Interrogating Illiberalism Through Chinese Communist Party Regulations

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Can the exercise of political leadership, which is meant to transcend laws, nevertheless, be governed by formal rules? This Article examines the relationship between the illiberal governance project and rule-based governance in the context of the Chinese Communist Party’s internal “intraparty” regulations. In the past few years, Chinese Communist Party leaders have sought to strengthen the Party’s political leadership by extending its discipline inspection mechanisms further into Chinese state organs. The Party leaders have also sought to regulate Party cadres’ uses of power more closely through intraparty regulations. The efforts to strengthen the Party’s political leadership through improving intraparty regulations point to a number of puzzling contradictions and even paradoxes in the illiberal governance project. Rules make the Party more governable and at least potentially limit space for corruption and other unsanctioned personal projects; but at the same time, they provide opportunities for resisting Party leadership and divide the Party into organizational departments with conflicting interests. This Article discusses such contradictions and paradoxes within the context of global illiberal political thought and argues that prominent solutions to the tension between illiberal political leadership and rule-based governance mask uncertainty about what illiberal political leadership actually entails.

Introduction .......................................................... 268

I. Rules and Political Leadership in Illiberal Political Thought .............................................. 273
   A. Privileging the Political ........................................... 274
   B. Appealing to the Irrational ............................... 278

II. CCP Intraparty Regulations in Institutional and Historical Context ....................................... 281
   A. Institutional Context: A Rationalist Narrative .......... 282
   B. Historical Context: An Irrationalist Narrative .......... 290

III. Decoupling Political Leadership from Rules ............................................................... 295
   A. Intraparty Regulations versus State Law ............... 296
   B. Intraparty Regulations versus Political Leadership .... 300

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Introduction

"Without a refined intraparty regulatory system it would be difficult to put the Party in charge of the Party."1

"What is the meaning of ‘the Party’ in the leadership of the Party?"2

"The Communist Party is in the middle of the law, under the law, and above the law."3

This Article examines the illiberal governance project in the context of the Chinese Communist Party’s (CCP) internal (or “intraparty”) regulations.4 At the center of this inquiry is a question about the relationship between political leadership and rule-based governance in the illiberal governance project: can the exercise of political leadership, which is meant to transcend laws, nevertheless, be governed by formal rules? This question is important for considering the global appeal of ostensibly rationalist illiberal governance projects.5

The distinction between “liberalism” and “illiberalism” is, of course, a highly abstract generalization. On the highest level of abstraction, illiberal political thought can be said to undermine autonomous legal processes and individual rights protections, whereas liberal political thought can be said to defend and expand such processes and rights.6 To be sure, the

4. See id.
5. For definitions of rationalism, see infra text accompanying notes 78-80, 116-119 and 165.
6. See, e.g., LEWIS D. SARGENTICH, LIBERAL LEGALITY: A UNIFIED THEORY OF OUR LAW 64-66, 72 (2018) (describing liberal legality as a “political position that prizes equal liberty” and its absence as “dependence on the grace of the authorities” instead of law); Mark Tushnet, The Possibility of Illiberal Constitutionalism?, 69 FLA. L. REV. 1367, 1368-69 (2017) (defining liberal constitutionalism through the principles of the equality of all citizens and the priority of the right over the good). To be sure, terms other than illiberalism are available for describing “the Other” of liberalism. See, e.g., Mark Tushnet, Authoritarian Constitutionalism, 100 CORNELL L. REV. 391, 396-97 (2015) (distinguishing between different types of authoritarian constitutionalism). In his classic text on fascist law, Ernst Fraenkel describes nineteenth century Prussia as “authoritarian” and Nazi Germany an “absolute dictatorship.” ERNST FRAENKEL, THE DUAL STATE 12, 167 (2017). Eva Pils defines contemporary China as “authoritarian,” but not as “totalitarian.” According to Pils, the Chinese state is not sufficiently centralized to meet the criteria of a totalitarian system. See EVA PILS, HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AUTHORITARIANISM 6 (2018).
actual differences between self-consciously illiberal and liberal forms of political and legal thought are not reducible to such neat categories. Instead of entirely negating the assumptions of liberal political and legal thought, the illiberal rhetorical strategy is to destabilize and limit autonomous legal processes and individual rights protections. Conversely, liberal political and legal thought provides various means for the holders of executive power to restrict legal processes and rights protections. The distinction between “liberalism” and “illiberalism” is, therefore, best understood as a matter of identities and sensibilities, rather than as categorical theoretical disagreements.

As this theoretical framework implies, the aim here is not to describe Chinese law “authentically” without foreign categories of political and legal thought. Instead, the People’s Republic of China (PRC) provides for this Article an intricate example of a contemporary illiberal governance project. The PRC is a self-declared people’s democratic dictatorship (albeit with multiple nominally distinct political parties), whose leadership is prone to draw contrasts between its system of governance and Western “liberalism.”

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7. For instance, many assumptions that form “liberal legalism,” the classic Western paradigm of law and development, would not be out-of-place in Chinese mainstream legal thought. In a seminal text on law and development, David Trubek and Marc Galanter defined “liberal legalism” as a paradigm, which assumes that (i) “society is made up of individuals, intermediate groups and the state”; (ii) that “the state exercises its control over the individual through law”; that (iii) “rules achieve social purposes”; (iv) that rules are “are enforced equally for all citizens”; (v) that “the legal order applies, interprets, and changes universalistic rules”; (vi) and that “[f]inally, the behavior of social actors tends to conform to the rules: officials are guided by the rules, not by personal, class, regional or other bases of decision making; a large number of the rules will be internalized by most of the population.” See David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. Rev. 1062, 1071–72 (1974).

8. For instance, Germany’s National Socialist leaders called for strict obedience to the law, which was the embodiment of the Führer’s will. In his treatise on law in the Third Reich, Ernst Fraenkel demonstrates this point through the following quote from Hermann Göring: “There may be circumstances in which the application of the ordinary law may lead to a profound injustice. The application of law even in such cases is not a matter to be decided arbitrarily. The judges are bound by the law which is the promulgation of the Leader’s will.” Fraenkel, supra note 6, at 74. At the same time, Fraenkel described the political sphere in National Socialist Germany as “a vacuum as far as law [was] concerned.” Id. at 3.


European illiberal political thought. A key argument of nineteenth and twentieth century European illiberal political theorists was that liberal legal institutions could not replace political leadership in the way their liberal proponents assumed.\textsuperscript{12} Calls for “law and order” played a role in the illiberal governance project, but the ultimate goals of illiberal politics were not meant to be achieved through or determined in a legal process.\textsuperscript{13} The political leader could choose to be bound by law, but ultimately the leader was unaccountable to legal processes. As Joseph de Maistre, a critic of the French Revolution and the European Enlightenment project, noted, “God obeys laws, but it was He who made them.”\textsuperscript{14}

The modern inheritors of this line of political thought are less vocal about the critique of liberal legal institutions than their predecessors and see much use for law, rights, and courts in the illiberal governance project.\textsuperscript{15} Nevertheless, contemporary promoters of illiberal political thought continue to privilege political leadership over legal processes.\textsuperscript{16} This remains the case also in China: despite having made significant strides towards professionalizing the Chinese legal system, Chinese Communist Party (CCP) leaders, CCP ideologues, and conservative socialist legal scholars imply that legal processes are ultimately conditional on political decision-making processes.\textsuperscript{17}
The difficulty with the illiberal narratives about political leadership is not that they describe extra-legal political interference into the legal system (which they, in fact, often times do not do). What is, however, implausible about the illiberal narratives on political leadership (at least to non-believers) are the various attempts to describe law-transcending political leadership as being coherent and harmonious with rule-based governance. This Article argues that such coherence and harmony should be seen as aspirational goals, much as the liberal narrative about the priority of procedural justice over substantive conceptions of the good should be seen as aspirational.

As a means for demonstrating the aspirational quality of the illiberal narratives on rules and political leadership, this Article analyzes Chinese political statements and scholarly debates on CCP’s intraparty regulations. A focus on non-legal political regulations, instead of the more common law-politics dichotomy, highlights the irrationalist aspects of the illiberal governance project: “the Party” may be above the law, but is “it” also above its own regulations?

Intraparty regulations are a set of CCP’s internal rules, which for the most part govern Party members’ conduct and the institutional relations between various Party organs. According to one Chinese scholar, intraparty regulations operate as the brains and the nerve system of the 90-million member CCP, enabling the Party leadership to control the body and limbs of this vast organization. Without these regulations, “it would be difficult to put the Party in charge of the Party.”

see Xu, supra note 3. The subtlety of the balancing act between law and politics is visible in the PRC Constitution, which states in Article 5 that the PRC “practices ruling the country in accordance with the law and building a socialist country of law.” Article 1 of the PRC Constitution decrees that “[t]he leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics” and that disrupting “the socialist system,” which comprises CCP leadership, “by any organization or individual is prohibited.” XIANFA art. 1, 5 (2018) (China).

19. See, e.g., infra notes 83, 89, 259, 300–01.
21. The materials for this Article comprise two distinct sources: (i) statements by CCP leaders and ideologues and (ii) Chinese legal scholarship on intraparty rules. Scholars are better able to present insightful views about intraparty rules than CCP leaders and ideologues, but their views do not represent the official Party line. It also needs to be acknowledged that, while some of academic texts are surprisingly frank about the conceptual and practical problems within the Chinese Party-state relationship, Chinese academic discourse is severely constrained by censorship.
22. For irrationalism, see Duncan Kennedy, A Semiotics of Critique, 22 CARDOZO L. REV. 1147, 1150 (2001) and infra text accompanying notes 78 and 165. For the Party’s position vis-à-vis law, see, e.g., Xu, supra note 3.
24. SONG, supra note 1, at 116-17.
25. Id.
Intraparty regulations are a means to bring the Party’s “political” leadership to bear. In recent years, the CCP’s leadership has sought to increase the rule-like quality of these regulations and extend the scope of the Party’s discipline supervision to fields that were formerly (and formally) governed by state law.26 Perhaps the most significant institutional development in this effort was the establishment of a new state organ, the National Supervisory Commission (NSC) and its local branches through a constitutional amendment in March 2018.27 The new organ expanded the scope of the Party’s discipline inspection methods by vastly increasing the number of officials under the Party-led discipline supervision.28 While the legislation establishing the NSC comprises some procedural safeguards to prevent rights abuses by its staff members, the organ was deliberately established as a non-judicial entity, which does not answer to Chinese people’s courts.29 At the same time, a stated aim of these reforms was to regulate political leadership through the Party’s rule-based system, which was closely linked to formal state law.30 Again, the question is whether the Party’s discipline supervision and other forms of illiberal political leadership are reducible to rule application.31

This Article is structured as follows. Part I of this Article identifies two key themes on the relationship between rules and political leadership in canonic illiberal scholarship: the privileging of the political over the legal and the use of irrationalist images of political power. Part II provides institutional and historical context for the Chinese debate on intraparty regulations, demonstrating that the rationalist attempts to systematize intraparty regulations have coexisted with the expansion of self-consciously situa-


28. The Xinhua news agency reports that in Beijing a pilot program on the NSC increased the total number of officials under supervision from 210,000 to 997,000. Lu Hui, China Focus: Supervision Law Gives Legal Teeth to China’s Graft-Busting Agency, XINHUA (Mar. 20, 2018), http://www.xinhuanet.com/english/2018-03/20/c_137053224 .htm [https://perma.cc/NBG3-6BXQ].


31. See infra Part IV.
tional and political discipline inspection methods, which may be described as irrationalist. Part III explains that in the Party ideology intraparty regulations do not constitute “the political,” which could be privileged over the legal. Part IV finally identifies a number of puzzles in the relationship between political leadership and rule-based governance in the illiberal governance project and argues that there is considerable uncertainty about the nature of political leadership in canonic strands of illiberal political thought.

I. Rules and Political Leadership in Illiberal Political Thought

This section identifies themes on the relationship between rules and political leadership in illiberal political thought through the writings of certain canonic illiberal European scholars.32 A few caveats are in order at the outset of this discussion. The intention here is not to suggest that the European thinkers discussed below have been genealogically important for the development of political and legal thought in China, although traces of such influence certainly exist.33 Chinese socialist jurists received key elements of their approach to law from the Soviet Union in the 1940s and 50s rather than from illiberal Catholic or fascist legal scholarship.34 It is also important to note that conservative socialist Chinese legal scholarship was (and is) produced in a different social context than European illiberal political thought. While most Chinese conservative socialist legal scholarship has been produced in a society already governed by a single, self-consciously illiberal party, influential European counter-canonic texts were written during times of crises in constitutional monarchies and republics.35 Therefore, the analogy to crisis-ridden European societies may not be the most appropriate reference point for a comprehensive understanding of law and politics in today’s China. It must also be acknowledged that the concept of illiberalism has far less descriptive value than, for instance, the term socialist legal thought. In contrast to twentieth century socialist

33. Some illiberal political and legal theorists, such as Carl Schmitt, have been closely studied by liberal and illiberal Chinese scholars. See, e.g., JIANG SHIGONG, FAZHI YU ZHILE GUOJIA ZHUANXING ZHONG DE FALU [LEGAL SYSTEM AND GOVERNANCE: LAW IN A TRANSFORMING STATE] 16 (2003). For the role of Schmitt’s political thought in contemporary China, see Charlotte Kroll, Reading the Temperature Curve: Sinophone Schmitt-fever in Context and Perspective, in CARL SCHMITT AND LEO STRAUSS IN THE CHINESE-SPEAKING WORLD: REORIENTING THE POLITICAL 103, 110 (Kai Marchal & Carl K.Y. Shaw eds., 2017); Carl K.Y. Shaw, Toward a Radical Critique of Liberalism, in id. at 37; Zheng Qi, Chinese Political Constitutionalism and Carl Schmitt, 1 CARL-SCHMITT-STUDIEN 43, 43 (2017); Ryan Mitchell, The Decision for Order: Chinese Receptions of Carl Schmitt Since 1929 (Aug. 7, 2019) (unpublished manuscript) (on file with author). For the concept of dictatorship in Marxism, see infra text accompanying note 110.
jurists, who shared a vocabulary and grammar derived from Marx, Engels, and Lenin, illiberal political movements have not been united by a single canon of social theoretical texts, nor have they consistently defined themselves as “illiberal.” Finally, it is clear that the scholars discussed in this section represent only a fraction of potential critiques against liberalism, many of which are presented from within the liberal credo.

A. Privileging the Political

With these caveats in mind, it is possible to point out that Chinese political leaders, Party ideologues, and conservative scholars share similar argumentative strategies with foreign advocates of illiberal political thought. One such strategy is the privileging of political leadership—both by individual Party cadres and the abstract entity of “the Party”—over legal rules and institutions and, by some accounts, over all rule-based processes. Seminal illiberal political theorists in Europe sought to establish, at least rhetorically, the unlimited authority of the political leader (be it the King, the Pope, or the Führer) over the legal system. Joseph de Maistre, the above-mentioned critic of the French Revolution and the Enlightenment, argued that no human society could “exist without government, nor government without sovereignty, nor sovereignty without infallibility.” The sovereign could choose to be bound by laws enacted by a legislature, but by definition the sovereign was above the law: there could be no “legitimate national assemblies without him.” Neither could tribunals ultimately bind the sovereign, since any tribunal allowed to do so would be part of the state, the head of which was the infallible sovereign. The same was true of constitutions, which in de Maistre’s view were unable to meaningfully constrain the sovereign. If the sovereign established the constitution, he or his successors could violate it; if somebody more power-

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37. For this point and other strands of anti-liberalism, see HOLMES, supra note 10, at xv, 5.

38. At issue here is not as much governmental legitimacy—that is, the question whether the ultimate bearer of sovereignty is the King, the Parliament, or the People—as is the question whether an autonomous legal system acts as the final arbiter on questions of the good. Regarding governmental legitimacy, see Quentin Skinner, A Genealogy of the Modern State, 162 PROC. BR. ACAD. 325, 338 (2009). De Maistre contends that “[t]he people are made for the sovereign and the sovereign for the people, and, both the one and the other, in order that there may be a sovereignty.” DE MAISTRE, supra note 13, at 115.

39. The contemporary Chinese approach is more subtle than this. See supra note 17.

40. Id. at 11. De Maistre did not use the word “liberalism” here. See Holmes, supra note 10, at 13.

41. See DE MAISTRE, supra note 13, at 20.

42. Id. at 11.

43. See id. at 117.
ful than the sovereign established the constitution, “by the very act of establishing the constitution, he would dethrone the sovereign.”

Consequently, there was no rational basis for deciding when a person was entitled to resist sovereign power. The sovereign was legitimate in and of itself.

At the same time, de Maistre did not argue that political leadership was entirely free of all normative ties, nor did he conflate sovereignty with the individual will of a single political leader. In de Maistre’s view the sovereign could not act free of all constraints: “No government has the power to do whatever it pleases. Whether it be a law, a custom, conscience, a tiara, or a poniard,—there is always something.” De Maistre both described the sovereign as an infallible, “supreme” entity, which was free of constitutional constraints, and acknowledged that legal processes could bind the powers of the sovereign in several meaningful ways.

De Maistre emerged from an earlier Machiavellian tradition of statecraft, which held that in extraordinary circumstances necessity excused a leader who violated common laws and morals. The Machiavellian tradition gave rise to the doctrine of state necessity, or *raison d’état*. This doctrine sought to articulate what was “expedient, useful and beneficial” for leaders of a state to do in order to reach “the highest point” of its existence.

Pre-Enlightenment (and pre-liberal) promoters of this doctrine both argued that laws and morals should not bind the sovereign and called for self-restraint and ethical contemplation when sovereigns intended to act for *raison d’état*. For instance, Gabriel Naudé, a seventeenth-century French scholar, explained that the unlawful, violent actions of a prince (Naudé called these *coup d’état*) were available only in extraordinary situations. This was the case, for instance, when establishing new principalities and kingdoms, and whenever “the benefit” of such actions was “to lessen or abolish some rights, privileges, franchises, and exemptions which the subjects enjoy to the prejudice and diminution of the power of the prince.”

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44. See id. at 118.
45. See id. at 118–20.
46. Id. at 177 (noting that “every government is good when it has been established, and has subsisted for a long time unquestioned.”).
47. Id. at 178–79.
48. Id. at 69.
51. Id.
52. See id. at 39–40, 43.
53. See id. at 199, 203.
54. Gabriel Naudé, *Political Considerations upon Refin’d Politicks, and the Master-strokes of State, As Practis’d by the Ancients and Moderns* 67, 76, 89 (Dr. King Trans., 1711). I thank Martti Koskenniemi for this source.
While the promoters of Machiavellian statecraft allowed the sovereign’s unlawful actions in extraordinary circumstances, self-consciously illiberal scholars took political thought further towards normalizing a dictatorship unconstrained by laws. This was achieved through a generalized critique of liberal legal proceduralism. Juan Donoso Cortés, a Spanish political theorist and an important figure in European illiberal canon, argued that liberalism’s fatal weakness was its fixation with procedural legitimacy. Liberals wrongly assumed that “when the government [was] legitimate, evil [was] impossible; and on the contrary, when the government [was] illegitimate, evil [was] inevitable.”55 Proceduralism also caused liberals to ignore substantive questions of the good: they failed to proclaim “I affirm, or, I deny” and to be decisive on questions of “truth and error, injustice and justice, stupidity and honesty.”56 Donoso believed that the period of liberal indecision was short, and only possible when the world did not know “whether to go with Barabbas or with Jesus.”57 When the masses flowed “through the squares and the streets” calling for a political leader, liberal legality could not control them.58

From this premise, Donoso concluded that the restoration of order and return to Catholic monarchy required an end to the inconclusive liberal debates.59 As such Donoso did not have a principled objection against legality: “When the letter of law is enough to save the society, the letter of law is the best.”60 However, Donoso believed that the constitutional governments of his time were “nothing more . . . than . . . skeletons without life.”61 Donoso argued that these constitutions should not have constrained the dictatorship in its project to restore Christianity.62 In Donoso’s view, the collapse of the old European religious order and the emergence of new technologies, such as “the electric telegraph” and police force, had prepared the world for “an enormous, colossal, universal, and immense tyranny.”63 What was needed to resist this impending tyrannical society was, ironically, the establishment of a faith-based political dictatorship.64

Carl Schmitt, the prominent German jurist and a member and supporter of the National Socialist Party, regarded Donoso as “one of the greatest political thinkers of the nineteenth century.”65 Schmitt praised Donoso for abandoning legitimacy from the theory of sovereignty,66 and for realizing that, “in the face of radical evil,” the only solution was a dictatorship,

55. Cortés, supra note 13, at 173.
56. Id. at 174–75.
57. Id. at 174.
58. Id. at 175.
60. Id. at 46.
61. Id. at 57.
62. See id.
63. Id. at 55.
64. See id.
66. See id.
not legality. Following Donoso, Schmitt derided liberalism for its misplaced trust in legal reasoning and legal procedures. Liberalism, according to Schmitt, failed to appreciate the true nature of “the political”: that is, the fact that a political decision about whether a person was a “friend” or an “enemy” preceded and overrode every legal process.

Whereas Donoso had (at least ostensibly) hoped to restore Catholic monarchy with its legal framework, Schmitt sought to normalize and domesticate what he saw as the dictatorial function of sovereignty: that is, “decisionism,” or decision-making free of “all normative ties” and claims to legitimacy. Schmitt first expounded his criticism of liberalism in the context of the 1920s German constitutional crisis, but suggested that this criticism extended beyond its original context. Schmitt argued in Political Theology that every legal decision, including a routine one, relied ultimately on a “friend-enemy” distinction and contained a “moment of indifference from the perspective of content.” The rule determined nothing, the exception determined everything, and the person (or entity) deciding the exception was the sovereign, exercising “unlimited authority” in this instance.

While Schmitt privileged “the political” over the legal, this view was not necessarily incompatible with the conception that a legal system operated ordinarily through formal (even logically formal) rules, which were distinct from “the political.” An adherent to Schmittian decisionism could hold that formal rules applied until, and only until, an extraordinary moment called for a “political” decision. The political remained privileged under such an interpretation, but a rationalist legal system could play


68. See SCHMITT, supra note 13, at 23, 26, 69-70.

69. SCHMITT, POLITICAL THEOLOGY, supra note 67, at 12, 66.

70. Id. at 30.

71. SCHMITT, supra note 13, at 1; SCHMITT, POLITICAL THEOLOGY, supra note 67, at 12.

72. Andreas Kalyvas, Who’s Afraid of Carl Schmitt?, Phil. & Soc. Criticism, Sept. 1999, at 87, 95. Max Weber famously identified logically formal rationality as the highest state of the development of law. In logically formal rationality, “legally relevant characteristics of the facts are disclosed through the logical analysis of meaning,” after which “definitely fixed legal concepts in the form of highly abstract rules are formulated and applied.” MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY: VOLUME II 657 (Guenther Roth & Claus Wittich eds., 1978). Weber contrasted logically formal rationality with substantive rationality. Substantively rational legal reasoning occurred according to “ethical imperatives, utilitarian and other expediential rules, and political maxims.” Id. Weber viewed formal rationality as the more advanced, “modern” form of rationality. Id. Substantive rationality was based on “ethical, political, utilitarian, hedonistic, feudal ... or whatever” criteria and “full of ambiguities.” MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY: VOLUME I 85 (Guenther Roth & Claus Wittich eds., 1978).

73. See Kennedy, supra note 22, at 1164-65.
an important role in the illiberal governance project.\textsuperscript{74} This argument had, however, its downside for an illiberal government: the more it appeared that formal rules could govern illiberal governments, the less urgency there was to destabilize formal law and to deny foes of the regime (however meager) legal protections.\textsuperscript{75} Such an outcome would also have been contrary to the underlying objective of canonic illiberal scholarship, which was precisely to demonstrate the weakness of (liberal) legal processes.

B. Appealing to the Irrational

The above-described illiberal scholars presented themselves as unsentimental realists who supposedly understood the realities of power better than their liberal colleagues.\textsuperscript{76} At least some of the readers of this scholarship experienced it as an awakening to the realities of political life.\textsuperscript{77} At the same time, canonic illiberal scholarship made use of irrationalist, even mystical images of political power.

The term “irrational” can be used pejoratively, but this term need not be normative, nor does it have to be exclusively associated with illiberalism. According to one sense of the term, irrationalist thought describes its objects of understanding (say, the God-like powers a dictator or the inalienable rights of man) as objects that exist beyond the physical world, which is observable through rationalist research methods.\textsuperscript{78} Rationalist thought, in contrast, describes its objects of understanding as being explainable through empirical and scientific research methods.\textsuperscript{79} Another way to define irrationalism is to juxtapose it with the Weberian rationalization process, as described more fully in Section III.B below: in this sense, irrationalism forms a contradiction with “rational” rule-based processes.\textsuperscript{80}

Irrationalist arguments played a role in illiberal scholarship alongside with rationalist arguments. De Maistre’s treatment of the relationship between the Pope’s infallibility and canonic law (the regulations governing the Catholic Church) is particularly interesting in this regard. In his treatise on papal supremacy, de Maistre considered the question whether

\textsuperscript{74} For such an interpretation of the relationship between rational rules and irrational politics in the Third Reich, see \textit{Fraenkel, supra} note 6, at 206. In line with Schmitt’s distinctions, Fraenkel interpreted the National Socialist political sphere as a norm-free space, which coincided and occasionally suspended norm-bound rational law. In the legal sphere, however, formal rationality took priority over National Socialist principles. \textit{See id.} at 3, 77.

\textsuperscript{75} Fraenkel explains that National Socialists both insisted on formal legal rationality and did so in front of a limited legal audience. \textit{See id.} at 74.

\textsuperscript{76} \textit{See Berlin, supra} note 35, at 146, 167 (describing de Maistre as a realist who focused on power); \textit{Muller, supra} note 32, at 8 (citing Schmitt’s statement that he did not have a method but instead “let the phenomena approach [him]” and describing readers’ reactions to Schmitt).

\textsuperscript{77} \textit{See Muller, supra} note 32, at 8 (describing readers’ reactions to Schmitt). Schmitt himself read de Maistre and Donoso as sober realists, who did not theologize. \textit{Schmitt, Political Theology, supra} note 67, at 61-62.

\textsuperscript{78} \textit{See Kennedy, supra} note 22, at 1150.

\textsuperscript{79} \textit{See id.}

\textsuperscript{80} \textit{See infra} text accompanying notes 116-119 and 165.
canon law was binding upon the Pope, whom he otherwise described as an infallible, “supreme” sovereign. De Maistre rejected the possibility that the Catholic Church could hold the Pope accountable through a circular argument: “how could men, subject to a power—and subject they are, since it convokes them—be superior to that power, although separated from it?” The idea that the Catholic Church could be divided against itself was, in de Maistre’s view, “extravagant” and unthinkable. At the same time, de Maistre acknowledged that the exercise of papal authority was, in fact, tied to a rule-governed process: “the Pope alone [could not] revise a dogma decided by himself.” De Maistre also recognized that his emphasis on sovereign infallibility was a rhetorical tactic made in bad faith. Sovereign infallibility, de Maistre argued, was a necessary fiction needed to prevent societies from disintegrating into warring factions: “we are obliged to suppose infallibility, even in temporal sovereignties (where it is not), on pain of beholding society dissolved.” In contrast to his bad faith arguments about secular governments, de Maistre was able to assume that the Pope actually was an infallible sovereign because of his faith. Jesus Christ had given the Pope “the keys of heaven, with infallibility of faith.”

Donoso’s approach to dictatorial power was also faith-based. Donoso compared political dictatorship to governance by God and suggested that both God and a dictator could transcend existing laws and social realities: “There are some direct, clear and specific times when [God] manifests his sovereign will by breaking the laws he himself has imposed, thereby bending the natural course of things.” In the same way as God was able to change the course of things by violating laws, Donoso prayed that the miracle of a law-violating dictatorship could restore Catholic society and its conceptions of legitimacy.

The relationship of Carl Schmitt’s scholarship with this history is a controversial issue. Schmitt’s views about preferable state institutions changed from context to another, as did his descriptions of these institu-

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81. See de Maistre, supra note 13, at 69.
82. Id. at 14.
83. See id.
84. See id.
85. Id. at 108. While Carl Schmitt argued that de Maistre supported his own view that political leadership was free of all normative ties, he also hinted at the performative quality of de Maistre’s approach to this question: “De Maistre spoke with particular fondness of sovereigny,” wrote Schmitt. Schmitt, Political Theology, supra note 67, at 55.
86. See de Maistre, supra note 13, at 34–35.
88. Donoso Cortés, supra note 59, at 48.
89. Id. at 48, 55.
90. Schmitt scholars disagree about how closely Schmitt’s theories actually work to glorify dictatorships. See Kalyvas, supra note 72, at 92–93. After the war, some German jurists were able to describe Schmitt as the father of West Germany’s liberal constitutionalism. See Muller, supra note 32, at 65.
Here it is helpful to note the structural similarity (which Schmitt himself pointed out) between his arguments about the foundation of social order and the theological arguments in de Maistre’s and Donoso’s texts. As explained above, Schmitt argued that every legal decision was ultimately free of normative constraints. This meant that sovereignty was not constructed through or within a legal structure, nor vested in the state in “an absolutist” sense, but instead a fact established in concrete instances. Every moment of rule application was, therefore, potentially a decisionist moment unconstrained by rules. At the same time, Schmitt was no anarchist, but a believer in order. How could order be established if rules were ultimately unable to constrain decision-making? Schmitt’s “politically” motivated answer was that in Nazi Germany, Adolf Hitler was the ultimate rule-applier and the person protecting the Reich’s legal system. Schmitt’s more philosophically reasoned answers, which he gave in various contexts, relied on the concept of the state, the notion of the political and the idea of a “concrete” social order. In The Concept of the Political, Schmitt asked himself, which “social entity” decided “the extreme case and determine[d] the decisive friend-and-enemy grouping.” The answer was not that a dictator, appointed as the “sovereign,” decided this grouping, but that it was “the State” that made this ultimate determination. The state made the friend/enemy distinction, and it was also manifested by this distinction. The state was the only “decisive” political entity, transcending all other social groupings.

Despite using such quasi-metaphysical phrases, Schmitt did not argue that the state and the political were moved by a divine force or the God-like powers of a dictator. Indeed, Schmitt criticized German legal theorists for deriving their conception of the state from the theological fiction of the divine right of kings, thereby mystically reproducing the state as an “abstract person.” Instead of God or a divinely acting dictator, Schmitt

92. Schmitt, Political Theology, supra note 67, at 37.
93. See supra text accompanying notes 69–71.
95. Kalyvas, supra note 72, at 95.
97. Schmitt, supra note 13, at 43. In this context Schmitt immediately apologized for using “the imprecise liberal concept of ‘social.’” Id. at 43.
98. Id. at 46.
100. Schmitt, supra note 13, at 45.
explained in his treatise on constitutional law that the normative order of the state rested upon the “actually existing element of concrete order.”

In another text written after the Nationalist Socialist takeover of power in Germany, Schmitt explained that a rule, far from creating the social order, was “only a component and a medium of order.” Similarly, an independent judge was not in office because of “rules and norms,” but because of the fact of “concrete judicial organization and concrete personnel appointments and nominations.” Neither was the Pope infallible because he established the order of the Church; the Pope was “only infallible in the power of his office.” Schmitt’s appeals to the concrete order were self-consciously empiricist and, according to the vocabulary of this Article, rationalist, and yet they played a similar rhetorical role as de Maistre’s and Donoso’s irrationalist appeals to God: the concrete social order was beyond reasoning and questions about its legitimacy.

In conclusion, canonic illiberal scholarship sought to establish political leadership as something that existed outside legal rules and institutions—and, in some instances, other rule-based processes—justifying it either as a matter of faith or describing it as an established fact. Similar argumentative strategies (and contradictions and paradoxes created by them) can be seen in the Chinese explanations for the CCP’s governance project.

II. CCP Intraparty Regulations in Institutional and Historical Context

As mentioned above, not all aspects of European illiberal scholarship are relevant to the study of the CCP’s governance project. Socialist legal thought in China and elsewhere differs from conservative Christian and fascist approaches to the law, among other things, in its adherence to Karl Marx’s dialectical view of history. Following Marx, mainstream socialists argued that socialist law, on a whole, was dialectically superior to capitalist law. The dialectical development of history would ultimately cause the state to wither away, but until that day socialist law was “near and dear” to citizens of a socialist country. Moreover, in contrast to de Maistre, Donoso, and Schmitt, legal theorists in the Soviet Union and other socialist countries did not have to go out of their way to establish theoretical

102. CARL SCHMITT, CONSTITUTIONAL THEORY 65 (2008).
104. Id. at 51.
105. Id. at 60.
grounds for suspending the formal legal system. This was already catered for by the Communist Parties ruling these countries. Finally, as for instance Patricia Thornton has argued, China’s idiosyncratic nature renders Western categories, some of which are used in this Article, ineffective for understanding China’s complexity.\footnote{108. PATRICIA M. THORNTON, DISCIPLINING THE STATE: VIRTUE, VIOLENCE AND STATE-MAKING IN MODERN CHINA 9 (2007).}

Nevertheless, certain themes in canonic illiberal scholarship are helpful for examining the role of political rules in the Chinese “people’s democratic dictatorship.”\footnote{109. XIANFA art. 1 (2018) (China).} After all, Chinese communists derived the concept of the dictatorship from Karl Marx and Lenin, who had developed it in the context of nineteenth century illiberal political thought.\footnote{110. See generally Mao Zedong, On the People’s Democratic Dictatorship: In Commemoration of the Twenty-eighth Anniversary of the Communist Party of China (Jun. 30, 1949), https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm [https://perma.cc/5S5G-8RS9] (attributing the concept of dictatorship to Marx and Lenin); Hal Draper, The ‘Dictatorship of the Proletariat’ from Marx to Lenin, \textit{MONTHLY REVIEW PRESS} (1987) (describing the intellectual context of Marx’s and Lenin’s uses of dictatorship), https://www.marxists.org/subject/marxmyths/hal-draper/article2.html [https://perma.cc/FQQ2-UWCG].} It also seems true that the Chinese experience is helpful for understanding European illiberal scholarship: instead of using canonic illiberal scholarship to analyze China, China can be used to analyze canonic illiberal scholarship. Even more importantly, Chinese political institutions and scholarship provide context for assessing the global appeal of ostensibly technocratic illiberal governance projects.\footnote{111. For Chinese technocratic authoritarianism in a global context, see CARL MINZNER, END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE 67–68, 167 (2018).}

Paving the way for this analysis, this Part describes CCP’s intraparty regulations in their institutional and historical context. The first section of this Part emphasizes the rationalist aspects of the Party’s governance project, whereas the latter section considers its irrationalist aspects.

A. Institutional Context: A Rationalist Narrative

The most obvious contrast between the illiberal counter-canon and the CCP’s governance project relates to Chinese Party leaders’ and Party ideologues’ tendency to emphasize the “scientific” and “rational” nature of the Chinese Party-state.\footnote{112. For such language, see, e.g., Xi, supra note 11, at 9–10, 19–20, 54, 89.} Such emphasis presents the reforms of intraparty regulations as part of a project to establish rational organizational structures within the Party.\footnote{113. Intraparty regulations featured prominently in Xi Jinping’s legal reform package were announced in 2014. \textit{CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward} (passed by 18th Central Comm. of the Chinese Communist Party, Oct. 23, 2014), in \textit{CHINA COPYRIGHT & MEDIA} (Rogier Creemers ed., Jeremy Daum trans., Oct. 28, 2014), https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-
claimed, the Party’s political power “must be caged within a system” of intraparty regulations.\(^{114}\)

Xi’s statement recalls Weber’s characterization of the modern bureaucracy as an “iron cage.”\(^{115}\) Weber famously described modern bureaucracies and their predecessors as being characterized by some (or all) elements of “rational legal authority,” a hierarchically structured organizational structure, which regulated its officials through formal rules.\(^{116}\)

As mentioned above, rationalist arguments may play a role in the illiberal governance project. Illiberal scholars have seen considerable use for (legal and non-legal) rules while suggesting that such rules need to be sup-


\(^{116}\) In more detail, Max Weber defined rational legal authority as comprising: (i) a “continuous rule-bound conduct of official business”; (ii) a “specified sphere of competence (jurisdiction)”; (iii) the organization of offices following the principle of hierarchy; (iv) the regulation of conduct of an office through technical rules or norms; (v) the separation of administrative staff from means of production or administration; (vi) the “absence of appropriation of official position by the incumbent”; and (vii) formulation and recording of administrative acts and decisions in writing. Weber also noted that (viii) rational legal authority may be exercised through different forms, the purest of which was legal authority with a bureaucratic staff. WEBER, VOLUME I, supra note 72, at 218–20. During the Cold War, Sovietologists debated whether and how much the Soviet system of administration deviated from the Weberian model. One argument was that the effectiveness of laws and regulations and the depersonification of government and Party offices was absent from the Soviet system. See Jan Pakulski, BUREAUCRACY AND THE SOVIET SYSTEM, 19 STUD. COMP. COMMUNISM 3, 6–8 (1986).
plemented, and occasionally trumped, by a “political” decision, which is ungoverned by the rules themselves.\textsuperscript{117} Moreover, whereas Weber associated “modern” rationality with definitely fixed, formal legal concepts,\textsuperscript{118} the more contemporary rationalist narrative embraces substantive justice considerations as part of the rule-based governance.\textsuperscript{119} From the latter perspective, which Chinese Party ideologues and scholars have embraced, rules coexist with substantive policies and principles.\textsuperscript{120}

The starting point of the rationalist narrative on the Party’s internal governance may be found in the revised PRC Constitution, which now recognizes “Party leadership” as the most essential element of socialism with Chinese characteristics.\textsuperscript{121} The Party, it can be maintained, is within the Chinese legal system rather than outside it. For further support for the rule-based nature of the CCP’s leadership role, it may be noted that the CCP itself is constituted by a constitution, which establishes the broad outlines of the Party’s organizational structure and its discipline inspection mechanism.\textsuperscript{122} The CCP Constitution also sets up the principle of democratic centralism as the fundamental organizational principle of the Party.\textsuperscript{123} According to this principle, the Party exercises intraparty democracy, but once a matter is settled, “all Party members must firmly uphold the authority and centralized, unified leadership of the Central Committee with Comrade Xi Jinping at the core.”\textsuperscript{124}

The rationalist narrative can then refer to a number of intraparty regulations, which set out the Party’s regulatory and organizational structure in more detail. These regulations are adopted by the central Party organs, the Central Commission for Discipline Inspection (CCDI), as well as by Party committees in provinces, autonomous regions, and municipalities directly under the Central Government.\textsuperscript{125} In contrast to various other formal and

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\item \textsuperscript{117} See supra text accompanying notes 74-75; Kennedy, supra note 22, at 1162–63 (contending that decisionism does not amount to an impossibility theorem about rational justification of choices). For statements about political decisions in CCP documents, see Central Political and Legal Committee of the Chinese Communist Party, supra note 17, at 30, 110; Office of the Central Political and Legal Affairs Commission of the Chinese Communist Party, Shehui zhuyi fazhi linlian xueyi wenda [Questions and Answers on the Socialist Rule of Law Concept] 18-19, 50-51 (2012).
\item \textsuperscript{118} See supra note 72.
\item \textsuperscript{119} See Sargentich, supra note 6, at 3, 61-64, 103-104; Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought, 55 Hastings L. J. 1031, 1055–53, 1072-73 (2004).
\item \textsuperscript{120} See infra note 143.
\item \textsuperscript{121} Xianfa pmbl, art. 1 (2018) (China).
\item \textsuperscript{123} Id. art. 4.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} See Zhongguo Gongchandang Dangnei Fazhi Zhidui Tiaoli [CCP Regulations on the Formulation of Intraparty Regulations] (May 26, 2012, rev’d on Aug. 30, 2019),
informal sources of normativity within the Party, which range from political speeches to newspaper editorials, intraparty regulations are meant to constitute a coherent and explicitly “rational” system of rules. According to one estimate from 2018, various Party organs have issued about 4,200 such regulations. Together with the CCP Constitution these regulations set up the formal procedures through which the Party leadership and its cadres are meant to exercise political leadership.

Intraparty regulations are not adopted in the state legislative process, and they are not, therefore, considered “law” in a technical sense. Chinese scholars point out that intraparty regulations are based on personal jurisdiction—they mostly regulate Party members’ conduct—whereas state law applies to everybody in the Chinese territory. Some intraparty regulations have binding effects on non-Party members, but Chinese scholars treat such situations as anomalies. Intraparty regulations are also thought to impose higher standards of conduct to Party members than the standards found within state law. The act of “living extravagantly, coveting pleasure and pursuing low-level tastes” is not an offense under Chinese

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126. WANG, supra note 23, at 11 (describing the Party’s goal to establish a complete, scientific and rationalist system of intraparty regulations). As an example of the plurality of sources of normativity within the CCP, Ewan Smith notes that the “Party speaks through guiding editorials in the People’s Daily.” Ewan Smith, The Rule of Law Doctrine of the Politburo, 79 CHINA J. 40, 45 (2017).

127. Song Gongde, Quan fangwei tuijin dangnei fagui zhidu tixi jianshe [Comprehensively promoting the system of intraparty regulations], CPC NEWS (Sep. 27, 2018), http://theory.people.com.cn/n1/2018/0927/c40531-30315496.html [https://perma.cc/5MDJDZ].

128. Chinese scholars distinguish between the Communist Party’s ideological leadership, political leadership, and organizational leadership. Political leadership, in this typology, refers to policy-making, whereas organizational leadership refers to the Party’s control of state organs and other bodies. See Zhi Zhenfeng, Dang nei fagui de zhengzhi luoji [The Political Logic of Intraparty Regulations], 11 ZHONGGUO FALU PINGLUN 42, 46 (2016). All these forms of leadership constitute “political leadership” for the purposes of this Article.

129. Intraparty regulations are not national laws, nor are they administrative regulations or local decrees. See Zhonghua Renmin Gongheguo Lifa Fa [PRC Legislation Law] (promulgated by the President of the People’s Republic of China on Mar. 15, 2000, effective July 1, 2000), at art. 7, 56, 63, http://english1english.gov.cn/laws/2005-08/20/content_29724.htm [https://perma.cc/LZ3J-2WVU]. For Chinese scholarship, see SONG, supra note 1, at 64 (defining intraparty regulations as quasi-legal “hard soft law” rather than as mere soft law or as mere state law); WANG, supra note 23, at 3–4 (discussing the nature of intraparty regulations).


national laws, but it is a violation of the Communist Party’s disciplinary rules.\textsuperscript{132}

Despite their important role in the Party’s leadership’s political statements, Chinese scholars describe intraparty regulations as technically inadequate for the purposes of rule-based governance within the CCP.\textsuperscript{133} In order to address this problem, the CCP’s leadership has emphasized the need to reform intraparty regulations and to link these regulations closer to state law.\textsuperscript{134} The Party leadership has sought to increase the systemic rationality of intraparty regulations through various means.\textsuperscript{135} Among other things, the CCP Central Committee has adopted rules of recognition, which direct lower-level Party organs to recognize and enforce intraparty regulations and other normatively binding decisions adopted by higher-level Party organs.\textsuperscript{136} According to one such rule, the Party’s constitution enjoys the “highest degree of effectiveness” compared to other intraparty regulations.\textsuperscript{137} Central Party regulations are hierarchically higher than CCDI regulations, and CCDI regulations are hierarchically higher than regulations issued by other party entities.\textsuperscript{138}

The CCP Central Committee has also adopted measures, which seek to clarify the nature of intraparty regulations and competences among different CCP organs to issue these regulations.\textsuperscript{139} Some matters—such as “major issues” concerning the Party—belong to the exclusive jurisdiction of the Party’s central organs, whereas other matters can be regulated by lower-level Party organs.\textsuperscript{140} The adoption of intraparty regulations, in general, is to take place in an integrated and “scientific” manner.\textsuperscript{141} Intraparty regulations will also have to comply with the requirement that the Party acts within the PRC Constitution and the law.\textsuperscript{142} The CCP Central Committee has made its main administrative organ, the General Office, responsible for

\begin{footnotesize}
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\item[132.] Qin, supra note 131, at 57.
\item[133.] Id. at 7.
\item[134.] CCP Central Committee Decision, supra note 113.
\item[135.] Wang, supra note 23, at 11.
\item[136.] Zhongguo Gongchandang Dangzu Gongzuo Tiaoli (Shixing) [CCP Regulations on the Work of Party Units (For Trial Implementation)], art. 18, XINHUANET (June 16, 2015, 8:45 PM), available at http://www.xinhuanet.com/politics/2015-06/16/c_1115638059.htm [https://perma.cc/RF3U-K2TK].
\item[137.] CCP Regulations on the Formulation of Intraparty Regulations, supra note 125, at art. 31. A rule of recognition refers to a secondary rule, which determines how primary rules are “ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.” H.L.A. Hart, The Concept of Law 94 (3d ed. 2012).
\item[138.] CCP Regulations on the Formulation of Intraparty Regulations, supra note 125, at art. 31.
\item[140.] CCP Regulations on the Formulation of Intraparty Regulations, supra note 125, at art. 9.
\item[141.] Id. at art. 15.
\item[142.] Id. at art. 7.
\end{enumerate}
\end{footnotesize}
reviewing the compliance of intraparty regulations with higher-level regulations and the PRC Constitution and laws.\textsuperscript{143} The CCP Central Committee has also attempted to strengthen the regulatory nature of intraparty regulations by requiring that intraparty regulations be expressed in terms of “clauses” \textit{[tiaokuan, 条款]}, as is the practice with Chinese state laws.\textsuperscript{144} While many intraparty regulations can be characterized as substantive standards, they also comprise a number of bright-line rules, which, for instance, set clear and specific time periods for various disciplinary penalties.\textsuperscript{145} Party experts on intraparty regulations have encouraged the drafters of these regulations to avoid ambiguous expressions in order to limit rule interpreter’s arbitrary discretion.\textsuperscript{146} Intraparty regulations should also be concise and accurate, as well as easily observed and enforced.\textsuperscript{147}

As is the case with some Chinese laws (and no doubt laws in other jurisdictions), Chinese experts describe existing intraparty regulations as opaque and poorly drafted.\textsuperscript{148} Many intraparty regulations are available to Party members and to the general public, but others are confidential and

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\item \textsuperscript{144} CCP Regulations on the Formulation of Intraparty Regulations, supra note 125, at art. 6. For the drafting of Chinese laws, see Zhonghua Renmin Gongheguo Lifa Fa [PRC Legislation Law] (promulgated by the President of the People’s Republic of China on Mar. 15, 2000, effective July 1, 2000), at art. 54, http://english1.english.gov.cn/laws/2005-08/20/content_29724.htm [https://perma.cc/LZ3J-2WVU].
\item \textsuperscript{145} As a general matter, “standards” are norms, which allow for more discretion than “rules.” \textsc{Frederick Schauer, Thinking Like A Lawyer: A New Introduction To Legal Reasoning} 188–90 (2009). For an example of a substantive standard in an intraparty regulation, see Zhongguo Gongchandang Jil¨u Chufen Tiaoli [Regulations of the Chinese Communist Party on Disciplinary Actions], Oct 1, 2018, art. 45, http://www.12371.cn/2018/08/27/ARTI1535321642505383.shtml [https://perma.cc/89RZ-34SD] [hereinafter CCP Disciplinary Regulations] (stating that a Party member who publicly supports “bourgeois liberalization” must be expelled). This clause is a standard because it leaves the definition of “bourgeois liberalization” open. \textit{See also} CCP Regulations on the Work of Party Units, supra note 136, art. 15 (setting forth the requirement that Party organs in charge of state-owned enterprises comply with Chinese Company Law). For an example of a bright-line procedural rule, see \textit{id.} at art. 18 (directing Party organs to follow decrees from higher-level Party organs). For more bright-line rules, see CCP Disciplinary Regulations, at art. 12, 13 http://www.12371.cn/2018/08/27/ARTI1535321642505383.shtml [https://perma.cc/VU7Q-GAVZ] (establishing a 2-year maximum probation period for Party members and depriving members on probation the right to vote and be elected [art. 12]; stating that dismissed Party members may not be considered for membership for a period of five years [art. 13]). For yet another example of a bright-line rule, see Ewan Smith, The Unwritten Constitution in Britain and China 279 (2018) (unpublished Ph.D. dissertation, Oxford University) (on file with author) (citing a Party directive, which states that a village mayor must be a Party member).
\item \textsuperscript{146} \textsc{Song, supra note 1, at 59.}
\item \textsuperscript{147} \textit{id.} at 16. Song notes that not all intraparty regulations actually follow this instruction. For example, the CCP Constitution is not written as law-like clauses. \textit{See} CCP Constitution, supra note 122.
\item \textsuperscript{148} For Chinese legislation, see Xin He, \textit{Why did they not take on the disputes? Law, power and politics in the decision-making of Chinese courts}, 3 Int’l J. L. Context 203, 219 (2007).}


apparently difficult to access even for Party members governed by these regulations. Some intraparty regulations are said to be overly complicated, lengthy and contradictory with one another. Some intraparty regulations are apparently so difficult to understand that they are “obviously beyond the comprehension of ordinary Party members and cadres.”

Despite such technical problems, a promoter of the rationalist narrative may argue that the Party’s leadership is not akin to the illiberal ideal of unconstrained political leadership described in Part I above, but rational, scientific and, most importantly, constrained by rules. Professor Song Gongde, an expert on intraparty regulations in the Central Party School, characterizes intraparty regulations as a distinctively legal model of governance. As is the case with state law, intraparty regulations are meant to be (within their scope) generally applicable, abstract rules, which are clear and transparent to their intended subjects so that they can be easily followed. As is also the case with state law, intraparty regulations confer Party members various rights and obligations and set out procedures for their enforcement. According to Song, there is ever more emphasis on the protection of Party members’ rights in the disciplinary process.

The rationalist narrative is, therefore, akin to the liberal conception of legality as far as the generality, impersonality, and coherence of intraparty regulations are concerned, and even as regards some rights concep-

149. Song, supra note 1, at 7; Qin, supra note 131, at 61; Zhi, supra note 128, at 42.

150. Song, supra note 1, at 7; Jin, supra note 130, at 39; Qin, supra note 131, at 61.

151. Song, supra note 1, at 7.


153. Id. 52–57.

154. Id. at 15, 119. Article 6 of the PRC Law on Legislation states that “[l]awmaking shall be based on actual circumstances, and shall, in a scientific and reasonable manner, prescribe the rights and obligations of citizens, legal persons and other organizations, and the powers and duties of state organs.” Intraparty regulations prescribe Party members the right to vote in the Party’s decision-making processes and the right to make various reports, accusations and appeals from the Party’s decisions. Party members may also elect representatives and stand for election. Song, supra note 1, at 120. Tu Kai, however, notes that only a few intraparty regulations adjust Party members’ rights and obligations. Tu Kai, Lun Dangnei Fagui Zhidu Tixi De Zhuyao Bumen Ji Qi Shezhi Biaozhun [On Major Departments and Standards of Setting of the Inner-Party Regulation System], 22 Zhongguo Zhongyang Dangxiao Xuebao 37, 39 (2018).

155. Song, supra note 1, at 38. Song maintains that intraparty regulations should be enforced in a procedurally fair manner. For skepticism about this aim, see infra text accompanying note 256.
tions. Promoters of the rationalist narrative may further point out that the Party's working culture has become more institutionalized over the decades, with more rule-bound personnel appointment and promotion processes and discipline inspection methods.

From the rationalist perspective, China's recent constitutional and institutional reforms, which seek to bring the Party and the legal system closer to one another, can be seen as part of an ongoing process to systematize and regulate—indeed, rationalize—the Party's political leadership. NSC, the newly established state organ in charge of anti-graft investigations in the public sector, has powers to conduct supervision of all public employees exercising public power and to detain persons suspected of illegal and criminal activities in a specific place up to six months. According to the PRC Supervision Law and Chinese supporters of the reforms, the new national supervision system improves "the rule of law" and effectively restricts and oversees the uses of power. Chinese media has even reported that the new supervision system aims to improve the protection of the rights of the accused. Also, the elimination of the PRC president's term limits from the PRC Constitution in March 2018—which might appear to have disrupted the established leadership succession process deemed essential for the institutionalization of CCP's power—has been seen to strengthen the rule of law. The amendment enables the PRC

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156. For liberal legality, see SARGENTICH, supra note 6, at 2.
158. Liberal-minded and politically centrist Chinese scholars insist that their effect is just the opposite. Minzer, supra note 111, at 106–07 (describing the push towards Party discipline as devolution of institutionalized governance rather than progress towards it); Interview R, in Beijing (Jun. 2018), notes on file with author. See infra text accompanying notes 241-42.
160. Id. at art. 6. Zhang Wenzian, a prominent advocate of the National Supervision system and the reform of intraparty regulations, explains that the goal of the reforms is to ensure that "respect for the law and the observance of law becomes the common pursuit and conscious action of all the people." Zhang Wenzian: Tongzhou Tujin Zhongguo Tese Shehui Zhuyi Tixi Jianshe [Coordinating and Promoting the Construction of the Socialist Rule of Law System with Chinese Characteristics], CPC NEWS (Aug. 14, 2017), http://theory.people.com.cn/n1/2017/0814/c40531-29467929.html [https://perma.cc/HG5Q-32CW]. See also Zhang Wenzian et al., Jianchi Yifa Zhiguo, Zhidu Zhi Dang, Yi gui Zhidang [Remain Committed to Governing the Country According to Law, Governing the Party Through Institutions, and Governing the Party Through Regulations], http://www.cssn.cn/fx/201705/20170502_3505809.shtml [https://perma.cc/J9C5-AJGR]; Xu, supra note 3 (arguing that strengthening the Party's leadership improves conditions for the independent exercise of judicial power).
162. Nathan, supra note 157, at 8 (discussing succession process); Constitution Change Strengthens Rule of Law, GLOBAL TIMES (Mar. 13, 2018), http://www.globaltimes.cn/content/1093137.shtml [https://perma.cc/NTB4-PQXT].
president to act as the head of the Party, the state, and the military potentially indefinitely and thus (pace Schmitt) “protect the law” more efficiently than what was previously possible.163

B. Historical Context: An Irrationalist Narrative

The above-described rationalist narrative has much explanatory power. The Party leadership clearly seeks to systematize intraparty regulations and strengthen their enforcement within the Chinese state and the Party itself. From the rationalist perspective, the Party does not exist outside rule-based processes, but is constituted through these processes.

At the same time, the rationalist narrative provides only a partial explanation for the CCP’s governance project. In contrast to the rationalist narrative, the recent reforms can be seen as part of a project to strengthen the political aspects of the Party’s leadership, which are intended to escape the constraints of all rule-based governance. This project is not explicitly irrationalist in the way the theological appeals of de Maistre and Donoso were irrationalist (although “the Party” sometimes attains a non-empirical meaning in the commentary on the Party’s internal regulations).164 Nevertheless, this project can be called “irrationalist” in the sense that it seeks to undermine (formally and substantively) rationalist rule-based governance in favor of situational and “political” decision-making.165 These efforts can best be appreciated against the historical background of the CCP’s governance project.

Discipline inspection is an old part of the Chinese state. Chinese dynasties and governments had various forms of internal supervisory organs, such as the Board of Civil Office and the Imperial Board of Punishments in the Qing dynasty and the Control Yuan in the Republic of China.166 These organs played their part in Chinese state-making.167 While the discipline inspection institutions in the PRC can be seen as part of the same institutional tradition, they have also impeded the institutionalization and regulation of the use of power by Party cadres.168 Within the

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163. MÜLLER, supra note 32, at 37 (describing Schmitt’s argument). See also supra text accompanying note 96.

164. See infra text accompanying notes 300-01 regarding the non-empirical statements about the Party.

165. Weber defined the purest type of irrationalism as the opposite of logical and mathematical reasoning, which in his view provided complete clarity for the basis of action. See WEBER, ECONOMY AND SOCIETY: VOLUME I, supra note 72, at 5-6. While Weber acknowledged that rationalist legal reasoning could be based on substantive rationality (and, therefore, not occur according to the logical generalizations of formal rationality), he also described the critique of formal legal logic as “irrational.” See WEBER, ECONOMY AND SOCIETY: VOLUME II, supra note 72, at 657, 885. For Weber’s views on formal and substantive rationalism in law, see supra note 72.

166. For Qing dynasty and republican discipline inspection organs, see THORNTON, supra note 108, at 26, 82.

167. The moral aspect of this institution-building is not captured through Weber’s theory of rationalization process. See id. at 203.

168. Id. at 206–07 (comparing discipline inspection in late imperial, Republic, and Maoist eras).
CCP, the need for intraparty discipline was first perceived during the Party’s internal struggles in the 1920 and 1930s.\textsuperscript{169} Mao Zedong himself, having won power struggles against his competitors, decreed in 1938 that it was necessary to “work out a set of fairly detailed Party rules which will serve to unify the actions of the leading bodies at all levels” and to establish an organizational hierarchy within the Communist Party.\textsuperscript{170} However, instead of establishing a Weberian bureaucratic structure within the Party, the early disciplinary organs administered punishments on the perceived enemies of the Party without institutional checks on their power.\textsuperscript{171} These organs were, according to one estimate, “the personal tools of dominant leaders against their political foes.”\textsuperscript{172} While such methods helped Party leaders to eliminate real and imaginary enemies, they also gave rise to a chaotic administrative process, hindering the institutionalization of the Party’s organizational structure.\textsuperscript{173}

The Party’s bureaucratic processes stabilized in the 1940s as the CCP consolidated its power throughout China.\textsuperscript{174} The General Office of the CCP Central Committee, an organ still in charge of promulgating intraparty regulations,\textsuperscript{175} issued regulations in the early 1940s in order to establish bureaucratic relationships between various Party organs.\textsuperscript{176} In the following decades, the CCP’s disciplinary organizations became increasingly bureaucratized, while still remaining vulnerable to political purges.\textsuperscript{177} In the 1950 and 1960s, intraparty regulations were unable to govern friend-or-enemy groupings even within the organizations enforcing these regulations, let alone the wider Chinese society.\textsuperscript{178}

The present dichotomy between intraparty regulations and national laws owes its origins to the legal construction project, which began during the reform era in the 1970s. After the Cultural Revolution, the Party leaders faced a choice between different models for organizing the Party-state relationship. Communist Party organs could have replaced state organs; the Party and the state organs could have been separated from one another; and the Party and the state could have come up with a functional division of labor between them.\textsuperscript{179} Chinese leaders opted for the second approach

\textsuperscript{169} Xuezhi Guo, China’s Security State: Philosophy, Evolution, and Politics 27–28 (2012).


\textsuperscript{171} Guo, supra note 169, at 28.

\textsuperscript{172} Id.

\textsuperscript{173} Id. at 40.

\textsuperscript{174} Thornton, supra note 108, at 127.

\textsuperscript{175} See Regulations of the Communist Party of China on Open Party Affairs (For Trial Implementation), supra note 149, at art. 5.

\textsuperscript{176} Guo, supra note 169, at 9.

\textsuperscript{177} Id. at 421.

\textsuperscript{178} Schmitt, supra note 13, at 43; Thornton, supra note 108, at 128–29, 144.

in the famous Third Plenary session in 1978, which launched the reform era. Party organs would be separated from state organs, and the state, which had crumbled during the Cultural Revolution, would be revived and empowered. The Third Plenary session decided that it was necessary “to tackle conscientiously the failure to make a distinction between the Party [and] the government.” The dichotomy between intraparty regulations and national laws was at the heart of this arrangement. Deng Xiaoping’s well-known call for legal reforms in the Third Plenary Session was coupled with a more rarely cited statement about intraparty regulations: “just as a country has its laws, the Party should have its rules and regulations.” National laws, adopted by the National People’s Congress (NPC), came to apply in the entirety of China, whereas intraparty regulations were meant to be applied to Party members only.

The potential conflicts between national laws and the Party’s political leadership became apparent in the deliberations of the 1982 PRC Constitution, which remains in force today in many relevant parts. The previous PRC Constitution, which dated back to 1975, had explicitly appointed the Communist Party a functional role in the Chinese state. According to Article 17 of the 1975 PRC Constitution, the NPC exercised its powers on the proposal of the CCP Central Committee. During the drafting of the 1982 PRC Constitution some prominent scholars opposed the insertion on a statement about Party leadership into the constitution, arguing that the concept did not comply with the principle of people’s sovereignty. Despite such opposition, the preamble of the 1982 PRC Constitution came to enshrine Party leadership (which was part of the Party’s political doctrine in any event).

Even after the 1982 constitutional reform, political leaders and scholars with a reformist bent continued to argue for the supremacy of the law over Party’s internal decision-making processes. Peng Zhen, a prominent Party leader who was in charge of the Party’s legal and political affairs, opined in 1984 that law took priority over individual expressions of the Party’s will: “Regardless of the level of the Party committee and no matter who the responsible person is, if his opinions are inconsistent with the law,

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181. Id. at 12.
182. Id. at 14, 16.
183. Zhi, supra note 128, at 43.
186. Liu, supra note 2, at 3.
they are his personal opinions.” The separation of state and the Party had political currency in the 1980s. Wang Huning, a former scholar who rose to hold one of the most important political offices in China, argued that one of the causes for the failure to prevent the Cultural Revolution had been the lack of “judicial independence.” “During the ‘Cultural Revolution,’” Wang wrote in 1986, “there was much illegal conduct and in reality no institution could be restrained,” and as a consequence “serious violations of human rights and human dignity occurred.” In the following year, Zhao Ziyang (who at the time served as the CCP General Secretary but who was later purged) used his address at the 13th Party Congress to lament the “lack of distinction between the functions of the Party and those of the government and the substitution of the Party for the government.” Zhao maintained that “the Party must conduct its activities within the limits prescribed by” the PRC Constitution and state laws.

The adoption of increasingly specific intraparty regulations was one way to ensure that the law and the Party members’ conduct were in conformity. In principle, no conflicts between formal state law and the Party could exist as long as intraparty regulations were compatible with the law and internally coherent. In the 1990s, the Party leaders clarified jurisdictional boundaries between different Party organs and adopted substantive rules on Party discipline in order to fight corruption.

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190. Wang, supra note 189.


192. Id. Zhao also insisted that the Party’s discipline organs “should not deal with breaches of the law,” but instead helping Party members to “cultivate fine conduct.” Id.

193. The CCP Central Committee sought to rationalize intraparty regulations by adopting Provisional Regulations for the Procedures for Formulating CCP Intraparty Regulations in July 1990. See CCP Regulations on the Formulation of Intraparty Regulations, supra note 125. For statements about fighting corruption through intraparty regulations, see Communiqué of the Sixth Plenum of the 16th CPC Central Committee (Oct. 11, 2006) (stating that “[e]fforts should be made in . . . strictly regulating the inner-Party life, strictly enforcing the Party’s discipline [and] studying of the Party Constitution, laws and disciplines); Hu Jintao’s Report at 18th Party Congress on Nov. 8, 2012, XINHUA, Nov. 17, 2012 (urging the Party to “to fight corruption, uphold Party integrity and improve Party rules and regulations.”), http://www.china-embassy.org/eng/21/18th_CPC_National_Congress_Eng/992917.htm [https://perma.cc/VM8E-HPGU]. See also FLORA SAPIO, SOVEREIGN POWER AND THE LAW IN CHINA 77 (2010).
adopted the so-called Eight-point Rules on Party members’ and government officials’ conduct in 2012.\textsuperscript{194} This measure urged Party cadres to “keep in close contact with the grassroots” and to “practice thrift and strictly follow relevant regulations on accommodation and cars.”\textsuperscript{195} In the same year the Party’s Central Committee launched an effort to review intraparty regulations in order to make them consistent with the PRC Constitution and the laws.\textsuperscript{196}

While the above-described reforms can be interpreted through the rationalist perspective—they sought to establish a disciplined and hierarchical Party organization—it should also be borne in mind that Party discipline developed outside formal state law.\textsuperscript{197} Flora Sapio has demonstrated that the Party’s internal discipline inspection methods, including the infamous shuanggui process, in which Party members were detained and interrogated within an extra-legal process, existed in a “zone of lawlessness.”\textsuperscript{198} Sapio notes that intraparty regulations governing internal disciplinary processes comprised no habeas corpus rights nor did they provide for administrative appeals against Party organs’ decisions.\textsuperscript{199} Investigations in this process were conducted through organs, methods, and facilities, which were extraneous to the formal legal framework.\textsuperscript{200} According to Sapio, detainees were held in “hospital rooms, factory dormitories, shelter for deportation centers, and even company offices,” and interrogated through methods that exceeded the legally prescribed forms of investigation, sometimes amounting to torture.\textsuperscript{201} The main justification for these methods was not procedural justice, but the effectiveness of investigation methods, which were unbridled by legal norms.\textsuperscript{202}

The establishment of the NSC in 2018 not only provided legal scaffolding for the Party’s extra-legal discipline inspection methods, but also extended the Party cadres’ ability to use power outside the formal legal framework.\textsuperscript{203} The NSC and its local branches have powers to “conduct supervision of all public employees exercising public power.”\textsuperscript{204} The NSC received many of its staff members from Party organs, and its personnel policy came to emphasize the political consciousness and ideological quali-

\begin{itemize}
\item \textsuperscript{194} Ba Xiang Guiding [The Eight-point Rules] (Dec. 4, 2012), (English translation available at http://cpcchina.chinadaily.com.cn/2012-12/05/content_15992256.htm [https://perma.cc/XW9G-S95H]).
\item \textsuperscript{195} Id. at art. 1, 8. The measure also addressed the media, prohibiting it from reporting on “stories about official events unless there is real news value.” Id. at art. 6.
\item \textsuperscript{196} Jin, supra note 130, at 43.
\item \textsuperscript{197} Sapio, supra note 193, at 3.
\item \textsuperscript{198} Id. at 8.
\item \textsuperscript{199} Id. at 94–95.
\item \textsuperscript{200} Id. at 8.
\item \textsuperscript{201} Id. at 102–05.
\item \textsuperscript{202} Id. at 96.
\item \textsuperscript{203} XIANFA art. 123–27 (2018) (China).
\end{itemize}
ties of its staff members. Also, the supervision methods of the NSC are self-consciously political rather than legal. According to Xinhua, China’s official news agency, the reforms aimed to “place the political before anything else.” Emphasis on political considerations was meant to allow the staff in disciplinary organs to “see the ‘forest’ from ‘the trees’”—something that legal processes are presumably unable to facilitate. These statements were part of a larger pattern of politicizing discipline inspection, which aimed to combine anti-corruption work with the promotion of ideological conformity and, as argued in the following section, remedy the perceived deficiencies of the rationalist rule-based approach to governance.

III. Decoupling Political Leadership from Rules

To sum up the above discussion, in recent years the CCP leadership has sought to strengthen the Party’s political leadership by reforming intraparty regulations and by extending the Party’s discipline inspection mechanisms into Chinese state organs. These efforts aim to institutionalize discipline inspection methods and regulate the uses of power within the Party, while establishing discipline inspection as a self-consciously political, extra-legal process. The former goals serve the rationalist approach to rule-based governance, whereas the latter objectives are motivated by the illiberal tendency to privilege situational and political discipline inspection methods over legal institutions and, it seems, all rule-based processes.

This Article now explains why Party ideologues and conservative-minded scholars do not view intraparty regulations as “the political,” which could be privileged over laws and legal processes. The first section of this Part demonstrates that Party ideologues and conservative scholars see formal state law and Party’s internal regulation as part of a single coherent regulatory system, which are not juxtaposed to one another. This section also points out that politically centrist, “mainstream” scholars identify conflicts between formal state law and intraparty regulations and maintain that intraparty regulations are subordinate to state law. The second section of this Part describes the relationship between intraparty regulations and political leadership. This section identifies tensions between formal rules and normatively unconstrained political leadership in the Party’s governance project. Also, these tensions suggest that the Party’s political leadership is not reducible to rationalist rule-based governance.

205. See Xinhua, infra note 206 (referring to the lessons learnt from the three pilot projects).
207. Id.
208. See Li, supra note 26, at 49–51, 60–61.
A. Intraparty Regulations versus State Law

CCP ideologues and conservative-minded establishment scholars, such as Professor Song Gongde, view the relationship between intraparty regulations and legal governance as a relatively straightforward matter.\footnote{209} The official Party doctrine does not encourage Party members and people’s court judges to disregard formal state law in favor of intraparty regulations. On the contrary, the CCP Constitution requires Party members to “act within the scope of the country’s Constitution and the law.”\footnote{210} This requirement is reproduced in numerous ideological texts as well as in intraparty regulations.\footnote{211} No matter what their actual role, intraparty regulations do not officially constitute a body of privileged political rules, which would be able to trump formal state law in an event of conflict between the two normative orders.\footnote{212} Party organs, which are in charge of state organs and state-owned enterprises, are instructed to make decisions in conformity with state law in a process governed by intraparty regulations.\footnote{213} Party members in state organs must then implement these decisions in accordance with the state laws governing them and in compliance with the Party’s disciplinary process.\footnote{214} From this perspective, there should be no conflicts between state law and intraparty regulations, since the two normative orders constitute a unified expression of the Party’s will.\footnote{215} The Party and the state form a single coherent whole, in which the Party’s political leadership occurs at every level but is never contrary to state law.\footnote{216}

In addition to the conflict-repressing narrative, there exists another, less harmonious approach to conceptualizing the relationship between intraparty regulations and Chinese state law. Under this approach, intraparty regulations and formal state law are in a potential conflict with one another, which has to be resolved in favor of either one of the normative systems. For some Chinese scholars the relationship between the two normative orders comes down to the question of whether “the Party is

\footnotesize{\begin{itemize}
\item \footnote{209. See Song, supra note 1, at 75.}
\item \footnote{210. See CCP Constitution, supra note 122, art. 5.}
\item \footnote{211. See Smith, supra note 126, at 55 (citing Hu Jintao); Xi Jinping, supra note 114 (citing Xi Jinping). For an intraparty regulation, which urges Party organs in charge of political and legal work to exercise their function in accordance with the law, see CCP Regulations on Political and Legal Work, supra note 11, at art. 1, 4, 31.}
\item \footnote{212. To be sure, Party leaders emphasize the need to follow the Party Constitution and its various ideological doctrines. See, e.g., CCP Central Committee Opinion on Strengthening of the Party’s Political Construction, infra note 241. However, as pointed out above, the Party Constitution instructs Party members to “act within the scope of the country’s Constitution and the law.” CCP Constitution, supra note 122, art. 5.}
\item \footnote{213. See Song, supra note 1, at 85.}
\item \footnote{214. See id. at 85.}
\item \footnote{215. See id. at 68.}
\item \footnote{216. See Li Lin, Dang De Lingdao Shi Zhongguo Tese Shehui Zhiyi Fazhi Zhi Hun [The Leadership of the Party is the Soul of Socialist Rule of Law with Chinese Characteristics], Renmin Ribao (Apr. 2, 2015, 09:03 AM), http://www.xinhuanet.com/politics/2015-04/02/c_127649563.htm [https://perma.cc/U98R-J8EN]; Xu, supra note 3.}
\end{itemize}
great or law is great.”217 As one commentator described the dilemma: “[o]n the one hand, decisions within party organs should be carried out within the framework of the Constitution and the law. On the other hand, Party organs should make decisions based on the decision-making system, mechanisms, methods and standards determined by the intraparty regulations.”218 As an example of such conflicts, Zhi Zhenfeng, a scholar at the Chinese Academy of Social Sciences, explains that Party cadres commonly seek to skirt legal regulations by issuing internal regulations.219 Similarly, Song Gongde recognizes the possibility of conflicts between the two normative orders220 and maintains that such conflicts should be resolved in favor of state law.221 The potential of conflicts between the two systems is even acknowledged in intraparty regulations. A meta-level intraparty regulation on the formulation of intraparty regulations notes that the CCP Central Committee may order an intraparty regulation, which is inconsistent with the PRC Constitution and national laws, to be corrected or revoked.222

Some Chinese scholars argue that conflicts between formal state law and intraparty regulations occur regularly.223 Liu Songshan, a professor at the East China University of Political Science and Law and the former Vice-Secretary of the National People’s Congress Standing Committee, has examined several aspects of such Party-state conflicts.224 In an article on the Party-state relationship, Liu argues that Party cadres and employees of state organs may, for instance, disagree about personnel appointments at state organs.225 Party organs recommend candidates for positions in state organs under their jurisdiction,226 In their capacity as Party members,

218. Jin, supra note 130, at 41.
219. See Zhi, supra note 128, at 46.
220. See Song, supra note 1, at 69.
221. See id.
222. See CCP Regulations on the Formulation of Intraparty Regulations, supra note 125, at art. 32.
225. See Liu, supra note 217, at 30.
226. See id. at 29.
state organ officials should observe the Party’s decisions, whereas in their capacity as state organ employees, the same officials should represent the People and the voters.227 Conscientious state organ employees may wish to object to the Party’s nominations when they believe that these nominations do not serve public interest. As Party members, state organ employees may also conclude that the Party organ’s decision has been reached in violation of the Party’s internal regulations.228 Liu explains that individual Party cadres sometimes ignore the Party’s internal decision-making processes and present their own individual opinions as the Party’s positions.229 Liu argues that such conflicts are not uncommon,230 and that it may not be straightforward to discipline Party members who go against the Party’s instructions as state organ officials.231

Such problems may, of course, be brushed aside as practically insignificant. Professor Song Gongde of the Central Party School maintains that, as the “governing party,” the CCP is authorized to instruct state organs to take certain action.232 Liu acknowledges that at the level of Party doctrine and also in practice, the relationships between the Party and the state are often clear. As mentioned above, the Party and the NPC exercise “democratic centralism,” which requires Party members to follow centrally made decisions.233 Nevertheless, Liu also asserts that there is “neither a theoretical nor a practical systematic answer” to the tensions between decision-making procedures within the Party and decision-making procedures within state organs.234 The effect of Liu’s argument is more subversive than the mere acknowledgement that intraparty regulations and

227. See id. at 30. Liu does not conflate “the People” with the CCP in this context but instead associates “the People” with the voters represented by the National People’s Congress, which enacts national laws. Id. Within the CCP, various intraparty regulations govern appointment processes. See Dangzheng Lingdao Ganbu Xuanba Renyong Tiaoli [Regulations for the Selection and Appointment of Leading Party and Government Cadres] XINHUA NEWS (July 23, 2002, 1:37 PM), http://www.people.com.cn/GB/shizheng/16/20020723/782504.html [https://perma.cc/6BYW-SNJV] (China); Tuijin Lingdao Ganbu Neng Shang Neng Xia Ruogan Guiding (Shixing) [Several Rules on the Promotion and Demotion of Leading Party Cadres (For Trial Implementation)] (effective Jul. 19, 2015), XINHUAUNET (July 28, 2015, 9:05 PM), http://cpc.people.com.cn/n/2015/0728/c64387-27375493.html [https://perma.cc/688Q-D4BJ] (China). A Party member’s failure to follow the Party’s instructions is a disciplinary violation. See Zhongguo Gongchandang Danggu Gongzuon Tiaoli (Shixing) [CCP Regulations on the Work of Party Units (For Trial Implementation)], art. 30, XINHUAUNET (June 16, 2015, 8:45 PM), available at http://www.xinhuanet.com/politics/2015-06/16/c_1115638059.htm [https://perma.cc/RF3U-K2TK]. Song Gongde presents a sanitized version of the appointment process in SONG, supra note 1, at 83.

228. Liu, supra note 217, at 29-30.

229. Id. at 30.

230. Id.

231. See id.

232. SONG, supra note 1, at 77. As just mentioned, in Song’s view such instructions must comply with the PRC constitution and the law, and they must be made through authorized means. Id.

233. Liu Songshan, Dang Lingdao Lifu Gongzuon Xuyao Yanjiu De Ji Ge Zhongyang Wenli [Several Important Problems Needed to be Solved in the Legislative Work of the Party Leadership], FAXUE 3, 7 (May 2017).

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formal state legislation are occasionally at odds with one another.\footnote{235} Regulatory discrepancies can be corrected by amending laws and intraparty regulations, whereas conflicts about, say, personnel appointments, suggest that the interests of Party organs and state organs are potentially incompatible and that the Party members’ positions in such conflicts may not be as legitimate for state organ employees as the state employees’ own viewpoints.

Faced with such conflicts, a number of politically centrist (and in this sense “mainstream”) Chinese scholars see it important to affirm the supremacy of Chinese state law over the CCP’s internal regulations.\footnote{236} Some of these scholars oppose the fusion of state law with CCP’s intraparty regulations and disciplinary mechanisms, Maintaining that “there is no authority above the law.”\footnote{237} Although Chinese state law is enacted “under the leadership of the Party,” these mainstream scholars argue that state law reflects more diverse interests than intraparty regulations and is, therefore, a more legitimate source of normativity than the Party’s internal regulations.\footnote{238} These scholars do not oppose the rationalization of intraparty regulation as such.\footnote{239} For them, governance through intraparty regulations is an improvement to the former practice of the rule

\footnote{235. Professor Qin Qianhong of Wuhan University describes a conflict between intraparty regulations, which conferred powers to the CCDI to freeze assets in banks and state law, which did not recognize such powers. The conflict (which according to Qin has now been resolved) was between PRC Administrative Supervision Law and an intraparty regulation on discipline inspection. See Qin, supra note 131, at 63; Zhongguo Gongchandang Jilì Jiancha Jiguan Anjian Jiancha Gongzuotiao [CCP Regulations On The Inspection Work For Cases Under Discipline Supervision Authorities] (promulgated by the CCP Central Commission for Discipline Inspection on Mar. 25, 1994, effective May 1, 1994), http://cpc.people.com.cn/GB/33838/2539632.html [https://perma.cc/Z97L-FKWX]; Zhonghua Renmin Gongheguo Xingzheng Jiancha [PRC Administrative Supervision Law] (promulgated by Order No. 85 of the President of the People’s Republic of China on May 9, 1997, effective May 9, 1997), http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004684.htm [https://perma.cc/2JBJ-BXN4].}

\footnote{236. See, e.g., Jin, supra note 130, at 41; Qin, supra note 131, at 52; Tu, supra note 179, at 50; Zhang Qianfan, Constitutional conundrums under the Party-State, CHINA HERITAGE, http://chinaheritage.net/journal/the-professor-a-university-the-rule-of-law/ [https://perma.cc/QYY4-DNPK] (last visited May 2, 2019).}

\footnote{237. Tong, infra note 244, at 22. See also Luo Haocai & Zhou Qiang, Ruanfa Yanjiu De Duowei Sikaio [Multiple Perspectives on Soft Law], 5 Zhongguo Faxue 102, 106 (2013) (characterizing intraparty regulations as “soft law” in contrast to “hard” state law).}

\footnote{238. Liu Songshan (who is, as mentioned above, not a liberal) adheres to the same view. Liu, supra note 217, at 31. For the Party’s leadership role in legislation, see PRC Zhonghua Renmin Gongheguo Lifa Fa [PRC Legislation Law] (promulgated by the President of the People’s Republic of China on Mar. 15, 2000, effective July 1, 2000), at art. 3, http://english1.english.gov.cn/laws/2005-08/20/content_29724.htm [https://perma.cc/LZ3J-2VVU].}

\footnote{239. Chinese scholars have assisted efforts to reform intraparty regulations, for instance, by systematizing intraparty regulations through traditional distinctions between substantive and procedural norms. For a comment and critique of these approaches, see Tu, supra note 154, at 38. For a distinction between substantive, criminal and procedural intraparty regulations, see Pan Zelin, Zhongguo Gongchandang Dangnei Fagui Ji Qi Tixi Jiangou Wenti Yanjiu [Research on Questions Relating to CCP Intraparty Regulations and Their Systematization], Nanchang Daxue Xuebao (Renwen shiheui kexue ban) 27, 31–32 (2007).}
of charismatic leaders through “fragmented documents and directives.”

Yet the Party leadership’s recent focus on intraparty regulations appears ominous to some of these scholars, because it facilitates the expansion of the Party’s ambiguous discipline and ideological controls further into the Chinese society. In the background of such concerns are mainstream scholars’ professional sensibilities. Mainstream scholars identify themselves with professionally trained lawyers and view staff in discipline inspection bodies as having, as explained by Flora Sapio, “low education levels, little or no legal training and few investigative skills.”

B. Intraparty Regulations versus Political Leadership

Conflicts between intraparty regulations and state law demonstrate how difficult it is for the Party leaders and ideologues to conceptualize political leadership exclusively as rule application without resorting to a conception of rule-transcending Party leadership. In other words, the primacy of Party leadership may not be understood simply as the supremacy of the Party’s internal rules over the law, nor is it reducible to rule-application alone. The nature of this issue becomes clear when one considers one of the most provocative arguments about intraparty regulations in recent Chinese legal scholarship. In the above-mentioned article on the Party-state relationship, Liu Songshan argues that state organ employees, who respond to Party nominations, should consider, among other things, whether the intraparty regulations, which are the basis of these recommendations, are “scientific and advanced” and whether they conform to State law. Professor Liu, who is by no means a liberal, maintains that “an order mingling, 命令] of a Party organ, which violates the constitution and

240. Qin, supra note 131, at 53.
242. RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS 141 (2012) (quoting Flora Sapio). As mentioned above, the Party assumes that its cadres are more sensitive to political considerations than legal professionals. See supra text accompanying note 207.
244. Prior to the March 2018 constitutional amendment, Liu Songshan advanced the controversial argument that the provision on the equality before the law in the PRC Constitution did not bar public officials from being detained extra-legally. Liu Songshan, Ling Yi Zhong Guardian: Jiancha (Cao’an) Zai Xianfa Shang Zongti Shi Zhan De Zhu De [Another Point of View: Supervision Law (Draft) Stands Constitutionally], ZHONGGUO FALU PINGLUN (Nov. 17, 2017) (on file with author). This article drew a strongly worded rebuke from Professor Tong Zhiwei at East China University of Political Science and Law in Shanghai. Tong criticized not only the substance of Liu’s argument but also Liu’s research practices. See Tong Zhiwei, Xianfa Xue Yanjiu Xu Changwen De Changshi He Guifan: Cong Jiancha Tezhi Gaike Zhong De Yi Zhong Tifa Shuoqi [Reconsidering the Commonsense and Norms of the Study of Constitutional Law: A Discussion Stemming
the law, is invalid.” According to Liu, “Party members have the right to disobey” such an order. If Liu’s suggestion were to be taken literally, his viewpoint would have far-reaching consequences for the Party-state relations, at least as far as the Party cadres’ orders are concerned. The requirement that the Party cadres follow the PRC Constitution and the law could open every Party order for a legal review by individual Party members. As a way to centralize decision-making, the Party leadership has issued regulations requiring lower-level Party organs to report up important matters and request instructions from higher-level Party organs. Nevertheless, these regulations also require that the implementation of the reporting requirements comply with the CCP Constitution.

It is, of course, improbable that the outcome of a potential conflict with and between intraparty regulations and formal state laws would be determined through the good faith interpretation of formal rules. Indeed, reducing the Party’s leadership role to rule-application alone misses an important feature of the Party leadership’s governance project. The very point of a dictatorship, even in its Marxist-Leninist form, is that its legitimacy is not judged against its compliance with formal rules. As Part I pointed out, a dictatorial intervention into the world (as well as a Machiavellian coup d’état) is called for precisely because formal rules are unable to provide a desired result in a given context.

In this respect, there is no principled difference between nominally “legal” and nominally “political” rules. In practice a Party leader may well wish to suspend not only laws but also specific intraparty regulations when extraordinary (“political”) considerations so require. The CCP’s disciplinary process provides again an example of such a situation.

from Certain Formulations in the Supervision System Reform], 2 FAXUE PINGLUAN 20 (2018).

245. Liu, supra note 2, at 18.

246. Id. at 18.

247. For instance, intraparty regulations relating to people’s courts allow Party cadres to intervene in the adjudication of concrete cases in certain instances, but it is uncertain whether lower-level Party cadres can resist such interference when they consider it to be contrary to (their interpretation of) intraparty regulations. Ling, supra note 223, at 71.

248. Other Chinese scholars have promoted similar arguments. See SONG, supra note 1, at 69; Tu, supra note 179, at 51.


250. Id. art. 1, 4.

251. Carl Schmitt argued that a conceptual definition of dictatorship needs to retain the “interventionist character of dictatorial practice,” for which “legal restrictions and restraints” are “an ill-considered . . . hindrance.” SCHMITT, DICTATORSHIP, supra note 67, at 117. For the Marxist-Leninist view, see Vladimir Lenin, The Proletarian Revolution and the Renegade Kautsky, available at https://www.marxists.org/archive/lenin/works/1918/prlk/soviet_constitution.htm [https://perma.cc/ZE66-ZTRR] (explaining that “in our proletarian republic the exploiters will have no rights”). In John Rawls’s terms, a dictatorship fails the test of “generality,” which is one condition of the principles of justice. JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION 112–13 (1999).

252. See supra text accompanying notes 50–53, 62–64.
CCP’s intraparty regulations confer various procedural rights for Party members in the discipline inspection process. These rights include the right of Party members to participate in each other’s defense and the guarantee to maintain whistleblowers’ complaints confidential from the accused Party organization. Various intraparty regulations direct Party members to observe the PRC Constitution and state legislation in the discipline inspection process as well as to refrain from obtaining evidence through threats, coercion, and deception.

In light of what is publicly known of the Party’s anti-graft campaign, it is doubtful that Party leaders expect Party cadres to follow Chinese state legislation and the Party’s own rights-conferring intraparty regulations in politically sensitive discipline inspection cases. Chinese leaders do not seem to perceive the anti-graft campaign merely as an ordinary law enforcement operation but (at least according to some statements) as an existential confrontation between the Party leadership and conspirators seeking to overthrow it. These are precisely the kinds of existential crises, in which the canonic illiberal scholars believed that rules must and will yield to political expediency.

In contrast to formal law, however, Chinese Party leaders may perceive intraparty regulations as a sufficiently malleable normative system, which

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254. Id. art. 11, 19.

255. The CCP Constitution requires Party members to “act within the scope of the country’s Constitution and the law.” CCP Constitution, supra note 122, art. 5. A similar requirement is included in Zhongguo Gongchandang Dangzu Gongzuo Tiaoli (Shixing) [CCP Regulations on the Work of Party Units (For Trial Implementation)], XINHUANET (June 16, 2015, 8:45 PM), art. 15, http://www.xinhuanet.com/politics/2015-06/16/c_1115638059.htm [https://perma.cc/RF3U-K2TK]. For the prohibition to collect evidence through threats, coercion and deception, see Zhongguo Gongchandang Jil¨u Jiancha Jiguan Jiandu Zhiji Gongzuo Guize (Shixing)” De Shuoming [The CCP Working Rules on Discipline Inspection Organ Supervision and Discipline (For Trial Implementation)], XINHUA (Jan. 20, 2017, 3:34 PM), art. 32, http://news.cctv.com/2017/01/20/ARTIQkb2nu3tvFB5qJ5aoy7Q170120.shtml [https://perma.cc/34KJ-YXKM]. See also Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Consideration of reports submitted by States parties under article 19 of the Convention, ¶ 57, U.N. Doc. CAT/C/CHN/5 (Apr. 3, 2014) (the Chinese government’s submission to the United Nations’ treaty monitoring process, describing efforts of “supervisory and discipline-inspection departments” to prevent torture in places of detention).


258. See supra text accompanying notes 53–54, 70.
they are able to control, and see, therefore, no need to establish intellectual grounds for suspending these regulations for political reasons—while at the same time seeking to constrain Party members through sufficiently unambiguous rules. In terms of the Party doctrine, the principle of democratic centralism, and its requirement that Party members adhere to “the unified leadership” of Comrade Xi Jinping, seem sufficient for suspending specific intraparty regulations in favor of a political objective, in case central leadership so requires. At the same time, an explicit aim of the proletariat’s dictatorship in China is the development of “a socialist rule of law system,” which comprises certain notions of procedural justice. Paradoxical as it may be, the Party exercises its dictatorial functions through and within a rule-based system in order to establish a procedurally just normative order.

Chinese scholars who have looked for intellectual grounds for decoupling political leadership from legal and non-legal rules have found these in illiberal political thought, including Schmitt’s texts, as well as in virtue ethics. Professor Chen Duanhong at Peking University, for instance, argues that the Party remains engaged with constitutional founding moments, which sometimes require it to violate written constitutional norms. Focusing on intraparty regulations, Zhi Zhenfeng of the Chinese Academy of Social Sciences explains that the CCP suffers from a crisis of bureaucratization and legitimacy. While Zhi believes that intraparty regulations should be “rationalized,” he also argues that the Communist Party should not restrict its flexibility through red tape and formalism.

259. For an example of this attitude, see how Xu Xianming outlines various reasons for establishing the Party “above the law,” without establishing reasons for suspending intraparty regulations. See Xu, supra note 3.

260. CCP Constitution, supra note 122, see CCP Constitution, supra note 122, art. 4. See also CCP Central Committee Opinion on Strengthening of the Party’s Political Construction, supra note 241 (calling Party members to follow and defend the core of the Party).

261. For the aims of the proletariat’s dictatorship in China, see CCP Constitution, supra note 122, General Program. For procedural justice in the socialist rule of law, see Central Political and Legal Committee of the Chinese Communist Party, supra note 17, at 64, 109.

262. As pointed out in Part II.A above, conservative-minded Chinese scholars maintain that the extension of extending the Party’s disciplinary mechanisms into state organs enables the Party to better respect the rule of law, promote the independent exercise of judicial power, and protect human rights. See supra note 160. This aim is in line with classical views about dictatorships and, according to Carl Schmitt, also true of liberal societies. See supra text accompanying note 68.

263. Chen Duanhong, Xianfaxue De Zhishi Jiebei: Yi Ge Zhengzhi Xuezhe He Yi Ge Xianfan Xuezhe Guanyu Zhixianquan De Duihua [The Boundary Of Knowledge In Constitutional Law: A Dialogue on Constituent Power Between a Political Theorist and a Constitutional Theorist], AI SIXIANG (Oct. 5, 2010, 2:19 PM), http://www.aisixiang.com/data/36400.html [https://perma.cc/94AR-K94S] (suggesting that as the representative of the people, the CCP remains engaged with constitutional founding moments); Zheng Qi, supra note 33, at 50–52 (describing the Schmittian aspects of Chen’s argument and attributing these to his unquestioning preference for the ability of the CCP to violate the PRC Constitution).

264. Zhi, supra note 128, at 45.

265. Id. at 46.
Zhi contends that ultimately the most important and far-reaching decisions emerge from a political process, which should be unencumbered with undue normative restrictions.266 Similarly, Jiang Shigong, a conservative-minded legal scholar at Peking University, is concerned with maintaining the Party’s political vitality.267 Sketching a new legal governance model for China (which may be translated as “the Party’s rule of law state” [zhengdang fazhiguo, 政党法治国]), Jiang argues that the Party must discard old legal regulatory models, which emphasize external rule-based constraints.268 In Jiang’s view, conceptualizing intraparty regulations through the dichotomy of formal state law and the CCP’s internal processes replicates an outdated Eurocentric model of the rule of law, which does not suit China’s present social conditions.269 Rather than the old regulatory models, Jiang argues that the Party should pay more attention to the virtues and spiritual pursuits of its members.270 The move to virtues has gained currency among Chinese conservative scholars, as even president Xi has urged Party cadres to govern not only through law but also through virtue.271

IV. Interrogating Illiberalism

Parts II and III of this Article described how the CCP’s project to strengthen its political leadership has coincided with efforts to regulate the use of power within the Communist Party through intraparty regulations.272 This Part turns to examine CCP intraparty regulations in the context of canonic illiberal scholarship discussed in Part I. The underlying question is whether illiberal governance can be exercised through formal rules. As was mentioned in the Introduction, this question is important for evaluating the appeal of ostensibly rationalist illiberal governance projects.

As was seen above, part of the illiberal criticism against liberalism builds on the assumption that legal rules are ultimately unable to constrain political decision-making. De Maistre and Donoso thought that the sovereign stood above the law, whereas Schmitt regarded “the political” as a sphere of human conduct, which was ultimately not governed by legal rules.273 In today’s China, a similar assumption is visible in the move towards self-consciously “political” forms of discipline inspection, as Part II.B above described. However, as was also pointed out above, it is possible

266. Id.
268. Id. at 41.
269. Id. at 37.
270. Id. at 41.
273. See supra text accompanying notes 42, 61-62, and 70.
to argue that the use of extralegal political power can and must be restrained through some form of regulations and rules-based processes, even if these regulations and processes are not nominally “legal.”274 Such an assumption informs the rationalist efforts in China to regulate CCP members’ conduct, as discussed in Part II.A above.275

The appeal of (non-legal) rule-based governance for illiberal political leaders and scholars is easy to understand. The more it seems that political conduct is caged within a rational system of rules, the easier it is to argue that the political leader, or a group of leaders, are able to govern the country purposefully. The rationalist narrative seems to pave the way to a form of non-legal constitutional order, which is achieved through nominally extra-legal rules and institutions.276

At the same time, the rationalist narrative is in tension with the illiberal critiques of liberal proceduralism, which are a central justification for the illiberal governance project.277 The classical attacks on liberal proceduralism did not hinge on whether the rules binding the sovereign were nominally called legal or non-legal, but on the impossibility or undesirability of constraining leadership through rules, no matter what their origin. As was pointed out in the previous Part, the decisionist elements of this critique can be directed at non-legal political regulations: just as law cannot govern the political, neither can political rules do so.278

The decisionist argument has potentially far-reaching consequences for illiberal governments, which claim to operate according to (quasi-) constitutional and bureaucratic practices. In China, the decisionist argument implies that the “Party’s will,” as manifested by its internal regulations, is as open to interpretations as state law is.279 Perhaps in order to exorcize

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274. Evgeny Pashukanis, the Soviet legal theorist, famously maintained that, while “law” was always tainted by its capitalist origins even in a socialist state, “technical regulation” could have been an authentically socialist form of governance. PASHUKANIS, supra note 106, at 81-82.

275. See supra text accompanying note 114 regarding such a statement in contemporary China.

276. See, e.g., Backer & Wang, supra note 139, at 341. As pointed out above, Chinese political leaders and Party ideologues have taken steps toward this direction. The “leadership” role of the CCP is recognized in the PRC Constitution, and the Party has adopted its own constitution, which establishes an internal organizational structure and discipline supervision methods. See supra text accompanying notes 17 and 122.

277. See supra notes 11 and 17 for the Chinese critique of liberal proceduralism.

278. See supra text accompanying notes 256-58.

279. Liu Songshan makes this argument in an article on the Party-state relationship in legislative work. Liu, supra note 233, at 3-4. According to the PRC Constitution, the NPC is the highest organ of state power, which exercises legislative power together with its Standing Committee. See XIANPA art. 57 (2018) (China). The PRC Legislation Law states that “[l]egislation shall be conducted in adherence to the socialist path, the people’s democratic dictatorship [and] the leadership of the Communist Party of China.” Zhonghua Renmin Gongheguo Lifa Fa [PRC Legislation Law] (promulgated by the President of the People’s Republic of China on Mar. 15, 2000, effective July 1, 2000), art. 3, http://english1.english.gov.cn/laws/2005-08/20/content_29724.htm [https://perma.cc/LZ3J-2WVU]. Apart from this statement, the law sets out no specific functions for the Party’s leadership in the legislative process. Liu identifies several open questions in this relationship. Is it the case, for instance, that the members of central Party organs
doubts about the uniformity of the Party’s will, some CCP ideologues insist on a particularly formalist view on rule application within the Party’s internal disciplinary process. Song Gongde, for instance, describes the adjudicative process within the Party as the straightforward application of rules to conduct, explaining that there should exist no ambiguous, grey areas of conduct in intraparty regulations.280 Interestingly, Song’s account of intraparty regulations is more formalist than the textbook approach to legal reasoning in Chinese jurisprudence.281

A formalist approach to rules creates, however, anomalies for the illiberal governance project. As demonstrated in Part IV.A above, the emphasis on rule-based governance not only enables calls for obedience, but also invites unwelcome arguments about the erroneous and unlawful application of intraparty regulations by superior Party cadres.282 A culture of formalism fits poorly within the illiberal ethos of unquestioning submission to the political leadership’s will (and the doctrine of democratic centralism in the Chinese context).283 It is, therefore, in the interests of illiberal political leaders to prevent their subjects from being too convinced about the rationalist, rule-based approach to governance. It helps that intraparty regulations comprise organizational doctrines, such as the doctrine of democratic centralism, which renders the entire system amendable to rule-transcending political control.284

These observations, however, only revive the decisionist argument: If intraparty regulations are not meant to be applied on their own terms in politically sensitive instances, or when powerful leaders so decide, how can it be assumed that intraparty regulations, on a whole, are able to regulate Party members’ uses of power? Conversely, it may be asked, how a massive political organization, such as the CCP, can establish a common will and can personally represent the Party when it exercises its “leadership” of legislative work? May local Party organs order local People’s Congresses to table specific pieces of legislation? If such direct leadership is not possible, and “Party leadership” is meant to occur on the level of “policies” [zhengce], Liu asks how these policies are supposed to be identified by NPC members and which level Party would be able to issue them. See Liu, supra note 233, at 4–9. Qin Qianhong argues that “policy” is a more general concept than intraparty regulations. Qin, supra note 131, at 59.

280. See Song, supra note 1, at 125–27.

281. A Chinese government-endorsed textbook on jurisprudence describes legal reasoning as a creative process, which aims at protecting individual rights, allowing citizens freedom to do whatever is not prohibited, requiring that government conduct be based on laws, safeguarding the presumption of innocence, and treating like cases alike. See Falxue [Jurisprudence] 181–82 (2010).

282. See supra text accompanying notes 246–47. An argument can also be made that legal formalism is based on the unquestioning submission to political power. Schmitt, for instance, argued that legal “positivists” submit themselves to “whichever current legislator possesses state power.” Schmitt, supra note 103, at 67. However, as Schmitt also pointed out, a legal positivist places normative demands on the legislator through arguments about “objective” laws. See id. at 67.

283. See Berlin, supra note 35, at 125 (regarding de Maistre’s views about unquestioning submission to political authority). See also Meierhenrich, supra note 91, at 193–94 (regarding Schmitt’s defense of an authoritarian state); supra text accompanying notes 123–24 (regarding democratic centralism in the CCP).

284. See supra text accompanying notes 259–60.
exercise purposeful leadership if not through a bureaucracy, which builds on formal rules (and standards).

As a way to deal with these questions, an illiberal scholar or a political ideologue may simply seek to wish away the implications of such decisionist arguments. As pointed out in Part I.B above, de Maistre acknowledged that papal power had to be exercised through canon law, but thought it “extravagant” to suggest that the Catholic Church could be divided against itself in a conflict about the correct interpretation of its internal rules.285 This solution may have its rhetorical uses, but it must seem implausible to those political leaders and participants in the illiberal governance project who believe that a key function of rules is to prevent and resolve conflicts. In China, at least some political leaders and Party ideologues have acknowledged the need to use intraparty regulations to resolve conflicts among Party cadres.286 Intraparty regulations are needed because the Party is not organically unified.

Another means to respond to the tension between rule-based governance and political leadership can be found in the Machiavellian raison d’état tradition. Under this tradition, political action, which violates laws and morals, is needed in a state necessity.287 Deciding when this is the case requires a great degree of “rationality and expedience” from the political leader who is prepared to violate laws.288 The raison d’état tradition is not limited to illiberal governments. It can also be applied to liberal societies.289 However, because of its limited nature and its possible compatibility with liberalism, the Machiavellian raison d’état tradition is poorly suited for the technocratic illiberal governance project. If political leadership in an illiberal government can ordinarily be made to comply with formal (legal and non-legal) rules, why should liberal legal institutions be resisted as a course of ordinary politics?

As was pointed out in Part III.A above, Chinese mainstream scholars, who are politically centrist, see no good answers to this question.290 The Chinese political leaders’ and Party ideologues’ answers to this question typically go back to the presumed beneficial nature of Party leadership rather than to a sense of political emergency, which marked canonic illiberal scholarship in Europe.291 Chinese avant-garde legal scholars, in contrast, regard liberal legal institutions as being devoid of Chinese traditional values and, therefore, harmful for the governance of China.292

285. See de Maistre, supra note 13, at 14.
286. See supra notes 170, 193, and 257.
287. For this argument, see supra text accompanying notes 50–54.
288. See Meinecke, supra note 50, at 6.
289. See Schmitt, Dictatorship, supra note 67, at 118–19; Schmitt, supra note 13, at 69–70; supra Part I.A.
290. See supra text accompanying notes 236–38.
291. For the European crisis literature, see supra references in note 13. For colorful statements about the benefits of the Party’s rule, see, e.g., CCP Constitution, supra note 122, General Program.
292. See Jiang, supra note 267, at 40.
Calls for resistance towards liberal legal institutions raise, however, further questions about the illiberal governance project. How can one know that a particular person or a group of persons is actually able to transcend the law and other norms for the common good? Is this because a holy text or a self-evidently true ideological doctrine says so, or should it be assumed (in line with Schmitt’s concrete order thinking) that the fact of political leadership is sufficient in its own right to satisfy questions about governmental legitimacy?293

The Machiavellian tradition presumes that a suitably virtuous person will know when extraordinary circumstances excuse violations of laws and ethics, but it also acknowledges that nothing guarantees that the person deciding on the exception is actually virtuous.294 As a consequence, the Machiavellian tradition sees much virtue in governance through laws and other institutions.295 The Machiavellian tradition also teaches that it is possible to learn from the virtuous actions of past political leaders, but such lessons are hard to combine with rationalist rule-based governance methods.296 Indeed, it may be asked how virtuous law-violating conduct would be governed. Would there be rules about this conduct, or would it simply be assumed, in line with Machiavelli, that virtuous leaders are able to interpret and apply the relevant virtues correctly?297 How would such an assumption help fight corruption and misuses of power within an illiberal government? Is not the root of the problem in a corrupt government precisely the absence of virtues? These questions raise doubts about relying on “virtues” as a means to address the deficiencies of rule-based governance in the illiberal governance project.298

As another solution to the inadequacies of rule-based governance, scholars have made the leap of faith to the irrational and imagined an omnipotent agent—say, the dictator, “the State,” or “the Party”—which is able to resolve the conflict between rules and politics. As described in Part I.B above, Donoso prayed that a dictator with God-like powers to transcend laws would appear and redeem fallen European societies.299

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293. For Schmitt’s concrete order thinking, see supra text accompanying notes 102–05. Against these questions it can be noted that the problem of political legitimacy emerges from liberalism and is, therefore, alien to illiberal political thought. A self-conscious opponent of liberalism would not agree that social order has to be acceptable to each and every person. See Jeremy Waldron, Theoretical Foundations of Liberalism, 37 Phil Q. 127, 149 (1987).

294. See Machiavelli, supra note 49, at 129 (noting that good men who use wicked means in the service of good ends are rare).

295. See id. at 92, 93, 108 (advising wise people to excuse a virtuous person’s extralegal actions when that person establishes a republic or a kingdom, while urging that person to establish a constitution and laws).

296. See id. at 83-85 (describing that the goal of his work is to appreciate the virtue of political founders).

297. Machiavelli described virtues as both an unregulated and a regulated force. Machiavelli, The Prince, in MACHIAVELLI, supra note 49, at 5, 74–75; Machiavelli, supra note 49, at 94. See also MEINERZ, supra note 50, at 35.

298. See supra text accompanying notes 268–271 for the Chinese virtue-based arguments.

299. See supra text accompanying note 88.
rary Chinese political leaders, ideologues, and scholars make use of irrationalist images when describing political leadership. Song Gongde, who otherwise adheres to the rationalist narrative, asserts that the will of the Party organization is able to transcend the will of its individual members. Such explanations reflect the illiberal attempt to decouple political leadership from rule-based governance and describe it as the property of some more foundational form of human existence.

Explanations about Party leadership in today’s China are more rationalist than in the canonic European illiberal scholarship. Until the constitutional amendments of March 2018, the 1982 PRC Constitution described Party leadership only as a historical fact in the preamble of the constitution. This choice allowed the drafters of the PRC Constitution to establish the fact of Party leadership without having to describe its concrete manifestations. Party cadres must “proceed from reality” and “seek truth from facts,” thereby establishing the fact of Party leadership.

Yet the fact of political leadership does not resolve questions about what such leadership should entail: who gets to decide the exception and how? Scholars may seek to bracket this question through Schmittian decisionism and concrete-order thinking or through the “Foucauldian” conception of power, according to which power permutes society in various ways and is not reducible to commands of the sovereign. Insightful as such explanations may be, they do not stop participants in the illiberal governance project from discussing how decisions about, say personnel appointments and nominations—the constitutive elements of Schmitt’s “concrete order”— should be made. Prominent Chinese scholars readily admit that the study of intraparty regulations lacks theoretical support and sufficient explanations to a number of concrete questions about the relation—

300. The CCDI has described the CCP Constitution as a “magic weapon” (fabao), which is able to bring about unity in Party members’ thinking. Ba Dangzhang Gao Gao Ju Qilai [Raise High the Party Constitution], CCDI (Apr. 24, 2016, 10:00 PM), http://www.ccdi.gov.cn/special/xsjw/series17/201801/t20180102_160828.html [https://perma.cc/Z82C-FETN]. For a similar statement in Chinese legal scholarship, see SONG, supra note 1, at 39.

301. SONG, supra note 1, at 40.

302. SCHMITT, supra note 103, at 54.

303. See XIANFA pmbl (2018) (China) (describing how the Party “overthrew the rule of imperialism, feudalism and bureaucrat-capitalism”). Party ideologues also explain the abilities and the leadership role of the Party as a social fact. According to Xu, the law always looks backwards, whereas the Party is able to “grasp the laws of social development.” Xu, supra note 3.

304. See Liu, supra note 2, at 8 (regarding the drafting of the PRC Constitution); supra note 279 (regarding the concrete manifestation of Party leadership); supra text accompanying notes 245–46.

305. See CCP Constitution, supra note 122, General Program. As was explained above in Part I, also Carl Schmitt found a basis for normativity in the ostensibly rationalist notion of the concrete order of society. See supra text accompanying notes 102–05.

306. For Schmitt, see supra text accompanying notes 70 and 103–04. For Foucault, see Wendy Brown, Power after Foucault, in THE OXFORD HANDBOOK OF POLITICAL THEORY 63, 67–69 (John S. Dryzek et al. eds, 2006) (characterizing Foucault’s conception of power as critique of the view that political power is “a matter of rule”).

307. See SCHMITT, supra note 103, at 51.
ship between political power, intraparty regulations, and state law.\footnote{308 See Song, supra note 1, Foreword, at 3 (noting the lack of theoretical support); Liu, supra note 233, at 7 (noting the lack of sufficient explanations).}

To conclude, it may well be the case that the political leaders of an illiberal government are not able to transcend rule-based governance in any meaningful way, but instead are constituted, constrained, and resisted through various rule-based frameworks. In today’s China, intraparty regulations both empower Party leaders’ uses of power and form a potential impediment to them.\footnote{309 As is the case with other rule-based system, intraparty regulations are inevitably over-inclusive and under-inclusive. See Frederick Schauer, Formalism, 97 Yale L.J. 509, 548 (1988).} Intraparty regulations not only constitute Party organs, but also establish organizational hierarchies and divisions between them. As long as there are organizational divisions within the Party, there are conflicts between different departmental interests.\footnote{310 Liu Songshan, Renda Zhudao Lifa De Ji Ge Zhongyang Wenti [Several Important Issues on NPC-led legislation], Zhengzhi Yu Falu 60, 68 (2018).} In this sense, the rationalization process disrupts the image of organic unity of the Party and imprisons party cadres in Weber’s iron cage of bureaucracy—something that CCP leaders also oppose.\footnote{311 See Weber, supra note 115, at 123–24. The Chinese leadership opposes “decadent” forms of bureaucratism. See Xi, supra note 11, at 405.}

Conclusions

This Article has considered whether law-transcending illiberal political leadership can be governed by a set of non-legal rules. Instead of answering this question directly, this Article has argued that the illiberal governance project involves considerable uncertainty about what such leadership actually entails for rule-based governance. CCP intraparty regulations offer an interesting entry-point for considering this uncertainty. Rules make the Party more governable and, at least potentially, limit space for (unwanted) corruption and other unsanctioned personal projects; but at the same time they provide opportunities for resisting Party leadership and divide the Party into organizational departments with potentially conflicting interests.

More generally, it appears that the technocratic illiberal governance project is based on a paradoxical premise of seeking to enforce a rule-transcending (people’s democratic) dictatorship through bureaucratic rule-based processes. Chinese and foreign illiberal leaders, political ideologues, and scholars will find no easy way out of this paradox. The more strongly they argue that rules govern political leadership, the less room they have to suggest that rule-based processes, including liberal legal institutions, need to be subjected to extra-legal political considerations. Conversely, the more strongly they argue that legal rules cannot constrain political leadership, the more doubtful it seems that non-legal political rules are able to do so. As a solution to such dilemmas, illiberal leaders, political ideologues, and scholars ask their audiences to take a leap of faith and presume that the
political leadership is able to transcend the limitations of rule-based governance. Those who are unwilling to make this leap may well conclude that illiberal political ideologues and scholars have not been able to develop a set of coherent governance principles to inform their preferred governance model. The same may, of course, be true of justifications for liberal democracies—but that is another story.