Introduction

In an economy where the market is allowed free rein, there can easily emerge the so-called prisoners’ dilemma in game theory, a propensity toward “free-riding,” “the tragedy of the commons,” or ambiguous standards of utility calculation. Finally, it may result in a failure to adopt a Nash equilibrium to advance mutual interests. It may also result in market failure. From this it can be seen that a stable market economy depends on certain nonmarket institutions as its premise. It needs a rule of rules. Investors, traders, laborers, and consumers—be it individuals, groups, or enterprises, no matter how different their interest claims are—only a lucid knowledge of the rules of conduct, as well as of the consequences of violating these rules, can help them to make rational plans and decisions. Nevertheless, the rule of rules in the market cannot take form out of certain traditional practices. For instance, the market might serve as a place for execution, where “executing criminal offenders at busy marketplaces [aims] to arouse public sentiments of abhorrence” (in the Book of Rites, see Chen 2004, p.91); as the place to gather public opinions, where ancient kings “attended to public discussions” (from Intrigues of the Warring States, in Wang and Meng 1993, p.756); or simply to demonstrate the authority of the emperor, for “all culprits will be exempted when the state emperor passes the market” (from the Book of Zhou Rites, in Lin 1985, p.146). More important than these traditional practices is a universal application of rules to all equally, where the government should not privilege one group against another, or arrogate a power above the law. This is to shape a state that approximates free and fair competition with rules and regulation, without which the relations between and among groups can be difficult to coordinate and for a competition-based, efficient mechanism to function properly. For this very reason, all states where a modern market economy functions well have chosen the modern principle of the rule of law as their foundation.

A rule-of-law order that binds all actors can properly define rights and obligations. Through a series of legal techniques (e.g., comparison,
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computation, exchange, and reconfiguration of varying interests) and negotiations, it can have a positive impact upon the efficiency of the economic system. With a good operation of the judiciary and the law-enforcement agency as the independent, objective, and just third-party, the rule of law can reassure participants of the market economy that their lawful rights will be protected from willful violations. There is no need to have negotiations with one stakeholder after another with regard to each and every issue and dispute during production and marketing, and thus they can focus all their attention on their enterprise and performance. From this it can be seen that the modern principle of rule of law not only forestalls violations of citizens’ rights but restrains the government from abusing its power. Only this can become a reliable safeguard of property rights and the performance of contracts, a precondition for free and fair competition, and a contribution to reducing transaction costs, improving efficiency, and preventing “rent-seeking” behaviors. Building a rule-of-law order in China upon its establishment of a market economy is an inevitable result of institutional reform and opening-up.¹ To a certain extent, it can indeed be argued that a market economy is a rule-of-law economy.²

Needless to say, market competition will lead to functional differentiation and a diversification in interest groups, thus giving an increasingly manifest plurality to the social structure and intellectual landscape. As a matter of fact, when the distinction between the “dominant group” (强势群体) and “the underprivileged” (弱势群体) first appeared in mass media and Chinese official rhetoric, as in the Government Work Report at the Fifth Meeting of the Ninth National People’s Congress in March 2011, the abstract conception of the “people” had already been fragmented. The existing theory of a totalitarian state, as well as a structure of state governance based on monistic power, is also subjected to reexamination, where the expression and coordination of interests by varying groups comes into the political agenda. In particular, when varying interest claims compete against each other, questions start arising concerning who on earth the government represents, or whether the

¹ Wu Jinglian, a leading Chinese economist, has in the past decade pegged his attention to the rule-of-law issue, setting it as the primary goal of institutional and political reform. For recent discussions, see Wu and Ma (2013, pp.301–2). For the leading opinions in legal scholarly circles, see Jiang and Ji (2010, pp.1–21). For the related intellectual background, cf. Ji (1998a, 2001a, 2006g).
² This used to be a fundamental proposition discussed by the Chinese legal scholarship during the 1990s. Cf. Zhang (1994).
government can maintain its impartiality in applying rules. Such questions can form an increasingly powerful pressure of opinion on the government. This means that in the landscape of an increasingly diverse society, there is a need to render state power unbiased, objective, and mediated, with its mode of governance to be transformed as well. In other words, the situation of a dominant group juxtaposed against the underprivileged, as well as the real task of solving conflicts in interests and values, has made reform in politics and institutions inevitable. The aim of political reform is a democracy with both freedom and equality, of which the entry point, or the best breakthrough node, is the rule of law that attends to due process of law. There is an internal demand to govern public affairs in accordance with rules of the market economy and social diversification, thus providing the fundamental motivation for building a rule-of-law state (*Rechtsstaat*). To examine this political issue within the macroscopic context of restructuring can help us to discover that the key to opening another axial civilization for China lies precisely in the rule of law.

In a retrospect on the two millennia-long imperial history of China, we may see a few common results of the convergence and competition between and among different forces. For instance, through the Qin law, a monistic power structure was formed, with the emperor at the apex of the pyramid (a coercive order), a symmetric system of authority based on Confucianized norms, rules, and codes of conduct (a recognized order), and a coupling of these two orders through the supreme righteousness of the emperor and the father (as the patriarch) and self-cultivation. From the mid-nineteenth century onward, under the impact of Western modern civilization, the traditional power-authority frame was constantly under attack until its demise. In 1905, the traditional civil examination system was abolished, signalling the falling apart of the classical authority system. The Republican Xinhai Revolution in 1911 led directly to the disintegration of the traditional power structure. These two great transformations in aggregation resulted in society falling apart, warlording, geographical division, and kinship demise. The Communist Party of China, as a powerful force of reintegration, not only liberated individuals from geographic-consanguine communities and guanxi nexus but reorganized the whole society into another monistic power structure. Within a certain period of time, a new authority was founded, as a substitute to institutional authority. This new authority contained a charismatic leader and a revolutionary ideology that built bonds between individuals and mobilized the masses. By way of comparison, in today’s
China, the problem facing all of us is that under the impact of globaliza-
tion, many an individual exists as an atomized being outside the existing
social structure. The new authority, or the substitute of the institutional
authority, has fallen. There is an increasing recourse to monistic power,
which in its turn is increasingly under pressure and approaching the edge
of falling asunder. Economic performance in and of itself cannot offer
a fundamental solution to the legitimacy of the regime.³ It at best
postpones the onset of crisis. During this process of deferment, there is
in all probability a deterioration of the systematic corruption within the
society, thus preparing the ground for a new social revolution.

Obviously, it is a grand mission for our generation to carve out anew
for China an appropriate power structure and a system of authority. Now
that China has already introduced a market economy, diversification, and
globalisation, the new power structure and system of authority will need
to take these into account so as to adjust to the demands of societal
development. This multilayered, plural, changing, and dynamic situation
can no longer be regulated by a monistic, absolute power structure. For
this very reason, the direction of reform in politics and institutions
should be enlarging the space for civil rights and liberties, corporate
autonomy, and local self-governance, as well as preventing the abuse of
power. Under the premise of ensuring an efficient integration, an appro-
priate devolution of power and decentralization are needed. To a certain
extent, this means that a diversification in the power structure may bring
forward a predicament of societal integration. For this very reason, the
task of reforming politics and institutions is not as simple as a mere
relaxation of regulation. In order to consider both plurality and integra-
tion, there is a need to offer a top-level design. Through a reasonable
institutional arrangement, this may help to solve the ever-present
problem in contemporary Chinese politics of “chaos once deregulated,
and inactivity once uniformly regulated” (一放就乱，一统就死).
Furthermore, there is one more important task, namely to establish a
system of authority that gains wholehearted recognition and respect by
citizens and voluntary respect so as to prevent the chaotic scenario of
anything going in all directions without the possibility of integrating into
a cohesive public choice. Only a modern rule-of-law order will be able to
combine into an organic whole such binary elements as restraining

³ Zhao Dingxin argued that economic performance is a source of political legitimacy, albeit
with an escalating pressure of promise, for which reason a performance-based legitimacy
rests on shaky ground (see Zhao 2012, pp.4–16).
power while strengthening authority, and protecting liberty while maintaining unity.⁴

In general, restructuring power and the system of authority can involve two steps. Firstly, through activating the existing constitutional law, a series of universal values in modern civilization (e.g., equality, liberty, democracy, and human rights) can be combined with highly centralized state power. On the basis of strengthening the implementation of legal rules and upholding the principle of an independent judiciary, power can be rationalized, legitimated, and improve efficiency, thus constituting a modern rule-of-law state (YHCQ Editorial Office 2013). Those universal values in modern civilization constitute the foundation of power legitimacy, while the highly centralized power that took shape as a result of the enlightenment regime or of the so-called developmental dictatorship may help to break through the existing complex of vested interests and ensure societal integrity during this great transformation. As a matter of course, there may exist this or that tension or conflict between these universal values in modern civilization and a highly centralized state power. For this very reason, during this stage, the top-level design should set as its basis an “institutionalization of contradictions” and due process of law, coordinating conflicts through the principle of an independent judiciary and other measures so as to strike a balance between varying constituent parts. An overcentralization or absolute power may lead to overriding universal values in modern civilization. By way of comparison, if power is overfragmented or even weakened, then societal integration may fall apart, and the institutional carrier of these universal values in modern civilization would perish in due course.

We need to pay enough attention before we take this step to the particularities in China’s issues in comparison with the West. The principle of rule of law in the Western context may differ in expression from that in China. In the West, the relations between and among three types of norms are clear, namely transcendental norms, state norms, and social norms – these are mutually independent from each other, while in

⁴ Noticeably, there can be radically diverse or opposing understandings of the rule of law, resulting in a plurality of plans during reform of politics and institutions. For this, in propagating the rule of law there is a need to clarify concepts, elucidate the modus operandi of related institutions, and make a wise choice among competing options. There is thus a need to uphold a reflexive rationality throughout. For this, a discussion on the rule of law by Rodríguez et al. (2010) can be illuminating.
terms of their effect, there is a governing hierarchy. Through the interpretative community of the law, these three levels of norms are efficiently integrated, where there is a set of discursive system of legal order and its legitimacy that is commonly shared by the society as a whole. By way of comparison, in China, there is no clear demarcation between and among the three types of norms which instead overlap and mutually interpenetrate, forming a mosaic-like melange of colors. Lü Simian, a historian, once pointed out that the law in traditional China did not coercively demand uniformity, where local laws and orders might differ from each other (1982, p.588). More importantly, in traditional China, the system of law was far from a hierarchical one. Norms of varying types were regarded as no different from each other within the will of the sovereign—they all spread out on a horizontal plane, where even a sub-statute could override a statute in the code, or some particular rule might override certain fundamental principles. This can be seen in today’s China as well. There may exist local versions of the law, where sometimes an inferior law or regulation may override that of a superior one in terms of their position within the hierarchy of effects. This is particularly the case for administrative regulations. In tax laws, normally it should be up to the National People’s Congress to make a uniform law. In fact, the making of the tax law was dominated by the administrative branch. By the same token, local governments might adopt their own regulations regarding taxation.

What can be seen from this cultural tradition? The answer is legal pluralism. Previously it has been mentioned that power in China is highly monistic and centralized. When it comes to political reform, what comes next naturally will be devolution of power, and checks and balances, namely to change this monistic power structure. In the context of legal pluralism, a preposterous diversification of power may lead to disintegration of the mechanism of social cohesion. Therefore, legal pluralization may not move forward simultaneously with power diversification. We need to take into account checks and balances as much as societal integrity, for which the law needs to maintain its integrity. Through the interpretative community of the law, we may prevent disintegration as brought about by a devolution of power and checks and balances. In fact, the principle of a modern rule-of-law state is fundamentally to use a uniform legal system to support a diversified power structure, enabling the institutional design of checks and balances to operate smoothly and coordinate consistently through uniform legal rules. Now the question is: Will China be able to create this? If we fail to
elucidate the logic first of all and preposterously move political reform forward, then it may generate high risks. Now that the real issue of “an absolute power corrupts absolutely” binds us to follow a path of separation of powers for checks and balances, then there is a need to unify the law first, using uniform rules to constrain and coordinate power so as to establish a new mechanism of societal integration. Henceforth, the direction for future political reform will be moving from “legal pluralism with a monistic power” to “a monistic law with plural power.” This formula may seem a bit simplistic, albeit with clarity to elucidate our understanding of the future efforts.

Secondly, upon the basis of a legal interpretative community having already taken shape and been consolidated, we can then in return proceed to reform the highly centralized power structure, reconfiguring the relations between universal values and power checks in accordance with constitutional law. To be more specific, this is a deliberate choice of constitutional design. The constitutional design can have a decisive impact upon the polity. In general, the so-called politics is a decision on public matters, while a democratic polity means that a decision concerning public affairs sufficiently reflects public opinions. To achieve this, we need information disclosure, freedom of expression, and argumentation and justification. From this it can be drawn that in deciding public affairs, no true democracy will be possible without free and open deliberation and debate. In order to avoid an impasse of competing opinions failing to compromise, there is a need for a voting procedure where the minority will have to respect a majority decision. In order to prevent a decision from being influenced by immediate interests or public sentiments, there is a need to introduce indirect democracy, where the public only decides upon the decision-maker. Henceforth, it is necessary to strengthen the institutional protection of the right to vote and to election, and to democratize the whole decision-making process. Furthermore, to consider both the fairness and efficiency of a decision, there should be an appropriate separation of different powers, such as the decision-making obligation (the legislative power), the obligation to efficiently carry out decisions (the administrative power), and the obligation to oversee and adjudicate the legality or appropriateness of decision-making and implementation (the judicial power). In today’s China, democratization

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5 For Dahl, the choice of a constitutional design is of crucial importance in a complicated situation or where the democratic base may be disadvantaged. An ill-designed constitution may result in the failure of democracy (see Dahl 1999, p.147).
seemingly is entrapped into the assumption of direct democracy in a small, sparsely populated state. As a result, it neglects the “grassroots mass election” that accords with the principle of rational organization. For one thing, an aggregate of purely personal choices may not be rational. Therefore, in the absence of party politics, this may easily lead to a manipulation of election results by religious, mafia, or other non-formal organizations. In addition to this neglect of the “grassroots mass election,” it emphasizes too much a politicized “law-enforcement for the people,” which in fact is to coerce a judicial judgment on an individual matter to reflect public opinions as well. Also, there is this “public opinion oversight” (舆论监督) that is un-, de-, or anti-institutionalized, where willful, changeable, and particular public opinions may decide on the operation of institutions. In a word, there lacks a long-term, institutionalized mechanism of checks and balances and coordination in accordance with the law.

The key to achieving a rule-of-law democracy is to enable legislation – a most typical example of decision-making on public affairs – to sufficiently reflect vox pop, instead of weaving public opinions directly into law enforcement, which will invariably result in the overall vox pop being revised by a partial one. In light of this statement, a measure of crucial importance for political and institutional reform is to revise the election mechanism and consolidate the principle of democratic polity upon the basis of strengthening the function of the National People’s Congress, especially its function to review budgets and to hold the administrative branch to account in accordance with audit reports. At the same time, we need to introduce a judicial review system on unconstitutional laws and regulations and unlawful administrative measures so as to strengthen the authority and function of justice and to consolidate the principle of independent judiciary. This judicial review of constitutionality can help to prevent a changing relationship between competing forces from interfering with legislation, and resulting in institutional breakdown so as to maintain the stability and consistency of state order. In other words, the review, reasoning, and judgment by the judiciary, in constraining the legislative and administrative power, also play the role of integration and legitimation. In this sense, democratic elections, as well as checks and balances at various levels, can generate a new power structure. A legal order fully representing vox pop, especially the much expected and credible principle of impartial justice, will constitute a new system of authority.

There is a need to rigorously distinguish the two concepts of authority and power. The difference between authority and power lies in the
coerciveness of the former being derived from social recognition, thus forming a superior value or righteousness and leading to voluntary respect and following. Put simply, authority is a force to induce obedience on the basis of trust. Authority can be understood as a voluntary obedience or an institutionalized obedience following the basis of legitimacy, rationality, and necessity. The reason that the rule of law acquires authority is because it can constrain the government’s power and the dominant group via a universal application of rules so as to ensure that all individual rights are respected equally without violation. For a rational citizen, an institutional arrangement to protect liberty via delimiting liberty itself is recognizable and acceptable. They will not feel that this is a limitation of their freedom. The rule-of-law order can take shape and be maintained without coercion, thus contributing to a significant reduction in cost for power to operate. This is particularly the case with a full implementation of the principle of democratic procedure in legislation, where the foundation of a binding norm includes freedom in choice and self-responsibility – both to be easily internalized and transformed into an autonomous action that abides by one’s promises. In this way, a norm can take real effect without frequent resort to physical force.

Under many circumstances, power and authority are confused. More often than not, some may even juxtapose authority against democracy, in an attempt to disparage authority. This understanding, if not wrong, is at least prejudiced. As a matter of fact, compared with other polities, a democratic polity is in greater need of authority. For one thing, democracy does not equal an autocracy of the masses, or a rule by public opinions. It is premised on autonomous citizenry. If without an authority compatible with autonomy, democracy loses its stability and become unsustainable. Under certain circumstances it may even be unable to make a significant political decision. On an occasion of varying opinions, an authoritative voice is needed to build consensus. When election

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6 From Plato and Aristotle onward, the dialectical relations between freedom and violence, and democracy and autocracy have been an important theme in political studies. In order to overcome the willfulness of democratic politics, an authority with expertise and wisdom are regarded as necessary, from which technocracy or expertocracy (专家治国) is derived. From the Federalist Papers, the towering works concerning the founding of the USA, it can be seen that there existed confrontation and checks and balances between the Thomas Jefferson-led democratists and the Alexander Hamilton-led camp of authority. This was a tension that served as a basis for the institutional arrangements in America. With the rise of mass democratism in the 1960s, the importance of authority to democracy again became a focus of attention in Western democracies (see Crozier et al. 1975).
candidates are in a tug of war, an authoritative decision is needed to dispel the cloud of doubt on the result of vote so as to avoid the crisis of a state falling apart. Authority comes from rationality, wisdom, norms, and credibility. Without authority, democracy can easily fall into crisis in the changing balances of competing political forces and capricious, sentimental vicissitudes.

Through procedural justice, the rule of law in a modern state can dissolve the conflict that results from the variance between and among competing substantial values to provide a widely recognized legitimacy to public decisions. Through a recognition and protection of rights, it can prevent a majoritarian dictatorship from violating civil rights and liberty. With a strict application and just implementation of rules, as well as an emphasis on reasoned argumentation and a rule-of-law spirit to constrain power, a sufficient amount of trust among societal members can be established so as to prevent any instability in democracy. Therefore, the rule of law is a depersonalized authority with its base rooted in a trust in the system. Only upon a shift from a trust in personality to that in the system will the rule of law be able to build its authority and function properly. As a matter of course, a majority support from public opinion may establish a powerful authority, and especially strengthen the authority of the sovereign, or the authority of the rule of law. In fact, only when democracy is combined with the authority of the rule of law will this democracy become stable, mature, and sustainable. This is my most fundamental judgment on the relations between democracy and authority. To grasp the rule of law from the perspective of authority instead of power can help us to avoid falling into the trap of cruel punishments and inhumane tortures that can be seen in traditional legalism, as well as to ensure that our enterprise of building a modern rule-of-law order will not fall into the traps of ancien régime.

The rule of law may help to restructure power and reconfigure the system of authority, to effectively replace those imperial traditions and the chaos right after the Republican Xinhai Revolution, and to build a widely accepted order and institution. If so, then there is every reason to believe that China is on its way to democracy via the rule of law. It may enter into a whole new age of another axial civilization in the background of the world economy shifting its center of gravity and social restructuring. There is no other choice than the rule of law and democracy when it

7 Dahl argued that power is the most crucial building block of democracy, while democracy in essence is a system of power (see Dahl 1999, p.56).