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# Introduction

Which one of the following statements describes the underlying nature of law?

- A. Law embodies the will of the ruling class.
- B. Law is enforced by the coercive powers of the State.
- C. Law is determined by specific social and material living conditions.
- D. Law consists of formal rules of conduct enacted or recognized by the State.

*– Preparatory Material for the Public Examination for the Recruitment of Provincial (City and County) Level Public Institution Staff, 7.*

## 1.1 A change of perspective

This book seeks to participate in the study of global legal thought by examining ideological conflicts in Chinese legal scholarship. More specifically, it studies arguments about the so-called “rule of law,” which is nowadays often translated into Chinese as 法治.<sup>1</sup> Scholarship on the rule of law is vast, both in China and abroad, and the concept has been declared passé on many occasions during the past decades. This book attempts to present a modest perspective change to the study of the rule of law phenomenon. First, it seeks to describe the internal dynamics of the Chinese rule of law discourse, instead of comparing Chinese conceptions of the rule of law to one or another external standard. To this end, it examines ideological divisions within Chinese legal academia, as well as their relationship to legal theoretical arguments about the rule of law. The book describes the argumentative strategies used by Chinese legal scholars to legitimize and subvert China’s state-sanctioned rule of law ideology, and it examines the efforts of Chinese legal scholars to articulate alternative rule of law conceptions. In addition to this

<sup>1</sup> Concepts such as “依法治国” are also part of the debate about the rule of law. See art. 5 of the PRC Constitution. “依法治国” has been translated as “ruling the country in accordance with the law,” and it has come to mark an instrumentalist, “thinner” version of the rule of law in contrast to the more “substantive” concept 法治. Randall Peerenboom notes that in the late 1970s Chinese scholars used the phrase “以法治国” instead of the phrase “依法治国” as a sign for an even more instrumentalist “rule by law” conception than what “依法治国” implied. Peerenboom, *China’s Long March*, 64. The concept “法制” is nowadays commonly translated as the “legal system,” but this term has also taken on

descriptive project, this book advances a more general argument about the rule of law phenomenon. On the highest level of generalization, and with certain far-reaching qualifications, it insists that many interventions in the rule of law discourse are better seen in terms of their performative qualities rather than as analytic propositions, descriptive statements or as good faith arguments about the nature of the rule of law. In order to illustrate this argument, this book demonstrates that various paradoxical, contradictory and otherwise implausible arguments about the rule of law discourse play an important role in the Chinese debate about the rule of law.

The Chinese rule of law discourse can be defined (rather tautologically) as a metalegal debate about legitimate legal governance models. Exploring the multiple layers of meaning in this discourse is a challenging task. Because of its politically sensitive nature, the discourse is often conducted in low voices and through veiled meanings. Accusations of opportunism and ideological cynicism are rife within Chinese legal academia. Also, the subject matter of the discourse is complex and offers no easy vantage points for outside observers. For instance, explaining the effects of globalization on Chinese legal scholars' ability to reinvent legal and political institutions requires one to make a number of theoretical presuppositions. It is possible to insist, for instance, that the rule of law is an "empty vessel" rather than an organic part of modern society or vice versa. But by doing so, one not only becomes a participant in the discourse that one analyzes, but one also risks occupying a small corner in that debate. The fact is that conflicting social theoretical traditions have been constitutive of Chinese legal thought and political ideology. The paradoxical challenge that this book undertakes is to identify, understand and make use of such mutually incompatible ideas about the rule of law, without adhering to any one of them.

As a narrative device to explore the Chinese rule of law discourse, this book identifies four hypothetical "ideological positions" that motivate statements about the rule of law. These ideological positions illustrate, at a very abstract level, different professional undertakings that are available for Chinese legal scholars. These positions are composed of loose clusters of theoretical premises and attitudes about legitimate governance, as well as shared solutions, problems and controversies. They are professional sensibilities, which define and emerge from the perceived interests of their advocates. As a matter of narrative convenience, the four ideological positions can be initially defined as follows: (i) "conservative socialism," which aims to preserve China's political status quo, for instance, through turning the relationship between law and the Party into various paradoxes about the supremacy of the law and the Party's will; (ii) "mainstream scholarship," which seeks to

meanings such as "the rule by law" and "socialist legality" when it has been contrasted with 法治. See Albert H. Y. Chen, "Toward a Legal Enlightenment," 125, 134–136; Liang Zhiping, "The Rule of Law," 85–86; Shen Yuanyuan, "Conceptions of Legality," 24–25. It may be helpful to note that the above terms draw meanings also from their supposed English language counterparts. Lydia Liu has called such thrown-together concepts linguistic super-signs. These signs thrive on the excess of presumed foreign meanings. See Lydia Liu, *The Clash of Empires*, 12–13.

increase individual freedom and equality through strengthening the autonomy of the law, without explicitly opposing the Party's leading role;<sup>2</sup> (iii) "liberalism," which extends the demands for equality and freedom to the political sphere, wishing to subject the Party to democratic and judicial controls; and (iv) the so-called "avant-garde" scholarship, which is opposed to both state socialism and liberalism and looks for new forms of social order. The labels "conservative socialism" and "liberalism" are helpful for making an association to certain professional sensibilities in China. The argument is not that these ideological positions are actually "socialist" or "liberal," however these terms may be defined.

One way of bringing these positions to life is to describe them as "characters," or as recognizable stereotypical professional identities within Chinese legal academia. The conservative socialist is the revolutionary old guard, who mostly lets the forces of history run their course, but who is willing to exercise his (seldom her) world-creating will at the crucial junctures of history. The mainstream scholar is a "social doctor," who purports to know both the correct diagnosis of China's social illnesses and their cure. The social doctor is not only concerned with means–end efficiency but his role is also ethical. The liberal scholar is the cosmopolitan, who is committed to the supposedly universal values of freedom, individualism and pluralism. Finally, to borrow a character from Alasdair MacIntyre's description of Western ethical life, the avant-garde scholar is an aesthete who is ultimately interested in his or her own immediate aesthetic experiences and self-expression rather than in any managerial or cosmopolitan project. For the aesthete, institutions are an afterthought aimed at evoking an experience of limitless possibilities and the assertion of as yet ill-defined Chinese selfhood.<sup>3</sup> These categories are only the starting point for the analysis of the scholarship of individual Chinese jurists.

Describing the rule of law discourse as a field of *ideological positions* differs from the exercise of typologizing various *rule of law* ideal types. Max Weber defined ideal types as being formed by "the one-sided accentuation of one or more points of view ... arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct."<sup>4</sup> The analysis of rule of law ideal types typically distinguishes between various thin (or formal) and thick (or substantive) rule of law conceptions. The former generally mean the rule of any law under certain procedural protections, whereas the latter associate the rule of law with one or another

<sup>2</sup> "Freedom" can here be defined as the absence of external constraints, whereas "autonomy" means the law-giving, value-making capacity of an individual or, say, the legal system. However, it is perhaps worth pointing out here that this book remains agnostic about the true meaning of these terms and describes contestation about their meaning when this is relevant. For instance, it can be argued that some conceptions of "freedom" include elements of "autonomy." See Berlin, "Two Concepts of Liberty," 183 and sections 3.4 and 5.7 below.

<sup>3</sup> MacIntyre, *After Virtue*, 30. The same point can be made about Western "avant-garde" scholarship, whose prominent strands are influenced by MacIntyre's virtue ethics. Thus, for Sandel the problem with liberalism is that it misses "the pathos of politics and also its most inspiring possibilities." Sandel, *Liberalism*, 183.

<sup>4</sup> Weber, "Objectivity," 90.

substantive value, such as the protection of specific rights.<sup>5</sup> This distinction has its uses. When seen as argumentative strategies, the distinctions between different rule of law ideal types can be interpreted as ideological interventions in debates about legal reforms. These distinctions are particularly effective in global debates about the rule of law. Nevertheless, the one-sided emphasis of certain elements in rule of law conceptions has led scholars to imagine fictitious ideal types, which no politician or scholar has actually found appealing. This was, for instance, the case with the Cold War era straw-man “Socialist Legality,” which was construed in the West as the opposite of the substantive rule of law theories of “free societies.” The International Commission of Jurists, a Western nongovernmental organization, described the Western version of the rule of law as “an ordered framework within which the free spirit of all its individual members may find fullest expression,” whereas socialist legality was supposedly marked by strict observance of the law.<sup>6</sup> The actual socialist approach to law in socialist countries was much more complex and, in retrospect, incoherent and politically unstable than what was imagined by the International Commission of Jurists. Accounting for such complexity is helpful also for understanding Chinese scholars’ intellectual strategies in the rule of law advocacy.

A focus on ideological positions does not produce coherent rule of law ideal types, but instead points out various paradoxes, contradictions and conflicts within argumentative strategies relating to the rule of law.<sup>7</sup> Among other things, the perspective change from rule of law typologies to typologies of ideological positions sheds light on various uses of paradoxicality. For instance, instead of simply claiming that the conservative socialist approach to the rule of law is instrumentalist, it can be pointed out that this approach makes use of paradoxical statements and that the opponents of conservative socialism experience the approach as increasingly incoherent. This is not a concise ideal type, but it is, in my understanding, a fairly realistic description of the Chinese leadership’s ambivalent, perhaps even paradoxical, approach to law and its reception

<sup>5</sup> According to Brian Tamanaha, the formal versions of the rule of law are from their thinner to thicker manifestations: (i) the rule by law (connoting the use of law as an instrument for government action); (ii) formal legality (connoting law that is general, prospective, clear and certain); and (iii) “democracy + legality” (which combines legality with consent to the content of the law). The substantive versions of the rule of law may be distinguished according to criteria regarding the presence of: (i) individual rights such as property, contract, privacy and autonomy; (ii) right of dignity and/or justice; and (iii) social welfare. Tamanaha, *On the Rule of Law*, 91. For other expositions of rule of law ideal types, see Gao Hongjun, *Path of the Modern Rule of Law*, 72–73, 75; Peerenboom, *China’s Long March*, 71 *et passim*; Santos, “The World Bank’s Uses”; Waldron, “The Rule of Law and the Importance of Procedure.”

<sup>6</sup> Marsh, *The Rule of Law in a Free Society*, 192–193.

<sup>7</sup> These terms do not have precise boundaries or meanings, and ambiguity about their meaning has implications in its own right, as sections 4.3 and 7.2 seek to demonstrate. According to Joan Wallach Scott, “paradox,” in a technical sense, means “an unresolvable proposition that is true and false at the same time,” whereas in “rhetorical and aesthetic theory, paradox is a sign of the capacity to balance complexly contrary thoughts and feelings.” See Scott, *Only Paradoxes to Offer*, 4. A prominent element of paradoxicality is a sense of absurdity, which is brought about by a seemingly contradictory statement that, nevertheless, seems somewhat compelling. See Bagger,

in Chinese legal academia. A striking example of the uses of paradoxicality for the conservative socialists is offered by the so-called “Three Supremes” doctrine. This doctrine teaches that Chinese judges ought to consider in their adjudicative practice “the supremacy of the Party’s cause, the supremacy of the interests of the people, and the supremacy of the constitution and the laws.”<sup>8</sup> The doctrine is potentially paradoxical because it provides no resolution to the obvious adjudicative dilemma it produces: which one of the “Three Supremes” is the most supreme in the event of a conflict between them? Whatever social effects the advocacy of the “Three Supremes” doctrine may have had, many of these effects followed from its perceived paradoxical nature rather than from its coherence and intellectual plausibility. In the late 2000s, the doctrine also served as a message in the Party leadership’s efforts to rein in the judiciary, which was feared to have become too Westernized.<sup>9</sup>

The “Three Supremes” doctrine emerges from classical (and potentially “Sinicized”) forms of Marxism and China’s idiosyncratic state structure. The supporters of China’s political status quo, including the ideologues in the Chinese Communist Party (CCP), also derive ideological raw material from contemporary Western legal thought. Instrumentalist or pragmatist arguments against “legal dogmatism,” which have been mostly received from American jurisprudence, have been particularly useful for China’s conservative socialists. In the context of the Chinese rule of law discourse, instrumentalist or pragmatist arguments juxtapose legal reasoning with one form or another of extralegal reasoning. The conservative socialists and their neoconservative supporters imply that sometimes (or often, or always) it is desirable that ultimate decisions about the right course of action in a given context are left to extralegal decision-making processes. The conservative socialist strategy is apparent, for instance, in a textbook on the socialist rule of law conception published by the Communist Party in 2009 and studied by Chinese legal scholars and

*The Uses of Paradox*, 3–4. In modern Chinese there is a word (悖论) marking the English language “paradox,” but the word that is commonly translated into English as contradiction (矛盾) can also refer to a contradictory statement, which can be called “paradoxical” at least in the nontechnical sense of the word. For such a use of 矛盾, see Zhu Jingwen, “The Paradoxes of the Rule of Law.” Even though some contemporary Chinese legal scholars use the word 矛盾 interchangeably with the word marking a paradox (悖论), David Hall and Roger Ames maintain that the word 矛盾 is not an “illustration of a set of contradictory propositions ... but the contrast of some particular ‘x’ and everything else as ‘non-x.’” See Hall & Ames, *Thinking from the Han*, 133. It is possible to draw even finer distinctions between arguments about contradictions. There is, for instance, the “static” view of contradictions, which describes timeless oppositions, such as “universality” and “particularity.” The static view of contradictions, as well as the “Chinese” view of “contradiction” (矛盾) described by Hall and Ames, can be contrasted with the “properly dialectical” view of contradictions, which perceives contradictions in terms of a historical development process. See Zizek, “Mao Zedong.” For a linkage between the word 矛盾 and critical legal scholarship, see Macdonald, *International Law and Ethics*, 3–6. Of course, paradoxes, contradictions and conflicts could be juxtaposed with many other concepts, such as “tensions,” but this book does not draw such distinctions.

<sup>8</sup> Wang Shengjun, “Always Adhere to the ‘Three Supremes,’” 4.

<sup>9</sup> Keith, Zhiqiu Lin & Shumei Hou, *China’s Supreme Court*, 42. See also section 4.3 below.

Party cadres. Printed in large characters (presumably to increase the legibility and appeal of the document) the textbook discusses, among other things, “legal realism, sociological jurisprudence and legal pragmatism represented by Holmes, Cardozo, Pound, and Posner.”<sup>10</sup> It asserts (fairly) that these scholars did not see the interpretation of formal legal rules as a sufficient method of adjudication. At the same time, it implies (less authentically) that legal realism, sociological jurisprudence and pragmatism lend intellectual support to the self-consciously narrow socialist conception of judicial independence, which perceives judicial independence as the absence of external influence in the concrete adjudication of cases.<sup>11</sup> The textbook’s references to foreign scholarship are scarce and, as such, insufficient to convince anyone of the virtues of sociological jurisprudence and legal pragmatism and their supposed relationship to the socialist rule of law conception. Nevertheless, the references to American legal scholars, who must be unknown to the vast majority of the textbook’s audience, give the impression that political control of the judiciary has a certain basis in American legal thought. However, while the textbook urges the people’s courts to discard legal dogmatism and to “serve the overall circumstances,” it also instructs the courts to follow the law “strictly.”<sup>12</sup> The end result of this dualistic move – discard dogmatism but follow the law strictly – is a potentially paradoxical (or, depending on the audience, contradictory) view of adjudication. As is the case with the “Three Supremes” doctrine, it is not important for the conservative socialist project that these paradoxes (or contradictions) are intellectually resolved, only that they exist in the first place.

A focus on ideological positions, instead of rule of law ideal types, also helps bring attention to what can be called “shared controversies” about the rule of law. Shared controversies help to reproduce the cohesiveness of an ideological project. The debate about thin (formal) and thick (substantive) definitions of the rule of law may nowadays be seen as a shared controversy for the scholarly mainstream, both in China and in the West. To be sure, the thin/thick distinction was once a significant point of contestation in Western political discourse. For conservative jurists such as A. V. Dicey and Friedrich Hayek, the distinction between formal and substantive rule of law was not merely a matter of analytical distinctions but a reflection of a fundamental disagreement about different governance models. Indeed, Dicey invented the term “the rule of law” as a reaction against increased administrative powers that had led, in his understanding, to the muddling of the boundaries between executive, legislative and judicial powers. In Dicey’s view, the rule of law required, among other things, the review of administrative action by ordinary English courts.<sup>13</sup> Brian Tamanaha has pointed out that Dicey’s rule of law conception

<sup>10</sup> Central Political and Legal Committee, *The Socialist Rule of Law Principle*, 30.

<sup>11</sup> *Ibid.* 30–31.

<sup>12</sup> *Ibid.* 98–99, 109.

<sup>13</sup> Dicey, *Introduction*, 190.

emerged from his opposition to welfare state institutions.<sup>14</sup> Hayek, like Dicey, thought that at stake with the rule of law definitions was “the fate of our liberty.”<sup>15</sup> Also, Hayek’s view was informed by his objection to welfare state politics. For Hayek, the rule of law could only stand for generality, equality and certainty of the law, and never for benefits afforded to a particular group of people.<sup>16</sup>

The thin/thick distinction is still seen as an insightful analytical tool. Jeremy Waldron, for instance, argues that not much is gained from collapsing together the ideals of human rights, democracy and the rule of law, even if these ideals are important in their own right.<sup>17</sup> Nevertheless, it appears that the thin/thick debate is no longer a focal point of ideological conflict for the scholarly mainstream. Scholars who prefer one or another position in the formal/substantive debate agree on the overall shape of political institutions. These institutions may take the form of the CCP’s “leadership” in the case of Chinese mainstream scholars, and human rights and multiparty democracy in the case of many Western scholars. It is thus perfectly possible for Joseph Raz, a proponent of the thin definition of the rule of law, to contend that a non-democratic legal system, based on the denial of human rights, is “an immeasurably worse legal system” compared with the legal systems of western democracies.<sup>18</sup> Raz’s political ideals include the same elements as some of the substantive rule of law principles he criticizes; the matter is about their correct characterization.<sup>19</sup> Similarly, a Chinese scholar may generally support the leadership of the Communist Party and the rule of law, while either arguing that the rule of law and “democracy” are two conceptually different matters,<sup>20</sup> or assuming that “democracy” (with Chinese characteristics) is a value within the rule of law.<sup>21</sup>

<sup>14</sup> Tamanaha, *On the Rule of Law*, 64–65.

<sup>15</sup> Hayek, *The Political Ideal*, 3.

<sup>16</sup> *Ibid.* 31, 34. See also Hayek, *The Road to Serfdom*, 82.

<sup>17</sup> Waldron, *The Rule of Law and the Measure of Property*, 12–13.

<sup>18</sup> As for the proper content of the rule of law, Raz identified eight attributes: (i) all laws should be prospective, open and clear; (ii) laws should be relatively stable; (iii) law-making should be guided by open, stable and clear general rules; (iv) the independence of the judiciary must be guaranteed; (v) the principles of natural justice, such as open and fair hearing and absence of bias, must be observed in the application of the law; (vi) the courts should have review powers over the implementation of the other principles; (vii) the courts should be easily accessible; and (viii) the discretion of the crime-preventing agencies should not be allowed to pervert the law. See Raz, “The Rule of Law and Its Virtue.” Raz also maintains that “the rule of law is an inherent virtue of the law, but not a moral virtue as such.” *Ibid.* 208. Contrast this view with the argument that the rule of law is non-instrumentally valuable. See Fuller, *Morality of Law*, 52 *et passim*.

<sup>19</sup> The debate continues. Trebilcock and Daniels question the benefits of defining the rule of law in a thin way. By ridding the rule of law of all substantive notions, the concept is made unnecessarily unappealing. See Trebilcock & Daniels, *Rule of Law Reform*, 23.

<sup>20</sup> Pan Wei, “Toward a Consultative Rule of Law Regime,” 8; Xia Yong, “What Is the Rule of Law?,” 64–65.

<sup>21</sup> Xin Chunying, “The Historical Destiny of the Rule of Law,” 89. Xin Chunying is a liberal-minded mainstream scholar, and it is not surprising that she assumes that “democracy” is a value within the rule of law. However, she could advance a liberal leaning mainstream agenda also by keeping the rule of law conceptually distinct from the rule of law. For an example, see Xia Yong, “What Is the Rule of Law?,” 64–65.

The thin/thick distinction has certain ideological effects (for instance, the thin definition may be used to weaken the connection between the rule of law and multiparty democracy), but ultimately nothing ideologically significant turns on this distinction alone in the scholarly mainstream.

Outside academia, demands for analytical purity have been commonly defeated by calls for a substantive definition of the rule of law. This dynamic was apparent already in a seminal New Delhi Congress on the rule of law, convened by the International Congress of Jurists in 1959. During the deliberations in the Congress the definition of the rule of law expanded progressively from what the secretariat had initially proposed in its working papers. The delegates eliminated, for instance, the qualifying statements about the implementation of human rights norms as part of the rule of law.<sup>22</sup> This was the case regardless of the analytic arguments made by the proponents of a thin version of the rule of law. The delegate from Switzerland, Professor Werner Kägi, warned that the “clarity [of the rule of law] will be endangered if it is sought to contain within it all political ideals.” Professor Kägi endorsed the distinction between “classical fundamental rights,” which could be effectively guaranteed in his view, and “social or positive rights.”<sup>23</sup> The case for an extensive definition of the rule of law was put forth strongly by the delegate from Thailand, who argued that the rule of law in classical constitutions had merely guaranteed the “liberty to starve from the cradle to the grave.”<sup>24</sup> Similarly, in a United Nations debate on the rule of law in 2007, only Singapore – but not countries such as China, Myanmar, Sudan or Vietnam – explicitly opposed the substantive definition of the concept. The critical comments about the rule of law, presented by the delegate of Sudan, concerned its use “as a tool for political pressure and threats.”<sup>25</sup>

For many scholars, the thin/thick distinction is hence no longer ideologically loaded, but at most an analytically relevant consideration.<sup>26</sup> Similar shared controversies abound in China. For instance, in the mid-2000s the relationship between the so-called socialist harmonious society and the rule of law gave rise to a shared controversy, with much cohesive power but limited ideological significance. First introduced by Hu Jintao in 2005, the concept of the socialist harmonious society marked a development ideal that was characterized by

<sup>22</sup> Marsh, *The Rule of Law*, 70.

<sup>23</sup> *Ibid.* 65.

<sup>24</sup> *Ibid.* 62.

<sup>25</sup> UN Doc. GA/L/3326.

<sup>26</sup> The ideologically unproblematic nature of the thin and the thick conceptions of the rule of law is apparent, for instance, in the account of the rule of law by Tom Bingham. Bingham first defines the core of the rule of law principle as the (thin) requirement that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.” Bingham, *The Rule of Law*, 8. When Bingham turns to discuss human rights, he rejects the thin version of the rule of law as a matter of common sense: “A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp ... is the subject of detailed laws duly enacted and scrupulously observed.” *Ibid.* 67.

“democracy, the rule of law, fairness, justice, sincerity, trustworthiness, amity, full vitality, stability, orderliness, and harmony between mankind and nature.”<sup>27</sup> In the years following the introduction of this development ideal, Chinese mainstream legal scholars published numerous articles that examined the precise role of the rule of law in socialist harmonious society. Perhaps socialist harmonious society was constructed through the rule of law, or perhaps the rule of law was constructed through the socialist harmonious society.<sup>28</sup> There was a subtle ideological taint to these arguments: a promoter of the rights-based approach predictably emphasized the role of rights protection in socialist harmonious society.<sup>29</sup> Nevertheless, the shared background assumptions of this “debate” ensured that each intervention ultimately reinforced the reach of the Party’s central ideological apparatus. Nobody participating in the debate objected to the Party’s central ideological doctrines. Instead, the debate provided a convenient means for scholars to demonstrate their support for the system – and served as a reminder that such support was called for from Chinese legal academics.

In addition to such shared controversies (which may sometimes be characterized as “good controversies”), there are also theoretical controversies that appear to have destabilizing effects for an ideological project. This is arguably the case, for instance, with certain common rationalizations of Chinese liberal and mainstream (thin or thick) rule of law theories. The appeal of Western – and, much more marginally, Chinese – liberal scholarship emanates from the assumption that the rule of law is necessary because of an ever-thinning value consensus in modern societies. In a value pluralist society, the rule of law allows individuals to pursue their own conceptions of the good. Since there is little agreement on what constitutes the good life in a pluralist society (there are no experts in ethics, according to this argument), only procedural justice, guaranteed by the rule of law and/or democratic rights (depending on whether the latter are thought to belong analytically to the former), can facilitate social integration and social justice. In contrast to this classically liberal narrative about the rule of law, the vast majority of Chinese mainstream scholars do not shy away from prescribing thick, substantive values to all members of Chinese society.<sup>30</sup> Rather than praising the virtues of value pluralism, Chinese mainstream scholars present a narrative of ever-expanding and ever-thickening rule of law conception, which is a consequence of an ever-deepening value consensus and is achieved through the agency of the mainstream jurist, a kind of “social doctor.”<sup>31</sup>

<sup>27</sup> Shambaugh, *China’s Communist Party*, 115.

<sup>28</sup> For details and references, see Liu Xuebin, Li Yongjun & Feng Fei, “Thirty Years of Chinese Legal Theory,” 17.

<sup>29</sup> See Zhang Wenxian, “Building the Legal Institutions.”

<sup>30</sup> As Randall Peerenboom points out, presently “[f]ew Chinese intellectuals would accept the liberal assumption ... that no person or group possesses superior moral insight.” Peerenboom, *China’s Long March*, 42.

<sup>31</sup> As one proxy for Chinese mainstream texts on the rule of law, this book considers the compilations of the China Academy of Social Sciences (CASS). These compilations include articles by CASS researchers and university-based scholars, and they may include texts also by foreign

While the appeal of Chinese mainstream legal scholarship lies in its unapologetically paternalistic civilizing mission, it does not turn into the “Asian values” discourse, which focuses on prescribing various (more or less convincingly justified) duties to Chinese citizens.<sup>32</sup> Instead, the self-consciously paternalistic mainstream project constitutes a project to liberate the Chinese people and to make them gradually free and equal. In Merle Goldman’s terms, the Chinese are allowed progressively more extensive rights in their transformation “from comrades to citizens.”<sup>33</sup>

However, it can also be argued that the mainstream scholars’ project to civilize the Chinese people through expanding their rights conceptions potentially erodes the very legitimacy of the mainstream project. If citizens ought to be free and equal within specific fields of law, such as civil law, the argument arises that they ought to be considered free and equal also when it comes to determining the basic structure of the political system (that is, free in the sense of being law-givers). The liberal project gives rise to a similar potentially destabilizing controversy. Proponents of the liberal rule of law narrative market their approach as a form of substance-free procedural justice, while acknowledging that in a developmental context procedural justice alone is not sufficient to transform people’s traditionalist attitudes and to make them appreciate the value of procedural justice. Since there are no good answers to these controversies, it should not be surprising that neither of them feature prominently in mainstream or liberal scholarship.

In this context, it may be worth emphasizing that this book does not claim that liberalism or mainstream legal scholarship (or socialism, for that matter) are inherently paradoxical or contradictory. Advancing such a claim would be a perfectly sensible strategy for somebody seeking to convince people about the merits or demerits of a particular ideological position. A critic of specific legal institutions heralded under socialism or liberalism could, for instance, insist that neither of these theories stands even in its philosophically soundest version and hence that neither offers convincing reasons to implement the legal institutions in question. This book analyzes such claims but does not present them. Instead of taking part in the defense of any single ideological position or concrete institutional arrangement, it seeks to analyze the effects of arguments about paradoxes, contradictions and conflicts on the intellectual appeal

scholars. Given CASS’s reputation as a moderately reformist establishment institution, it seems safe to assume that the content of these compilations is neither ultraconservative nor exceedingly liberal in the context of Chinese legal scholarship. For CASS compilations on the rule of law, see the “historically” significant *Collected Essays on the Rule of Law and the Rule of Man*. For more recent texts, see Xia Yong & Li Lin (eds.), *The Rule of Law and the 21st Century*, and Li Lin & Li Xixia (eds.), *A New Understanding of the Rule of Law*. For CASS’s role in Chinese politics, see Goldman, *From Comrade to Citizen*. Naturally, many other texts can be considered part of the mainstream. See, e.g. Cai Dingjian & Wang Chenguang, *China’s Journey*, and Wang Liming, *An Introduction to the Interpretation of Law*.

<sup>32</sup> On the Asian values debate, see de Bary, *Asian Values*.

<sup>33</sup> Goldman, *From Comrade to Citizen*.

of an ideological position. These effects need not be negative. Often it seems that sufficiently convenient paradoxes and contradictions – and even incoherence, ambiguity and intrigue – offer reasons to support a particular ideological position.

To summarize, the effects of specific paradoxes, contradictions and conflicts can be perceived as being either useful for or harmful to an ideological project. The choice between these characterizations depends on the context in which they are made and on the interpreter's ideological and social theoretical preferences.<sup>34</sup> In either case, paradoxicality itself is often in the background of legal scholarship, and deployed as external critique against ideological statements. Even the seemingly absurd “Three Supremes” doctrine is offered as a coherent, good-faith principle in the Party's ideological literature, and potentially experienced as such by some conservative socialists.<sup>35</sup> Sometimes, however, paradoxicality surfaces in rule of law scholarship. The notion that a socialist government relates to law in a paradoxical manner was once an integral part of certain forms of Marxism. Marx himself implied that law was both necessary for and counterproductive to the achievement of a Communist party's goals.<sup>36</sup> Leon Trotsky agreed, pointing out mockingly that “[s]uch a contradictory characterization may horrify the dogmatists and scholastics; we can only offer them our condolences.”<sup>37</sup> In the Chinese rule of law discourse, paradoxicality has received a prominent status in the so-called “avant-garde” legal scholarship. This form of scholarship opposes both state socialism and liberalism in their search for new forms of social order. Chinese avant-garde scholars do not adhere to Marxist, developmentalist or neoliberal theories, but instead advance a postmodernist, context-specific view of the rule of law. At the same time, many of these scholars view the world as being dominated by (Western) hegemonic ideological structures that obstruct the reimagination of the socialist and liberal rule of law ideals. Hence some Chinese avant-garde scholars openly admit that their critical project is influenced, and even determined, by the same ideological structures that they criticize. On the one hand, the paradoxical nature of avant-garde scholarship has frustrated avant-garde scholars' efforts to articulate plausible alternatives to the established rule of law conceptions. On the other hand, the paradoxicality of this strand of scholarship has been harnessed for political gain in the resistance of both liberal and socialist conceptions of the rule of law.

<sup>34</sup> The terms “paradoxes,” “contradictions” and “conflicts” do not have precise boundaries, but the intention here is not to conflate these terms when it is necessary to describe differences between them. The effects of statements that appear blatantly paradoxical are different from the effects of statements that either seem contradictory or make use of that term (revealing, for instance, the contradictory nature of another ideological statement). Arguments about “conflicts,” finally, can be used to reject arguments about “contradictions.” There is, for instance, the argument that a legal system comprises conflicting principles rather than irreconcilable “contradictions.” See Dworkin, *Law's Empire* 443–444, fn. 19.

<sup>35</sup> Wang Shengjun, “Always Adhere to the ‘Three Supremes,’” 4.

<sup>36</sup> Marx, “Critique of the Gotha Program,” 530–531; and section 4.3 below.

<sup>37</sup> Trotsky, *The Revolution Betrayed*, 54.

The following chapters explain and weave together the above-described arguments through the analysis of individual Chinese legal scholars and social theorists. The four ideological positions offer a narrative structure for this project. It is, however, well-understood that this structure may be challenged on various grounds.<sup>38</sup> In any event, the positions should blend into the background of the analysis of individual scholars. Moreover, the placement of scholars within this narrative should not be seen as a statement of their true scholarly identity. This book includes specific sections on the following scholars: (i) Professor Zhu Suli (朱苏力) (or Su Li), probably the single most renowned Chinese legal theorist, who has formulated a politically conservative form of legal thought on the basis of contemporary social and economic theory; (ii) Professor Jiang Shigong (强世功), a prominent neoconservative constitutional scholar, who teaches at Peking University; (iii) Professor Wang Liming (王利明), a central figure in the development of Chinese civil law, who has had a long career at the Renmin University in Beijing; (iv) Professor Li Buyun (李步云), a retired constitutional law scholar, who was instrumental in mainstreaming rule of law and human rights in Chinese state ideology in the 1980s and 1990s; (v) Professor Ji Weidong (季卫东), an advocate of procedural justice, who has applied liberal social theory to a developmentalist and authoritarian context; (vi) Professor Cui Zhiyuan (崔之元), a political economist at Tsinghua University, who was one of the first non-orthodox Marxist critics of Western liberalism in China; (vii) the late Professor Deng Zhenglai (邓正来) of Fudan University, who published a seminal critique of Chinese legal paradigms in the 2000s; (viii) Professor Wang Hui (汪晖) a prominent critic of neoliberalism, who teaches Chinese and literature at Tsinghua University; (ix) Professor Xia Yong (夏勇), a holder of high political offices, who has sought to develop a “Chinese” philosophy of civil rights; and (x) Professor Gao Hongjun (高鸿钧) an advocate of communitarian approaches to the rule of law, who teaches at Tsinghua University. This book also examines texts attributed to (xi) the former Politburo Standing Committee member Luo Gan (罗干) who was one of the principal advocates of the “socialist rule of law conception” in the 2000s, and (xii) Wang Shengjun (王胜俊), the former president of the Supreme People’s Court, who is known for his conservative legal ideology and the “Three Supremes” doctrine.

## 1.2 A return to ideology

It is hardly self-evident that ideology, let alone rule of law ideology, is relevant to the study of contemporary China. Indeed, post-Tiananmen China has been perceived in decidedly non-ideological terms, although Xi Jinping’s use of Confucian, Marxist and Maoist terms has added more nuances to this image.<sup>39</sup> Chinese government policies are commonly described as pragmatist and instrumentalist, and the Chinese government’s approach to law is perceived in equally non-ideological terms. The view of China as a post-ideological society

<sup>38</sup> See sections 2.8 and 3.4 below.

<sup>39</sup> For background, see Feng Chongyi, “China’s Socialist Rule of Law.”

has coincided with the debate about the end of ideology, although with an interesting twist. The last stop of ideological development in the West – liberal democracy – is the one that the Chinese are supposedly not “ideologically” interested in their pursuit of economic and social goods. It is also true that the rule of law has been seen as a particularly irrelevant ideological construct. The assumption that law “rules” human conduct has been subject to critique since the early twentieth century. Karl Llewellyn, a prominent American legal realist, contended in 1930 that “‘rules of substantive law’ [were] ... of far less importance than most legal theorists [had] assumed in most of their thinking and writing.”<sup>40</sup> More recently, Duncan Kennedy has argued that the ideological discourse of judges, legal authorities and political theorists “denies ... the degree to which the system of legal rules contains gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, or unconscious ideological projects.”<sup>41</sup> Critics of the rule of law do not deny that rules can have a social effect; their argument is that the role of rules is exaggerated, mystified and used for “wrong” ends.<sup>42</sup>

Criticism of the rule of law is amplified in the development context. Frank Upham has sought to demystify the so-called “rule of law orthodoxy,” or the belief that the “formalist rule of law [is] essential to establishing stability and norms that encourage investment and sustainable economic growth in the developing world.”<sup>43</sup> Yves Dezalay and Bryant Garth describe the rule of law as a “rallying cry for global missionaries” who “cannot claim too many successes in [their] latest campaign” to promote the concept.<sup>44</sup> Tom Ginsburg argues that the “idea of the rule of law ... has become our modern *mission civilisatrice*.”<sup>45</sup> On a similar note, Kenneth Winston outlines “striking parallels” between actual seventeenth-century Jesuit missionaries and modern-day “rule of law missionaries.” Winston points out that both forms of missionary work are marked by (i) a one-size-fits-all orthodoxy; (ii) ambiguity about the beneficiaries of the mission – that is, the question of whether missionary work is ultimately altruistic or egoistic; and (iii) the obfuscation of the missionaries’

<sup>40</sup> Llewellyn, “A Realistic Jurisprudence,” 442.

<sup>41</sup> Duncan Kennedy, *A Critique of Adjudication*, 14.

<sup>42</sup> Roberto Unger, an often-cited legal theorist in China, provides a sweeping criticism of the liberal rule of law principle in *Law in Modern Society*. Professor Unger criticizes what he sees as the “two crucial assumptions” of the rule of law principle in liberal societies: that significant forms of power can be concentrated in government and that this power can be constrained through rules and thus be made impersonal and impartial. In reality, Professor Unger argues, in liberal societies power is not limited to the government, but it exists in the inequalities of the family, the workplace and the market. Rules, on the other hand, cannot be made impersonal and impartial because their meaning cannot be determined independently of the administrator’s preferences. Unger, *Law in Modern Society*, 178–179.

<sup>43</sup> Upham, “Mythmaking in the Rule of Law Orthodoxy,” 75. For the target of Upham’s criticism, see World Bank, *World Development Report 2002*, 131 (stating that the “judicial system plays an important role in the development of market economies”). For the rule of law in World Bank policies, see Santos, “The World Bank’s Uses.”

<sup>44</sup> Garth & Dezalay, “Introduction,” 1–2.

<sup>45</sup> Ginsburg, “In Defense of Imperialism?,” 224. Emphasis original.

actual domestic practices and institutions, which do not meet the standard of the missionaries' normative undertakings abroad.<sup>46</sup> Winston argues that modern-day American rule of law missionaries fail to recognize the "seriously deficient" state of the rule of law in the United States with regard to issues such as the lack of equal access to legal assistance and widespread manipulation and evasion of the law by the federal government in the war on terror.<sup>47</sup> Expressing similar doubts about rule of law advocacy, Stephen Humphreys has interpreted the transnational rule of law discourse as a "theater," arguing that the interventions in this discourse aim to achieve political or economic goals, some of which are at odds with the rule of law ideal itself.<sup>48</sup>

Criticism of the transnational or "Western" rule of law ideal has found fertile ground in studies of Chinese law. Donald C. Clarke has argued that the Western paradigm of China studies builds on a number of flawed presumptions, starting from the assumption that "China has a set of institutions that can meaningfully be grouped together under a single rubric, and that it is meaningful ... to label this rubric 'legal.'"<sup>49</sup> Randall Peerenboom has criticized both the conception that Asian countries, whose cultures are supposedly too different from the Western ones, cannot obtain the rule of law, and the practice of equating the rule of law principle with "the contingent values and institutional arrangements of contemporary Western liberal democracies."<sup>50</sup> Peerenboom maintains that "China is more likely to adopt a Statist Socialist, Neoauthoritarian, and Communitarian version of rule of law than it is to adopt a Liberal Democratic one."<sup>51</sup> In Peerenboom's analysis, (i) the Liberal Democratic rule of law model comprises free market capitalism, multiparty democracy and a liberal interpretation of human rights, which prioritizes civil and political rights; (ii) the Statist Socialist version comprises, inter alia, a socialist form of economy, a non-democratic political system and an interpretation of rights, which emphasizes stability and collective rights; (iii) the Communitarian variant builds on market capitalism, a form of genuine multiparty democracy and an "Asian values" or communitarian interpretation of rights, which emphasizes majority interests and collective rights; and (iv) the Neoauthoritarian version builds on a market economy but rejects the liberal interpretation of rights and allows democracy only at the local level, if even there.<sup>52</sup> Teemu Ruskola, finally, argues that Western knowledge of Chinese law takes the form of "Legal Orientalism," describing Chinese law through images of despotism, backwardness, irrationality, inadequacy, non-subjectivity and

<sup>46</sup> Winston, *Ethics in Public Life*, 135 *et passim*.

<sup>47</sup> *Ibid.* 144.

<sup>48</sup> Humphreys, *Theatre of the Rule of Law*, 223.

<sup>49</sup> Clarke, "Alternative Approaches," 52–53. For commentary, Peerenboom, *China's Long March*, 141–145.

<sup>50</sup> Peerenboom, "The X-Files," 57.

<sup>51</sup> Peerenboom, *China's Long March*, 558.

<sup>52</sup> *Ibid.* 3–4, 105.

non-legal harmony.<sup>53</sup> Ruskola maintains that the “specifically American ideology of law’s rule” has exacerbated the “discourse of Chinese lawlessness.”<sup>54</sup>

Criticism of the Western rule of law ideal takes place within the wider context of disenchantment with development studies. The field finds itself in a “Post Moment” in which “big ideas and grand solutions have been abandoned,” as Professor Scott Newton has observed.<sup>55</sup> Instead of presenting universalizing and totalizing claims, most scholars emphasize the context specificity of development. As a study by Dani Rodrik, Arvind Subramanian and Francesco Trebbi concludes, “optimal reform trajectories ... cannot be designed without regard to prevailing conditions and without weighting the consequences for multiple distorted margins.”<sup>56</sup> The same tendencies that are in the foreground in development studies and the foreign study of Chinese law can be observed in the field of postcolonial cultural studies. Also here the integrity of Western and colonial conceptions has been questioned in favor of a more nuanced image of postcolonial social reality. Homi Bhabha, for instance, has described colonial political conceptions using the notion of “hybridity.” Hybrid political concepts are neither copies of the European concepts nor “original” indigenous ideas, but their own beings: they are “neither the One ... nor the Other ... but something else besides which contrasts the terms and territories of both.”<sup>57</sup> Postcolonial studies, development studies and Chinese area studies all contribute to the impression that received truths about the rule of law and its importance are dissolving.

Given the increasing skepticism about the Western rule of law ideal, the question remains: what kinds of legal institutions, if any, should China adopt? This is the topic of the Chinese rule of law discourse. Issues within the Chinese rule of law discourse include, among other things,

- (i) institutional arrangements such as
  - (a) the position of the Communist Party in the legal system and society at large;
  - (b) the desirability of the judicial review of legislation;
  - (c) the possibility to adjudicate constitutional rights;
  - (d) the desired form of judicial independence; and
  - (e) the optimal ways to increase democracy in China;
- (ii) normative questions such as
  - (a) whether and when the “legal” should prevail over the “political” and the “people’s will”;

<sup>53</sup> Ruskola, *Legal Orientalism*.

<sup>54</sup> *Ibid.* 234.

<sup>55</sup> Newton, “Law and Development,” 29.

<sup>56</sup> Rodrik, Subramanian & Trebbi, “Institutions Rule,” 158.

<sup>57</sup> Bhabha, *The Location of Culture*, 41. The original emphasis omitted. As an example of such hybridity, Bhabha mentions the “socialist-feminist perspective,” which does not fit into traditional working class politics or into gender politics but is its own political being. *Ibid.*

- (b) whether the Party's interest, the state interests and the people's interests can legitimately diverge from one another, and if so, how the conflicts between these interests are decided;
  - (c) whether the right to subsistence trumps other rights; and
  - (d) whether "democracy" is or should be inherently linked to the rule of law, and if so, what should be the form of this democracy; and, finally,
- (iii) "theoretical" questions such as
- (a) whether society should be perceived in terms of dialectical and historical materialism, as a spontaneously evolving organic entity, or as an increasingly disintegrating social system;
  - (b) whether China's socialist rule of law should be seen as the most advanced rule of law model or as a backward but developmentally necessary rule of law model;
  - (c) whether legal reasoning is different from political reasoning;
  - (d) whether and to what extent it is known what constitutes "good" in society; and
  - (e) whether Chinese traditional (or traditionalist) concepts can and should transform the nature of the Chinese legal system.

In the Chinese rule of law discourse scholars compete with one another to provide appealing combinations of theoretical conceptions, normative arguments and institutional solutions to such questions.<sup>58</sup> One intellectual move within this debate is to deny the very point of discussing the rule of law at an abstract level. One may argue that the Chinese "rule of law" discourse is no more the "basis" of Chinese law and its legal institutions "than the painted rock is the support of a painted tower."<sup>59</sup> Remove all texts on the rule of law from jurisprudence, and the practice of law will go on as usual. In China an analogous argument has been furthered by Professor Zhu Suli, who has alluded to the unknowable nature of the rule of law phenomenon. Zhu argues that various cultural and linguistic reasons cause scholars to distort foreign countries' experiences of the rule of law, whether or not they are conscious of this fact.<sup>60</sup> Zhu's viewpoint arises from his pragmatist philosophical leaning, but it also supports his conservative political outlook. One of Zhu's key points is that, since it is not possible to draw any general conclusions about the relationship between Western style legal institutions and economic and social development, China should make better use of its "native resources."<sup>61</sup>

Should it, therefore, be concluded that Zhu Suli's and other legal scholars' views on the rule of law are no more the basis of China's legal reality "than the painted

<sup>58</sup> In order not to disappoint anyone, it should be noted that this book does not provide systematic answers to these questions from the various ideological positions.

<sup>59</sup> I derive this Wittgenstein quote from David Luban. See Luban, "What's Pragmatic about Legal Pragmatism?," 57–58.

<sup>60</sup> Zhu Suli, *Rule of Law and Its Native Resources*, 19–20. I have derived the English language translation of this title from Upham, "Who Will Find the Defendant if He Stays with His Sheep?"

<sup>61</sup> Zhu Suli, *Rule of Law and Its Native Resources*.

rock is the support of a painted tower”? In some ways, this certainly is the case. There is no reason to assume that Zhu’s legal thought determines the actions of Chinese legal scholars, let alone Chinese decision-makers. At the same time, Zhu’s legal thought has clearly played a significant role in legitimizing the (neo)conservative approach to law. It also remains a towering presence in the minds of younger Chinese scholars. The fact is that Zhu has been able to provide an appealing bricolage of philosophical, political and legal arguments, which a number of Chinese scholars and law students have found sufficiently convincing to take as the bedrock of their supposedly realist worldview. In this worldview, iconoclastic philosophy (of Friedrich Nietzsche and Michel Foucault, for instance) is aligned with sociological, economic and pragmatic thinking about the rule of law, all wrapped up in patriotism and politically correct support for the Communist Party. Without the ideological basis provided by Zhu, the neoconservative picture of law would be rather like a painting of a tower hanging in midair – an unappealing image for the followers of social (or socialist) realism.<sup>62</sup> Zhu himself recognizes the importance of theoretical abstractions for his project. Zhu argues that Chinese legal scholars should not only describe examples of the use of local resources, but also provide theoretical explanations for why local resources must be used. As Zhu points out, people need theory to convince not only others but also themselves.<sup>63</sup>

Also the CCP, or at least certain factions within it, are adamant about the importance of articulating a socialist alternative to the Western rule of law principle. In its 2009 textbook on the socialist rule of law conception, the Party notes that “only by firmly establishing the socialist rule of law conception, can the copying of Western rule of law ideology and its judicial system be effectively prevented.”<sup>64</sup> Without such vigilance, the textbook fears that China may experience the same “tragedy” as Russia and Eastern Europe experienced at the turn of the 1980s and 1990s.<sup>65</sup> In 2013, the Party reportedly called its members to “resolve all problems in the ideological sphere” in the struggle against the “Western anti-China forces.”<sup>66</sup> Similar existentialist questions have motivated important scholarly works within Chinese legal academia.<sup>67</sup> The quest for a Chinese rule of law ideology is hence an actual social phenomenon. Some of the results of this ongoing quest are required reading for the members of the Communist Party and the civil service. Knowledge about these ideological formulations may even be acutely practical, as the epigraphs in Chapters 1–6 of this book seek to demonstrate. The multiple-choice questions at the beginning of these chapters are from two books, one of which prepares candidates for the

<sup>62</sup> David Luban makes this point in his discussion of Richard Posner’s legal pragmatism. See Luban, “What’s Pragmatic about Legal Pragmatism?” 57–58.

<sup>63</sup> Zhu Suli, *Rule of Law and Its Native Resources*, 6.

<sup>64</sup> Central Political and Legal Committee, *The Socialist Rule of Law Principle*, 52.

<sup>65</sup> *Ibid.* 40.

<sup>66</sup> See ChinaFile, “Document 9.”

<sup>67</sup> See Deng Zhenglai, *Whither Chinese Law*, 2–3 (translated into English as Deng Zhenglai, *Rethinking Chinese Jurisprudence*); Zhu Suli, *Rule of Law and Its Native Resources*, foreword v; Xia Yong, *Philosophy of Chinese Civil Rights*, 38.

national civil service examination; the other, for public examinations for the recruitment of staff for certain agencies that deliver public services, such as educational and cultural institutions. The textbooks' answers to these questions are in the back of this book.

Ideology matters, but a study of ideological positions need not accept ideological statements at their face value. Without a doubt, many central concepts of Marxism are today utterly unconvincing both in China and abroad.<sup>68</sup> In this context it is uncertain whether conservative socialist ideology is produced in good faith. In fact, the intended message of a conservative socialist ideological statement may be its very implausibility and bad-faith nature, which signals the leadership's unwillingness to engage in a rational discourse with its subjects. Sensitivity to ideological cynicism seems a helpful approach to the interpretation of CCP leaders' speeches on the "socialist rule of law principle," as Chapter 3 demonstrates. Ideology in general, and ideological positions in particular, do not need to be thought of as being synonymous with earnestly believed dogmas or genuine "class consciousness." There is also no need to see ideological statements exclusively as purposeful activity that serves the establishment and re-establishment of power relations in a universal struggle for power. Neither is it necessary to insist that ideological statements have de facto legitimizing effects on these relations. Depending on the circumstances, ideological statements can have all or some of these effects.<sup>69</sup> Defining ideological positions as professional projects allows one to account for ideological cynicism and its effects on the rule of law discourse. Ideological statements matter regardless of whether they are sincerely believed – and sometimes they matter because they are not sincerely believed.

### 1.3 Limitations, academic positioning and apologies

It may be worth making some of the limitations of this book explicit. This is a book about a particular global and Chinese elite legal discourse that has limited relevance to popular opinions in China and abroad.<sup>70</sup> The actual practice

<sup>68</sup> Tom Ginsburg, for instance, maintains that China's ideological drift has produced "euphemisms, such as the 'Three Represents,' that help provide an increasingly thin 'socialist' cover for a market economy with a large state sector." Ginsburg, "Administrative Law," 68.

<sup>69</sup> Of the classic conceptions of ideology, Karl Mannheim's *Weltanschauung* comes closest to the notion of ideology I am deploying in this study. The concept marks the contrast between the "total conception of ideology" and the "particular conception of ideology." The latter conception defines ideology in a struggle between individual political adversaries, whereas the former concept examines the "total structure of the mind," or the *Weltanschauung*, of an epoch or a group. See Mannheim, *Ideology and Utopia*, 55–56. For a definition of ideology as the universalization of group interests, see Duncan Kennedy, *A Critique of Adjudication*, 41. For other conceptions of ideology, see Eagleton, *Ideology*. Also, the approach adopted in this book owes much to David Kennedy's description of professional fields in public international law. See David Kennedy, "When Renewal Repeats."

<sup>70</sup> For a study of popular ideological conceptions in China, see Jennifer Pan & Xu Yiqing, "China's Ideological Spectrum."

of law and the empirical relationship between economic development and legal institutions are beyond its scope.<sup>71</sup> It may also be disappointing to some readers that the scope of this book is limited to contemporary Chinese legal scholars and their texts, some which date back to the 1970s. A proper genealogical study of the rule of law conceptions would reach back at least to the nineteenth century or earlier.<sup>72</sup> Unfortunately, the interpretation of historical texts in their original social context is beyond the scope of both this book and my personal capacity. Rehashing secondary literature would seem pointless here, for reasons explained in Chapter 2. The reader is referred to existing literature on the topic.<sup>73</sup> The book also presumes a certain level of knowledge about Chinese history, politics and law. This background knowledge may be easily gained by reading a general presentation on Chinese law.<sup>74</sup>

In terms of disciplinary identities, the genre of this book – the study of an elite legal discourse and its global implications – is perhaps best captured through a sufficiently broad concept, such as the study of “global legal thought.” This genre is primarily motivated by the search for global ideological and legal theoretical relevance.<sup>75</sup> Although the book makes most of its arguments with regard to a specific, geographically defined legal discourse, its perhaps lofty ambition is to take part in the global debate about the nature of the rule of law phenomenon.<sup>76</sup> The important elements of this debate do not build on distinctions between “us” and “them.”<sup>77</sup> The theoretical contributions of this book have been formed in conversation with scholars who work, inter alia, in America, Australia, Canada, China, continental Europe and the United Kingdom, or in some combination of these places. As a consequence, comparisons between legal systems, cultures and traditions are less relevant for this book than they might be for a study that defines itself on the basis of the foreignness of its object of study.<sup>78</sup> Having said this, this book has been written about a predominantly Chinese-language discourse in the English language by a habitual foreigner who is a native speaker of neither

<sup>71</sup> For studies on these topics, see, e.g. Alford, “‘Second Lawyers, First Principles’”; Biddulph, *Legal Reform*; Clarke, “Economic Development”; Lubman, *Bird in a Cage*; Michelson, “The Practice of Law”; O’Brien & Li Liangjiang, *Rightful Resistance*; Peerenboom, *China’s Long March*; Peerenboom & He, “Dispute Resolution in China”; Pils, *China’s Human Rights Lawyers*; Sapio, *Sovereign Power*.

<sup>72</sup> Stephen Angle’s analysis of the Chinese human rights discourse, for instance, goes back to classic texts and Song dynasty thinkers. Angle, *Human Rights and Chinese Thought*. Perry Keller extends the analysis of sources of order in Chinese law to imperial codes. See Keller, “Sources of Order.”

<sup>73</sup> See, e.g. Angle, *Human Rights and Chinese Thought*; Cline, *Confucius*; Keller, “Sources of Order”; Peerenboom, “Confucian Justice”; Wang Renbo, *The Chineseness of Law*; Zhang Yongle, *The Remaking of an Old Country*.

<sup>74</sup> See, e.g. Potter, *China’s Legal System*.

<sup>75</sup> For a foundational piece, see Duncan Kennedy, “Three Globalizations.”

<sup>76</sup> For background on this debate, see Alford, “Exporting the ‘Pursuit of Happiness’”; Jiang Shigong, “Written and Unwritten Constitutions”; Ruskola, *Legal Orientalism*; Zhu Suli, “The Party and the Courts.”

<sup>77</sup> For this point, see Ruskola, *Legal Orientalism*, 35, 221.

<sup>78</sup> For a critical description of the comparative law tradition, see David Kennedy, “The Methods.”

Chinese nor English. My institutional, social and emotional distance to mainland China is no doubt apparent in the way I lay out the competing ideological positions within the Chinese rule of law discourse. My outsider status has also meant that I have encountered some genuine difficulties in accessing and understanding information about ideological conflicts in Chinese legal academia. Readers are therefore welcome to see the descriptive elements of this book as “comparative events” – whatever my domestic point of comparison may be.<sup>79</sup>

While this book does not seek to situate itself within the field of comparative law, it does examine a number of comparative law projects. Arguments about comparative law play a distinct role in legitimizing and delegitimizing ideological projects.<sup>80</sup> In the 1980s and 1990s, for instance, Chinese legal scholars debated the direction of legal reforms with reference to the concept of “legal transplantation.” The progressive mainstream position in this debate was to endorse the notion of legal transplants as a theoretically sound concept, and to argue that transplants from capitalist societies were a necessary and valuable part of China’s modernization process.<sup>81</sup> The more marginal, politically conservative position emphasized the differences between socialist and capitalist societies, without rejecting out of hand the possibility of legal transplantation. Zhu Suli’s above-mentioned argument about the use of native resources was part of the transplantation debate.<sup>82</sup> At stake in the debate was not the soundness of the transplant hypothesis, but the direction of China’s legal reforms.<sup>83</sup> Other examples of ideologically meaningful comparative projects include debates about the role of rights in premodern China and the relationship between traditional Chinese culture and what is perceived as the Western rule of law.<sup>84</sup> As far as the objectives of this book are concerned, the payoff of these debates lies in examining their ideological dimensions. Comparative examinations of, say, different models of constitutional review, have helped politically centrist jurists to resist the adoption of Western-style constitutional review.<sup>85</sup>

As a final note on academic positioning, it should be acknowledged that this book offers no concrete policy prescriptions about legal reforms in China or anywhere else.<sup>86</sup> This book stands on the shoulders of Chinese legal scholarship (especially its avant-garde strand), but it does not adhere to the ideological program of any of the approaches described here. Given its methodological approach, it would be disingenuous to make a leap of faith into any one of

<sup>79</sup> For comparative events, see Ruskola, *Legal Orientalism*, 34–35.

<sup>80</sup> Duncan Kennedy, “Political Ideology.”

<sup>81</sup> Zhang Wenxian, “Inheritance, Transplantation, Reform.”

<sup>82</sup> Zhu Suli, *Rule of Law and Its Native Resources*.

<sup>83</sup> For further references, see Liu Xuebin, Li Yongjun & Feng Fei, “Thirty Years of Chinese Legal Theory, 10, fn. 1.

<sup>84</sup> See sections 2.2 and 6.3 below.

<sup>85</sup> Li Buyun, *On the Rule of Law*, 397–400.

<sup>86</sup> Prescriptivism, or “the demand that each piece of scholarship offer some account, however nebulous, of the stakes for how the law should be,” has been seen a bane of legal scholarship.

the ideological positions. It is, of course, true that enclosing the “rule of law” within quotation marks and adding words such as “paradox” and “contradiction” in its close proximity elicits a certain type of predictable response both in China and abroad. For many readers, their first impression of this book may be that it does not enthusiastically support China’s liberal democratic transition. But such readers are reminded of the fact that there is nothing inevitably illiberal about the language of incoherence.<sup>87</sup> The same can be said to those who tolerate nothing but unproblematized support for the “socialist rule of law principle”: there is nothing inevitably non-socialist about the language of incoherence.<sup>88</sup> Moreover, while the focus on performativity has its own (performative) effects, there is nothing predetermined about these effects. As is the case with other texts on the rule of law, a supportive or critical engagement with this book can take any ideological form: liberal or conservative socialist, or something else altogether.

Then, a number of apologies are in order. This book makes its arguments with reference to the Chinese rule of law discourse, but it cannot claim to produce an “authentic” image of Chinese politics, society or legal academia, or even of the individual scholars it examines. The scholars discussed in this book are so prolific and dynamic that it has not been possible for me to examine all their published texts. Consequently, I can only give a partial and no-doubt skewed view of the scholarship of such complex thinkers as Gao Hongjun, Ji Weidong, Jiang Shigong, Li Buyun, Wang Liming, Xia Yong, Zhu Suli and others. In my opinion, an imperfect view of these scholars is better than a comprehensive view of only one or two of them, but I can see why these scholars might think my approach impudent. Moreover, there are no established schools of legal thought in China. As a consequence, all attempts to set up and name positions within this discourse will be controversial and vulnerable to easy criticism. No Chinese scholar proclaims to be “a conservative socialist” or a “mainstream scholar.”<sup>89</sup> Even the label “liberal” is shunned by scholars who otherwise stay close to the theoretical and political postulations of liberal political thought.

Another potential concern relates to the selection of scholars for this book’s case studies. The texts and scholars studied in this book have been selected not only on the basis of their impact on the Chinese rule of law discourse (to this end, I interviewed thirty Chinese legal scholars, mostly in Beijing, Shanghai and Changchun), but also to build specific arguments about the rule of law phenomenon. This creative project is manageable only against a limited

According to Balkin and Levenson, prescriptivism “deeply circumscribes the legal imagination and the permissible boundaries of legal scholarship.” See Balkin & Levinson, “Law and the Humanities,” 175.

<sup>87</sup> Berlin, “Introduction,” 42 and section 5.7 below.

<sup>88</sup> Trotsky, *The Revolution Betrayed*, 55.

<sup>89</sup> The mainstream is not a self-consciously held label, whereas its counterpoint clearly is. See, e.g. Jiang Shigong, “Written and Unwritten Constitutions,” 15.

number of purposefully selected viewpoints.<sup>90</sup> Consequently, many important scholars have been left with little or no attention.<sup>91</sup> The radically reductionist nature of this exercise also means that this book cannot capture research orientations or *sui generis* scholars, who may be influential in China but fall outside this book's narrative.<sup>92</sup> As said, the goal of this book is not, and cannot be, the authentic representation of the entire Chinese rule of law discourse and the relative importance of its various strands. It may, of course, be that I have missed a particularly helpful scholar for the purposes of my own argument. In fact, a reoccurring theme in my discussions with Chinese legal scholars was the assumption that a certain Chinese scholar had been able to devise a truly unique rule of law conception that was relevant to my study, although the speaker was unclear about the specifics of this conception. Much of the research project consisted of playing catch-up with Chinese legal scholarship. The music had to stop eventually. It is also unfortunate that the radically reductionist nature of this book leads to a de-emphasis of legal theoretical distinctions between Chinese scholars. This is evident when one compares the map presented in this book to more sophisticated maps that focus on legal theoretical distinctions in China.<sup>93</sup> There is hence a much better, multivolume book series waiting to be written on contemporary Chinese legal thought and its history for a global audience, complete with insider information, political intrigue and paradigm-shifting legal theoretical insights. Finally, a word of caution: while I have been helped with the translations in this book by competent Chinese speakers, I recommend that the reader refer to the original Chinese-language texts, many of which are easily accessible on the Internet or through Chinese-language databases.

#### 1.4 Structure of the book

The structure of this book can be sketched as follows. Chapter 2 describes the broad framework of the Chinese rule of law discourse in its historical context.

<sup>90</sup> For other, more detailed mapping exercises, see Deng Zhenglai, *Whither Chinese Law*; Liu Xuebin, Li Yongjun & Feng Fei, "Thirty Years of Chinese Legal Theory"; Wei Dunyou, *The Mission of Contemporary Chinese Legal Philosophy*. See also Liu Dasheng's mischievous essay "Schools of Chinese Legal Scholars."

<sup>91</sup> For instance, chapter 6 discusses traditionalist and "Sinicized" forms of Chinese legal thought through Xia Yong's texts. It was clear from my interviews that Xia was perceived as a prominent scholar in this field. Moreover, Xia's scholarship and his connection with Harvard allow me to bring up several points in chapters 6 and 7. Focus on Xia means, however, that many other interesting scholars working in the same genre are marginalized in the narrative of this book. For the latter, see Fan Zhongxin, "Legal Historical Approach"; Wang Renbo, *The Chineseness of Law*.

<sup>92</sup> A clear omission on my map concerns, for instance, Professor Liang Zhiping's cultural approach to law. See Liang Zhiping, *Thinking outside the Margins*. For analysis of Liang's scholarship, see Deng Zhenglai, *Whither Chinese Law*, 131 *et passim*. There are many other fruitful research streams that have been ignored in this book. See, for instance, Sapio, "Carl Schmitt in China."

<sup>93</sup> Professor Ji Weidong provides an elaborate map of the Chinese rule of law discourse, which includes no fewer than ten different-level dimensions and dichotomies presented on two graphs. See Ji Weidong, "Two Analytical Frameworks."

The ideological positions described in this book have changed during the past decades. For instance, the key doctrines that make up today's conservative socialism were daring and reformist in their original context in the late 1970s and early 1980s. Today's conservative socialist doctrines gained their contemporary meaning in the course of the 1980s and 1990s, when the mainstream of Chinese legal scholarship embraced legal dogmatic and hermeneutic research methods. The mainstream position itself developed from seeing the rule of law in terms of legal predictability and logically formal rationality toward a more pragmatist approach to law. A distinctively "liberal" approach to the rule of law emerged in the 1990s. This strand of liberalism was, first, an intellectual disposition that deployed various social theoretical arguments against Marxist and neoconservative scholarship. During the 2000s and 2010s, liberalism was expressed in increasingly politically activist terms. Avant-garde scholarship, finally, began as a response to the ever-liberalizing nature of Chinese legal scholarship. Avant-garde scholarship tapped into Western postmodern critiques of liberalism in an attempt to articulate a specifically Chinese conception of the rule of law. In the 2000s and the 2010s, the cultural and political nostalgia of early avant-garde projects gave way to a forceful defense of China's idiosyncratic political structure.

Chapter 3 takes a step back from the examination of the Chinese rule of law discourse. The chapter discusses certain common methodological prejudices that affect the interpretation of Chinese legal thought. In particular, it criticizes the self-consciously realist notion that ideology can be reduced to a universal battle over readily discernable interests. From a realist perspective, it appears clear that certain ideological statements (say, the defense of the "Three Supremes" doctrine) are merely "cynical" window dressing for the attainment of concrete financial and political interests. While the chapter demonstrates that cynicism plays an important role in the Chinese rule of law discourse, it also argues that realism itself is too reductionist a method for understanding Chinese legal scholars' views about the rule of law. No great insight is gained by assuming that Chinese legal scholars' interests are based on a universal struggle for advantage. More generally, Chapter 3 demonstrates that no single social theoretical innovation or tradition offers a panacea for the understanding of the Chinese rule of law discourse. For instance, a scholar who seeks to understand the Chinese rule of law discourse and genuinely believes that the rule of law is an "empty vessel" must still account for the fact that Chinese legal theorists, such as Li Buyun to Zhu Suli, have believed that social forces necessitate a certain form of the rule of law. Conversely, a scholar who sees the rule of law in terms of deterministic social forces must account for the role of the "empty vessel" arguments that also appear in the texts of Li Buyun, Zhu Suli and other Chinese scholars. Chapter 3 makes these points through a case study of the legal ideology of Luo Gan, a principal advocate of the socialist rule of law principle in the mid-2000s. Luo Gan is an unlikely subject for a legal theoretical study. While his speeches are often obscure and potentially even nonsensical,

they nevertheless raise important questions about ideological cynicism and interpretation precisely because of their suspect nature.

Chapter 4 continues the analysis of the conservative socialist approach to the rule of law. The chapter argues that the CCP's relationship to law can be seen, in parts, as suggestive, contradictory and even paradoxical. The chapter points out that, despite the increasingly marginalized nature of Marxism in China, Chinese conservative socialists have derived certain paradoxical elements of their ideology from classical Marxist dogmas. The practical reason for this paradoxical sensibility can be easily explained. In a socialist system, subunits of the government, such as factories, railroad operators and agricultural communes, supposedly share a single unified cause, which is set out in a common economic plan. In theory, the subunits contribute to the achievement of a single goal. The actual implementation of the common plan, however, sets the interests of these administrative units against one another. If the economic plan cannot be carried out in its entirety, or if there are economic setbacks, the administrative units compete against one another to fulfill the requirements of the plan. It is easy to see the result as a paradox: the implementation of a common plan that is premised on the unity of interests causes these interests to be diversified. Karl Marx himself suggested that the interests of the individual members of society could be diversified as a result of socialist legislation that aimed to bring about the unification of societal interests. Chapter 4 discusses the uses of such conservative socialist paradoxes through an (as such inauthentic) engagement with Professor Zhu Suli's work on "local knowledge." Local knowledge is not formal legal knowledge but, in Zhu's view, knowledge that is meaningful only in the concrete context in which it exists. Chapter 4 argues that the paradoxical, contradictory and suggestive use of language is useful for the conservative socialist project because it helps, to a certain extent, maintain concrete local knowledge about the correct relationship between the Party and the law.

Whereas Chapter 4 discusses paradoxes (and, to a lesser extent, contradictions and arguments about conflicts) that are ideologically useful, Chapter 5 examines paradoxes and contradictions that are potentially destabilizing for an ideological project. Here, the focus is on mainstream and liberal ideological positions. There are, of course, numerous legal theoretical perspectives in Chinese mainstream and liberal scholarship. Chapter 5 re-examines the thinness and thickness of various rule of law theories, which still form the central theoretical axis of the global rule of law discourse as discussed above. The chapter begins with an assertion that mainstream approaches to the rule of law postulate a thick understanding of the good, whereas liberal approaches adhere to a thin (or thinner) understanding of it. Whereas mainstream scholars place their trust in the moral authority of the social doctor or some other figure, who is able to prescribe a life worth living, the much more marginal liberal narrative holds that no such ethical experts exist and that only procedural justice, guaranteed by the rule of law and (or including) democratic

rights, can facilitate social integration and social justice in China. Chapter 5 then collapses these positions in an effort to demonstrate the destabilizing use of paradoxes and contradictions. To this end, the chapter discusses elements of mainstream scholarship (as represented by Professors Li Buyun and Wang Liming) and the so-called “neoproceduralism” advocated by Professor Ji Weidong. The chapter concludes by arguing that the result of mainstream and liberal narratives on the rule of law is an unstable – but perhaps beneficial – ideological practice that provides arguments for its conservative, neo-conservative and avant-garde critics.

Chapter 6 discusses a form of rule of law scholarship that brings paradoxicality and contradictions to the fore of rule of law theories. The chapter examines three strands of China’s so called avant-garde scholarship: (i) the critique of mainstream and liberal rule of law theories by scholars such as Cui Zhiyuan, Deng Zhenglai and Wang Hui; (ii) visionary proposals for a new rule of law ideology by Xia Yong and Gao Hongjun; and (iii) certain aspects of Jiang Shigong’s neoconservative legal thought. The chapter argues that many Chinese avant-garde scholars are unable to renew mainstream and liberal scholarship on the rule of law because they are influenced by the same hegemonic ideology that informs the object of their critique. As a consequence, they only seek to create illusions of ideological change, lest their proposals appear too unrealistic or outlandish. The chapter also points out that, as is the case with the conservative socialist scholars and ideologues, some Chinese avant-garde scholars have turned the paradoxicality of their project into a strength by suggesting that ideological development is a paradoxical process and that the quest for ideological coherence is theoretically outdated. The chapter concludes with a discussion on Jiang Shigong’s scholarship, and argues that a strand of Chinese avant-garde legal thought is experiencing a politically meaningful irrationalist moment.

The concluding chapter demonstrates how the ideological positions play out in a concrete policy debate. The chapter interprets the Chinese discussion on rural land rights through the perspectives of the four ideological positions. The chapter argues that a conservative socialist strategy in this debate is to establish possibilities for suspending and destabilizing land rights. It also contends that the difference between mainstream and liberal positions is one of degree: mainstream scholars emphasize the virtues of formalized land rights and paternalistic considerations for allowing individuals to exercise their freedom within these rights; whereas liberals are inclined to treat individual property as an integral element of a person’s freedom and hence see China’s present rural land rights regime as a human rights problem. The avant-garde position, finally, is to oppose any perceived “false necessities” in the construction of land rights. The chapter also explores the differences between Chinese and Western legal scholarship on the rule of law. While many aspects of the Chinese rule of law discourse are familiar to European and American scholars, Western and Chinese legal scholars differ slightly, perhaps, from each other in their attitude

to the paradoxical and the irrational. Most legal scholars writing within the Western tradition either deny or repress paradoxes and contradictions, or present them as evidence of failures in other scholars' work; in contrast, some Chinese scholars – at least, those who have inspired my own book – make use of paradoxes, contradictions and conflicts within their own ideology without falling into an existential crisis.