

THE LEGAL SCHOLAR AS PUBLIC INTELLECTUAL

AN INTERVIEW WITH HE WEIFANG

He Weifang, a professor of law at Peking University, was one of China's 50 "influential public intellectuals" named in *Nanfang Renwu Zhoukan* in October. In this excerpt from an interview with journalist He Jun published on the Web site of the All China Lawyers Association in May, He Weifang suggests that China would be well served by legal scholars following the American example and becoming more involved in public life.

Question: Now that China's legal system is in the midst of transformation, what do you see as the role and function of a jurist? And in a broader sense: what is the social role of a public intellectual?

He Weifang: Political and legal factors are probably more significant in shaping China's current transformation than economic factors. Without sound legal institutions, positive social and economic development cannot be achieved. British history shows this very clearly. Without common law and law of equity, there would have been no effective legal framework for the growth of the market economy. Without them, it's hard to imagine that Britain could have become the world's first market economy. Without sound laws and regulations, there is no way of establishing a market system.

It must be said that China still has a long way to go in terms of rule of law and democratization. We are probably still in the initial stages of this process. Judicial reform appears to be proceeding apace and to be penetrating social relations ever more deeply, but at the same time, we are discovering that people's most basic demands from the rule of law, including legal certainty and predictability and equality before the law, have not yet been met. As long as these demands are not met, the safety and predictability of commercial transactions cannot be guaranteed. This is probably the biggest restraint on the market economy.

The reason for this failure is not that we don't want to establish the rule of law and democracy, but rather that all too

often we have a simplistic understanding of the workings of democracy and what it takes to establish the rule of law in our society. As I argued in one of my essays, those striving for democracy tend to consider it a value that can only be achieved by shedding blood, while those who are hostile to democracy regard it as a great scourge that must be fiercely suppressed. This makes social compromise very difficult. I believe that democratic societies and societies that enjoy the rule of law are societies that make compromises. Different groups certainly have different interests and demands, but it's not a dog-eat-dog situation, but rather one that calls for compromise.

Democracy facilitates social compromise and legitimizes political authority. Likewise, the rule of law promotes social order, because an independent judiciary is capable of rigorously judging every case, including disputes between citizens and the government and disputes between individual citizens, in accordance with the law. We must all endeavor to resolve such disputes rationally in courts of law, where arguments are based on facts and evidence. If we do this, society will gradually become more well-ordered. When grievances and resentments can be resolved through rational legal channels, people are willing to place greater trust in the government's authority.

I believe that we sorely need our own *Federalist Papers*. The founders of the United States carefully debated how to manage society while avoiding majority despotism, how to guarantee states' rights while establishing a strong federal government, how to balance the principles of democracy and aristocracy, and how to establish a judiciary that was independent, but not so much so that it gave rise to some sort of preemptory power. A debate over how to design legislative and judicial power would be extremely important and should be conducted in the mass media. Such a debate would spread knowledge of the rule of law, politics and democracy throughout society and allay people's fear of and resistance to democracy.

In the past 50 years, we've never conducted detailed study and public debate over how China should be governed. This is probably because of Socialist political philosophy, which has eliminated [political] tensions at the most fundamental level. In fact, social contradictions are not altogether a bad thing. Without contradictions there can be no compromise. By evading contradictions, we miss an opportunity to develop our political system.

Over the past 50 years, we've never really debated specific questions regarding the People's Congress. How should delegates be selected? How should the legislative process be set up? What is the ideal number of delegates? How should they go about debating issues? Why have China's administrative divisions become emblematic of merging the three branches of government into one? How do we set up an effective legislative public hearing system that will give all interested people the opportunity to express their opinion? Legislation cannot represent everyone's interests, but it can be a process for redistributing power. If we enable those who have a stake in the process—the people—to participate in it and express their opinions, they will identify with the law and abide by it more than they do now.

I therefore believe that public intellectuals ought to transcend the narrow confines of their academic disciplines and become more knowledgeable about the world at large in order to participate in the process of democratization, the establishment of the rule of law and the marketization of the economy.

Academic disciplines are not divided along the lines of social divisions. Academic divisions are a means for us to more conveniently learn about the world. But if we assume that a narrow academic discipline encompasses all we need to know, we become complacent and conservative and end up with a very limited understanding of the world. A public intellectual needs to care not just about his branch of learning, but also about society. Intellectuals ought to show concern for society from different perspectives and not just from that of their own academic discipline. There is a unique value in approaching reality from different perspectives. Different intellectual backgrounds are an important precondition for public intellectual life. Without diversity there is no value in intellectual life.

Question: Is there a conflict between the social responsibility of public intellectuals and the demands of their scholarship?

He Weifang: As a matter of fact, I think that this is a false premise. Most of history's greatest thinkers became famous because of their concern for issues of public importance. That's what made their works immortal. Plato, Socrates, Locke, Montesquieu and Weber all paid close attention to politics and society. Being intellectuals, their approach to social questions had an intrinsic scholarly and intellectual value.

I especially hope that some legal scholars will continue to pursue pure legal research. It is certainly a good thing that some can devote themselves to abstract scholarship, but this is not for everyone, and those who do are not superior to those who don't. Max Weber, for example, was an extremely wide-ranging scholar who did not limit himself to a narrow academic discipline.

Today, many people believe that scholars should stick to their own academic field. This is wrong. Weber certainly wasn't this sort of scholar. He followed German politics with great interest and often commented on it. Some of his political contributions have proved to be of great value to later generations and have had a profound impact on political development. I believe that scholars in the natural sciences can also contribute

to public debate. Albert Einstein, for example, was also concerned about social issues. Social order affects everyone in society.

Law is a discipline that is particularly concerned with society. Society is the laboratory where all our theories are put to the test. I believe that if your theory has no connection to society, and if you fail to criticize and expose corrupt social practices and violations of the law, you lack social concern. Such scholars fall short.

Question: Direct elections are being held over much of the Chinese countryside, but in many places there have been cases of election bribery. Interestingly enough, earlier this year there was a hint of "election bribery" during the election of the president of the Peking University graduate student union. Every dorm was given a potted flower. Isn't this similar to campaign promises made by Western politicians? On the one hand you have a candidate making a payback in the form of a potted flower, a meal or a few hundred yuan. On the other hand, the candidate's payback takes the form of a tax reduction or an increase in welfare benefits. Doesn't this mean that so-called election bribery is perfectly normal in real elections? And that



A trial in progress at a Beijing court. Photo: Reuters

perhaps this is not a bad thing, because at least it shows that the voter's ballot is worth something? What the candidate gives back for a vote—a potted flower, a meal, a few hundred yuan, a tax reduction or an increase in welfare benefits—is his own business. What's your opinion?

He Weifang: All too often, we have a polarized understanding of politics. We either see politics as an extremely dirty business, or we regard it as a great, sacred and pure undertaking. In fact, politics is neither extremely dirty nor particularly pure. Politics always involves factional struggle, conflict, deals and compromise. Politics is not black-and-white. A society that operates by the rule of “whoever is not my friend is my enemy” is impervious to reason.

To my mind, a democratic society is one that allows the pursuit of political ambition through legal and orderly channels. Institutional safeguards ensure that ambitious politicians don't cause major calamities. It is important to achieve the right balance in political institutions, because ambitious political candidates will try every means to gain favor with voters. That's in large measure why election bribery is a problem.

A regrettable aspect of modern democratic societies is that politicians seek to gain favor with voters in vulgar ways. Public opinion polls debase the political process. When a politician's looks determines his popularity among women voters, isn't this tantamount to election bribery? After all, good looks satisfy the psychological needs of a certain proportion of the electorate.

To my mind, the tendency to approach politics in terms of good and evil is harmful to the political process. Summing up the lessons to be drawn from the failed attempt to establish constitutional government in China, a professor of Chinese civilization and history at Columbia University says that in modern times, Chinese politicians have been unable and unwilling to compromise. There can only be conflict, never compromise, between my enemy and me. This makes it impossible for politics to be rational, vigorous, orderly and at the same time humane.

Question: Some argue that more people who have studied law ought to go into politics. They reason that if more jurists went into politics, this would mark an improvement in the rule of law. In your view, what role does legal education play in the transformation of Chinese society?

He Weifang: In Britain and America as well as on the European continent, legal training produces jurists in the strict sense of the word: judges, public prosecutors and lawyers. But law schools also contribute to society by training other people of talent. This is most apparent in Britain and America, where lawyers are very influential in politics. There are historical reasons for this. Most of the American Founding Fathers were either lawyers or had a legal background, and as a result, the American political class came to be led by people with legal backgrounds. More than half of America's presidents have had a legal background. Many sound arguments can be put forward to show that it's good for a country to be governed by

people with a legal background. This trend should be welcomed.

Today, almost every Chinese leader has an engineering background. The reason for this is also historical. In the 1950s, the majority of outstanding students majored in engineering. If you studied mathematics you could get a job anywhere. Liberal arts departments recruited very few students, and law departments essentially stopped recruiting students. In those days, liberal arts students, which included law students, were marginalized. Legal education only began to recover in the 1970s and to flourish in the 1980s. People with a law degree are now gaining more and more prominence in all professions, including politics. This is a promising trend, but we have to give it some time.

Jurists also need to be aware of their own mission. In *The Lost Lawyer*, Tony Kronman, the former dean of Yale Law School, argues that today's lawyers resemble less and less their predecessors from the early years of the American republic. In those days, a lawyer was also a politician. Today, on the other hand, lawyers show less concern for politics, because all they care about is making money. Lawyers no longer aim to reform politics and improve society.

Here in China we have never experienced the golden era Kronman describes in his book. I hope that Chinese lawyers will increasingly play a positive role in China's social transformation. Law schools should also gear their curricula toward meeting the twin goals of improving traditional legal education and fostering greater concern for society and human affairs. I think there's a lot of room for improvement in our legal education. These past few years I have followed the reform of China's legal education with great interest, and I have recently begun preparing to write an essay entitled “Reforming China's Legal Education.”

Postscript: In December the Supreme People's Court ruled out an amendment to the Law on the Organization of People's Courts drafted by He Weifang and other legal scholars. The proposal, described by China's official media as “bolder than perhaps any previous judicial reforms,” touched on the setup of local courts, the division of adjudicatory power and the budget system, among other matters. Xinhua quoted a “senior Supreme Court source” as saying that any reform proposal should be made “with great caution” and “should not overlook reality.” (http://news.xinhuanet.com/english/2004-12/13/content_2327832.htm)

Translated by Paul Frank.

The original Chinese article from which this excerpt was taken was posted on the Web site of the All China Lawyers Association: <http://www.chineselawyer.com.cn/program/article.jsp?ID=21569&CID=619243405>.