

Cambridge University Press & Assessment

978-1-108-42481-3 — Socialist Law in Socialist East Asia

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Excerpt

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PART I

Socialism and Legality

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Socialist Law in Socialist East Asia

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More than fifty years ago, socialist states in Asia turned to the Soviet Bloc for inspiration in developing their political and legal systems. They enacted constitutions and laws, and established institutions that, with varying degrees of faithfulness, replicated Soviet regulatory models. The collapse of socialism in the Soviet Bloc was accompanied by the literal collapse of structures and bodies previously considered indestructible, such as the Berlin Wall and statues venerating socialist heroes. Mirroring this decline, much subsequent analysis about socialist Asia promptly devalued and dismissed socialist institutions, legal theories and forms of knowledge – presupposing a linear transition from socialism to liberal legalism. Far from linear, legal reform in this region has been variegated and complex – raising the question of whether socialist laws and institutions were more resilient and adaptable than previously thought.

This book argues that the scholarly focus on the emergence of liberal legalism has marginalised the ongoing normative and structural legacy of Asian socialism found in various guises in contemporary Vietnam and China. The assumption of the inevitable export of Western capitalism, together with versions of liberalism and its institutional manifestations, is, we suggest, flawed, or at least misconceived, in socialist Asia. The chapters suggest that, at least in part, a failure to recognise the normative and structural legacy of Marxist–Leninist approaches to socialism constrains our capacity to interpret the contemporary Vietnamese and Chinese reforms. Further, and significantly, a failure to recognise the socialist legacy risks overlooking a key reason for ongoing local support for strong/authoritarian states in socialist Asia, which seek to promote ‘development’ while also resisting its destabilising effects. As will become evident, the impacts of contemporary socialism vary across countries, jurisdictions and institutions.

We commence this Chapter with a brief review of the history of socialism, including recalling socialist debates before the advent of the Russian Revolution. Subsequently, we briefly trace the ‘import’ of Soviet

socialism into both the People's Republic of China and the Socialist Republic of Vietnam. We turn then to the 'puzzle' of socialism's resonance and relevance today, outlining the debates about its resilience and adaptation in socialist Asia.

1.1 A Brief History of Socialism Pre-Russian Revolution

Socialist ideas predate the Russian Revolution and the subsequent export of Marxist–Leninism around the world. In its narrowest sense, socialism is a theory of society where the means and benefits of production are collectively owned and enjoyed by labour. This definition reflects the political economy of the nineteenth century, where the means of production was almost exclusively factories and land. Owning the means of production enabled the reorganisation of the political economy to advance the interests of the labouring classes. With the emergence of post-industrialisation in the late twentieth century, what constitutes the means of production has become an increasingly open-ended question. Whether the core values underlying socialism – equality, community and fairness – require the socialisation of the means of production is unclear. However, as the discussion about the historical development of socialist ideas makes clear, for socialism to realise its objectives it is necessary to retain some type of central coordination over the political economy.

Socialist ideas arose from the interpretation of the French Revolution by French and German intellectuals. The French philosopher and businessman Henri de Saint-Simon is credited with distinguishing between the industrial and idling classes, and developing a notion of class that continues to animate social critiques.¹

Taking the analysis further, Lorenz von Stein developed a 'sociological interpretation of the proletariat as the labour force in modern society and as a class-conscious unit struggling for power in pursuit of their interests'.² He was influenced by Hegel's historical idealism, and viewed the

¹ Albert S. Lindemann, *A History of Modern Europe: From 1815 to the Present* (Oxford: Wiley-Blackwell, 2013), p. 67; Kaethe Mengelberg, 'Introduction', in Lorenz von Stein, *The History of the Social Movement in France, 1789–1850* (ed. and trans. Kaethe Mengelberg, New York, NY: Bedminster Press, 1964), pp. 1, 27 [translation of: *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage* (first published 1850)]; Werner Sombart, *Socialism and the Social Movement* (M Epstein, translated from 6th German edition, London: J.M. Dent; New York, NY: J.P. Dutton & Co, 1909), p. 2.

² Mengelberg, 'Introduction', pp. 1, 27; Friedrich Mucke, *H. de Saint-Simon* (Jena: Fischer, 1908), p. 329.

French Revolution as the perfect example of a mass of people energised by the notions of liberty and equality, and cognisant of the unequal nature of their participation in the economic system. The principles of equality underlying socialism arose in France because the proletariat toiled ceaselessly for the capitalists – the owners of the means of production – who deprived them of the surplus value of their labour. Stein preferred political reform to revolution as a means of allowing the proletariat to acquire property through labour.³

Drawing on the utopian ideas of French philosopher Charles Fourier,⁴ Robert Owen argued that human distress was caused by the competition of human labour with machinery. Like other utopian socialists, Owen proposed that the poor should form communities that allowed members to achieve a state of human flourishing by participating in varied and fulfilling occupations.⁵ Although experiments during the nineteenth century with ‘utopian’ socialist communities failed, they provided inspiration for later communist projects.

Marx and Engels were attracted to the ‘utopian project’, but disagreed with ‘utopian’ socialists that mere exhortation and good example would convince the bourgeoisie to relinquish power.⁶ Marx and Engels regarded revolution as a necessary process for socialising the means of production. Their 1848 publication of the *Manifesto of the Communist Party* provided a clarion call for the proletariat to arise and overthrow the capitalists that controlled the means of production.⁷ Marxist ideology consisted of four interrelated elements: (1) that society was divided into classes, including the proletariat and bourgeoisie; (2) that those classes had general interests; (3) that those interests were implacably opposed; and

³ Lorenz von Stein, *The History of the Social Movement in France, 1789–1850* (ed. and trans. Kaethe Mengelberg, New York, NY: Bedminster Press, 1964), pp. 73–75 [translation of: *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage* (first published 1850)].

⁴ Jonathan Beecher, *Charles Fourier: The Visionary and His World* (Berkeley, CA: University of California, 1986), p. 355. See also Lindemann, *A History of Modern Europe*.

⁵ Letter from Robert Owen to the Committee of the Association for the Relief of the Manufacturing and Labouring Poor, 12 March 1817, in Robert Owen, *The Life of Robert Owen Written by Himself* (1857–1867), vol. 2 (Fairfield, NJ: A.M. Kelley, 1977).

⁶ See especially K. Marx, F. Engels, S. Moore and D. McLellan, *Manifesto of the Communist Party* (Oxford: Oxford University Press, 1992), ch. 3.

⁷ Famous last line of the *Manifesto of the Communist Party*. See Marx and Engels *Selected Works*, vol. 1 (Moscow: Progress Publishers, 1969), pp. 98–137.

(4) that class struggle was the only way to eliminate dependence of labour on capital.⁸

It is possible to extract from this body of socialist literature a cluster of characteristics that describe socialism. A socialist-inclined position tends to favour centrally organised political economy decision making that redistributes production according to notions of equality. It also favours the aims and values of community or society, over those of the individual. Marx, for example, privileged commitments to universal social and moral perspectives over individual perspectives.⁹ Finally, socialism tends to favour cooperation above hierarchy and competition. For Michael Newman, socialism is ‘based on the values of solidarity and cooperation ... it promotes a relatively optimistic view of human beings and their ability to cooperate with one another’.¹⁰ Socialism places a premium on working together for the service of the state and furthering communal reciprocity. This spirit of (idealised) cooperation, or state mandated collectivisation, contrasts with the pursuit of material self-interest underlying capitalism, a point that Dowdle will elaborate further in Chapter 2.

1.2 Socialism and Legal Development

Socialist legal theory is relatively underdeveloped when contrasted with theories of socialist political economy. Questions about the particular legal and institutional arrangements required of a socialist state – to grant supervisory jurisdiction to a procuracy or not, for instance; a topic discussed by Partlett in Chapter 3 – were peripheral to the socialist theories of the nineteenth century. As Schleiermacher noted, ‘[l]aw is the expression of existing conditions’.¹¹ It is reflective of the distribution of power among the classes in society. In a similar fashion, Stein stated ‘[a] valid legal system contains two elements: it is the pronounced will of the state, and it is a result of circumstances’.¹² The key circumstance of socialism – the socialisation of the means of production – had not taken

⁸ Sombart, *Socialism and the Social Movement*.

⁹ Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (New York, NY: Oxford University Press, 2002, 2nd edn.).

¹⁰ Michael Newman, *Socialism: A Very Short Introduction* (New York, NY: Oxford University Press, 2005), p. 3.

¹¹ Quoted in Sombart, *Socialism and the Social Movement*, p. 48.

¹² Von Stein, *The History of the Social Movement in France, 1789–1850*.

place, and without this social change, socialist doctrine had not formulated legal institutional arrangements.

Marx's theory of historical materialism¹³ was much clearer than previous socialist writings in linking the rate and direction of social progress to the development of the means of production and exchange.¹⁴ Although his writings draw on this theory to provide a practical approach to questions of law, he did not develop a detailed and systematic theorisation of law.¹⁵ Marx's main contribution to our understanding of law resides in his analysis of the social relations that underlie, but are often obscured by, formal legal categories, such as private property and state property. The core insight is that legal rights are not natural attributes of individuals or the product of state power, but rather a set of social relationships that emerge in particular historical circumstances. For example, Marx concluded that despite the appearance of voluntariness, the commodity economy establishes abstract rules that governed trade and labour contracts. Workers in commodity economies are forced to price their labour at market rates, rather than according to the value of the products or services they produce.

When socialism finally triumphed in 1917 in the former imperial Russian Empire, a fierce struggle emerged between a decentralised, 'utopian' version of socialist law and a more centralised, 'statist' approach grounded in the imperial Russian tradition. Evgeni Pashukanis was the leading utopian, applying Marx's critique of political economy to jurisprudence.¹⁶ Pashukanis concluded that legal thinking, which arose in bourgeois societies, was inextricably linked to its origins and would wither away in socialist political economies. Andrei Vyshinsky was the leading statist, arguing that the use of formalist and centralising imperial

¹³ Best elucidated in the preface to Karl Marx, *A Contribution to the Critique of Political Progress* (Moscow: Progress Publishers, 1977).

¹⁴ John Spargo and George Louis Arner, *Elements of Socialism* (New York, NY: Macmillan, 1912), p. 77.

¹⁵ Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1984), p. 9; Robert Fine, 'Marxism and the Social Theory of Law', in Reza Banakar and Max Travers (eds.), *Law and Social Theory* (Oxford: Hart, 2013) pp. 95–109.

¹⁶ As Harold Berman writes: E. B. Pashukanis was, until 1936, the Director of the Institute of Soviet Construction and Law, attached to the Communist Academy. After this post he was a member of the USSR Academy of Social Sciences. See Harold J. Berman, *Justice in the USSR* (Cambridge, MA: Harvard University Press, 1963), pp. 31, 389–390. Extracts of Pashukanis' writing are located in V. I. Lenin et al., H. W. Babb (trans.), 1951, cited in John N. Hazard, *Communists and Their Law* (Chicago, IL: University of Chicago Press, 1969), p. 18.

Russian legal institutions was necessary to overcoming the exploiting class and attaining a socialist state. Relying on the ideas of Lenin and Marx, this approach placed a highly centralised bureaucratic state – rather than the individual or community organisations – at the centre of a transition to socialism. In short, a powerful and centralised socialist state itself was a normative good for progress to socialism; something that could smash the class enemy, allow the Soviet Union to catch up with the West, and manage economic inequality or destructive competition. This Marxist–Leninist and statist conception of socialist law as a centralised and coordinated legal system was transferred to China and Vietnam during the 1950s and has shown considerable resilience since then.

1.3 Borrowing from the Soviet Union: China

China's embracing of the Soviet-style socialist system was a significant departure in terms of the trajectory of its legal history, but the shift was partial.¹⁷ Chinese legality and legal practices after 1949, in substantive terms, were more profoundly shaped by the unique sequence of revolutionary experience prior to 1954 when the first Constitution was promulgated under a strong Soviet influence. The Land Reform Law and the Marriage Law, both enacted one year after the establishment of the People's Republic of China, were the defining characteristics of an indigenous revolution in legal innovation. The Land Reform Law, as brutal as it was in its enforcement, gave land title to individual farmers, fulfilling an essential revolutionary understanding to give land to its tillers.¹⁸ The Marriage Law had a powerful emancipatory impact in freeing women from traditional bondage. The formation of a joint government in 1949 composed of multiple parties to represent the interests of all classes allowed the Communist Party to exercise leadership with meaningful participation from other political forces supportive of the Communist Revolution.¹⁹

¹⁷ Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: LexisNexis Butterworths, 2011, 4th edn.).

¹⁸ William Hinton, *Fanshen: A Documentary of Revolution in a Chinese Village* (Berkeley, CA: University of California Press, 1977); and Edwin E. Moise, *Land Reform in China and Northern Vietnam: Consolidating the Revolution at the Village Level* (Chapel Hill, NC: University of North Carolina Press, 1983).

¹⁹ Xiaoping Cong, *Marriage, Law and Gender in Revolutionary China, 1940–1960* (Cambridge: Cambridge University Press, 2016); and Neil J. Diamant, *Revolutionizing the*

The making of the 1954 Constitution brought the full impact of the Soviet constitution to bear, formally incorporating China into the Bolshevik orbit, even if it would never be a satellite of the USSR. With Stalin's personal intervention modelled on the Soviet 1936 Constitution, the Chinese Communist Party (the CCP) followed the footsteps of 'Soviet Old Brothers', as they were colloquially referred to, in creating a constitutional order based on congressional supremacy and democratic centralism.²⁰ The new Constitution ended the multi-party joint government that had been practiced since 1949, clipping the wings of the non-CCP political forces into a consultative body and entrenching the CCP's monopoly on political power. The 1954 Constitution also laid a foundation for the abolition of private ownership in production and central economic planning, and formally nullified the promises that the CCP had made to the ethnic minorities that the new China would be built upon a federal structure that would maximise ethnic autonomy.

The Constitution also created a legal system modelled on other Soviet examples, in which the court is directly accountable to the congress at the corresponding level and the procuracy has a general supervisory power to ensure faithful implementation of state law. From legal theories (e.g. the jurisprudence of state and law and the four elements of crime), legislative drafts (e.g. for criminal law and in the general principles of civil law), institutional designs (e.g. the creation of a super procuracy) and legal practices (e.g. formalised popular participation), China witnessed a revolutionary change in its political and legal systems.²¹

The legal revolution was both deep and comprehensive. In 1949, the CCP declared the abolition of all laws that were enacted by the regime it overthrew and applied revolutionary norms in their places. The 1954 Constitution created a wide range of new legal institutions guided by new ideologies aimed at achieving new missions. In the meantime, the CCP initiated a systematic rectification campaign to remove legal professionals, judges and lawyers who worked for the previous regime from the newly created institutions. The transformation was thoroughgoing and total; historical continuity was intentionally rendered impossible.²²

Family: Politics, Love, and Divorce in Urban and Urban China, 1949–1962 (Berkeley, CA: University of California Press, 2000).

²⁰ Han Dayuan (ed.), *1954 Nian Xianfa yu Zhongguo Xianzheng* [*The 1954 Constitution and Chinese Constitutionalism*] (Wuhan: Wuhan University Press, 2004, 2nd edn.).

²¹ Chen, *An Introduction to the Legal System of the People's Republic of China*.

²² Ji Pomin, 'Liufa Quanshu Feichu Qianhou' ['Before and after the Abolition of the Six Laws'], available at www.iolaw.org.cn/shownews.asp?id=7314, accessed 12 January 2018.

The creation of a socialist legality in a revolutionary society was an uncertain endeavour, and in terms of the rules of the game the legal system experienced dramatic fluctuations. Conflict in a revolutionary society is reflected by a duality whereby law withers away and at the same time a socialist legality is created that cannot be abolished automatically. While the need for social and economic progress requires the laws of bureaucratic command and hierarchical organisation, the ideological mission to create a socialist, egalitarian and self-regulating society required political mobilisation to achieve substantive justice. Roberto Unger well captures the revolutionary tension embedded in socialist legality. For him, socialism fluctuates between the law 'of self-education' in a 'self-regulating community' and the law of 'government control' though 'industrial organisation and political centralisation'.²³

Similarly, Brady and others have interpreted the legal history of communist China as reflecting the 'two-line struggles as ideology and history', in which an antagonism between the 'ethic of social revolution' and the 'ethic of bureaucratic centralisation' unfolded.²⁴ Indeed, for Brady and many others, the fluctuation between 'continuous revolution and legal order' is a 'unifying theme' in the legal history of the socialist China in which the pragmatists wanted stability and discipline while the 'idealists' sought social change and continuous revolution.²⁵

Central to this dichotomy is the periodisation of legal development in communist China. Accordingly, the legal history of communist China since 1949 is roughly periodised into several phases, with each model of law dominating each successive phase. During the periods of 'formal', 'bureaucratic' and 'juridical' law, such as between 1953 and 1956 and between 1962 and 1965, there was a drive towards formalism, all in relative terms of course, with legal procedures specified, institutions established and legal professionals playing a leading role. On the contrary, during the periods of 'societal' and 'informal' law, such as between 1957 and 1961 and between 1966 and 1976, formal rules and legal institutions were displaced by mass mobilisation and

²³ Roberto Unger, *Law in Modern Society* (New York, NY: Free Press, 1976).

²⁴ James Brady, *Justice and Politics in People's China: Legal Order or Continuing Revolution?* (London: Academic Press, 1982).

²⁵ Leng Shao-chuan and Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* (Albany, NY: State University New York Press, 1985).

popular participation, with procedures simplified, courts closed and judges and lawyers alike sent down to the labour camps.²⁶

Socialist legality did not have a stronghold in the political system as it had in the USSR. The CCP learned from the Soviets how to construct a one-party state, albeit one that differed from the Soviet template. The CCP had much less faith in the imported legal institutions and tended to rely more on its own institutions to exercise control over important areas such as anti-corruption and censorship, whereas the Bolsheviks tended to rule indirectly through legal institutions – for example, in deploying the procuracy as an anti-corruption agency. CCP leaders, and Mao in particular, were more dedicated to the pursuit of a continuous revolution in the cultural and other spheres, and demonstrated a marked tendency to sabotage their own legal institutions and procedures through the mass-line populism.²⁷ The CCP, in comparison with its Soviet counterpart, was insistent on the continuation of a class struggle without an enemy class, and had been openly critical of what it perceived as class reconciliation advocated by the Bolsheviks; and as a result it was more willing to treat law as a dictatorial tool against its enemies, real or imagined. Three years after the creation of a constitutional order and a functioning legal system in 1954, the CCP initiated a series of violent campaigns to undo the brave new socialist legality. Those were the years of legal nihilism, when revolutionary lawlessness was openly advocated.²⁸

Mao's anti-bureaucratic inclination was a decisive factor in perpetuating Chinese informalism. The Maoists argued that law was socialist when it was sensitive to social needs and when legal actors were responsive to the interests of the masses. What was wrong with legal institutions was their inherent bureaucratic tendency, by which they meant when legal actors were divorced from social practices and made judgements only according to technical rules. To overcome the problem was not so much to dismantle the legal system, but to break bureaucratic isolationism and to purge elite arrogance. This is typified by the Maoist popular saying: 'Cadres must not be judged solely on whether they have obeyed the laws and the formal obligations of the position, but also on their performance against the mass line.'²⁹

²⁶ James R. Townsend, *Politics in China* (Boston, MA: Little, Brown and Company, 1980); Victor Li, 'The Role of Law in Communist China' (1970) 44 *The China Quarterly* 66.

²⁷ Michael Dutton, *Policing Chinese Politics: A History* (Durham, NC: Duke University Press, 2005).

²⁸ Brady, *Justice and Politics in People's China*.

²⁹ *Ibid.*