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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.[1] 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

[1] 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;[2] (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.[3] 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."[4] 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

[2] "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.

[3] 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.

[4] Weber, "Objectivity," 90.

substantive value, such as the protection of specific rights.[5] 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.[6] 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.[7] 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

[5] 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."

[6] Marsh, *The Rule of Law in a Free Society*, 192–193.

[7] 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."[8] 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.[9]

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.

[8] Wang Shengjun, "Always Adhere to the 'Three Supremes,'" 4.

[9] 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."[10] 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.[11] 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."[12] 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.[13] Brian Tamanaha has pointed out that Dicey's rule of law conception

[10] Central Political and Legal Committee, *The Socialist Rule of Law Principle*, 30.
[11] *Ibid.* 30–31.
[12] *Ibid.* 98–99, 109.
[13] Dicey, *Introduction*, 190.

emerged from his opposition to welfare state institutions.[14] Hayek, like Dicey, thought that at stake with the rule of law definitions was "the fate of our liberty."[15] 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.[16]

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.[17] 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.[18] 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.[19] 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,[20] or assuming that "democracy" (with Chinese characteristics) is a value within the rule of law.[21]

[14] Tamanaha, *On the Rule of Law*, 64–65.

[15] Hayek, *The Political Ideal*, 3.

[16] *Ibid.* 31, 34. See also Hayek, *The Road to Serfdom*, 82.

[17] Waldron, *The Rule of Law and the Measure of Property*, 12–13.

[18] 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 fear 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*.

[19] 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.

[20] Pan Wei, "Toward a Consultative Rule of Law Regime," 8; Xia Yong, "What Is the Rule of Law?," 64–65.

[21] 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.[22] 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."[23] 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."[24] 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."[25]

For many scholars, the thin/thick distinction is hence no longer ideologically loaded, but at most an analytically relevant consideration.[26] 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

[22] Marsh, *The Rule of Law*, 70.
[23] *Ibid.* 65.
[24] *Ibid.* 62.
[25] UN Doc. GA/L/3326.
[26] 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."[27] 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.[28] 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.[29] 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.[30] 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."[31]

[27] Shambaugh, *China's Communist Party*, 115.
[28] For details and references, see Liu Xuebin, Li Yongjun & Feng Fei, "Thirty Years of Chinese Legal Theory," 17.
[29] See Zhang Wenxian, "Building the Legal Institutions."
[30] 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.
[31] 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.[32] 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."[33]

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 lawgivers). 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*.

[32] On the Asian values debate, see de Bary, *Asian Values*.

[33] Goldman, *From Comrade to Citizen*.