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Ruling the Country without Law: The Insoluble Dilemma of Transforming China into a Law-Governed Country

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Abstract

Despite more than 40 years' legislation to build a 'law-governed country' and the Communist Party of China (CPC)'s repeated proclaiming to 'govern the country according to law', China still lacks legislation concerning a constitutional matter that is central to its governance, ie, the powers of the CPC to rule. No law specifies its powers, and the CPC's rule is not based on law. Why has such a crucial and apparent loophole not been filled? It is essentially because of the CPC's insistence on supremacy with unchallengeable authority in the governance of China. Specifying in law the Party's powers, and how they should be exercised, would subject its rule to law and set a legal limit on its powers, which is irreconcilable with its goals of maintaining supremacy and absolute authority. Hence, an insoluble dilemma can be observed: while the CPC leadership wants China to become a law-governed country to attain lasting order and stability, they have to rule the country extralegally to avoid legal challenges to the supremacy of their rule. This article not only sheds light on this inherent contradiction, but also offers insight into the nature of the CPC's practice to 'govern the country according to law'.

Introduction

'Governing the country according to law' has been a key component of the Communist Party of China (CPC)'s strategy for modernising China since the start of the 'reform and opening up' period. In 1978, the then-supreme leader Deng Xiaoping called for the establishment of 'socialist legality' to ensure 'that laws are in place, observed and enforced strictly, and that anyone who violates the law is held to account'.¹ In 1997, 'governing the country according to law and building a socialist country of law'² was approved by the CPC as a guiding policy for Chinese socialism,³ which was later written into the Constitution of the People's Republic of China ('Constitution') in 1999.⁴ After Xi Jinping

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¹Translated from '有法可依，有法必依，执法必严，违法必究' (*Youfa Keyi, Youfa Biyi, Zhifa Biyan, Weifa Bijiu*). See Xiaoping Deng (邓小平), '解放思想，实事求是，团结一致向前看' [Emancipate the Mind, Seek Truth From Facts and Unite as One in Looking to the Future] (Speech at the closing meeting of the Central Working Conference of the CPC, 13 Dec 1978).

²Translated from '依法治国，建设社会主义法治国家' (*Yifa Zhiguo, Jianshe Shehui Zhuyi Fazhi Guojia*). '法治国家' (*Fazhi Guojia*) has also been translated as 'a rule-of-law state'. See Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press 2002) 59.

³Zemin Jiang (江泽民), '在中国共产党第十五次全国代表大会上的报告' [Report at the 15th Congress of the CPC] (12 Sep 1997).

⁴See Zhonghua Renmin Gongheguo Xianfa Xiuzheng An (中华人民共和国宪法修正案) [Amendment to the Constitution of the PRC], adopted at the 2nd Session of the 9th National People's Congress (15 Mar 1999).

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took over as the current supreme leader in late 2012, the importance of law was further heightened, and renewed efforts were taken to step up the construction of a ‘law-governed country’. In 2014, the CPC convened a congress meeting to deliberate specifically on ‘governing the country according to law’, and decided to ‘comprehensively advance law-based governance’ and build ‘a socialist country of law’ with ‘a complete system of laws’ that is effectively implemented.⁵ The ultimate goal is to ‘rejuvenate the Chinese nation’, ‘realise the Chinese dream’, and attain ‘eternal order and stability’.⁶ It is clear that the CPC leadership desires a prosperous and strong China with lasting order and stability, and they believe that ‘law’ is the tool to achieve it. In essence, to attain success with order and stability over the long term, the CPC leadership wishes China to become a ‘law-governed country’ where society operates in accordance with a comprehensive system of laws and all citizens comply with these laws. These are the goals and rationales behind the CPC’s strategy to ‘govern the country according to law’.

To accomplish ‘governing the country according to law’, laws were enacted at an extraordinary speed. By March 2008, 229 primary legislation, approximately 600 administrative regulations, and more than 7,000 local regulations had been enacted.⁷ The then Chairman of the National People’s Congress (NPC) Standing Committee officially declared that ‘a socialist legal system with Chinese characteristics’ had been largely formed, meaning that all major laws had been put in place.⁸ A CPC Central Committee Decision to comprehensively advance ‘law-based governance’ was passed in 2014 to establish ‘a complete system of laws’ with the Constitution at the core and with commitments to continually improve on it.⁹ In addition, the CPC also announced that it would strengthen intra-Party legislation, because ‘governing the country according to law’ has to be on the basis that the Party is concurrently governed by rules and regulations.¹⁰

However, an article published by *The Economist* in April 2016 indicated that the legal system was far from being formed. It reported that Xi Jinping had acquired a series of titles in addition to the ‘trinity’ of ‘General Secretary of the Party’, ‘Chairman of the Armed Forces’, and ‘President of the State’, effectively side-lining the Premier of the State Council and abrogating the collective leadership at the Party centre. In other words, Xi Jinping became ‘Chairman of Everything’.¹¹ How could this happen? Essentially, it was because there was no law in China stipulating what powers the General Secretary is bestowed with, how these powers are to be exercised, and how the roles of the General Secretary and the Premier are separated. As a matter of fact, there was also no law on how the General Secretary, the de facto head of the country, other members of the Politburo and its Standing Committee, the highest public offices with the greatest power in the land, are selected and removed. Moreover, as presented in the following section, while the Party monopolises the power to rule and enjoys de facto overriding authority over state institutions in governing the country, no law specifies such power and the Constitution contains nothing specific on the relation between the Party and the State, except proclaiming the CPC’s leadership position. Therefore, despite more than 40 years’ worth of legislation and the claim that ‘a socialist legal system’ has been largely built, there is still no law regulating a constitutional matter of utmost importance, ie, the Party’s power to rule.

⁵The CPC Central Committee (中共中央), 中共中央关于全面推进依法治国若干重大问题的决定 [Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Advancing Law-Based Governance], passed by the 3rd Plenum of the 18th Congress of the CPC (23 Oct 2014).

⁶Jinping Xi (习近平), ‘关于《中共中央关于全面推进依法治国若干重大问题的决定》的说明 [Explanation on the CPC Central Committee Decision on Major Issues Pertaining to Comprehensively Advancing Law-Based Governance]’ (Speech delivered at the 3rd Plenum of the 18th Congress of the CPC, 23 Oct 2014). ‘Eternal order and stability’ is ‘长治久安’ (*Changzhi Jiu’An*) in Chinese.

⁷Banguo Wu (吴邦国), ‘全国人民代表大会常务委员会工作报告 [Work Report of the Standing Committee of the National People’s Congress]’ (Delivered at the 5th session of the 11th NPC, 8 Mar 2008).

⁸*ibid.*

⁹CPC Central Committee (n 5).

¹⁰*ibid.*

¹¹Xi Jinping’s Leadership: Chairman of Everything’ (*The Economist*, 2 Apr 2016) <<https://www.economist.com/china/2016/04/02/chairman-of-everything>> accessed 1 Aug 2022.

When Chinese leaders announced that they want to ‘govern the country according to law’ and build ‘a socialist country of law’, certainly they did not intend to turn China into a country based on ‘rule of law’¹² – not even the minimalist ‘thin’ version of this concept.¹³ Their instrumentalist view of law was also different from the liberal understanding of law in democracies with the rule of law. Nevertheless, there was no doubt about their belief in the utility of law in helping China become a prosperous and strong country with lasting order and stability. To attain the goal, their strategy was to transform China into a ‘law-governed country’ with ‘a complete system of laws’ that governed the country and everybody abiding by them. However, while it is uncertain whether legislating on the CPC’s power would ensure that China becomes a law-governed country, the lack of such legislation will no doubt defeat this goal. The country’s system of laws is not ‘complete’ when no law exists to govern such a fundamental constitutional matter; China cannot operate in accordance with law when such basic constitutional legislation is absent. Therefore, for China to become a ‘law-governed country’, the bottom line is that laws should be in place to regulate the Party’s rule, and a central question regarding whether China will become a ‘law-governed country’ is whether such laws could possibly be adopted. This article seeks to answer this question.

The following section first provides evidence that the CPC indeed rules the country without law and investigates how the CPC rules extralegally. It demonstrates that the CPC does not only act as the political leadership and formulates policies for state institutions to implement, but also directly exercises legislative, executive, and judicial power. With respect to state affairs, the CPC is the final decision maker and arbiter without any specific legal basis. Under the leadership of Xi Jinping, the CPC has ‘advanced’ rather than ‘retreated’ from governing state affairs,¹⁴ but no law has been adopted to regulate the CPC’s new power. In addition, it is found that, although there are numerous Party rules and regulations, it is unclear whether or which rules exist for inner-chamber operations at the very top echelon of the Party’s hierarchy, because everything is shrouded in secrecy at that level.

Subsequently, it examines the Party’s attitude towards the call to legislate on its power, made by the so-called ‘socialist constitutionalists’ and ‘political constitutionalists’ in China who accepted the political reality of the CPC’s one-party rule but nevertheless pushed for establishing ‘constitutionalism’ in China.¹⁵ It finds that the CPC has been apathetic or have even become hostile under Xi’s leadership towards the idea of specifying its powers in laws. The last section then explains why the CPC has exhibited such an attitude and explores the possibility for such legislation in the future. It offers an explanation based on the literature on sham constitutions. It also examines the effect that legislating on the CPC’s power would have on its supremacy and authority, and analyses the costs and benefits from such legislation. It demonstrates that supremacy and absolute authority inherently contradict the basic principles and requirements of law, and legislating on the CPC’s power and maintaining its supremacy with absolute authority are irreconcilable. The conclusion is that the prospect to legislate on the CPC’s power so that it rules genuinely in accordance with law is next to zero, so long as the CPC’s doctrine on its supremacy and authority in governing China remains unchanged.

This article fills a gap in the research on China’s ‘law-based governance’. Little academic attention has been paid to the lack of legislation on the CPC’s power to rule and few writings focus on this critical lacuna in China’s legal system. Although an influential book on the legal developments

¹²For the possibility of constitutionalism or rule of law in an authoritarian state, see Mark Tushnet, ‘Authoritarian Constitutionalism’ (2015) 100 *Cornell Law Review* 391. Tushnet’s thesis was based on a case study of Singapore. However, the authoritarianism practiced in China and in Singapore are different.

¹³For the discussion of ‘rule of law’ in general and the distinction between the ‘thick’ and ‘thin’ version of ‘rule of law’, see Peerenboom (n 2) 63–109.

¹⁴For the argument that the Party had ‘retreated’ prior to Xi, see Peerenboom (n 2) 188–216.

¹⁵Albert HY Chen, ‘The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi’s Studies on China’s Political Constitution’ (2014) 14 *China Review* 183; Baogang He, ‘Socialist Constitutionalism in Contemporary China’, in Michael W Dowdle & Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge University Press 2017) 176–194.

in China published in the early 2000s recognised the lack of such legislation as an obstacle to establishing a rule of law in China, it did not examine how the CPC ruled extralegally and whether laws could be adopted to regulate its rule; instead, it argued that the Party had and would continue to ‘retreat’ from ruling the country directly.¹⁶ Eager to persuade the Party to accept their call to legislate on its power, those ‘constitutionalists’ such as Zhiwei Tong, Qianhong Qin and Haibo Ye had gone to great lengths and pains to theorise why constitutionalism is compatible with the one-party rule in China, but provided no details on whether and how their suggestions could be implemented. They were criticised as being naïve in calling for such legislation by the so-called ‘liberal constitutionalists’, who themselves did not elaborate on their criticisms.¹⁷

This article does not only expose the inherent contradiction of, but also sheds new light on the nature and characteristics of the CPC’s ‘governing according to law’. It supports the view that ‘governing according to law’ is far from being a system of ‘rule of law’, by demonstrating it does not even meet the minimum threshold for the ‘thin’ version of ‘rule of law’ – that laws exist for both the ruling and the ruled to follow.¹⁸ China’s ostensibly ‘law-based governance’ has been widely recognised as actually being ‘rule by law’. This article demonstrates that the essential characteristic of China’s ‘rule by law’ is that law exists only to govern the people, but the ruling elite themselves are not subject to law in ruling the country. Thereafter, this article reveals a serious flaw in the system of ‘rule by law’ where the rulers use law as a tool to rule. Though the rulers wish their countries to be governed by law, they have to rule extralegally in order to maintain their supremacy with unchallengeable authority. ‘Rule by law’ is therefore intrinsically contradictory; it is ‘mission impossible’.

Finally, there is a controversial constitutional debate in China that commands high public awareness and academic interest: is the CPC above or under the law?¹⁹ The official rhetoric is that the Party is committed to act within the limits of the law²⁰ and many scholars concur, citing the provision in the Constitution that ‘all political parties’ must abide by the Constitution and laws.²¹ This article establishes that the attention on whether the CPC abides by the current Constitution and existing laws obfuscates the important fact that no law exists to regulate its rule, which means the CPC’s rule is not subject to law.

The CPC’s Rule in China: Ruling the Country Without Law

As the ruling party, the CPC monopolises the power to rule China.²² It is omnipresent and omnipotent, being supreme with unchallengeable authority in the governance of China.²³ It controls all aspects of the society and acts as the final decision maker and arbiter for matters that it sees

¹⁶Peerenboom (n 2) ch 5.

¹⁷Hongguo Chen (湛洪果), ‘中国当下的宪政思潮—目标及路径之争 [Trend of Thoughts of Constitutionalism in Contemporary China: Debates on Goals and Paths]’ (Gongshi Wang, 20 Jun 2013), archived at <https://chinadigitaltimes.net/chinese/299975.html> accessed 21 Sep 2022.

¹⁸See Peerenboom (n 2) 63–109.

¹⁹Albert HY Chen, ‘Towards a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law’ (1999) 17 UCLA Pacific Basin Law Journal 125.

²⁰Commenting on the debate, Xi Jinping said ‘the question of whether the Party is above the law or the law above the Party is a political trap and a false proposition’, and ‘Party leadership and governance by law are congruous rather than contradictory, in that the law fully manifests the Party as well as the people’s wills’. See Jinping Xi (习近平), ‘坚定不移走中国特色社会主义法治道路 为全面建设社会主义现代化国家提供有力法治保障 [Unswervingly Follow the Path of the Socialist Rule of Law With Chinese Characteristics to Provide a Strong Legal Guarantee for the Comprehensive Construction of a Modern Socialist Country]’ (2021) 5 Qishi (Seeking Truth) 4. But the real concern in the debate is whether the Party should act within the limits of the law, which Xi answered affirmatively.

²¹Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) [The Constitution of the PRC 1982], art 5.

²²Tony Saich, *Governance and Politics of China* (Palgrave Macmillan 2015) 109–115.

²³A popular book on the CPC begins its first chapter with ‘The Party is like God. He is everywhere. You just can’t see him’: Richard McGregor, *The Party: The Secret World of China’s Communist Rulers* (Harper Perennial 2010) 1.

necessary to intervene.²⁴ The Party does not only exercise political power and formulate policies for state institutions to implement, but also make decisions on matters that fall in the de jure domain of the state. The state machinery – comprising the legislature, executive, judiciary, procuracy, the newly-created supervisory organ, as well as the armed forces – formally make decisions ‘onstage’, but the CPC is the real decision maker; important matters are always decided backstage by the Party Centre or Party committees.²⁵ All state institutions are mandated to set up a ‘Party Group’, whose membership consists of Party members of the institutions’ senior leadership. In addition to implementing Party policies, these ‘Party Groups’ are obligated to report important specific issues to the Party Centre or Party committees and to ensure that decisions they make are implemented.²⁶ The Party rules the country not just through the state apparatus, but also on its own. The Party has adopted numerous documents by itself and makes decisions that directly impact not only Party members but also ordinary citizens. In addition, issues related to personnel and ideology are reserved exclusively for the Party to manage.²⁷ The CPC holds the exclusive power to staff leadership positions of state institutions²⁸ and to discipline Party members who occupy virtually all those positions. Since the creation of the supervision commission in 2018, the state supervision organisations have been merged into the Party discipline committees and the Party has acquired the power to supervise and discipline not only Party members but all office holders of state institutions.²⁹ To increase control over ideology, 2018 also saw the Party taking over the regulation and administration of the news media, publishing and film industries, as well as the internet.³⁰ In short, the CPC rules China either through the state apparatus or on its own. It exercises not only political power, but also de facto legislative, executive, and judicial power.

However, no law provides for the power the CPC enjoys in ruling the country and how the power should be exercised. The Constitution mentioned the CPC on five occasions in the preamble, offering historical justification for its leadership and declaring that the country will stick to its leadership. A rhetoric that ‘the CPC’s leadership is the most essential trait of socialism with Chinese characteristics’ was added to Article 1 of the Constitution when it was amended in 2018; but again, nothing was specific.³¹ In some other constitutional legislation (ie, legislation governing matters concerning the state structure, distribution of state power, citizens’ rights, etc) and ordinary laws adopted by the NPC or its Standing Committee, the CPC is also mentioned. For example, the *Legislation Law 2000*, *Civil Servants Law 2005*, *National Defence Law 1997*, *Village Committees Organic Law 1998*, and *Company Law 1994* stipulate that either the CPC’s leadership should be upheld, or Party lines and policies should be followed, or Party organisations should be set up.³² However, similarly, all these laws contain nothing specific on the CPC’s power.

²⁴Yongnian Zheng, ‘The Party Domination of the State’, in Kjeld Erik Brodsgaard (ed), *Critical Readings on the Communist Party of China* (Brill 2016) 249–278.

²⁵Ling Li, ‘“Rule of law” in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China’ (2015) 2 *Asian Journal of Law and Society* 93.

²⁶Zhongguo Gongchangdang Dangzu Gongzuo Tiaoli (Shixing) (中国共产党党组工作条例 (试行)) [CPC Regulations on Party Group Work (Provisional Implementation)] (16 Jun 2015).

²⁷Li (n 25).

²⁸John P Burns, ‘The Chinese Communist Party’s Nomenclatura System as a Leadership Selection Mechanism: An Evaluation’, in Kjeld Erik Brodsgaard (ed), *Critical Readings on the Communist Party of China* (Brill 2016) 479–509.

²⁹The supervision commissions are one branch of the state in name, but the Party is in real charge. See Jamie P Horsley, ‘What’s so Controversial About China’s New Anti-Corruption Body? Digging into the National Supervision Commission’ (The Diplomat, 30 May 2018) <<https://thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body/>> accessed 1 Aug 2022.

³⁰Chris Buckley, ‘China Gives Communist Party More Control Over Policy and Media’ (The New York Times, 21 Mar 2018) <<https://www.nytimes.com/2018/03/21/world/asia/china-communist-party-xi-jinping.html>> accessed 1 Aug 2022.

³¹See Zhonghua Renmin Gongheguo Xianfa Xiuzheng An (中华人民共和国宪法修正案) [Amendment to the Constitution of the PRC], adopted at the 1st Session of the 13th National People’s Congress (11 Mar 2018).

³²Robert Heuser, ‘The Legal Status of the Chinese Communist Party’ [1987] Occasional Papers/Reprints Series in Contemporary Asian Studies no 4, Article no 1; Manuel Delmestro, ‘The Communist Party and the Law: An Outline of

First, the CPC holds control over the legislature of the state and exercises legislative power backstage without specific legal basis. Although the Constitution provides that the NPC is the highest organ of state power, and the NPC and its Standing Committee are the national legislature, exercising the legislative power of the country,³³ there is no doubt that legislation is under the CPC's control. Draft laws have to be reviewed and approved by the Party Centre (an elusive term with no clear definition) before they are adopted by the NPC or its Standing Committee. This review and approval process started in 1979,³⁴ and was formalised after the Party Centre issued a document in 1991, which was revised in 2016, to strengthen its control over legislation.³⁵ This is a classified document, but its contents nevertheless leaked out and could be gleaned from academic writings. Not only should the legislature follow the political line, direction, and policies established by the CPC, all constitutional amendments, laws relating to politics, important economic and administrative laws as well as legislation plans must be examined and approved by the Party Centre before they are submitted to the NPC or its Standing Committee for deliberation and adoption. In fact, even the drafting of a law has to be approved by the Party Centre before it starts. The NPC Standing Committee is also required to report through its Party Group to the Party Centre when disputes or doubts arise in legislation.³⁶ The principle of Party review and approval in legislation has been confirmed by the CPC Decision on governing the country according to law in 2014.³⁷ In addition, all constitutional amendments were initiated by the Party and the contents and detailed wording of amendments were decided by the Party Centre before they were passed over to the NPC for adoption. As a matter of fact, it is the CPC who has the last word in state legislation and the real power regarding legislation on issues that it deems important always resides with the CPC. Nevertheless, the Constitution is silent on the CPC's power in legislation, saying nothing about the review and approval, the report requirement, or the role of the Party in constitutional amendments.³⁸ The *Legislation Law 2000* says nothing more, except stating that the CPC's leadership should be upheld.³⁹

It is true that legislation in democratic countries with the rule of law is also controlled by the governing party. However, in these countries, after a party has won a general election or the nominees of a party won a presidential election, they exercise the constitutional right to form a government and legislate via the parliament or congress in accordance with the constitution. There is no such practice as in China and, indeed it is inconceivable, that the centre or a committee of the party acts separately from the government to draft a bill or review and approve a draft bill before handing it over to the parliament or congress to enact.

The Party does not only exercise legislative power backstage and legislates through the NPC and its Standing Committee, but also directly by itself. Numerous documents with various titles such as 'regulation', 'decision', 'advice', and 'notice', etc, have been issued by the Party. The Party Centre alone issued more than 23,000 documents between 1949 and June 2012. Among them 1,178

Formal and Less Formal Linkages Between the Ruling Party and Other Legal Institutions in the PRC' (2010) 43 *Suffolk University Law Review* 681.

³³Constitution of the PRC, arts 57 and 58.

³⁴Songshan Liu, 'Dang Lingdao Lifa Gongzuo Xuyao Jiejue De Jige Zhongyao Wenti (党领导立法工作需要研究解决的几个重要问题) [Several Issues on Party's Leadership in Legislation to be Resolved]' (2017) 5 *Faxue* [Legal Science] 3.

³⁵Murray Scot Tanner, *The Politics of Law-making in Post-Mao China: Institutions, Processes, and Democratic Prospects* (Oxford University Press 1999) 64–70; Li Han, 'Zhongguo Lifa de Fei Zhengshixing Jiqi Zhengzhi Gongneng' (中国立法的非正式性及其政治功能) [Legislation in China: Informality and Its Political Functions]' (2002) 2 *Dangdai Zhongguo Yanjiu* [Modern China Studies] 49.

³⁶*ibid.*

³⁷See Peerenboom (n 2).

³⁸For the procedure of constitutional amendment, see Constitution of the PRC, art 64.

³⁹*Zhonghua Renmin Gongheguo Lifa Fa* (中华人民共和国立法法) [Legislation Law of the PRC], adopted at the 3rd Session of the 9th National People's Congress (15 Mar 2000), amended at the 3rd Session of the 12th National People's Congress (15 Mar 2015), art 3.

were recognised as ‘intra-Party regulations’ or ‘normative documents’, and 322 of these were repealed; 369 declared to cease to be valid; and 487 continue to be valid.⁴⁰ Not all of these documents are publicly available, but a cursory glance of book collections published with these documents reveals that the subject matters covered by them are not just internal Party issues, but encompass all aspects of Chinese society, many of which clearly fall in the state’s domain of legislation. For example, one document involved tackling misconduct in the field of engineering and construction,⁴¹ one concerned the management of festival celebrations in China,⁴² and another regulated rewards for civil servants.⁴³ The classified document on legislation reviews and approvals is obviously also a piece of constitutional legislation impinging on the power of the state. People who violate the provisions of these documents would face dire consequences, not just Party discipline but also punishment by the state machinery – though, only related state laws but not Party documents would be cited as the legal grounds for judicial punishment. This demonstrates the CPC’s control over legislation by state legislatures, as well as its ability to legislate by itself on matters that are within the state’s jurisdiction. However, there is no legal basis for the Party to legislate on those issues. Nothing in the Constitution or any other laws touch on the power of the CPC to legislate by itself and there is no legal limit on the scope of subject matters that it can legislate on. Even the Party Charter or any other Party regulations say nothing about what matters the Party can legislate on. The CPC Central Committee issued in 1990 and revised in 2013 a document on intra-Party legislation, which is supposed to regulate legislation exclusively concerning internal Party matters, such as the Party’s internal work and Party members’ conducts.⁴⁴ Can the Party legislate on non-Party matters? No law or Party document offers an answer. In reality, the Party can legislate on anything by itself, and its legislative power is unlimited under state laws or even by Party regulations.

In the same vein, the Party does not only hold political power to formulate policies that the executive branch of the state (ie, the administration headed by the State Council) is responsible for implementing, but also exercises executive power that is formally vested in the administration. The Party and the administration used to be intertwined and ‘the Party substituting for the government’ was seen by Deng Xiaoping as a serious shortcoming and cause for the chaos during the Cultural Revolution from 1966 to 1976.⁴⁵ Therefore, central to his approach to political reform

⁴⁰Zhonggong Zhongyang Feizhi he Xuanbu Shixiao 691 Jian Dangnei Fagui (中共中央废止和宣布失效691件党内法规) [The Centre of the CPC Repealed and Declared to be cease to be valid 691 Pieces of Regulation] (Renmin Ribao [People’s Daily], 17 Nov 2014).

⁴¹The General Office of the CPC Central Committee & the General Office of the State Council, ‘Guanyu Kaizhan Gongcheng Jianshe Lingyu Tuchu Wenti Zhuanxiang Zhili Gongzuo de Yijian (关于开展工程建设领域突出问题专项治理工作的意见) [Advice on the Special Rectification of Serious Wrongoings in the Field of Engineering and Construction]’, in *中国共产党党内法规选编 (2007–2012)* [Selection of Intra-Party Regulations of the CPC (2007–2012)] (法律出版社 [Law Press China] 2014). This advice was originally issued on 20 August 2009.

⁴²The General Office of the CPC Central Committee & the General Office of the State Council, ‘Jieqing Huodong Guanli Banfa (Shixing) (节庆活动管理办法 (试行)) [Measures on Managing Festival Cerebration Activities (Trial Implementation)]’, in *中国共产党党内法规选编 (2007–2012)* [Selection of Intra-Party Regulations of the CPC (2007–2012)] (法律出版社 [Law Press China] 2014). These Measures were originally issued on 29 May 2012.

⁴³The Organisation Department of the CPC Central Committee & the Ministry of Personnel, ‘Gongwuyuan Jiangli Guiding (Shixing) (公务员录用考试违纪违规行为处理办法 (试行)) [Regulations on the Rewards for Civil Servants (Trial Implementation)]’, in *中国共产党党内法规选编 (2007–2012)* [Selection of Intra-Party Regulations of the CPC (2007–2012)] (法律出版社 [Law Press China] 2014). These Regulations were originally issued on 4 January 2008.

⁴⁴The CPC Central Committee, *Zhongguo Gongchandang Dangnei Fagui Zhiding Chengxu Zanxing Tiaoli* (中国共产党党内法规制定程序暂行条例) [Provisional Regulations on the Procedure to Enact Intra-Party Regulations] (31 Jul 1990); CPC Central Committee, *Zhongguo Gongchandang Dangnei Fagui Zhiding Tiaoli* (中国共产党党内法规制定程序暂行条例) [Regulations on Enacting Intra-Party Regulations] (27 May 2013).

⁴⁵Xiaoping Deng, ‘Dang He Guojia Lingdao Zhidu de Gaige (党和国家领导制度的改革) [On the Reform of the Party and State Leadership]’, in *Deng Xiaoping Wenxue [Selected Works of Deng Xiaoping]* (人民出版社 [People’s Press] 1983) 320–343. This is in Volume 2 of the book.

was ‘separating the Party and the government’. However, his reform in this area was abandoned after the Tiananmen Square Incident in 1989. After Xi Jinping came to power, the principle of separating the Party and the government was brought into question and reversed. Regardless, there is no doubt that the Party exercises executive power throughout the history of the People’s Republic of China (PRC) either behind the scenes through the administration or on its own.⁴⁶ First, issues that the Party deems important are decided by the Party Centre or Party committees before passing them over to the administration to complete the formality. Party organisations within the administration are also obligated to report important issues to Party committees at the upper level and request for instructions.⁴⁷ Second, as has already been shown, the Party issues documents, many of which deal with matters that the administration is responsible for deciding. Most of these documents are jointly issued by the Party and the administration or by their respective subsidiaries, but the Party is undoubtedly in charge. Third, Party leaders at different levels frequently intervene in specific administrative issues as they wish. The latest example is that Xi Jinping made six written orders to demolish luxury villas that were said to have been illegally built in the ecologically fragile Qinling mountains in Shaanxi Province.⁴⁸ It was speculated that the real reason why Xi Jinping was so keen on seeing the villas gone was his belief that they damaged China’s *feng shui*.⁴⁹ Initially, local officials took no action, perhaps due to bureaucratic paralysis, which is conceivable in view of the size of the CPC and the state or due to resistance from entrenched local interests, which proved eventually futile and dangerous. In the end, the villas were demolished and local officials were duly punished, the former provincial Party Secretary being sentenced to a suspended death penalty, though under charges of corruption.⁵⁰ This case indicated that senior Party leaders can intervene in administrative matters as they wish; there is no legal procedure that they need to follow, and no legal protection is available to those harmed by possible abuses of power.

In addition, there have been various so-called ‘leading small groups’ in the Party system, many of which are in charge of administrative matters.⁵¹ The most important of these ‘groups’ are usually headed by the General Secretary of the Party. Under Xi Jinping, new groups were set up, such as ‘Central Leading Group for Cybersecurity and Informatisation’ and the ‘Central Leading Group for Comprehensively Deepening Reforms’.⁵² This ‘Reform Group’ is the most important and plays a central role in formulating economic policy and managing the economy, usurping the power and authority of the State Council.⁵³ After the 19th Party Congress of 2017, most of these leading groups have been converted into ‘commissions’. More have since been set up, such as the ‘Central Commission for Comprehensive Law-Based Governance’ and ‘Central Commission

⁴⁶Susan L Shirk, ‘The Chinese Political System and the Political Strategy of Economic Reform’, in Kenneth G Lieberthal & David M Lampton (eds), *Bureaucracy, Politics, Decision Making in Post-Mao China* (University of California Press 1992) 60–93.

⁴⁷The Central Committee of the CPC, *Zhongguo Gongchandang Zhongda Shixiang Qingshi Baogao Tiaoli* (中国共产党重大事项请示报告条例) [Regulations of the CPC on Reporting Important Issues and Requesting for Instructions] (28 Feb 2019).

⁴⁸Xiangwei Wang, ‘As Shaanxi Saga Shows, Even Xi Hits China’s Bureaucratic Brick Wall’ (South China Morning Post, 19 Jan 2019) <https://www.scmp.com/week-asia/opinion/article/2182577/shaanxi-saga-shows-even-xi-hits-chinas-bureaucratic-brick-wall?module=perpetual_scroll_0&pgtype=article&campaign=2182577> accessed 1 Aug 2022.

⁴⁹Shin Kyung-Jin, ‘Return of the Emperor’ (Korea JoongAng Daily, 27 Jan 2019) <<https://koreajoongangdaily.joins.com/2019/01/27/fountain/Return-of-the-emperor/3058730.html>> accessed 1 Aug 2022.

⁵⁰Jun Mai, ‘Chinese Provincial Chief Given Suspended Death Sentence for Role in Major Corruption Scandal’ (South China Morning Post, 31 Jul 2020) <<https://www.scmp.com/news/china/politics/article/3095595/chinese-provincial-chief-given-suspended-death-sentence-role>> accessed 1 Aug 2022.

⁵¹Alice Miller, ‘The CCP Central Committee’s Leading Small Groups’ [2008] China Leadership Monitor no 26 <<https://www.hoover.org/sites/default/files/uploads/documents/CLM26AM.pdf>> accessed 1 Aug 2022.

⁵²Alice Miller, ‘More Already on the Central Committee’s Leading Small Groups’ [2014] China Leadership Monitor no 44 <<https://www.hoover.org/sites/default/files/research/docs/clm44am.pdf>> accessed 1 Aug 2022.

⁵³‘To rule China, Xi Jinping Relies on a Shadowy Web of Committees’ (The Economist, 10 Jun 2017) <<https://www.economist.com/china/2017/06/10/to-rule-china-xi-jinping-relies-on-a-shadowy-web-of-committees>> accessed 1 Aug 2022.

for Auditing'. Now China is virtually run single-handedly by Xi Jinping through a web of Party 'commissions' and 'groups' headed by him; the 'Party substituting the government' practice has returned. The State Council has been side-lined in the administration of state affairs. However, there is no legal foundation for these Party 'commissions' and 'groups'. Even the Party Charter or any other Party legislation says nothing about them. Official news media reported that some of these commissions had adopted procedural rules to self-regulate their work, but they have not been publicised. The operation of these commissions and groups is secretive.

Lastly, the Party exercises judicial power and holds absolute authority over the courts and other legal institutions of the state. The Party Centre controls both macro and micro judicial work.⁵⁴ On the macro side, the Centre decides political lines and principles, adopts policies, sets work priorities, and approves reform programmes and measures, which legal institutions (including the courts) are obligated to implement. The Party Centre's subsidiary organs and legal institutions of the state including the Supreme People's Court also jointly issue documents with regard to judicial policies, specific tasks, or internal institutional issues of those institutions. These macro directions and guidance influence the courts and judges when deciding specific cases. For example, after the Party Centre launched in January 2018 a campaign to crackdown on crimes involving 'underground forces and gangs' (the so-called 'special action to sweep away the black and get rid of the evil'), the President of the Supreme People's Court told judges in the country to 'harshly' punish such crimes.⁵⁵ Following Xi Jinping's meeting with a group of prominent entrepreneurs in November 2018, aiming to reassure private businessmen in the wake of resurrected Maoist leftism and economic slowdown, the Party Group of the Supreme People's Court held a meeting and vowed to strictly implement the principles of *nulla poena sine lege* and the presumption of innocence, to resolutely oppose treating economic disputes as crimes, and to be cautious in seizing and freezing assets of private business, etc.⁵⁶

At the micro level, Party and state officials' interference with judicial decisions of individual cases used to be pervasive,⁵⁷ causing widespread grievances and low public trust in the judiciary. They can interfere *ex ante* or *ex post*, in the name of 'coordination' or 'supervision'.⁵⁸ Interference could be formally pursued through institutionalised channels like the Party's Political and Legal Affairs Commissions, or in an informal and *ad hoc* way such as through the Party and state leaders giving oral or written instructions. Xi Jinping has tried to curb such interference and the Party Centre has issued documents to establish a system for recording interference by leading officials and subsequently, holding them to account for illegal interference.⁵⁹ However, in the meantime, he doubled down on the Party's control over legal institutions and repeatedly dictated that the Party's leadership over legal institutions of the state should be absolute. This was written into a Party document regulating the work of legal institutions, which commands that legal institutions, in handling 'important

⁵⁴Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Dependence in China' (2016) 64 *The American Journal of Comparative Law* 37.

⁵⁵Zhouqiang: Shenru Tuijin Saohei Chue Zhuanxiang Douzheng (周强: 深入推进扫黑除恶专项斗争) [Zhouqiang Calls for Further Pushing on with the Special Struggle to Sweep Away the Black and Get Rid of the Evil] (Renmin Ribao [People's Daily], 25 Dec 2018).

⁵⁶Zuigaofa Dangzu: Wei Mingying Jingji Fazhan Tigong Gengyouli de Sifa Fuwu he Baozhang (最高法党组: 为民营经济发展提供更有力的司法服务和保障) [The Party Group of the Supreme People's Court: Providing More Robust Judicial Service and Guarantee to Support the Development of the Private Economy] (Zhongguo Ribao [China Daily], 5 Nov 2018).

⁵⁷In a survey of 280 judges, almost 70% said that they were subject to interference. See Peerenboom (n 2) 307. See also Ting Gong, 'Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China' (2004) 4 *The China Review* 33; Benjamin L Liebman, 'China's Courts: Restricted Reform' (2007) 21 *Columbia Journal of Asian Law* 1.

⁵⁸Li (n 54).

⁵⁹The General Office of the Central Committee of the CPC & the State Council, Lingdao Ganbu Ganyu Sifa Huodong, Chashou Juti Anjian Chuli de Jilu, Tongbao he Zeren Zhuijiu Guiding (领导干部干预司法活动、插手具体案件处理的记录、通报和责任追究规定) [Provisions on Recording, Noticing and Disciplining Leading Officials Interfering with Judicial Activities and Meddling in Individual Cases] (31 Mar 2015).

cases' and 'crucial issues', report to and request for instructions from the General Secretary, the Party Centre, the Central Political and Legal Affairs Commission, or local Party committees.⁶⁰ But what constitutes 'important cases' and 'crucial issues' was not defined. Politically sensitive cases or those critical to social stability are said to be 'important', but ultimately it is up to Party leaders to decide which are important. Basically, Party leaders hold the power to intervene in any case that they deem important. The outcome is that so-called 'illegitimate interference' has decreased and become discreet, but 'legitimate interference' has persisted and has even been reinforced.⁶¹ All in all, the Party is the ultimate decision maker for both macro and micro judicial matters and its influence is ubiquitous.⁶² The Party holds and exercises *de facto* judicial power; but as with legislation and administration, its power is not based on and limited by law.

In connection to the CPC's monopolisation of power to rule the country, the senior leaders of the CPC are the most powerful persons in China. Specifically, the politburo of the Central Committee and its standing committee are the power centre. The General Secretary is the highest public office with the greatest power in the land, and the *de facto* head of the country. Xi Jinping is the most powerful person in China not because he is the President of the state, but because he is the General Secretary of the CPC. However, nothing is likewise said in law about what power those offices have or how power is to be exercised. The Party Charter provides no clarification, only stating that the Politburo and its Standing Committee may exercise the power of the Central Committee when it is not in session, and that the General Secretary convenes the meetings of these bodies.⁶³ The same can be said about the selection, appointment and removal of persons from these offices. Legislation says nothing about these issues, and the Party Charter only states that the General Secretary and members of the Politburo and its Standing Committee are elected at the Plenary meeting of the Central Committee.⁶⁴ While a Party document provides some more detailed rules on the selection, appointment and removal of leading cadres of the Party and state institutions, remarkably it is stipulated that these rules are not applicable to the most senior positions like the General Secretary, the members of the Politburo and its Standing Committee, the Chairman and Vice-Chairman of the NPC, the Premier and the Vice-Premier of the State Council, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate.⁶⁵ Therefore, it is unclear how those most senior Party positions (ie, the General Secretary, the members of the Politburo, and its Standing Committee) are selected and removed: either there is no rule, or the rules are highly classified in that they are not known to the general public.

In summary, the Party is omnipresent and omnipotent in the PRC. Not only does it act as the political leader and sets policies for state institutions to implement, but it also exercises legislative, executive, and judicial power either indirectly through state institutions or directly by itself. The Party is the final decision maker and arbiter for all state affairs. However, there is no law governing what power the Party has and how it should be exercised. The power of the Party is not based on and limited by law. Thus, the Party rules China extralegally. It is no exaggeration in claiming that the CPC rules the country without law.

⁶⁰The Central Committee of the CPC, *Zhongguo Gongchandang Zhengfa Gongzuo Tiaoli* (中国共产党政法工作条例) [Regulations on Political-Legal Work] (18 Jan 2019).

⁶¹Xin He, 'Pressures on Chinese Judges under Xi' (2021) 85 *The China Journal* 49.

⁶²Suli Zhu 'Political Parties in China's Judiciary' (2007) 17 *Duke Journal of Comparative & International Law* 533.

⁶³*Zhongguo Gongchandang Zhangcheng* (中国共产党章程) [Charter of the CPC], adopted at the 19th Congress Meeting (24 Oct 2017), art 23.

⁶⁴*ibid.*

⁶⁵*Dangzheng Lingdao Ganbu Xuanba Renyong Gongzuo Tiaoli* (党政领导干部选拔任用工作条例) [Regulations on the Work to Select and Appoint Leading Cadres of the Party and the State], issued on 9 Jul 2002, revised and recirculated on 15 Jan 2014 by the Central Committee of the CPC, art 4.

Alongside the slogan of ‘governing the country according to law’, Xi Jinping also emphasises the importance of ‘governing the Party according to regulations’⁶⁶ and great efforts have been made to revise existing intra-Party regulations and to adopt new ones. A document regulating intra-Party legislation was revised and reissued in May 2013 to formalise the procedure for intra-Party legislation.⁶⁷ A parallel system of intra-Party regulations thus emerged. In view of this, is it still valid to say that the CPC rules China without law? First of all, there is the question of what types of Party documents qualify as ‘intra-Party regulations’: why were only 1,178 of more than 23,000 documents issued by the Party Centre recognised as ‘intra-Party regulations’ or ‘normative documents’?⁶⁸ What were the differences between ‘intra-Party regulations’ and ‘normative documents’? Is the regulation on intra-Party legislation applicable to the adoption of Party documents that govern state affairs rather than internal issues of the Party? Clearly, there is an artificial demarcation where the state is responsible for legislating on state affairs while the Party adopts rules to govern its internal issues. But in reality, the Party is ubiquitous and its legislative power is unlimited. Party legislation on state affairs is a grey area and does not seem to be regulated by Party rules, let alone laws.

Second, there is the question of whether intra-Party regulations qualify as ‘law’. Obviously, intra-Party regulations are very different from state legislation. They do not meet some basic criteria for a law to be ‘law’, such as generality, publicity, clarity and stability.⁶⁹ Two points suffice to prove that they do not qualify as ‘law’: the process of adoption is opaque and they are not necessarily publicised. The Supreme People’s Court has ruled that the Regulations on the Disclosure of Government Information are not applicable even to documents jointly issued by a Party institution and a government body, and such documents do not need to be disclosed to the public.⁷⁰ Therefore, even Chinese scholars who argued that intra-Party regulations are law in nature have admitted that they do not meet the basic requirements for law in their current state, and called for improvement in their drafting, adoption, publicity, and stability.⁷¹

Last but not least, for those important constitutional matters regarding the Party Centre’s power, we do not know whether intra-Party regulations exist or what the rules are, because everything is shrouded in secrecy at the top echelon of the Party hierarchy. For example, we do not know whether there are Party regulations governing the selection and removal of top Party leaders; although it was reported that the Party Centre adopted a document to govern legislation by the NPC and its Standing Committee,⁷² the document has not been published. It was designated as ‘secret’ and circulation was restricted to Party officials whose rank is no lower than ministerial level.⁷³ These classified documents may indeed leak out, but leaking, receiving, and/or holding classified information is a crime that is subject to severe punishments. Hence it is still valid to say that the CPC rules China without law, despite the emergence of a parallel system of intra-Party regulations. There is an argument that China is governed by unwritten constitutions,⁷⁴ but for those constitutional

⁶⁶Translated from ‘Yigui Zhidang’ (依规治党).

⁶⁷See text to the CPC Central Committee (n 44).

⁶⁸See text to ‘Zhonggong Zhongyang Feizhi he Xuanbu Shixiao 691 Jian Dangnei Fagui (中共中央废止和宣布失效 691 件党内法规) [The Centre of the CPC Repealed and Declared to be cease to be valid 691 Pieces of Regulation]’ (n 40).

⁶⁹Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 46–94.

⁷⁰The Supreme People’s Court of PRC, Xingzheng Caidingshu (2018) Zuigaofa Xingshen 798 Hao [Administrative Verdict (2018) No 798 of Administrative Appeal] (28 Mar 2018).

⁷¹Mingan Jiang, ‘Lun Zhongguo Gongchandang Dangnei Fagui de Xingzhi yu Zuoyong (论中国共产党党内法规的性质与作用) [On the Nature and Functions of the Intra-Party Regulations of the CPC]’ (2012) 49 Beijing Daxue Xuebao (Zhexue Shehui Kexue Ban) [Journal of Beijing University (Philosophy and Social Sciences)] 109.

⁷²See Tanner (n 35) 66 fn 27.

⁷³ibid.

⁷⁴Shigong Jiang, ‘Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China’ (2010) 36 *Modern China* 12.

matters regarding the Party Centre's power, it would be a stretch to say that they are regulated by unwritten laws, not least for the reason that it is unknown to the public what the specific rules are.

Specifying the Power to Rule in Laws: The CPC's Attitude

When the PRC was first established in 1949, the CPC did not completely monopolise the power to rule the country; the senior offices of the state were not all occupied by members of the CPC. For example, three of the six Vice-Presidents of the Central People's Government, the supreme organ exercising state power, were members of 'democratic parties', as was the President of the Supreme People's Court and the Minister of Justice.⁷⁵ Indeed, under the 'Common Programmes', China's provisional constitution, the CPC was only the first among equals and, together with 'democratic parties' and other 'people's groups', formed the People's Consultative Conference, which announced the establishment of the PRC and created the Central People's Government.⁷⁶ However, the status of the CPC was raised in the first Constitution enacted in 1954, and became the 'leader' of the 'united front' that consisted of these 'democratic parties' and 'people's groups'.⁷⁷ The power to rule the country became the monopoly of the CPC, and senior offices of the state were almost all occupied by members of the CPC. Nonetheless, like the constitution of the Soviet Union that China had heavily borrowed from, the Constitution did not specify what power the CPC had, and the CPC was not mentioned except in the Preamble.⁷⁸

The 1954 Constitution was revised towards the end of the Cultural Revolution in 1975, by which time the Constitution had been ignored and the country was run without the least pretence of legality. The first session of the 4th NPC should have been held in 1969, but was not held until 1975; the then-President Liu Shaoqi was persecuted to death, but was never formally removed from the office by the NPC; local governments were replaced by 'revolutionary commissions'; and the Procuratorate and the Ministry of Justice were abolished.⁷⁹ The PRC was in a state of lawlessness. The purpose of revising the Constitution was to preserve the legacy of the Cultural Revolution. Nevertheless, the 1975 Constitution was more honest than both the 1954 and the current 1982 Constitution in representing the reality of how China is governed. It did not only confirm the leadership position of the CPC, but also stipulated that the armed forces were under the command of the Chairman of the CPC Central Military Commission, that the NPC was to be led by the CPC, and that the CPC Central Committee nominated the Premier and other members of the State Council, who would then be appointed or later removed by the NPC.⁸⁰ These contents were largely retained when the Constitution was amended again in 1978 because leftists were still in control, despite the Cultural Revolution having ended in 1976.

The current Constitution adopted in 1982 was a return to the 1954 version. The structure of the state is basically the same, with the NPC being the supreme organ of state power, the President the ceremonial head of the state, the State Council the executive, the Supreme People's Court the judiciary, and the Supreme People's Procuratorate responsible for legal supervision. The contents

⁷⁵Zhongguo Renmin Zhengxie Diyijie Quantu Huiyi Shengli Bimu (中国人民政协第一届全体会议胜利闭幕) [The 1st Plenary Meeting of the Chinese People's Political Consultative Conference Concluded Successfully] (Renmin Ribao [People's Daily], 1 Oct 1949).

⁷⁶Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Programme of Chinese People's Political Consultative Conference], adopted at the 1st plenary meeting of the Chinese People's Political Consultative Conference (29 Sep 1949), Preamble.

⁷⁷Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) [Constitution of the PRC], adopted at the 1st Plenary Meeting of the 1st National People's Congress (20 Sep 1954), Preamble.

⁷⁸William C Jones, 'The Constitution of the People's Republic of China' (1985) 63 Washington University Law Quarterly 707.

⁷⁹Albert Chen, *An Introduction to the Legal System of the PRC* (4th edn, Butterworths Law (Asia) 2011) 53.

⁸⁰Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) [Constitution of the PRC], adopted at the 1st Plenary Meeting of the 4th National People's Congress (17 Jan 1975), arts 15, 16 and 17.

covering the power of the CPC in the 1975 and 1978 constitutions were removed, with only those proclaiming the leadership of the CPC in the Preamble retained, just like in the 1954 Constitution. This change was generally regarded as a sign of progress. Indeed, a serious debate occurred before the Constitution was adopted regarding whether the CPC should be mentioned at all, and only after Deng Xiaoping's intervention were the contents on the CPC's leadership retained in the Preamble.⁸¹ In the meantime, the Constitution proclaimed that political parties and people's groups should act within the limits of the Constitution and laws.⁸² Since it was adopted, the Constitution has been amended five times with the latest amendment in 2018, but the structure of the state machinery remained the same except for the addition of the National Supervisory Commission as a new branch of government in 2018. The power of the CPC remains unspecified and the 2018 amendment only inserted the rhetoric that 'the CPC's leadership is the most essential trait of socialism with Chinese characteristics'.

From 1986 there had been calls by legal scholars to specify the CPC's power in order to legalise its role.⁸³ However, the CPC during this period was still aiming for political reform and the focus was to separate the CPC from the state, which was first proposed by Deng Xiaoping and confirmed at the 13th National Congress of the CPC in 1987. The overall objective was to reduce Party interference in state affairs, and indeed, Deng Xiaoping once said that 'we should not practise ruling the country by the Party'.⁸⁴ Thus, it was proposed during the 13th National Congress that the Party maintained its political leadership while allowing state organs to operate autonomously, and that the Party lead the country by setting political principles and directions, deciding major policies, and recommending candidates for key state offices.⁸⁵ However, although the overall objective was to reduce Party interference, the Party document produced during this National Congress only offered a broad-brush description of the relationship between the Party and the state. Indeed, there remained the practical question of how to maintain Party leadership while ensuring the autonomy of state organs. It is thus understandable that the Party did not respond to the call to specify its power, because it had no desire to do so while the relationship between it and the state was still unsettled.

Previous attempts at political reform were terminated after the crackdown on the student protests in Tiananmen Square in 1989. Aspects separating the Party from the state that had been implemented then were reversed.⁸⁶ After Deng Xiaoping's 'southern tour' in 1992, the Party single-mindedly focused on economic growth and the whole country plunged into the mania of money-seeking. Although the Party formally proposed 'governing the country according to law and establishing a socialist country of law' in 1997 and provided some explanation for this,⁸⁷ it did not touch on the relationship between the Party and the state; there was no plan to legislate on the power of the Party. In 2004, the Party proposed to 'rule the country according to law'⁸⁸ as a way to improve

⁸¹Songshan Liu, 'Dang de Lingdao Xieru 1982 Nian Xianfa de Lishi Huigu yu Xinqidai (党的领导写入 1982 年宪法的历史回顾与新期待) [A Historical Review and New Expectation on the Party's Leadership in the 1982 Constitution]' (2014) 143 *Henan Caijing Zhengfa Daxue Xuebao* [Journal of Henan University of Economics and Law] 1.

⁸²Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) [Constitution of the PRC], adopted at the 5th Plenary Meeting of the 5th National People's Congress (4 Dec 1982), art 5.

⁸³Feilong Tian, *Political Constitutionalism in China* (City University of Hong Kong Press 2017) 277–320.

⁸⁴Translated from *Yidang zhiguo* (以党治国). See Wei Wu, 'Shisanda hou de Dangzheng Fenkai (十三大后的党政分开改革) [The Reform to Separate the Party and the Government After the 13th Party Congress]' (New York Times in Chinese, 30 Sep 2014) <<https://cn.nytimes.com/china/20140930/cc30wuwei31/>> accessed 20 Jul 2022.

⁸⁵Ziyang Zhao (赵紫阳), '沿着有中国特色的社会主义道路前进 [Advance Along the Road of Socialism with Chinese Characteristics]' (Report delivered at the 13th National Congress of the CPC, 25 Oct 1987).

⁸⁶Wu (n 84).

⁸⁷Zemin Jiang (江泽民), '高举邓小平理论伟大旗帜, 把建设有中国特色社会主义事业全面推向二十一世纪 [Hold High the Great Banner of Deng Xiaoping Theory and Push the Cause of Building Socialism with Chinese Characteristics into the 21st Century]' (Report delivered at the 15th National Congress of the CPC, 12 Sep 1997).

⁸⁸Translated from *Yifa Zhizheng* (依法执政). See the Central Committee of the CPC, Guanyu Jiaqiang Dang de Zhizheng Nengli Jianshe de Jueding (关于加强党的执政能力建设的决定) [The Decision on Improving the Ruling Capability of the Party], adopted at the 4th Plenary session of the 16th Central Committee of the CPC (19 Sep 2004).

its ruling capability, but again no plan was espoused to legislate on the Party's power to rule. Throughout the history of reform since 1978, senior leaders have emphasised the importance of adopting Party rules and regulations to govern the Party. In 2006, Hu Jintao, the General Secretary, proposed to build a system of Party rules and regulations with the Party Charter at its core.⁸⁹ Thereafter, a large number of rules and regulations have been issued. But none of these rules and regulations that have been published say anything specific about the CPC's power to rule.

The early 2000s saw the rise to prominence of a group of legal scholars who pushed for establishing 'constitutionalism' based on the current Constitution.⁹⁰ They are colloquially referred to as 'political constitutionalists' and 'socialist constitutionalists'. Their common ground is accepting the leadership of the CPC and theorising the compatibility between one-party rule and constitutionalism, but their foci of research are divergent. Some of them called for specifying, in law, the power of the CPC and laying down the procedures for the CPC to exercise its power.⁹¹ But they were criticised as being naïve by scholars from a different camp dubbed the 'liberal constitutionalists'.⁹² On the other hand, the call of those 'socialist constitutionalists' fell on deaf ears of the CPC. The CPC remained silent to such call until late 2012 when a heated debate on constitutionalism erupted.⁹³ The debate started after the newly ascended Xi Jinping gave a speech during the ceremony commemorating the 30th anniversary of adopting the 1982 Constitution. He extolled the merits of the 1982 Constitution and called for governing the country in accordance with it. Soon after, a raft of articles, opinions, and editorials by these 'constitutionalists' appeared in newspapers, academic journals, and online media, calling for the CPC to launch political reform and implement the 1982 Constitution. However, the Party responded by coordinating the publication of a series of articles in the CPC's official newspapers and journals, sternly attacking the concept of constitutionalism with language borrowed from the Cultural Revolution. The 'constitutionalists' were accused of harbouring a hidden agenda to weaken or even overthrow the rule of the CPC. In the meantime, a secret CPC document was circulated, warning of the danger of 'universal values' (including constitutionalism) and calling to fight against them.⁹⁴ Since then, 'constitutionalism' has become a word that is heavily censored. Both the 'liberal constitutionalists' and those 'political constitutionalists' and 'socialist constitutionalists' who accept the CPC's rule, but nevertheless advocate putting it on a firmer legal footing, have been silenced and censored. Only the writings of the ultra-leftists who advocated for absolute power of the Party are not deleted from the internet,⁹⁵ but their suggestions to write the CPC's absolute ruling position into the Constitution and merge the Constitution with the Charter of the Party have nonetheless been neglected by the Party.

This event did not stop the CPC from convening a plenary congress meeting specially to deliberate on establishing a 'law-based governance' system and deciding on how to 'comprehensively advance governing the country according to law'.⁹⁶ However, while the CPC announced to complete and improve on the legal system and detail the areas that the state would focus on to legislate, it did not mention the need to legislate the CPC's powers. It reiterated the rhetoric to govern the country according to law, but ignored the glaring hole in the legal system about the power of the CPC. In

⁸⁹Zhong Li, 'Goujian Yigui Zhidang Fagui Zhidu Tixi Yanjiu (构建依规治党法规制度体系研究) [Research on Constructing a System of Regulations for Governing the Party In accordance with Regulations]' (2017) 5 *Xibei Daxue Xuebao (Zhaxue Shehui Kexue Ban)* [Journal of North-Western University (Philosophy and Social Sciences)] 19.

⁹⁰See Chen (n 15); He (n 15).

⁹¹Zhiwei Tong, *The Constitutional Reform in Contemporary China* (City University of Hong Kong Press 2016) 179–203.

⁹²See He (n 17).

⁹³Thomas E Kellogg, 'Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform' (2017) 11 *University of Pennsylvania Asian Law Review* 337; Rogier Creemers, 'China's Constitutionalism Debate: Content, Context and Implications' (2015) 74 *The China Journal* 91.

⁹⁴Jianfu Chen, 'Out of the Shadows and Back to the Future: CPC and Law in China' (2016) 24 *Asia Pacific Law Review* 176.

⁹⁵Huaqing Ke & Rong Liu, 'Lun Lixian Dangdaozhi (论立宪党导制) [On the Party-Led Constitutionalism]' (2015) 7 *Zhanlue Yu Guanli* [Strategy and Management].

⁹⁶See the CPC Central Committee (n 5).

2019, the CPC issued a document, decreeing that the Party's leadership be written into laws, but it did not mean to specify the Party's power and its exercise.⁹⁷ It also repeated the call to establish a complete system of intra-Party regulations. In November 2013, the CPC announced a 5-year plan for intra-Party legislation, and in 2018, the second 5-year plan was published.⁹⁸ Most of the planned items were rules dealing with internal affairs of the Party, with a few touching on its power versus that of the state. For example, one agenda item was to revise the document strengthening the Party Centre's control over state legislation – and it was indeed revised in 2016 – but the contents have not been published. The practice of keeping secret intra-Party documents concerning the highest echelon of the Party hierarchy continues to be maintained. For other matters concerning the Party's power to rule, there is no plan for Party legislation.

In summary, despite repeated announcements to 'govern the country according to law', the CPC ignores the fact that there is no law to govern the crucially important constitutional matter regarding its power to rule. It has never responded to the call to specify its ruling power through legislation. Under the leadership of Xi Jinping, it has become more hostile towards the suggestion to put its rule on a firmer legal basis. A parallel system of intra-Party regulations is emerging, but the power of the very top of the Party hierarchy remains a forbidden zone for Party legislation and the practice to hide them from the public is maintained.

Legislating on the CPC's Power to Rule: The Prospect Explanations based on Theories of Sham Constitutions

Why has such a crucial and apparent loophole in the legal system not been filled? Why has the CPC been apathetic, and even become hostile towards the call to legislate on its power? What is the prospect for China to do so in the future? To answer these questions, the existing literature on sham constitutions of authoritarian countries will be examined.⁹⁹ A central theme of this literature concerns the question of why authoritarian rulers bother to adopt a constitution that bears little resemblance to how their authoritarian state functions in real life. Briefly, the answer is that in an authoritarian state, the constitution has four functions: (1) as an operating manual, (2) as window dressing, (3) as a blueprint, and (4) as a billboard.¹⁰⁰

The authoritarian constitution as an 'operating manual' provides that these constitutions serve some genuine functions such as coordination among elites and controlling agents in the party-state hierarchy. On the other hand, the authoritarian constitution as 'window dressing' means that it hides and obfuscates actual political practice with its grandiose facade in order to enhance regime legitimacy. Another way of 'window dressing' is to confuse people inside the country by 'debasement of the very currency of rights and suggesting ... that rights everywhere were meaningless promises'.¹⁰¹ For the 'blueprint' role, it is said that in every country there is a gap between the constitution and

⁹⁷The CPC Central Committee, *Guanyu Jiaqiang Dang de Zhengzhi Jianshe de Yijian* (关于加强党的政治建设的意见) [The Opinions of the CPC Party Centre on Strengthening the Party's Political Construction] (31 Jan 2019). See Aimin Ou (欧爱民) & Jiachen Xiang (向嘉晨), "Dang de Lingdao" Ru Fa Yuanze ji Biaozhun ("党的领导"入法原则及其标准) [Principles and Standards of Stipulating "the Leadership of the CPC" in Law] (2020) 3 *Zhongguo Tianjin Shiwei Dangxiao Xuebao* [Journal of the Party School of Tianjin] 3.

⁹⁸Zhongyang Dangnei Fagui Zhiding Gongzuo Wunian Guihua Gangyao (2013–2017 Nian) (中央党内法规制定工作五年规划纲要 (2013–2017 年) [The Outline of the Party Centre on the 5-Year Plan for Legislating on Intra-Party Regulations (2013–2017)] (28 Nov 2013); Zhongyang Dangnei Fagui Zhiding Gongzuo Dierge Wunian Guihua (2018–2022 Nian) (中央党内法规制定工作五年规划纲要 (2013–2017 年) [The Second 5-Year Plan of the Party Centre for Legislating on Intra-Party Regulations (2018–2022)] (24 Feb 2018).

⁹⁹Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014); David S Law & Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.

¹⁰⁰Tom Ginsburg & Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes', in Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 1–17.

¹⁰¹*ibid* 7.

real politics, and many provisions in the constitution are to some extent aspirational, ie, a blueprint describing objectives regimes aim for. Constitutions in authoritarian states serve this purpose to a much greater extent. Lastly, the ‘billboard’ function suggests that constitutions advertise political messages to both domestic and international audiences, and constitutional change signals political intentions.

Except for the function of an operating manual, the other three functions provide some insightful explanations as to why the CPC has been apathetic with the suggestion to legislate on its power, and offer good predictions about the possibility to do so in the future. The PRC Constitution is no doubt a kind of window dressing. For example, its list of citizens’ rights is complete and includes freedom of speech, press, association, religion, as well as the right to criticise the government, to vote and stand for election, to demonstrate and protest, etc. These are comparable or even more generous than in many liberal democracies.¹⁰² However, reality does not match the contents on paper and the Chinese people are routinely deprived of these rights.¹⁰³ These lavish descriptions of rights become window dressing, serving the purpose of enhancing the legitimacy of the CPC’s rule, which would be defeated if the power of the CPC were specified in the Constitution to reflect political realities. For example, if the power of the CPC over the NPC is stipulated in the Constitution, the façade that all of the power of China belongs to the People and the People exercise their power through the NPC, the highest organ of state power, would fall apart; if the power of the CPC to control and censor all the press and media is written into laws, the falsehood that Chinese people enjoy the freedom of speech and press would be revealed; if the power of the CPC to select and approve candidates for election to the People’s Congresses is laid down in law,¹⁰⁴ it would then become obvious to the people that they actually do not really enjoy the right to stand for election and their right to vote is meaningless. Explicitly defining these powers in the Constitution is the antithesis of window dressing, and the Constitution would lose its function of enhancing the legitimacy of CPC rule.

It has been argued that the Chinese Constitution operates more accurately as a false blueprint.¹⁰⁵ The cardinal principle of the CPC is to maintain its monopoly on political power.¹⁰⁶ Despite proclaiming by the Constitution that all power belongs to the People, the Party’s commitment to ‘govern the country according to law’, and the grandiose description of rights enjoyed by the People, the CPC does not have the intention to fully implement the Constitution because that is not compatible with its cardinal goal to maintain supremacy and its absolute authority would be eroded.¹⁰⁷ Nevertheless, the CPC constantly extols the Constitution and proclaims to govern the country in accordance with it. This offers the Chinese people hope that a constitutional state *will* be built and that their constitutional rights fulfilled – which again serves the function of legitimacy enhancing and motivating the people to support the regime. However, if the powers of the CPC were specified in the Constitution, the Constitution would lose its function as a blueprint. For example, if the power of the CPC to decide state affairs and to exclusively manage personnel appointments are formally set in stone in the Constitution, people would lose the hope that they can elect their representatives and participate in the decision-making of state affairs; if the power of the CPC over legislation through the NPC and its Standing Committee is spelt out in law, people who aspire for a constitutional state would no longer see that as possible under the rule of the CPC. The Constitution will no longer be seen as a beacon of hope and the CPC would no longer be able

¹⁰²Law & Versteeg (n 99).

¹⁰³Qianfan Zhang, ‘A Constitution without Constitutionalism? The Path of Constitutional Development in China’ (2010) 8 *International Journal of Constitutional Law* 950.

¹⁰⁴‘China Holds Elections’ (The Economist, 10 Nov 2016) <<https://www.economist.com/china/2016/11/10/china-holds-elections>> accessed 1 Aug 2022.

¹⁰⁵Kellogg (n 93).

¹⁰⁶Charter of the CPC, Preamble.

¹⁰⁷Kellogg (n 93).

to constantly perform legitimacy enhancing activities by extolling the greatness of the Constitution. Just like window dressing, legislating on the power of the CPC would compromise the blueprint function of the Constitution, and damage the CPC's legitimacy to rule.

The adoption of the PRC Constitution and its subsequent revisions is a classic example of the 'billboard' function of authoritarian constitutions. The adoption of the Constitution in 1982 advertised the political message that China would end political struggles and focus on economic development. Subsequent revisions to the Constitution also signalled the CPC's intention to allow private business to develop, the market to operate, and so on. The adoption of the Constitution and the revisions made, except the latest one abolishing the term limits of the Presidency and Vice Presidency, have been well received both domestically and internationally.¹⁰⁸ Changes to the Constitution detailing the absolute power of the CPC would no doubt serve to signal political changes. But what kind of political message would such changes send out? Obviously, it would signal a leftist reversion of previous reforms. It would tell people in the country and across the world that the CPC would no longer pursue political liberalisation and the current system with the CPC in total control would be the end game. It would signal to the world of the CPC's confidence in the 'China model'. What would happen if the CPC did indeed make such a change? Just look at the reactions following the abolition of the term limits of the Presidency and Vice-Presidency in the constitutional amendments of 2018. There were both strong domestic and international backlashes. The international media was in a frenzy when the news broke and the titles of news articles were inevitably negative.¹⁰⁹ International commentators expressed deep disappointment and frustration. Domestically, although all of the local press carried only one voice dictated by the CPC, there was an uproar on social media and the CPC censors had to work fanatically to block dissenting opinions and angry comments. Many political dissidents, who had been severely suppressed, still openly exhibited defiance against the change in despair.¹¹⁰ The political cost for the CPC was huge and its legitimacy was damaged in the eyes of many. The change to stipulate the absolute power of the CPC in the Constitution would not be a less significant move. It is doubtful whether a leader as bold as Xi Jinping would risk such a move with no clear benefit to the Party and its leader.

Based on the theories on sham constitutions of authoritarian states, it is thus understandable why the CPC is unenthusiastic about the suggestion to legislate on its power and why there is little chance that the CPC will do so in the future. Specifying the power would cause the Constitution to lose its window dressing and blueprint functions, damaging the legitimacy of the CPC's rule. It would also send out a political message, which would risk eroding further its legitimacy and causing domestic and international backlashes. Clearly, there is a conflict between legislating on the CPC's power and maintaining its supremacy with unchallengeable authority because the damage from such legislation to its legitimacy is detrimental to its authority.

Legislating on the CPC's Power and Maintaining Its Supremacy with Unchallengeable Authority: The Inherent Contradiction

Even more importantly, legislating on the power of the CPC would have the effect of limiting its power. In the present state, because there is no law on what power it has and how it should exercise the power, the CPC is not constrained by law in ruling the country. It can do anything and act in any way without the concern of violating law. This means that the CPC enjoys complete flexibility

¹⁰⁸ Albert HY Chen, 'Constitutions, Constitutionalism and the Case of Modern China' (University of Hong Kong Faculty of Law Research Paper No 2017/023) <<https://ssrn.com/abstract=3027562>> accessed 20 Jul 2022.

¹⁰⁹ See eg, 'China's Xi Allowed to Remain "President for Life" as Term Limits Removed' (BBC, 11 Mar 2018) <<https://www.bbc.co.uk/news/world-asia-china-43361276>> accessed 20 Jul 2022; Ben Blanchard & Christian Shepherd, 'China Allows Xi to Remain President Indefinitely, Tightening His Grip on Power' (Reuters, 11 Mar 2018) <<https://www.reuters.com/article/us-china-parliament/china-allows-xi-to-remain-president-indefinitely-tightening-his-grip-on-power-idUSKCN1GN07E>> accessed 20 Jul 2022.

¹¹⁰ 'Xi Jinping Decides to Abolish Presidential Term Limits' (The Economist, 1 Mar 2018) <<https://www.economist.com/china/2018/03/01/xi-jinping-decides-to-abolish-presidential-term-limits>> accessed 1 Aug 2022.

and discretion to rule the country. However, if its powers were detailed in law, the CPC could only do things that are specified in the laws and must follow the procedures set by them. Otherwise, it would be in violation of these laws. Currently, the CPC can easily commit to act ‘within the limits of laws’ because there is nothing regulating its ruling activities. It is hence clear that spelling out the CPC’s power in laws would have the effect of limiting its power and freedom to rule the country.

Putting a legal limit on the CPC’s powers is indeed the goal of many ‘constitutionalists’ who called for legislation on these powers.¹¹¹ The accusation made by the articles published in the CPC’s official journals and newspapers during the 2013 constitutional debate that these ‘constitutionalists’ harboured the hidden agenda to weaken the CPC’s rule is true. That accusation suggests Party leaders clearly understood the harmful consequences of such legislation on its power and authority, which they would not tolerate. Upholding the CPC’s leadership is one of the ‘four cardinal principles’ and senior Party leaders since Deng have constantly warned of the danger of weakening the Party’s authority. Xi Jinping has made it explicit that the CPC exercises leadership over all areas of undertakings and its leadership is absolute.¹¹² It becomes evident that legislating on the CPC’s power and maintaining its supremacy and absolute authority are irreconcilable.

The deleterious consequence such legislation would have for the CPC’s power and authority can be tangibly discerned by examining several practical dilemmas the Party would face. First, would the documents the Party adopts and the decisions it makes need to be disclosed to the public, if its legislative, administrative, and judicial power is stipulated in laws? Currently, Party documents, indeed even documents jointly adopted by a Party organ and a government department, are not subject to the Regulations on Open Government Information and do not need to be disclosed to the public.¹¹³ On the contrary, if the Party’s rule were put on a legal footing and its legislative power was recognised by law, Party documents would acquire the status of law to become a part of the country’s system of laws and, as a type of law, should be publicised. Refusing to disclose Party documents would no longer be legally justifiable. The same can be said about the Party’s administrative and judicial decisions. This new transparency would certainly be welcomed by the public, but for the Party, transparency would come with public scrutiny and pressure. The flexibility and discretion currently afforded by secrecy would be reduced and, instead of basing their conduct on their own judgement and will, Party leaders would be under increased pressure from public opinion in legislation and decision-making, which in turn translates into restrictions on the Party’s power and freedom to rule the country.

Second, if the Party’s power in legislation, administration and adjudication were recognised by law, the questions of whether Party documents should be subject to constitutional supervision by the NPC and its Committees¹¹⁴ and whether Party organisations should be allowed to be sued in the courts would also arise.¹¹⁵ China’s legal system has long been riddled with legislative inconsistency, characterised in particular by conflicts between inferior and superior laws with the Constitution at the pinnacle.¹¹⁶ The ‘filing and review’ system initially established by the 1982 Constitution – and later fleshed out in the *Legislation Law 2000* – to resolve these conflicts were

¹¹¹See Tong (n 91); Qianhong Qin & Haibo Ye, *The Study of Socialist Constitutionalism* (City University of Hong Kong Press 2017) 13–32, 42–53.

¹¹²Xi Jinping Zhuchi Zhonggong Zhongyang Zhengzhijue Changweihui Huiyi (习近平主持中共中央政治局常委会会议 [Xi Jinping Chairs a Meeting of the Standing Committee of the Politburo]) (Xinhua, 7 Jan 2016).

¹¹³See the Supreme People’s Court of PRC (n 70).

¹¹⁴For the institutions responsible for constitutional supervision, see Constitution of the PRC 1982, arts 62 and 67.

¹¹⁵Party decisions are not covered by the Administrative Litigation Law, and Party organisations cannot be sued in administrative litigation because they are not recognised as ‘administrative organisations’. Similarly, the laws of procedure governing civil, criminal and administrative litigation say nothing about the Party’s power(s) in judicial decision-making, and judicial decisions ‘made’ by Party organisations backstage cannot be appealed. The only scenario where Party organisations can become a defendant in litigation is when they enter into commercial transactions in a private capacity, not in exercises of public power.

¹¹⁶Peerenboom (n 2) 256–262.

ineffective; as a result, ‘state organs with formal authority to annul or amend conflicting lower-level legislation rarely if ever exercise this authority’.¹¹⁷ Since announcing ‘to comprehensively advance governing the country according to law’, Xi Jinping has been emphatic about the importance of constitutional supervision. The same Decision to comprehensively advance ‘law-based governance’ called to ‘perfect the constitutional supervision’, to ‘strengthen the filing and review system to cover all normative documents’, and to ‘cancel and correct normative documents that violate the Constitution or the law’.¹¹⁸ The amendment to the *Legislation Law* in 2015 further strengthened the ‘filing and review’ system, and in 2018 when the Constitution was amended, the name of a special committee of the NPC, the ‘Law Committee’, was changed to ‘Constitution and Law Committee’ with the additional task of constitutional supervision.¹¹⁹ In the meantime, the CPC adopted in 2013 (subsequently revised in 2019) a document to regulate the supervision of intra-party legislation, requiring intra-party regulations and normative documents to be filed with upper-level Party organisations for review.¹²⁰

It seems that a comprehensive system is now in place to supervise all the legislation or quasi-legislation produced by both state institutions and Party organisations, except for one type – legislation enacted by the Party Centre. Furthermore, Party regulations and normative documents are not subject to the ‘filing and review’ system of the state and the NPC and its committees have no power to supervise Party legislation. However, if the Party’s legislative power is legalised, Party regulations would become a part of the country’s system of laws and should then be subject to constitutional supervision by the NPC and its committees. Along the same principle, the current practice that Party organisations cannot be sued in the courts would no longer be legally tenable. Nevertheless, subjecting Party legislation to constitutional supervision and allowing Party organisations to be sued in the courts would undermine its supremacy and absolute authority. If the NPC and its committees could annul a Party regulation and a court could rule that a Party decision is unlawful, the Party would no longer be supreme nor its authority unchallengeable.

Hence it is plain to see fundamental conflicts between legalising the CPC’s power and maintaining its supremacy with absolute authority. Publicity, equality, and generality are basic principles of law¹²¹ and adjudication is an indispensable requirement to give effect to law. In line with these basic principles and requirements, legislation and decisions made by the Party should be publicised and disputes regarding their constitutionality and legality should be reviewable and justiciable, if the Party’s rule is put on a legal footing and its legislative, administrative, and judicial powers were recognised by law. But publicity and constitutional review on Party legislation and adjudication concerning Party decisions would all undermine the CPC’s supremacy and absolute authority.

Of course, the Party could opt not to follow the basic principles and requirements of law. It could also dictate that the laws specifying the Party’s power and how it should be exercised, explicitly or implicitly, do not allow the disclosure of Party documents and decisions, constitutional review of Party legislation, or litigation against Party decisions. The Party could also simply ignore the laws that require publicity or allow for constitutional review and litigation against the Party. But such practices mean that either the Party continues ruling the country extralegally, or violates the laws and breaks the Party’s self-proclaimed commitments to ‘act within the limits of law’

¹¹⁷Keith J Hand, ‘Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony’ (2013) 26 *Columbia Journal of Asian Law* 139.

¹¹⁸See the CPC Central Committee (n 5).

¹¹⁹Keith J Hand, ‘Constitutional Supervision in China after the 2018 Amendment of the PRC Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System’ (2022) 23 *Asian-Pacific Law & Policy Journal* 137.

¹²⁰Zhongguo Gongchandang Dangnei Fagui He Guifanxing Wenjian Beian Shencha Guiding (中国共产党党内法规和规范性文件备案审查规定) [Regulations on Filing and Reviewing Intra-Party Regulations and Normative Documents of the CPC], issued by the General Office of the CPC Central Committee (4 Jun 2012), amended by the Politburo of the CPC Central Committee (30 Aug 2019).

¹²¹See generally Fuller (n 69).

and ‘govern the country according to law’. Not only does it raise the question of the point of legislating on the Party’s powers, but violation of laws would further damage its legitimacy. It would become much more apparent to the public that the Party ‘governing the country according to law’ and ‘acting within the limits of law’ is untrue.

In addition, such legislation would pose an additional risk to the Party due to its special function. Unlike the legal provisions on citizen rights, legislation on the CPC’s power would also govern the intra-elite relationship and provide rules for elites at the top to coordinate via power play. ‘Coordination is a powerful source of constitutional force’,¹²² and it would be much more risky and costly for the top leader to violate the rules established by legislation, because the interest of other elites would be affected. For example, if the rule to select senior Party leaders is set in a law but the top leader ignores it in order to choose the persons he likes, the law could be weaponised by other leaders who oppose his choices to fight back. If the Constitution vests the NPC and its Committees the power to annul Party legislation and the courts the power to overrule Party decisions, there would always be the risk that *de jure* power is used to challenge the *de facto* power of the Party. Considering Chinese leaders have paid particular attention to the lessons from the former communist states in Eastern and Central Europe, they would be extremely cautious about constitutional or any form of legal supervision over the Party. Many of these states established some kind of institution for constitutional supervision, and though they were tightly controlled by the communist parties, some of them did exhibit occasional independence.¹²³ The fact that all these countries eventually collapsed would be a stark message to Chinese leaders that no dispersion of power should be allowed, especially by setting up institutions that could overrule decisions of the top leader.¹²⁴ Dispersion of power, even if only in name, would increase the risk of infighting among Party leaders. It is suggested that Xi Jinping decided to centralised power onto himself, because he saw dispersed power during the reign of his predecessors causing huge problems.¹²⁵

Lastly, there is a practical problem to ensure the Constitution would still be coherent and meaningful. If the contents in the current Constitution are retained and the contents regarding the CPC’s power were added, the Constitution would be full of contradictions and absurdity. For example, the NPC would be the highest organ of state power responsible for legislation, but all the important decisions in legislation would have to be approved by the Party Centre; all the senior state leaders are elected by the NPC or its Standing Committee, but the Constitution would also stipulate how Party seniors choose persons for those positions; all the deputies of People’s Congresses were democratically elected, but only after candidates are selected and approved by the CPC; Chinese citizens are entitled to freedom of press and speech, but the CPC has the power to fully control and censor the press and media; the Party is empowered to promulgate laws, but those laws do not necessarily need to be publicised. This shows that supremacy and absolute authority are incompatible with the basic principles and requirements of law; it will be impossible to put these competing concepts in a legal document while ensuring that it is logical and congruent.

In conclusion, legislating on the Party’s power would have the effect of limiting its power, which would in turn undermine the Party’s supremacy and absolute authority. Fundamentally, supremacy and absolute authority contravene basic principles and requirements of law. As long as the CPC

¹²²Ginsburg & Simpson (n 100) 10.

¹²³Keith J Hand, ‘An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: The Constitution as Commander?’, in John Garrick & Yan Chang Bennett (eds), *China’s Socialist Rule of Law Reforms Under Xi Jinping* (Routledge 2016) 30–44.

¹²⁴*ibid.*

¹²⁵Yuwen Deng ‘“Xi Taiyang” shi Zhenme Shengqi de? Neng Zhao Duojiu? (“习太阳”是怎么升起的，能照多久?) [How did “Xi Jinping, the Sun” rise? How Long will it Shine?]' (New York Times in Chinese, 30 Oct 2018) <<https://cn.nytimes.com/opinion/20181030/how-xi-sun-rose-shine/>> accessed 20 Jul 2022.

insists on its supremacy and absolute authority, there is no prospect that its rule will be put on a legal footing.

A Cost-Benefit Analysis

So far, the potential cost to the Party from legislating on its powers has been demonstrated to be real and substantial. But in the end, if such legislation brings benefits and the benefits exceed the cost, leaders like Deng Xiaoping and Jiang Zemin in the past, who were renowned for pragmatism, should have allowed for such legislation and the possibility for it to happen in the future exists. Hence are the questions of what benefits such legislation would bring and whether the benefits outweigh the cost. For those so-called ‘constitutionalists’ advocating legalising the Party’s powers, the benefits are actually not much different from the conventional ones associated with constitutionalism in democratic countries. Their main goal was to put a legal limit on the Party’s powers, which they believed is necessary to protect individual rights and freedom, curb government excesses and overreach, prevent abuses and misuses of public power, and ensure certainty and stability.¹²⁶ These ‘constitutionalists’ accept the rule of the CPC, but they nevertheless believe that specifying the CPC’s power to establish law-based governance is a precondition for China to become prosperous and strong – an aspiration they share with the CPC. Even those far-leftists who propose ‘Party-led constitutionalism’ believe that legalising the CPC’s power is necessary for ‘the great rejuvenation of the Chinese nation.’¹²⁷

Obviously, these views on the benefits of legalising the Party’s power are diametrically opposed to the assessment of Party leaders. Party leaders have repeatedly warned against undermining the supreme leadership of the Party. Clearly, they do not see limiting the Party’s power as beneficial. Instead, they see it as a grave danger. They claim that only under the Party’s leadership can the Chinese nation rejuvenate and the ‘Chinese dream’ be fulfilled.¹²⁸ For them, political and social stability is the overriding priority and stability can only be maintained under the Party’s leadership.¹²⁹ Without CPC’s leadership, China would plunge into chaos or even disintegrate, and a prosperous and strong country would be unattainable. In terms of individual rights, they say that ‘survival right’ and ‘development right’ are the most important human rights and the Party has been tremendously proud of what has been achieved in reducing poverty and raising people’s living standard.¹³⁰ Again, the CPC claims that it is only under the Party’s leadership that the People’s living standard can continue to improve. In terms of preventing abuses and misuses of public power, the Party has been very proud of what has been achieved in its anti-corruption campaign, and its leaders believe that the current Party-led system works well. They are now openly talking about China’s ‘system advantages’ in curbing corruption.¹³¹ It is clear that Party leaders’ assessment of the cost and benefits of legalising the Party’s power is totally different from that of ‘constitutionalists’ and the reason for the difference is their views on the necessity to limit the CPC’s power.

Why do Party leaders view the Party’s leadership as being so important and the maintenance of its supremacy to be first and foremost? There are cynical arguments that the interests of the Party

¹²⁶See Tong (n 91); Qin & Ye (n 111).

¹²⁷Ke & Liu (n 95).

¹²⁸Shujun Zhang, ‘Zhongguo Gongchandang he Zhonghua Mingzu Fuxing de Sanci Weida Feiyue (中国共产党与中华民族伟大复兴的三次伟大飞跃) [The CPC and the three great leaps in the rejuvenation of the Chinese nation]’ (2018) 17 *Qiushi* [Seeking Truth].

¹²⁹Jinping Xi ‘Zhongguo Gongchandang Liangdao Shi Zhongguo Tese Shehui Zhuyi Zui Benzhi De Tezheng, (中国共产党领导是中国特色社会主义最本质的特征) [The CPC Leadership is the fundamental characteristic of the socialism with Chinese characteristics]’ (2020) 14 *Qiushi* [Seeking Truth].

¹³⁰The State Council Information Office, ‘Wei Renmin Mou Xingfu: Xin Zhongguo Renquan Shiye Fazhan Qishi Nian (为人民谋幸福：新中国人权事业发展70年) [Seeking Happiness for the People: China’s Human Right Progress in 70 Years]’ (White Paper, Sep 2019).

¹³¹Duowei Zou, ‘Wei Quanqiu Zhidu Fanfu Gongxian Zhongguo Zhihui (为全球制度反腐贡献中国智慧) [Chinese wisdom for systemic anti-corruption around the world]’ (Xinhua, 9 Sep 2019).

and the country are not necessarily convergent, and it is in the Party's rather than the country's interests that Party leaders jealously protect the Party's supreme leadership. But the official line is: the Party does not have its own special interests and the interests of the People and the country are the same as the Party's.¹³² To be fair, many Party leaders may truly believe the Party's supreme leadership is crucial to the well-being of the People and the country – a belief shared by many ordinary Chinese. Such a belief can be explained in view of China's history, culture, and traditions. For example, China is renowned for its collectivist culture and many Chinese people believe that it is justifiable to sacrifice individual rights and freedom for the benefits of a collective group;¹³³ and the history of 'a century of humiliation' has long been remembered in China and it is widely believed that disunity and weak leadership were to blame.¹³⁴ Due to the influence of these culture, traditions, and history, Party leaders as well as many ordinary Chinese may genuinely believe that the Party's supreme leadership is legitimate and crucial. As a result, their assessment of the costs and benefits of legislating on the Party's power are different from that of the 'constitutionalists'. Because traditions and culture are deeply rooted, it is hardly possible that the belief in the Party's supreme leadership and the cost-benefit assessment by Party leaders will change in the near future.

Last but not least, Party leaders and many ordinary Chinese see the current system with the Party's power unrestricted by law as working very well. They frequently point out the great achievements that the country has made since the founding of PRC, especially since the beginning of economic reform in 1978. Xi Jinping openly talks about the shifting world order and 'the rise of the east and the decline of the west'.¹³⁵ As China continues rising, Chinese leaders become increasingly confident in their current system. If they believe the current system works well, there is no reason to expect them to substantially change the system. It is true that one day China might run into crisis and the 'rejuvenation of the nation' might not be realisable. As a result, the Chinese people and their leaders' belief in their system might be shaken and they might see the need for change. However, if this indeed happens, any change that would be seen as necessary would be first made to the supremacy of the Party, because the supremacy of the Party is fundamental to the system and, if the Party is no longer supreme, the issue of legalising its power would become irrelevant.

In summary, while the 'constitutionalists' see the benefits of legislating on the Party's power, Party leaders believe such legislation would bring grave danger. The difference in the cost-benefit assessment is due to their diametrically opposite views on limiting the power of the Party and Party leaders' belief that the Party should maintain its supremacy with unchallengeable authority is deeply rooted in China's culture, traditions, and history. Moreover, as China continues rising, Party leaders have become increasingly confident in their current system with the Party's power unrestricted by law. There is no reason to expect that they will substantially change the system that they genuinely believe works well for China.

However, such a system of 'ruling without law' comes with a grave danger that political contenders might challenge the top leader and seize power by resorting to violence in the form of coups or even assassinations.¹³⁶ Moreover, smooth transfer of power from one generation to the next is rare in countries without the rule of law.¹³⁷ Why do Chinese leaders from Deng to Xi then still decide not to adopt

¹³²Hao Zhang, 'Women Dang Meiyou Ziji De Teshu Liyi (我们党没有自己特殊的利益) [Our Party does not have its own special interests]' (Renmin Ribao [People's Daily], 25 Aug 2020) <<http://theory.people.com.cn/n1/2020/0825/c40531-31835226.html>> accessed 20 Jul 2022.

¹³³Snejina Michailova & Kate Hutchings, 'National Cultural Influences on Knowledge Sharing: A Comparison of China and Russia' (2006) 3 *Journal of Management Studies* 43.

¹³⁴Suisheng Zhao, 'Chinese Nationalism and Its International Orientations' (2000) 115 *Political Science Quarterly* 1.

¹³⁵Chris Buckley, "'The East Is Rising': Xi Maps Out China's Post-Covid Ascent' (The New York Times, 3 Mar 2021) <<https://www.nytimes.com/2021/03/03/world/asia/xi-china-congress.html>> accessed 1 Aug 2022.

¹³⁶There is no shortage of such incidents of violence in the CPC's history. One prominent example is Lin Biao, a Marshal and Vice Chairman of the CPC Central Committee, who fled the country and died when an aircraft carrying him and several members of his family crashed in Mongolia on 13 September 1971.

¹³⁷When Mao died, there was a struggle for power at the top of the CPC until the 'Gang of Four' were arrested.

some legal rules to govern the power of the CPC and its top office holders, which could at least establish 'rules of the game' for power play and transition? There is no doubt those leaders are aware of the dangers. They must have reached the conclusion that the cost to limit the CPC's power by specifying its power in laws outweighs the risks of possible violence or chaos in power transition. On the other hand, they have developed some strategies to mitigate such risks. First, they recognise that the most powerful position in the Party and state is the Chairman of the Armed Forces. Deng Xiaoping chose not to assume the position of the General Secretary of the Party but to hold onto the office of the Chairman of the Armed Forces until he was too old to continue. Since then, the trinity practice that one person simultaneously holds the positions of the General Secretary of the Party, Chairman of the Armed Forces, and President of the State was established. This practice seems to have minimised the risk of military coups. Second, Deng Xiaoping introduced the age-based retirement system, term limit for the Presidency, and the practice of designating successors. As a result, the transition of power has since been peaceful. But Xi Jinping abolished the term limit and broke the previous practice of designating successors who would join the Politburo Standing Committee from the start of the top leader's last term. In the meantime, he has greatly consolidated power and become the most powerful leader since Mao Zedong. He also reintroduced the personality cult in Chinese politics, intensified indoctrination of 'Xi Jinping Thought', and promoted his close proteges to important and key positions. Only time will tell whether these strategies will succeed in ensuring smooth and peaceful transition. But even if transitions are not trouble-free, there is no strong reason to expect the current practice of 'ruling without law' would change, as long as serious crises can be avoided and the Chinese people and their leaders' belief in their one-party system remains unshaken.

Conclusion

'Governing the country according to law' has been a key component of the CPC's strategies to modernise China ever since the start of the 'reform and opening up' period. Generations of the CPC senior leadership have repeatedly proclaimed to 'govern the country according to law'. Such a strategy has long been established as a central part of the CPC's policy to develop and govern the country. It is evident that the CPC leadership strongly desires a strong and prosperous China with lasting order and stability and, to achieve the goal, they believe China should become a 'law-governed country' where the society operates in accordance with a comprehensive system of laws. However, despite more than 40 years' worth of legislations aiming to fulfil the Party's commitment of 'governing the country according to law', China still lacks laws on a constitutional matter that is central to its governance, ie, the power of the CPC to rule the country. The CPC's power is omnipresent, but no law provides for it and its exercise. Contrary to 'governing the country according to law', the CPC's governance is not based on law. The Party actually rules the country without law, and it has been indifferent or even become hostile under the leadership Xi Jinping towards the call to put its rule on a firmer legal footing by legislating on its power.

Such a contradiction and loophole are essentially due to the CPC's insistence on supremacy with unchallengeable authority in the governance of China. Specifying the Party's power and its exercise in laws would cause the Constitution to lose its window dressing and false blueprint functions, damaging the legitimacy of the CPC's rule. It would also send out a leftist political message, which would risk further eroding its legitimacy. Clearly, there is a conflict between legislating on the CPC's power and maintaining its supremacy with unchallengeable authority because the damage from such legislation to its legitimacy is detrimental to its authority. More importantly, Party leaders would not tolerate putting the CPC's rule on a legal footing, because this would subject its rule to law and set legal limits on its power, which would undermine their supremacy and absolute authority. In addition, such legislation would increase the risk of infighting among Party leaders due to its special functions and hence can weaken the Party's rule. The Constitution would also become utterly contradictory and incongruent.

In essence, legislating the Party's power so that it governs the country genuinely in accordance with law is irreconcilable with aims to maintain supremacy with unchallengeable authority. Fundamentally, supremacy and absolute authority conflicts with the basic principles and requirements of law. Once the CPC's powers and their exercise are specified in laws and follows the basic principles and requirements of law, the CPC will lose its supreme position and unchallengeable authority. Therefore, the prospect to legislate on the CPC's power so that its rule is governed by law is next to nil, so long as it continues demanding supremacy with absolute authority.

This article not only exposes the inherent contradiction, but also sheds new light on the nature and characteristics of the CPC's 'governing according to law'. It supports the view that the 'governing according to law' is far from being a system of 'rule of law', by demonstrating it does not even meet the minimal threshold for the 'thin' version of 'rule of law' that laws exist for both the ruling and the ruled to follow. China's ostensibly 'law-based governance' is widely recognised as actually being 'rule by law'. This article demonstrated that the essential characteristic of China's 'rule by law' is that law exists only to govern the people, but the ruling elite themselves are not subject to law vis-à-vis their power to rule. Moreover, this article revealed a serious flaw in the system of 'rule by law' where the rulers use law as a tool to rule. Though the rulers wish their country to be governed by law, they have to rule extralegally in order to maintain supremacy with unchallengeable authority. 'Rule by law' is intrinsically contradictory. It is 'mission impossible'. Finally, this article established that the attention on whether the CPC abides by the current Constitution and existing laws obfuscates the important fact that no law exists to regulate its rule, which means the CPC's rule is not subject to law.