

INTRODUCTION

Fighting for a Constitutional China: Public Enlightenment and Legal Professionalism

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We are here not because we are law-breakers; we are here in our efforts to become law-makers.

—EMMELINE PANKHURST, leader of the British suffragette movement

The right rulings make a country great because the event is seen by all.

—STEPHEN BREYER, Associate Justice, U.S. Supreme Court

One evening in the fall of 2011, almost five months before the dramatic downfall of heavyweight political leader Bo Xilai, I sat in an auditorium at the Law School of Peking University listening to a panel discussion on China's judicial reforms.¹ The Beida Law Society, a student organization on campus, sponsored this public forum featuring He Weifang and Xu Xin, two distinguished law professors in Beijing.² The auditorium was crowded with several hundred people (mainly students and young faculty members but also some Chinese journalists). As I listened to this engaging and enlightening discussion, it occurred to me that I was witnessing a profound political movement unfolding for constitutionalism in the People's Republic of China (PRC).

I would like to thank Eve Cary, John Langdon, Jordan Lee, and Andrew Marble for their very helpful comments on an early version of this introductory chapter.

What struck me—and shocked me as a foreign visitor—was not only that the entire discussion was explicitly critical of the Chinese Communist Party (CCP) for its resistance to any meaningful judicial reform but also that the atmosphere was calm, reasonable, and marked by a sense of humor and sophistication in the expression of ideas. Both professors criticized the CCP’s omnipresent role in the country’s legal system, especially in regard to the infinite power of the Central Commission of Politics and Law (CCPL) of the CCP.³ In the words of He Weifang, many recent well-known cases of injustice were largely due to the “invisible hand” of the CCPL. Both speakers called for a fundamental change in the role and presence of the CCPL, including the abolition of the politics and law commissions at all subnational levels.

As part of China’s overall political reforms, He and Xu proposed prioritizing judicial reforms with a focus on judicial independence. They argued that judicial reforms are in line with the need for social stability and thus should be considered the least disruptive way to ease China’s much-needed political transformation. They outlined several important systematic changes to China’s legal system:

- transferring the leadership of judicial reforms from the CCPL to the National People’s Congress (NPC) in the form of a yet-to-be-established judicial reform committee, one in which legal scholars, lawyers, and representatives of nongovernmental organizations would constitute more than half of the members;

- adjusting the role of the CCP from appointing presidents of courts and chief prosecutors to only nominating them (an independent selection committee, rather than the party organization department, would make these appointments);

- prohibiting interference by the CCP in any legal cases, especially by prohibiting judges from being CCP members and banning party organizations within law firms;

- reducing the power of both presidents of courts and chief prosecutors in order to enhance procedural justice; and

- establishing a constitutional review system, including a new constitutional committee and constitutional court.

In addition, Professor Xu presented a comprehensive plan for establishing a protection and guarantee system. He specifically addressed important issues such as how to ensure budget security for an independent judicial system, how to provide job security for legal professionals, how to prevent corruption and other power abuses in law enforcement, how the rule of law can ensure

citizens' democratic rights including the development of the jury system, and how to protect the legal rights of vulnerable social groups.

The panel discussion was also politically and intellectually stimulating thanks to an interactive session with the audience that covered a broad range of questions from students. One questioner asked, "If judicial reform is the lowest-risk approach for China's political transformation, where does the strongest resistance come from?" Professor Xu responded bluntly, "The strongest resistance comes from the CCP leadership, and this is most evident in senior leader Wu Bangguo's recent statement widely proclaiming the 'five no's' for China."⁴

Another questioner opined, "Wasn't it a wise decision on the part of the former Libyan justice minister Mustafa Abdul Jalil to denounce the Libyan leader Muammar Gaddafi before the collapse of the regime?" Professor He did not directly answer this intriguing question but instead told the story of Qing dynasty minister (ambassador) to the United States Wu Tingfang, a U.K.- and U.S.-educated lawyer who decided to support Sun Yat-sen's 1911 Revolution because, as He said somewhat jokingly, "Wu wisely stated that 'the Qing dynasty cannot be saved (*meijiule*).'"

Still another questioner wanted to know, "What's the incentive for the CCP and powerful special interest groups to pursue judicial reform that may very well undermine their own power and interests?" Professor He replied, "It's a result of a domino effect—a natural and inevitable consequence of the fundamental change of state-society relations in China. From the perspective of CCP leaders, some may want to be remembered in history as having been on the right side."

This episode of openness and pluralism in intellectual and political discourse, though eye-opening and surprising for foreign observers like myself, is by no means unique in present-day China. In recent years an increasing number of well-known professors and opinion leaders have shown that they are not afraid of publicly expressing their controversial views, including sharp criticism of the CCP authorities. Such remarks would have been regarded as politically taboo or even "unlawful" just a few years ago. Never before in the six-decade history of the PRC has the Chinese general public, and especially the rapidly growing legal community, expressed such serious concerns about the need to restrain the power of the CCP and to create a much more independent judicial system.

Like He Weifang and Xu Xin, many other prominent legal scholars in the country frequently give public lectures and panel discussions on similar topics, with many of these events being webcast on the Chinese Internet.⁵ In

November 2010, for example, the death of the distinguished constitutional scholar Cai Dingjian led to nationwide, year-long memorial activities honoring his advocacy for the rule of law in China.⁶ Cai's last words, "Constitutional democracy is the mission of our generation," were widely cited in both the country's official media and social media.⁷

These instances do not necessarily mean that Chinese authorities have loosened control of the legal profession. On the contrary, liberal legal scholars and human rights lawyers are often among the main targets for harsh treatment, including imprisonment. Yet the movement for rule of law in the country seems to have already reached a moral and political high ground. It has gained further momentum in the wake of recent crises such as the defection of former Chongqing police chief Wang Lijun to the U.S. consulate in Chengdu, the downfall of Politburo member Bo Xilai and the subsequent murder charge against his wife, and graphic tales told by blind human rights activist Chen Guangcheng of torture and other abuses of power by Chinese law enforcement. Both the frequent manifestations of social unrest and the growing transparency of factional infighting in the CCP leadership in recent years further underscore the urgency of developing a credible legal system.

He Weifang and China's Legal Development: Objectives of the Volume

This volume is a collection of the English translations of He Weifang's representative work from 2001 to 2011. He Weifang has been at the forefront of the country's bumpy path toward justice and judicial independence for more than a decade. A proponent of reform rather than revolution, He's political and professional endeavors have largely paralleled the painstaking quest for rule of law in China during this crucial period of sociopolitical transformation. This volume examines some of the most important topics in China's legal development, including judicial independence, judicial review, legal education, the professionalization of lawyers and the selection of judges, capital punishment, and the legal protection of free speech, religious freedom, and human rights. In the volume, He also offers a historical review of Chinese traditional legal thought, enhanced by cross-country comparisons.

Though maintaining his characteristically optimistic personality, He is also keenly aware of the political, institutional, and cultural barriers to genuine constitutional development in China. To promote constitutional governance in a culture that lacks a strong legal tradition—and in a political system that is largely lawless—is an overwhelming task. This requires the country's legal

scholars and other professionals, as a group, to be fully engaged in educating and enlightening the public (and elites as well) rather than merely pursuing academic and judicial research. Not surprisingly, Professor He is highly regarded for his dual roles as practitioner and thinker, as advocate and scholar, in the Chinese legal world. In addition to presenting a selection of He's important academic writings, this book also includes some of his public speeches, media interviews, and open letters, providing comprehensive and accurate accounts of his distinctive broader role as a public intellectual rather than as a more narrow, purely "ivory tower" scholar of legal studies.

With a few exceptions, most chapters in this volume are available to English readers for the first time. The US-based *Foreign Policy* magazine appropriately recognized He Weifang as one of the 100 top global thinkers in 2011.⁸ The English-speaking world, including the China studies community in the West, however, has largely remained unfamiliar with He's scholarly writings and personal endeavors regarding China's legal development, reflecting a serious discrepancy in our understanding of the intellectual and policy discourse in this rapidly changing country.

To start the volume, this comprehensive introductory chapter aims to present the personal and professional background of He Weifang, the intellectual and political contexts essential to understanding his pursuits, and the legal and policy debates that his work has stimulated. This discussion can help readers grasp He Weifang's extraordinary contributions in the domains of public enlightenment and legal professionalism, which are the main focus of this introductory chapter.

Such an understanding of He Weifang and his remarkable endeavors is critical because, of all the issues sparked by China's ongoing economic and sociopolitical transformation, the development of the Chinese legal system is arguably the most consequential. The paradoxical trends of growing public demand for rule of law, on the one hand, and continued party interference in legal affairs, on the other, present an intriguing political phenomenon. How this battle will unfold has strong implications for the country's social stability, economic development, and political trajectory; and its ramifications go far beyond China's national borders. He's political and intellectual journey is a fascinating story of one man's courageous fight to promote justice within the world's largest authoritarian regime. His story enriches our more general understanding of the pluralistic and dynamic nature of present-day China. To a great extent, this timely volume provides invaluable insights and well-grounded assessments of the prospects of constitutionalism in China.

Public Enlightenment: Views, Values, and Courage

To better understand He Weifang's views, values, and courage, one needs to know something about the broader intellectual enlightenment movement in China. Public enlightenment (*qimeng*) has been an enduring aspiration of Chinese intellectuals in contemporary China. Over the past century, major sociopolitical crises at home, which were usually accompanied by strong ideological influences from abroad, often led forward-looking Chinese intellectuals to develop new ideas, views, and values in order to "wake up" the public and the nation. The May Fourth Movement in 1919, occurring in the wake of the collapse of the Qing dynasty, was a turning point in China's modern history and marked the first enlightenment movement in the Middle Kingdom. Hu Shih, one of the most prominent intellectual participants in the movement, characterized it as the "Chinese Renaissance" for its embrace of foreign ideas regarding science and experimentation.⁹

The Chinese intellectual ferment in the post-Mao era from the late 1970s to the late 1980s, especially its critical reflection on the decade-long political fanaticism and human suffering of the Cultural Revolution and the subsequent call for humanism, was often seen as the second enlightenment movement. In a sense, the post-Mao enlightenment was a strong wave of intellectual and public awakening that fulfilled the unaccomplished tasks of the May Fourth Movement.¹⁰ Unfortunately, this second enlightenment ended tragically in the 1989 Tiananmen Square incident.

TOWARD A THIRD ENLIGHTENMENT MOVEMENT
IN CONTEMPORARY CHINA?

In the past few years, a third wave of public enlightenment has arguably been in the making—this despite the tight control, particularly over the media, that the Chinese authorities have maintained. A third enlightenment is the subject of a new volume, *The Enlightenment and Transformation of Chinese Society*, edited by Zi Zhongyun, a distinguished scholar and former director of the Institute of American Studies at the Chinese Academy of Social Science (CASS). In the book Zi pointedly asks, "Why do we need a 'new enlightenment' now?"¹¹ The answer lies, as she and other contributors describe, in the growing tension between rapid socioeconomic transformation and the stagnation of political reforms, between China's economic rise on the world stage and the party's ideological stance that resists universal values, and between revolutionary changes in telecommunication and the government's strict media censorship.¹²

In Zi's view, China needs a new enlightenment because of what she calls "obscurantism" (*mengmei zhuyi*), which refers to the efforts of those officials opposed to democratic change.¹³ These officials and some conservative public intellectuals, as Zi describes, have spread the false notions that democracy does not fit with the Chinese people and that universal values are nothing but a Western conspiracy against China. She particularly warns against the danger of nationalism—leading to a tendency to perpetuate injustice in society in the name of the state's interest.¹⁴

According to PRC liberal intellectuals, enlightenment means that people are liberated from obscurantism and ignorance, from having blind faith in myths or in a dictator. One important aspect of the post-Cultural Revolution enlightenment movement was its strong critique of—and break from—the shadow of Mao worship.¹⁵ What has been astonishingly disturbing in recent years, in the view of Chinese liberal critics, is the fact that Mao worship and myths about the "glorious" Cultural Revolution have resurged in the country—most noticeably in Chongqing under Bo Xilai, who himself, as many liberal critics believe, was very much a Mao-like figure in terms of the personality cult that surrounded him.¹⁶

Under these political and ideological circumstances, Chinese liberal intellectuals have begun mobilizing for a new wave of enlightenment. The overarching theme of this latest and ongoing intellectual ferment, as some prominent Chinese scholars observe, is rule of law and constitutionalism. According to Xu Youyu, a distinguished scholar at the Institute of Philosophy at the CASS, the enlightenment movement in the post-Mao era was heavily engaged in the philosophical discussion of humanism. In contrast, in this latest enlightenment movement Chinese public intellectuals are more interested in discussing law-related issues, including "rule of law, the protection of individual rights, and limiting the scope of authority and restraining the power of the government."¹⁷ In Xu's words, Chinese liberal intellectuals seem to have highlighted "constitutional democracy" as the overall programmatic concept.¹⁸ In the same line of thinking, Wei Sen, a professor of economics at Fudan University, believes that enhancing the awareness of the constitutionally granted rights of taxpayers is "a top priority for the 'new enlightenment.'"¹⁹

He Weifang shares similar views with Zi Zhongyun, Xu Youyu, and Wei Sen. As He argues forcefully in this volume, "constitutionalism and the rule of law are the best safeguards of liberty and the foundation of good governance in China." (See chapter 2.) He believes that "a rigorous system of auditing tax revenues, fiscal budgets, and government spending . . . is a very important manifestation of constitutional government" in democracies. (See

chapter 3.) Early in his career, He recognized the daunting challenges confronting China's legal scholars. His LL.M. thesis in 1985 examined religious influences in the development of law in the West.²⁰ As He observed, the religious sentiment in the Western tradition that "everyone is equal before God" was what laid the cultural foundation for the legal consciousness, namely, that "everyone is equal before the law."²¹ China has apparently lacked such a cultural foundation for this profoundly important notion of rule of law.

In his 1994 article on the comparative study of legal cultures, He Weifang described both the enormous difficulties and various effective approaches in transplanting the Western legal system to different cultural environments such as China:

No legal system can be transplanted to another cultural circumstance without itself undergoing change, and that system cannot play the same role as it did in its original circumstance. Legal transplantation might be considered a two-way development. On one hand, foreign legal systems and ideas transform the native culture; on the other hand, they are themselves altered by the influence of that culture. During this process, some systems or ideas will be rejected because of sharp conflicts with native traditions; some will partly revise the native culture, establishing a new system different from both the system in its original place and the culture before transplantation; and lastly some systems and ideas may be absorbed by the native tradition completely. This can lead to the curious position where a transplant can even be believed to be an essential part of the native culture and defended as such by nationalists.²²

He firmly believes that a "successful mixture of different legal cultures requires profound study of the foreign and native cultures."²³ In practice, He has long been committed to disseminating scholarly research to a much broader audience and to fully participating in the latest wave of the public enlightenment movement, especially spreading Western views of constitutionalism and what he believes to be universal values of the rule of law. Tellingly, He's life experience and intellectual journey personifies the nation's arduous struggle to make the rule of law more than just something that authorities pay lip service to or more than just documents sitting in libraries; He wants them to be legally binding and publicly recognized norms and practices. For He, the implementation of rule of law and coordination of judicial reforms through public discourse can be as important as the making of laws itself.

THE HE WEIFANG PHENOMENON:
A LEGAL SCHOLAR'S PUBLIC OUTREACH

A native of Shandong Province's Muping County (located between Yantai City and Weihai City), He Weifang was born on July 17, 1960. He's father, a doctor in the People's Liberation Army (PLA), was demobilized to work in a civilian hospital when He was three years old. In the midst of the Cultural Revolution, his mother brought the ten-year-old He and two of his siblings back to their native village of Jianggezhuang (comprised of about 800 households) in Muping County.²⁴ He obtained most of his elementary and middle school education at schools in that village. When the PRC resumed its higher education entrance examinations in 1977, He took the exams but failed to be accepted as he scored only 4 of a possible 100 points on the mathematics test. He took the exams again the following year and was accepted. Although he chose the Department of Chinese Literature at Shandong Normal College as his preferred program, he was instead admitted to the newly reestablished law program at the Southwest College of Political Science and Law in Chongqing, a school he "had never heard of before."²⁵

During his college years from 1978 to 1982, He was primarily interested in two broad subjects. The first was the "national madness of the decade-long Cultural Revolution," which was most notable for its political persecution, torture, and human suffering. The legal and judicial prevention of the recurrence of such a tragedy was a main concern for this young law school student.²⁶ This concern naturally led him to develop, especially in his junior year, a strong interest in a second broad subject: the "ideas of the European Age of Enlightenment." He thus became intensively absorbed in reading the classic works of Rousseau, Voltaire, Locke, Montesquieu, and Milton. At a time when books on law and the Western legal system were extremely rare in China, the writings of these great Western philosophers were enormously helpful to He's educational development.

As a law student, He conducted intensive research on church-state relations in medieval Europe. He wrote his undergraduate thesis on Catholic canon law and the role of religion in legal and judicial development in European states—a subject that he continued to focus on in his graduate studies under the supervision of Professor Pan Huafang at China University of Political Science and Law (CUPSL) from 1982 to 1985.²⁷ After receiving a master's degree, He remained at CUPSL as an instructor and research fellow at the Institute of Comparative Law. He was promoted to associate professor of law in 1992. He helped establish *Comparative Law* (Bijiaofa yanjiu), the PRC's first scholarly journal on comparative law, and served as deputy editor of this quarterly Chinese

journal. For almost a decade, He also served as editor-in-chief of *Peking University Law Journal*, a prominent journal in China that covers both foreign and Chinese legal issues.

In the early 1990s, in collaboration with several other young legal scholars, He was engaged in a number of major translation projects of Western legal thought and systems textbooks.²⁸ He also served as editor of *Xianzheng yuecong* (Constitutionalism studies), a translation series published by SDX Joint Publishing Company. He's instrumental role in translating important English language legal books into Chinese and his editorship of the journal *Comparative Law* greatly contributed to the dissemination of Western legal thought among Chinese law school students and the newly emerging legal professional community in the country. As He described, the Western legal system and intellectual evolution can serve as a mirror, reflecting some of the characteristics of Chinese legal development.²⁹

In 1995, after having worked at CUPSL for a decade, He moved to Peking University where he served as an associate professor of law. His main faculty responsibility thus changed from research to teaching. Four years later, he was promoted to full professor. He has always been a popular professor on campus, including being named one of the "Top Ten Teachers" of Peking University Law School for three consecutive years (1998–2000) and receiving the title of the best teacher in the entire university in 2000.

Like many of his law school colleagues of the same generation, He had the opportunity to study in Western countries as a visiting scholar. In 1993 he participated in a two-month program on research techniques in social sciences at the University of Michigan in Ann Arbor. He was a visiting scholar at the East Asian Legal Studies program at Harvard University from July 1996 to January 1997. In addition, over the last two decades, He has frequently visited the United States, Japan, and European countries, giving lectures, participating in academic conferences, and attending court hearings. An admirer of American democracy, He has explicitly expressed his reservation about the notion of "moneycracy," the term that many critics in China and elsewhere used to characterize the U.S. political system. He observed, for example, "If a [Chinese] company can spend RMB 400 million to advertise a liquor product, it is really not so big a deal for Americans to spend \$240 million to elect a president who will hold the position for four years or even eight years." (See chapter 3.)

Firsthand overseas experiences, especially extensive professional exchanges with foreign legal scholars, have not only enriched He's thinking on legal issues but also broadened his perspective in his efforts to promote the rule of law in China. He believes that China is in the midst of a crucial historical

transition that needs many “Chinese Madisons” and “Chinese Hamiltons” to guide the country along the right track to constitutional development. He was profoundly inspired by his role model, Hu Shih, the aforementioned leading figure in the May Fourth Movement, a legendary figure in contemporary China. He’s reference to these intellectual and political giants in both the West and China reflects his outlook on China’s future political transformation rather than his own personal ambition. As He expressed in a number of interviews, “I will never be able to approximate the same level of Hu Shih’s academic excellence, dedication to China’s embrace of the modern world, and sense of how to maintain appropriate scholarly distance from political events.”³⁰

Fang Zhouzi, a well-known critic in the Chinese media, has criticized He Weifang for his lack of productivity in academic work and for his “trivial role” in legal scholarship. For Fang, He’s contribution has not extended beyond a mere promoting of “legal literacy” (*falü puji*) in China. In Fang’s judgment, He is not qualified to be a law professor at Peking University. Fang’s criticisms of He, however, have elicited a strong backlash against Fang on Chinese online message boards.³¹ Tong Zongjin, an associate professor at CUPSL, has used the fact that He’s scholarly publications have frequently been cited by distinguished law professors in the United States to reject Fang’s critique. Yuan Weishi, a well-respected Chinese historian, has also vigorously defended He’s contributions from a broader perspective. According to Yuan, He has helped to shape legal development in China through his instrumental role in public enlightenment regarding the notion of civil society and judicial independence. In Yuan’s words, “The impact of one powerful open letter or one profound public speech can be far more valuable than that of one hundred academic essays combined.”³²

He indeed has the ability to write so powerfully and speak so profoundly because he can draw from his scholarly work on comparative law and long-standing stance on the importance of legal professionalism. Having remained in close touch with the rapidly changing society in China, He has on a number of important occasions played a distinct role in either voicing vigorous dissent or winning a landmark battle in the name of justice. Thus the Chinese phrase “He Weifang phenomenon” first came into vogue several years ago to refer to the keen desire by public intellectuals to participate in political and policy discourse as well as the strong impact liberal legal scholars can have on public thinking and social norms.³³

He Weifang himself has stated that he aims to serve as “a public speaker promoting basic judicial concepts.” (See chapter 3.) In every year since 1998, he

has delivered or participated in about thirty to fifty public lectures or panel discussions on college campuses (other than the institution where he has taught) and with local governments, nongovernmental organizations, and legal institutions (such as courts) throughout the country.³⁴ In some of his public speeches at colleges, students have waited for three to four hours outside the lecture hall in order to get a seat, with many having to sit on the floor.³⁵

In addition to public lectures, He has been known for his public outreach through social media. Between 2006 and 2008, for example, He's blogs had a total of 3.7 million hits.³⁶ By the summer of 2012, his blog on sina.com had a total of 16 million hits.³⁷ Unlike most of his colleagues in China's law schools who usually devote their time to research and writings in academia, He has frequently written for popular magazines and has been interviewed by a variety of media outlets. Altogether, He has tendered several hundred nonacademic articles and media interviews during the last decade.

In 2001 He was selected by *China Youth*, a popular magazine in the PRC, as one of the top 100 young people who might shape China in the twenty-first century.³⁸ Within two years he had already begun to leave important marks on China's legal development. In 2003, for instance, in the wake of the tragic death of twenty-seven-year-old migrant worker Sun Zhigang who was beaten to death in Guangzhou, He and five other legal scholars in Beijing submitted a request to the Standing Committee of the NPC, asking that the "Regulation for Internment and Deportation of Urban Vagrants," adopted by the Chinese government in 1982, be considered unconstitutional. The news of the request circulated widely throughout the country. Within a month, Premier Wen Jiabao announced the abolition of the regulation, bringing to an end two decades of legal discrimination against migrants.³⁹

He's provocative remarks at the famous New Western Hills Symposium in 2006, including his assertion that China's party-state structure is "a serious violation of the constitution and law" because it exempts itself from constitutional controls and proper registration as a legal entity, are considered the strongest critique of the CCP party-state in PRC history. (See chapter 5.) He argued that the CCP should be registered as a "corporate legal person" (*shetuan faren*), as otherwise the existence of the CCP itself is unconstitutional. He believes that the party should have its own bank account and the party and state should have separate coffers. The salaries of CCP leaders should also not come from the state coffer, which is based on income from the vast number of taxpayers in the country, but instead should come from party membership dues. In the symposium, He also proposed that the PRC should make a political transition on two fronts. The first would be to make a constitutional move to strip the

CCP of its control of the PLA, thus transforming the party army to the state army. The second would be to divide the CCP into two rival factions with a new mechanism of checks and balances within the party, eventually leading to a multi-party political system similar to that in democratic Taiwan.

Lately, He has taken a critical view of Hu Jintao's notion of the "harmonious society." In He's view, lawyers by profession are the products of a legal culture that respects dissent and conflict. He argues that "lawyers inherently conflict with prosecutors, with judges, and even with public opinion. Lawyers will lose their practical utility and professional purpose if a culture does not respect conflict. Genuine harmony in a given society should be based on the respect for conflict through legal process."⁴⁰

In recent years, He's voice of reason was often in the limelight during major political events, such as the CCP's decision to close the liberal media outlet *Freezing Point* weekly in 2006 (see chapter 9); the Tibetan protest for religious freedom on the eve of the Beijing Olympics in 2008 (see chapter 11); the controversy over Bo Xilai's Cultural Revolution-style campaign, especially its disregard for the rule of law, in Chongqing in 2009–11 (see the prologue); the call for the launch of the judicial review process, which He characterized as the never-woken "sleeping beauty," following the bullet train crash in Wenzhou in 2011; and Chinese public outrage over the death penalty verdict in the financial fraud case of private entrepreneur Wu Ying in 2012.⁴¹

A LIBERAL SCHOLAR ON ALL FRONTS: CONSISTENCY AND CONSTRAINTS

He Weifang has been known as a vocal opponent of the death penalty for over a decade. According to PRC criminal law, a total of fifty-five crimes are punishable with the death penalty, including tax evasion, embezzlement, bribery, and drug trafficking.⁴² To abolish capital punishment—and to end the long history of cruelty in China's criminal system, especially public executions—has been one of the recurring topics of He's public lectures. (See chapter 10.) As a result of the indefatigable campaign by He Weifang and other liberal-minded public figures, in 2007 the Chinese authorities decided to instruct the Supreme People's Court to review all capital punishment cases. The number of executions dropped sharply from as many as 15,000 people annually in the 1990s to about 1,700 people in the year 2008, according to estimates by Amnesty International.⁴³

In his public speeches, He constantly expressed the notion that the purpose of criminal law was not just retribution—and certainly not in any way to advocate for cruelty and violence—but to transform criminals.⁴⁴ The irony, as He pointed out, is that "while the state does not allow anyone to kill

people, the state in fact executes people.”⁴⁵ This manner of state behavior has an effect on the public psychology in any given country. In He’s view, to the degree that the government is cruel, so is the public. He further argues that human beings cannot be without compassion and sympathy for each other. One’s sympathy should extend even to criminals. (See chapter 10.)

He’s liberal views are also evident in his comments on the sensitive issue of Taiwan and other controversial foreign policy matters. Regarding Taiwan, He believes that the mainland should respect the reality of the over sixty years of separation and existence of the Republic of China. In light of international law, the cross-strait relationship cannot be simply framed as a central government-province relationship. Taiwan has its own government, judicial system, passports, and territory. He believes that the mainland government should allow more international space for Taiwan. A truly close relationship between the mainland and Taiwan is, in his view, dependent upon the mainland’s improvement in rule of law, human rights, democracy, and freedom.⁴⁶

He is critical of the Chinese government’s policy of supporting totalitarian regimes such as North Korea. He believes that a foreign policy that supports the dictators of North Korea is akin to suppressing the democratic demands of the Korean people. He challenges the notion that China’s strategic interest in the Korean Peninsula should be driven by the need for a “buffer zone.” He considers this professed “need” to be the external extension of the internal policy of “stability overrides everything” (*wending yadaoyiqie*), which means in this case that so-called stability comes at the expense of the freedom and human rights of the Korean people. He argues that today’s narrow-minded “national interest” may be tomorrow’s national liability or national scourge.

In response to the visit of blind human rights activist Chen Guangcheng to the U.S. embassy in Beijing in the spring of 2012, He Weifang commented on his microblog that such a visit was “consensual” and that CCP authorities should not make it a big deal by punishing Chen or condemning the U.S. government.⁴⁷ Not surprisingly, some conservative public intellectuals, such as Peking University professor Kong Qingdong, labeled He a traitor and a “running dog” of Western anti-China forces.⁴⁸ In fact, from time to time, He Weifang has expressed some reservation about certain aspects of Western countries’ policies toward China. He argues that Western governments and politicians should deal with China in a more responsible manner, rather than solely expressing radical views so as to cater to domestic political audiences. Such domestically determined foreign policy pronouncements will only “fuel nationalism in China.” (See chapter 11.)

Largely due to He Weifang's good reputation, especially among the country's youth, the Chinese authorities have been hesitant to persecute him. But this does not necessarily mean that He is exempt from punishment or threats by CCP hardliners for his liberal views and public outreach. In a number of instances over the past decade, He has been subjected to tremendous political pressure and faced with the possible loss of his teaching job.

At the end of 2007, the Guanghai Law School of Zhejiang University in Hangzhou invited He Weifang to join the faculty. In July 2008, He accepted the offer and resigned from Peking University. However, as He was about to move to Hangzhou for the 2009 spring semester, the Zhejiang University administration withdrew its offer. It was widely believed that He's signing of Charter 08, a manifesto that adopted the name and style of the anti-Soviet Charter 77 issued by dissidents in Czechoslovakia, offended the Chinese authorities.⁴⁹ Eventually, Peking University decided to reinstate him. For the following two years, however, He was assigned to teach in Shihezi, a small city in remote Xinjiang, as part of an exchange program.

He regards his two years in "exile" in Xinjiang from 2009 to 2011 with a resigned humor. He stated that for those two years he was following in the "footsteps of several renowned Chinese intellectuals, such as the writer Wang Meng and poet Ai Qing, who were exiled to Xinjiang during the Mao era."⁵⁰ In fact, these two years allowed him to reach out to a broader audience, both geographically and ethnically.⁵¹ Yet when He finished his teaching assignment in Xinjiang and returned to Beijing in early 2011, he found himself in the midst of another political storm.

THE COURAGE TO CHALLENGE BO XILAI AND WANG LIJUN

Enlightenment movements—in China and elsewhere—often require political courage from those who attempt to challenge authority and power.⁵² In his famous 1784 essay "What Is Enlightenment?" Immanuel Kant asserted that "hav[ing] the courage to use your own intelligence is the motto of the enlightenment."⁵³ Quoting the German jurist Rudolf von Jhering, He Weifang considers his professional pursuits in an authoritarian political system as a "struggle for the law." (See the prologue.) The tremendous personal danger He faced in his own struggle for the law was most evident in his courageous legal and political fight against Bo Xilai and Wang Lijun before their dramatic downfall.

Soon after Bo Xilai moved from Beijing to Chongqing, where he served as party chief from the end of 2007, this ambitious politician launched two

idiosyncratic initiatives: “singing red songs” and “striking the black mafia” (*changhong dabe*). For the first initiative, Bo requested that both officials and ordinary Chongqing residents sing revolutionary songs to lift their spirits. This was a way for Bo to highlight his background as a communist princeling or member of the “red nobility,” making him an ideal successor of the red regime that his father’s generation established. This initiative also reflected Bo’s Cultural Revolution–like mentality and behavior, with which he intended to mobilize the masses to achieve his ideological and political objectives.⁵⁴

The second initiative was a police campaign that Bo launched in Chongqing in 2009 to arrest what he called the “gangsters of the underground mafia,” who were often supported by corrupt law enforcement officials in the city. In June 2008, prior to launching this police campaign, Bo transferred his protégé Wang Lijun—then police chief of Jinzhou City, Liaoning Province—to Chongqing, where Wang served as executive deputy police chief. Then, in July 2009, Wang was promoted to police chief, and in the same month Bo and Wang mobilized a total of 30,000 police officers in the city to participate in the “striking the black mafia” campaign, which led to the arrest of 5,789 people.⁵⁵ According to *Chongqing Evening News*, Bo ordered the city’s police to arrest approximately 9,000 criminals.⁵⁶ A handful of those arrested were quickly tried and executed, including Wen Qiang, the former executive deputy police chief and head of the municipal government’s justice department. The execution was highly publicized across the country.

Before Bo’s dramatic downfall, his ideological and political campaign had gained considerable momentum. Five of the nine members of the Politburo Standing Committee of the CCP, China’s supreme leadership body, visited Chongqing, leading to speculation that these most powerful party leaders had endorsed Bo’s campaign. Meanwhile, many distinguished PRC public intellectuals made pilgrimages to Chongqing. Some left-wing intellectuals called Bo’s Chongqing development model the “Thousand Days’ Reform,” borrowing the term from the famous “Hundred Day’s Reform” of the late Qing dynasty.⁵⁷ According to Kong Qingdong, Bo’s “Chongqing model,” which was known for its tough measures dealing with “underground mafia” on the political front, “singing red songs” on the cultural front, and the promotion of “common prosperity” on the economic front, paved the way for China’s future development.⁵⁸ Wang Shaoguang, a professor of public administration at the University of Hong Kong, praised the Chongqing model of socioeconomic development as “Chinese-style socialism 3.0.”⁵⁹ Quite popular not just among the Chongqing public, Bo’s loud bravado

earned him the title of “man of the year” in a 2009 online poll conducted by the national paper *People’s Daily*.⁶⁰

A large number of law professors and legal professionals in the country, however, expressed serious reservations about Bo’s campaign at its outset.⁶¹ He Bing, the associate dean of the law school at the China University of Political Science and Law, was one of the most outspoken liberal intellectuals who challenged the resurgence of Mao fever and the remnants of the Cultural Revolution exemplified in Bo’s campaign.⁶² He Bing sarcastically asked what the nostalgia for the Mao era espoused by Bo and other like-minded people tried to glorify: the political persecution of the Anti-Rightist campaign? The economic catastrophe that resulted from the Great Leap Forward? Or perhaps the sociopolitical chaos of the Cultural Revolution?

He Weifang, too, was deeply troubled by the Cultural Revolution nostalgia held by some in the country. A strong believer that the Chinese nation should seriously reflect on the terrible tragedy of the Cultural Revolution, He once poignantly reminded his countrymen that the famous writer Ba Jin’s appeal for the establishment of a Cultural Revolution museum was sadly ignored. For the education of the future generations, He went on to argue, “The Chinese should do as the Germans have done: establish something like a monument for Jews who died in the Nazi era.”⁶³

Equally important, He pointed out that the way in which Bo Xilai and Wang Lijun dealt with crimes and the underground mafia in Chongqing was extremely troubling. He referred to the Nazis when making critical remarks on the ideological and police campaigns to the Chinese media in May 2011:

I believe that the attempt to purify society through draconian methods was the idea of the Nazis. The mafia was a century-long problem for Italy. But under the rule of Benito Mussolini, it was effectively controlled, and the public was very happy. Many dictators in fact began their iron-fisted rule in the name of social justice, doing things that pleased the public. But consequently, liberty and independent intellectuals were soon in jeopardy.⁶⁴

THE LI ZHUANG CASE: DEFENDING LAWYERS’ RIGHTS

The direct confrontation between law enforcement in Chongqing, led by Bo Xilai and Wang Lijun, and liberal legal scholars, represented by people like He Weifang and He Bing, centered on the Li Zhuang case—arguably the most important trial in the PRC in the past three decades.⁶⁵ This was the case that He Weifang had warned could set “China’s legal reform back thirty years.”⁶⁶

The case, however, turned into a big victory for the Chinese legal professional community. With its twists and turns and its far-reaching impact, the case constitutes a telling story about the effects of the enlightenment movement. For He, although the episode reveals the sad reality of political interference in legal affairs in the country, it also shows “the glimmer of the rule of law in China.”⁶⁷

Li Zhuang was a lawyer at the Beijing-based Kangda law firm. In November 2009, Li was commissioned by the relatives of a suspect named Gong Gangmo in Chongqing to be his defense lawyer. Gong, a rich private entrepreneur, was arrested during Bo’s “striking the black mafia” campaign and was charged as “heading a mafia” of thirty-four people that was allegedly involved in homicide, bribery, illegal gambling, drug and gun trafficking, and other criminal activities. When Gong and other “mafia members” were arrested in June 2009, the Chongqing and national media called this prosecution “the first case of Chongqing’s ‘striking the black mafia’ campaign.”⁶⁸

As a defense lawyer, Li Zhuang found that most of the charges lacked evidence. In addition, he found that the Chongqing police had horrifically tortured Gong and other suspects in this case. On December 10, however, a few weeks after Li took the case, his client Gong Gangmo reported to prosecutors that Li had encouraged him to fabricate his statement about police torture. The following day, Li was recalled by his law firm to Beijing and was suspended. One day later, the Chongqing police went to Beijing to arrest Li and took him back to Chongqing on charges of fabricating evidence.⁶⁹

In January 2010, the court sentenced Li to a jail term of two years and six months. Li filed an appeal with the First Intermediate Court of the Chongqing Municipality. Surprisingly, during the appeal trial, Li pleaded guilty despite the fact that his defense lawyers stated that Li was not guilty. When the Chongqing Intermediate Court maintained the first trial conviction and handed down a sentence of one year and six months of imprisonment, Li screamed at the court, claiming that it had not kept its promise to exempt him from a jail term. Li revealed that his guilty plea had been the result of threats and pressure from the Chongqing authorities.

The Li Zhuang imbroglio took a further twist in April 2011 when Chongqing prosecutors attempted to level new charges against Li for falsifying evidence on a case three years earlier. The objective of the Chongqing police, as many observers believed, was to send Li back to jail again when his first prison term ended in June 2011. The Chongqing authorities’ eagerness to give Li a longer jail term was widely interpreted as an effort to deny Li the opportunity to criticize Bo and Wang’s campaign, which likely would have undermined the chances for Bo’s promotion at the Eighteenth Party

Congress in the fall of 2012. Zhu Mingyong, a defense lawyer for the “mafia,” bluntly stated at the court trial that the whole case against the “Gong Gangmo mafia was false,” arguing that in order to justify the campaign, “the Chongqing police used illegal methods to convert a simple homicide case and a few common criminal cases into a complicated plot of organized crime by a mafia.”⁷⁰ Zhu concluded by stating explicitly, “The director of this drama is the Chongqing Public Security Bureau.”⁷¹

As the Chongqing police leveled new charges against Li Zhuang, the entire Chinese legal community became outraged. It demonstrated great unity and solidarity in condemning the Chongqing authorities for undermining the rights of defense lawyers and for disregarding the legal process. Hundreds of blog posts by lawyers and law firms in the country expressed their support for Li, proclaiming that the case against him was “an insult and threat to China’s rapidly expanding community of lawyers.”⁷² Chinese liberal media outlets reported extensively on the latest developments of the Li case. *Caixin* magazine, for example, criticized the fact that Li’s lawyers were not allowed to “exercise their legal right to read case documents, meet their client, or investigate the case.”⁷³ In support of Li, a group of prominent Chinese legal scholars formed a consulting team for Li’s defense, which included Jiang Ping, the former president of China University of Political Science and Law; Zhang Sizhi, the founder of *Chinese Lawyers* magazine and lead defense lawyer for the “Gang of Four” trial; Professor He Weifang; Professor He Bing; and a number of well-known lawyers such as Chen Youxi. Wei Ruijiu, a member of the team, described their effort this way: “Defending Li Zhuang is defending the right to work as a lawyer in China and the ideal of justice.”⁷⁴

He Weifang’s instrumental role in the Li Zhuang case cannot be overemphasized.⁷⁵ Immediately after Li’s arrest, He was alerted to the political motivation of the Chongqing authorities. When the official media in Chongqing and elsewhere launched a campaign of character assassination against Li before the trial, including accusations of involvement in prostitution, He expressed his dissent. He argued that questions of Li’s guilt or innocence aside, the original prosecution process lacked integrity. The flaws in the legal process were abundant; for example, defense requests for the case to be transferred to a court in a city other than Chongqing were rejected, witnesses in police custody were not allowed to appear at his first trial, and defense lawyers were denied access to witnesses whose statements contradicted Li’s. He vigorously criticized the Chongqing court for severely depriving defense lawyers of some of the basic rights granted to them for criminal proceedings.

He Weifang's most important dissent was an "Open Letter to Legal Professionals in Chongqing" that he published on April 12, 2011. This letter, which has been chosen as the prologue of this volume, stands as a landmark in China's long journey for judicial independence and rule of law. By July 2012, the web link to the letter had received about a quarter of a million hits and over 14,000 comments on the author's blog. Additionally, hundreds of media outlets and websites also published or posted the open letter. In this letter, He highlighted the destructive and unlawful nature of Bo Xilai's "striking the black mafia" campaign, including its unambiguous rejection of "independent exercise of adjudicative and prosecutorial powers"—as was specifically evident in the Li Zhuang case. (See the prologue.)

Given subsequent events, his letter becomes even more important. In the letter He directly admonishes then police chief Wang Lijun that "respect for judicial independence is equally important for major power holders." He warned Wang that what happened to his predecessor Wen Qiang (that is, being purged and then executed) could also happen to him, because "without judicial independence no one is safe." Perhaps He's words affected Wang's decision, ten months later, to break his patron-client ties with Bo Xilai and defect to the U.S. consulate in Chengdu. This letter of remarkable foresight undoubtedly conveyed a much-needed warning to the nation about radicalism, violence, abuse of power, the rise of a demagogic dictator, and the complete retreat of justice and law.

On April 22, 2011, the Chongqing prosecutors suddenly decided to drop the new charges against Li Zhuang, and about two months later Li was released from prison. It seems that He Weifang and China's emerging legal community had won a public opinion battle on the importance of rule of law.

Legal Professionalism: Dimensions, Priorities, and Prospects

Public enlightenment about the rule of law, though important, cannot by itself lead to constitutional governance in a given country. Ultimately, the development of an independent judicial system requires legal professionalism—another domain in which He Weifang has made great contributions. The Chinese legal community's collective efforts to defend lawyers' rights in the Li Zhuang case is testimony to the remarkable advances in the development of legal professionalism that have occurred in post-Mao China, especially during the past two decades. Yet the priority that should be placed on the development of legal professionalism as well as the larger prospects for China's constitutional change remain topics of heated debate in the country. He Weifang's views on these issues represent the liberal perspective among

PRC legal scholars. A brief review of the development of the judicial system and the coming-of-age of Chinese lawyers and judges reveals how much China's legal professional community has accomplished during the past two decades, and how many daunting problems it has yet to overcome.

OVERCOMING CULTURAL AND POLITICAL BARRIERS:
BUILDING A LEGAL SYSTEM FROM SCRATCH

The Chinese legal tradition has been weak primarily due to what He Weifang calls the tight "integration of moral and political authority." As He observes, "Moral authority, intellectual authority, political authority, and religious authority were combined to form an insurmountable challenge to any attempt to limit the power of the sovereign in ancient China." (See chapter 2.) He has noted that Mencius, for example, the most prominent philosopher in the Confucian school of thought who also wrote substantially on law, "consistently emphasizes filial piety and assigns it a higher value than law." (See chapter 2.) He believes that this explains why in China's long history the norm of "rule by virtue" (*dezhi*) has consistently prevailed over other forms of governance such as rule of law (*fazhi*).

During the first three decades of the PRC, legal nihilism and legal instrumentalism dominated the public view of law in the country. A good example of legal nihilism was embodied in the remarks Mao made at the important CCP Politburo meeting in August 1958: "Every one of our party resolutions is law, and every meeting itself is law, and we can therefore maintain social order through resolutions and meetings."⁷⁶ The neglect of even a basic legal consciousness accounted for the fact that from 1949 to 1978, the PRC promulgated only two laws, one being the constitution itself and the other the marriage law.

In Mao's China law was largely seen as a tool of the ruling class to maintain its power and exercise its dictatorship. In the late 1950s and early 1960s, it was quite common for officials at various levels of the leadership to serve concurrently as public security chief, principal prosecutor, or court president.⁷⁷ Not surprisingly, prior to the late 1990s, when discussing the role of law in the country, Chinese authorities often used the phrase "to use law to rule the country" rather than "to govern the country according to the law."⁷⁸ These two phrases are fundamentally different in connotation. The former emphasizes the utility of law from the party perspective, and the latter emphasizes that no individual, group, or party should be above the law.⁷⁹ In 1996 the Institute of Law of the CASS convened a conference discussing these two Chinese phrases and concluded by adopting the second notion.⁸⁰

Since economic reforms began in 1978, many top leaders who had suffered from the lawlessness of the Cultural Revolution, such as Deng Xiaoping and then chairman of the Legal Committee of the NPC Peng Zhen, have made systematic efforts to issue important laws. Over the years, many laws have been established in China, including the criminal law and the code of criminal procedure in 1979, the general principles of civil law in 1987, the administrative procedure law in 1989, the administrative punishment law in 1996, and the property law in 2007. The promulgation of these laws, in the words of He Weifang, has constituted “landmark events in China’s legal development.”⁸¹

The main motivation for the Chinese leadership to issue these laws has not been liberal legal thinking but rather self-interest, as the late Cai Dingjian—one of the prominent drafters of some of these laws—stated specifically in regard to the CCP leadership’s desire to vindicate property rights.⁸² China’s transition to a market economy requires more laws and regulations, without which the economy would fall into anarchy. In July 1981, the State Council established the Research Center of Economic Laws, which was responsible for drafting large-scale economic legislation. From 1979 to 1993, among the 130 laws approved by the NPC, more than half were in the areas of economic and administrative law.⁸³

According to the Chinese authorities, China’s legal framework was largely established by the end of 2010. This legal system includes seven main functional areas: the constitution, civil and commercial law, administrative law, economic law, social law, criminal law, and litigation and nonlitigation procedural law. According to the official account, China has promulgated 239 laws in the reform era. The State Council has additionally issued 690 administrative rules and regulations, and local governments have issued about 8,600 local laws and regulations. Taken together, these developments are a substantial improvement over the legal vacuum of Mao’s China.⁸⁴ Admittedly, many of these laws either have not been implemented or are insufficiently enforced, but they nonetheless represent an important foundation on which a more effective system can be built over time.

HE WEIFANG ON LAWYERS AND JUDGES: SPECIALIZED TRAINING AND PROFESSIONAL STANDARDS

Nearly keeping pace with this rapid emergence of a Chinese body of law has been a burgeoning legal profession.⁸⁵ In the early years of the PRC, the country had only four colleges that specialized in politics and law.⁸⁶ Only a few universities had law departments. These were all closed, moreover, during the

Cultural Revolution. In 1977 Peking University, Jilin University, and the Hubei Institute of Finance and Economics admitted law students for the first time since the Cultural Revolution, with the entire country registering only 200 law students that year.⁸⁷ Even then, the legal specialization remained as only part of the broad academic major called “politics and law” (*zhengfa*). By 1980 fourteen colleges and law departments in the country had admitted an underwhelming total of 2,800 undergraduate law students.⁸⁸ It is also interesting to note that in the early 1980s, there were only about 3,000 lawyers in the PRC, a country of approximately one billion people.⁸⁹

By the end of 2010, however, this group had expanded sixty-eight-fold to 204,000 licensed lawyers.⁹⁰ In that year about 40,000 PRC nationals received licenses to become registered lawyers in the country. And in 2011 China’s 640 law schools and law departments produced roughly 100,000 law graduates.⁹¹ These numbers will continue to swell in the coming years. Meanwhile, the programs in legal studies—such as jurisprudence, constitutional law, administrative law, criminal law, civil law, procedural law, and environmental law—have over the past two decades become well-established professional subfields. As He Weifang recently described in a public talk, there were hardly any textbooks on law when he began his undergraduate study in 1978; now law-related books usually constitute one-fourth of the books in an academic bookstore.⁹² In 2007 about 400 books and 70,000 scholarly articles on law, including translated works, were published in the country. In 2009 China had over 200 professional journals that focused on law.⁹³

In addition, legal aid institutions and programs have begun to establish a presence in China. In 1992 China had its first nongovernmental legal aid institution: the Socially Vulnerable Group Protection Center at Wuhan University. Other legal aid institutions have since arisen, including Peking University’s Women’s Rights Legal Research and Service Center, Tsinghua University’s Constitution and Citizens’ Rights Protection Center, and the Oriental Public Interest Lawyers’ Legal Aid Firm. These organizations have pursued many public interest litigation cases.⁹⁴ By the end of 2009, there were 3,274 registered legal aid institutions with 13,081 staff members in the country.⁹⁵ In 2010 a total of 8,189 Chinese volunteer lawyers worked on issues concerning protection of minors’ rights, with the Beijing Children’s Legal Aid and Research Center and the Beijing Legal Aid Office for Migrant Workers winning some important legal cases in this area.⁹⁶ A new phrase, “rights protection lawyers” (*weiquan lüshi*), was created during the past decade, reflecting the great strides made by a small but influential coterie of rights protection lawyers that have devoted their careers to human rights issues.

One of the most important contributions that He Weifang has made in promoting China's legal professionalism was his famous 1998 article on "Ex-Servicemen of the PLA Now Serving at Court."⁹⁷ The article boldly criticized the trend of ex-servicemen of the PLA, the majority of whom have not had any formal legal training, becoming a main source for judges in the country. He strongly criticized this practice as being akin to appointing demobilized servicemen to be medical doctors, saying that because a judge is as responsible as a medical doctor for the life and death of people, the position requires specialized knowledge and thus professional training.

For He Weifang, judiciary specialization (*sifa zhuan yehua*) should consist of many specific components, including professional training of lawyers and judges, separation between judicial and administrative functional areas in legal and law enforcement institutions, and ultimately an increase of judicial power and authority. By the nature of their profession, lawyers are responsible for containing state power. Yet lawyers are also professionally interested in developing legal norms to reshape state power. Lawyers can enable public resentment and grievances against the government to be expressed through legal channels rather than street protests. On many occasions over the past decade, He proposed that China should jettison undergraduate legal education in favor of the Western model of providing specialized legal training via postgraduate law schools. (See chapter 7.)

As for the professional specialization of judges, He argues that a judge must have received formal legal education and should possess both a capacity for superb legal thinking and an analytical mind. The relationship between the public security sector, prosecutors, and the courts should be well defined. Judicial power should be independent not only from external interference but also from internal restriction. According to He, both communist ideology and the traditional Chinese conception of law were the cause and consequence of "a judicial process dominated by laymen." (See chapter 1.) He argues that a sound legal system "is highly dependent on different legal practitioners having the same educational background." (See chapter 7.)

He's foresight and outspoken stance on the promotion of legal professionalism in China has yielded some very positive results. For example, the PRC established the judicial examination system in 2001. Not only are lawyers and legal scholars no longer considered state officials (as they were in China's recent past), they also now boast an unprecedented degree of political autonomy and a steadily increasing level of professionalism. At least partly because of He Weifang's initial advocacy, judges and judicial staff members now wear robes and use gavels in court.⁹⁸ Despite these advances, He is quick to say

that Chinese judges are far from being able to maintain professional standards for judicial independence or even the spirit of judicial professionalism.

JUDICIAL INDEPENDENCE AS THE TOP PRIORITY

Legal development in China, like elsewhere in the world, is certainly not a linear process. The rapid expansion of and growing demand for professionalism in the Chinese legal community have paradoxically led the Chinese authorities, especially conservative leaders, to more aggressively strengthen the CCP monopoly over the legal system. As He Weifang observes in this volume, the party's supremacy over the judicial system has remained the defining feature of the Chinese legal system. The legal community and the general public "simply do not have a means to restrict the power of the top leader." (See chapter 2.)

In an article published in 2007, He criticized the phenomenon widespread at various levels of leadership in which the head of the public security bureau is simultaneously a member of the standing committee of the party committee or the secretary of the politics and law commission—an arrangement that effectively places police power higher than judicial power. He believes that this had led the police to become an important force in the maintenance of the CCP's monopoly on state power and in the suppression of any resistance to this system.⁹⁹

What particularly troubles He Weifang and many other like-minded people is the recent return to a convergence of power between the police chief, the attorney general, and the chief judge at various levels of government in the form of the "three chiefs conferences." These "three chiefs" of vastly different functional areas often "work in a coordinated fashion so that the cases are decided before they even go to trial." (See the prologue.) Such a practice is most evident in the fact that the president of the Supreme Court is now supposed to report to the chairman of the Central Commission of Politics and Law or even to the police chief (minister of public security) on the work of the Supreme Court, rather than report to the NPC as China's constitution specifies. This has led He to pointedly ask: "How can a judiciary like this exercise effective supervision and constraint over police power?"¹⁰⁰

Since a top priority of the CCP leadership is the maintenance of its own rule, it is no surprise that the police have become more powerful, not only in terms of their input into socioeconomic policies but also in terms of budget allocation. For example, the total amount of money used for "maintaining social stability" in 2009 was 514 billion yuan—almost identical to China's total national defense budget (532 billion yuan) that year. The Chinese government

budget for national defense in 2012 was 670.3 billion yuan, while the budget for the police and other public security expenditures was 701.8 billion yuan (an 11.5 percent increase).¹⁰¹

Three factors have contributed to the growing power of the police force. First, the Arab Spring led CCP leaders to fear that they could face an outcome similar to that, for example, of the Mubarak regime. Second, business elites—especially those who work in state-monopolized industries such as banking, oil, electricity, coal, telecommunications, aviation, railway, tobacco, and shipping—have often bribed government officials and formed a “wicked coalition.” This coalition constantly talks about the need for stability in the country but in fact is more concerned about maintaining its own interests.¹⁰² Finally, the number and scale of group protests have increased in recent years, with some having become increasingly violent. In response, the authorities have often used administrative or political methods to fire local officials, crack down on protests, or apply what sociology professor Sun Liping and his colleagues at Tsinghua University have called “campaign-method governance” (*yundongshi zhili*).¹⁰³ These methods are largely arbitrary, being executed at the personal direction of individual leaders and often disregarding the role of law and the legal process.

The growing power of the Central Commission of Politics and Law—and the police force that implements its decisions—not only has generated much criticism from Chinese public intellectuals, especially legal scholars, but has also created a vicious circle in which the more fiercely the police suppress social protests, the more violent and widespread the protests become. As characterized by PRC scholars, “The more you are obsessed with social stability, the less you will have of it.”¹⁰⁴ A popular sentiment in the country is particularly revealing: “Big protests lead to big settlements; small protests, small settlement; no protests, no settlements.”¹⁰⁵ As He Weifang has insightfully pointed out, the rapidly growing power of the Internet and social media may not necessarily be conducive to the promotion of rule of law and legal procedures; sometimes Internet discourse is a distorting mirror, representing extreme views.¹⁰⁶

In addition to the growing number of social protests, the rapid increase of petition letters also reflects the failure of the judicial system. Every year, all levels of the government combined receive over 10 million petition letters. Three recent remarkable events—Wang Lijun’s defection to the U.S. consulate, the downfall of Bo Xilai, and Chen Guangcheng’s visit to the U.S. embassy—have further revealed the major flaws in the Chinese political system in general, and its police and law enforcement apparatus in particular.

He Weifang believes that all of the recent phenomena resulting from the CCP authorities' heavy reliance on the use of police reflect an urgent need for an independent judicial system. He argues bluntly that China is in the midst of a race between a bottom-up revolution and judicial reform. This race will not require eighty—or even twenty—years to complete; it will likely occur much sooner. In He's words, the CCP has no other way to go (*wulu kezou*).¹⁰⁷ For He and many like-minded legal scholars, the judicial reform outlined in the beginning of this chapter is the approach with the lowest political cost and risk for what will be China's inevitable political transformation. He recently told the Hong Kong media that the tension between liberal leaders, such as Premier Wen Jiabao, and conservative leaders reflects the tension between the party's desire to surrender some of its power and privilege in order to promote rule of law, on the one hand, and the party's desire to retain its monopoly on power at all costs, on the other.¹⁰⁸ The recent discussion within the CCP leadership regarding the need to reduce the power and influence of the Central Commission of Politics and Law, if indeed adopted, is an encouraging development.¹⁰⁹ In a much broader context, China's judicial reforms and bold move toward constitutionalism should become top priority if the leadership wants to avoid a bottom-up revolution.

PROSPECTS FOR CONSTITUTIONALISM IN CHINA: THREE CONTENDING VIEWS

China has a constitution, but its government does not adhere to constitutionalism. Since the founding of the PRC in 1949, China has had four separate constitutions, promulgated in 1954, 1975, 1978, and 1982, with the 1982 constitution having undergone four amendments, adopted in 1988, 1993, 1999, and 2004.¹¹⁰ He Weifang believes that China's current constitution has two major defects. The first is “intrinsic, something that cannot be solved by minor amendments, because it was formulated at a time (1982) when constitutionalism was still seen in an ideologically tinged light. . . . The second major defect is that even this unsatisfactory constitution is not well implemented.” (See chapter 3.)

According to Xia Yong, a well-known legal scholar who currently serves as director of the State Secrecy Bureau under the State Council, there have been three types of constitutions in the world: the revolutionary constitution, the reform constitution, and the constitution based on constitutionalism (*xianzheng xianfa*).¹¹¹ Xia believes that China is in the midst of transitioning from the reform constitution to constitutionalism. Only this third type can

provide political legitimacy and enduring social stability because it contains the basic principle that “there is no other law above the constitution.”¹¹²

Students of the Chinese legal system, however, have vastly different views on the future prospects of constitutionalism in the PRC. The three contending perspectives—pessimistic, optimistic, and pragmatic—have contrasting assessments of China’s political and legal development at present.

Pessimists believe that the Chinese legal system is incompatible with constitutionalism. They believe that virtually all of the key elements of the current PRC constitution reflect the influence of both a Leninist approach to constitutionalism and the supreme authority of the party-state structure. The PRC constitution does not contain any provisions for constitutional adjudication or judicial review, which is often regarded as a foundation of constitutionalism. As some Western scholars argue, constitutionalism should entail creation of a state organ with the authority to legitimately interpret the meaning of the constitution and “determine whether any action by the state apparatus (or others) exceeds their authority to act under that framework.”¹¹³ There is no such independent state organ in China. Chinese courts are not given the ability to exercise such review power but merely apply the law with no power to interpret it when adjudicating cases.¹¹⁴

Pessimists often emphasize that in the absence of the supreme authority of the constitution, the rule of law loses any real significance. For the court, police, and prosecutor in the PRC, the primary concern is political accountability rather than legal accountability. Under these circumstances, any efforts on the part of legal professionals and the public to use the law against the party-state’s autocratic rule and to demand constitutionally granted rights are akin to what some critics call “asking the tiger for his skin” (*yuhu moupi*).¹¹⁵ As M. Ulric Killion argues, in the absence of a separation of powers, popular sovereignty, or independent judicial review, “neither liberty nor social rights will be protected.”¹¹⁶

As both political structure and values are at the heart of constitutionalism, some pessimists point out that partly due to the Confucian cultural tradition and partly due to socioeconomic circumstances, the Chinese public does seem to enjoy economic liberties, rising living standards (for most), and newly obtained civil and political rights. Therefore the concerns of the Chinese public may profoundly differ from those of liberal legal professionals like He Weifang in the sense that they are not so interested in legal rights that involve political issues or institutional mechanisms that can impinge on the control of the regime. According to this view, the Chinese public places more value on the “competent leader” than they do on “competent law.”¹¹⁷

In contrast, optimists believe that critics of the Chinese legal system, especially those in the West, seem too quick to reject the party-state political organization on the grounds that such a system is inherently despotic and thus incompatible with constitutionalism. As Larry Backer argues, the prevailing pessimistic view in the West about the prospect of Chinese constitutionalism is “both anachronistic and too simple-minded for the emerging possibilities in states like China.”¹¹⁸ For Backer, China presents “an interesting variant on constitutionalism.”¹¹⁹ He argues that in the case of China, one needs to “focus on party rather than state, grounded in separation of powers principles in which the administrative function is vested in the state while political authority overall is vested in the party under law.”¹²⁰ An institutionalization of the role of the party leadership within the Chinese constitutional framework may therefore represent “the most appropriate way of further legitimating constitutionalism within the Chinese legal order.”¹²¹

Other scholars challenge the conventional view that the Chinese constitution is static and unchanging. Instead, they believe that judges, lawyers, and Chinese citizens can use the courts as a mechanism for constitutional litigation—a process that Chinese legal scholars call the “judicialization of the constitution” (*xianfa sifabua*). Thomas Kellogg argues that attempts by actors inside and outside the government can make the Chinese constitution a legally operative principal document.¹²² Along this same line of thinking, Xia Yong argues that although China has neither a Western-style separation of powers nor federalism, in reality the PRC’s constitution recognizes three powers (legislative, executive, and judicial) and a functional division between central and local powers.¹²³

Many optimists believe that the NPC can play a crucial role in constitutional adjudication and judicial review. Some argue that the foundation of constitutional review in the Chinese constitution already exists as the Division of Check and Filing under the Standing Committee of the NPC. This pronounced mechanism, created by an amendment to the Working Procedure in 2005, can be regarded according to the optimists as the first stage of the activation process.¹²⁴ Some foreign scholars also point out the fact that it took a long time for many Western constitutional democracies to practice constitutional review. As Michael Dowdle observes:

France’s constitution, for example, did not articulate a practice of constitutional review until 1958, some eighty years after the initial establishment of her constitutional foundation, and that practice did not begin protecting the political and civil rights enumerated in that constitution

until the 1970s. Britain developed a practice resembling judicial review only in the 1990s. The Dutch constitution, now entering its second century, forbids judicial review. Sweden's constitution articulates a judicial review practice, but as of 1987 Sweden had not yet resorted to this practice in its two-hundred-year history.¹²⁵

Dowdle also argues that many of today's successful constitutional systems actually emerged out of environments in which neither democracy nor the rule of law initially enjoyed significant normative support from the public. Constitutional values are often the product rather than the cause of successful constitutional experience.¹²⁶

It should be noted that optimists are divided into two broad and profoundly different camps: those who believe that the CCP can be a force for the promotion and implementation of Chinese constitutionalism, and those who believe a constitutional China can be achieved only after the end of one-party rule.

Yu Keping's call for fundamental political reforms represents the first camp. For Yu, constitutionalism means the constitution should be the ultimate basis of the operation of state power. Yu observes that the CCP constitution dictates that the "CCP should operate within the sphere allowed by the constitution and law," although in practice this principle has often been violated in the PRC.¹²⁷ Like other liberal scholars in the Chinese political establishment, Yu believes that "the CCP leadership cannot claim it governs the country by law unless the party is subject to the rule of law."¹²⁸ This does not mean that China should establish a law on political parties or move to a multiparty system but rather that the party should strictly comply with both the PRC constitution and the CCP constitution to regulate party affairs and member behavior. Specifically, Yu calls for political reforms in the three major relationships the CCP has with other institutions in accordance with the PRC constitution: the relationship with the NPC, with the government or the state council, and with judicial institutions.¹²⁹

In the wake of the Bo Xilai crisis, an increasing number of liberal leaders and scholars in the CCP recognize the need to surrender some of the party's power and privilege. It is interesting to note that Wang Huning, a top aide to President Hu Jintao and former dean of the Law School at Fudan University, recently republished his 1986 article in which he argued that "public security, prosecutors, and the court merging into one" was one of the main reasons for the prevalent human rights violations, such as torture and vandalism, during the Cultural Revolution. He stated unambiguously that the

“Cultural Revolution could happen only in a country without an independent judicial system.”¹³⁰

The second brand of optimism that scholars have about China’s constitutional future is not based on the scenario that the CCP may transform itself. Rather, this view holds that a bottom-up revolution can take place at any time, as the party has lost its legitimacy in the wake of many recent scandals, especially with regard to rampant official corruption. He Pin, a seasoned New York–based analyst of Chinese elite politics, believes that China’s current political and socioeconomic problems—and its painful experiences during the decade-long democratic transition—are not caused by the public enlightenment movement for constitutionalism and democracy but are the consequences of a long-standing authoritarian and lawless political system.¹³¹

Zhang Lifan, a well-known scholar in Beijing, has argued that “China is not in danger, but the CCP is.”¹³² He states that many CCP elites do not care whether the CCP will collapse but instead are only concerned about the well-being of their own families. The large-scale outflow of capital in recent years, presumably by corrupt officials, further indicates the lack of confidence party elites have in the country’s sociopolitical stability. According to a 2011 report released by the Washington-based organization Global Financial Integrity, from 2000 to 2009 China’s illegal capital outflow totaled \$2.74 trillion, five times more than the total amount from second-ranked Mexico.¹³³

Optimists in both camps believe that an increasingly vibrant legal community in the country will likely contribute to the establishment of an independent judicial system. But neither camp of optimists can provide a convincing roadmap or model for a constitutional China. Understandably, many scholars take a pragmatic view. Randall Peerenboom, for example, argues that “legal reforms are path dependent and in that sense inherently local. Thus, no single model is likely to work everywhere given the diversity of initial starting conditions and the complexity of the reform process.”¹³⁴ In a sense, the constitutionalism and democratization of a given country arise not by design but by necessity—the necessity to deal with contextual problems such as the abuse of police power and official corruption.¹³⁵

Pragmatists reject the pessimists’ cultural incompatibility thesis by referring to the World Bank’s recent rule of law index: five East and Southeast Asian countries or jurisdictions—Singapore, Japan, Hong Kong, Taiwan, and South Korea—rank in the top quartile.¹³⁶ As pragmatists observe, these entities usually place priority on economic growth rather than civil liberty. Over time, however, “as the legal system becomes more efficient, professionalized,

and autonomous, it comes to play a greater role in the economy and society more generally.”¹³⁷

Pragmatists recognize the long process facing constitutional development in countries such as China. They also believe, however, that one should not “dismiss the importance of transformative processes simply because at the present time they seem too subtle or glacial for our tastes.”¹³⁸ Quite often the evolution of the legal profession and pressures from lawyers and civil society that “seem glacial today could suddenly revolutionize the system tomorrow.”¹³⁹

While pragmatists have serious reservations about both the possibility of the CCP subjecting its power to constitutional supremacy and the role of the NPC in exerting legal constraints on the party in the short term, they do believe it is worthwhile to make an effort on these fronts. As Ji Weidong, dean of Kaiyuan Law School of Shanghai Jiaotong University, recently stated, it may take decades or longer to make the rule of law a way of life. However, judges and lawyers as a group need to start moving right now. “Step by step, they will lead institutional change.”¹⁴⁰

As for He Weifang, it is difficult to characterize him as either an optimist or a pessimist, an idealist or a pragmatist. On the one hand, he is optimistic in that he has devoted his entire career to fighting for justice and constitutionalism in China. It is in part due to his tireless efforts that the country has witnessed remarkable growth in the legal profession. The victory of the landmark case of Li Zhuang and He’s bold and effective challenge to some of the most formidable and ruthless politicians also may have enhanced his sense of optimism. On the other hand, however, he is soberly aware that party leaders wield unrestrained power, there is unprecedented official corruption, many high-profile lawsuits result in unfair verdicts, and civil rights activists are treated in an unlawful manner. What is truly remarkable about He Weifang is the fact that he seems to have combined, in a marvelously engaging and balanced way, both idealism and pragmatism in his search for a constitutional China.

Each reader, of course, will arrive at his or her own judgment of He Weifang’s pursuits and analyses, the prospects for constitutionalism in China, and implications of its success or failure for the outside world. One can cogently argue, however, that the rule of law is of utmost importance to China, as it is elsewhere in the world. While this volume focuses on one truly extraordinary Chinese legal scholar’s intellectual and political odyssey, it is also about the broader experience of China’s journey into the twenty-first century—the country’s painful search for a sound, safe, and sustainable political and legal system. Based on He Weifang’s insights and foresight, the struggle

for justice and rule of law will most likely become the prevailing issue in the next phase of China's political transformation.

The two epigraphs that open this introductory chapter remind us of equally arduous undertakings in Western democracies. Emmeline Pankhurst's courage and determination led to the victory of the British suffragette movement.¹⁴¹ Justice Stephen Breyer's recent remarks made in China highlight the lessons learned and strengths derived from the growth of American constitutional democracy and its uncompromising adherence to justice.¹⁴² These quotes remind us that He Weifang's words and endeavors, frustration and inspiration, courage and vision are by no means alien to Western readership. Perhaps more than anything else, this volume highlights the common aspiration, transnational values, and enduring human spirit in our rapidly changing world.