. From the whole book we can see that Professor Heuser has adopted just this kind of method.

Lastly, the author studies the legal system. After a penetrating analysis of history and tradition, as well as the *de facto* conditions of society from which Chinese legal culture originates, the author starts his all-round, systematic investigation and interpretation of the existing Chinese legal system.

In the third part of the book, the sources of Chinese law, Professor Heuser makes a full, detailed interpretation of the sources and procedures of the existing Chinese legal system and its hierarchy, e.g., laws, regulations, international law, domestic law, policies and directions, court judgements, judicial interpretations, customs, legal theories, legislative procedures, etc. He summarizes the characteristics of each of these sources. After this, he provides a general introduction to specific legal systems involving not only substantive law, such as public and private law, but also procedural laws, such as constitutional law, international law, international private law, administrative law, civil law, criminal law, judiciary organizations, lawyering system, and corresponding procedure law system as well as some interpretations for specific laws and regulations. In his eyes, "legal regulations are the components of every culture, and thus the research in such regulations has almost the same value as literary research and religious research in the cognition of a culture and value judgment of a society". Because "every society displays through its laws the most inherent secrets of the behavior manners of its people that live in groups", the research of a legal culture is in fact an important channel for understanding a country's culture.

Professor Heuser's research on these matters results in the production of an invaluable panorama on the Chinese legal system. His book provides Western scholars with the latest, most complete scholarly study thus far available for the study and understanding of the Chinese legal system. As far as I know no single scholar has ever before made so thorough an introduction to Chinese legal culture for Western readers.

### III. Meritorious Views

In his study of the Chinese legal system and corresponding legal cultures, Professor Heuser raises ideas that differ from those of some other Western scholars. First, the issue of “legal family”. Comparative law scholars in China and other countries have not solved a very important issue that has existed for a long time, namely, whether the Chinese legal system can be the basis for an independent legal family – the Chinese legal family. To this question, Western scholars provide many answers and disagreement continues. Professor Heuser adopts a simple approach: he divides all legal systems in the world into two families, the Continental family and the Anglo-American family.

After some basic discussion of the two families and an interpretation of the contemporary legal system, he holds that to solve the question of which family the legal system of the People’s Republic of China belongs the following aspects should be considered.

- a. The main sources of Chinese law are codified. This means the basic structure of the existing Chinese legal system follows the model of the European Continental legal system.
- b. The Supreme Court of the PRC adopts “opinions” for its “legal interpretation”. Though its opinions are binding on inferior courts, they are essentially different from judicial opinions in the cases of the common law system. On this issue, professor Heuser’s statement is penetrating. He says this kind of legal interpretation is not for individuals and “in case and controversy”, instead, it is a kind of abstract filling in of the gaps in legislation (“abstrakte Ausfüllung von Gesetzeslücken”). It is a kind of legislation and is not similar to the case law of Anglo-American legal systems. His view on this aspect is really instructive for Chinese scholars because some of us often point to judicial interpretations from within the judicial system as examples from which to argue that China has the basis for case law and that we should model on the case laws of the Anglo-American legal system.
- c. A socialist legal system still exists in many parts of the Chinese legal system and exerts much influence.

In the end, Professor Heuser concludes that “categorizing the Chinese legal system as either of the two systems will no doubt miss the point though discussions may be allowed on putting the system under the Continental Legal System. In observing the Chinese legal system, we should not hasten to put it under any system, rather, we should regard it as a self-generating (*sui generis*) legal culture.” Seen from studies of Chinese legal system in the past, Professor Heuser’s view is unique. It is obvious that he interprets the Chinese legal system and culture as independent, self-governing systems.

What should be emphasized is that Professor Heuser does not analyze and evaluate Chinese legal culture and its corresponding system from the standpoint of a “socialist legal system”, as is done by most Western scholars on the issue of legal family. This is really commendable. For a long time, many Western scholars, and even some Chinese

comparative law academicians, believed the Chinese legal system should be categorized as a socialist legal system. Professor Heuser does not deny such a point directly but neither does he accept it.

Many Western scholars, including some prestigious ones, such as Rene David, Zweigert and Kotz all put the legal system under the category of a socialist legal system. Rene David, nevertheless, has also realized that “socialist bloc countries belonged to Roman-German legal system”, but “the system was abolished after the communists’ victory though it really once got a priority status “It must be pointed out that such an idea of “ a socialist legal system” lacked scientific grounds from the beginning. It is obviously a demarcation based on ideology and politics. From the views of Zweigert and Kotz, we can find its reasons. They said that, “if people study the laws of socialist countries with the method of modern science of comparative law, they will come to understand that these countries are just like Western countries in readjusting many fields with law. Though there are many ideological differences, similar questions in life are always solved with similar means”. It is well known that the so-called East European “socialist bloc” collapsed quickly after the late 1980s, and the so-called socialist legal system is no longer a topic. Whether the “socialist legal system” has ever existed is still a question. For a correct understanding of the legal system of former socialist countries it is necessary to conduct new investigations.

Second, the *status quo* and structure of the Chinese legal system. As an expert who has studied the Chinese legal system for many years, Professor Heuser knows the development of the system well, including its origin and evolution. He points out that Taiwan’s legal system has a *de facto* inheritance from the German legal system. Importantly, he recognizes the direct relationship and indubitable joint historic and cultural basis of the legal systems of Taiwan and the mainland. He also interprets the historic sources of the legal systems of Macao SAR in Portuguese legal system and the corresponding property from the German branch of the Continental Legal System. Meanwhile, he points out the exception of Hong Kong SAR’s legal system due to its origin from the United Kingdom.

Third, the basic characteristics of Chinese legal culture. Professor Heuser notices an important point, namely, that the sources of the traditional system comprise habits, moral rules, *li* (rites) inherited from history, and *fa* (statutes) passed by rulers. The basic characteristic is the combination of law and ethics. It is possibly due to this that the question can be answered why ancient China did not have an independent civil law or private law system like that of the West, but could nevertheless survive so long without a private law for adjustment. As to this question, many Western scholars, and even some Chinese scholars who have been unnaturally comparing Chinese laws with Western laws, have not been able to see it clearly and give an interpretation.

Besides this, Professor Heuser explains the relationship between *li* and *fa* or *lǚ* (the last two are the same), such as the rule “*chu li ru xing*” (courtesy first and criminal procedure second), and points out that in traditional Chinese concepts, “*fa* is the rule following *li*”, that “*li* is the primary rule while *fa* or *lǚ* is the rule for penalty”. Positive laws are considered subordinate rules inferior to moral rules which are the basic rules of social life. I believe it important that Professor Heuser points this out because it indicates the basic components of traditional Chinese legal culture and the features of

legal culture displayed in these components. Realizing this point is the prerequisite for a correct understanding of the operating mechanism and realizing process of the traditional Chinese legal system.

It can be said that those who do not realize that *li* in traditional Chinese culture is an important component of legal culture cannot possibly realize and interpret Chinese legal culture; those who interpret Chinese legal culture with *fa* or *lii* in Chinese history alone, whether they are Western scholars or their Chinese counterparts, have in fact not realized the essence of Chinese legal culture. It is due to this realization that Professor Heuser takes time to explain *li* and *fa* or *lii* and the relations between them. His mastery of the key point of Chinese legal culture results in a very valuable discussion. Professor Heuser also mentions other features of Chinese legal culture, such as the underdevelopment of property law, accepting duties as a standard, the concept of reducing lawsuits, and the place of mediation in China, etc.

Fourth, prediction as to the future of Chinese legal culture. After examining Chinese legal history from the perspectives of history and reality, Professor Heuser proceeds to consider the future. He believes that, after more than two thousand years of sustained independent development, with its own thoughts and social features, Chinese legal culture started to accept the influence of Western legal thoughts during the period of contact with colonialist and imperialist forces in the mid-19th century, and has embarked on a new period of new creation. This process is still going on today, the inheritance of former legislation, partly because of social, and economic requirements. To be specific, this process, on the one hand, displayed in the growth and role of traditional "factors exerting a subtle influence" (such as habits and practical rules), and, on the other, in rapidly growing social, economic and political concepts as well as corresponding legal system concepts which are unknown and challenging to traditions. It is these challenges that prompt the modernization of the traditional Chinese legal culture and reveal drastic changes of major social reform.

In one word, Professor Heuser believes contemporary Chinese legal culture is in the process of transition, the specifics of which are as follows:

- (a) The transition of norm systems. That is, the personal relation standard based on a small-scale self-sufficient peasant economy is being transformed into a contract based standard of a complex social economy; the traditional standard system of social habits is developing gradually towards the legal order system of legal norms and legal systems realized through contracts.
- (b) The transition of norm direction. This refers to the transition of the standard of vertical responsibility, reflecting a patriarchal society, towards a horizontal right-duty relationship characteristic of a market economy, thus changing the traditional concept that "harmony is more important than anything else" into a striving for rights and, correspondingly, making the traditional concept of reducing and rejecting lawsuits develop in the direction of accepting lawsuits and judicial protection.
- (c) The transition of the state's legislative function. This refers to a change from focusing on penalties for violating social moral norms to focusing on the adjustment



of means for realizing the state's economic goals and conflicts of interests and the protection of personal rights.

- (d) The transition of power distribution as a result of social division. This refers to the transition from a small-scale self-sufficient peasant economy, an agricultural and industrial economy adjusted by the State, to a multiple ownership and capital investment regime under which the former administrative control systems change towards a "society of bourgeoisie" where relations are governed by laws.
- (e) The transition of the ruling structure. This means that law is changing from the tool of the ruling class into the means of restraining uncontrolled political activity: from the "rule by law" (legal system) to "rule of law".

Based on these observations, Professor Heuser develops his ideas. He believes that the history of contemporary Chinese legal culture is one of change which started at the beginning of the 20th century, increased in the 1980s, and will last into the 21st century. China's entry into the WTO will quicken the rate of change. As to how China's political and social systems will change, the Chinese people will have the final say. This is hard for scholars of "sinology" (*Chinawissenschaft*) to speculate.

#### IV. Some Points that Could be Discussed

Excellent as it is, there are some points to be discussed in Robert Heuser's outstanding study.

First, there are some questionable points about the way certain materials are used. For example, with regard to the statute law in the earliest dynasty of Qin, Professor Heuser says the "Qin Law" only had Criminal Rules and Administrative Rules, but this was not the case. According to the bamboo slips on which Qin Law was written, there were many rules relating to civil cases. There can be two explanations for this:

1. Evidence that in ancient China there was no distinction between criminal rules and civil rules;
2. Although *li* played the part of "civil rules" in ancient China, it does not mean that "civil rules" were totally excluded from laws and statutes. On the contrary, in the statutes and precedents of every dynasty, civil rules and criminal rules were usually written in the same law.

Another shortcoming is that, though Heuser rightly says property law in China is far from developed, he fails to give a thorough explanation of this from a sociological or historical point of view. He only offers a few words about the social background of Chinese legal culture without relating it to the specific principles and system of laws.

Secondly, there are a few defects in the discussion of the characteristics of contemporary Chinese legal culture. Heuser provides a vivid metaphor: "Traditional Chinese law, the influence of the Western World and that of the Soviet Union are the three legs with which Chinese legal culture can walk". However, what Heuser fails to see is that this represents the characteristic of only a certain stage of modern Chinese legal culture. Besides, the influence of the former Soviet Union is being replaced by the influence

of the Western World. The age of what he called “three legs” is fading away; the future Chinese legal culture will be simplified, there will be “two legs” – traditional Chinese legal culture and Western legal culture. Of course, the influence of traditional Chinese culture on Chinese legal culture will continue though there will be changes and elimination of the systems born in traditional Chinese legal culture. The reason is, as Heuser says, “The fact that an old system is not carried out does not mean that the people who brought it into being are not influenced by it any longer”. “Chinese legal system is going to exist with the burden of its influence on every other system of the nation. We are studying a law that is living, if not literally, at least spiritually. And this law is probably going to live for generations until the old system melts ...”

Thirdly, Heuser expresses some personal views that are arguable. As I have emphasized, his survey and interpretation of the characteristics of Chinese legal culture are profound and significant; however, there are several arguable statements. Here I only want to make an argument on one of them. Heuser holds that “pragmatic rule versus rule of law” is a characteristic of Chinese legal culture.

The argument goes as follows: Because law or other rules provide individuals with little protection while seeking social and economic security, individuals are forced to rely on personal relationships or such methods as “stratagems” and “cheating”. To explain it further: Because there exists little law protection in China, stratagems as a ‘kind of indispensable means of living’ came into being more immediately than other things. The tradition of such a pragmatic rule and the related violation of law and moral norms can be seen everywhere. And these are important characteristics of Chinese legal culture, which is an obstacle to modernization, and hence an obstacle to legal culture.

As to Robert Heuser’s statement about this feature of Chinese legal culture, some defects appear in the following three areas: methods, logic, and materials.

Firstly, with regard to methods, he confuses such phenomena as “stratagem” and “cheating” with convention. What is worse, he even classifies occasionally-appearing phenomena as culture, only to draw the absurd conclusion that “stratagem” and “cheating” are one component of Chinese legal culture. In reality, the widely accepted “Thirty-six Stratagems” in Chinese history represent an excellent collection of stratagems. However, stratagem has nothing to do with cheating, and it is a mistake to classify stratagem and cheating as one component of Chinese legal culture on the basis of this fatal misunderstanding. Furthermore, it should be mentioned that there are few Chinese who really know the “Thirty-six Stratagems”. Although there are some people who use a stratagem from the “Thirty-six Stratagems” consciously or unconsciously, this does not prove that “stratagem” and “cheating” are one component in Chinese legal culture.

It is true that nowadays in China, with the development of the economy, there are indeed many loathsome “stratagem” and “cheating” phenomena, especially since the time of reform and opening-up. Changes have occurred in Chinese peoples’ values, and traditional moral values are greatly challenged. More and more the “stratagem” and “cheating” phenomena occurred in the economic field and interpersonal relationships. However, these are only some abnormal phenomena during a special period of time. To regard these as a kind of legal culture is a lopsided view. It is more important

to analyze these phenomena in an objective way since they appear increasingly with the development of economy, reform, and opening-up. According to Heuser, it is Western culture or capitalist society that makes this legal culture. In fact, one of the most prominent characteristics of traditional Chinese culture is idealism, rather than pragmatism. It is in the West that pragmatism is a common value and philosophy. So the statement on the traditional Chinese "pragmatic rule" in Heuser's work is quite mistaken.

Secondly, with regard to logic, Robert Heuser states at the beginning of his work that the fundamental characteristic of Chinese legal culture is the unity of law and morals. Since "stratagem" and "cheating" are in complete conflict with traditional moral values, it is contradictory to regard "stratagem" and "cheating" as one component of Chinese legal culture.

Thirdly, legal culture is certainly one part of the historical culture of a nation. But this does not mean that all historical culture can be taken into legal culture. To put it more accurately, Robert Heuser confuses historical culture with legal culture. Although the "Thirty-six Stratagems" is one valuable and characteristic part of Chinese historical culture, there is insufficient proof to regard it as legal culture.

Fourth, whether there exists such an absolute relationship between the lack of law protection and the seeking of stratagem is a question deserving more investigation. This at least, is a question to discuss.

Fifth, in order to illustrate his viewpoints, Robert Heuser quotes opinions which are not representative. In addition, to regard stratagem as a serious obstacle in the process of modernization in China seems very unilateral; it is like putting the cart before the horse. Altogether, the last entry in the survey of the characteristics of Chinese legal culture in Robert Heuser's work seems unnecessary; it is, as the Chinese say, "to draw a snake and add feet to it". Of course, this does not affect the excellence of the work as a whole.

In summary, Robert Heuser's book completely achieves its goal of introducing, interpreting, and evaluating a kind of characteristic and independent legal culture. It not only provides Western scholars with a valuable understanding of Chinese legal culture but it also provides Chinese lawyers with enlightenment in comprehending their own legal culture. As a highly successful work on comparative legal culture it has even greater significance. When comparing differences between the independently existing legal cultures of the West and the Orient we should set our eyes on similarities. It is the similarities that are the everlasting factors in the development of human society, which draw different legal cultures closer together, that being the final goal of comparative law. There can be no doubt whatever that the work of Professor Robert Heuser represents a major contribution to the realization of this goal.