COMMENTS

HEDGEHOGS OR FOXES? : A REVIEW OF WESTEN'S AND SCHLEIDER'S *ZIVILRECHT IM SYSTEMVERGLEICH*

*Inga Markovits**

I

If one were to play the game of dividing legal academics into hedgehogs and foxes, most comparative lawyers would be easy to place. They would clearly be foxes. Comparativists do not know one big thing, but many things. Unlike their colleagues from the Chicago law-and-economics school, for instance, who structure all their arguments around one concept, evaluate all evidence in its light alone—typical hedgehogs!—comparative lawyers are happily indiscriminate in their search for information. They assemble evidence not only in one or two fields, like their colleagues specializing in torts or tax law, but across many areas of law; not just within one country's legal system, but across national borders and ideological divides. Comparative lawyers tend to be gatherers: they collect information wherever they can, compare notes at conferences around the globe, then bring home what they discovered abroad and add it to their larder of facts. They like exhaustive treatises covering a subject from every conceivable angle;[1] encyclopedias bringing together the knowledge of experts from all over the world.[2] They are finders and keepers, treasure hunters rejoicing in the variety of detail. No data are insignificant, no facts too small to escape their amazing attention.

The book under review in many ways is an archetypical foxes' book. Klaus Westen's and Joachim Schleider's *Zivilrecht im Systemvergleich*[3] is a handbook on East and West German civil law: a comprehensive and scrupulous synopsis of all areas covered by the

* Professor of Law, University of Texas.

1. E.g., Schlesinger (ed.), *Formation of Contracts*, 2 vols. (1968).

2. E.g., *International Encyclopedia of Comparative Law*, *Encyclopedia of Soviet Law*, 2 vols. (2d ed. 1985).

3. Westen & Schleider, *Zivilrecht im Systemvergleich*, Osteuropa Institut an der Freien Universität Berlin, Rechtswissenschaftliche Veröffentlichungen, vol. 13 (1984). All page citations without further reference will refer to this book.

German Civil Code of 1900, still in force (though much amended) in West Germany, and the new East German Civil Code of 1975. It is an impressive piece of work: sensibly organized, well written, carefully documented. Even as a paperback it weighs solidly in the hand: 864 pages, 2488 footnotes, 300 bibliographical references since 1975. For anyone wanting to compare the state of civil law on both sides of the German Wall, it offers a useful and reliable source of information.

But as its title suggests, the book seeks to go beyond the genre of an ordinary foxes' compendium. "Zivilrecht im Systemvergleich"—a comparison of systems, a systematic evaluation of the civil law in both states—not only focuses on what is but intends to ask questions going beyond the mere surface of the law. In the authors' words, they want to uncover "the basic structures", "the systemic relevance" of the civil law systems of both German states; they want to show the law in "its dependence on the underlying political, social and economic conditions."[4] That implies looking for unifying principles, for those essential characteristics which make a capitalist legal system "capitalist" and a socialist legal system "socialist". Such an investigation requires a concentration of thought, a single focus, a hedgehog's perspective. It requires looking for the one thing rather than the many, for the one thing *in* the many: that common denominator which determines the peculiar characteristics of capitalist or socialist law.

For such a "comparison of systems" the authors could not have chosen better objects of study. East and West Germany offer a unique laboratory setting for investigating the impact of different political structures and economic organizations on law. Nowhere else in the world could one find two sophisticated legal systems so similar in all respects other than their adherence to opposed political ideologies. East and West Germany share the same historical and legal past, similar levels of industrial development, similar types of populations, and the same civilist approach to law. If indeed there should exist peculiar "socialist" and "capitalist" strands of legal thought and practice, the German setting should be the place to discover and isolate them.

Nevertheless, at least from a hedgehog's perspective, the result of the authors' efforts is disappointing. Despite its ambitious design, the book lacks a hedgehog's urgency of purpose, its intellectual singlemindedness. The authors handle their data well. There are many nice points, many instances in which we are convinced by a particular interpretation. But the insights do not connect to form, in the end, a convincing picture of the whole. When we put the book down, we are left with more questions than answers. Why is a work of this range, by authors who can build on long experience, have great command of their facts, and show sensitive judgment so unsatisfying in the end? Why is so much of comparative law work so un-

4. P. 35.

satisfying in general? Why are we so often left with a sense of great learning but no enlightenment, no real "aha"-experiences, which change the ways in which we perceive the law's impact on people's lives?

The reasons why this "comparison of systems" falls short of our expectations are typical, I believe, for the reasons why we comparativists so often get into trouble if we want to do a hedgehog's job. The problem begins already with our "comparative method". Comparativists tend to be proud of this method. But examined more closely, it does not offer much methodological help by itself. It simply suggests attacking legal problems by looking at several legal systems rather than only one. But like comparative law in general, the "comparative method" is indiscriminate:[5] it teaches us how to look closely and systematically at whatever we choose to examine, but it does not tell us why we should look, what we should look for, and how to make sense of our findings. Guided by the "comparative method", we are good at placing information into proper doctrinal slots, at comparing the technicalities of different legal regulations, and if we are progressive, even at exploring the functional differences and similarities between two legal systems. But we are not very good at asking questions going beyond that. The "comparative method" cannot relieve us of the task of formulating hypotheses and devising research plans.[6] But comparativists often seem to believe that it does.

Take the project at hand, for instance. If one wanted to use the civil law systems of both German states as a basis for uncovering the essential features of socialist and capitalist law, respectively, how could one go about it? One method might be to reflect upon the underlying economic and political systems, speculate about the ways in which the political essentials of capitalism and socialism (market vs. planned economy, pluralism vs. democratic centralism, etc.) might affect the function of civil law, and check the actual working of both codes against our assumptions. This approach would have the advantage of forcing us to articulate our expectations about both legal systems and to develop hypotheses which would guide our further investigation. It would also have the disadvantage of requiring mastery of a virtually boundless mass of information. To understand the political and economic systems of capitalism and socialism well

5. See, for instance, Gutteridge, *Comparative Law* (2nd ed. 1949): "The fundamental characteristic of comparative law, viewed as a method, lies in the fact that it is applicable to any form of legal research. The method is equally at the service of the legal historian, the analytical jurist, the practitioner and the teacher of law. . . Not the least of its merits is its flexibility. . ." (at 10). And: "The comparative method is sufficiently elastic to embrace all activities which, in some form or other, may be concerned with the study of foreign law" (at 7).

6. See Kahn-Freund, "Comparative Law as an Academic Subject," 82 *Law Q. Rev.* 40, 41 (1966): "A comparative lawyer must make many decisions entirely for himself; decisions on the field he wishes to cultivate, and decisions on the tools and implements he wishes to use in cultivating it. More than that: he must set out on a voyage of discovery to find the field and on another voyage to find the tools."

enough to formulate intelligent hypotheses and to measure those hypotheses against the entire civil law systems of both states seems a task of gigantic proportions.

A more modest way of attacking the job would be to start at the opposite end: to compare not whole "systems" but individual manifestations of these systems. This way was chosen by Marx, who developed his analysis of capitalism by examining its smallest components (like price or profit), and by Pashukanis, who built his study of capitalist law on the dissection of what he believed to be its smallest parts (the juridical person and his manner of relating to other juridical persons through contracts). We might imitate this approach and explore the differences between capitalist and socialist civil law by focusing, on both sides, on the structure and function either of a few central concepts such as contracts or private law rights or, better yet, of *specific* contracts or rights, such as rent contracts or buyers' rights. Such an approach would have the advantage of being both narrow and general: the field of investigation would be limited to manageable proportions, but our purpose would go beyond the mere subject under review and we would be able to draw overall conclusions about the specific characteristics of socialist and capitalist law. However, this method would be based on an assumption which strikes me as persuasive but which might not be shared by many comparativists: namely, that *all* elements of a legal system reflect its essential features; that each individual part, so to speak, repeats the genetic make-up of the whole; and that if we can crack this genetic code, we will understand the system in its entirety.

A third method might reject any *a priori* notions about what to expect from "socialist" or "capitalist" law in general, or about any internal logic of legal systems, and instead start out with the evidence. We might simply accumulate as much information as possible about both legal systems and see whether we can make any particular sense of it. This is the method a comparativist is most likely to choose. It suits our encyclopedic curiosity, our openmindedness, our foxy inclination to see many things. But it also has the disadvantage of not providing us with any hypotheses or analytic guidelines to distinguish or even recognize what we see: we simply stare long and hard at our facts until they seem to fall into a pattern. If most of our evidence fits into this pattern, we will be satisfied. If not, we have to rearrange things for a better fit.

II

Although not articulated, Westen's and Schleider's way of attacking their "*Systemvergleich*" most closely resembles this third approach. They suggest no specific methodology for investigating the relationship between legal and social systems. They present no hypothesis about how and why socialist civil law should differ from capitalist civil law, which they then set out to prove on the basis of

their evidence. Instead, the authors collect information on the state of the law on both sides, arrange it by subject matter concerning similar types of transactions, and lead us, topic by topic, through the accumulated evidence, pausing whenever a particular feature appears which we seem to have encountered before.

Some readers will disagree with this characterization. The book does indeed contain two introductory chapters outlining the different scope of civil law regulation in East and West Germany and describing, in conceptual terms, what the authors perceive to be the different functions of civil law under both systems.[7] These chapters reflect certain theoretical convictions, which I will examine at a later point. But they do not set the stage for the following investigation. They outline no research strategies and spell out no assumptions. Rather, they state categorical assertions about the special quality of socialist civil law which are unrelated to the material that follows and are not summarized at the end. Throughout the main body of the book's text, we thus never experience a developing argument, advancing step-by-step from hypothesis to result. Rather, we get an explanation or an enlightening aside whenever our progress through the material provides a suitable occasion. Any understanding we have gained from the book at the end does not seem to be based on a process of reasoning but on largely spontaneous insights, founded on the accumulated experience of people who for years have worked and written in the field and thus cannot help but perceive certain recurrent features and patterns.

It is true, of course, that it would have been exceedingly difficult to construct a complex, gradually unfolding argument within the framework of a handbook. But the authors chose this format themselves; they apparently saw no conflict between exhaustive descriptiveness and analytic acuity and no need to pull together the numerous strands of their narrative with a tight analytic structure or a theoretical summary at the end. A handbook requires a breadth of coverage which must be paid for with a loss of depth; its comprehensiveness implies the refusal to sort out the wheat of significant data from the chaff of mere facts; proximity to detail is achieved at the cost of critical distance. The very format of the book thus not only poses special expositional problems but betrays a certain ambivalence about the project itself. If the authors did not recognize the difficulty of being both choosy and all-embracing, both hedgehog and fox at the same time, it may be because they did not properly size up the analytic job before them.

In the following pages, I want to examine the outcome of their efforts in order to learn from what I believe to be their mistakes. If this sounds like a negative enterprise, it is not meant to be. I have great respect for the project and its authors, have learned a lot from the book, and will no doubt use it often in the future. But I also

7. Chs. 1 and 3, dealing (in somewhat puzzling order) with the function of civil law under the two systems (ch. 1) and the substantive definition of civil law (ch. 3).

think that both they and we can do better if we become aware of our own limitations. A critical look at what went wrong in a particular case seems a good way of doing so. For this purpose, I will first describe the results of this book and outline, with specific examples, the kind of questions raised by its arguments. I will then pull together and analyze what I take to be the major reasons for the book's specific weaknesses. And finally, I will extend my critique to comparative law work in general.

III

To give a survey of the theoretical results of this book, a reviewer must necessarily collect and choose the main points herself; the authors—more occupied with the task of writing a handbook than a *Systemvergleich*—have not done so. With one exception: they spend considerable time on the definition of "civil law" under both systems. Since the subject matters dealt with by the BGB and the ZGB overlap only partially, the authors had to decide which topics to cover in the first place. For this purpose, they engage in detailed deliberations to determine, for instance, whether family or labor law (both regulated, at least partially, by the BGB in West Germany but by special legislation in East Germany) are indeed civil law and should be included in their comparison.[8] To someone raised in a common law system, these *Abgrenzungsfragen* must have a very scholastic ring (in many instances, a quick arbitrary decision—yes or no—might have done just as well). But to the authors, these questions have more than just practical meaning: they reflect the essence of civil law itself.

Accordingly, the book begins by delineating the different subject matters covered by the two civil codes. The dissimilarity is indeed substantial. While the West German BGB applies to all horizontal exchange relationships on the market and thus includes interactions between enterprises as well as between individuals, the East German ZGB regulates only exchanges between individuals or between individuals and their suppliers, whether private or state-owned. West German civil law thus presupposes the formal equality of all legal subjects engaging in horizontal transactions, whether ordinary people or businesses; East German law distinguishes between individuals and enterprises: only individual transactions are governed by civil law, whereas relationships between state-owned enterprises fall under a special branch of law called "economic law". The West German BGB could be called a "market code", while the East German ZGB might be called a "people's code".

These distinctions seem clearly reflected in the very different style of both codes. Throughout the book, the authors draw our attention to these matters of legislative technique. The BGB appears plodding, exhaustive, obsessed with doctrinal consistency and techni-

8. Ch. 2.

cal minutiae, far removed from ordinary life experiences—a lawyer's code. The ZGB, by contrast, is practical, accessible, short, almost contemptuous of detail, cutting through dogma to regulate issues instead in clusters of actual life situations, easy to read and eager to be understood—a citizen's code. The two codes seem to speak to very different audiences: the BGB, to the autonomous burgher, maximizing his self-defined interests in the market; the ZGB, to a member of the collective, taking care of his daily needs while leaving all economic activities to the state.

And finally, the unequal subject matters and audiences of ZGB and BGB seem to betray the very different purposes of the two civil law systems. Again, the authors point to these divergent purposes on many occasions, but I will paraphrase and draw their remarks together for the sake of the argument. West German civil law, we are told, *balances* private interests; East German civil law focuses above all on the *realization* of societal interests.[9] West German law wants to *resolve* the individual conflicts of private right holders; East German law primarily wants to *prevent* conflict in the interest of the collective.[10] West German law wants to protect *individual rights*; East German law wants to realize *social goals*.[11]

All this sounds extremely persuasive. I have myself outlined similar distinctions on earlier occasions.[12] But if we look more closely, a number of questions arise. Let us begin with the different subject matters covered by the two codes. West German law, the book tells us, by seeing all civil law actors as potential entrepreneurs, preserves the formal equality of all civil law subjects, whether private or businesses.[13] East German law, on the other hand, by distinguishing between a civil law for ordinary citizens and an economic law for state-owned enterprises, has renounced this formal equality not only by creating a special socialist business law but also by differentiating between the rights and liabilities of individuals and state-owned firms in the civil code itself.[14] But is this distinction really so crucial? Would we not have to look at the actual resolution of business conflicts under West German civil law and East German economic law before we can make any assertions as to the similarity or dissimilarity of the two bodies of law? And for that matter, does West German civil law really treat businesses and citizens as formally equal? Have not strict liability, products liability, protected tenancy, the regulation of contracts of adhesion and the like under capitalist law, too, given recognition to the fact that individual citizens and businesses, however formally equal, in real life have quite unequal powers, interests and capacities to respond? And

9. E.g., at pp. 370, 374, 682.
10. E.g., at pp. 130, 502, 574.
11. E.g., at pp. 388, 573, 592.
12. Markovits, "Socialist vs. Bourgeois Rights," 46 *Univ. Chicago L. Rev.* 612 (1978).
13. P. 53.
14. P. 61, 408.

how important is the BGB in affecting relationships between business partners? Does not special legislation on business associations, restrictive practices, secured transactions, etc.—a capitalist economic law all outside the BGB—have far greater impact than the civil code? And finally: the Soviet Civil Law Fundamentals, passed at a time when the "civilist" approach to economic relations seemed a promising way to encourage managerial initiative, do in fact apply to state-owned enterprises as well as to citizens (just like the BGB) if no special regulations apply. Does that mean that Soviet civil law is more "capitalist" than East German civil law? Obviously not. Obviously it cannot matter that much whether a particular area of legal regulation is labeled "civil" or "economic" law. But then the fact that the BGB and the ZGB address very different groups of legal subjects cannot be that significant either. We cannot draw reliable conclusions about the two systems' views of legal man from the formal organization of their respective civil codes alone.

Or take some of the authors' examples illustrating the different function of socialist and capitalist civil law. When talking about legal capacity, for instance, the authors stress the fact that under the BGB the capacity to be a bearer of rights is an unlimited and automatic attribute of every human being, while under the ZGB this capacity is not inborn but assigned by the state and limited only to those rights specifically listed by law.[15] This distinction is seen as an affirmation of the different ideological persuasions of the two codes: the BGB is individualistic, honoring the autonomy of every person; the ZGB is collectivist, seeing the citizen primarily as a creature of society. But again, does this dogmatic distinction lead to different result in practice? Even the authors have doubts.[16] In fact, I cannot think of a single situation in which a GDR citizen cannot hold a right only for lack of a general inborn legal capacity, while a West German citizen can hold a right only because of it. Under both systems, rights can be held and protected only on the basis of specific legal assignments. Doctrinal distinctions about legal capacity have at best symbolic significance.

The same holds true for many other characteristically "socialist" or "capitalist" features which the authors point out to us. Throughout the book, for instance, they assemble evidence on the preventive character of East German civil law and contrast it with West German civil law, which allegedly is not primarily concerned with the prevention, but rather with the resolution, of conflicts. Again, this distinction is taken as a reflection of the different ideological thrust of both systems: the BGB is concerned with the individual, wanting to give each his due; the ZGB is concerned with society, trying to keep the collective peace. A good deal of verbal evidence can be collected to support this distinction. The ZGB contains many general admonitions: for instance, the duty to "respect

15. P. 197-98.
16. P. 198.

societal needs and to observe the rules of socialist life together"[17] or the duty to refrain from causing society or fellow citizens any damage.[18] Similarly, it gives special expression to the general socialist duty of being one's brother's keeper by articulating a number of specific, related obligations: for instance, the obligation of state-owned travel agencies to carefully inform and advise prospective travelers.[19]

However, as the authors admit themselves (although only partially and reluctantly),[20] these admonitions, standing alone, have no legal significance. No civil law consequences face an East German citizen who does not observe the rules of socialist life unless he also violates specific duties or rights, causes damage to a neighbor's property, or violates a legal obligation to act. And if the State Travel Agency fails its obligation to assist a citizen with counseling and information, it will be liable for any resulting damage only if the misinformation was part of the contract between agency and client.[21] If East German civil law is actually applied to concrete cases, it appears to play the same role as West German law in similar circumstances, such as redressing grievances or balancing individual interests. Its special preventive function, so stressed by the authors, again seems large symbolic in nature: the ZGB teaches and admonishes, but it does not follow up on its lessons unless individual rights are involved. But if that is so, does it still make sense to contrast socialist conflict prevention with capitalist conflict resolution? And does not the BGB, by specifying the legal consequences of individual misbehavior, also try to prevent conflicts? And to go a step further: how are we going to assess the impact of either code on the frequency of conflict in the two societies? Can socialist law prevent conflict by preventing litigation? Does the protection of individual rights reduce or increase conflicts? Can either ZGB or the BGB tell us anything at all about social peace under the two systems?

The authors do not ask any of these questions. Although they admit on a number of occasions that certain distinctive characteristics of East or West German civil law are of little or no practical significance, they do not seem bothered by the largely symbolic nature of their findings. The reason lies in their peculiar understanding of "law". By "law" Westen and Schleider mean the law of the books. This is a comparison of codes. The authors cite very little case law; if they do list an occasional decision,[22] it is not to let us know what the courts do in real life, but to confirm a particular doctrinal interpretation of the statute. We hear nothing about the legal profession, litigation rates, alternative ways of dispute resolution; nothing, for

17. § 13 ZGB.
18. § 324 ZGB.
19. § 205 ZGB.
20. P. 617.
21. P. 502.
22. Primarily in the paragraphs dealing with the liability of sellers of defective merchandise, pp. 421-447.

instance, about the very significant differences between ordinary courts and dispute commissions, both of whom apply civil law rules; nothing even about socialist civil procedure. "The underlying political, social, and economic conditions", which the authors have set out to reveal, are only those which may have found reflection in the wording (not in the application or non-application) of the two civil codes.

It is true that in socialist countries any investigation going beyond the mere letter of the law meets with many difficulties. Cases are not consistently published, legal statistics are largely unavailable, and survey research and field work just about impossible. It is therefore tempting to restrict one's analysis to the much more accessible law of the books. But the authors do not view these limitations on research as a significant shortcoming. To them, the code *is* the law. This perception seriously curtails their vision and blocks questions from mind which have to be asked, if one wants to understand how the function of civil law in the two countries is affected by differences in social organization.

This is not to say that an analysis of the mere text of both codes would be a pointless enterprise. Both the BGB and the ZGB, after all, were written in the belief that they would affect relationships governed by their rules, and *if* disputes come to court, the codes will be one important factor in their resolution. The text of the law can at least be read as a revealing statement of the powers-that-be about what is considered to be of value in a particular society; what they expect of its citizens; how they would like their society to see itself. But we must remember that the portrait thus revealed is an idealized portrait not necessarily resembling the sitter. Especially in a socialist state, where the legislative process is more removed from majority opinion than in a bourgeois democracy, we have reason to doubt its accuracy. But under capitalism, as well, countless social influences come between the law and real life and distort the likeness which any code can give of the society it claims to depict. We never can be sure that what the law says bears much of a resemblance to what actually happens to people.

The authors don't share these doubts. Take, for instance, their treatment of the so-called *allgemeines Persönlichkeitsrecht* under the two systems.[23] Both East and West German law recognize a right to personal integrity, which offers protection against interference with one's name, picture, reputation, or other aspects of individuality. In both countries, the "personality" is recognized in constitutional provisions (art. 1, 2 constitution FRG; art. 19, 30 constitution GDR). Under West German civil law, the BGB itself protects only the right to one's name, but many other ramifications of the "personality right" have since been developed by case law (building primarily on the constitution and on the BGB provisions

23. P. 626 ff.

dealing with compensation for pain and suffering).[24] In East Germany, the "personality right" is protected expressly by § 7 ZGB.[25]

From this the authors conclude that "congruity exists so far between both legal systems of compensation—a fact however, which cannot surprise since (personality rights) concern elementary values which every legal order must protect without reservation."[26]

But this statement is patently misleading. The living law on the protection of individuality under the two systems is simply worlds apart. Under West German civil law, the "personality right" serves primarily to protect individual privacy by providing injunctions and, under certain circumstances, financial compensation for reprehensible interferences with a person's private life. The huge body of case law which developed around this *Persönlichkeitsrecht* could be used as a model example to demonstrate the particular strengths and weaknesses of capitalist law: its respect for the individual, the thoroughness of its judicial protection, but also its Midas-touch, manifested in its readiness to measure personal intimacy in terms of money or to protect the wealthy who have a reputation to protect, a private life interesting enough to be invaded, more effectively than the anonymous poor.

Under East German law, on the other hand, no civil court case defines the ZGB's boundaries of individual privacy (at least, none is known to me and none is cited by the authors). Nor is such case law likely to develop, since as the authors point out themselves, the ZGB allows no monetary compensation for the infringement of non-material interests.[27] Disputes concerning violations of personal honor and reputation, quite frequent in the GDR, involve almost exclusively quarrels between neighbors and acquaintances and are handled by dispute commissions: lay tribunals, deliberating cases before neighborhood audiences in an atmosphere more conducive to the violation of privacy than to its protection. No practical constitutional protection of privacy exists in the GDR, which knows no judicial review of administrative acts and thus could never develop the kind of case law which in West Germany, building on art. 2 of the Basic Law, was so influential in encouraging the private law protection of personal intimacy. And finally, although East German courts do safeguard the fruits of individual creativity (like inventions and copyrights), this case law is much better understood as a socialist attempt to reward inventiveness through economic incentives than as a commitment to the legal protection of personal individuality, as § 7 ZGB seems to suggest. Despite the wording of the code, privacy has no legal value in everyday East German life (although it does, of

24. See Palandt, *Bürgerliches Gesetzbuch*, § 823, 15 (40th ed., 1980).

25. § 7 ZGB: "Every citizen is entitled to the respect of his personality, in particular his honor and reputation, his name, his picture, his rights as an author, and other similarly protected rights arising from his creative activity."

26. P. 635.

27. P. 666.

course, have great human value). As this example shows, the letter of the law can be thoroughly misleading.

IV

But even if we accept the authors' limited vision and assume that we can make meaningful comparisons between the two civil law systems on the basis of their written law alone, we run into trouble. Sure, many rules are different on either side of the border—some of them unimportant, many of them quite important. But are they different in a way which throws light on the underlying social systems? If we learn, for example, that under West German law protection of tenancy (*Mieterschutz*) is enjoyed only by tenants who comply with their contractual obligations, while under East German law even defaulting tenants cannot simply be given notice but can be evicted only on the basis of a court decision,[28] we are persuaded by the authors' explanation: that the distinction is due to the different function of civil law under both systems. In the West, we are told, the law protects primarily horizontal equity between two parties and therefore must take note of the unilateral violation of the contract by one side. In the East, on the other hand, the law is less interested in the balancing of private interests than in the accomodation of all who need housing. Since every evicted tenant would have to be assigned housing elsewhere, it lies in society's interest to at least investigate whether he is not best left where he is.[29]

But a similar explanation is less persuasive on other occasions. Take the effect of violations of price regulations, for instance. Under West German law, the buyer of a car who paid a higher price than official price regulations permitted (assuming their existence) could not later retrieve the excess amount: the contract would be illegal and therefore void, but the BGB's chapter on unjust enrichment offers no protection to someone who himself violated the law and would leave the parties where it found them. Under East German law, the contract would be valid at the officially permissible price and the buyer could reclaim his excess payments. The authors explain this distinction by the collective functions of socialist civil law: since the law is more interested in the "state's task to provide" (for all citizens) than in horizontal equity, it is content to leave the car with the buyer at a price acceptable to the authorities.[30] But wait a second. We know that the seller would not have parted with his car at the lower official price. There is thus no reason to assume that at that price the car is more socially useful to the buyer than to the seller. Is it not much more likely that the state, having trouble in policing its price regulations, wants to offer a reward to that party most likely to blow the whistle? If that is so, the distinction has

28. P. 375. In practice, even eviction of defaulting tenants is extremely unlikely.
29. P. 378.
30. P. 592.

nothing to do with the "providing" functions of socialist law or the "protective" functions of capitalist law but with the shortage of cars in the GDR and the resulting need for price regulations.

Scarcity of consumer goods rather than ideological distinctions would also explain many other differences between East and West German civil law.[31] And unless one wants to claim that such scarcity is inevitable under socialism and thus an inherent feature of the "system" (a possibility the authors do not address), there would be nothing particularly "socialist" about rules which, like war or postwar regulations in the West, take such shortages into account. Take the rules that East German sellers of defective merchandise (almost exclusively state-owned stores) may choose to repair the defective product rather than offer the buyer a price reduction or the chance to rescind his contract as under West German law.[32] The authors explain this rule in terms of the societal interest in restoring the product's use-value in the cheapest possible way while still providing for the purchaser's socially acceptable needs.[33] That sounds convincing. But if there existed no shortage of consumer goods in the GDR at the time the new civil code was drafted and if no such rule allowing the state-owned consumer industry to unload defective goods upon reluctant buyers had been instituted, would that have made East German law any more "capitalist"? Or if—as the authors themselves point out—many West German suppliers introduce their right to repair rather than replace defective merchandise by way of contracts of adhesion,[34] does that make West German law (which in this fashion, too, tries to keep down the costs of defective production) in any way "socialist"? Or is the crucial difference that under West German law the resulting savings are meant to benefit the individual supplier, while under East German law they will benefit the state? But in the GDR, suppliers and state are identical. Are we to conclude that under both systems, civil law rules favor suppliers at the expense of consumers: either by providing state-owned suppliers with advantageous choices (as under the ZGB) or by providing private suppliers with the contract autonomy to introduce these choices themselves into their relationships with customers (as under the BGB)? This is a rather cynical conclusion which the authors certainly would not share, since they see East German civil law as much more caring and consumer-friendly than its West German counterpart[35]—again, in their view, a "socialist" feature resulting

31. See, for instance, § 222 para. 4 ZGB, dealing with the rent of appliances or tools from state-owned stores. If the rented object is returned before the contractual date of return, the customer is entitled to a prorated refund of his rent payment. Obviously, this rule is meant to encourage the early return and thus the more effective circulation of scarce resources.

32. § 152 para. 1 ZGB.

33. P. 428.

34. P. 438.

35. P. 408.

from the law's concern with societal welfare rather than with individual entitlements.

But the different attitudes towards consumers manifested by the two codes (for which the authors offer a number of examples) could again be explained in other than ideological fashion. BGB and ZGB are three quarters of a century apart in age—no wonder the younger code shows greater social concern. Such concern is not necessarily absent under West German law; given the doctrinal confines of the old BGB, it just had to find different expression. When tackling the modern problem of products liability, for instance, West German courts had to respect the fact that, as a rule, no contractual connection exists between the producer and the purchaser of defective goods and had to base damage awards on torts and on a reinterpretation of evidentiary rules. The East German ZGB, on the other hand, could simply introduce the purchaser's right to claim damages from either producer or supplier with a stroke of the pen.[36] But is this innovation "socialist"? Are the many other ways in which the ZGB has learned to leave behind the more cumbersome and scholastic constructs of the BGB[37] (or, for that matter, the ways in which it has profited from solutions worked out by bourgeois judges and scholars)[38] necessarily "socialist"? Even if the rules contained in both codes read quite differently, these differences need not at all have "systemic" significance.

And conversely, if rules under both codes happen to coincide, does that necessarily mean that social conditions underlying the rules in question are basically alike? When noting the similarities between ZGB and BGB rules dealing with damage claims arising from repair or other service contracts, for instance, the authors refer to the "largely system-neutral character" of such services,[39] by which they mean that the use of repair shops or dry cleaning establishments involves sufficiently similar interests and problems on both sides of the border to be regulated by largely similar provisions. But that is not very persuasive. From a practical viewpoint, we know that the positions of customers of such services in East and

36. § 156 ZGB.

37. For instance: the ZGB, predictably, has not adopted the BGB's complicated form of property transfer, according to which the transfer-agreement itself is independent of the contractual agreement which gave rise to the transfer in the first place (*Abstraktion von der causa*). Under West German law, a transfer will be valid even if the underlying sales contract, for instance, turns out to be void. The transferred object will have to be reclaimed under the rules of unjust enrichment. Under East German law, the validity of the transfer is determined by the validity of the sales contract itself: § 26 ZGB.

38. E.g., the ZGB, in § 92 para. 2, adopts in statutory terms a doctrine which under traditional German civil law had been developed by case law in response to a gap in the BGB's rules on contracts: the concept of *culpa in contrahendo*. Under this doctrine, contracting parties have to compensate each other for reliance damage caused during the preparatory stages of their contractual relationship independent of whether a contract was later concluded or not. Cf. p. 287.

39. P. 466.

West Germany are anything but alike: while a West German citizen can get his suit dry-cleaned from one day to the next, his East German cousin may have to wait for weeks. And from a theoretical viewpoint, it is also not self-evident that East and West German law should pursue similar goals in regulating such services. If socialist law is indeed more concerned with the satisfaction of societal needs than with the protection of horizontal equity, we would expect rules penalizing belated performance (because a need would not have been satisfied when it arose) but not necessarily sub-standard performance (because, as in the law of sales,[40] a somewhat less-than-satisfactory performance might be sufficient to keep a citizen adequately provided for, by societal definitions, if not his own).

But even if we could be persuaded of the "system-neutrality" of service contracts, some of the book's other examples of supposedly "apolitical" civil law rules would give us pause. When the authors state, for instance, that the ZGB's law of inheritance, in doctrinal terms, is very similar to that of the BGB because rules of succession "are largely politically neutral in their distributive functions,"[41] they themselves have second thoughts and point in a footnote to the very different economic significance of inheritance in the two states.[42] But we would have appreciated an explanation at this point telling us why, and under what conditions, economic differences are or are not reflected in differences in legal regulation. Our bewilderment grows if we are told that even property rules are "basically neutral" and that therefore "the legal construct 'property' is essentially identical" on both sides of the border.[43] Property? That crucial concept lying at the very heart of the confrontation between both ideologies should be regulated by ideologically colorless, basically fungible legal provisions? Why? And if that is the case, would we not have to conclude that the study of legal rules can provide no clues for discovering the social significance of law under different political systems?

When surveying all the "systemic" distinctions between East and West German law which the authors have collected for us in their book, we are thus left in considerable confusion. Many rules are different under both systems, but not all these differences would necessarily have to be explained in political or ideological terms. Some apparently "socialist" rules could just as well be due to a scarcity of goods and resources which, in other times, have led to comparable rules in the West. Others may be the result of legislative experiences gained in the 75 years which separate the two codes. As the authors point out, many "socialist" ZGB provisions seem to have only symbolic significance. And in a number of situations, the dif-

40. Cf. supra n. 32 and 33 and accompanying text.

41. P. 788.

42. P. 788 n. 2.

43. P. 298.

ferences between East and West German civil law rules have no particular significance at all.

If, on the other hand, numerous civil law provisions are similar under the two systems, we again do not necessarily know what to make of that. Some may be similar because they are, in the authors' words, "system-neutral" and regulate interactions equally likely to be found on both sides of the border. Others are similar despite fundamental distinctions between the underlying economic and social conditions. We are not told why some rules should be less susceptible to ideological influences than others. It is obvious that socialist lawmakers themselves would claim that all their law is fundamentally different from ours. But how much of their claim should we believe? Do ideological distinctions lie primarily in the eyes of the beholder? Then this enterprise resembles the task of deciding whether a glass is half full or half empty.

V

My complaints about this book are really complaints about our branch of the profession in general. It may seem unfair to use this particular work to show how we comparativists tend to fail if we try to go beyond the merely descriptive. The authors are more interested in the social importance of law, more skeptical even about the importance of rules in real life,[44] than many of their colleagues. But if they fail nevertheless to develop a cohesive explanation of how and why socialist and capitalist civil law differ from each other, it is because they share the basic weaknesses of much work in comparative law today: a reluctance to theorize, a lack of critical distance, and an all-absorbing proccupation with doctrine.

To accuse the authors of a shortage of theory may seem unwarranted to some readers. As shown earlier on, they do have very definite notions about what distinguishes East and West German civil law and reassert these notions throughout the book. To restate their view in their own words: Socialist law "is not perceived as an instrument to safeguard the equivalence of horizontal exchanges and to compensate for damages, but essentially as a means to secure the satisfaction of the material and cultural needs of the population."[45] This definition conforms, at least in part, almost verbatim to that of the ZGB.[46] As the authors tell us themselves, it also is in line with Soviet definitions of civil law since the mid-1930s. Until that time, socialist legal theory had been dominated by Pashukanis' "legal nihilism", which saw not only capitalist law but all law as an essentially bourgeois category. Stalin replaced this politically dangerous doctrine with a new theory rehabilitating the use of civil law under socialism. The new view distinguished between capitalist private

44. See especially p. 695 on the divergence between family law and family reality under both systems.

45. P. 388-89.

46. ZGB preamble, para. 2 at 3.

law and socialist civil law. Private law, protecting the economic autonomy of self-serving individuals, was necessarily linked to capitalism and a market economy. But civil law, safeguarding the daily needs of consumers in the social as well as their personal interest, could safely be put to use under socialism.[47]

Westen and Schleider accept the private law/civil law distinction as a necessary "correction" of Pashukanis' earlier errors.[48] In doing so, they also accept the claim that socialist law is indeed essentially different from its capitalist counterpart because it focuses not on individual rights but on collective needs. And throughout their book, they refer to the rights/needs distinction or the individual/collective distinction as evidence of the unique quality of socialist civil law.

But to be persuasive, their argument had to be worked through. The authors could have done so on different analytic levels. In an abstract and theoretical vein, they could have taken issue with Pashukanis. For this purpose, it would have been helpful had the authors reminded their readers *why* the legal nihilists viewed all law, including laws passed by the new Soviet state, as bourgeois rather than socialist. Pashukanis[49] defined law as a mechanism for coordinating conflicting interests and believed that only with the abolition of social conflict—or, as he called it, with "unity of purpose"[50] between social actors—the stable, predictable rules of law could be replaced by flexible, technical regulations, "changing constantly as conditions change."[51] Until that blessed state, which for Pashukanis (as for Marx) presupposed a change in human nature, abundance of goods, and their direct distribution, law would be needed to mediate and temporarily reconcile the conflicting interests involved in all exchange relationships. From this viewpoint, it makes no difference whether a contract is concluded between state-owned store and socialist customer or between private merchant and purchaser. In either case, the contract has the function of coordinating the parties' conflicting interests. Furthermore, it owes its very existence to the fact that the parties' interests are not aligned but at odds with each other. Law in this view is essentially an egotistical category, reflecting social division rather than harmony. It would make no sense to speak, as the ZGB does, of a conformity of interests between citizen and state.[52] All civil law would necessarily also be private law. And any assertions as to the uniqueness of socialist law would be unfounded.

The authors do not argue their jurisprudential case against Pashukanis. Nor do they argue their case on a more mundane em-

47. P. 108 ff.
48. P. 109.
49. Pashukanis, "The General Theory of Law and Marxism," in Babb, *Soviet Legal Philosophy* 111 (1951).
50. Ibid. at 137.
51. Ibid. at 178.
52. ZGB preamble, para 4, § 14.

pirical level. They simply assert that socialist civil law differs from capitalist civil law because it pursues societal welfare rather than individual protection. But this claim is neither self-evident nor self-explanatory. How can the law protect "material and cultural needs of the population" without also protecting individual rights? In order to know which needs to support, the law must distinguish between acceptable and non-acceptable needs—between rights and non-rights. To be articulated, asserted, and possibly litigated, these rights must be assigned to concrete individuals—owners, buyers, landlords and tenants. It is difficult to imagine how it could be otherwise in a civil law system that does not want to police the satisfaction of societal needs with an army of public prosecutors. Civil law cannot treat the entire population as children in need of guidance and care. Nor does the ZGB attempt to do so: despite all its talk about social concerns and responsibilities, it takes legal notice of needs only if they appear in the shape of individual rights. Even for the ZGB, rights are thus an essentially egotistical category, to be invoked by those who feel most strongly about them. Extra-statutory forms of state involvement in the enforcement of rights may well exist; but the authors, not going beyond the frame of the ZGB, do not tell us about them. So what are we to make of the supposedly different thrust of the two civil codes?

Since the authors do not ask these questions, we do not get any answer. Their definition of socialist law remains on the surface, a description rather than a theory. And so it cannot do a theory's job and back up the authors' assertions against our doubts. I do not mean to say that Westen and Schleider are necessarily wrong; many of their observations seem plausible. But without a theoretical foundation for their arguments, they cannot really be right, either, and can convince us only by accident, not by the power of their analysis. It is not by chance, I think, that this long and thorough piece of work does not, as one would have expected, conclude with a summary. Not having set out with a well-articulated hypothesis, the authors cannot, in the end, say: "See, we told you so."

VI

The book's second basic weakness, its lack of critical distance, follows from the first. A theory offers protection against the onslought of data: it enables us to sort out the significant from the trivial, to order our information, and to question our own and other people's assumptions about it. Without such intellectual armor, it becomes difficult to resist the power of first impressions and to question ideological pretensions. A shortage of theory thus becomes particularly critical when dealing with a subject matter as complex and as ideologically loaded as socialist law.

I believe that it was this shortage of theory which caused the authors to accept the socialist distinction between civil and private law with as little questioning as they did. They also buy other socialist

phrases and definitions without much scrutiny. The book repeatedly uses the concept of a "unity of rights and duties" under socialism, for instance, without ever pausing to ask what this much proclaimed unity can possibly mean. If it means that rights are *limited* by duties (e.g., that my right as an owner is limited by my duty to pay taxes), this meaning would be nothing new and would imply no "unity" either: rights would still be viewed as opposites to duties rather than as their alter ego. If it means that rights and duties are *identical* (i.e., that my right as an owner obligates me to exercise ownership privileges), this meaning would not make much sense: a "right" ceases to be a "right" if it does not convey control over the territory it supposedly protects. Nor would this interpretation be supported by the ZGB, which in no instance compels a rightholder to make use of his rights. And if the "unity of right and duty" means that rights are *conditioned* upon the fulfillment of duties (i.e., that my rights as an owner are protected only to the extent that I exercise responsible ownership), this meaning might make some sense but is exceedingly risky and difficult to apply in practice. The ZGB, for instance, gives no positive definition of "responsible ownership" and requires an owner only to exercise his right within the limits of the law and with due respect for the legitimate interests of others and of society.[53] That sounds not like some mystical equation of rights and duties but like the quite conventional limitation of rights from the outside. It would take a careful investigation of doctrine and case law to find out what significance, if any, the shadowy concept of a "unity of rights and duties" actually has. Its facile acceptance and repetition, as if the term had some obvious meaning, will simply not do.

This is only one example. There are many other instances in which the authors merely restate socialist claims without critical questioning. They talk about the "constitutional protection" of tenancy[54] or of personality rights[55] in the GDR as if constitutions in socialist countries, had the same functions as in bourgeois democracies. They refer on many occasions to the educational tasks of socialist civil law without investigating how this education is meant to affect people's behavior if it apparently operates neither with legal sanctions nor with legal rewards. And although more than once the authors express doubts about the actual effectiveness of the ZGB's admonitions, they nevertheless continue to accept the fact that socialist law tries to teach and admonish as evidence of its unique quality. But what are we to make of a legal system that belittles the concept of individual rights, but continues to use it or that insists on defining its law as a vehicle for ideological messages despite the fact that these messages seem to fall on deaf ears?

53. § 22 para. 3.
54. P. 374; see Constitution GDR art. 37 para. 2.
55. P. 626; see Constitution GDR art. 19, 30.

VII

That brings us to the third, most serious shortcoming of this work: its confinement to doctrine. Since law, to the authors, is the law of the books, courts appear simply as applicators and executors of legislation. They have no life of their own. Westen and Schleider seem to take it for granted that case law (correctly decided case law, that is) will simply confirm the tenets of statute and doctrine. From this viewpoint it makes sense to use case citations, if at all, only to support some doctrinal interpretation. Decisions are never used to *challenge* the supposed meaning of the law.

Take, for instance, their treatment of contracts which are void because they violate some prevalent notions of morality—"good morals" in West Germany,[56] "socialist morals" in East Germany.[57] Here the authors claim, as a matter of fact, that "because of the different value-judgments of the two legal systems. . ., the interpretation of the concepts . . . diverges significantly."[58] They see no need to cite any cases which support their assertion. But I am not sure that they could find very many. While in the early years of the GDR the "general clauses" of civil law were indeed used as convenient vehicles for judicial repression, case law since the mid-1960s has calmed down considerably. I would guess that decisions involving truly political interpretations of § 68 ZGB are extremely rare—that is, that East German judges very seldom adopt interpretations with which West German judges would disagree in substance and not just in language. Nor am I so certain that the authors are right if they claim—again, without any concrete evidence—that GDR courts are more likely to interfere with parental custody decisions after divorce than are their West German counterparts.[59] Maybe, maybe not. In any case, these would have been good occasions to find out whether assertions about the different moral quality of socialist law are really more than mere verbiage.

But the authors are so captured by the doctrine and language of both legal systems that they cannot break out and examine the impact of law on real life. They never seem to realize that it takes more than black ink and paper to construct a "legal system". Judges must have the time, the inclination, and the incentive to apply the civil code's exhortations in individual cases—but the authors never look at socialist civil procedure and its possibilities and constraints. Rights must be invoked or contested by real people if statutory value judgments are to be translated into social reality—but the authors never look at litigation rates or the distribution of plaintiffs and defendants in East German courts. What if civil law claims are only rarely litigated, if socialist consumers prefer administrative complaint procedures to court suits, or if the moralizing of socialist

56. BGB §§ 134, 138.
57. ZGB § 68 para. 1 no. 2.
58. P. 235.
59. P. 761.

family law is undercut by people's private marital or extra-marital behavior? How much of the "systemic" distinctiveness of socialist civil law which the authors describe finds any reflection in the behavior of socialist courts and their users?

Even a careful reader of this long and exhaustive volume will get no real feeling for the importance of law in the life of ordinary East and West German citizens. He will put the book down with the vague impression that the two civil law systems pursue very different goals but that many of their statutory provisions, for whatever reasons, seem to lead to fairly similar results and that, in the end, the impact of civil law on the life of ordinary people is not all that different between East and West. The authors say as much when they claim that despite the "considerable divergences" in civil law doctrine both codes have "largely similar functions" in regulating the day-to-day relationships of citizens under the respective systems.[60] That result not only raises questions about the enterprise as a whole: what then is the importance of the "systemic" differences which the authors describe in their book? It also cannot possibly be true.

Look only at some of the factual differences between the two legal systems. Adjusting for different sizes of population and workforce, West Germany has 3.4 times as many professional judges as East Germany; more than 6 times as many law students; almost 20 times as many private attorneys. West German civil courts handle a caseload 9 times as large as that of their East German counterparts, and West German employees are more than 7 times as likely to sue their employer than are their socialist colleagues.[61] These figures suggest that law must play an enormously different role in the daily reality of the two states. We all know, from personal experience, how important and omnipresent law is in our capitalist lives: people are quick to sue and court dockets crowded; lawyers are well-respected and affluent members of the community; a large percentage of our elites have legal training, and even political disputes (involving issues like abortion or environmental concerns) are often battled out in legal terms. In East Germany, on the other hand, law seems peripheral and unused, an ideological artifact rather than a political life-force. Every socialist official talks about its dignity and authority; codes exhort its social concerns; scholars praise its collective spirit; official legal propaganda campaigns try to persuade citizens of the need to know and follow the law. But these appeals ring hollow. Few seem to listen, and few use the law to protect their individual interests.[62] Despite its enormous ideological pretensions, socialist law seems to have captured the hearts and minds of ordinary people much less than its counterpart under capitalism. For all

60. P. 66.

61. See Markovits, "Pursuing One's Rights Under Socialism," *Stan. L. Rev.* (forthcoming).

62. Id.

this, the book provides no explanation; it does not even give us an inkling of the greatly disparate weight of law as a social force under both systems. As an account of the significance of civil law in capitalist and socialist society, it is profoundly misleading.

Much of our comparative law research is similarly misleading. We talk about legal systems but not about the people living and breathing under those systems. We write about dogma, but cannot fill it with life. More than any other area of legal research, comparative law could be colorful, exiting, challenging, and mind-stretching. It rarely is.

How can we change? First of all, I think, we have to learn from the hedgehogs: pull our thoughts together, focus more precisely, think harder, become more selective about what is and is not important. We must stop behaving like registrars and start behaving like spies: search for vital information rather than record, index, and classify whatever data are available. When we ask questions, we must also ask why we (or anybody else) would want to know the answer.

For that purpose, we must develop hypotheses and design research plans to know where to go and how to get there. Our intellectual temperament (and often, our civilist upbringing) tends to make us doctrinal; our allegiance to dogma, in turn, may give our arguments a semblance of intellectual order, the illusion of conceptual cohesion. But a successful argument needs a structure of its own, and we cannot simply borrow existing doctrinal frameworks (as the authors do in the book under review) to support our investigations. We need to develop our own intellectual tools and use them with more critical distance, more self-doubts, and less respect for the letter of the law.

Above all, we must learn from other disciplines. Comparative law should offer unique possibilities to learn about other societies (and thus, incidentally, about our own) by looking at law as a mirror of social realities. Yet we tend to treat law as an independent, self-contained phenomenon, consisting of rules and procedures, but not of people who manipulate, apply, use, or disregard these rules. Our empirical efforts are minimal. Our contacts with the Law and Society movement are minimal. Our knowledge of economics is minimal. Despite their worldwide connections, comparativists are strangely parochial people—preferring to hang out with each other, publishing in their own, specialized journals, ignoring what else is going on in the world of legal scholarship. Take our conceptualism, for instance. We tend to take legal constructs seriously but in an unreflected, superficial way: as necessary elements of any legal system which for that very reason are worthy of our attention. We might learn instead from our Critical Legal Studies colleagues, who also take concepts seriously, but not as phenomena whose reality and importance cannot be in doubt, but as crystallizations of consciousness which must be debunked and decoded to reveal their social implica-

tions.[63] Unfortunately most of us are trained neither in empirical research nor in philosophical speculations. But we can learn. If we want to fill our books and articles with more life, if we want to understand law as a truly humanist discipline and comparative law—even better, as a discipline which looks at human relationships across national and cultural borders—we must leave our safe world of codes and doctrines, forsake our encyclopedias and handbooks, narrow our focus, sharpen our questions, and take the plunge.

63. See, for instance, Balbus, "Commodity Form and Legal Form," 11 *L. & Soc. Rev.* 671 (1977).