Ideological Conflict and the Rule of Law in Contemporary China

Useful Paradoxes

This book studies ideological divisions within Chinese legal academia and their relationship to arguments about the rule of law. The book describes argumentative strategies used by Chinese legal scholars to legitimize and subvert China's state-sanctioned ideology. It also examines Chinese efforts to invent new, alternative rule of law conceptions. In addition to this descriptive project, the book advances a more general argument about the rule of law phenomenon, insisting that many arguments about the rule of law are better understood in terms of their intended and actual effects rather than as analytic propositions or descriptive statements. To illustrate this argument, the book demonstrates that various paradoxical, contradictory and otherwise implausible arguments about the rule of law play an important role in Chinese debates about the rule of law. Paradoxical statements about the rule of law, in particular, can be useful for an ideological project.

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Foreword

The Chinese language is known for its evocative sayings, one of which – 青出于蓝而胜于蓝 – very nicely captures the sentiment I wish to convey in this short foreword marking the publication of Samuli Seppänen's book *Ideological Conflict and the Rule of Law in Contemporary China: Useful Paradoxes*. Drawn from the writing of the philosopher Xunzi (approximately 310–235 BCE), a somewhat textualist translation of this phrase would read that "the blue that emerges from the indigo plant is even bluer than the plant itself," with the larger meaning being an acknowledgment that the scholar in question has surpassed those with whom he studied.

Useful Paradoxes represents an extraordinary achievement. Its genesis lay in Samuli's skepticism, informed by critical legal theory, of the pieties surrounding liberal legality and of associated conventional understandings of the idea of the rule of law. This gnawing intellectual curiosity led Samuli first to look toward China, with its abundance of self-proclaimed efforts to reimagine what a rule of law might be in the hope of finding alternative understandings capable of resolving such tensions. The very scrupulousness that drove this undertaking, however, kept Samuli from easily resting content – and so, unable to find what he had thought he might from the writings of leading Chinese thinkers of the day, Samuli next took it upon himself to decamp to China, there personally and at length to engage a host of the most important and innovative thinkers about law in the contemporary PRC.

Samuli's exploration did not yield what he would consider a normatively or conceptually preferable alternative vision of what a rule of law might be – but it did lead to a groundbreaking study of the range and character of contemporary Chinese legal thought. *Useful Paradoxes* deserves praise for the empathetic but rigorous manner in which it delves deeply and deftly into the thinking of a bevy of major and quite varied thinkers in law, including, but not limited to, such major figures as Cui Zhiyuan, Deng Zhenglai, He Weifang, Ji Weidong, Jiang Shigong, Li Buyun, Luo Gan, Sun Guohua, Wang Liming and Zhu Suli. There is no better critical guide in a western language to the leading figures in early twenty-first century legal thought in China. That noted, *Useful Paradoxes* also deserves praise for the artfulness and candor with which it recognizes and teases out the contradictions and paradoxes that inform the larger project of

legal development in the PRC – and with it, attempts therein to articulate an alternative to liberal legality. In this sense, *Useful Paradoxes* has made a valuable contribution not only to our understanding of the law and institutions in the PRC more broadly, but also to our thinking about what may (or may not) be possible in law anywhere and, as such, it is an important contribution to legal theory in general, deserving of being studied far beyond the world of contemporary Chinese studies.

William P. Alford
Harvard Law School
October 31, 2015

Preface and acknowledgments

The audacious scope of this book was more a function of my ignorance than the result of an informed scholarly decision. The body of Chinese scholarship on the rule of law is, first of all, voluminous. This can be easily attested at the All Sages Bookstore in Beijing, which features a seemingly never-ending array of thought-provoking interventions into the debate on the rule of law and legal thought, more generally. After I had learned enough Chinese to appreciate this fact, I also realized that Chinese legal scholars do not write in a vacuum but instead engage closely with global legal theoretical debates. Understanding these global debates is a precondition for understanding the interventions in the Chinese debates on the rule of law. Soon it also dawned on me that many Chinese legal scholars use language suggestively and against a background of implicit, contextual local knowledge. This adds yet another layer of complexity to the interpretation of Chinese scholarship on the rule of law. In the background to all of this is the question of traditional (or traditionalist) Chinese thought and its possible influence on contemporary Chinese legal discourse. And it goes without saying that understanding scholarly arguments about the rule of law is only a small step toward saying something relevant about the subject of the debate itself, the rule of law. This creative practice is the goal of Chinese rule of law scholarship, and to do justice to this scholarship one should set one's goals equally high.

Fortunately, I was able to speak with thirty Chinese legal scholars who were generous with their time and helped to make the project somehow manageable. I will not thank all these scholars here, as I did not obtain permission from many of them to be associated with this book. I must also emphasize that the scholars discussed in this book did not read this manuscript or sign off on my interpretations of their texts. I apologize to these scholars if I have not grasped the meaning of their scholarship, or if they feel that my emphasis is somehow wrong. Any mistakes in this book are solely my own fault. With these caveats, I would like to express my sincere thanks to Professors Feng Fei, Gao Hongjun, He Weifang, Hou Meng, Ji Weidong, Li Ping, Li Yongjun, Liu Xuebin, Shi Daxiao and Sun Guodong.

This book was conceived first as a doctoral dissertation project at Harvard Law School's Graduate Program.[1] I wish to thank William Alford for his wise guidance and virtuous example during this dissertation project. I also thank Duncan Kennedy and David Kennedy for the many hours of teaching they offered to me. I am grateful to Professors Martti Koskenniemi, Eva Pils, Teemu Ruskola, Kenneth Winston and Yu Xingzhong, who read different versions of the manuscript and provided helpful questions, suggestions and corrections to it. Teemu's invaluable encouragement and support took this project through a number of critical junctures. Many other friends, colleagues, teachers, students and conference participants helped me during this long project. These include Ira Belkin, Sarah Biddulph, Martin Björklund, Anthony Carty, Matthew Cheng, Gonçalo de Almeida Ribeiro, David Donald, Michael Dowdle, Jacob Eisler, Fang Meng, Iain Frame, Ermal Frasheri, Christopher Gane, Gao Lingyun, Gregory Gordon, Guo Rui, Stuart Hargreaves, Scott Hirst, Vishaal Kishore, Damjan Kukovec, Delia Lin, Luo Xinzhi, Bryan Mercurio, Hank Ng, Will Partlett, Randall Peerenboom, Chad Priest, Flora Sapio, Osama Siddique, Nimer Sultany, Chris Taggart, Jeanne Tai, Joanna Tong, Sue Trevaskes, Andrew Tuch, Daniel Vargas, Wang Gangqiao, Xi Chao and Yan Xu. Thank you all. I am also grateful to Joe Ng at Cambridge University Press for his generous support for this project. The five anonymous reviewers obtained by Cambridge University Press provided helpful comments on the manuscript. Portions of this book were published as "Ideological Renewal and Nostalgia in China's 'Avant-garde' Legal Scholarship," *Washington University Global Studies Law Review* 13 (2014), 83–125. I thank the editors of *Washington University Global Studies Law Review* for their meticulous work.

As for institutions, I wish to thank Harvard Law School's Graduate Program for its support for my doctoral studies. I am also grateful to a number of foundations who supported my studies at Harvard. These foundations include the Finnish Lawyers' Association, the Ella and Georg Ehrnrooth Foundation, the Finnish Cultural Foundation, the Fulbright Center Finland, the Helsingin Sanomat Foundation, the Niilo Helander Foundation, and the Scandinavia-Japan Sasakawa Foundation. Fudan University in Shanghai worked as the basis for my research in China during the dissertation phase. The revision of the dissertation into a book occurred at the Faculty of Law at the Chinese University of Hong Kong, which, among many other things, funded my research trips to mainland China.

Perhaps a few more words should be said about the role of Hong Kong in this research project. In Hong Kong, I have felt encouraged to cross the boundaries of Western and Chinese legal discourses more boldly than might have been otherwise possible. This is comforting, since there is no denying that part of my project is orientalist in at least one of the senses that Edward Said gave to this

[1] Samuli Seppänen, Useful Paradoxes: Ideological Conflicts in the Chinese Rule of Law Discourse, unpublished S.J.D. Dissertation, Harvard Law School 2012.

word. According to Said, "the Orientalist, poet or scholar, makes the Orient speak, describes the Orient, renders its mysteries plain for and to the West."[2] While I admit hoping that my description of inter-elite rivalries within China speaks to the modern orientalist, I also hope that there are some mitigating circumstances for the epistemic violence and other real injustices associated with this project. In particular, the recently acquired participant-observer status of all Hong Kong legal scholars in Chinese politics has provided some tangible insights into the predicament and ethical choices that Chinese legal scholars face. In this sense, the present text is not entirely external to the Chinese rule of law discourse.

Finally, the most important support persons have been at home, but words are not enough to thank them.

[2] Said, *Orientalism*, 20–21.