(Non)legality as Governmentality in China

Xin He
Faculty of Law
The University of Hong Kong
xfhe@hku.hk

This essay proposes "governmentality" as an alternative to the paradigms of legality and stability maintenance to explain China's legal developments since the founding of the People's Republic. It argues that non-legalities, such as *shuanggui*, the rule of mandates, and the political-legal system, are the strategies, tactics, or programs by which the ruling Communist Party reins in the country and controls society. These strategies and tactics in China originated from its political structure, the Chinese revolution, and the experiences of the CCP. Their deployment is contingent on the CCP's priorities in a given political and social context. This essay concludes with implications such a paradigm change would have on future research.

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How can sense be made of China's legal developments over the last four decades? On the one hand, there has been an avalanche of laws and regulations, and numerous legal institutions have been in place. Law schools have mushroomed from 9 in the late 1970's to around 600 by the 2000s, and the number of registered lawyers has surged from almost zero in the early 1980's to around 300,000 by 2016 (*People's Daily* 2016). Legal discourse has dominated both the official rhetoric and society at large. Yet China remains far from a rule-based society; there are also numerous inconsistencies, setbacks, and regressions. Examples include the persistence of *shuanggui*, the political-legal committee, the repression of cause lawyering, and the enemy and friend distinction. Each of these factors cannot be regarded as growing pains from a stage of legal immaturity to a finalized, mature, universal destination. It would be too simplistic to explain them away as "legal extras," or "legal extra's extras" (Fu 2011). Instead, they are a different species, neither law nor legality.

In his keynote speech "China's Legal Non-Construction Project" delivered at the 2019 Annual Conference of the European China Law Studies Association, Professor Clarke (2019) argues that the paradigm of legality is inadequate. It is inadequate because too many phenomena cannot be regarded as legalities, as long as legality means rule-following, which, according to Clarke, is a broad interpretation.[1] China's legal developments have followed a trajectory that is qualitatively different from that of the Western world. Referring to "China's long march toward rule of law" (Peerenboom 2002) is problematic because China may not be moving in this direction at all. It is also problematic to call China's legal developments "premature" (Wang 2015) because China may not evolve to the mature stage. Thus, a different paradigm is needed to characterize China's legal developments, if they can be called "legal" at all. "法院" should not necessarily be translated to "courts", and "法官" should not necessarily be translated to judges. Instead, these terms should be translated to "tribunals" and "adjudicators," respectively. This better represents their meanings within the Chinese context. By the same token, the legal systems, or "legality", should be replaced by "order maintenance institutions" (Clarke 2019).[2]

[1] Clarke defines legality as "rule-making, rule-application, and rule-following." He clarifies that "Deciding disputes by coin-flipping is not…a legal phenomenon." According to Weber's (1954) typology of legal development, however, coin-flipping can also be a form of legal system labelled "formal irrationality." China's legal systems may, in Weber's sense, be categorized as "substantive rationality" or "substantive irrationality," similar to Khadi justice (Rheinstein 1954: viviii). I thus regard Clarke's definition of legality as a form of "formal rationality," now dominant in contemporary Western countries.

[2] Recent scholarship has revived an old idea (Fraenkel 1941; Sharlet 1977) and characterized China's legal systems as a duality (Wang and Liu 2019; Fu 2019). The duality characterization is similar to the legal extras: in some areas or cases, law is working and the rules are followed; in other areas, it is politics, or telephone law (Hendley 2017) that dominate. Fundamentally, it still falls under the rule of law paradigm. This is problematic, however, in that there is no line between the law side and the politics side. Where the extra-legal forces end and the legal forces begin is unclear. In virtually every case, even the most mundane, the state can penetrate the decision-making process and dictate its outcome. A better characterization may be the spectrum: there are only a handful of areas in which extra-legal forces are unlikely to intervene, but the line between more and less likely areas along this continuum is blurry.

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Clarke proposes an alternative paradigm, "stability maintenance", to characterize China's order maintenance institutions over the past four decades. He argues that all of these "inconsistencies, mistakes, setbacks, regressions, and unrepresentative aberrations" occur because of the overarching concern for social stability (Clarke 2019). To maintain stability, or to maintain stability in a better way, these legal extras persist. In this sense, the political-legal committee is a means for the Party to control society and maintain stability. *Shuanggui* is another mechanism to maintain stability. Even "local experimentalism," in which laws are often violated, is an effort to maintain stability, not to mention the recent Xinjiang detentions.

Clarke's efforts are admirable. Elegantly written in the Dworkinian style, his paper is ambitious and inspiring. Most China law scholars assume that given time, China will develop a system similar to what Western countries have today: limited state power, respected fundamental rights, and relatedly, a high degree of judicial independence. Clarke's challenge of the linear (low to high) conception of the rule of law trajectory echoes Cheesman's (2015) call for "opposing the rule of law": law and order emanating from non-Western contexts is not on a sliding scale on the same pole toward the rule of law; it is qualitatively distinct. As Ng (2019) argues, China may not be characterized as a rule-by-law regime, and thus we should move beyond the debate between the rule of law and rule by law. Such theoretical deliberations are timely and important, because without reflecting on our assumptions, we may end up barking up the wrong tree.

Nevertheless, I do not believe "stability maintenance" to be an alternative paradigm. In Clarke's own words, it has been an "animating principle" of order maintenance institutions over the past four decades. Stability maintenance has, of course, become a paramount concern in certain periods after the Reform, but it has not been an overarching principle throughout the *whole* Reform period. I will demonstrate that during several periods, stability maintenance has *not* been the regime's priority; many legal-extras during these periods have little relevance to stability maintenance. Rather, they are intertwined with the strategies, tactics, or programs by which the ruling Communist Party directs human behavior according to its will—or more bluntly, by which it reigns in the country and controls society. I thus argue that law, as literally translated from "法律", along with these legal extras, are better regarded as the CCP's governmentality, as defined by Foucault (1991). These strategies and tactics utilized in China originated from its political structure, the Chinese revolution, and the unique experiences of the CCP. Their deployment depends on the priorities of the CCP in a given political and social context. This essay concludes with the implications of such a paradigm change for future research.

Is Stability Maintenance the Animating Principle?

Scholars have realized that stability maintenance has been a top concern of the regime (Su and He 2010; He 2017; Minzner 2013; Liebman 2014). Trevaskes et al. (2014) devoted the edited

There is no line between the routine and the politically sensitive cases. Instead, it is a spectrum, in which the penetration of extra-legal forces may have varying degrees of influence, or where the light of extra-legal sources penetrates through one end. Nonetheless, the spectrum or duality characterization faces the same problem: there is no way to guarantee, or even to expect, that the non-law end will evolve toward the other end. The two ends are, to use Cheeman's (2014) term, "asymmetrical opposite."

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volume "The Politics of *Law and Stability*" (emphasis added) to this topic. Similar emphases have been placed on this concern. Stability maintenance is similar to law and order, in which the goal is to "eliminate restlessness through particular injunctions delivered administratively" (Cheesman 2014: 96). For several reasons, however, I do not believe this to be the animating principle for China's ordering institutions during the Reform period.

For much of the Reform period, stability maintenance was not the regime's priority. According to Wang and Minzner (2015), this concern emerged only in the early 2010s. In the 1980's, the regime's major concern was economic reform, and especially, reversing the thoughts of the extreme left (Yang 2004). Only in the late 1980's, when student protests engulfed big cities, and especially after the 1989 Tiananmen Protests, did Deng Xiaoping state stability as the regime's primary concern (Vogel 2011: 586) (稳定压倒一切). However, even this emphasis was short-lived. Soon after 1989, Deng retreated to the backstage of politics, and then premier Li Peng, began regulation and consolidation (治理整顿) of the economy. Upset by this, Deng initiated the famous Southern Tour and delivered several signature speeches. Once again, his concern was to facilitate economic reforms, urging the leaders of the day, including Jiang Zemin and Li Peng, to be more liberal and audacious in economic reforms (Vogel 2011: 664–65). This trend persisted throughout the tenure of Jiang Zemin and the early Hu Jintao era. Indeed, economic development, anti-leftist thought, anti-bourgeois thought, environmental protection, and more recently, the Great Rejuvenation of the Chinese Dream have each been priorities of the regime. In other words, for the majority of the last four decades, stability maintenance was not the regime's primary concern.

Furthermore, most "extra" institutions listed by Clarke are only loosely tied to stability maintenance. They have some relevance to stability maintenance, but this is not their primary objective. Instead, they are mechanisms to achieve the regime's goals, although during certain time periods, these goals have happened to include stability maintenance. In short, they are the means to achieving other goals.

The most obvious illustration of this point may be "local experimentalism." Clarke uses this to demonstrate that under this policy laws were often violated. Land auctions, for example, which should have been prohibited by law, persisted (Qiao 2015). Indeed, time and again constitutional amendments justified earlier practices prohibited by law. Clarke's point is valid: the regime does not always play by the law. However, the policy—to allow local governments to conduct experimental activities before the law permitted them—was intended to promote the economy. This is also related to the relationship between the Central and local governments. The point is that this practice or policy has little relevance to stability maintenance.

By the same token, the political-legal system has persisted throughout the existence of the People's Republic as an organ to implement the regime and the ruling party's policy. During some eras, its policy goal has been to maintain stability. For example, it has played a crucial role in *yanda* (severe crackdown against criminal activities). However, the institution itself has little connection to stability maintenance. Rather, it is an organ that coordinates between the Party committee and other political-legal organizations, including the police and the courts. This organ has been used to advance the Party's other concerns, for example, punishing politically powerful individuals, such as the Gang of Four, Zhou Yongkang, and Bo Xilai. Once again, these concerns have, at best, remote relevance to the goal of stability maintenance. As far as this matter is concerned, the function of the organ has been to ensure that the regime maintains full control over these political cases.

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The same rationale applies to *shuanggui*, a unique approach to disciplining Party members which does not entail due process of law. Under the lens of legality, the practice seems weird, because Party members, after all, are citizens, and the law is supposed to trump the Party's internal rules. However, as a mechanism, *shuanggui* has little connection with stability maintenance. It is more related to the ruling party's internal control: it wants to ensure that its members are loyal. Party members have committed their lives. This includes sacrificing their "legal" rights to the Party. In this sense, the Party has every right to detain them without due process of law or access to a lawyer.

One can draw the same conclusion for the enemy and friend distinction. It is true that during Reform periods, this dichotomy has persisted. This is inconsistent with the spirit of the rule of law, or legality (Biddulph 2020, forthcoming). Yet again, this dichotomy has little connection to social stability. It is simply a way for the ruling party to divide the people, and thus control them. It can be used to achieve stability maintenance, or other purposes, when necessary.

Indeed, stability maintenance was the regime's concern before the Reform period. The political campaigns of the pre-Reform period which culminated in the Cultural Revolution, were not focused on maintaining stability. On the contrary, their goals were to instigate social *in*stability. For example, for most of the Mao era, class-struggle was the guiding principle. "The CCP's tradition was struggle" (MacFarquhar and Schoenhals 2006: 458). This principle was supposed to mobilize groups to fight one another. During the Cultural Revolution, the Red Guards were unleashed against the Party. Tens of thousands of officials were humiliated, tortured, and even killed. The work team, dispatched to the grassroots level, was to educate, cajole, and persuade poor peasants to fight against rich peasants, landlords, and anti-revolutionaries. "Law was demobilized" and "war was framed", resulting in mass killings across the country (Su 2011: 156, 188). This can hardly be characterized as stability maintenance; nor is it law and order. If anything, it is the other way around—lawless disorder.

Indeed, stability maintenance only represents one type of social order. Clarke refers to it as "law and order," the opposite of restlessness. In his schema, law and order overlap. However, law does not equal order. There are other relationships between law and order. If the Cultural Revolution represents lawless disorder, then there has been law and disorder in many post-colonial societies (Comaroff and Comaroff 2006; Saha 2013). At time of this writing (July to August 2019), law and *disorder* may also characterize the ongoing events in Hong Kong. Ellickson (1991) famously coins "order without law," to portray another type of relationship between law and order, in which the state law does not penetrate the grassroots of society. In this relationship, social norms dominate social order. This is also common in contemporary China (Wang 2010).

(Non)legality as Governmentality

If stability maintenance is not the animating principle of order maintenance institutions in China, then what is?[3] I argue that governmentality is a better paradigm. According to Foucault (1991),

[3] Kwai Hang Ng (2019) suggests replacing law with "policy implementation," because "the written laws are, first and foremost, policy statements of the party" (2019:19), and such a treatment explains legal empowerment and judicial reform. However, equating law with policy implementation neglects many characteristics of law as listed by Fuller

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governmentality is the strategies, tactics, and programs to control society. It was an "ensemble formed by the institutions, procedures, analyses, and reflections, the calculations and tactics, that allow the exercise of this very specific albeit complex form of power…" (Foucault 1979: 20). He entitled his lecture at the College of France in the 1980s "Territory, Population, and Security". As I will show, both the legalities and the legal extras, as listed by Professor Clarke but not limited to them, make better sense through the prism of these elements which can be summarized as governmentality of the regime.[4] They may be characterized as leadership maintenance, instead of stability maintenance.

From a historical perspective, law, or legality, has not been a primary concern for the CCP. It is true that China ratified its Constitution in 1954, but it was more symbolic than functional, and has never been seriously implemented. The role of the law could not have been more minimal during the Mao era and the Cultural Revolution, in particular. Even since the Reform, the role of the law has remained marginal. The preeminent concern for Deng Xiaoping was to grow the economy. *The Selected of the Works of Deng Xiaoping* (1983), for example, barely touched the law. Deng did talk about legislative work and some legal issues, but these words were succinct and summary, compared with economic development, the construction of the Party, and cadre management. Legal works, in his eyes, were to attract foreign investment and safeguard economic activities. The evolution of administrative law in China also speaks volumes about the subsidiary role of legal works. Only in 1989, a decade into the Opening-Up Policy, were the administrative laws introduced. As many administrative scholars have agreed, the implementation of administrative law has primarily been instrumental: it strives for a better way to govern the country (Peerenboom 2008), or to put bluntly, it is a means of political control (He 2010). Many functions can be utilized through "rule by law" such as maintaining social control, establishing legitimacy, the management of administrative agents and agencies, the advancement of economic interests, and the delegation of controversial decisions to the judiciary (Ginsburg and Moustafa 2008). In other words, law or legality, is only a strategy, or technique for the ruling CCP.

When the law is regarded as an instrument to achieve its fundamental goal of keeping the Party in power, it is understandable that the CCP has no reason to give up these means of governmentality. When the means of law would inevitably clash with other strategies or techniques, the result is compromise: sometimes legality is sacrificed, while other times the legal extras such as *shuanggui* are legalized, and the Party Discipline Committee is incorporated into the Supervisory Commission. This is why China's "legal" developments have never been linear: it may enact more laws, but this does not mean that the authorities honor the laws and rights. The CCP may have devoted an entire plenum to the rule of law in 2014, but that does not mean that it has loosened control over the judiciary, other political-legal institutions, or their personnel. On the contrary, presidential term limits can be abolished, and the power of *shuanggui* can be strengthened, so much so that it may trump the long-established tenets of criminal justice (Chen 2018; Sapio 2019). It all depends on the CCP's evaluation of the situation: which bundle of strategies suits its reign?

(1958). Moreover, policy implementation is mechanical; it does not indicate the goals, contents, norms, and values inherent in an ordered institution.

[4] Many scholars have utilized Foucault's definition of governmentality. They have expanded the meaning of the term to refer not just to the strategies and techniques of sovereignty, but also to the daily practices of each institution such as schools, hospitals, and prisons. However, the focus of this essay is sovereignty's governmentality.

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By the same token, the legal-extras are the toolkits of the CCP's governmentality. They are residues or "extras" under the lens of legality, yet they make sense as governmentality. For example, if one believes that the CCP should observe the laws that it has promulgated, the measures, including detentions and formalized brainwashing in Xinjiang, are difficult to understand. However, these measures are intended to maintain the integrity of the territory, one of the regime's top concerns. Would this not be a priority for any king or prince? Can any sovereign afford to openly lose part of its territory? Losing territory invariably deals a blow to the legitimacy of a sovereign. It lays bare a regime's vulnerability. Some regimes are even toppled because of it. The problem with Xinjiang, especially as the Chinese regime has framed it as a fight against separatism rather than the mistreatment of the Uyghur minority (Hillman 2016), is that it falls victim to its own discourse. It thus has to take any measures necessary to prevent it from seceding. With such grave concerns, it should be no surprise that China has taken extreme measures, regardless of whether they violate fundamental rights that it has agreed to observe, or whether the death penalty has been used excessively. Indeed, the death penalty is the most common form of punishment employed against challenges to sovereignty. Formalized brainwashing has also been employed, despite the regime's commitment to freedom of religion. Each of these measures are nothing more than strategies or programs for governance. If the conflicts escalate, it should come as no surprise when more extreme measures are adopted.

Similarly, *shuanggui* and the crackdown on students advocating for workers' interests (Hernández 2018), which both seem weird from the perspective of legality, are just additional aspects of governmentality: security of the sovereign. *Shuanggui* has long been a tactic of the CCP to control its members. Its emphasis is loyalty to the Party, rather than the rights of Party members. From the legal lens, many *shuanggui* practices are hard to comprehend. From the perspective of governmentality, however, they make perfect sense.

The collective ideology is another governmentality tactic. It emphasizes the collective goal, which has been represented by the CCP. This emphasis suggests sacrificing individual rights when they conflict with the collective's goals. This tactic is important for the sovereign because it facilitates ruling: whenever the sovereign proposes a policy, it faces minimal resistance because the collective goal outweighs individual rights and interests. The same rationale applies to the repression of cause lawyering. The law does permit these lawyers' activities. However in the long run, the expansion of cause lawyering and the rights discourse can threaten one-party rule. This is a concern for the regime's security. Thus, limiting the activities of cause lawyering becomes a preventive or preemptive strategy to safeguard the sovereign's security. In Zhang's words (2010: 15), this is related to "ideological security."

Indeed, the major policies during the Reform period, including economic development, the Family Planning (One-Child) Policy as well as its easing (Greenhalgh 2010), and the recent environmental protection policy, are all related to another aspect of governmentality: the population. It is related to promoting welfare, preventing disease, ensuring the population can progress and improve, and addressing its desires, aspirations, and needs, without challenging sovereignty. These are strategies to control the risk of disease and rebellion. The governmentality within pertains to "pragmatic security" (Zhang 2010: 15).

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Table 1: A Contrast between Legality and Governmentality.

Legality	Governmentality
The Law	Instruments
Rights	Interests
Professionalism	The Political-legal System
Due Process of Law	*Shuanggui*
Division of Power	The "Democratic" Dictatorship
Equal Implementation of the Law	The Rule of Mandates
Procedures	Outcomes
Means	Ends
Individual Rights	Collective Ideology

Table 1 contrasts the terms when viewed from the perspective of legality and governmentality. First of all, in the cosmology of legality, the law is regarded as the ultimate arbiter. However, in the lens of governmentality, it is only an instrument.[5] The law, along with the legal-extras, comprises the reigning sovereign's arsenal. The law does not enjoy this status in countries where the rule of law is genuine. The law in China is dispensable when there are higher priorities. In this sense, the debate between rule of law and rule by law is a moot point because China has never had rule of law, nor is there a guarantee that it ever will move in that direction, regardless of what is written into the Party's official documents or Constitution. No cases, even the mundane, are immune from political intervention. One could argue that the political authorities do not care about these cases because they are too numerous or too trivial (He 2011). Yet, this does not mean that the authorities cannot, or will not, intervene. As long as there is a higher priority, this option is on the table. Furthermore, there is always a legal or non-legal channel through which they can intervene. The only difference between those routine or mundane cases and the political, or politically sensitive cases (Fu and Peerenboom 2009), is the likelihood of extra-legal interference.

Consider the evolution of the four cardinal principles enshrined in China's constitution. Three of the four principles (the Party's leadership is the lone exception) have been either weakened,

[5] This does not mean that I subscribe the Leninist definition of law—law is the instrument of the dominant class to repress the underclass. The law does not merely serve the interests of the dominant class; it also serves the interests of the underclass, or the population as a whole. In short, it is the mechanisms, strategies, and programs to reign. As governmentality, the law is used not just to deal with the underclass, but also the elite, such as some of the Party members in *shuanggui*. Its function is to maintain order and protect sovereignty. Along with non-legalities, legalities are broad, but subtle, strategies and techniques. For example, the train table (Stone 1985) serves not just the interests of the dominant class, but all social classes, or the entire population. However, a train table is a method to discipline individuals' behavior and govern society, thus maintaining social order. Therefore, it is a typical example of governmentality.

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abandoned, or voided altogether. This is why I argue that the Party's leadership is the living constitution (He 2012). If these three cardinal principles can be sacrificed, couldn't the law, or a campaign pertaining to it, be sacrificed as well?

This is why rights are not truly honored, because interests, as defined as utilitarian calculations, and especially the state's interests, are the primary concern. In this way, collective ideology is emphasized, while individual rights are slighted. This is why the political-legal system is practiced, as it offers an efficient, convenient, and effective channel to fulfill the Party's goals. The professionalism of the judiciary is destined to be slighted, simply because a well-trained profession, imbued with credos, may resist Party orders. In the Party's list of priorities, judicial professionalism, which is created to overcome the principal-agent problem, is secondary to loyalty to the Party. This is why there is no need for the SPC president to be trained in law, a phenomenon that scholars of the rule of law have difficulty comprehending. Similarly, the rule of mandates persists (Birney 2014), because it, like the political-legal system, offers the efficiency needed for the Party to achieve its goals. If every dispute was resolved through administrative litigation or constitutional litigation, following the Legislative Law and relevant regulations, the process would lack the efficiency the Party expects (He 2009). It would also impose uncertainties, thus complicating one-party rule.

The list goes on and on. Ultimately, concerns due to governmentality are the outcome: to what extent is sovereignty secure? The law, instead, cares more about the procedure. It may serve the outcome of the sovereignty indirectly. However, when it trumps the more imminent or fundamental goals of sovereignty, it is destined to be sacrificed. The regime cares more about the ends than the means.

The Political Structure as the Root?

Professor Clarke suggests that "the actual political structure" is the key to understanding the animating principle of China's order maintenance institutions. This is true, as governmentality is intertwined with the CCP's one-party rule. However, the uniqueness of China's governmentality is also linked to China's revolutionary, and especially the CCP's own, experiences. The one-party ruling political structure in other countries has not generated the same strategies, tactics, and programs as it has in China. These strategies, programs and tactics are evolving, gathering and losing momentum in China's unique context.

The political structure is a dominant factor. The paradigm of governmentality even allows for an understanding of the "legal" and "non-legal" developments that have occurred over the past seven decades. "Class struggle as the ultimate guideline," for example, was just another governmentality tactic of the ruling party before the Reform. The Party believed that this was an effective way to govern society and maintain its ruling status, even though it ruptured society and left millions humiliated, and even dead. During the Cultural Revolution, all legal institutions were abolished. Arguably, this was another CCP strategy, because abolishing the legal institutions paved the way for the Cultural Revolution. Many legal-extras, such as *shuanggui*, the political-legal system, the collective ideology, and the enemy and friend dichotomy, had been regarded by the CCP as effective means of social control, had boosted its legitimacy, and had facilitated the maintenance of its ruling status.

Since the economic reforms brought about the legal reforms, both legal and non-legal tactics have been employed by the regime, embedded under such a political structure. As a one-party regime, it is paranoid about maintaining its power. Above all, it has been concerned with the maintenance of leadership. Thus, it addresses any political threat through measures of coercion

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and relief. Since society is the source of disorder, or at least a latent source of disorder, the Party has been engaged in a permanent programme of reigning. The worries are easily intensified, given that China is a single unitary political entity, with the world's largest population. Under liberal democracies and multiple-party regimes, most incumbent parties are not concerned about being overthrown. Election has been a peaceful means of transition. The incumbent party endeavors to maintain its power and strives for reelection. Indeed, as Ginsburg (2001) points out, to ensure it is treated fairly upon losing power, in democratic regimes the incumbent party often beefs up administrative laws for its own protection. In short, once the rule of law is entrenched, the sovereign's worries about its very existence are mitigated. Sovereignty is diffused into society, thus becoming a micro-process. In a one-party regime, however, the ruling party will devise various tactics, strategies, and programs to maintain its position. This explains the existence of not just legalities, but also non-legalities.

Politics is not the only factor steering China's governmentality. These non-legality mechanisms or strategies have been associated with the characteristics of Chinese revolutions, and especially CCP history (Zhu 2007). *Shuanggui*, for example, has been an effective measure to control its own members since the time of Chinese Communist Soviets (Sapio 2006). Wielded by the CCP, it has proven effective at reining in its members. The CCP thus has no reason to abandon it. If anything, it will only strengthen it, even without a legal mantle. Historically, Chinese courts have never been genuinely independent. The appointment of senior court officials has always been in the hands of the Party. The judges do not have life-long tenure; they can be removed at any time. Omnipresent, the Party has always maintained various means to control the courts' decision-making process (Zhu 2007; Ng and He 2017). The political-legal system has been crucial to achieving this (Hou 2016; Li 2016). Needless to say, the rule of mandates originated out of the CCP's revolutionary experience. Throughout the history of the CCP, it has also adopted the democratic dictatorship, instead of the division of power, to implement its policies. Once a decision is made, all Party institutions and members must implement it, even if they disagree with it. All of these extras bear the imprint of CCP history. Since the one-party political structure has remained unchanged, some of these extras have been reinforced during the Reform period. Of course, others have waned. Nonetheless, they represent a fundamentally different set of strategies for reign.

Conclusions and Implications

Adopting the perspective of governmentality to study China's "legal" developments over the past four to seven decades provides a vantage point. Legal scholars have long accepted the rhetoric and discourse on rule of law. This has been done both consciously and unconsciously. Many of them are critical of China's legal developments, focusing on problems, shortcomings, and inconsistencies. Others, dubbed "panda huggers," defend China. They point out that one cannot use the international best practices to assess China's development. If measured by the standards of developing countries, or countries at the same economic development level, China has been doing fairly well (Peerenboom 2009). Yet, both sides of the debate subscribe to the same rule of law paradigm.

The paradigm of governmentality elicits another set of research questions. Instead of assuming that the rule of law, as practised in Western liberal democracies, is the terminus of China's legal evolution, it argues that China has a qualitatively different trajectory. Its course may never intersect with the rule of law. Even if it does intersect, it may have a different trajectory. To paraphrase Cheesman (2014: 113), the Chinese are not on the "low rungs on a ladder to the rule of law; they are climbing a different ladder altogether." This perspective underscores Clarke's (2019) expectations: "Then bugs become features, errors become normal behavior, and

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regression and setbacks become just change, or possibly progress toward a different goal from the one imagined or wished for by the analyst."

Scholars should also move beyond the debate over China's *progress* in legal developments. Instead, they should empirically examine the operations of the different systems, such as the rule of mandates, *shuanggui*, and the supervisory commission (e.g., Li and Wang 2019). How do they work? To what extent do they enhance the CCP's legitimacy and boost its capability to govern? What contextual factors have strengthened or weakened particular strategies, tactics, or programs? To what extent will the various mechanisms, laws and non-laws alike, help the CCP control its territory, population, and security? Analysis of the regime's governmentality should also include the daily tactics and tools that have been diffused and internalized in private and community activities, such as budgets, audits, standards, benchmarks (Power 2000), interviews, case records, diaries, brochures, and manuals (Rose et al. 2006: 86). The questions should include: "Who governs what? According to what logics? With what techniques? Towards what ends?"(Rose et al. 2006: 85). An analytical perspective of governmentality will utilize empirical inquiry to answer these questions.

If political structure is the root of the emphases on various tactics of governmentality, what are the new regulatory mechanisms that have been developed and deployed in countries with one-party rule? If pluralizing of policing is the trend in democratic countries (Merry 2001), is this also true of authoritarian countries? If variations in governmentality stem from governance in an era of freedom, how can the techniques and tools observed in contemporary China be understood? China's reform period has witnessed the expansion of freedom in certain aspects, yet coercive forces and surveillance remain ubiquitous and have even intensified. To borrow a book title, has China ever become modern (Latour 1993)? If China is indeed pre-modern, then how does it differ from European societies before the rise of capitalism (c.f., Raeff 1983) or other non-Western countries such as Malaysia (Balasubramaniam 2012) or Myanmar (Cheesman 2015)? Is there any cultural influence from Chinese tradition (Zhang 2011)? We should also compare the varieties, distributions, and targets of these mechanisms across political regimes and whether they focus on restraining the soul, corporal punishment, and/or spatial management. Studying these mechanisms will elucidate the diverse relationship between law and order in their own contexts. The new knowledge and concepts generated in the process could in turn enrich the discussion of legality and the rule of law.

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