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## Approaching Aliens: A Plea For Jurisprudential Recovery as a Theoretical Introduction to (Ex)Socialist Legal Systems

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## I. *Introduction*

It might be wise to stop here. Even a reader who is sympathetic to jurisprudential imagination must regard the communicable part of my title with considerable misgiving. For he or she can hardly be unaware of the double jeopardy in which the general theorist of law places himself when dealing with socialist legal systems. The first has been aptly described by Alasdair MacIntyre in his parable of a man who aspired to be the author of the general theory of holes.<sup>1</sup> The moral of the story, that the concept of a hole is a poor foundation for a general theory that would explain all holes, is, to put it mildly, not devalued by the fact that, in construing a theory of socialist legal systems, one may lack concepts of both socialism and law, not to speak of the concept of a legal system.

The second source of danger can be detected without a meta-theoretical enlightenment: at the time the main part of this paper was written, in September 1989, the first non-communist prime minister in the Soviet bloc, in Poland, barely passed the Kremlin's acid test of reliability: by early February 1990, when the finishing touches are being added to the present version of this paper, all communist parties in Eastern Europe (and even some in the Soviet Baltic) have renounced their monopoly on power and seem to be ready to face democratic national elections. By the time this article appears in print, the Soviet Union, which is threatened by secessionist, non-Russian Soviet republics and nations, may no longer exist within the boundaries and with the regime that have constituted it since 1917. But if one nonetheless insists on a meta-theoretical explanation of the obvious, one can find it stated

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\*\*A revised version of lectures held at Dalhousie Law School on October 1 and 2, 1989. I owe some of the ideas on the nature of socialist societies which are expressed in this paper to Professors Zarko Puhovski, Eugen Pusic and Ivo Prpic of Zagreb University. Possible misinterpretations and errors are solely mine.

1. A. MacIntyre, "Is a Science of Comparative Politics Possible" in Id., *Beyond the Self-Images of the Age* (London: Duckworth, 1971), at 260.

bluntly in Kirchmann's notorious pamphlet *On the Worthlessness of Jurisprudence as a Science*, where it is said that libraries of legal science are by a dash of the legislative pen trans-substantiated into waste paper.<sup>2</sup>

Although it might be wise to stop, I will go on. An academic jurist in a socialist country, who has switched from the study of constitutional law to legal theory (as quite a few have, because no constitution could be identified in the country, and what could be identified as operative rules did not seem to be legal enough to be conceptualized as public law and were definitely not public enough to be referred to without peril in academic publications)<sup>3</sup> can as little refrain from speculating about law in his political habitat as the proverbial Wittgensteinian skeptic can stop doing philosophy. Potential readers, on the other hand, have not necessarily displayed greater self-control. Many non-academics as well as legal scholars, most notably western students of comparative law, have also speculated about the nature of law in socialist societies, even when factual information about the subject was negligible and when theories had no discernible practical consequences. Are we indeed to infer from the sudden disappearance of the hammer, sickle and other symbols of communist power that libraries of socialist and comparative legal scholarship have become waste paper? And to the extent that they have, is not the reason that they have never had much cognitive value?

These queries indicate that there exists a good reason for, and a manageable subject-matter for this inquiry. Rather than socialist legal systems, the subject matter is theories about their nature. They are something we can (still) put our fingers on. For the time being, they represent the only conceptual framework for the study of laws from the

2. Kirchmann's phantom pamphlet (originally entitled *Über die Wertlosigkeit der Jurisprudenz als Wissenschaft* and published in the late 19th century), which is no longer read but is still frequently referred to, is by informed legal scholars commonly regarded as a grotesque misunderstanding of the nature of legal science. Grotesque as it may be, its central argument may be more universally valid than it is assumed. Thus a professor of Eastern European government and politics was recently reported to worry that her students might "answer a question on an exam incorrectly, and then tell me later 'Well, it was in the book'." It's very important now that a student takes into account what has been happening". "Professors, Students Scramble to Keep Up with Events in East Europe: Text Books and Journals are Rendered Increasingly Out of Date Each Day as Students and Teachers Deal with History in the Making" (December 6, 1989), *The McGill Reporter*, 5. The article has been brought to my attention by colleagues from a faculty of medicine, who have been passing in through their department with comments which inadvertently — but I suspect: not inappropriately — reiterated the gist of Kirchmann's argument.

3. See, e.g., Ivan Padjen and Bozidar Bakotic, *Vanjski: poslovi Jugoslavije, sa stajalista medjunarodnog i poredbenog prava, s osobitim osvrtom na federalno uređenje/Yugoslav Foreign Affairs: An International and Comparative Legal Study of Federalism/* (Cakovec: Zrinski, 1972).

Elbe to the Pacific and they will remain to serve in that capacity at least till the moment that socialist insignia are stripped off the Soviet flag. And for this reason they may be problematic and in need of revision, retroactive as well as prospective.

This essay, therefore, is to be not merely a theoretical, but a “meta-theoretical” introduction into (ex)socialist legal systems. It will state a major problem of the theory of comparative law, outline some prominent solutions to it, analyze their assumptions, and offer alternative perspectives and solutions.

The problem traditionally has been formulated in, roughly, the following way: are legal systems which have evolved in Eastern European socialist countries since the First World War merely a variant within the family or type of civil law systems? Or are socialist legal systems a distinct legal family or type, with a common core that differs from Western European civil law systems as well as from common law systems, Islamic legal systems, Hindu laws, and so on?<sup>4</sup>

Section 1 of this paper will be concerned with some explicit and implicit criteria for the analysis and comparison of legal systems and with their applicability to the study of socialist systems. The latter task requires, needless to explain, not only an alternative approach to the problem *in abstracto*, but also a different interpretation of the place of law in socialist countries. Section 2 will address the main problem of the study by focusing on the role of legal theory or doctrine in socialist systems. Thus the study will in both principle parts descend from an analysis of other theories to explicit theorizing about the nature of socialist legal orders. Section 3 will abandon not only the “meta-theoretical” but also the “theoretical” stance and engage in an expressly “practical” discourse, concerning, again, legal theory.<sup>5</sup> Starting from the findings in previous sections that problems of socialist legal systems are largely problems of legal scholarship, which, if anything, cannot be solved by a dash of the pen, the concluding part of the paper will propose a set of measures for a “jurisprudential recovery” of what until recently has been, and has largely remained, the world run by “communists and their laws”, and for a parallel recovery of western scholarship concerned with socialist legal systems.

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4. For a brief discussion of the relevance and main approaches to the problem see V.A. Tumanov, “On Comparing Various Types of Legal Systems”, in W.E. Butler and V.N. Kudriavtsev, ed., *Comparative Law and Legal System* (New York: Oceana, 1985), 69 at 70-72; see also a systematic analysis of the approaches.

5. The distinction between the theoretical and practical (not to speak of the meta-theoretical) level of legal discourse is, of course, far-fetched, but a part of (at least) the continental tradition of legal scholarship. See, e.g., I. Padjen, “The Root of Legal Theory” (1988), 8 *Synthesis Philosophica* 235.

## II. *Criteria of Comparison and Socialist Legal Reality*

Modern comparative legal research began at the end of the last century as a practically and even technically, rather than cognitively or theoretically oriented discipline.<sup>6</sup> Its explicit aim was the unification of private laws of industrially developed nations, which could facilitate international traffic and commerce.<sup>7</sup> Hence the focus of comparative inquiries were differences between Roman-Germanic civil laws and Anglo-American common laws. Since both types of legal systems performed very similar social and almost identical economic functions, and since those functions were not regarded as problematic, the subject-matter of comparative legal inquiries could be narrowly conceived and criteria for comparing different legal systems could be relatively simple and expressly juristic.

The principal criterion for comparison was the nature of the so-called sources of law. According to that criterion, Romano-Germanic systems are created by legislators and, to some extent, by scholars, whereas common law systems are made primarily by judges. The subsidiary criterion was the internal structure of legal systems. According to that criterion, the common law of contracts and the civil law of contracts are comparable branches of law, whereas trust is a peculiarly common law institution and obligations are a peculiarly civil law set of institutions.<sup>8</sup> The two criteria have been usefully applied in the study of non-western

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6. On the history of comparative legal scholarship see Leontin-Jean Constantinesco, *Traité de droit comparé, t. 1: Introduction au droit comparé* (Paris: L.G.D.J., 1972), livre 2e, at 50-94. See also essays collected and edited by Konrad Zweigert und Hans-Jurgen Puttfarcken, Hrsg., *Rechtsvergleichung* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1976).

7. See Constantinesco, note 4, at 107.

8. The two criteria have become so deeply entrenched in the modern comparative legal scholarship that they figure as the principal criteria of the multivolume, half completed, *International Encyclopedia of Comparative Law* (Tubingen: Mohr and Paris: Mouton, 1970-) [further: *I.E.C.L.*], which is prepared under the auspices of the International Association of Legal Science and edited by an international board of comparatists from all major legal systems. Thus, although R. David in "Introduction" of *Structure and the Division of the Law* (*I.E.C.L.*, vol. 2, ch. 2) — which presumably reveals theoretical underpinnings of the *Encyclopedia* — stresses the necessity of functional approach in comparative legal studies and suggests that "(i)t is often necessary to go beyond what is considered as being strictly speaking the domain of law" (at 6), his brief "Introduction" (at 3-14) is concerned with little more than sources and divisions of laws. The impression created by the "Introduction" is reinforced by David's study *Sources of Law* (*I.E.C.L.*, vol. 2, ch. 3), the only other — but lengthy (172 pp.) — part of the *Encyclopedia* which can be interpreted as an exposition of the criteria of comparison applicable in the comparison of all legal systems. The impression is, of course, misleading, and should not be understood as a reflection of either the present state of comparative legal scholarship or the criteria which are actually followed in numerous chapters of the *Encyclopedia*. But it very probably reflects the minimal common denominator of the scholarly traditions represented on the editorial board of *I.E.C.L.*

legal systems, for example, of Hindu and Islamic laws. But the emergence and development of socialist systems created unforeseeable problems.

### 1. *Jurisprudence, Contextualism, and Traditional Assumptions*

When the Soviet Union stabilized its newly created legal system in the 1930s, Western legal scholars noticed that the new system retained two distinctive features of the Romano-Germanic legal family. Soviet law was based on codes, with little or no room for judicial law-making (which should not be confused with often vast discretionary powers of the Soviet judiciary and the interference of the communist party apparatus in the judicial process) and it was divided, though with some rearrangement, into branches which exist in Romano-Germanic systems.<sup>9</sup> The similarity between Romano—Germanic and socialist laws became even more pronounced after the Second World War, when communist governments of eight Eastern European nations adjusted their legal systems to the Soviet model,<sup>10</sup> especially after 1961, when the Soviet leadership refused influential proposals to amalgamate the civil and administrative law regulating the organisation and operation of Soviet state enterprises into a single branch of economic law.<sup>11</sup>

However, Western legal scholars could not fail to see that, although the internal structure of socialist legal systems had been derived from the civil law type, socialist systems functioned in unprecedented ways, their most striking features being the etatization of economy and the omni-presence of the communist party and its ideology. In addition, at the time that the Soviet system stabilized in a form that could not conceal its civilian ancestry, Soviet ideologists and scholars began to insist that socialist laws constituted an entirely new legal type.<sup>12</sup> The claim of originality went so

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9. The two features are noted, as traits common to all socialist legal systems, also by R. David, "Introduction", *I.E.C.L.*, vol. 2, ch. 2, at 3 and 8.

10. Although the principle of *I.E.C.L.* that each legal system and its peculiarities ought to be presented by scholars from within the system has been widely criticized (not only by experts on foreign laws who have been deprived of the opportunity to contribute to *I.E.C.L.* and, in addition, some of the Eastern European contributors whose national reports have already been published in *I.E.C.L.*, vol. 1, may now wish to rewrite them (to remain faithful to the principle that a scholar writes current history and rewrites history of past events in accord with wishes of the present superiors), their reports on Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Romania, Union of Soviet Socialist Republics, Yugoslavia) may still be a handy introduction into socialist legal systems. Theoretical (or ideological) underpinnings of the reports can be found in V.M. Tschikvadze and S.L. Zivs "The System of Socialist Law", *I.E.C.L.*, vol. 2, ch. 2, 115, and I. Szabo, "The Socialist Conception of Legality", *I.E.C.L.*, vol. 2, ch. 1, 49.

11. See Norbert Reich, *Sozialismus und Zivilrecht* (Frankfurt a.m.; Athenäum, 1972), at 288 ff.

12. See Klaus Westen, *Die Rechtstheoretischen und Rechts-politischen Ansichten Josef Stalins* (Lindau: Thorbecke, 1959), esp. at 97-112.

far that in 1964 a Hungarian epigone thought meaningful comparison between the Marxian socialist legal systems and legal systems of the West difficult, if not impossible. Thus it became obvious that new criteria of comparison were needed.<sup>13</sup> Since Bartels has left what may well be the last, if not definitive, study of Eastern European Marxist and Western approaches to the comparison of different families of law,<sup>14</sup> I will examine what I consider to be two basic approaches in contemporary comparative legal scholarship in the west and analyze how they are related to basic assumptions of that prevailing, mainstream, general theory of law.

Some Western scholars have tried to find new criteria for the comparison of socialist and other legal systems (and for the analysis of the latter) within jurisprudential categories, that is, within categories that have been derived by lawyers in, say, abstract or theoretical studies of legal problems but which were not regarded as decisive by early modern comparative lawyers in their classifications of legal systems and families of law. A prominent and still discussed example of this new, jurisprudential approach is Wolfgang Friedmann's analysis of socialist legal systems in his book *Law in a Changing Society*.<sup>15</sup> In that analysis, Friedmann recognizes that the Bolshevik Revolution of 1917 has been one among those which "totally and violently destroyed the existing constitutional and legal structure."<sup>16</sup> He maintains, however, that notwithstanding the many basic differences between socialist and non-socialist legal systems "no basically new concepts and relationships" have developed in the former.<sup>17</sup> In his view, even socialist systems have had to respect, although on a limited scale, the private property of individual citizens and the entrepreneurial autonomy of state-owned corporations.<sup>18</sup>

At the opposite end of the spectrum of more recent interpretations — which may conveniently be labelled as contextualist — is John Hazard's landmark study, *Communists and their Law*, the first and still the only comprehensive analysis of "the common core of Marxian socialist legal systems." Hazard's book closes with the finding that there are economic,

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13. G. Erosi, "Comparative Analysis of Socialist and Capitalist Law" (November 1964), *Coexistence*, 139 at 151.

14. Hans-Joachim Bartels, *Methode und Gegenstand intersystemarer Rechtsvergleichung* (Tubingen: Mohr, 1983), esp. at 5-22.

15. See, e.g., W.E. Butler, "Marxian Concept of Ownership in Soviet Law" (1985), 23 *Columbia Journal of Transnational Law* 281 at 283-85.

16. Wolfgang G. Friedmann, *Law in a Changing Society* 2nd ed. (New York: Columbia University, 1972), at 37.

17. *Ibid.*, at 24.

18. See *ibid.*

political, social and ideological marks which distinguish all (including Asian and African) Marxian socialist legal systems from other families of laws.<sup>19</sup> He points out that these apparently non-legal features are a normal concern of European law faculties but can hardly be seen from an English and American law “school,” which is “usually physically separated and often emotionally apart from the rest of the university in which it functions.”<sup>20</sup> But he does not admit openly what his reader cannot fail to note, namely, that his summary characterization of these features are almost identical with the official and semi-official self-interpretations of Marxian socialist legal systems with which the book opens.

In the opening chapter, Hazard states the “basic laws applicable in all countries embarking upon a socialist course,” which were listed in the declaration of the Twelve Communist Parties in Power of 1957,<sup>21</sup> and then quotes an influential Soviet textbook of the same year, which translated these “laws” into the following three guidelines to be observed by every Marxian legal system: (i) the leading role of the communist party and the massive involvement of citizens in the political process; (ii) the liquidation of private capitalist property and the end of employment by private employers; (iii) the acceptance of the Marxist-Leninist world-view and the working out of a cultural revolution.<sup>22</sup> The only significant difference between these guidelines and Hazard’s own summary of the distinctive features of Marxian socialist legal systems is that Hazard’s summary ranks the economic arrangements first and the political arrangements second.

I believe that not only the first mentioned, expressly juristic, criteria for comparing legal systems, namely, the criteria of sources and the internal division, but also the criteria employed by Friedmann and Hazard, are inherently limited conceptual tools for inquiries into socialist legal systems. When I say that the criteria in question are inherently limited, I mean that they are based and dependant on some higher criteria, which function as rarely explicated tacit assumptions of the mainstream jurisprudence, and that the higher order criteria, or assumptions of the mainstream jurisprudence, provide a distorted picture, at least, of socialist legal reality. To make good this claim, it is necessary to explicate some of

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19. John N. Hazard, *Communists and Their Law* (Chicago: University of Chicago Press, 1969), at 523 f.

20. *Ibid.*, at 521-22.

21. *Ibid.*, at 6-7 refers to the text of the Declaration published in D. Jacobs, ed., *The New Communist Manifesto*, 3rd ed. (1961), 169 at 176.

22. Hazard, note 18, at 7 refers to Institut prava Akademii nauk SSSR, *Gosudarstvennoe pravo zarubezhnykh sotsialisticheskikh stran* (1957), at 3-4.



the assumptions and, moreover, to clarify Friedmann's own criterion for the appraisal of socialist legal systems.

Friedmann's *Law in a Changing Society* is commonly regarded as a sociological study of law. Without denying or disputing the sociological orientation of his book, which makes it akin to Hazard's treatise on communists and their laws, it is important to recognize that in his denial of the alleged originality of socialist legal systems, Friedmann obviously has in mind a traditional jurisprudential, rather than a distinctly sociological, criterion, namely, the degree of autonomy enjoyed by subjects of a legal system.<sup>23</sup> It is a *prima facie* relevant analytical tool, which may need refining but cannot be dismissed. What is problematic is the assumption on which Friedmann applied the criterion in his appraisal of the nature of socialist legal systems. The scarcity of his references to either positive or scholarly materials on Soviet and other socialist legal systems is a strong indication that he has accepted what I will label the first assumption of mainstream jurisprudence: the assumption that law is not an empirical problematic subject-matter of study, because what the formal sources of a legal system proclaim is by and large observed in practice, so that one can competently discuss general traits of, for example, Soviet law, by taking into account Soviet basic legislative enactments and studies based on such enactments. Since the assumption is closely related to another assumption, it will be convenient to state the latter and discuss the two of them together.

In his analysis of the common core of Marxian socialist legal systems, Hazard relies on criteria which are far more complex than either the criteria of autonomy or the criteria of sources and divisions of law. In *Communists and their Law*, as well as in other studies of socialist law and institutions, he takes into account not only proclaimed formal sources, such as codes, statutes, and regularly published decrees, but also available judicial and administrative decisions and even assorted decisions adopted by organs of communist parties and affiliated organizations, such as trade unions. However, his criteria presuppose the second basic assumption of mainstream jurisprudence and, as will be argued in section III, 3 reinforces a third one. By focusing on decisions not only of states but also of communist parties in power, Hazard presupposes what is, as persuasively shown by Lon Fuller in his criticism of positivism, presupposed by much of contemporary, especially Anglo-American legal theory, namely the idea or notion that law is a one way projection of

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23. Kant may be credited with the classical philosophical analysis of autonomy, as opposed to heteronomy, but the distinction is contained in older distinctions between *jus dispositivum* and *jus strictum*, and is presupposed by distinctions between private and public laws.

authority from above.<sup>24</sup> That idea is, of course, also presupposed by traditional comparative legal scholarship to the extent to which it treats codes, judicial decisions, and other governmental enactments as the sources of legal systems. Although the two above-mentioned assumptions of mainstream jurisprudence are conceptually distinct, the second is normally presupposed by the first, namely, that what formal sources proclaim is by and large carried out. This is also the case with Friedmann's sociological study, which is concerned primarily with social change by positive law.<sup>25</sup> For this reason, I will develop my criticism of the first assumption within the arguments against the second.

At the time that the first version of this paper was being prepared — in early fall of 1989 — my attempt to show that the view of law as a one-way projection of authority was so misguided that it failed to account even for the structure of then existing socialist legal systems in the Soviet Union and Eastern Europe, and that, as explanation, it was an outrage not only to positivistically minded legal scholars, but also to social theorists of any kind, not to speak of western students of the communist world. At the time that the present version of this essay is being written — late January of 1990 — the attempt may seem to be superfluous. For in the past few months all Eastern European nations, except Albania, and even some nations within the Soviet Union, have renounced the basic provision of their constitutions<sup>26</sup> — which recognized the communist

24. Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven, Yale University Press, 1969), at 192.

25. See Friedmann, *note 16*, at 19-44.

26. Hungary: the Parliament voted to allow independent political parties (January 11, 1989); the ruling party shed communism (October 7, 1989); national elections called for March 25, 1990. Poland: the government agreed to legalize "Solidarity" and held open elections (April 5, 1989); after an overwhelming victory of "Solidarity" in parliamentary elections (June 4, 1989) the country's first non-communist president was nominated (August 19, 1989); the communist party abandoned its ideology and split (January 1990); East Germany: the communist party renounced its monopoly on power (November 1989); open elections called for May 6, 1990. Czechoslovakia: the communist monopoly renounced (December 1989); open elections in June 1990; Bulgaria: the leading role of the communist party renounced (January, 1990); open elections in June 1990. Romania: the Front of National Salvation, the communist led organisation which has assumed control in the country after the overthrow of Ceausescu's dictatorship, accepted partnership with other political parties (January 1990); open elections in April 1990. Yugoslavia: the federal congress of the communist party renounced the party's leading role and broke up (January 23, 1990); open elections called for April 1990. See, e.g., *Time* (N.Y.): "There Goes the Block" (November 26, 1989), 24-28; "An Irresistible Tide" (November 27, 1989), 32-34; "What Have You Done For Us Lately?" (December 11, 1989), 29-30; "Now, the Hangover" (January 15, 1990); and *New York Times International* (February 1, 1990), Section A. On the national independence movements and the legislation of opposition parties within the Soviet Union see, e.g. "And Now, Divorce?" (January 22, 1990), *Time*, 10-12.

party's monopoly of power — thus showing the strength of the *vox populi* to exert substantive changes not only within socialist legal systems but beyond their limits.

However, I believe that my original argument was, and still is, plausible not because of, but despite, the changes that have taken place in the last four months. I believe that there are good reasons to assume that socialist legal systems have been created largely from below, though not in a way that is explicable by traditional theories of legal pluralism, and that the future of legal systems in Eastern Europe and the Soviet Union (or even China) still critically depends on inputs from below, which have shaped them as socialist systems. To make good this claim, I will briefly describe the peculiar structure of sources of socialist laws (II, 2). I will then hypothesize about inputs into sources and offer a projection of possible developments (III, 3).

## 2. *Sources and Incognoscibility of Socialist Legal Systems*

The reason that traditional theories of political pluralism, which are concerned with the creation of law “from below” and find their source in autonomous social and legal sub-systems, for example, in traditional communities, economic markets, churches,<sup>27</sup> illuminate also the “nature” — but not, say, the “structure” — of socialist legal systems, is the peculiar relationship that exists between the communist party in power, its state, and society.

A political party, a state or government, a society, as a system of basically market relations, and a community, such as a church, can all be defined, at least for some analytical purposes, as relatively independent networks of communication within a broader network that can be termed, for the sake of brevity, a social system. In a pluralistic, characteristically western, social system, it often happens that a governing political party or coalition of parties privatizes the state, by filling numerous administrative positions with its supporters, and that the state intervenes in virtually all societal relations, leaving only traditional communities on the outskirts of its domain. But the four types of networks can nonetheless be discerned.

However, in a typical socialist country, which is ruled by a communist party, a new type of relationship between the governing political party,

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27. See the classic in the field, Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. (Cambridge: Harvard University Press, 1936). Later contributions to the field include: Georges Gurvitch, *L'Idée du droit social*, repr. (Aalen: Scientia, 1974); J. Glissen (ed.), *Le Pluralisme juridique* (Bruxelles; Editions de l'Université de Bruxelles, 1972); A. Allott and G.R. Woodman, eds., *People's Law and State Law* [The Bellagio Papers] (Dordrecht: Furis, 1985).

state, and society is established. It can be described metaphorically as a relationship in which the communist party has woven itself into the state, which has, in turn, woven itself into society: in Red Khmer Kampuchea, the process encompassed even the basic communities, as evidenced by the fact that the party dismembered a vast number of families. A result of the merger of the party, state and society is a legal system that appears to be a projection of the omnipotent (and all-knowing) will of the party, which is rubber-stamped by the state. If it were indeed such a projection, it would be a paradigmatic instance of the legal system that the traditional positivist, especially Anglo-American and comparative lawyers have in mind, which, needless to add, would defy description in terms of legal pluralism. But in eastern Europe, very probably since the death of Stalin, in China since the death of Mao, the appearance has been deceptive. To understand why it has been deceptive, it is necessary to consider what one can know about socialist legal systems and then make informed guesses about their probable content.

It may be best to start from the common wisdom that one learns law from its sources, whatever they may be. I have already given some examples of sources and indicated some anomalies of sources in socialist legal systems. Anthony D'Amato's theory of custom can shed additional light on both the nature of the problem in general and on other salient features of sources of socialist laws.

The gist of D'Amato's argument runs as follows: a rule of international customary law is created when there is a state practice (*usus*) and linguistic articulation that the practice is exemplary and binding (*opinio*). The first element, *usus*, may consist of an action performed only once by one state only; even a doctrinal opinion of a distinguished scholar expressed in a reputable law review can perform the role of the second element, *opinio*.<sup>28</sup> These views illuminate the basic feature of all sources of law. It is a fact that a source can exist in various degrees and various appearances and that its existence critically depends not only on the observance of norms that are contained in it but also on the linguistic articulation or appearance of the source as a norm-creating act.

A source of law functions best and is most easily identified when its highly authoritative application and linguistic articulation are performed by the same act or by a series of clearly connected acts. Thus precedents are normally identified as a source of English law because English judicial decisions claim they are based on precedents. Likewise, the

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28. Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell University Press, 1971), at 85 and 91-98.

French *Code Civil* is normally identified as a source of law because French judicial decisions claim that they are based on the Code. However, it is essential to note that what makes English precedents and the French Code paradigmatic sources of law are the following three assumptions: first, that judgements do not merely invoke precedents but are actually based on them; second, that judgments are observed, that is, executed; third, that social relations which are not directly related by individual judicial decisions also conform to provisions stated in the precedents and in the Code.

Needless to say, these assumptions can be counterfactual. There are many ways in which a source of law can fail. But it is important to recognize that a source which has failed in some way can nonetheless function as a source, albeit an imperfect one. An example is a practice that is often imitated but poorly articulated, such as D'Amato's practice articulated by a law professor only. A contrasting example is an enactment that is highly articulated in widely circulated propaganda materials but is little observed in judicial and other social decisions. My claim, of course, is that a typical socialist legal system abounds with sources that fail in different ways but are nonetheless sources of law.

The best indication of the phenomenon is the treatment of sources in *The Encyclopedia of Soviet Law*, the best Western reference book on the subject. What is missing in *The Encyclopedia* is a list of authoritative and available publications of governmental documents where one can find Soviet by-laws and leading judicial and administrative decisions.<sup>29</sup> The reason that these materials are missing is that they are not systematically published or if they are, that they are only available to limited categories of Soviet users. Dietrich Loeber brought the problem to the attention of Western readers two decades ago.<sup>30</sup> By now it has become widely known, although, by its very nature, the problem cannot be studied systematically: the secret laws are (or at least were till a month or two ago) an all pervasive feature of socialist legal systems; what one can learn from the regularly published official gazettes is (was) only the tip of an iceberg and often not even the tip.<sup>31</sup> Thus *Vedomosti Verkhavnogo Soveta USSR* has carried mostly lists of decorations and sometimes only

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29. F.J.M. Feldbrugge, G.P. van Berg and W.B. Simons, eds., *The Encyclopedia of Soviet Law*, 2nd rev. ed. (The Hague: Nijhoff, 1985).

30. D. Loeber, "Legal Rules 'For Internal Use Only': A Comparative Analysis of the Practice of Withholding Government Decree from Publication in Eastern Europe and Western Countries" (1970), 19 *International and Comparative Law Quarterly* 70.

31. I have summarized my first-hand (by no means exhaustive) knowledge of the unavailability and secrecy of laws in Yugoslavia in I. Padjen, "Vadavina prava: perspektive i problemi" / "The Rule of Law: Perspectives and Problems" (1989), 22 *Dometi* (Rijeka), 347 at 354-55.

such lists. At the same time, the official gazette of the Council of Ministers of the USSR, *Sobranie postnovleniia Pravitelstva SSSR*, has carried only selected decrees adopted by the Council, and, at least till very recently, the latter gazette was not commercially available outside the Soviet Union.<sup>32</sup>

*The Encyclopedia of Soviet Law* also indicates the function of documents which are not normative acts but affirm a fact, assert a right and, in general, communicate information.<sup>33</sup> The indication is misleading in two ways. First, it states that documents in the Soviet Union can be conveniently classified into official and private.<sup>34</sup> The classification should not read as implying that in the Soviet Union or, for that matter, Yugoslavia, or any other socialist system, there exists an official or authoritative concept or reality of government publications.<sup>35</sup> Second, the Encyclopedia states that, as a rule, a document must bear the signature of the person who issues it, a letterhead, and seal or stamp. On the basis of my experience in Yugoslavia, I am inclined to think that an official document in a socialist country, as a rule, fails to meet one or more of these and other common sense requirements of communicability.

There are more subtle ways, short of secrecy and sloppiness, in which socialist legal acts and official documents fail. One is the notorious civilian disregard for the facts of a case. When socialist judges, like their counterparts in Italy — the cradle of civil law — and other European countries, state the facts, they are likely to use as few words as possible — and digest them when decisions are reported.<sup>36</sup> However, the sparing

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32. *Gazety i zhurnaly SSSR: Katalog*, a catalogue of Soviet periodicals commercially available outside the USSR has not listed *Postanovleniia* . . . at least till 1986. It may be interesting to note that in the mid-70s the European Law Division (in fact, research institute) of the Library of Congress, Washington, D.C. had only an — incomplete — photocopy of *Postanovleniia*, obtained directly from Moscow.

33. "Documents", in Feldbrugge, *note 29*, 263.

34. *Ibid.*

35. The concept cannot be formulated because in a socialist country most institutions are, in the final analysis, departments of government and most official documents are withheld from publication. A good indication of the reality of Soviet government publications, and of the availability of Soviet official documents via such publications, is the fact that in 1986 Yugoslav depository library for Soviet official publications (in Savajevo) received 98 volumes as such publications, whereas the Yugoslav depository library for U.S.A. government publications (in Zagreb) received 55,000 volumes as such publications (and was, in addition, flooded by volumes other than Soviet government publications donated by the Soviet Union). I am grateful for this information to D. Pomykalo of the National and University Library in Zagreb.

36. *Comp.* "[Judicial] opinions contain no coherent statement of the facts of the case, and even those that do are seldom published with the fact intact. Instead, at the point where the facts might be found, one encounters the disheartening term "omissis", signifying that a part of the opinion is omitted. The emphasis is not on the facts, but on production of the polished maxim (*massima*) and this abstract and conceptual statement, divorced from its factual context may

vocabulary resorted too often conceals not only arbitrary fact-finding but also whimsical legal qualifications of the facts. Informed rumour has it that a Yugoslav administrative court, which has sweeping powers comparable to the jurisdiction of the Conseil d'Etat, dismisses 80% of the cases submitted to it with summary motivations which read, roughly, as follows: "the act which is submitted for review is not an administrative act and therefore falls outside the jurisdiction of the Court."<sup>37</sup>

The second way in which socialist legal acts and official documents fail may be a Yugoslav specialty. In Yugoslavia (or at least in its constituent Socialist republic of Croatia) motivations of judicial decisions in some areas of civil (especially private property) law do not refer to sources on which they are based at all.<sup>38</sup> The apparent reason is that statutory provisions in which the decisions are based have been revoked without being replaced by new statutes. And there are cases which indicate that, in fact, a new judicial habit has evolved: a judgement mentions the rule (statutory or judge-made) on which it is based only when the rule is new to the court that renders the judgement.<sup>39</sup>

This picture of sources of laws in socialist systems would be essentially incomplete without a mention of three additional peculiarities. The first is the multitude of collegial decision-making bodies at all levels of the party-state-society structure, many of which perform meaningful functions but are constantly hindered by the virtual non-existence of rules of order. The second, which parallels the first, is the widespread decentralization of economic, other social, and even some strictly political functions, especially in Yugoslavia, but recently also in the Soviet Union. Decentralization, often labelled as self-management, has created thousands, perhaps millions, of autonomous authorities which regulate important aspects of the lives of citizens without being aware of the regulations they have issued.<sup>40</sup> The third feature is the omni-presence

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be the only part of the opinion to be published". Mauro Capelletti, John H. Merryman and Joseph M. Perill, *The Italian Legal System: An Introduction* (Stanford, Cal.: Stanford University Press, 1967), at 245-46.

37. This is not to suggest that a senior law professor would be in principle denied access to archives of the court in question and check the accuracy of what is rumored as well as engage in a comprehensive research into the unreported decisions of the court, and publish results in a law review. But another informed rumor has it that the professor could do it in principle — just as the proverbial Radio Erevan's Moskvitch can, in principle, enter at a speed of 100 km.p.h. a curve — i.e. only once.

38. See Prilog Nase Zakonitosti (Zagreb, 12 x Ann.) which publishes selected decisions of Croatian courts.

39. According to two judges who have taken part at the legal theory workshop on the interpretation of law at the Faculty of Law of Split University, December 12, 1988.

40. As the administrator of an institution with not more than 40 employees I once chased, with the assistance of two administrative secretaries, internal regulations of the institution for three months.

of the communist party and, as a rule, the unavailability and possible non-existence of documents that would indicate its presence.<sup>41</sup> One can only make guesses about the party influence on law-making. It will be convenient to state some of the facts that allow extrapolations.

A typical communist party in power has an inner circle of activists, which is probably much larger than the *nomenklatura* or its equivalent. An activist, depending on his/her proximity to an important party bureau, shares confidential information. Top party executives have direct access to, and control over, the state security services. In totalitarian socialist states, such as Romania before the fall of Ceausescu, or Albania, a large number of party activists and of black-mailed non-members, especially in universities and other ideologically sensitive areas, cooperate with the state security services. In countries like the Soviet Union, where there still exists a hierarchy of party departments that duplicates governmental lines of command, the contact between the party apparatus and party members is constant and intensive. In countries like Yugoslavia, where the party has retained control over the state security services and major appointments in government, the media and, possibly, financial areas, such as banking, contacts between the apparatus and members have lost much of their earlier significance.

An illuminating insight into the functioning of a liberalized communist party in power can be found in a recent study, probably the first of its kind, of the Zagreb party organization.<sup>42</sup> Authors of the study were given the opportunity to look into archives of the city committee of the League of Communists and found, not surprisingly, that the main function of the Committee in the late 1980's was the screening of candidates for some 3,000-4,000 administrative positions in the city of 800,000 inhabitants. An interesting finding was that the city committee exercised its screening powers, as a rule, only when approached by one of the candidates for a position, presumably by a party member threatened by either a non-member or a member of a lower party rank. The party, therefore, communicated with its rank-and-file as sort of a labour court of last resort for aspiring careerists. Given the fact that the role of the communist party in Zagreb had, well before the turmoil of 1989, shrunk to the level of

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41. See the illuminating account (only 3 pp. long but probably the longest publicly available) by an insider in S. Zamashchikov, "The Dissemination of Decision Within the Party", in Dietrich A. Loeber, ed., *Ruling Communist Party and Their Status Under Law* (Dordrecht: Kluwer, 1986), 53-55.

42. Euan Pusic et al., *Problemi integracije u komunalnom sistemu grada Zagreba / Problems of Integration in the Communal System of the City of Zagreb* (Zagreb: Pravni fakultet and CIT GK SKH Zagreb, 1988). An abbreviated version of the research report is published in the journal *Nase teme* (Zagreb), vol. 32 (1988), 3006-41.



making selective, quasi-judicial interventions into politically-coloured (*nomenklatura*) appointments, it is not at all surprising that the City Committee paid special attention to the selection of regular judges: the Committee screened more than 80% of candidates for judicial appointments, as against 20% of candidates for administrative offices in the City Council. Luhmann may interpret the selective steering as a reduction of complexities, but a less sophisticated analyst may interpret it as a sign that even the communist party has come to recognize the pivotal role of adjudication.

What is known about the sources of socialist laws makes one wonder whether one can at all comprehend what a socialist legal system, indeed, what a socialist country, is really like.<sup>43</sup> This is not meant to dismiss with a dash of the pen the growing body of Western, especially Anglo-American and German socialist law scholarship or the libraries on the subject assembled by Eastern European lawyers. On the contrary, a *bona fide* Eastern European legal academic will readily admit that, although she has irreplaceable first-hand experience of socialist legal reality and despite the fact that socialist legal scholarship is growing steadily in quality as well as quantity, in order to understand what socialist laws are all about, she has to consult the once prescribed Western studies on socialist legal systems and their institutions. It is precisely the fact that we in the East, in order to understand ourselves, have had to read Western studies of socialist laws, which have relied as much on our own off-the-record information as on documents available more readily in our immediate environment, that justifies us in saying that the cumulative knowledge of socialist legal systems is highly deficient.

I am, of course, not endorsing the claim of Soviet and other emigrés to the effect that reality within the Soviet world is, in principle, incomprehensible to outsiders. Nor am I claiming that socialist legal systems are not legal systems but something else. Although I will argue that they are highly erratic and anomic (see II, 3), to claim that they have been anomic *simpliciter* would imply that they have never existed. And to say that they have been so anomic that they cannot be classified as modern legal systems is to insist on the obvious yet miss what is equally obvious the peculiarities of socialist legal systems are the mergers of party, state, and society.

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43. See Ivan Padjen, *(Ne)cudorednost (medjunarodnog) prava / The (Im)Morality of (International) Law* (Rijeha: ICR, 1988), at 120-124 for a brief elaboration of the view that social facts are constituted by norms, that complex social systems are constituted legal norms and that, therefore, structures of social systems which are constituted by secret laws cannot be learned by sociological and similar methods, which allegedly (unlike jurisprudential methods) are directed at "hard social facts".

My positive argument runs as follows: (i) the most fruitful definition of law is that law is a process — *a flow* — of decisions that regulates, by and large authoritatively and efficaciously, the most important social relations that are, as such, conflicting;<sup>44</sup> (ii) in a socialist country only a tip of the process (basic statutes, some selected — but not sufficiently representative and possibly misleading — judicial, administrative, and autonomous decisions) can be seen and studied, especially in the most important area of their party-state-society structure, which is regulated by administrative, financial and labour law and, of course, by accompanying party decisions; (iii) as a result of insufficient empirical evidence, even well-intended insiders in a socialist legal system have a distorted picture of the main traits of their own system. The picture is further distorted by the ideological propaganda within the system and by interpretations within the categories of the mainstream jurisprudence. To put it simply, what a socialist system is like is not knowable to either internal participants or external observers. To paraphrase Kant, it is a *Ding an sich*, but for the prosaic the reasons stated above.

### 3. *Socialist Osmosis and Threats of Change*

Since a skeptic cannot claim complete ignorance, and a socialist academic cannot resist the temptation to speculate, I will venture to make claims, in the form of virtually untestable hypotheses, about probable inputs into sources of socialist laws. The basic hypothesis is that, since the sources of a socialist legal system are in constant disorder, the sources cannot function only in the way that they are meant to function by party rulers and western commentators, namely as a one-way projection of authority from above. It is more probable that they are bent by pressures which are not recognized by official self-interpretations and interpretations focusing on nominal structures of power. With this in mind, it is possible to offer further hypotheses about groups that promote their interests in socialist legal systems.

The first group comprises members of the communist party or, more precisely, an inner group of party activists, including the *nomenklatura*. Voslensky, a leading authority on the problem, claims that members of

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44. The definition of law may be understood as a variation of the policy-science conception of law. See, e.g., H.D. Lasswell and M.S. McDougal, "Criteria for a Theory About Law" (1971), 44 *Southern California Law Review*; 360 at 382-390. At the same time, it is a variation of the trialistic teaching that law consists of positive norms, trans-positive values and social relations (introduced to Yugoslavia by B. Peric, *Struktura prava / The Structure of Law*, 1963 and developed by N. Viskovic, *Pojam prava / The Concept of Law*, 1976). The idea that law is a *flow* of decisions is implied also by Kelsen's normodynamics and his early insistence that only an efficacious individual norm can be considered a legal norm.

the Soviet political elite are concerned with their own interests only, namely, with the maintenance of their own political and administrative positions.<sup>45</sup> Although it is not advisable to ascribe rationality to political groups, it is not unreasonable to assume that many members of the Soviet elite — and members of the communist elites in other socialist countries — rationalize their interests in, roughly, the following way: (i) in countries like the Soviet Union a new type of a social system has been created under the leadership of the communist party: (ii) the new system has been in many respects a success: it has developed industry, created jobs for all, eliminated poverty in some perennially under-developed regions, and in one period achieved a higher rate of growth than comparable capitalist systems; in addition, countries like the Soviet Union, China and Yugoslavia have won an international position that would have been denied them had they not become red; (iii) without the communist party in command, the system would slide back into capitalism and the party would capsize. If a typical *apparatchik* reasons in the manner just indicated he is not prepared to defend his personal position only: he is ready to defend and, moreover, develop and reform, the system and he is likely to believe, at least half-heartedly, that he serves the common good.

The maintenance of socialist systems has proved to be an exasperating task, because they have been sliding back for years. But, with few ominous exceptions in Central Europe, they have also displayed tremendous vitality. After a bloody revolution of the Romanian people their communist party reinstalled itself in power under an assumed name. Just as the Hungarian communist party had done bloodlessly a few months earlier. The Yugoslav league of communists seems to have disbanded but it is nonetheless running the federal, provincial, and local governments. The Polish, Czechoslovakian, and East German communists are staffing key security services. The Bulgarian Party may be breaking up but it is not facing serious contenders for power: all that is facing is the apathy of the toiling masses, which may well be a more positive attitude towards political change than the interest with which Soviet citizens met the call of Sakharov's democratic intellectuals for a general strike (in December 1989) to end the communist party's monopoly on power.

However, the source of the vitality of socialist systems is not the apathy but the complicity of the toiling masses in the "socialist democracies." It does not take Thomas Hobbes to make us realize that contemporary

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45. M.S. Voslensky, "Nomenklatura", in Feldbrugge, *note 29*, 537 at 539. See also Michael S. Voslenskii, *La Nomenklatura: les privileges en URSS*, trad. (Paris: Belfond, 1980).

socialism, unlike its Stalinist predecessor, rewards by security citizens who are willing to surrender their liberty. And since the latter commodity has always been in short supply in Russian and neighbouring countries, rewards need not be handed out lavishly. The Armenian jet-setter who in Moscow is treated to a Big Mac will find her excursion from Erevan a success. When Big Brother runs out of snacks, he can safely offer his reliable supporters treats for their peace of mind: the realignment of Czechoslovakia into a socialist brotherhood, Russian as the universal language, or Bulgarization of Turkish names.

The ultimate source of vitality is the clandestine recovery of what is being publically surrendered in exchange for security. The day-to-day recovery of freedom, which unfolds as wheeling and dealing between patrons and clients as well as between rules and citizens, which publically bends proclaimed laws and secretly conveyed orders, is not only the network of connections that makes life bearable and the cement that holds the socialist system together, it is the key element that imbues sources of socialist legal systems with their content from below. Large parts of socialist legal systems, such as labour and administrative law, especially in the areas of health and education, of which there is little systematic knowledge even among insiders, are driven — in all probability — primarily by deals made *contra, praeter*, and sometimes even *secundum legem*. However, it is useful to bear in mind that the people-made and people-perverted law which in its result is similar to creations of legal pluralism, has its origin in the solid block represented by the party-state-society structure of socialist systems.

If socialist systems are as stable as I claim they are, the recent changes require explanation. It can be provided in the form of four complementary hypotheses which, admittedly, only partly support my claim.

The first hypothesis is that socialist systems in Eastern Europe, even in the Gorbachev era, are nearly as interdependent as they were in the past twenty or thirty years, the dependence of countries like Poland and Yugoslavia in the Soviet Union being, of course greater, but not incomparably greater, than the dependence of the Soviet Union on its former satellites. That even Yugoslavia has been highly responsive to developments in the Soviet block is indicated by the hardening of the Yugoslav regime at the peak of the Brezhnev era (1973-1983) and the loosening of the LCY grip on power with the advent of Gorbachev's *perestroika* rather than with the disappearance of Tito and his old guard.

That the Kremlin has given, at the very least, its blessing to most "anti-communist" actions in Eastern Europe is notorious: suffice it to mention the early acceptance of the changes in Poland and Hungary, the surge of

changes in Czechoslovakia,<sup>46</sup> and the rumours surrounding the spontaneity of the Romanian uprising.<sup>47</sup> The plausibility of the rest of the hypothesis can be tested by considering two distinct possibilities. The first is a conservative coup in Moscow. How would such an event affect the willingness of the Romanian crypto-communists, Bulgarian communist quitters and Yugoslav dismembered communists to run their candidates in free national elections? The second is the failure of the newly formed coalition governments in Central Europe to organize viable economies and maintain political order. How would it affect Soviet readiness to reduce its military presence in Europe and devote its energy to internal political and economic reforms?

The second hypothesis is that, given the interdependence of Eastern European socialist systems, the dominant position of the Soviet Union within that family, and the nature of the Soviet social system — vast numbers who may support moderate reforms but are likely to pervert them at the grass-roots — positive changes in the socialist family of nations can be brought about only by the Kremlin. The first step has been partly completed. By allowing and encouraging democratic movements in eastern Europe, Gorbachev's Politburo has undermined the external might of Brezhnev's Empire. The stability of newly formed governments in Eastern Europe and prospects for real economic and political changes in the Soviet Union depend on the second step: the containment of the military and the police within the USSR. Now that new forces "from below" have been released, a bold step forward may reasonably be expected.

However, a step to the side — or into abyss — can easily be provoked by nationalist movements, which provide my third hypothesis. Communism has for decades fought on two fronts. The struggle against "liberalism" or "anticommunism" in the strict sense, that is, against pockets of resistance concerned with human rights and political pluralism, has largely been successful in the Soviet Union and the Balkans, though less so in central Europe. But the victory on the first front has increased losses on the second, where the war with nationalism (real as well as imaginary) has been waged behind front lines.

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46. See "Anatomy of Purge: In an Exclusive Account of Jakes's Ouster, Time Reveals How the Czechoslovak Party Chief Double-Crossed Gorbachev and Lost" (December 11, 1989), *Time*, (N.Y.) 31.

47. See A. Jacob, "Questions sur la genèse d'une révolution: Les nouvelles autorités de Bucharest assurent que le mouvement qui a renversé Nicolae Ceausescu était entièrement spontané; il y a toutes raisons de croire que, depuis plusieurs mois, les politiques étaient à l'oeuvre" (January 6, 1990), *Le Monde*, (Paris) 3.

It might help to recall that communism promised its followers national liberation as well as liberation for the toiling masses. The first promise was to be realized through the soviet type of federalism. But the multinational soviet federation, ruled by the monolithic communist party and managed by a highly centralized government, of necessity favoured the largest ethnic group of the union. In addition, the promise of liberation was broken by virtue of Soviet control of Eastern Europe. All members of the "socialist commonwealth" were to serve the Soviet Union and, indirectly, the Great Russian People. It need hardly be added that great nationalisms provoked lesser nationalisms.

It is essential to note how communism formed, systematically though inadvertently, its second face. First, by merging the party, state and society into a single bloc, and by dividing that bloc into administrative units which, where applicable, covered traditional territories of ethnic groups, communist rulers stimulated their subjects to identify with the bloc as a whole or, more in accord with traditional tastes, with one of its (similarly single) ethnic units. Second, by gradually transferring powers from the centre of the bloc to its territorial ethnic units — rather than to democratically controlled agencies of government, autonomous social organizations, and citizens themselves — communist parties created regional leaders with near dictatorial powers and, almost inevitably, nationalist aspirations. Third, by eradicating liberalism, communists prevented the articulation of political interests in terms that emphasized individual responsibility and voluntary associations; thus they diverted their subjects to seek oblivion in traditional national and religious communities and to search for leadership in the new nationalist communist parties, states, and unions of writers.

The awakening of nationalism has been less pronounced in Central Europe, which has been relatively liberal and ethnically homogenous, with the exception of East Germany, which is *sui generis*. But even the recent changes in Central Europe can be seen as national liberation movements against Brezhnev's Empire as well as social, liberal, and Christian democratic takeovers within communist countries. One may also hint that the real driving force behind the changes has been a new trans-nationalism, or at least Europeanism, which leads Poles, Czechoslovaks, Hungarians, and many Yugoslavs to seek larger unions within, to use Gorbachev's phrase, "the common European house", and free communication with the rest of the world. Unfortunately, it would be an excess of courtesy to ascribe similar aspirations to ethnically self-centred movements in the Balkans, Caucasus, Soviet Asia, and even Russia itself. One hopes that they will not take the step aside, or into the abyss, of massive bloodshed. However, increased inter-ethnic tensions

need not result in the collapse of multinational socialist states. Tensions may actually help federal governments to carry out, unconstrained by the usual political concerns, comprehensive economic and institutional reforms, as they have probably assisted federal cabinets in Yugoslavia in the past two years.

The fourth hypothesis is that great religions will play a decisive role in the events to come, just as they have played in the recent past, when the atheistic propaganda and punitive measures could not contain them. Religions, along with lingering traditional communities and emerging patterns of urban life, have been the only appreciable autonomous sources of social laws, in the sense of theories of legal pluralism, in socialist systems. The Catholic Church was instrumental in the formation of "Solidarity", the first truly autonomous social organization in a socialist country, which started as a trade union and is now a senior partner in the Polish government.

The Catholic Church has demonstrated its strength in other parts of Central Europe as well, and is now on the offensive within the Soviet Union. So is Moslem fundamentalism, which has been "in action" in Azerbaidjan. A puzzling question is whether the action is indicative of the contribution Islam will make to the resolution of crises in the Soviet Union and Yugoslavia. A related question is whether the recent movement within the Serbian Orthodox Church, which has resurrected the long suppressed unity of the Serbian religion, ethnicity and statehood, and, on account of the latter elements, fostered a mutual understanding of the Church hierarchy and the leadership of the Serbian communist party, is indicative of the dynamism of the Russian Orthodox Church and Russian nationalists and communists.

Vague as it is, the above-mentioned hypothesis about the impact of religions on socialist countries may be the best introduction to a closer analysis of a related problem, namely, the problem of "ideological" influences on the formation of socialist legal systems in the past, subject on which there remains much speculation.

### III. *The Civilian and Marxist Infrastructure of Socialism*

It will be recalled that the main question with which I am grappling in this paper is the extent to which socialist legal systems are shaped by doctrines and institutions that are distinctly civilian rather than marxist or socialist. In this section, I will argue that the influence of the civil law tradition has been more pronounced than it is commonly assumed to have been. The first medium of influence, to which comparative lawyers and legal theorists pay little or no attention is legal science and legal education. The second medium of influence of the civil law tradition on

socialist legal systems has not even noticed either legal or non-legal literature: it is marxism itself.

Legal science and education have managed to maintain the civil law structure of socialist legal systems largely because of the strength of the Civil Law mind and, more specifically, the counterfactual reasoning that is inherent in civil law thinking. To understand how this operates in socialist countries it is helpful to briefly recall how the Civil law tradition was reinstated in Continental Europe in the late Middle Ages.

### 1. *A Counterfactual Bent of the Civil Law Mind*

Although the reception of Roman law was prepared by North Italian judges, it was the work of academics.<sup>48</sup> Professors of the first modern law faculty, organized in Bologna around 1088, were teaching Justinian's *Digesta* (discovered or, what comes to the same thing, made intellectually available, a few years earlier) as the *ratio scripta* (written reason) rather than as a *jus scriptum* (written law) which had been valid *imperio ratione* (by virtue of its reasonableness or rationality) rather than by *ratione imperii* (by virtue of the imperial power). Law professors as well as other educated men of the period considered Justinian's *Corpus Juris Civilis* to be a *prima facie* valid legal authority rather than a historical document sanctioned by an emperor who had been dead for five centuries, on two principal grounds.

The first was a belief which, from a modern perspective, reflects the absence of historical consciousness. It was the belief that Medieval Europe was still living as part of the Roman Empire, which had never ceased to exist, and that, consequently, the code enacted by a Christian Roman Emperor in 533 continued to be valid law of the Empire. This belief was not mere fiction. The late middle ages witnessed a rediscovery of the European identity. Scholars in monasteries studied ancient texts and taught them to their pupils. In 806, Frankish kings reestablished the Roman Empire of the German Nation, which was to last, even though as a loose union, the next thousand years, when it was formally dissolved by Napoleon. Carolingian Roman Emperors reformed the Latin language, which became the official language of the Court and the Church and served as such for more than a thousand years: Latin was the official

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48. The account that follows is based largely on Paul Koschaker, *Europa und das römische Recht*, 2 Aufl. (München: Beck, 1953), 109 and passim. See also H. Coing, "The Roman Law as *Ius Commune* on the Continent" (1973), 89 *Law Quarterly Review* 505; *Id.*, H. Coing, "Die juristische Fakultät und ihr Lehrprogramm", in *Id.*, Hrsg., *Handbuch der Quellen und Literatur der neueren europäischen Rechtsgeschichte; Bd. 1 Mittelalter (1100-1500)*, (München: Beck, 1973), 39; Charles M. Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna 850-1150* (New Haven: Yale University Press, 1988).



language of the Croatian parliament until 1844 and the principal liturgical language of the Roman Catholic Church until the Second Vatican Council. In this context, it was natural for medieval scholars to regard Justinian's Codex as sort of a holy, God-inspired scripture and to add it as the fourth leaf to the treefoil of Christianity, Empire, and Latin, which had constituted the European medieval world. But the theoretical reception of Roman Law in the 12th century, not to speak of its practical reception soon after, would not have taken place or would not have occurred the way it did if it had not been prepared by a distinct frame of mind.

The second ground for the *prima facie* validity of Roman Law in Medieval Europe has two aspects. The first was the scholasticism of the medieval law professors. What exactly the assumptions were with which they were reading *Corpus Juris Justiniani* is still a matter of debate. But it is safe to say that, since they considered *Corpus* to be a repository of universally valid principles, they could find in it the necessary starting point for the formulation of a theoretical science of law in Aristotle's sense, that is, as a science or knowledge of law which, like theology or physics, explains its subject-matter on the basis of immutable principles.<sup>49</sup> Without some such attitude, medieval law professors would never have developed the distinctly civilian habit of analyzing general legal norms independently of the contexts in which the norms were created and applied but rather as systematic relationships between general norms and in hypothetical cases in which they may be applied.

Some legal historians and comparative lawyers have claimed that medieval commentators imbued *Corpus*, originally a compilation of pragmatic formulas very much like early English law, with a spirit that was foreign to the original Roman Law. However, recent commentators have pointed out that it was Roman law itself that offered the possibility of, say, dogmatic or scholastic reading. Thus Alan Watson stresses the fact that "Roman law, as it appears in sources divides naturally into self-contained and self-referential blocks" and expounds at length the block effect of Roman law as the factor that shaped "civil law systems, their rules, systematization, and legal attitudes."<sup>50</sup> Gray Dorsey goes even further and claims that classical Roman private law doctrines were

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49. Thus R. Dreier, "Zum Selbstverständnis der Jurisprudenz als Wissenschaft", in *Id.*, *Recht-Moral-Ideologie* (Frankfurt a.M.: Beck, 1981), 49. Comp. Maximilian Herberger, *Dogmatik: Zur Geschichte der Begriff und Methode in Medizin und Jurisprudenz* (Frankfurt a.M.: Klostermann, 1981), 203 f. on Baldus' method. See Aristotle's distinction in *Metaphysics*, 1026 at 18-20.

50. Alan Watson, *The Making of the Civil Law* (Cambridge, Mass.: Harvard University Press, 1981), at —.

decisively shaped by Stoic philosophy.<sup>51</sup> If so, it is not difficult to understand why medieval law professors were so fascinated by Justinian's Codification and to discern the frame of mind that prepared the way for the reception of Roman law. They recognized in the Codification a pattern of reasoning that permeated medieval thought. This was the second aspect of the frame of mind that made the reception of Roman law possible.

An attempt to describe the pattern of reasoning to which I have referred could easily lead to a rewriting of the history of the West. But Dorsey's masterpiece suggests that the distinctive trait that not only Plato and Stoic juris-consults in Rome, but also the medieval law professors, modern civilian legal scholars and, of course, Marxists, have in common, is the urge to translate the highest truths into practical wisdom,<sup>52</sup> a translation which — to state the obvious — can never fully succeed. This is what makes civil law reasoning counterfactual.

Common law jurists tend to believe that civilians would greatly improve their legal reasoning by paying just a little more attention to facts, namely, by stating them in more detail in judicial decisions and by reporting and reaching decisions more systematically. This objection is taken seriously by many European law professors, in the eastern as well as the western part of the continent; for example, since the early 1980's, the Faculty of Law in Zagreb University has been developing a computerized data base that will eventually store all decisions of higher courts in Croatia.

But Anglo-Americans jurists often fail to recognize that the civilian disregard of facts is based on a healthy skepticism about the basic assumption and intention of the civil law mind. At least since Kant, probably since Aristotle, Europeans have been painfully aware of a gap between high truth and practical wisdom.<sup>53</sup> Thus, rather than being blind to facts, civilians tend to believe that the facts of a case are always a unique constellation of phenomena, which can be grasped by practical wisdom only (*phronesis, prudentia, prudence, Klugheit*). From that point of view, an individual legal norm, such as the norm contained in a judicial decision, is not regarded as a deduction from general norms stated in a code, but as a creation which, as it were, forces phenomena under a concept provided by the general norms. For this reason, it is

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51. Gray L. Dorsey, *Jurisculture: Greece and Rome* (New Brunswick: Transaction Publishers, 1989), at 64-72.

52. *Ibid.*, at 54-63.

53. See Kant, *Kritik der reinen Vernunft*, A 106, B 169 on the impossibility of individual concepts, and Aristotle, *Nicomachean Ethics* 1139b31-1140b5.

largely irrelevant whether facts are stated briefly or in detail.<sup>54</sup> The main concern of a civilian judge is to show that there is, after all, a rational (or, perhaps, reasonable) relationship, which looks like a deduction, between the general norms contained in statutes, doctrinal works, customs or, for that matter, precedents.

A more detailed statement of acts would be required if civilian judges were allowed to base their judgements on equitable considerations only. But no legal system grants judges such sweeping powers, because that would be the end of law. And there are good reasons why civilian judges do not act like their common-law counterparts, who state the facts in detail in many of their decisions and create from time to time individual norms which are distinguished from precedents and persuasive authorities and will probably be invoked as precedents and persuasive authorities (i.e. as general norms) in the future.

On the one hand, civilians tend to believe, for reasons already explained, that their judges can reach more equitable decisions by twisting general norms than by dwelling on facts. On the other hand, while informed civilians admire the common law mind at work, they are likely to regard it, in the final analysis, as socially and intellectually uneconomical: by emphasizing what is peculiar in a case (rather than what relates it to a broad category of social relations), common law reasoning promotes liberty at the expense of equality, blinds lawyers to the social context of law and to litigation. In addition, civilians, who learn the hard core of their laws from authoritative treatises, and who regard legislation and, *a fortiori*, judicial decisions, as indicative rather than conclusive evidence of relevant developments, rightly suspect that their common law colleagues, not despite, but because of, their proclaimed faith in the authority of reported decisions (and their parallel disregard for scholarly treatises) in fact transmit the hard core of their knowledge orally, thus preserving it as “the mysterious science of the law” that is only or mainly available to professionally trained lawyers.

However, these objections, serious as they are, do not amount to convincing reasons for rejecting a partial reception of common law thinking by civilians. One can play with chopsticks, enjoy Japanese cuisine, and include selected Japanese dishes without assimilating shintoism and becoming fully-fledged Japanese. And I will argue that a partial reception of common law thinking by lawyer in (ex)socialist

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54. An important educational consequence has been the elimination of the so-called practical jurisprudence from German law faculties. See Jan Schroder, *Wissenschafts-theorie und Lehre der “praktischen” Jurisprudenz auf deutschen Universitäten an der Wende zum 19. Jahrhundert* (Frankfurt a.M.: Klostermann, 1979).

countries is a must if they want to modernize their systems and integrate them into the international community. There is, however, a serious obstacle in the way of persuading civilians to expose themselves to common law influences: common law reasoning does not accept the myth that, despite difficulties mentioned earlier, we somehow can and ought to translate high truth, solemnly proclaimed in preambles and codes, into practical wisdom and action. To exploit the analogy further, the Japanese manner of dining barefoot may be an embarrassing experience for a non-Japanese, especially for an ex-Westerner.

## 2. *The Irrelevance of Obvious Ideological Intrusions*

After this lengthy explanation of the counterfactual nature of civil law reasoning it is not difficult to visualize how the civilian mind operates in the socialist context. The fact that socialist judges write poor judgements and that much of socialist legislation and jurisprudence is not properly published has not erased the impact of the civil law tradition on socialist legal systems. On the contrary, it has preserved the purity of legal scholarship (which was never much impressed by legal practice anyway) and increased the formative influence of legal science and education in socialist legal systems.

In most Eastern European socialist countries, as in Italy and West Germany, articling has been regarded as an essential part of legal education, a part which presupposes university training in legal and social sciences and takes place in law offices and courts of law, with little or no additional systematic training in the nuts and bolts of law.<sup>55</sup> It is not difficult to see that the physical separation of the two aspects of legal education, the temporal precedence of the academic side, and the academic disregard for practice, which is partly motivated by traditional civilian considerations and partly a corollary of the fact that the practice is *Ding an sich*, results in the logical precedence of legal science in the day to day operations of a socialist legal system. An inspiring lawyer in a socialist country condemns the law professors on the ground that they teach theory only and fail to prepare him or her for practice. But in the end the professor in her prevails; she organizes her practical experience

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55. For brief surveys of the organisation of legal education and training in major legal system in the world see appropriate section in Alan N. Katz, ed., *Legal Traditions and Systems: An International Handbook* (New York: Greenwood Press, 1986). For more comprehensive treatments of legal education and training in the Soviet Union see Jean G. Collignon, *Les juristes en Union Soviétique* (Paris: Ed. du C.N.R.S., 1977), at 21-89 and 20nf; and Samuel Kacherov, *The Organs of the Soviet Administration of Justice: Their History and Operation* (Leiden: Brill, 1970), pt. 2, at 251-312 and passim.

within the conceptual network of civilian legal science, or she does not become a lawyer at all. This is hardly the best way to learn law but is the way things are done on both sides of the (now lifted) iron curtain.

Since civilians are prone to interpret their codes as holy scriptures, and since Marxism is (or was) the official ideology of (ex)socialist legal systems, an external observer (as well as an optimistic party ideologist) might well expect socialist lawyers to take the view that intrusions of official ideology into socialist constitutions and codes represents ultimate truths that must replace traditional civilian categories and thus be translated into legal science and legal practice. I will suggest that such intrusions have never lasted long and that even when they have given rise to unusual legal doctrines they have left no perceptible trace either in theory or practice.

The best example is Pashukanis' commodity exchange theory of law, which reigned in the Soviet Union for 1925 till 1937. Following closely Marx's theory, Pashukanis conceptualized law as the regulation of social relations in the production of commodities, but a regulation which is also a reflection of the relations it orders. He maintained that in socialism, where the production of commodities is replaced by a planned economy, law withers away and is replaced by administrative-technical rules.<sup>56</sup> The consequences did not please Stalin, who replaced Pashukanis with Vyshinsky. From that time on, authoritative Soviet theory has taught that law is a creation of the State.<sup>57</sup> But little would have changed in operative legal doctrines and in legal practice had lawyers remained faithful to the commodity exchange theory of law.

In Yugoslavia, however, a strange doctrine was conceived and implemented by the longest constitutional text in human history, adopted in 1974, and a statute entitled the Code of associated Labour, passed in 1976. The striking feature of the legal system proclaimed in the mid-seventies was that social property in the means of production was recognized as a social and economic, that is, non-legal, phenomenon only. The new legislation induced many lawyers and social scientists to justify and elaborate the new doctrine.<sup>58</sup> Thus even judges of economic

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56. See Evgeny B. Pashukanis, *Obshchaia teoriia prava i marksizm*, 3rd ed. (Moskva: Komakad, 1927), trans. in John N. Hazard, ed., *Soviet Legal Philosophy* (Cambridge, Mass.: Harvard University Press, 1951), at 111-225. See a critical summary of Pashukanis' theories in P. Beirne and R. Sharlet, "Editor's Introduction in Id., eds., *Pashukanis: Selected Writings on Marxism and Law* (London: Academic Press, 1980), 1, esp. at 5-24.

57. See Westen, note 12.

58. See a discussion of main views in I. Padjen, "Kritika politekonomskog i gradjanskopravnog poimanja vlasnistva" / "A Critique of Politeconomic and Civilian Conceptions of Property" (1985), 29 *Nase teme* (Zagreb) 990 at 1004-1011 and 1024-35.

courts espoused the view, which was, in all probability, a correct deduction of the Constitution and the Code, that when two social (as distinct from private) corporations enter into a contract for the sale of goods there is no transfer of legal title but only a physical movement of the goods from one corporation to another. Now, every Yugoslav lawyer knows that, according to the law of obligations, the sale of goods is a consensual contract involving a transfer of title independent of delivery of the goods. But the judges who were neither ignorants nor sycophants, were paying lip service to the new doctrine: in fact, they were conveying and enforcing legal titles to social property as if the new legislation had never existed.<sup>59</sup>

### 3. *Civilian Roots of Marxism*

The Yugoslav juridico-economic experiment, which was quietly dismantled in 1988-89, indicates the second source of the influence of civil law thinking on socialist legal systems. It is the assumption — which may well be the third basic assumption of the mainstream jurisprudence — that law is a normative structure which is, somehow, distinct from but produced by, and dependent of, hard, non-normative social, economic, and political facts.

The assumption can also be found in Hazard's criteria for the analysis of socialist legal systems. As noted in III, 1 above, he maintains that socialist legal systems are distinguished by economic, political, social, and ideological features, which are a common concern of European law faculties, but of no interest to Anglo-American law schools. Hazard does not suggest that these marks are legal features. On the contrary, he creates the impression that they are non-legal properties which determine the nature of a legal system. In that he differs from his conservative legal colleagues, but not from comparatists who believe that, for instance, the difference between common law and civil law reflects half a millenium (and probably more) of social and political history. Moreover, the striking similarity between Hazard's characterization of socialist legal systems and Marxists-Leninist self-interpretations reveals that he may be tacitly endorsing the Marxist doctrine that law is, in the final analysis, explicable by economic factors.<sup>60</sup>

The doctrine which treats law and legal reasoning as a component of the institutional and ideological super-structure constructed upon the economic base is commonly regarded as a socio-economic grand theory,

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59. See the last point in J. Barbic, "Drustveno vlasnistvo i poslovna praksa" (1985), 29 *Nase teme* (Zagreb) 1036 at 1039.

60. See, e.g. O. Kuusinen, ed., *Fundamentals of Marxism-Leninism*, 2nd impr. (Moscow: Foreign Languages Publishing House, 1961) at 150-54.

derived from Hegel's philosophy and British political economy, and is incomprehensible in jurisprudential terms. I will briefly show that, contrary to its reputation, this doctrine was most probably derived from a pedestrian distinction formulated by Roman lawyers.

The Marxist doctrine of base and superstructure hangs on the distinction between economic property relations, as the constituent of the economic base, and legal property relations, as a component of the superstructure; or, to put it simply, on the distinction between economic and legal property. It is often claimed that Marx bequeathed a theory of property that articulates this distinction.<sup>61</sup> However, it is more probable that he left no such theory but simply treated all relations of production as property relations.<sup>62</sup> Moreover, his theory of alienation, which is based on Hegel's thesis that taking possession of a thing by forming it, that is, by producing it, "is most in conformity with the Idea",<sup>63</sup> reveals that Marx, together with Hegel, assumed the Romanist concept of property. Hegel defined property as consisting of will and occupancy; he divided the latter into taking possession of a thing by directly grasping it physically, by forming it, and by merely marking it as one's own.<sup>64</sup> This is not the Romanist view of property but it is almost identical with the Romanist view that possession consists of *animus* and *corpus*<sup>65</sup> and that it can be acquired by occupation,<sup>66</sup> fabrication,<sup>67</sup> and symbolic tradition.<sup>68</sup>

61. See, e.g. N. Poulantzas, "A propos de la théorie marxiste de droit" (1967), 12 *Archives de philosophie du droit* 145 at 156; Hans Lottig, *Marx und das Recht* (Hamburg: Universitat, 1961), t.1; Otto-Wilhelm Jakobs, *Eigentumsbegriff und Eigentumssystem des sowjetischen Rechts* (Koln: Bohlau, 1965), 5-13, esp. 10; G.-W.

Kuster, "Zum Begriff des Eigentums bei Marx" (1983), 69 *Archiv für Rechts- und Sozialphilosophie* 107.

62. Peter Gey, *Der Begriff des Eigentums bei Karl Marx: Zur Kritik der Klassischen Eigentums-Paradigme bei Locke, Hume, Smith und Hegel* (Frankfurt a.M.: Haag und Herchen, 1980), at 201, 138 and *passim*.

63. Richard Schacht, *Alienation* (Garden City, N.Y.: Doubleday, 1970), 75 ff. Quotation is from Hegel, *Grundlinien der Philosophie des Rechts*, par. 56, trans. by T.M. Knox as *Hegel's Philosophy of Right* (Oxford: Clarendon, 1942). Kusters, *note 61*, at 132 and *passim*, who maintains that "Marx has a positive conception of property that founds the critique and manifests in a conception of unity of labour and its conditions, in an identification of labour and property" and that "(t)he conception of labour as a material action has a constitutive relevance", would probably concur with Schacht's finding cited in this text.

64. Hegel, *note 63*, par. 53.

65. See, e.g., *Digesta*, 41, 2, 1, 21. Historians of ideas may wish to consider a possible influence of Friedrich K. v. Savigny's *Das Recht des Besitzes*, 1st ed. 1803, trans. by S.E. Perry as *Von Savigny's Treatise as Possession* (London: S. Sweet, 1848; repr. Westport, Conn.: Hyperion); Von Savigny's *Treatise* namely reestablished the constitutive role of *animus* in possession in Germany jurisprudence.

66. See, e.g., *Institutiones Iustinianae*, 2, 1, 12.

67. See, e.g., *Ibid.*, 2, 1, 26 and 2, 1, 34.

68. See, e.g., *Digesta*, 41, 2, 1, 21.

It does not take a lawyer or a philosopher to realize that the last mentioned distinction between the three ways of acquiring possession is a pragmatic device of Roman lawyers, which can serve purposes of pleading and teaching, but ontologically is as illuminating as the sausage-seller's division of his ware into thick, juicy, and yellow eatables. What the distinction of the three ways of acquiring property most certainly does not imply is that the fabrication, production or forming does not include physical grasping or occupation, and that the latter does not include marking or a symbolic tradition of a thing. Nor can it be imputed to Hegel that, when he characterized taking possession of a thing by forming it as "most in conformity with the Idea", he interpreted the forming or production of material wealth as a process which did not involve symbolic interaction.

But Marx's theory of alienation, derived from Hegel's theory of the acquisition and alienation of property, either assumes, or is commonly interpreted as implying, that the production of material objects is not regulated by symbolic interaction (is independent of language) which constitutes or at least formulates legal norms. Whether Marx actually regarded or merely treated instrumental labour in the capitalist mode of production as more fundamental than language is not a concern here. Suffice is to mention that, according to a recent analysis, Marx underestimated the regulating power of contract as the paradigmatic legal institution,<sup>69</sup> but did not consider symbolic interaction to be in principle subordinated to instrumental labour.<sup>70</sup> If so, Pashukanis' view that law is both a reflection and regulation of economic relations which will be replaced by technical-administrative rules, may well be the best interpretation of the original teaching. What is important to note at this juncture is that from Pashukanis to our own day three curious turns have occurred in the Soviet-inspired marxism.<sup>71</sup>

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69. Dona C. Kline, *Dominion and Wealth: A Critical Analysis of Karl Marx' Theory of Commercial Law* (Dordrecht: Reidel, 1987) esp. at 153-75.

70. *Ibid.*, at 71 states that "Marx wished to restructure the producer/consumer relationship from self-interested exchange or bargaining to some other form of relationship, where allegedly the relationship would be one of mutual recognition of need." This statement, which represents Kline's interpretation of Marx's view of alternative social relationships, does not imply that Marx regarded all social institutions (which I consider to be constituted or at least formulated by symbolic interaction, esp. by language) as subservient to instrumental labour. However, Kline's other comments (esp. *ibid.*, 162-63) allow a different reading, namely, that Marxed submerged all processes of social interaction into the webb of historical necessity.

71. It is interesting to note that Anglo-American experts on Soviet law in their discussions of Soviet property law and doctrines regularly fail to note not only the shift in Soviet doctrines but also the fact that the doctrine about the dual nature of property has played a prominent role in Soviet legal theory. Representative example of such omissions are George M. Armstrong, Jr., *The Soviet Law of Property* (The Hague: Nijhoff, 1983), a monograph which claims to be based on the writings of political leaders and theorists as well as on legislation and judicial decisions, and Butler, *note 15*.



First, in the 1930s the old basic doctrine was reinstalled. It teaches that, in addition to legal property, which consists of symbolic interaction, chiefly by contracts, which can be reduced to a *nudum jus* or mere title, there exists economic property, which consists of human interactions in the process of instrumental labour and which is, as the economic base, the determinant of legal, ideological, and all other social relations.<sup>72</sup> Needless to explain again, this doctrine is a materialist ontology read into the sausage-seller classification of Roman jurisprudence. The last monumental expression of the doctrine is the Yugoslav Constitution of 1974.

Second, to make room for more pressing ideological needs, the basic doctrine has been made inapplicable to other socialist countries by the stalinist teaching that in a socialist country the ideological and institutional superstructure, namely, the party and the state, can consciously, by man-made laws, change its economic base.<sup>73</sup> The new teaching has dispensed with the impossible task of providing non-legal evidence that in socialist and in capitalist countries socialist and capitalist economic property relations exist respectively. The evidence that a socialist country has established a truly socialist system can now be formulated directly in terms of the romanist jurisprudence, which Marx abhorred.

Third, the distinction between economic and legal property is now used by critics of existing socialism, who believe they have found in it a powerful analytical tool for the study of discrepancies between proclaimed structures and hard realities of socialist systems or for the reconstruction of socialist doctrines and policies.<sup>74</sup> However, the new uses of the old doctrine do not show that the economic property — and the

72. See the authoritative formulation of underpinnings of the doctrine in Kuusinen, *note 60*. The doctrine is probably rooted in positivistic interpretations of Marxism which had been developed within the II Communist International esp. by Karel Kautsky, *Die materialistische Geschichtsauffassung*, 2 bde., 2. Aufe. (Hamburg, 1929). For an informative analytical survey of elaborations of the doctrine in the Soviet polit-economic and legal literature in the post WWII period see Jakobs, *note 61*, at 13-28. More recent endorsements of the doctrine are, e.g., S.I. Sdobnov, *Sobstvennost i Kommunizm* (Moskva: Mysl. 1968), at 6-12; and "Sobstvennosta, in *Ekonomicheskaja entsiklopediia: politicheskaja ekonomija*, t. 3 (Moskva, 1979), at 570; "Ownership", *Great Soviet Encyclopedia*, trans. of 3rd ed., vol. 24 (New York: Macmillan, 1980), 174-75; O.N. Sadikov, ed., *Soviet Civil Law*, trans. (Armonk, N.Y.: Sharpe, 1988), at 111; and the article of the Czech Professor Viktor Knapp, "Socialist Countries", *I.E.C.L.*, vol. 6: *Property and Trust*, ch. 2: *Structural Variations in Property Law*, 35 at 35-36.

73. See Westen, *note 12*.

74. See, e.g. Branko Horvat, *The Political Economy of Socialism: A Marxist Social Theory* (Armonk, N.Y.: Sharpe, 1982), 235-39. H. Berman, "The Possibilities and Limits of Soviet Economic Reform", in Olimpiad S. Loffe and M.W. Janis, *Soviet Law and Economy* (Dordrecht: Nijhoff, 1987), 29 at 30 ff. finds this distinction, i.e. theory of the two kinds of property, also in O.S. Ioffe's works.

non-normative *locus originis* of law — has been identified. As witnessed by Branko Horvat's *Political Economy of Socialism*, economic property can be meaningfully conceptualized only in terms of rights, not brute facts.<sup>75</sup>

I hope that these remarks concerning conceptualizations of property and the earlier notes on the counter-factual thinking have disposed of doubts as to whether socialist legal systems have retained distinctly civilian features. It may well be that socialism is the civilian mind worked up to a paroxysm.

#### IV. *For a Jurisprudential Recovery of (Ex)Socialism*

It is now common wisdom on both sides of the old Iron Curtain that the future of the (ex)socialist countries in the formerly Eastern and now suddenly again Central Europe, depends on the ability of socialist systems to transform their political institutions and economic infrastructures into viable social and liberal democracies and healthy free market economies; and that, since Eastern European countries lack the capital and skills that are necessary for such a transformation, a new Marshall plan is urgently needed, but this time for the recovery of Central Europe.

Historical experience suggests, however, that a simple Marshall plan will hardly do. Eastern European economies are where they are, not because they lacked capital but because they have wasted in the last two decades their — ever thinner — savings as well as massive foreign loans. In addition, Eastern European human resources are not comparable to the person power of Western European nations at the end of the Second World War. Eastern Europe now is much worse off. Yugoslavia, Poland, Hungary, East Germany, and probably the rest of the Eastern European nations have lost in the post-War period, through brain-drain, more skilled people than in the war. The “socialist osmosis” has not merely prevented the promotion of qualified people to responsible positions: it has prevented talents remaining in those countries from gaining qualifications that could now be put to proper use. Most importantly, former Eastern Europeans do not have to learn new mechanical technologies only: they have to learn a new way of life in new institutions.

If one believes more in facing the “New and Dynamic” than in making historical analogies, one must even more readily accept that what Central Europeans need most is knowledge and education, not raw capital and brute skills. To quote the American management guru Peter Drucker, the

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75. See Padjen, *note 58*, 1000-04.

21st century is no longer a business society; it is a knowledge society and it has already arrived.<sup>76</sup>

The view into the past and the view into the future suggest that Eastern, that is, Central, Europeans have to learn first and foremost how to build and maintain a different set of institutions. But if the analysis in the first two sections of this paper have shown anything it is that we are all in need of a general jurisprudential recovery if we are to create a more integrated world. New, more inclusive unions have to be formed and they cannot be designed and studied with antiquated notions of the now dominant jurisprudence. The mainstream jurisprudence, which is still based on a fixation on the nation-state, provides a worm's-eye view of law that reiterates three antiquated maxims: *ex facto jus oritur* (see 3rd assumption in Section III,3), *quod princeps solutus est legis habet vigorem*, and, *quod non est in actis non est in mundo* (see 2nd and 1st assumptions in Section II,1).

What is needed is a jurisprudence that will be concerned primarily with international and comparative legal problems, and will be interested in their origin "from below", empirical evidence of their development and their ultimate moral foundations.<sup>77</sup> A systematic elaboration of such a jurisprudence could be a major task of the Decade of International Law (1991-2000), recently proclaimed by the General Assembly of the United Nations. What is urgently needed is a speedy jurisprudential recovery of Central Europe and of Western Scholarship of (ex)socialist legal systems in Central Europe and the Soviet Union.

Western lawyers, their clients and governments, should find such a project *prima facie* relevant and attractive. Western businessmen will be interested to invest in Eastern Europe if they find reliable partners. Partners will not be reliable if they lack expertise that is necessary for the maintenance of open and stable legal systems. In addition, Western lawyers can be poor advisors to investors if (ex)socialist legal systems continue to be a *Ding an sich*.

The project would be, of course, primarily in the interest of lawyers and governments in Central Europe, but, given the state of their legal systems and legal scholarship, they may not know from which end to start. In Section IV, 2, I will make a list of urgent measures but, at this juncture, I will mention only one, namely, a partial reception of common law reasoning. There are three good reasons for such a reception. First,

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76. "Facing the 'New and Dynamic'" (January 22, 1990), *Time*, 42.

77. An inspiring beginning of such a jurisprudence is R. St. J. Macdonald, G.L. Morris and D. Johnston, "International Law and Society in the Year 2000" (1973), *Canadian Bar Review*, 49-70. An attempt to construe legal theory as primarily a theory of international law is Padjen, *note 43*, esp. at 125 f.

as pointed out at III, 2, common law reasoning has certain purely methodical advantages over its civilian counterpart. Second, modern political institutions cannot be developed without a proper understanding of Anglo-American constitutional theory and practice. Third, the emerging autonomous international *Lex Mercatoria* is based primarily on principles of American law.<sup>78</sup>

In view of my comments on the limitations of the common law mind at III, 2, my advocacy of the need for the reception of common law reasoning may suggest that I am prescribing to my family as a shock therapy a dosage that I would not dispense to my neighbours in a generation. To avoid such a misunderstanding, I will state a principle of designing a legal system which, at the same time, specifies institutional limitations of the reception of foreign jurisprudence.

### 1. *The Role of the Legal Academy in a Legal System*

The principle of design which specifies the optimal role of the academic legal profession in a civilian legal system can be formulated in a variety of ways, but I will compress it, somewhat bluntly, in the following maxim: what is good for the academic legal profession is good for the legal system that it serves.

When I say the academic legal profession, I think of autonomous corporations of experts who have learned their law in the hardest way and are, first and foremost, legal scholars. There is only one proper way of learning hard-core private and public law in disciplines such as civil law and criminal procedure: an extensive pre-university schooling in arts and sciences, with an emphasis on languages; 3-4 years of undergraduate education in law and social sciences, with a moderate exposure to legal practice (in tutorials and clinics) but with a focus on the intensive study (chiefly in seminars) of principles which are offered by sociology, political theory, political economy and psychology, by general jurisprudence and legal history, by dogmatics of major "positive" legal disciplines such as constitutional, family and criminal law, and by international and comparative legal studies; a period of structured articling intertwined with a formal training in forensic skills, professional exam, and perhaps a few years of practice in a law office, court of law, corporate management, or public administration; a year or two of graduate studies and two or three years of postgraduate research, refreshed by some teaching to undergraduates or legal practice, and

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78. I am therefore closely following the reasoning of J.G. Wetter in "The Case for International Law Schools and an International Legal Profession" (1980), 29 *International and Comparative Law Quarterly* 206.

resulting in a comprehensive published work which is a distinct contribution to legal science and, as such, the admission ticket to the academic legal profession; a life long commitment to research which is aimed at a systematic critical exposition of a broad area of law and is transferred to practice primarily by the vehicle of legal education (in moderate quantities, not exceeding four hours of classes a week) and only exceptionally by direct involvement in advocacy (when hard cases require the highest expertise).

This way of learning law is in principle valid also for aspiring specialists in the areas where legal expertise is only one of the essential ingredients of a fruitful academic career. Since, however, a future professor of patent laws, law and economics, or legal philosophy cannot spend her lifetime cramming for exams, a systematic academic education in a field other than law can be an acceptable substitute for formal articling, forensic training, and professional examinations (and even for a part of the academic legal education).

Finally, it is essential that legal academics, formed in the way just described, be organized in self-managed and autonomous academic institutions (law faculties, university departments, and research institutes). Self-managed in the sense that faculty-members settle their affairs themselves, their dean being *primus inter pares*; autonomous in the sense that academic and administrative appointments are within the exclusive jurisdiction of the faculty and that the basic research and education of an academic institution is financed by the state or para-statal foundations, as long as external academic and professional evaluators find that results of the institution are on a certain academic and professional standard, irrespective of their utility.

I hope it is obvious why it is that what is good for the legal academy is good for the country. It is because the legal system is better served by legal academics who have received a proper academic and professional training and who train in the same way all other legal professionals, most notably future judges. By producing massive treatises on major areas of the law, and by training their students to assimilate the treatises as if they were exhaustive and definitive restatements of the law in force, legal academics reduce the complexity of the law to proportions that are manageable for ordinary lawyers, who have not received more than three to four years of university education and a year or two of articling, crowned by a professional examination. Moreover, by training future judges in the same manner, law professors pave the way for the most effective and economical development of the law by the judiciary. The end result is a legal system which is relatively simple and, as such, easily available, intellectually as well as financially, to ordinary women and men.

A model of the best possible relationship between a legal system and the profession which serves it is, of course, a picture of the best traits and still undeveloped potentials of the civilian legal tradition in Europe. Even Eastern European (ex)socialist legal systems conform in an appreciable degree to such a model. But the European legal academy has failed in its most visible, though not basic, function. Crowded university cafeterias and empty lecture halls, sparse seminars and unimaginative tutorials, inaccessible law libraries, and poorly researched term papers are symptoms of the malaise of undergraduate legal education in Europe, visible for decades and now becoming unbearable. In Eastern Europe, the malaise has been aggravated by the “socialist osmosis”, which has additionally prevented legal education and, in recent years, (when prewar academics, whose only means of survival had been scholarly excellence, died out) ruined even the basic function of law faculties. Hence it is high time for European legal academics to change the content, method, and means of services they render to their students. A continuing reluctance of Eastern European law professors to offer to their students the best that can be imported from the New World may easily result in a paralysis of (ex)socialist legal systems and the social systems they sustain.

But the point of this excursion into the best of all possible legal worlds is that it is incompatible with an important dimension of the North American Model. By European standards, North American legal education is uneconomical, in two respects. On the one hand, the consumer of legal services in North America must pay not only for the time his lawyer has spent in acquiring his training (in the United States four years in a university, three years in a law school) but also for the unnecessary complexities of the legal system created in part by the fact that lawyers are over-qualified for routine work and that judges, by European standards, are not properly trained for the production of easily digestible decisions. At the same time, law schools cannot pay teachers who would be prepared to relinquish the opportunity to capitalize their legal training in practice *and* engage in additional 3-5 years of graduate studies and research. On the other hand, law professors, who have little and sometimes no graduate training, are pushed by law deans to teach three or four often divergent courses.

Having issued this *caveat*, I will now describe the reception of common law reasoning that I advocate.

## *2. A Partial Reception of Common Law Reasoning by the (ex)Socialist States.*

The recovery of Eastern European governments and economies is more dependent on the recovery of their legal academics (and of their faculties

and institutes of economics) than the reverse is the case. For this reason, law faculties need a shock. And, unlike massive unemployment of ordinary workers, who will lose their jobs without having caused any harm, a proportional lay-off of lousy legal academics would not only be harmless (since most will be able to find decent positions elsewhere) but beneficial. Indeed, the recovery of legal research, education and information resources would be, for most of those involved, who love their work, a challenging experience in the creation of a new world. I will briefly state the principal measures that are *prima facie* valid for all countries from the Baltic to the Adriatic and which include a partial reception of common law reasoning.

To begin with, law faculties and research institutions should find the optimal institutional model that will foster the autonomy and scholarly excellence of academic legal institutions. The problem of autonomy cannot be overemphasized. Liberalization will probably result in pressure to make university research and education more practical. It will not be wise to seek direct government financing. European (and perhaps all) governments regard legal research and education as inexpensive activities. In addition, governmental money is spent irresponsibly. A better solution is a para-governmental foundation, financed by the state budget but managed by representatives of the executive and parliamentary branches of the government, principal “consumers” of legal academic services (the legal profession, judiciary, public administration, business), law faculties and universities. It goes without saying that no financial scheme will work which treats law faculties as, in principle, educational institutions. It may well be that the best solution is to finance 50-70% of basic activities of a law faculty by a science foundation and the remaining 30-50% by a foundation for legal education.

There is probably little that can be changed overnight in undergraduate legal education. One must first convert European law professors into North American Law teachers, without losing European scholarly ambitions in the process. But foundations which finance legal education could easily eradicate the Sacrosanct European Academic Freedom (which has emptied lecture halls and filled cafeterias) by enforcing the Ground Rule of Academic Imagination: a student who is absent from more than 25% of the lectures cannot take the exam *and* the teacher who is found lecturing without a record of absentees will be fined. Students, if not teachers, will do the rest, since there is nothing more annoying than lecturing to a bored audience. Foundations which finance legal research and education would greatly facilitate the enforcement of the Ground Rule by granting special awards to teachers who edit the first two collections of cases and materials for a standard course. Furthermore,

they would facilitate the transition to case analysis and the Socratic method of teaching by forcing teachers to mark class performances and students to take mid-term exams. The measure is absolutely indispensable.

Central European lawyers and their governments will probably find it necessary to make substantive improvements in their systems for the professional training of magistrates, administrators, and advocates, and will, to that end, send their experts to study the French *L'Ecole Nationale Judiciaire* in Bordeaux and the *L'Ecole Nationale Administrative* in Paris. Each country will also have to develop a national centre for the law of European communities and, probably, transplant complete programs of instruction in European law, together with visiting professors, to such centres. This is an obvious option. However, the transplantation of western European laws does not, unfortunately, involve great problems, because it is not a threat to established Eastern European routines. As I indicated in the introduction to this section, what (ex)socialist lawyers may need even more than European laws is a sound legal education and a sound knowledge of Anglo-American business and constitutional law.

North American legal education cannot be transplanted unless its performers are, in large numbers, trained in it. The same is true for business and constitutional law. A year of graduate education in an American law school costs US\$20,000, 5,000 less at a Canadian law school. Costs are, by Eastern European standards, excessive and returns are, by North American standards, low; a year is often not enough and, what is worse, an American-trained lawyer cannot develop and use his skills properly outside a community of common law lawyers and without access to common law libraries and data bases. The solution is to transplant the whole of the North American graduate program in law to major Eastern European universities, roughly in the way in which Denver Law School has already opened its graduate program in London.

What a North American law school would teach in an (ex)socialist university is what it teaches its own first year students (*Legal Method, Contracts, Property, Torts, Civil Procedure, and perhaps some Criminal Law*) and electives in Anglo-American constitutional law and international law, Human Rights, Business Organization, Taxation, International Commercial Law etc. An advanced seminar in policy analysis and planning (rather than independent research resulting in a thesis) may integrate the knowledge gained in a cluster of similar courses and develop skills in the analysis of a complex problem. Gradually, a course in legal theory, concerned with transnational legal problems, could be added. Programs could probably be accomplished within three trimesters (12 months) or in a year and a half. Teachers would be, of



course, visiting professors from North American universities, but the involvement of qualified professors from the host country in elective courses would be encouraged. Only students who had completed a university training in law and who satisfied the admission standards of an accredited North American law school would be admitted to the program (L.S.A.T. etc.)

The principal obstacle to the establishment of such a school, which could function as a permanent division of an established law faculty, is not the cost of its day-to-day operation. The whole program could be carried out by a faculty of 5 visiting professors and a few guest professors from the host country at a cost of, say, US\$500,000. This is not an excessive amount if it is divided between 70-80 students, sponsored by their firms and governments. The forbidding cost is the installation of a common law library and on line access to major law data bases.

If capital investment under a new Marshall plans is anywhere needed it is in a chain of law libraries in Central Europe. And if North American universities have ever contemplated whether they could and ought to assist their Eastern European colleagues to move to the center of Europe, it is a good time to sit together and see whether North American university presidents and law deans, professors, and librarians could help with advice and with a recommendation to their governments and law publishers to advance ideas such as those discussed in this paper.

Quite naturally, I think primarily of the Canadian government, universities, and law schools. Canada has for a long time led an independent and active foreign policy, with considerable understanding for problems of developing countries. In this case, the Government of Canada may recognize that by assisting the jurisprudential recovery of Central Europe it is serving also the Canadian business community as well as many Canadians who have roots across the Atlantic. An even more important consideration is that Canadian law faculties — with their unique expertise in both common and civil law, a similar position between the legal traditions of England and the United States, and a great expertise in international law and problems of federalism and human rights — are uniquely qualified to provide the assistance that is required.

Finally, since I have been given this — equally unique — opportunity to ride my favorite hobby horse at will at the pages of one of my *Almae Matris*, I will allow myself one more liberty and advertise my first university as a candidate for the host of a Canadian law school. Zagreb University, located in the major Yugoslav industrial cultural center, has a tradition of 200 years of legal scholarship and teaching, a law library of 150,000 volumes, National and University Library with over 4,000,000 titles, and a large physical plant. A North American law school would

not be an alien in the environment: Zagreb University has established an interuniversity center of post-graduates studies in Dubrovnik, which hosts every year several hundred professors and students from all over the world; a filial Faculty of Law in Rijeka is now developing a Center for European Business Law and is organizing the World Congress of Family Law. Zagreb Faculty of Economic Sciences is opening a business school of a university in Florida. But the distinct advantage of Zagreb over all other candidates for the job is that the Yugoslav self-management has relaxed further the Sacrosanct European Academic Freedom, so that a Canadian visiting professor in Zagreb can recover from jurisprudence on long weekends in Venice, Dubrovnik, Slovenian Alps, Vienna, and Budapest.