

RESEARCH ARTICLE

Formalism and anti-formalism in the Chinese Communist Party's governance project

Samuli Seppänen 

Faculty of Law, The Chinese University of Hong Kong
Email: sseppanen@cuhk.edu.hk

Abstract

This article argues that the governance project of the Chinese Communist Party (CCP) oscillates between rule-based formalism and anti-formalist scepticism about rule-based governance. In this dichotomy, anti-formalist arguments support CCP leaders' efforts to maintain and increase the Party's influence over the judiciary and other state organs, which is a key justification for the Party's power. Formalist language, in contrast, supports Party leaders' attempts to constrain lower-level cadres' uses of power within the Party. Formalist language is particularly prominent in the writings of Party ideologues on the interpretation of the Party's internal regulations, including the CCP Constitution. At the same time, Party ideology also provides for various anti-formalist arguments about rule-based governance within and outside the Party. Paradoxical as it may be, the Party leadership seeks to exert rule-transcending political leadership through formal rules. While the focus of this article is on China, it argues that other illiberal regimes may also be studied in terms of similar, potentially incoherent approaches to rule-based governance.

Keywords: China; Chinese Communist Party (CCP); illiberalism; legal formalism; legal theory

I. Introduction

This article makes use of a simple observation in order to examine the approach taken by the Chinese Communist Party (CCP) to rule-based governance. As this article demonstrates, CCP ideologues assign formal rules, including the CCP Constitution, an important role in the Party's internal governance structure.¹ This is ironic because a central justification for the CCP's control over the judiciary and other state organs relies on (often implied) scepticism about the viability and benefits of formal rule-based legal processes, including formal constitutional law.²

¹ See, for example, Song Gongde, *Danggui zhi zhi* [Governance Through Intraparty Regulations] (Falü chubanshe, Beijing, 2016) 247–52; Wang Zhenmin, *Zhongguo Gongchandang dangnei fagui yanjiu* [Study on CCP Intraparty Regulations] (Renmin chubanshe, Beijing, 2015) 193.

² For explicit scepticism about rule-based governance in the legal system, see for example Central Political and Legal Affairs Commission of the Chinese Communist Party, *Shehui zhuyi fazhi linian duben* [The Socialist Rule of Law Concept—A Reader] (Zhongguo Chang'an chubanshe, Beijing, 2009) 30–31; Fan Mingzhi, 'Xifang 'sifa duli' weisheme zai Zhongguo zoubutong' [Why Western 'Judicial Independence' Cannot Break Through in China], *Qiushi*, 15 January 2018, available at <http://www.qstheory.cn/dukan/qs/2018-01/15/c_1122241714.htm>. For scepticism about formal constitutional law, see Office of the Central

This observation provides a useful entry point for analysing the role of rule-based governance in the CCP's governance project and in illiberal legal and political thought more generally. On the highest level of abstraction, the role of rules within the Party's governance project can be conceptualised through a dichotomy between 'legal formalism' and 'anti-formalism'. In this dichotomy, legal formalism (or simply 'formalism') stands for the belief that rules can and should restrict decision-making by screening off undesired considerations from the decision-making process.³ Anti-formalism, in contrast, connotes a theoretical practice, which explicitly challenges legal formalism in one form or another.⁴ A common formalist argument holds that the underlying proposition of formalism is uncontroversial and that 'legal formalism' itself is a moot object of criticism.⁵ A common anti-formalist strategy consists of insisting that, despite its mainstream nature, 'legal formalism' falsely denies or plays down the role of choice in rule-application.⁶

Although the concept of 'formalism' is sometimes used as a loosely defined caricature in legal theoretical debates,⁷ the concept itself is ideologically meaningful. A European or American scholar extolling the virtues of formalism typically seeks to promote accountability, transparency, equality, and checks and balances within the government.⁸ In contrast, a European or American critic of formalism typically argues that formalist language prompts decision-makers to disregard socially important aspects of judicial decisions, while at the same time disguising the actual ideological and political biases behind judicial decisions.⁹ Since the early twentieth century, anti-formalist critique has often been motivated by a self-consciously progressive (liberal or socialist) political agenda.¹⁰

Political and Legal Affairs Commission of the Chinese Communist Party, *Shehui zhuyi fazhi linian xuexi wenda* [Questions and Answers on the Socialist Rule of Law Concept] (Zhongguo Chang'an chubanshe, Beijing, 2012) 21–22. For similar arguments in Chinese legal scholarship, see Zhu Suli, 'The Party and the Courts' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, Cambridge, 2010) 52, 57, 64; Zhu Suli, *Sending Law to the Countryside* (Springer, Singapore, 2016) xxxviii–xxxix, 17–20, 123. Ideological statements on the CCP's leadership over the legal system often avoid detailing how such leadership is meant to be exercised. See, for example, 'Xi Jinping's report at 19th CPC National Congress', *Xinhua*, 3 November 2017, 32–33, available at <http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm>.

³Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992) 16–18; Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 510, 535.

⁴Horwitz (n 3) 18–19. There are various (present and historical) forms of anti-formalist critique. The critique of formalism may object to: (1) the possibility of legal deduction and the presumed ability of a legal system to facilitate meaning-based interpretation; (2) the assumption that law is a gapless system, which does not need to consider social desiderata; (3) the presumption that there are easy cases; and (4) the possibility of meaning-based interpretation in general. Duncan Kennedy, 'Legal Formalism' in Neil J Smelser and Paul B Baltes (eds), *Encyclopedia of the Social & Behavioral Sciences: Volume 13* (Elsevier, Amsterdam, 2001) 8634, 8635–36.

⁵Schauer (n 3) 548; Martin Stone, 'Formalism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002) 166, 172.

⁶Kennedy (n 4) 8634. For an early example, see Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605, 615–16.

⁷For this observation, see Schauer (n 3) 510; Stone (n 5) 172.

⁸Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2001) 500; John Manning, 'Constitutional Structure and Statutory Formalism' (1999) 66 *University of Chicago Law Review* 685, 691.

⁹Kennedy (n 4) 863.

¹⁰Horwitz (n 3) 154; 194–98; Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, Cambridge, 2006) 19, 37–39.

This article demonstrates that in the Chinese context, ‘formalism’ (*xingshi zhuyi*) and its critiques have different uses than in Europe and America. In particular, formalist language supports Party leaders’ attempts to constrain lower-level Party cadres’ uses of power through formal rules.¹¹ Formalism also serves to portray the Party leadership as rational and scientific.¹² Formalist conceptions are particularly prominent in Party ideologues’ writings on the interpretation of ‘intraparty regulations’ (*dangnei fagui*).¹³ Anti-formalist arguments, in contrast, legitimise the Party’s leadership over the Chinese judiciary and other state organs and justify the Party’s extra-legal uses of power and, arguably, conduct against the Party’s own regulations.¹⁴

This article does not take sides in the debate between formalism and anti-formalism, nor does it pass a judgement on whether ‘legal formalism’ is an appropriate target of criticism in the first place.¹⁵ Instead, it argues that *both* formalist *and* anti-formalist arguments are necessary for the CCP’s governance project. As Max Weber pointed out, modern political parties seek to regulate party members’ conduct through formal – indeed, ‘formalist’ – rules.¹⁶ Further, the CCP leadership seeks to formalise the Party’s internal governance structures.¹⁷ At the same time, the CCP cannot rely on formal rules alone for its governance project, which is (formally) premised on enforcing a ‘people’s democratic dictatorship’ in China.¹⁸ The very purpose of a dictatorship is its ability to suspend formal rules when political expediency so requires (see Part V). This is arguably not only the case with formal state laws, but also with formal political rules – that is, with the same rules that formally constitute the Party as a bureaucratic organization and govern its decision-making processes. Just as is the case with formal legal rules, there is no reason to assume that intraparty regulations are meant to be applied in a formalist manner, even at the lower levels of the Party hierarchy. The formalist approach to the CCP’s intraparty regulations would namely encourage lower-level Party cadres to interpret rules ‘formalistically’ against higher-level Party cadres’ situational judgement calls. Formal rules, no matter how they are constituted, do not serve the Party leadership’s interests in all situations. At the same time, leaders of a vast bureaucratic organization such as the CCP cannot do without formal rules and the notion of formalist rule application.

In contrast to some CCP-endorsed literature,¹⁹ this article does not paint a harmonious picture of the Party’s approach to rule-based governance. Instead, it describes the oscillation between formalism and anti-formalism as an ever-present contradiction at all levels of Party governance. In addition to shedding light on a sparsely studied aspect of the

¹¹Xi Jinping: Ba quanli guan jin zhidu de longzi li’ [Xi Jinping: Shutting power into the cage of a system] Xinhua, 22 January 2013, available at <http://www.ccdi.gov.cn/ldhd/gcsy/201307/t20130710_114955.html>.

¹²Song (n 1) 73, 249.

¹³(n 1).

¹⁴(n 2).

¹⁵See Stone (n 5) 172.

¹⁶Max Weber, *Economy and Society* (University of California Press, Berkeley, CA, 1978) 220–24.

¹⁷Song (n 1) 12–14; Wang (n 1) 11. For the observation that CCP governance has become more law-orientated in recent years, see Taisu Zhang and Tom Ginsburg, ‘China’s Turn Toward Law’ (2019) 59 *Virginia Journal of International Law* 306, 361.

¹⁸Zhonghua renmin gongheguo xianfa [PRC Constitution], as amended on 11 March 2018, Art 1, available at <http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm>.

¹⁹Song (n 1) 249.

Chinese party-state,²⁰ a focus on contradictions offers a chance to reconsider certain seminal descriptions of the role of rule-based governance in totalitarian and authoritarian regimes.²¹ In particular, it must be asked whether the illiberal ‘dual state’ – a regime that comprises separate spheres of formal state law and politics – can rely on formalism to govern political conduct.²² Conversely, it must also be questioned whether the ‘modern’ illiberal political sphere can be free of formalist rule application. This article answers both questions in the negative.

Today’s People’s Republic of China (PRC) differs from twentieth-century totalitarian and authoritarian regimes in many crucial ways. Most obviously, the Chinese party-state does not claim a monopoly over information or the economy.²³ Nevertheless, CCP ideologues share with the earlier totalitarian and authoritarian regimes an ‘illiberal’ tendency to prioritise political leadership over formal rule-based processes.²⁴ The particular dichotomy discussed in this article is therefore relevant to the study of all regimes, which combine rationalist, bureaucratic governance methods with illiberal resistance to formal legal processes.

This article is organised as follows. Part II describes uses of anti-formalism in statements about the Party’s leadership over the judiciary and other state organs. Part III turns to examine formalism within the Party’s internal governance. Part IV illustrates the uses of formalism through texts on the interpretation of CCP intraparty regulations. Part V discusses reasons for the oscillation between formalism and anti-formalism in Party ideology and considers its implications for the study of illiberal regimes beyond the Chinese context. Part VI concludes the article.

II. Anti-formalism and Party leadership

Conceptualising the CCP’s governance strategies through a dichotomy between formalism and anti-formalism may seem surprising, given that it is more common to emphasise the anti-formalist – and in particular, the instrumentalist and pragmatist – nature of the Party’s approach to law.²⁵ Indeed, on its face the CCP’s political ideology is explicitly and self-consciously anti-formalist. Formalism – ‘doing things for form’s sake’ – is one of the

²⁰There are few English language sources on intraparty regulations. See Ewan Smith, ‘Party Norms and Constitutional Conventions’ (SSRN, 1 January 2017), available at <<https://ssrn.com/abstract=2942770>>; Yang Fan, ‘The Role of CPC Regulations in Chinese Judicial Decisions: An Empirical Study Based on Published Judgments’ (2019) 19(2) *The China Review* 69; Zhang Xiaojun, ‘The Historical Track of Internal Regulations of the Communist Party of China Ruled by Law’ (2019) 7 *China Legal Science* 3.

²¹Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, New York, 1976) 457; Ernst Fraenkel, *The Dual State* (Oxford University Press, Oxford, 2017) 3; Carl Schmitt, *Dictatorship* (Polity Press, Cambridge, 2003) 117. For a contemporary discussion on Fraenkel and Schmitt in Chinese legal studies, see Fu Hualing, ‘Duality and China’s Struggle for Legal Autonomy’ (2019) 1 *China Perspectives* 3, 3.

²²Fraenkel (n 21) 3.

²³Eva Pils, *Human Rights in China: A Social Practice in the Shadows of Authoritarianism* (Polity Press, Cambridge, 2018) 7.

²⁴For such preference within China, see for example Central Political and Legal Commission (n 2) 111; Office of the Central Political and Legal Affairs Commission (n 2) 20–21; Song (n 1) 66. For such preference outside China, see for example Arendt (n 21) 457; Fraenkel (n 21) 3; Schmitt (n 21) 117.

²⁵Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press, Stanford, CA, 2002) 131; Randall Peerenboom, *China’s Long March Toward Rule of Law* (Cambridge University Press, Cambridge, 2002) 23; Stein Ringen, *The Perfect Dictatorship: China in the 21st Century* (Hong Kong University Press, Hong Kong, 2016) 84–85. Cf. Zhang and Ginsburg (n 17).

four forms of decadence opposed by the Party leadership.²⁶ As a form of decadence, formalism is associated with an unnecessarily bookish and 'bureaucratic' working style.²⁷ According to Party ideologues, formalism prevents CCP cadres from implementing the Party's policies creatively in accordance with local realities.²⁸ Instead of relying on 'books', Party cadres ought to 'seek truth from fact'.²⁹ A prominent CCP textbook on the socialist rule of law conception, published in 2009, extends the critique of formalism into the legal field, instructing Party members to 'resolutely prevent and overcome formalism' in law enforcement – without, however, explaining what formalism in law enforcement entails.³⁰

A central aspect of early twentieth century continental European and American critique against formalism targeted the formalists' (supposed) denial of the role of political choice in adjudication.³¹ The CCP textbook on the socialist rule of law conception reproduces some of this critique. The textbook explains that 'there has never existed a judiciary that was truly independent from politics' and that 'the political has always maintained its control and influence over the judiciary'.³² The textbook makes this argument with direct reference to American legal realism and pragmatism, implying that political leadership of the judiciary is an indispensable aspect of any government.³³

Another form of critique against formalism in Europe and America centred on the (supposedly formalist) method of deciding cases through the textual analysis of meaning without regard for social facts and policies.³⁴ Echoing this critique, the above-mentioned CCP textbook instructs law enforcement officials to 'serve the overall circumstances' (*fuwu daju*).³⁵ 'Serving the overall circumstances' stands for considering all socialist desiderata in adjudication, including the promotion of social justice, social harmony and stability, the adherence to various Party doctrines, the protection of the Party's efforts to safeguard national security – and even the strict application of state laws.³⁶ The textbook also urges Party cadres to prioritise the 'political and social effect' of law enforcement instead of its 'legal effect'.³⁷ According to the textbook, the (as such

²⁶Xi Jinping, *The Governance of China* (Foreign Language Press, Beijing, 2014) 405; 'Four Forms of Decadence', China.org.cn, 7 September 2015, available at <http://www.china.org.cn/english/china_key_words/2015-09/07/content_36528042.htm>.

²⁷Jing Yi, 'Jianjue zhengzhi xingshi zhuyi, guanliao zhuyi' [Resolutely Remedy Formalism and Bureaucratism], Qiushi, 30 September 2019, available at <http://www.qstheory.cn/wp/2018-09/30/c_1123509631.htm>.

²⁸Ibid.

²⁹Ibid.

³⁰Central Political and Legal Commission (n 2) 76.

³¹Kennedy (n 4) 8634. As Oliver Wendell Holmes wrote in his famous dissent in *Lochner v. New York*, 'General propositions do not decide concrete cases.' See *Lochner v New York* 198 US 45 (1905) 76. The majority opinion in this case did, however, allude to the social consequences of contractual freedom. Ibid. 57. For a self-consciously anti-formalist reading of the majority opinion, see Pound (n 6) 615–16.

³²Central Political and Legal Commission (n 2) 30–31.

³³Ibid. The legal realist and pragmatist arguments are elaborated in Office of Central Political and Legal Commission (n 2) 173–76.

³⁴For examples of this critique, see Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 465–66; Pound (n 6) 221–22. See also Stone (n 5) 173–74, arguing that the two forms of anti-formalist critique are mutually exclusive.

³⁵Central Political and Legal Commission (n 2) 99.

³⁶Ibid 104–09.

³⁷Ibid 110.

undefined) 'political and social effect' of a decision must provide the ultimate criterion for law enforcement.³⁸

Similar arguments can be seen in other texts justifying Party leadership. According to an article published in *Seeking Truth*, the CCP's main theoretical journal, the Western emphasis on 'formal justice' [*xingshi zhengyi*] turns adjudication in Western courts into a contest of litigation skills.³⁹ The Western notion of judicial independence stresses that judges and jury members may not be influenced by 'the outside world' [*waijie*].⁴⁰ Consequently, adjudication in the West is unable to take note of the actual questions of substantive inequality.⁴¹ (The author of the article also maintains, rather confusingly, that in reality American judges cannot escape the outside influence of political parties and financiers.)⁴² Another example of the anti-formalist justification of the Party's leadership of the judiciary is provided by Xu Xianming, China's Deputy Procurator General and a prominent legal theorist.⁴³ Xu explains that the Party must be above the law (as well as 'in the middle of the law and under the law'), because the law is inevitably 'an affirmation of past relations'.⁴⁴ Instead of looking back to formal legislation, the Party must grasp the laws of social development in real time.⁴⁵

Anti-formalist arguments are also advanced in theoretically ambitious Chinese legal scholarship, where they sometimes serve to legitimize the Party's leadership of the judiciary and other state organs. As was true of the sociological and realist critiques of early twentieth century Western legal thought, Chinese sociological jurisprudence describes 'legal formalism' as a theoretically outdated, socially out-of-touch foreign tradition.⁴⁶ According to Jiang Shigong, a prominent constitutional law scholar at Peking University, 'the state of Chinese legal scholarship has been especially preoccupied with legal formalism in order to quickly adapt to international standards'.⁴⁷ Jiang argues that Chinese scholars have to 'break away from legal formalism' and understand constitutional questions against 'China's political reality, history, and cultural traditions'.⁴⁸ The fact of Party leadership is a central part of this political reality.⁴⁹

Anti-formalism also allows Chinese legal scholars to argue that the Communist Party brings valuable outside information to the insular world of legal rules. Zhu Suli, the former dean of Peking University Law School and an early promoter of sociological

³⁸Ibid 110. For a supportive discussion of the same arguments, see Office of Central Political and Legal Commission (n 2) 189–92.

³⁹Fan (n 2).

⁴⁰Ibid.

⁴¹Ibid.

⁴²Ibid.

⁴³Xu Xianming 'China Vitae', available at <http://www.chinavitae.com/biography/Xu_Xianming/full>.

⁴⁴Xu Xianming, 'Gongchandang ji zai falü zhi zhong, ye zai falü zhi xia, hai zai falü zhi shang' [The Communist Party is in the Middle of the Law, Under the Law, and Above the Law], *China Digital Times*, 16 April 2017, available at <<https://chinadigitaltimes.net/chinese/2017/04>>.

⁴⁵Ibid.

⁴⁶For the association of 'legal formalism' with socially out-of-touch foreign influences in twentieth-century Western legal thought, see Kennedy (n 10) 48–49; for an example, see Roscoe Pound, 'The End of Law as Developed in Juristic Thought II' (1917) 30 *Harvard Law Review* 201, 211.

⁴⁷Jiang Shigong, 'How to Explore the Chinese Path to Constitutionalism? A Response to Larry Cata Backer' (2014) 40 *Modern China* 196, 199.

⁴⁸Jiang Shigong, 'Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China' (2010) 36 *Modern China* 12, 38, 42

⁴⁹Ibid 26.

jurisprudence in China, urges judges ‘to settle disputes well’ and ‘not just ... abide by their duties and implement extant legal rules’.⁵⁰ Zhu, who is a critic of ‘simplistic Western notions of judicial independence’,⁵¹ suggests that Party influence in the judiciary has evolved as a response to China’s social needs and, therefore, functions well in the Chinese context.⁵²

In addition to the ideological and theoretical critiques of ‘formalism’, the institutional design of China’s one-party system sets the Party against legal formalism in several concrete ways. For instance, the newly established state organ, the National Supervision Commission (NSC), has been tasked with the holistic, extra-legal supervision of Party cadres and state organ employees in anti-corruption matters. Such supervision, as well as the enforcement of Party discipline in general, is meant to occur free of the constraints of the Chinese judicial process.⁵³ The supervision commissions make use of the Party’s discipline inspection facilities and methods,⁵⁴ which reportedly need not comply with formal legal rules.⁵⁵ The Chinese state media have applauded the self-consciously ‘political’ approach of the new supervisory processes, suggesting that it enables anti-corruption investigations to address the root causes of corruption better than legal processes.⁵⁶

III. Formalism in the Party’s internal governance

Describing the Party’s approach to rule-based governance through anti-formalism, which prioritises Party leadership over the legal system, is consistent with seminal descriptions of twentieth-century totalitarian and authoritarian governments. In Hannah Arendt’s analysis, for instance, twentieth-century totalitarian and authoritarian regimes were characterised by a demand for unlimited power. For this project, ‘even the most unjust legal rules’ were an obstacle.⁵⁷ Ernst Fraenkel, a German jurist and political scientist, described the political sphere – the so-called ‘Prerogative State’ – in Nazi Germany in similar terms as ‘a vacuum as far as law [was] concerned’.⁵⁸ Fraenkel argued that in Nazi Germany the ‘Prerogative State’ was able to trump the ‘Normative State’ of formal law whenever political leaders so decided.⁵⁹ Fraenkel’s analysis was informed by Carl Schmitt’s view of ‘the political’.⁶⁰ For Schmitt (who eventually joined the German Nazi Party), ‘the political’ was superior to the normative sphere of formal constitutions and laws because the normative order ultimately depended on existential political decisions.⁶¹

⁵⁰Zhu, *Sending Law to the Countryside* (n 2) 123.

⁵¹Zhu, ‘The Party and the Courts’ (n 2) 58.

⁵²*Ibid* 66.

⁵³(n 18) Art 127.

⁵⁴Lu Hui, ‘China Focus: Supervision Law Gives Legal Teeth to China’s Graft-busting Agency’, Xinhua News Agency, 20 March 2018, available at <http://www.xinhuanet.com/english/2018-03/20/c_137053224.htm>.

⁵⁵(n 23) 38; Flora Sapio, *Sovereign Power and the Law in China* (Brill, Leiden, 2010) 102–05.

⁵⁶Lu (n 54).

⁵⁷Arendt (n 21) 457.

⁵⁸Fraenkel (n 21) 3.

⁵⁹*Ibid*.

⁶⁰*Ibid* 25.

⁶¹Carl Schmitt, *Constitutional Theory* (Duke University Press, Durham, NC, 2008) 154. See also Ulrich K. Preuß, ‘Carl Schmitt and the Weimar Constitution’ in Jens Meierhenrich and Oliver Simons (eds), *Oxford Handbook on Carl Schmitt* (Oxford University Press, 2016) 471, 477.

Schmitt thought the purpose of dictatorial intervention was specifically to discard all legal restrictions.⁶² He also argued that ‘the political’ was ultimately unconstrained by rules in all political systems, including liberal democracies.⁶³

Helpful as these accounts are for understanding illiberal legal and political thought, seeing political leadership as antecedent to formal rules fails to capture the paradoxical nature of the illiberal governance project in the Chinese context and, it can be argued, in other illiberal regimes as well. Without suggesting too close a similarity between the PRC and twentieth-century totalitarian governments, it can be noted that in reality the latter regimes also had a complicated relationship with rule-based governance.⁶⁴ Ernst Fraenkel, for instance, acknowledged that there existed rules within the political sphere even in Nazi Germany. Fraenkel, who otherwise believed that the ‘Prerogative State’ was devoid of law, alluded to the internal regulations of the German Nazi Party, which could ‘transfer entire spheres of life from the jurisdiction of the Normative State to the Prerogative State’.⁶⁵ Fraenkel made use of Max Weber’s views about political organisations to understand these rules.⁶⁶ According to Weber, political parties (and other modern organisations) could become rationalized to a certain extent through bureaucratic processes, which built upon rational legal authority.⁶⁷ Weber defined rational legal authority in formalist terms. Under this form of authority, ‘legally relevant characteristics of the facts [were] disclosed through the logical analysis of meaning’, after which ‘definitely fixed legal concepts in the form of highly abstract rules [were] formulated and applied’.⁶⁸ At the same time, Weber believed the ultimate ends of bureaucratic conduct were not decided in a rational process but rather in an irrational struggle between different ends.⁶⁹ Following Weber, Fraenkel thought that the Nazi government combined rational bureaucratic methods with irrational ones.⁷⁰

CCP ideologues commonly emphasise the rationalist nature of the Party’s governance project.⁷¹ Despite justifying Party leadership of the judiciary through various anti-formalist arguments, the Party also supports the construction of a legal system that adheres to the values of legal formalism. For instance, although the above-described CCP textbook on the socialist rule of law objects to ‘formalism’ (*xingshi zhuyi*), it also endorses the ‘formal conception’ (*xingshi yiyi*) of the law and instructs Party cadres to construct a gapless and internally coherent socialist legal system.⁷²

⁶²Schmitt (n 21) 117.

⁶³Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, Chicago, 2005) 30.

⁶⁴Hannah Arendt, for instance, described the relations between a totalitarian party and the state (the site of formal legal processes) as maddeningly complex. Arendt (n 21) 395. According to one interpretation, Carl Schmitt ‘did not try to eliminate the norm in favour of exception but to elucidate the conditions of its emergence and of its possibility’. Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press, Cambridge, 2008) 95.

⁶⁵Fraenkel (n 21) 27–28.

⁶⁶Weber (n 16) 223.

⁶⁷Ibid 223–24.

⁶⁸Ibid 63.

⁶⁹Max Weber, *From Max Weber: Essays in Sociology* (Oxford University Press, Oxford, 2007) 152.

⁷⁰Fraenkel (n 21) 206.

⁷¹David Shambaugh, *China’s Communist Party: Atrophy and Adaptation* (University of California Press, Berkeley, CA, 2008) 119.

⁷²Central Political and Legal Commission (n 2) 64.

Rule-based formalism is also an integral part of the Party's internal governance. The attempt to govern the CCP through formal rules dates back to the political struggles between Party leaders in the 1920s and 1930s.⁷³ After several false starts, Party leaders reiterated the need to govern the Party through regulations in the beginning of the Reform Era in 1978.⁷⁴ Over the following decades, the Party issued and revised a number of regulations on its internal discipline.⁷⁵ Today, a stated aim of the CCP leadership is 'to cage' Party cadres' uses of power within a system of formal intraparty regulations,⁷⁶ which mostly govern Party members' conduct and relations between various Party organs.⁷⁷ The CCP has embarked on a far-reaching effort to systematize the Party's internal regulations.⁷⁸ Among other things, the Party has sought to decrease the ambiguity of intraparty regulations and clarify the competences among different CCP organs to issue these regulations.⁷⁹

Party documents and (mainstream) legal scholarship on intraparty regulations paint a bright picture about the possibilities of rule-based governance within the Party's internal governance. In an extensive study on intraparty regulations, Song Gongde of the Central Party School in Beijing describes the CCP's system of intraparty regulations as an essentially 'legal' model of governance.⁸⁰ Song explains that intraparty regulations are (or at least ought to be) generally applicable, abstract rules, which are sufficiently clear to their intended subjects.⁸¹ According to Song, intraparty regulations prescribe in clear cut-terms what Party members may do, what they must do and what they are not allowed to do.⁸² In Song's view, intra-Party regulations constitute a 'logical structure' that solves the 'irrationalist problem of arbitrary decision-making' within the Party⁸³ and guarantees the 'determinacy' of the relationships between CCP organs.⁸⁴ Using 'simple and accurate language', intraparty regulations also set out Party organs' powers and responsibilities and Party members' duties and rights.⁸⁵ Intraparty regulations 'must be followed by the entire Party without exceptions', according to Song.⁸⁶ Finally, Song argues that intraparty regulations enable the equal treatment of like cases and make Party life 'fair and equal'.⁸⁷

⁷³Mao Zedong, 'The Role of the Chinese Communist Party in the National War', in *Selected Works of Mao Tse-tung*, available at <https://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_10.htm#p8>.

⁷⁴Communiqué of the Third Plenary Session of the 11th Central Committee of The Communist Party of China', *Beijing Review*, 22 December 1978, 6, 16.

⁷⁵Sapio (n 55) 84–95.

⁷⁶(n 11); Song (n 1) 251.

⁷⁷For a definition of intraparty regulations, see *Zhongguo Gongchandang dangnei fagui zhiding tiaoli* [CCP Regulations on the Formulation of Intraparty Regulations], 27 May 2013 (revised on 30 August 2019), Art 2(1).

⁷⁸Wang (n 1) 11; Zhang (n 20) 6.

⁷⁹(n 77) Art 14, requiring, among other things, that intraparty regulations be clear and specific and within the scope of higher-level intraparty regulations.

⁸⁰Song (n 1) 26–27.

⁸¹Ibid 52–57.

⁸²Ibid 249.

⁸³Ibid.

⁸⁴Ibid.

⁸⁵Ibid.

⁸⁶Ibid 251.

⁸⁷Ibid 249.

Similar descriptions abound in Chinese scholarship on intraparty regulations. Wang Zhenmin of Tsinghua University (who also holds a high position in Beijing's liaison office in Hong Kong) elucidates the nature of the Party's internal regulatory system through the principles of legality and rationality.⁸⁸ Under these principles, Party organs may not exceed their authority when adopting intraparty regulations; intraparty regulations and Party organs may not violate the CCP Constitution, hierarchically superior intraparty regulations, or the PRC constitution and state laws; intraparty regulations must adhere to the Party's theories, lines, principles and policies; and these regulations must be adopted in accordance with prescribed administrative processes.⁸⁹

The image of rule-based governance emerging from the above-described accounts can best be described as Weberian rational legal authority, which relies on legal formalism as its method of rule-application.⁹⁰ Indeed, some Chinese scholars have found their frame of reference for describing intraparty regulations directly in Max Weber. Citing Weber's views on the legal rationalization process, Zhang Xiaojun of Shanxi Normal University, for instance, contends that 'the Party regulations are developing increasingly along the line of the rule of law and assuming legal rationality'.⁹¹ Weberian language is apparent in commentary on intraparty regulations even when his texts are not explicitly cited.⁹²

The formalist approach to intraparty regulations is not without its dissenters within Chinese legal academia. Perhaps most prominently, Jiang Shigong, the constitutional law scholar at Peking University, has been sceptical about formalism with regard to both constitutional law and intraparty regulations. Jiang argues that the Party should pay more attention to the virtues and spiritual pursuits of its members instead of resorting to old Eurocentric regulatory models.⁹³ Chinese leaders have also occasionally alluded to the benefits of 'the rule of virtue' in governance, contrasting such virtues with the 'rule of law'.⁹⁴ The juxtaposition of 'the rule of law' and 'the rule of virtue' implies that Chinese leaders view legal processes as partly deficient, or at least insufficient, for governance.⁹⁵ On the whole, however, anti-formalist critiques are rare in Chinese commentary on intraparty regulations.

IV. Formalism and the interpretation of intraparty regulations

The previous two sections have argued that the critique of rule-based governance is more emphatic in texts that seek to justify the CCP's leadership role than in texts that take part in designing the Party's own internal regulatory system. This discrepancy becomes

⁸⁸Wang (n 1) 176.

⁸⁹Ibid 176–79.

⁹⁰(n 66) 63.

⁹¹Zhang (n 20) 6.

⁹²For example, Song Gongde argues that intraparty regulations inject 'logical rationality' into the Party's governance structure. Song (n 1) 122, 247–52. See also Wang (n 1) 176.

⁹³Jiang Shigong, 'Cong xingzheng fazhiguo dao zhengdang fazhiguo: Dangfa he guofa guanxi de falixue sikao' [From an Executive Rule-of-Law State to the Party's Rule-of-Law State: A Legal Theoretical Analysis of the Relationship Between Party Law and State Law], (2016) 11(3) *Zhongguo Falü Pinglun* 35, 41. See also Zhi Zhenfeng, 'Dangnei fagui de zhengzhi luoji' [The Political Logic of Intraparty Regulations] (2016) 11(3) *Zhongguo Falü Pinglun* 42, 46.

⁹⁴Xi Jinping's report at 19th CPC National Congress' (n 2) 19.

⁹⁵Ibid.

particularly obvious when one considers arguments about the interpretation of intraparty regulations.⁹⁶

Intraparty regulations themselves provide some rules for their application. CCP Regulations on the Formulation of Intraparty Regulations establish a formal hierarchy between various levels of intraparty regulations.⁹⁷ According to these regulations, the CCP Constitution has the highest degree of ‘effectiveness’, and it is followed by regulations issued by high-level Party organs, the CCP Central Committee and the Central Commission for Discipline Inspection.⁹⁸ The same regulation also adopts two general principles for interpreting intraparty regulations: the *lex specialis* rule and the rule assigning priority for new intraparty regulations over earlier norms.⁹⁹ Some intraparty regulations authorise a specific Party organ to interpret them.¹⁰⁰

Apart from such rules, there is not much official guidance on the interpretation of intraparty regulations.¹⁰¹ Scholarship on this topic is also scarce. As of 16 August 2019, a full text search for the terms ‘interpreting intraparty regulations’ and ‘the interpretation of intraparty regulations’ (*dangnei fagui jieshi*, *dangnei fagui de jieshi*) in the comprehensive CNKI database produces 116 articles mostly from 2017–19. The most cited of these articles had received 47 citations.¹⁰² Only six articles contained the terms ‘interpretation’ and ‘intraparty regulations’ in their titles.¹⁰³ As Chinese scholars have noted, these figures are relatively low by the standards of Chinese legal academia.¹⁰⁴

Some monographs discuss the interpretation of intraparty regulations. A textbook from 2008 illustrates the application of the CCP Disciplinary Regulations through a number of case studies.¹⁰⁵ The textbook cites the 2004 CCP Disciplinary Regulations, which stated (and still state in their revised form) that findings of violations of Party

⁹⁶(n 15) 170–71.

⁹⁷(n 77).

⁹⁸Ibid Art 31.

⁹⁹Ibid Art 33.

¹⁰⁰See, for example, Zhongguo Gongchandang dangyuan quanli baozhang tiaoli [CCP Regulations on the Protection of Party Members’ Rights], 25 October 2004, Art 37; (n 77) Art 34.

¹⁰¹Wang Zhenmin notes the same in Wang (n 1) 191.

¹⁰²This article, written by two Wuhan University professors, discusses the relationship between state law and intraparty regulations. See Qin Qianhong and Su Shaolong, ‘Lun dangnei fagui yu guojia falü de xietiao xianjie’ [On the Linking and Coordination of the CPC’s Regulations and the National Laws] (2016) 10 *Frontiers* 50.

¹⁰³Guo Shuchen and Xu Junting, ‘Jian xi dangnei fagui jieshi de goujian yuanze yu fangfa’ [Brief Analysis on the Principles and Methods of the Interpretation of Intraparty Regulations] (2018) 20(1) *Journal of the Party School of Leshan Municipal Committee of CPC* 71; Liao Xiujian and Lei Haowei, ‘Wanshan Zhongguo Gongchandang dangnei fagui jieshi tixi’ [Perfecting the Interpretation System of CCP Intraparty Regulations] (2019) 4 *Changbai Journal* 80; Lü Pin, ‘Guanyu dangnei fagui jieshi zhidu jianshe de sikao’ [The Construction of an Interpretation System for Intraparty Regulations] (2019) 4 *Theoretical Horizon* 70; Sun Caihua, ‘Lun dangnei fagui jieshi de guifanhua’ [The Standardisation of the Interpretation of Intraparty Regulations] (2017) 172 *Huxiang Forum* 64; Tan Bo, ‘Lun dangnei fagui jieshiquan guishu ji qi fazhi wanshan’ [The Attribution of Interpretive Powers on Intraparty Regulations and Its Perfection Under the Rule of Law] (2018) 4 *Jiangnan Academic* 76; Wang Fuyou, ‘Dangnei fagui zhidu jieshi tiaowen ruhe biaoshu’ [Explaining the Interpretation of Intraparty Regulations] (2018) 5 *Office Administration* 33.

¹⁰⁴Liao Xiujian and Lei Haowei (n 103) 85 (discussing the situation in May 2019). By way of comparison, as of 16 August 2019 the CNKI database included 85 articles with the words ‘intraparty regulation’ (*dangnei fagui*) and ‘law’ (*falü*) in their titles.

¹⁰⁵Yang Xiaoguang, *Dangji chufen tiaoli shi’an jiedu* [Interpreting the Party’s Disciplinary Regulation Cases] (Zhejiang renmin chubanshe, Beijing, 2008).

discipline are based on ‘facts, with the CCP Constitution and other intraparty regulations as well as state laws and regulations as their criterion’.¹⁰⁶ As an illustration of this provision, the textbook discusses an incident where a chairperson of a state-owned enterprise approved an investment, which subsequently caused a loss to the enterprise.¹⁰⁷ The analysis of this case makes no reference to the methods of interpretation of intraparty regulations, nor does it discuss the relationship between facts and rule application. Instead, the textbook provides a short, factual narrative about how the overall profitability of the chairperson’s other investment decisions persuaded the Party’s discipline inspection officials not to take disciplinary action against him.¹⁰⁸ This account is not informed by an explicit anti-formalist method, nor is it consistently applied throughout the book. Elsewhere, the textbook applies bright-line rules without considering principles or facts beyond what the text assumes is within the scope of the literal rule.¹⁰⁹ The textbook also contends in a formalist manner that certain pieces of legislation and intraparty regulations are able to ‘clearly stipulate’ standards for conduct (for instance, prohibiting corruption).¹¹⁰

An explicit discussion of the interpretation of intraparty regulations may be found in the above-mentioned monograph by Wang Zhenmin of Tsinghua University. Wang contends that the interpretation of intraparty regulations should follow ‘the basic principles of general hermeneutics’, which in Wang’s view are commonly accepted within the Party.¹¹¹ Under these principles, intraparty regulations first need to be interpreted so they conform to the CCP Constitution and the Party’s theories, lines, principles and policies.¹¹² Second, Wang asserts that intraparty regulations need to be interpreted so that they are consistent with the PRC Constitution and state laws.¹¹³ (This requirement is also stated in the CCP Constitution and in other intraparty regulations.)¹¹⁴ Third, intraparty regulations must be interpreted so as to strengthen the long-term stability of the Party’s regulatory system, instead of introducing short-term changes to the Party organisation and Party members’ conduct.¹¹⁵ Fourth, Wang argues that the meaning of intraparty regulations needs to be established in accordance with the ordinary meaning of their terms, avoiding unjust and unreasonable outcomes and inconsistencies with legislative intent.¹¹⁶ Fifth, intraparty regulations need to be interpreted in their ‘systemic’ or ‘logical’ context so their meaning is consistent with other intraparty regulations.¹¹⁷ Finally, Wang argues that the drafting history of intraparty regulations may be used to establish the meaning of intraparty regulations.¹¹⁸

¹⁰⁶Ibid 5; Zhongguo Gongchandang jilü chufen tiaoli [CCP Disciplinary Regulations] 18 February 2004, Art 5. For the clause in revised regulations, see Zhongguo Gongchandang jilü chufen tiaoli [CCP Disciplinary Regulations], 1 October, 2018, Art 4.

¹⁰⁷(n 105) 5–6.

¹⁰⁸Ibid 5–6.

¹⁰⁹This is the case, for example, with the textbook’s section on a one-year promotion ban for the recipients of warnings. Ibid 13.

¹¹⁰Ibid 19 (regarding state law); 125 (regarding intraparty regulations).

¹¹¹Wang (n 1) 191.

¹¹²Ibid.

¹¹³Ibid 192.

¹¹⁴Zhongguo Gongchandang zhangcheng [CCP Constitution], 24 October 2017, Art 5.

¹¹⁵Wang (n 1) 192.

¹¹⁶Ibid 192.

¹¹⁷Ibid 193.

¹¹⁸Ibid 193.

The methods of interpretation outlined by Wang appear conventional both in Chinese and foreign legal thought.¹¹⁹ Most tellingly, Wang stresses that the ordinary meaning of the text of an intraparty regulation sets the limits for its interpretation, and that systemic considerations, legislative history and the purposes of the intraparty regulations cannot allow the interpreter to derogate from this meaning.¹²⁰ The preference for textual interpretation over other means of interpretation is recognised also in mainstream Chinese jurisprudence. For instance, *Falixue*, a government-endorsed textbook on jurisprudence (which is part of an official Marxist textbook series) states that the interpretation of a legal norm begins with establishing the ordinary meaning of the text.¹²¹ At the same time, *Falixue* acknowledges that ‘formal logic’ does not necessarily solve a case when there are two contradictory legal propositions at play.¹²² In hard cases, the textbook urges the law-applier to engage with ‘substantive’ and ‘dialectical’ reasoning, and consider principles, values, interests and policies which inform the conflicting legal propositions.¹²³ The textbook also describes all legal reasoning as a creative process.¹²⁴

Another mainstream textbook on jurisprudence (also called *Falixue*) balances formalist and anti-formalist interpretative strategies. While emphasising the principles of legality and rationality, the textbook also explains that interpretation has to follow the principle of ‘unity of history and reality’.¹²⁵ This principle stands for interpreting a legal norm in a way that best serves the present and the future in light of the legislative history of the legal norm.¹²⁶ At the same time, the textbook acknowledges that the starting point of interpretation may be found in literal interpretation and rules of formal logic.¹²⁷ The textbook also contends that the interpretation of a text may not ‘arbitrarily’ expand the literal meaning of a rule, but that interpretation must be based on legislative intent, on the purposes of the rule and on legal principles.¹²⁸ These somewhat ambiguous statements soften the notion that a legal rule has a definite literal meaning, which sets the limits for its interpretation.

Wang’s study of intraparty regulations is thus stylistically more ‘formalist’ than the mainstream, Party-approved treatises on jurisprudence. Various journal articles on the interpretation of intraparty regulations adopt positions between self-consciously formalist textualism and a more relaxed, policy- and principle-driven approach to interpretation. While some of these texts contain nuanced, even anti-formalist, views about the role of policies and principles in the interpretative process, they rarely attack the formalist approach to interpretation explicitly. Instead, these texts are optimistic about the power of formal rules to constrain decision-making.¹²⁹

¹¹⁹In fact, Wang articulates more stringent rules for interpretation than, for example, Robert Alexy. See Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press, Oxford, 2010) 245–50.

¹²⁰Wang (n 1) 193.

¹²¹*Falixue: Makeshi zhuyi lilun yanjiu he jianshe gongcheng zhongdian jiaocai* [Jurisprudence: Key Teaching Materials on Marxist Theoretical Research and Construction] (Renmin chubanshe, Beijing, 2010) 178–79.

¹²²Ibid. 181.

¹²³Ibid.

¹²⁴Ibid. 181–82.

¹²⁵Zhang Wenxian, *Falixue* [Jurisprudence], 5th edn (Beijing daxue chubanshe, Beijing, 2018), 295–96.

¹²⁶Ibid.

¹²⁷Ibid. 296.

¹²⁸Ibid. 297.

¹²⁹For example, the above-mentioned six articles containing the terms ‘interpretation’ and ‘intraparty regulations’ in their titles (n 103) can be summarised as follows: Guo Shuchen and Xu Junting advocate

V. Reasons for the discrepancy and its implications

Both formalist and anti-formalist arguments have their uses for the CCP leadership and Party ideologues. Whereas the concept of ‘constitutionalism’ (*xianzheng*) is a political taboo in China,¹³⁰ formalist language allows Party leaders and ideologues to argue (and imagine) that Party organs are set up in a system of clear hierarchies and specific fields of jurisdiction. This image fits the narrative of the scientific and rational nature of the Party’s governance project.¹³¹ Formalist language also holds out the promise of implementing the highest Party leaders’ will to the letter throughout the Party organisation, and it has informed the Party’s internal reform efforts.¹³² Moreover, as is case with Chinese legal institutions,¹³³ Party leaders can hope to benefit from the legitimising effect of formal, rule-based processes within the Party’s internal governance. At the same time, formalist language also suits the sensibilities of those politically centrist Chinese scholars, who hope to strengthen the autonomy of the Chinese legal system without explicitly opposing the one-party state. These scholars see intraparty regulations as a means to establish rule-based boundaries within the CCP (although some of them have doubts about the viability of these efforts in China’s current political climate).¹³⁴

Anti-formalist arguments, in contrast, pave the way for maintaining and increasing the Party leaders’ influence over the judiciary and other state organs. These arguments are also useful for legitimising the Party’s extra-legal discipline control mechanism, as was seen in the lead-up to the establishment of the NSC in March 2018.¹³⁵ From the anti-formalist perspective, anti-corruption work is best conducted through holistic, self-consciously political methods in a Party-led investigation process. Some conservative-minded Party ideologues are also concerned about the perceived loss of vitality and ethical standards within the Party, which are supposedly caused by the stultifying effects of formalism.¹³⁶

various methods for the interpretation of intraparty regulations, including interpretation according to the principles of legality, rationality and purposefulness. The authors also contend that the interpretation of intraparty regulations may not expand or limit the meaning of a text. See Guo and Xu (n 103) 73–74. Liao Xiujian and Lei Haowei contend that the interpretation of intraparty regulations cannot be marked by rigid adherence to legislative intent alone. The authors also maintain that intraparty regulations should be applied through ordinary methods of legal interpretation, including textual interpretation and restrictive interpretation. See Liao and Lei (n 103) 81–82, 85. Lü Pin describes the interpretation of intraparty regulations as a hermeneutic process, acknowledging that some regulations are inevitably vague. At the same time, Lü argues that intraparty regulations must be made clearer and less ambiguous. See Lü (n 103) 71, 75. Sun Caihua calls for the standardization of Party organs’ powers to interpret intraparty regulations and criticises the fact that the CCP Constitution does not spell out which organ has the power to interpret it. See Sun (n 103) 67. Tan Bo is concerned about maintaining the jurisdictional hierarchies and the supremacy of state law in the interpretation of intraparty regulations. See Tan (n 103) 80. Wang Fuyou criticizes the fact that some Party organs do not adhere to the jurisdictional rules on interpretative powers when issuing intraparty regulations. See Wang (n 103) 33. As mentioned, above some Chinese scholars have advanced less formalist, even explicitly anti-formalist, arguments about intraparty regulations. See (n 93).

¹³⁰Fu (n 21) 7.

¹³¹Zhang (n 20) 11.

¹³²Wang (n 1) 9–11.

¹³³Mary E. Gallagher, *Authoritarian Legality in China: Law, Workers, and the State* (Cambridge University Press, Cambridge, 2017), 30–31, 49.

¹³⁴Interviews with seven Chinese legal scholars (Shanghai, May 2017; Beijing, June 2017; Shanghai, July 2017; Beijing, June 2018; Beijing, April 2019). All interviewees were promised anonymity.

¹³⁵(n 54).

¹³⁶Interview with a Chinese legal scholar (Beijing, June 2017).

Formalist and anti-formalist arguments therefore support different goals in the Party's governance project. It is, of course, possible to insist that the two tendencies constitute a coherent governance project after all. One may, for instance, try to keep the wrong kind of formalism – nitpicky and aloof working style – distinct from the right kind of formalism, which calls for the rationalisation of the Party's governance structure and processes. From this perspective, anti-formalist arguments appear as anomalies, mostly promoted by heterodox scholars (such as professor Jiang Shigong) in the Party's otherwise coherent rule-based approach to governance. Interestingly, describing the Party's political sphere in terms of unproblematised formalism would turn the seminal descriptions of totalitarian and authoritarian governments, described in Part III above, inside out. According to such an interpretation, the political sphere in a totalitarian or authoritarian government would be governed by Weberian rational legal authority, at least at the lower level of the Party organization. It is questionable how realistic such an interpretation would be in the Chinese context, given the Party cadres' propensity to ignore formal rules even within the Party organisation.¹³⁷

There are also other possible coherence-seeking explanations. Perhaps formalism and anti-formalism find their resolution on a higher level of ('Sinicized') Marxist dialectics and its eternal struggle of opposite tendencies.¹³⁸ Extending this argument to the global level, the oscillation between formalism and anti-formalism can be seen as a natural part of all forms of government, including liberal democracies. One may also seek to argue (in anti-formalist terms) that whatever superficial conflicts there may exist within the Party's ideological statements, 'the Party' itself needs to be understood as an organic social movement, which is able to transcend the constraints of its bureaucratic form.¹³⁹

Nevertheless, coherence should not be the last word in the analysis of the CCP's governance ideology. The Party leaders hope to establish a system of formal rules within the CCP because *ad hoc* policy statements and other vaguely normative methods – such as speeches about 'the rule of virtues' – do not allow them to govern the Party effectively. However, instead of concluding that Party leaders have actually succeeded in building a Weberian clockwork of rational intraparty regulations within the Party, it appears that the same problems that have given rise to anti-formalist arguments in the legal system (both within China and abroad) also apply to the CCP's internal regulatory system. According to Chinese Party ideologues, intraparty regulations are vague, obscure, internally contradictory and easily reinterpreted or ignored.¹⁴⁰ As is the case with all rules, intraparty regulations can also be over- and under-inclusive from the Party leadership's perspective. Over-inclusive rules impose inconvenient restrictions on Party members' conduct, whereas under-inclusive rules allow too much leeway for Party members.¹⁴¹ Moreover,

¹³⁷See Jamie P. Horsley, 'What's So Controversial About China's New Anti-Corruption Body?' *The Diplomat*, 30 May 2018, available at <<https://thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body/>>; Smith (n 20); Minxin Pei, 'Rewriting the Rules of the Chinese Party-State: Xi's Progress in Reinvigorating the CCP' *China Leadership Monitor*, 1 June 2019, available at <<https://www.prcleader.org/peiclml60>>.

¹³⁸Mao Zedong, 'On Contradiction', Marxist Internet Archive, available at <https://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1_17.htm>.

¹³⁹For the argument that 'the Party' is 'an organic whole', whose 'unified will' determines the essential attributes of intraparty regulations (and, confusingly, vice versa), see Song (n 1) 39–41.

¹⁴⁰Song Gongde can again be relied upon to make these points. *Ibid* 7.

¹⁴¹Among other things, CCP intraparty regulations prohibit the collection of evidence through threats, deception and coercion in the Party's internal discipline inspection process. It is easy to imagine that Party cadres may be occasionally tempted to suspend such regulations. See further Samuli Seppänen, 'Interrogating

intraparty regulations include ideologically aspirational provisions, which are most likely not meant to be taken at face value. As mentioned above, intraparty regulations, for instance, instruct Party cadres to strictly observe state laws.¹⁴² This requirement seems disingenuous, given that the enforcement of intraparty regulations is meant to take place in a self-consciously political process.¹⁴³ This process is unlikely to be infused with a deeply felt ethos of legality, let alone a ‘culture of formalism’, which is marked by resistance to power and values such as equality and transparency.¹⁴⁴

Most fundamentally, the incoherence of the Party’s approach to rule-based governance is due to the illiberal, yet bureaucratic, nature of the CCP’s governance project. On the one hand, Party ideology conceptualises the Chinese party-state as a dictatorship.¹⁴⁵ As Carl Schmitt argued, the purpose of dictatorial intervention in its various forms is its ability to suspend formal rules.¹⁴⁶ On the other hand, as Chinese literature on intraparty regulations is also fond of pointing out, the CCP is built as a ‘modern’ political organisation, which possesses at least some of the qualities of a rationalist bureaucracy, including rule-based governance.¹⁴⁷ Nevertheless, formal rules cut both ways: they not only restrain uses of power by lower-level Party members, but also provide opportunities to argue for a specific interpretation of a rule against higher-level Party cadres’ situational judgement calls. The Party both must be and cannot be governed by formal rules.

From a critical perspective, it appears that the contradictions between formalist and anti-formalist arguments reduce the overall coherence and integrity of the Party leaders’ governance project, despite their attempts to centralise power within the Party.¹⁴⁸ For instance, the principle of democratic centralism, which plays a key role in the CCP Constitution, requires that ‘lower-level Party organisations defer to higher-level Party organisations’.¹⁴⁹ Higher-level Party cadres may use this principle to insist that their subordinates adopt a specific interpretation of intraparty regulations. At the same time, it is at least theoretically possible (and, according to some Chinese scholars, not unheard of in practice) that a brave Party member objects to a particular interpretation of an intraparty regulation because it violates the (presumed) will of ‘the highest leading bodies of the Party’.¹⁵⁰ Faced with such an objection, a higher-level Party cadre may accuse the lower-level Party cadre of ‘formalism’ and instruct that person to ‘serve the overall circumstances’. The higher-level Party cadre may also rely on formal intraparty

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¹⁴²(n 114) Art 3, 32.

¹⁴³Feng Lin, ‘The 2018 Constitutional Amendments: Significance and Impact on the Theories of Party-State Relationship in China’ (2019) 1 *China Perspectives* 11, 16; Horsley (n 137); Liu Songshan, ‘Quanli jiguan xingshi zhiquan zhong de dangnei fagui yu guojia falü’ [Intraparty Regulations and the Law in the Exercise of Authority by Organs of Power], (2016) 11(3) *Zhongguo Falü Pinglun* 28, 28–29; Pei (n 137).

¹⁴⁴Koskeniemi (n 8) 500.

¹⁴⁵Article 1 of the PRC Constitution (n 18) states that, ‘The People’s Republic of China is a socialist state under the people’s democratic dictatorship.’

¹⁴⁶Schmitt (n 21) 117. Lenin contended that in the dictatorship of the proletariat, ‘the people can suppress the exploiters [almost] without a special apparatus, by the simple organization of the armed people’. Vladimir Lenin, ‘The State and Revolution’, Lenin Internet Archive 1993, 1999, available at <<https://www.marxists.org/archive/lenin/works/1917/staterev>>.

¹⁴⁷Song (n 1) 29; Wang (n 1) 47; Zhang (n 20) 6.

¹⁴⁸Pei (n 137).

¹⁴⁹(n 114) Art 10(1).

¹⁵⁰(n 114) Art 10(3). For disputes between Party members in Party and state organs, see Liu (n 143) 29–30.

regulations, which instruct all Party cadres to refer significant matters to higher-level Party organs.¹⁵¹ In response, the lower-level Party member may argue, also relying on the Party's ideological doctrines, that strictly applying formal law (and, by implication, intraparty regulations) is part of the principle of 'serving the overall circumstances', and that this principle compels a certain course of action in this instance.¹⁵² The Party cadre receiving the higher-level instruction may also insist – through an anti-formalist argument – that a specific interpretation of an intraparty regulation is not 'scientifically' valid.¹⁵³ After all, it is entirely possible that the higher-level Party cadre is seeking to further a corrupt scheme through the instructions. In response to such observations, an advocate of sociological jurisprudence may point out that intraparty conflicts will be resolved 'in practice'. The argument here is, however, that Party ideology provides no coherent means to resolve them.

VI. Conclusion

In conclusion, rather than assuming that the political sphere within the Chinese party-state is either devoid of formal rules or effectively regulated by them, Party leaders and ideologues should be seen to oscillate between formalist attempts to establish rule-based constraints within the political sphere and anti-formalist attempts to reject such constraints. As a bureaucratic organisation, 'the Party' is constituted by intraparty regulations, including its constitution, and it operates according to these rules; as an instrument of dictatorship, 'the Party' takes the form of an organic entity (or a social movement), which exercises its world-creating will free of 'bookish' black-letter rules. The Party leadership, in other words, seeks to exert rule-transcending political leadership through formal rules. This contradiction, it may be presumed, is present in all political organisations, which combine bureaucratic governance methods with illiberal resistance to formal legal processes, including liberal constitutionalism. As a rhetorical tool, the dichotomy between formalism and anti-formalism offers a way to mediate this paradox for both illiberal political ideologues and their critics.

¹⁵¹Zhongguo Gongchandang zhongda shixiang qingshi baogao tiaoli [CCP Regulations on Seeking Instructions and Referring Significant Matters] 28 February 2019, Art 3, available at <http://www.xinhua.net.com/politics/2019-02/28/c_1124177187.htm>.

¹⁵²Central Political and Legal Commission (n 2) 109; Liu (n 150) 30.

¹⁵³Liu (n 150) 29.