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STRATAGEMS AS UNIVERSAL FORMULA OF THE CHINA LAW

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This article explains Kantian's "secrets of law" of legal policy of China. It is given concept of ancient roots of stratagems formula of the context of modernization carried out in China. In this regard, revealing analysis of legal policy in intellectual property rights, financing mining of Chin gives the key to current state modernization strategy a number of Eastern countries (Japan, South Korea, Singapore, India, etc.) and clearly demonstrate a new way of social development, a new way of modernization based on a synthesis of the principles of Western technocratic culture with the spiritual traditions of their own culture with the preservation of national identity and civilization identity.

When we looked for conception necessary to find out any instrument of analyze and formula, in philosophy of law we have Kant's formula of pure law. Kant worked out possibility to question matter of law from point of view its "secrets" and possibility to settle the conflicts of interests. Kant arguing not only those rights is an epiphenomenon of duty, rather than vice versa, but also that "practical reason" has priority over "theoretical reason". Both of these tendencies appeal to Chinese philosophers, because, quite simply, they are inherently "Chinese" tendencies.

Though China has been a subject of considerable interest and fascination in the West for many centuries-perhaps since Marco Polo's day-it has had little place in the university. But intellectuals had exchanged by their reflexive concepts of China in different way. Diversity appeared to be soon. Thus, although back in 1757 Danish lawyer M. Hübner in the comparative study of antiquity, China and Europe proved the existence of natural law in China [14; 15], many modern Western scientists still believe that China has no real legal tradition. This is highly strange idea that China has achieved such success in modernizing the economy and in many areas exceeds even America on a strong belief in most European lawyers still "has no real legal tradition" and is still in search of the right, which would have a high technical value and is relatively stable [6, *240*], and it was to be no reason to talk about legal policy based on "real" law. Thinking and system of Chinese legal institutions seem so distant European scientists, and often incompatible with the views that profess these researchers that can be questioned, as they believe in the existence of rights in China. And when for lack of better they still use it, you always try to emphasize the inadequacy and inefficiency of this concept as having a western roots, quite alien in relation to reality. Chinese people "well do without the law," — wrote R. David [1, *400*; 2, *397*].

Chimse point of view from Confucian ethics in this case served as common idea for genaralisation. It was used by Nietzsche. Beforehed it was called by Kant as the "Chinaman of Konigsberg". Nietzsche summed up the characteristics or tendencies those ideas that have tended to characterize most Chinese philosophers and interest of West in China in time when Bilfinger was known for a work on Confucianism (1724), a quasi-Taoist commentary on Wolff's German Metaphysics (1725), and a tract on force (1728). Wolff's continued tradition of Leibniz in his speech on the Chinese (1721) — a watershed event in the Enlightenment. All that had moti-

vated Kant. It appear to be in Tübingen. There was inspired the "study these provocative pagans (in 1726 Wolff would cite Bilfinger when preparing his speech for print). In Taoist ontology, the dynamic principle (Tao) weaves the world by "stretching out" the void (dao zhong) and that produces things and life by individuating the resulting field into lingering wholes. Nature and the good are opposites but harmonize in their parallel thrust toward sustainable complexity". It is true tat Kant's point of viwe was based on "a Eurasian rather than a purely Western context. Recent research suggests that key ideas of Kant's natural philosophy also have sources in Taoist and Confucian thought, which were disseminated in continental Europe by Jesuits based in China, popularized by Leibniz and Wolff, and further developed by Wolff's Sinophile student Bilfinger" [20]. Later only one person was able to understand that "Bilfinger found in the Chinese classics, and which Kant encountered".

It was time when interest to China was immense. Ad appeared to be the struggle of different point of view. France interested in roots tj China and pushing Russia in that direction. It was idea that "Chinese Kant-scholarship has long recognized a basic similarity between Kant and the major school of Chinese philosophy, neo-Confucianism. Confucius, along with most of his interpreters down through the centuries, largely ignored the metaphysical and epistemological questions that have generally taken center stage in the West. Instead, Chinese philosophers tend to emphasize the importance of acting on principle (or, according to the rites, called li in Chinese), with the result that most Chinese people value a person's collective duty as a member of society far above one's individual rights as a human being. Western philosophers, in stark contrast, have typically emphasized rights over duties, with both playing second fiddle to questions of reality and knowledge. Whereas Chinese philosophy tends to define personhood in terms of the duties placed on an individual by his or her position in the social hierarchy, Western philosophy tends to define personhood in more abstract terms of the rights accorded to any human being simply by virtue of being human. Kant actually talks a great deal about both duties and rights; but he clearly gives priority in his System to duty. He put himself in the minority among Western philosophers by arguing not only that rights are an epiphenomenon of duty, rather than vice versa, but also that "practical reason" has priority over "theoretical reason". Both of these tendencies appeal to Chinese philosophers, because, quite simply, they are inherently "Chinese" tendencies. Comparisons of Confucian ethics and Kantian ethics have, consequently, served as the springboard for much cross-cultural dialogue, especially from the Chinese side" [14].

Kant's first formulation of the Categorical Imperative, the Formula of Universal Law, runs: "Act only according to that maxim by which you can at the same time will that it should become a universal law" [17, *421—439*]. A few lines later, Kant says that this is equivalent to acting as though your maxim were by your will to become a law of nature, and he uses this latter formulation in his examples of how the imperative is to be applied. Elsewhere, Kant specifies that the test is whether you could will the universalization for a system of nature "of which you yourself were a part" [17, *69—72*]. E. Kant calls us to understand the Asians' mind-set and law style throw the influential cultural roots of Asia, primarily Confucianism, Taoism.

The modern Traditional Chinese Law roots' paradigm is built by Orientalists and Lawyers. Orientalists discovered the huge legal science legal culture. Especially notable contribution to study of traditional and medieval Chinese law made E. Kychanov [4] and L. S. Perelomov [7]. The first of these authors is known as the researcher Tangut State as well as an authoritative expert in medieval Chinese law. At the same time they prepared and published one of the most important monuments of the medieval law of China [5]. L. S. Perelomov is the leader specialists in Confucianism, including its legal ideas. It should be noted that the Orientalists contribute and study of the current law in China. Among them is called publication A. Javoronkin [3] dedicated to criminal law of China. It is known legal scholar of Supotaev [8]. In his numerous writings he not only subjected analysis

of the various branches of the law contemporary China, but also led translation and publishing examples of contemporary Chinese legislation. In this direction work scientist Apollon Garic, Benoliel Michael, Faure O. G., Seligman S. D., Chang T. K., James K. Sebenius, Cheng (Jason) Qian, Qu Tongzu, Philip C. C. Huang.

Qu Tongzu's [23] Law and Society in Traditional China remains classic for anyone working in this field today. The broad theme of this book is the question of what was wrong with "traditional" Chinese institutions, such that they "failed" to foster capitalism and modernization along Western lines. In this discourse, which measures China against an ideal type of "the modern West," China's failure is simply taken for granted: the purpose of historical inquiry is to illuminate the inadequacies that predestined its failure. This approach derives from Max Weber, who tested his theory about the rise of capitalism through a comparative analysis of two other civilizations where capitalism had not developed, namely, China and India. Unlike Europe, Weber argued, Chinese society was dominated by kinship (in India the problem was caste), which discouraged the development of individual rights, free contract, and the concept of the corporate person; domination by kinship inhibited the development of law, which Weber defined as formal rules enforced by autonomous authorities. The Chinese "patrimonial state" suppressed the development of autonomous corporations that might have threatened it politically, thereby further inhibiting the development of modern law. Moreover, China's Confucian elites lacked the autonomy of European elites, and China entirely lacked the autonomous "free" cities in which the bourgeoisie had gestated. The thesis of Law and Society is that "traditional" law was a highly stable synthesis of legalist structure and Confucian values: in effect, a legalist system was geared toward enforcing a Confucian vision of moral social order. After the "Confucianization of the law" during the early empire, "no significant change occurred until the early twentieth century when the Chinese government began to revise and modernize its law" [23, *285*]. For more than a thousand years, "there were no fundamental changes until the promulgation of the modern law. We find stability and continuity in law and society, both dominated by the Confucian values" [23, *289*]. The key priority of this "Confucianized" law was to uphold "particularistic" hierarchies within the family (defined by generation, age, sex, and degree of kinship), as well as between legally defined "social classes" in society: officials, commoners, and people of mean or debased status. Primary importance was given to particularism. As a result, the law was primarily concerned with status-relationship and the corresponding obligations, paying little attention to such matters as individual rights, which were incompatible with particularism. Specifically, it was particularism which prevented the development of a universal law and abstract legal principles. The emphasis on particularism shaped the characteristics of Chinese law; it also set a limit on the development in Chinese law [23, *284*]. It was this invidious "particularism" that prevented progress along Weberian lines. Qu closes with a brief but revealing discussion of how the "modernization" of Chinese law at the end of the Qing failed. Reactionary officials like Zhang Zhidong stubbornly resisted modernization, despite the urgent need for reform; they succeeded in preventing the full elimination of particularism from the legal order, so that "the force of tradition remained very strong for decades after the revision" [23, *287*]. Modernization was superficial and ineffective.

The study produced by Derk Bodde and Clarence Morrisis about Law in Imperial China [12]. The book appends to the title the phrase, — Exemplified by 190 Ch'ing Dynasty Cases (translated from the Hsing-an hui-lan) with historical social and juridical commentaries. It could equally well be described as a treatise on Ch'ing law accompanied by a heavily annotated selection of translated cases.

Aforementioned authors treated law mainly as an instrument of domination. It assumed that the legal system was essentially penal, that minor matters involving no serious crime were referred to lineage and community elders for mediation rather than being judged in court, that every court case ended with corporal punishment, and that ordinary people thus feared any

involvement with the law. As Clarence Morris writes in Law in Imperial China [12]. "Any entanglement with the Chinese imperial penal system was a personal disaster... It tended to terrify the public into good behavior, rather than to redress disharmony" [12, *542*]. As this passage suggests, Bodde and Morris share Qu Tongzu's bias against "tradition". Bodde makes the following comment about the case summaries: "It is hoped that a reading of the cases, despite the gap of more than a century between them and the present day, will help make clear why the Chinese monarchy had to give way to a republic in 1911, and why the republic in turn had to be torn by further revolution" [12, *160*]. He follows with a discussion of the crushing oppression of the individual by the hierarchical family system in "Confucian China", which he contrasts with the modern West. "Confucianism has long been officially dead in China, but the social and political patterns here summarized have never ceased to influence the painful process of change during the past half century" [12, *199*]. Here Bodde reveals his sympathy for the May Fourth critique of Chinese tradition (especially the Confucian family system) and for the Chinese revolution as a whole, which had consumed "the past half century" to which he alludes.

When scholars first began looking at local court archives, it became obvious that some basic assumptions of the first generation were wrong. For example, Qing magistrates in fact adjudicated large numbers of "minor matters related to household, marriage, and land" as a matter of routine; moreover they did so in a consistent manner that often involved no punishment of any party. Local archives also made it obvious that ordinary people were not afraid to go to court and even humble people could afford to do so. In short, Qing law was not simply a device for terrorizing the population into submission, nor yet simply a system for punishing violent crime. On the contrary, the dynasty's local courts served an important social function by adjudicating mundane disputes that arose in the daily lives of the people. Buxbaum was the first American scholar to make these observations, on the basis of the Danshui/Xinzhu cases, which showed him Qing law "in action at the trial level" [11, *255*]. Buxbaum's aim was to refute claims of Chinese inferiority by showing similarity to the West. He was the first to introduce local case records to American scholarship. The findings of his seminal 1971 article set much of the agenda for Philip Huang's subsequent work on "civil justice". Buxbaum is operating within the Weberian paradigm, although he seeks to refute its bias against Chinese tradition. After rehearsing Weber's criteria for modern "rational" law, Buxbaum concludes that "many, if indeed not most, of the attributes of modern law can be found in Chinese law of the period under discussion," and he attests to its "rationality" [11, *273—274*]. Buxbaum's argument that Qing law was modern and rational depends heavily on his claim that it included a significant measure of civil law. As Buxbaum is aware, Qing law had no exact equivalent in either discourse or procedure to the criminal/civil distinction that comes from the Western legal tradition. He surmounts this difficulty by equating the Qing category "minor matters of household, marriage and real property" with "what we would normally term civil law matters" [11, *261—262*]. This equation rests on subject matter: "minor matters" involved everyday disputes over family, property, and the like. Buxbaum also argues that the Qing code's section of "Household Statutes" should be considered "civil law" because it addresses the same sort of subject matter (even though the individual measures in this section are nearly all penal in nature). But Buxbaum makes a further suggestion that seems to imply a lack of confidence in his own classificatory scheme: one of the ways in which criminal cases may be differentiated from civil cases at this point in the proceedings is by the nature of the decision. If criminal punishment were forthcoming, then we could, at least from hindsight, regard the case as criminal in nature. If, on the other hand, the court decreed. One of the ways in which criminal cases may be differentiated from civil cases at this point in the proceedings is by the nature of the decision. If criminal punishment were forthcoming, then we could, at least from hindsight, regard the case as criminal in nature. If, on the other hand, the court decreed specific performance of a contract, damages, reforma-

tion of a deed, we might assume such cases were civil [11, *264*].

The full potential of legal archives for historical research was demonstrated in Philip Huang's Civil Justice in China: Representation and Practice in the Qing, which exploited 628 cases from the archives of three county courts to build on Buxbaum's empirical and conceptual findings [13]. Huang's text is very rich, and I will address just a few of its contributions and the questions they raise. Like Buxbaum, Huang equates "minor matters" with "civil cases"; he uses these cases in conjunction with surveys of North China villages conducted by Japanese investigators in the 1930s to analyze what he calls the Qing "civil justice system". Huang divides this system into three "realms", which operated according to different principles and procedures. In the "informal" realm of village mediation, disputes were settled by local worthies through compromise. Most disputes never went beyond this level, but if mediation failed, one or another party would likely file a lawsuit at the county yamen. In the "formal" realm, magistrates adjudicated these lawsuits according to the Qing code in formal court hearings, usually finding in favor of one of the parties at the expense of the other. In the "third realm", which lay in between, disputants would file lawsuits while continuing to negotiate but usually would settle out of court on the basis of clues about the likely outcome of a formal court hearing, which they found in the rescripts that magistrates wrote on their plaints. These and many other empirical contributions have transformed our understanding of how Qing local courts worked. But the book's central thesis is that the Qing civil justice system should be understood as a paradoxical conjoining of representation and practice. Huang argues that past scholarshipmade the mistake of looking at only one dimension or the other (usually mistaking representation for reality), whereas the system cannot be fully understood without taking both into account. Similarly, Qing codified law appears to be almost completely penal in character, and yet, according to Huang, it contains implicit "civil law" principles that magistrates consistently used as the basis for adjudicating routine "civil cases" [13, *78—79, 86—87, 104—108*]. Again, Qing judicial discourse contained no doctrine of "rights" comparable to that of the Western constitutional tradition, nor even any word for that concept; nevertheless, in Huang's view, Qing courts actually protected ordinary litigants' rights on a regular basis (e. g., by safeguarding property against theft). Hence, Qing law can be said to have had "rights in practice" even though it lacked "rights in theory" [13, *15, 108, 235—236*]. Huang closes by borrowing Weberian language to argue that this paradoxical system is best summed up as "substantive rationality", by which he means "a combination of patrimonial-substantive representations with bureaucratic-rational practices" [13, *236*]. Huang's Weberian formulation recalls Qu Tongzu's classic argument that the Confucianization of the law resulted in a paradoxical but stable system that deployed legalist means to enforce a Confucian vision of moral order. Huang's elucidation of these paradoxes is powerful, but it also provokes questions, and in some quarters, considerable skepticism. Take, for example, the question of rights. I believe we should respect the fact that Qing judicial discourse did not have a word for the Western legal concept of "rights," and that fact should make us skeptical about whether any substantially similar concept existed either. Does it make sense to import the Western legal concept of rights into this context? By "rights in practice", Huang means that people could seek protection against theft, assault, fraud, and so on. But by definition, any legal order must provide protection against such things, just as it must provide some coherent forum in which people can settle disputes; the alternative would be vendetta and anarchy. For security reasons, the Qing state had a vital interest in preventing local disputes from getting out of hand, just as it had an interest in clarifying property claims so as to establish tax liability; also it derived a certain legitimacy from the magistrate's pose as a defender of the weak against powerful wrongdoers. But that is not the same as endowing people with rights. Moreover, what Huang calls "rights in theory" (i. e., civil rights explicitly recognized by the state) is a definitive part of rights doctrine as it has evolved in Western legal systems:

the existence of rights without rights in theory appears to be less a paradox than an oxymoron. It seems that this particular paradox derives from Huang's insistence on using an anachronistic vocabulary rather than from any quality inherent to Qing law.

Bradly Reed [19] used Ba County's administrative records to provide an unprecedented insider view of how a county yamen actually functioned during the Qing. Reed finds that the clerks and runners of Ba County developed a form of "customary law" for regulating their own affairs; magistrates adjudicated intra-yamen disputes by enforcing this customary law, which the clerks and runners themselves recorded in writing. These rules included the division of fees from legal cases, which, it turns out, provided the fiscal basis for much of the yamen's operations. Moreover, the numbers of clerks and runners actually needed to do the yamen's work far exceeded statutory limits, so magistrates simply followed local precedent in hiring the necessary numbers while concealing this act from their superiors. The lingering image is of the outsider magistrate's temporary presence on the local scene, the tenacity and autonomy of local personnel with their own enforceable customary norms, and the sheer irrelevance of directives from the imperial center. That is why Similarly, Christopher Isett has used legal cases to analyze the illegal sale of banner and noble land to Han Chinese immigrants in Qing Manchuria. These transactions required the systematic falsification of contracts and double bookkeeping on a massive scale (similar subterfuges facilitated the illegal alienation of native land to Han immigrants in Yunnan, Taiwan, and other frontier zones). When such transactions ended up in court, they were canceled and punished, but prosecution was rare because at the grassroots level no one had an interest in upsetting locally convenient arrangements. Over time immigrants managed to transplant the customary land tenure system of the North China plain, even though this posed a direct threat to the vital interests of the dynasty's conquest elite. The legal system was impotent in the face of this threat, and by the mid—nineteenth century the vast majority of Manchuria's inhabitants were Han peasants.

Scientist Matthew H Sommer [22] concluded the works of the above mentioned authors in such way: "After three decades of phenomenal economic growth in China, the question of "failure" no longer seems like a useful problematic; on the contrary, China today is an enviable success, at least in terms of the classic goals of "wealth and power". Nevertheless, the big comparative questions continue to fire people's imaginations, as shown by the "great divergence" debate provoked by Kenneth Pomeranz's. The tired orientalist generalizations of an earlier generation notwithstanding, there is much fruitful work to be done on Qing law that should help us understand late imperial China's developmental trajectory in a broader perspective. The big picture for the peasant economy is already pretty clear. But the fundamental question of how political and legal institutions helped shape economic behavior has yet to be fully explored using the rich evidence that the archives offer. How did the legal system influence business decisions? Did it raise or lower "transaction costs"? Did courts play a major role in enforcing contracts and protecting long-distance exchange — or did business firms prefer extrajudicial venues for securing deals and solving disputes? If the latter, then can we speak of a parallel system of "customary" business law that flourished outside the formal legal system of the state? How did the legal environment for business change under the Unequal Treaties, as Chinese firms found themselves competing with foreign ones?" [22].

Kenneth Pomeranz [18] thinks that "the Great Divergence brings new insight to one of the classic questions of history: Why did sustained industrial growth begin in Northwest Europe, despite surprising similarities between advanced areas of Europe and East Asia? As Ken Pomeranz shows, as recently as 1750, parallels between these two parts of the world were very high in life expectancy, consumption, product and factor markets, and the strategies of households. Perhaps most surprisingly, Pomeranz demonstrates that the Chinese and Japanese cores were no worse off ecologically than Western Europe. Core areas throughout the eight-

eenth-century Old World faced comparable local shortages of land-intensive products, shortages that were only partly resolved by trade. Pomeranz argues that Europe's nineteenth-century divergence from the Old World owes much to the fortunate location of coal, which substituted for timber. This made Europe's failure to use its land intensively much less of a problem, while allowing growth in energy-intensive industries. Another crucial difference that he notes has to do with trade. Fortuitous global conjunctures made the Americas a greater source of needed primary products for Europe than any Asian periphery. This allowed Northwest Europe to grow dramatically in population, specialize further in manufactures, and remove labour from the land, using increased imports rather than maximizing yields. Together, coal and the New World allowed Europe to grow along resource-intensive, labour-saving paths. Meanwhile, Asia hit a culde-sac. Although the East Asian hinterlands boomed after 1750, both in population and in manufacturing, this growth prevented these peripheral regions from exporting vital resources to the cloth-producing Yangzi Delta. As a result, growth in the core of East Asia's economy essentially stopped, and what growth did exist was forced along labor-intensive, resource-saving paths-paths Europe could have been forced down, too, had it not been for favorable resource stocks from underground and overseas" [18].

We used this immence citation only from point of view understanding of deep roots of his understanding of situation.

Apollon Garic [9] thinks that the Chinese Confucian philosophy of law is marked by a strong Particularistic legal system, whereas the American democratic and liberal philosophy has strong Universalistic historical legal foundations. The practical effects of this diametrical opposition are well known by international business practitioners: American is contract-oriented and Chinese are more relationship-oriented when establishing business relationships. Special attention G. Apollon gives to The Thirty-Six Stratagems. The stratagems originated from the civil wars in China either during the Warring States Period (403—221 B. C.) or the Three Kingdom Period (220—265). The most influential ancient Chinese authority in stratagems and philosophy of war was Sun Tzu and his Art of War philosophy has been applied to many fields in the West and East such as: politics, diplomacy, business, law, negotiation, dispute resolution and litigation.

Michael Benoliel [10]. He argues that "agues that the examination of the historical influence of millennia ancient Chinese philosophy of law, Confucianism, Taoism, Sun Tzu's Art of War and the Thirty-Six Stratagems provides significant explanations for the legal irritants of Western contract law in China, and also explains the challenges for the Sino-American bargaining and contract formation process for practitioners" [10, *235*]

If we evaluate the overall concept of the Chinese legal policy in the context of a "socialist" country's modernization, we can again repeat the expression of Perelomov about availability of the centuries-old controversy between concepts of Legalists and Confucians. This contradiction offers a choice between policy "People for the state" or "State of the masses". Annalist John Gruetzner [7] thinks that in this content modernization now in China looks like stratagem. It is really what is in China's own medium-term interest. In reality China is going to be world leader.

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The paradigm's examination demonstrates the historical influence ancient Chinese philosophy of law, Confucianism, Taoism, Sun Tzu's Art of War and the Stratagems on modern China's modernization process. That the Chinese legal policy has traditional controversy between concepts of Legalists and Confucians. This contradiction offers a choice between policy "People for the state" or "State of the masses". It looks like stratagem of world leader. It explains the challenges for the Sino-American bargaining and contract formation process.

Експертиза парадигми демонструє історичний вплив стародавньої китайської філософії права, конфуціанства, даосизму, мистецтва війни Сунь Цзи та стратагемності на процес модернізації сучасного Китаю. Китайська правова політика традиційно відбувається в контексті суперечки між концепціями легістів і конфуціанців. Це протиріччя пропонує вибір між політикою "люди для держави" або "держава мас". Таке протиріччя виступає у формі стратагеми світового лідерства і пояснює специфіку процесу китайсько-американських переговорів та формування контрактів у цілому.

Экспертиза парадигмы демонстрирует историческое влияние древней китайской философии права, конфуцианства, даосизма, военного искусства Сунь Цзы и стратагемности на процесс модернизации современного Китая. Китайская правовая политика традиционно проходит в контексте противоречий концепций легистов и конфуцианцев. Это противоречие предлагает выбор между политикой "люди для государства" или "государство масс". Такое противоречие выступает в форме стратагемы мирового лидерства и поясняет специфику процесса китайско-американских переговоров и формирования контрактов в целом.

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