

He Weifang



# In the Name of Justice

Striving for the Rule of Law in China

Foreword by John L. Thornton

Introduction by Cheng Li

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Law in China

HE WEIFANG

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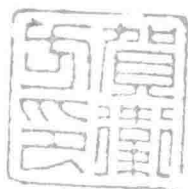
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## THE THORNTON CENTER CHINESE THINKERS SERIES

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China's momentous socioeconomic transformation has not taken place in an intellectual vacuum. Chinese scholars have actively engaged in fervent discussions about the country's future trajectory and its ever-growing integration with the world. This series introduces some of the most influential recent works by prominent thinkers from the People's Republic of China to English language readers. Each volume, translated from the original Chinese, contains writings by a leading scholar in a particular academic field (for example, political science, economics, law, or sociology). This series offers a much-needed intellectual forum promoting international dialogue on various issues that confront China and the world.

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## FOREWORD

JOHN L. THORNTON

I have long believed that the rule of law is a critical civic virtue for the development of a just and thriving society. It is a view I have held in particular about China since the beginning of my involvement with the country more than twenty years ago. In those days, my enthusiasm for the topic was not usually matched by the Chinese officials with whom I interacted, but I felt confident that their views would change over time as China opened up to the world, especially the commercial world that would increasingly demand legal clarity as a condition for investing and trading.

I have also felt that the rule of law should top the list of perennial issues discussed when the leaders of the United States and other major nations meet with their Chinese counterparts. As both an internal and external strategic matter, the goal for the Chinese state should be, on the one hand, to provide clarity and certainty to its own citizens about their rights and responsibilities and, on the other, to reassure the rest of the world that China intends to integrate into the international system seamlessly and as a positive contributor to relations between states.

Therefore, I was heartened to hear Premier Wen Jiabao, in his meeting with a group of us from Brookings in late 2006, define the Chinese objective of “democracy” as comprising three primary components, one of which was the rule of law (the other two being elections and supervision based on checks and balances). Premier Wen stressed the need for continued reform to guarantee the Chinese legal system’s “dignity, justice, and independence.” That meeting catalyzed my research over the next two years into the topic of

political evolution in China. In order to understand the state of the country's judicial system, I spoke to a broad range of Chinese and Western experts and practitioners, among them a vice president of China's Supreme People's Court and a professor at the Central Party School who had given lectures to the Politburo on the topic of the relationship between the constitution and the Communist Party.

These discussions and research led to an article in *Foreign Affairs* in January 2008 in which I concluded that, while they still had much further to go, on the whole the Chinese had made notable progress over the past three decades on this particular aspect of democratic evolution. In 1979, at the start of the era of reform and opening initiated by Deng Xiaoping, the entire country had only several hundred attorneys and was beginning to reopen the law schools that had been shuttered during the Cultural Revolution. From the time of the Anti-Rightist Campaign of 1957 to the end of the Cultural Revolution in 1976, the National People's Congress did not adopt a single new piece of legislation (other than passing pro forma the Constitution of the People's Republic of China in 1975). In fact, the legislature hardly met for nearly ten years during the Cultural Revolution.

By contrast, today there are more than 17,000 law firms operating in China and over 200,000 licensed attorneys. China has adopted 239 new laws in the past thirty years. Courts used to be staffed overwhelmingly with judges having little or no legal education, most of whom were demobilized military officers. In 1995 only 5 percent of judges nationwide held a bachelor's degree. Today the Judges Law and its amendments have established basic standards for new jurists that require a college degree, passing the National Bar Examination, and at least two years of prior legal experience. There is evidence that citizens are turning to the justice system in increasing numbers to try to resolve disputes and for protection of their legitimate rights from the interests of corporations and the state. According to government figures, from 2006 to 2010, approximately 10 million cases were litigated in China, another 5 million were resolved without litigation, and about 1 million cases involved legal aid.

Nonetheless, as the essays in this volume illustrate plainly, in too many instances China's justice system still falls well short of the letter and spirit of the codes on its books. Corruption is endemic. Collusion among police, prosecutors, and judges remains widespread. And the most fundamental obstacle to further progress remains the question of judicial independence—whether the ruling Chinese Communist Party serves the law or vice versa. The party controls the court system as a whole and keeps a tight rein on sen-

sitive cases. It operates an extensive “inspection and discipline” system for party members separate from the legal system that applies to average citizens. At the heart of this complicated and imperfect reality sit the thinking and writing of He Weifang.

Given the consequential events that have occurred in China over the past year, a book addressing the state of rule of law in the country from the perspective of one of its boldest legal scholars could not be more timely. The fall of Bo Xilai and the related criminal cases against his wife Gu Kailai and the former Chongqing police chief Wang Lijun transfixed the country and drew intense scrutiny to its legal system. Yet nearly a year before the excesses in Chongqing were officially condemned—and while Bo and his mass campaigns were still at their height of popularity—He Weifang issued a widely circulated and debated “Open Letter to Legal Professionals in Chongqing,” the first of his works collected in this volume. In the letter, He criticized local authorities, including police chief Wang by name, for their extralegal methods. He reproached Chongqing’s lawyers and legal scholars, including those at his alma mater, the Southwest University of Political Science and Law, for staying silent or even cheering on official acts that they surely knew contravened Chinese law and due process. At the time Professor He published his letter, it was a decision not without personal risk. It was also unsurprising in that it was the sort of unblinking defense of principle that has marked his career. As a professor of law at Peking University, He Weifang has argued for two decades that the rule of law, however inconvenient at times to some of those who govern, must be embraced because it is ultimately the most reliable protector of the interests of the country, of the average citizen, and, in fact, even of those who govern.

In more ways than one, the events in Chongqing highlighted the central, if still tenuous, place the law is coming to occupy in today’s China. Discussion of legal topics on social media platforms such as Sina Weibo, used by hundreds of millions of Chinese, draws intense interest. The Bo case underscored the view held by Professor He and others that accelerated progress toward rule of law is an essential condition if the country is to extend the progress it has made over the past three decades. My own view is that Bo’s demise could in the end advance the rule of law in China if it pushes the Chinese Communist Party at the highest level to consider in earnest how to reconcile the power of the party with the legal system. The visibility and sheer difficulty of the case may force leaders to wrestle in a serious way with the relevant conceptual issues and systemic fissures. If this occurs, the prolonged national conversation about Bo and his associates could point the system in a healthier direction.



This is because, in part, some officials have already been thinking in forward-looking ways, others will come to realize that there is no alternative, and the public may demand that things be changed.

The rule of law should be of equal concern to the rest of the world that is invested in the development of a prosperous, stable, and open China. It is the necessary foundation for China's pursuit of political evolution and democracy. A nation in which respect for the rule of law has taken root is also more likely to abide by international legal norms. It would provide a more transparent and stable environment in which foreign enterprises could operate. These issues will only increase in consequence as China's economic, political, and military influence expands in coming decades.

Yet, surprisingly, even now there are few places to which an English speaker can turn to understand firsthand how leading *Chinese* think about this critical subject. While there are respected Western specialists in Chinese law, in general the outside world operates with an incomplete understanding of the country's legal system: its origins, development, and remaining challenges. This deficit can give rise to generalizations and oversimplification about a topic that plays an increasingly important part in the international community's engagement with China, whether it be in the realms of diplomacy, business, or human rights. The purpose of this volume is to help catalyze the process by which this situation may be remedied.

I first met He Weifang in 2007 when I was preparing the aforementioned article for *Foreign Affairs*. I sought him out because I wanted someone with a discerning mind who had lived at the center of the Chinese legal system during the country's reform era to critique the draft sections on rule of law. His forthright and trenchant comments, which improved the article measurably, reflected not only an understanding of the arduous path his country's legal system had traveled during the last century and a recognition of the advances of recent years, but also an unsentimental appraisal of its remaining deficiencies.

As a constructive critic, Professor He writes passionately and persuasively about the ways in which China's judicial system falls short. In his "Open Letter," He condemns the continuing use of so-called three chiefs conferences "in which the chief judge, the attorney general, and the police chief hold meetings and work in a coordinated fashion so that the cases are decided before they even go to trial. When the case is finally heard, it is a mere formality." Whether in commercial disputes, politically sensitive cases, or instances when the property of farmers has been expropriated by local governments and sold to developers, relevant laws can be ignored or distorted to fit the desired outcomes of those who hold the most influence. Ultimately, in

He's view, true rule of law in China can only be achieved when the party decides that it too must live, without exception, under the law's jurisdiction.

This debate goes to the heart of what course China will choose to take over the coming decades. In Professor He's view, greater rule of law must be established not only because it is the right thing to do but also to guarantee the country's continued stability. Public confidence in the neutrality and fairness of the courts is a condition for social order; citizens take to the streets when they no longer trust the efficacy of the system to address their grievances. A sound legal system is also essential for the next stage of China's economic development. The government's goals of creating an "innovation society" and a higher value-added economy depend on reliable protections for intellectual property. One former adviser to the Chinese central bank has argued that rule of law is a necessary "reform" for underperforming Chinese stock markets, which suffer from a lack of transparency and thus investor confidence. It has been suggested that the government create a central court to handle securities-related lawsuits to circumvent the undue influence of local governments.

As Brookings scholar Cheng Li recounts in detail in his introduction, Professor He's determined advocacy of a system in which no person or party is above the law has sometimes come at significant personal costs. Professor He had the temerity to criticize Bo Xilai's reign in Chongqing when far more powerful people in legal and political spheres dared not. Because of his propensity to speak and write the inconvenient truth, he has endured various penalties, including being "assigned" to teach for two years in the remote region of Xinjiang. That he has not been punished more severely is likely due to the widespread recognition and respect he has won for sticking to his principles. He's forthright advocacy of judicial independence has made him one of his university's most popular lecturers. His blog posts have received more than 16 million hits.

Not long after He Weifang and I met for the first time, he began his two-year "exile" in Xinjiang. He spent part of his time in the far west rereading the Chinese classics, some of which he acknowledged he had not read closely before. He's time in Xinjiang, if anything, appears to have reinforced his conviction that the rule of law must be China's foremost priority; upon returning to Beijing in 2011, he rejoined the debate with his open letter to Chongqing.

He Weifang is an intellectual and patriot in the best Chinese tradition. It is in China's interest to value and channel his insights for the good of the country. We in the West should read him carefully in order to better understand the hopes and fears of this rapidly changing nation, and envision a more promising scenario for its future development.

The Chinese struggle to create a nation ruled according to laws is not unique. While the specific obstacles and issues vary, every nation that has successfully established the rule of law has done so only after long and difficult effort. In his important book, *Making Our Democracy Work*, Supreme Court Justice Stephen Breyer traces America's own complex experience: "We simply assume today that when the Court rules, the public will obey its rulings. But at various moments in our history, the Supreme Court's decisions were contested, disobeyed, or ignored by the public and even by the president and Congress." He notes that in 1957, 170 years after the adoption of the U.S. Constitution, President Eisenhower had to send 1,000 soldiers of the 101st Airborne Division to Little Rock, Arkansas, to enforce *Brown v. Board of Education* and the constitutional right of black children to attend integrated schools. Such recent experience can usefully inform how we understand, empathize with, and give support to China's arduous and momentous task.

## ACKNOWLEDGMENTS

As China undergoes rapid economic and sociopolitical transformations and continues to rise in stature on the global stage, the development of a stable and impartial legal system has emerged as a crucial issue. I am greatly honored to be the contributor of the latest volume of the Brookings Institution's Thornton Center Chinese Thinkers series, sharing my analysis of the complex nature of Chinese legal development with English readers.

I would like to acknowledge a number of individuals who greatly aided in the production of this volume. First and foremost, I sincerely thank Mr. John Thornton, chairman of the Brookings Institution and professor and director of global leadership at Tsinghua University, for his confidence in me and for his generous support without which this book project would simply not have been possible. Through our numerous conversations over the years, his remarkable insights and strong interest in rule of law in China have been truly inspirational. I am also profoundly grateful to him for finding time in his busy schedule to write the foreword of this volume. I would also like to thank Mr. Woo Lee for helping facilitate my one-on-one meetings with John in Beijing and for his own valuable input on the book project.

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and provided extensive consultation. I would also like to thank Dr. Li for his analytically keen and empirically rich introductory chapter. His research assistant, Eve Cary, was extremely helpful in the process, providing feedback and extensively editing the materials.

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Several individuals have had a direct hand in helping to prepare the content and presentation of the project. I am grateful for the excellent translation work offered by Li Yunfeng, and equally excellent editorial assistance by Jordan Lee (Princeton University), Dr. Andrew Marble (freelance editor), and four very talented interns at Brookings: Kevin Wu (Yale University), Veronica Li (Stanford University), Lyric Chen (Harvard Law School), and John Langdon (Johns Hopkins University). At the John L. Thornton China Center, Kevin Foley, Teresa Hsu, and Iris An provided various help in keeping everything on track.

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For any deficiencies and errors that might have survived all the assistance above, I, of course, bear responsibility. Any single volume that tries to explore the complicated, and often paradoxical, development of rule of law in contemporary China can be no more than an introduction. I hope that my English-speaking colleagues in the legal world and China watchers in general will be tempted to invest time and energy on this important subject, sharing their experiences, perspectives, and insights.

*He Weifang*  
*Peking University, Beijing*  
*October 2012*

## INTRODUCTION

### *Fighting for a Constitutional China: Public Enlightenment and Legal Professionalism*

CHENG LI

*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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup>

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.<sup>5</sup> In