

SOCIALIST LEGALITY: THE DEVELOPING LAW OF CHINA AND A COMPARISON WITH THE TRANSITIONAL CONCEPT OF REVOLUTIONARY LEGALITY IN PAKISTAN

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ABSTRACT

In the present international order the countries, which do not correspond to a democratic norm, are deemed as totalitarian. It is an evaluation based upon the liberal denominator that sets pluralism as the benchmark of a legal order. The social systems that rest upon a socialist mandate, such as China reflect an ideal based on an egalitarian role model that redresses the structural differences in society. Its origins are contained in the theory developed by Marxist jurisprudence that has been enhanced by the legal reforms to facilitate an economy based on the market mechanism. In this changing environment the concept of public liberty becomes a valid question. Peerenboom who discerns an indigenous rule of law has addressed the presence of this in the Chinese framework. The natural right theorists reject this interpretation but sociological theory points to a critique of linguistic barriers. The Westminster Constitution adopted by the countries that practice Parliamentary democracy on the UK model are the very anti thesis of this concept of popular sovereignty. In Pakistan where there has been frequent internal regime changes arising from coup de tats Kelsen's theory of efficacy has been upheld that allows the martial law governments to abrogate the constitution. This form of rule is based on state necessity and can be traced to the prerogative powers of the British Crown that have been imbibed by the Commonwealth governments to suspend the rule of law. In this regional study of the comparative law a distinction is made between the theory of permanent revolution in China, and the temporary expedient that

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is employed in Pakistan to suspend civil society. The Chinese supra structure has proven successful in maintaining the unity of the state and in developing an infrastructure that enacts a rule of law within its cultural framework. The imperfect adoption of the Westminster Parliament has allowed the emasculation of the legislature, suspension of judicial review and restriction of fundamental rights when the military authority changes the status quo in Pakistan.

INTRODUCTION

Globally, those oligarchies that still exist such as the Chinese one party state and the reoccurring Pakistani military junta maintain their power by an absolute authority to rule over their citizens. In the modern era it is a cause for friction between the occident and the orient because it does not espouse the multi party political equilibrium. The states where the executive centralizes power to an authority and justifies it by an external threat, or by an imminent internal explosion need to be judged by the rights granted to their citizens when they enact laws. This evaluation can be achieved both in China and Pakistan by drawing on the benchmark based on a rule of law and if there is a claim to legality by means of ruling by an emergency decree or by an ideological imperative. It is a comparison that can be done by considering their access to justice and the source of their constitutional powers.

The Peoples Republic of China since it's coming into existence in 1949 has had four constitutions in 1954, 1975, 1978 and 1982. A hierarchy of 'peoples' courts represents its judicial branch.¹ While the Chinese development of law pre 1977 was based on the strict adherence to the Cultural Revolution it has become a recognisable code based on the fusion of Communist ideals with a de jure code.² The reforms that have

¹ There is a Peoples Supreme Court at the apex of its judicial system. The remaining three levels are Higher People's Courts, the Intermediate People's Courts and the Basic Peoples Courts. Throughout the system, litigants are generally limited to one appeal, on the theory of finality of judgment by two trials. The appeals are often reviewed de novo as to both law and facts.

² The end of the Cultural Revolution came with the arrest of the Gang of Four on 11 October 1976 a mere month after the death of Chairman Mao. The former associates of the Chinese leader were charged with treasonous crimes, including being counter revolutionaries. The officials consisted of Jiang Qing, Mao Zedong's last wife and the leading figure of the group, and her close associates Zhang Chunqiao, Yao Wenyuan, and Wang Hongwen. They, together with disgraced Communist general Lin Biao, were labeled the two

come subsequently suggest that the road to a constitutional order is in the gift of China and it can attain it on its own terms. This has caused jurists in the west to speculate as to the socialist experiment ending prematurely in the wake of Communism ending in the Eastern bloc.

It leads to the examination of the theory of 'inalienable rights' and if this could apply in any circumstances to China. The definition of natural rights is that it is a universal right inherent in the nature of living beings and is not contingent upon laws and beliefs. This can be contrasted with the concept of a legal right that is created by the law making sovereign and enforced by the government. The question of which rights are natural, and which are legal is an important one and the proponent of natural rights argues on the basis of a 'social contract' that all human beings have legal rights.³

The Chinese adherence to a non-western model is inherent on a traditional norm, which allows people to have a sense of shame and to self-correct rather than by an imposition of a penal code. There has been a development of the classical interpretation of *Fa Xing* that means fairness in the legal process, which originates in Confucius's logic allowing the patronage of the ruler to solve the myriad problems of society. The founding stone of common law based systems is the rule of law emanating from a Westminster style constitution that was conveyed by the British colonial government. In Pakistan that has been arrogated by the military to their advantage when they have usurped power from the 'civilian' administrations premised on the doctrine of Hans Kelsen, that law is binding if the efficacy of change is accepted by the citizens.⁴

In determining the progress made by China it is necessary to evaluate the constitutional guarantees for individual rights under a socialist legal framework. This concept needs analyses based on the theory of Marxist sociologists in the formative period when they advocated the doctrine of "revolutionary legality" based on class-

major "counter-revolutionary forces" of the Cultural Revolution and officially blamed for the worst excesses of the societal chaos that ensued during the ten years of turmoil. (1966-76), at <<http://www.ovimagazine.com/art/4958>>

³ Rousseau, JJ., *Contrat social ou Principes du droit politique*, Paris, 1763, (editor : Garnier Frères, Translated by Henry A. Myer), at pp. 240-332.

⁴ Kelsen, Hans., *General Theory of Law and State*, 1945, (Translation by Andres Wedbery), Cambridge, Massachusetts, Harvard University Press, at pp. 110-20.