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Socialist Law and the Civil Law Tradition

Revolutions leading to socialist legal systems occurred in countries of the civil law tradition, not in common law countries.[1] Eastern Europe had been controlled by Germany, Austria-Hungary, and Russia, all of which were civil law countries.[2] China had in the early twentieth century incorporated elements of civil law as an overlay on its Confucian base. Vietnam used French law from the late nineteenth century.[3] Cuba had a legal system established by Spain.

After socialist revolutions, significant changes were made in the legal systems of these countries. Just how significant these changes have been is a matter of controversy. Many Western and socialist-country comparatists argue that sufficient innovations have been introduced to constitute socialist law a separate family of law. Other comparatists reject this separationist thesis but have not systematically scrutinized the separationists' arguments.[4] This article examines those arguments, taking particular account of developments of the late 1980s in socialist law. The issue of the proper classification of socialist law, it will be suggested, is of more than academic interest. Improper classification yields misunderstanding about the role and function of law in both socialist and non-socialist legal systems.

I. The Separationist Thesis as Expounded by Western Scholars

Most Western scholars who have addressed the issue in depth hold that socialist law forms a family of law separate from the civil law family.[5] René David wrote in 1950 of Soviet law, the first and

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1. John N. Hazard, "Is Soviet Russia in a Unique Legal Family?," in *Jubilee Lectures Celebrating the Foundation of the Faculty of Law, University of Birmingham* 93, 99 (1981).

2. John Merryman, *The Civil Law Tradition* 3 (1985).

3. Jerome A. Cohen, *The Criminal Process in the People's Republic of China 1949-1963*, 7 (1968). John Quigley, "Vietnam's First Modern Penal Code," 9 *N.Y. Law School J. Int'l & Comp. L.*, 43 (1989).

4. The issue is posed in William Butler, *Soviet Law* 1-7 (1988).

5. By socialist law is meant the law of countries whose governments officially view the country as being either socialist or moving from capitalism to socialism, and which hold a communistic society as an ultimate goal. By civil law is meant the law

prototype socialist legal system, that it "possesses, in relation to our French law, particular features that give it a complete originality, to the extent that it is no longer possible to connect it, like the former Russian law, to the system of Roman law." He said that "there is reason to give it its own place in the division of contemporary systems of laws."[6] After other socialist legal systems developed in Asia and Eastern Europe,[7] David broadened his thesis to include them as well:

> The Socialist laws make up a third family, distinct from the previous two [common law, civil law]. To date, the members of the socialist camp are those countries which formerly belonged to the Romano-Germanic family, and they have preserved some of the characteristics of Romano-Germanic law. Thus, the legal rule is still conceived in the form of a general rule of conduct; the divisions of law and legal terminology have also remained, to a very large extent, the product of the legal science constructed on the basis of Roman law by the European universities.
>
> But apart from these points of similarity, there do exist such differences that it seems proper to consider the Socialist laws as detached from the Romano-Germanic family—the socialist jurists most decidedly do—and as constituting a distinct legal family, at least at the present time.[8]

John Hazard agrees with David that socialist legal systems separated from the civil law tradition: "The civil-law relations in their traditional Romanist form have been pushed to the fringes of social relationships . . . [T]hey stand on the verge of becoming museum pieces."[9] John Merryman takes the same view. Dividing contemporary legal traditions into "civil law, common law, and socialist law,"[10] he finds that socialist reforms imposed "certain principles of socialist ideology on existing civil law systems and on the civil law tradition," producing "a young, vigorous legal tradition that still displays its essentially hybrid nature."[11]

Marc Ancel finds that socialist law has become a new and third

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that developed in Europe based on Roman law, and which is typically termed either civil law, Continental law, Romanist law, or Romano-Germanic law. Merryman, supra n. 2 at 1-5.

6. René David, *Traité élémentaire de droit civil comparé* 319 (1950).

7. Slapnicka, "Soviet Law as Model: The People's Democracies in the Succession States," 8 *Natural Law Forum* 106 (1963).

8. René David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* 25 (1978).

9. John Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* 523 (1969).

10. Merryman, supra n. 2 at 1.

11. Id. at 4.

system, alongside the common law and civil law.[12] Christopher Osakwe finds socialist law "an autonomous legal system to be essentially distinguished from the other contemporary families of law." He says that it is "qualitatively different from the civil law."[13] Michael Bogdan considers socialist law "an independent family" of law.[14] Constantinesco writes that Soviet law "does not belong to the Continental European system despite the many similarities in technique, concepts, and institutions."[15]

The views of David, Hazard, Merryman, Ancel, Osakwe, Bogdan, and Constantinesco have been questioned by other Western comparatists. Wolfgang Friedmann finds in Soviet law "no basically new concepts or legal relationships."[16] F.H. Lawson and Albert Ehrenzweig do not find in it enough novelty to take it out of the civil law family.[17] Lawson characterizes Soviet law as "in many important respects a member of the civil law group."[18] Losano finds socialist law a "sub-species" of civil law.[19]

Western separationists find what they consider technical similarities between socialist and civil law to be overshadowed by differences at the "macro" level.[20] They do not all agree on a set of features that distinguish socialist law from civil law. Some find the distinction in a single feature, while others point to a combination of several features. Various of them have identified the following features as distinguishing socialist law from civil law: (a) that socialist law is programmed to die out with the disappearance of private property and social classes and the transition to a communistic social order; (b) that a single political party dominates in socialist countries; (c) that law is subordinated to creation of a new economic order, a process in which private law is absorbed by public law;

12. Marc Ancel, *La Confrontation des Droits Socialistes et des Droits Occidentaux*, in *Legal Theory—Comparative Law: Studies in Honour of Professor Imre Szabó* 13, 16 (Zoltán Péteri, ed. 1984). Accord: Henry W. Ehrmann, *Comparative Legal Cultures* 16-17 (1976).

13. Christopher Osakwe, in Mary Ann Glendon, Michael W. Gordon, & Christopher Osakwe, *Comparative Legal Traditions in a Nutshell* 268-269 (1982).

14. Michael Bogdan, "Different Economic Systems and Comparative Law," 2 *Comp. Law Y.Bk.* 89, 107 (1978).

15. Léontin-Jean Constantinesco, *Traité de droit comparé: Tome III: La Science des droits comparés* 158 (1983).

16. Wolfgang Friedmann, *Law in a Changing Society* 9 (1959).

17. F.H. Lawson, "Book Review" of John Hazard, *Law and Social Change in the U.S.S.R.* and Boris Konstantinovsky, *Soviet Law in Action*, 21 *U. of Chic. L.Rev.* 780-784 (1954). Albert Ehrenzweig, "Book Review" of John Hazard, *Communists and Their Law*, 58 *Calif. L.R.* 1005, 1006 (1970).

18. F.H. Lawson, "The Field of Comparative Law," in his *The Comparison: Selected Essays, Volume II* 2, 13 (1977).

19. Mario G. Losano, *I Grandi Sistemi Giuridici* 117-118 (1978).

20. Constantinesco, supra n. 15 at 158.

(d) that law has a religious character; (e) that law is prerogative instead of normative.

These features must be analyzed to determine whether they are, indeed features peculiar to socialist law. If they are, then it must be asked whether they, individually or collectively, remove socialist law from the civil law tradition.

A. The Future Dying Out of Law

David finds as an indication of "the originality of Socialist laws" the "proclaimed ambition of socialist jurists" to "create the conditions of a new social order in which the very concepts of state and law will disappear."[21] Hazard cites the projected dying out of law as a "mark of distinction" that removes socialist law from civil law.[22] Ancel points to socialist law's "essentially transitory" nature as a "fundamental characteristic" of socialist law.[23]

Socialist theorists maintain, to be sure, that law will eventually die out, though not at an early date. First, abundance of material goods must be achieved, in order to overcome greed, and second, in the predominant view, communism must be achieved on a worldwide basis.[24] "The process of the dying out of the state," says a leading Soviet theorist, "will occupy an entire historical period and will have a series of transition steps."[25]

In the U.S.S.R., the theory of the eventual dying out of law received little attention during the 1930s and 1940s. The 1961 Program of the Communist Party of the Soviet Union stated that the U.S.S.R. would achieve communism by 1980, but since the 1960s Soviet theoreticians have placed little emphasis on it.[26] The reform movement in Soviet law of the late 1980s moves in the direction of strengthening legal processes rather than bringing about their elimination.[27] Theorists in other socialist states accord the theory less emphasis still.

The theory has some impact on the present functioning of socialist legal systems, contributing to what has been termed "legal nihilism," a deprecation of the importance of legal processes.[28] It was

21. David & Brierley, supra n. 8 at 25.
22. Hazard, supra n. 9 at 524-525.
23. Ancel, supra n. 12 at 14.
24. *Teoriia gosudarstva i prava* [Theory of State and Law] (A. I. Denisov, ed.) 395-396 (1967).
25. Id. at 396.
26. Hazard, supra n. 9 at 524.
27. John Quigley, "Soviet Courts Undergoing Major Reforms," 22 *Int'l Lawyer* 459 (1988).
28. G.M. Reznik, *Advokat: prestizh professii* [The Advocate: Prestige of the Profession], in V.M. Savitskii (ed.), *Advokatura i sovremennost'* [The Bar and the Present Day] 60 (1987). For discussion of this point, see the author's review of *Ad-*

influential, particularly in the early 1960s in the U.S.S.R., in promoting use of lay alternatives to formal judicial processes. But it does not alter the modes of operation of legal institutions, certainly not to the point of removing socialist law from the civil law tradition.[29]

B. Role of a Dominant Political Party

Some Western separationists view the dominance of a single political party as a distinguishing feature of socialist law. David, listing factors that, he believes, remove socialist law from civil law, states: "The sole source of Socialist rules of law lies with the legislators who express popular will, narrowly guided by the Communist Party."[30] Osakwe finds the strong role of communist parties a characteristic of socialist law that removes it from the civil law family.[31] Hazard finds as a "mark of distinction" a "structuring of society to assure strong, even unchallengeable, leadership, fortified by law in maintaining its dominant position, but relying upon its members' skills both as organizers and persuaders to make leadership effective."[32]

Hazard concedes that non-socialist countries may be headed by a dominant political party but finds the distinguishing feature for the socialist countries to be that a dominant role in politics for a given political party is combined with state ownership of productive resources. This combination, he states, removes possible competing sources of power.[33]

But the predominant political party of any single-party country may exert substantial control over the economy. During martial-law rule in the Philippines (1972-1986), a single political party predominated, and persons close to that party controlled much of the economy.

In some socialist countries political parties other than the dominant party have played a minor role. Within a single dominant party, diversity of opinion has been manifested. Multi-candidate elections have been held in some countries, as in the 1989 elections for the restructured Soviet parliament. In Poland a non-Communist group, Solidarity, assumed a leading role.

Civil law systems developed in Europe under monarchies, with no role for political parties. Since the development of parliamentarism, a number of civil law countries have been ruled under a single-

vokatura i sovremennost' published as John Quigley, "The Soviet Bar in Search of a New Role," 13 *Law & Social Inquiry* 201 (1988).

29. Ehrenzweig, supra n. 17 at 1007.
30. David & Brierley, supra n. 8 at 25.
31. Glendon, Gordon, & Osakwe, supra n. 13 at 274.
32. Hazard, supra n. 9 at 523.
33. Hazard, supra n. 9 at 523-524.

party system. Italy and Germany in the 1930s, and Portugal and Spain from the 1930s until the 1970s, are examples. Greece had a military dictatorship from 1967 to 1974[34] but remained in the civil law tradition during that period. Latin American countries experiencing military dictatorship have not thereby taken themselves out of the civil law tradition. In Africa, single-party systems have prevailed since independence in a number of civil law countries,[35] and some prohibit by law any but a single named political party.[36]

C. *Absorption of Private Law by Public Law*

Another asserted point of distinction is "political-economic doctrine."[37] It is argued that the state's role in the economy has absorbed private law into public law, and that this development removes socialist law from the civil law family. David writes:

> [A]ll means of production have been collectivized. As a result the field of possible private law relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its preeminence—all has now become public law. This new concept substracts from the realm of law a whole series of rules which jurists of the bourgeois countries would consider legal rules.[38]

Hazard cites state control of the economy as the chief distinction between civil and socialist law. The "first mark of distinction," he says, is "an economic factor marking the difference between Marxian socialist and welfare state frameworks for legal systems. It is evidenced by the degree of involvement of all elements of society and of its institutions in the operation of a fully state-owned and planned economy."[39] Osakwe cites as distinguishing features of so-

34. *Introduction to Greek Law* 19 (K.D. Kerameus and P.J. Kozyris, eds., 1988).

35. Pius Msekwa, "The Doctrine of the One-Party State in Relation to Human Rights and the Rule of Law," in International Commission of Jurists, *Human Rights in a One-Party State* 21, 22 (1976).

36. Zaire, Constitution, 31 Dec. 1982, in *Constitutions of the Countries of the World* (Blaustein & Flanz, eds. 1987), art. 32 ("In the Republic of Zaire, there is only one institution, the Popular Movement of the Revolution); art. 33 ("The Popular Movement of the Revolution is the Zairean Nation organized politically. . . . Every Zairean is a member of the Popular Movement of the Revolution."); art. 36 ("The President of the Popular Movement of the Revolution is by law President of the Republic.") Burundi, Constitution, 20 Nov. 1981, id., art. 22 ("The Republic of Burundi adopts the principle of the one mass party, called 'Union for National Progress' (UPRONA)."); art. 26 "The National Congress is the supreme instance of the party."); art. 29 ("The President of the Uprona Party is the only candidate for the presidency of the Republic.").

37. Zweigert, "Zur Lehre von den Rechtskreisen," in Kurt Nadelmann, Arthur von Mehren, John Hazard (eds.), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* 42, 53 (1961).

38. David & Brierley, supra n. 8 at 25.

39. Hazard, supra n. 9 at 523.

cialist law "national economic planning as the central core of economic development," a "less than enthusiastic accommodation of private ownership," and a "doctrinal rejection of the Romanist division of law into public and private law."[40]

Bogdan thinks that it may "seem artificial to place such closely-related legal systems" as socialist law and civil law "into different families of laws only because the countries concerned have different economic systems." But he states that "the socialist systems are today, due to the common economic system and to the reception of Soviet legal ideas, much closer to each other than to any Western law. . . . Because of this, the socialist legal systems should form an independent family."[41]

To focus on the economic role of the state as a distinguishing feature of socialist law may overemphasize the private nature of private law. Private law serves a public function. The law of tort arose to avert private vengeance. Both tort and contract law serve societal purposes, permitting commerce to function. Even marriage law is public in that civil law jurisdictions from the time of the French Revolution established the right of the state to authorize marriage.[42] The state has increasingly viewed itself as protector of the family.[43] Lenin's *dictum* that all law is public law should not evoke shock.

In Western civil law countries too, the distinction between private and public law has blurred: "Fundamental private law concepts have . . . been modified by the addition of social or public elements."[44] "The civil law classification that is most eroded by time and events is the 'fundamental dichotomy' between public and private law."[45] Tort law is increasingly replaced by state-sponsored insurance.[46] Property law has become overlaid with public law as states impose obligations on property owners in the public interest.[47] The labor relation in Western civil law countries is state-regulated. Many Western civil law countries, like socialist countries, prohibit the discharge of an employee without cause.[48]

Freedom of contract has been eroded in Western civil law countries by state economic planning.[49] Governments operate sectors of

40. Glendon, Gordon & Osakwe, supra n. 13 at 274.
41. Bogdan, supra n. 14 at 107.
42. Mary Ann Glendon, *State, Law and Family: Family law in Transition in the United States and Western Europe* 318 (1977).
43. Spain, Constitution, 29 Dec. 1978, art. 39, para. 1 ("Public authorities shall assure the social, economic and legal protection of the family.")
44. Merryman, supra n. 2 at 94-95.
45. Glendon, in Glendon, Gordon, & Osakwe, supra n. 13 at 115.
46. Id. at 117.
47. Id. at 117.
48. Id. at 114.
49. Id. at 116.

the economy and direct private industry and agriculture into desired avenues.[50] "As state economic planning replaces the market economy, it becomes hard to distinguish commercial law from administrative law."[51] To reflect the substantial state regulation, French and German writers have changed the former category "commercial law" to "commercial and economic law."[52]

Economic policy for Western European civil law countries is made by a supranational institution. The European Economic Community has displaced much private decision-making. In the socialist countries, fewer economic decisions are made at the supranational level, as the socialist-country Council of Mutual Economic Assistance has less power than the EEC.[53]

Disputing the separationist thesis on the issue of private vs. public law, Lawson writes that "[a]ll economies are mixed economies and the Soviet economy is no exception. It is only the mixture that is different."[54] The combination of an increasing state role in Western civil law countries and decreasing reliance on planning in socialist countries require the separationists to draw a fine line to indicate the extent of state control that removes a legal system from the civil law family.

Much of the analysis that distinguishes socialist law on the basis of state economic activity was written prior to the economic reforms of the 1980s in socialist countries. These reforms have returned considerable economic activity to private or cooperative control. China's reforms have been far-reaching, particularly in agriculture. Several East European socialist governments opened significant new outlets for private industry and commerce; the U.S.S.R. authorized substantial private activity in the service sector.[55]

It is true, as the separationists argue, that fewer private-law relations are found in socialist law. Lawson notes that the socialist countries "leave a much smaller field for the operation of private law, but," he says, "where it does operate, it is mainly of the usual continental type."[56] Such private-law fields as marriage, inheritance, and ownership of private residences, are regulated, for the

50. Ehrenzweig, supra n. 17 at 1007.

51. Glendon, in Glendon, Gordon, and Osakwe, supra n. 13, at 114.

52. Id.

53. Thomas Hoya, *East-West Trade: Comecon Law, American-Soviet Trade* 1-29 (1984). Hoya & Quigley, "Comecon 1968 General Conditions for the Delivery of Goods," 31 *Ohio St. L.J.* 1-51 (1970).

54. Lawson, supra n. 17 at 782.

55. Law of the U.S.S.R. on Individual Labor Activity (entered into force 1 May 1987), *Vedomosti verkhovnogo soveta SSSR* [Gazette of the Supreme Soviet of the U.S.S.R.], no. 47, item 964 (1986); also in Pravda, 21 Nov. 1986, at 1; in English in *Current Digest of the Soviet Press*, 17 Dec. 1986 at 6.

56. Lawson, supra n. 17 at 783.

most part, as in other civil law countries.[57]

Even relationships among state-owned enterprises and between them and private persons are regulated by private-law rules of the civil law tradition.[58] "[T]he exchange of commodities takes place within the framework of traditional forms of civil law, especially contract law, and the continuation of commodity production under socialism thus implies that the civil law rules for the exchange of goods must continue to exist."[59]

The role of the socialist state in economic matters has "not changed the essentially civilian structure of what we have come to call the classical 'private law' subjects of the laws of the family, property, succession, contracts and torts. Even in the border subjects of criminal law and procedure, old patterns have been retained."[60]

D. Religious Character of Law

Osakwe finds a "pseudo-religious character" in socialist law[61] in "the claim to ultimacy, the deep relatedness to the normative, the requirement of faith or commitment, the fear of heterodoxy and apostasy, ritual rites and mythologies, the fleet of theologians and missionaries, and its role as providing an interpretation of life as a whole that gives life meaning, significance and purpose."[62] He cites an article of the U.S.S.R. Constitution that provides:

> enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state, or infringe the rights of other citizens.[63]

Obligations of a citizen to others and to society are not unique to socialist law, however. In most civil law systems one finds the concept of *abus de droit* (abuse of right), which prohibits exercise of a

57. Berman, "What Makes "Socialist Law" Socialist?," 20 *Problems of Communism* 24, 27 (1971).

58. U.S.S.R., Fundamental Principles of Civil Legislation (1961).

59. Markovits, "Civil Law in East Germany—Its Development and Relation to Soviet Legal History and Ideology," 78 *Yale L.J.* 1, 8 (1968).

60. Ehrenzweig, supra n. 17 at 1006.

61. Osakwe, in Glendon, Gordon & Osakwe, supra n. 13 at 271. Osakwe, "Prerogativism in Modern Soviet Law: Criminal Procedure," 23 *Colum. J. Transnat'l L.* 331, 336 (1985).

62. Osakwe, in Mary Ann Glendon, Michael Gordon & Christopher Osakwe, *Comparative Legal Traditions: Text, Materials and Cases on the Civil Law, Common Law and Socialist Law Traditions, with Special Reference to French, West German, English and Soviet Law* 685 (1985). David, another separationist, finds in socialist law precisely the opposite: that "legal science is not principally counted upon to create the new order." David & Brierley, supra n. 8 at 25.

63. U.S.S.R. Constitution, art. 39, para. 2, cited by Osakwe, in Glendon, Gordon, & Osakwe, supra n. 62 at 687.

right in a way that deprives others of their rights.[64]

Hazard finds as a distinguishing feature of socialist law a governmental effort to achieve "total social involvement" and cites the obligation to work.[65] Osakwe labels as religious the Soviet constitutional provision that citizens have a duty to work.[66] One finds, however, a similar—though not identical—obligation in other civil law countries, based on the theory that if the state is to take responsibility for social welfare, citizens have an obligation to contribute to the common good.[67]

Osakwe attributes a religious character to a provision in the U.S.S.R. Constitution that requires parents to train their children "for socially useful work," and to raise them "as worthy members of socialist society."[68] In many civil law countries, however, one finds a parental obligation to provide an education and a governmental policy to educate children to contribute to society.[69] A parent who fails to educate a child can be deprived of parental rights.[70] Osakwe also cites as religious in concept a provision in the U.S.S.R. Constitution that "Children are obliged to care for their parents and help them."[71] That obligation is typical of family law in civil law countries.[72]

Osakwe finds a religious element in Soviet penal law in "an attempt to engineer the creation of a new Soviet man through criminal law."[73] He cites: (1) a duty to report certain crimes; (2) a duty to seek medical treatment for venereal disease even if no third party is directly threatened; (3) a duty to support one's children and parents; (5) a duty to render medical assistance to a sick person; (6) a duty on a ship captain to assist persons in danger at sea; (7) a duty to testify

64. Friedmann, "The Teaching of Comparative Jurisprudence," in Mario Rotondi, *Inchieste di Diritto Comparato: Aims and Methods of Comparative Law* 225, 228-229 (1973).

65. Hazard, supra n. 9 at 524.

66. U.S.S.R. Constitution, art. 60, cited by Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 687-688.

67. Ehrenzweig, supra n. 17 at 1007. Spain, Constitution, Dec. 27, 1978, art. 35 ("All Spaniards have the duty and the right to work.") France, Penal Code, punishing vagabondage (art. 269), defining "vagabond" (art. 270) as a person without fixed domicile or support who fails to practice a trade or profession; Belgium, Penal Code, punishing vagabondage and defining "vagabonds" (art. 347) as "persons who have no fixed abode, no means of subsistence and no regular trade or profession."

68. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 688, 689. The provision of the U.S.S.R. Constitution is art. 66.

69. France, Civil Code, arts. 371-2, 375, 375-1 through 375-8. Spain, Civil Code, art. 154. The Swiss Civil Code provides: "Parents shall provide for the professional training of their children." Switzerland, Civil Code, art. 276.

70. France, Civil Code, art. 378-1.

71. U.S.S.R. Constitution, art. 66. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 688.

72. France, Civil Code, art. 205.

73. Osakwe, in Glendon, Gordon, & Osakwe, supra n. 62 at 688.

in a criminal proceeding regarding a crime about which one has knowledge; (8) the duty to engage in socially useful work.[74] There is, to be sure, in Soviet penal law a conception of using punishment to make the individual selfless and productive. But the obligations cited by Osakwe are typical of civil law countries.[75]

Osakwe finds a religious element in three aspects of Soviet tort law: (1) it precludes punitive damages; (2) except for defamation, it compensates for material injury only; and (3) as remedies for defamation, it provides only for retraction and apology. He characterizes these provisions as reflecting a philosophy that "money should not be used as a painkiller."[76]

Socialist practice is not uniform on these matters, however. Some socialist countries provide greater protection than Soviet law for moral damage, pain and suffering, and personality interests.[77] Civil law countries generally provide more limited damages than do common law countries.[78] The general character of socialist tort law is typical of civil law jurisdictions—it retains the civil law approach of basing tort liability on fault.[79] Both socialist and West European civil law countries have substituted compensation through insurance for fault-based liability in some situations.[80]

E. Role of Courts

The role of courts in socialist countries is asserted to be different from that of courts in civil law countries. "Much more than their civil law counterparts," says Osakwe, socialist courts "mechani-

74. Id.

75. See, e.g., Germany, Penal Code (1871), art. 138 (failure to inform authorities of serious crimes); *id.*, art. 170(b) (failure to fulfill a support obligation); Feldbrugge, "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue," 14 *Am. J. Comp. L.* 630-657 (1966); on the duty to work, see supra nn. 66-67. Failure to support parents had been a crime in tsarist Russia, Statute on Punishments Imposed by Justices of the Peace, art. 143 (1885 ed.); for explanation of art. 143, see N.A. Nekliudov, 3 *Rukovodstvo k osobennoi chasti russkago ugolovnago prava* [Guide to the Special Part of Russian Criminal Law] 136-138 (1878). Failure to seek treatment of venereal disease even if no other person is directly endangered is not punished in most civil law countries, but this is a public health matter. Moreover, several Soviet scholars have recommended exclusion of this provision from the criminal code, along with the provision punishing failure to support parents. S.G. Kelina, *Nekotorye napravleniia sovershenstvovaniia ugolovnogo zakonodatel'stva* [Certain Directions for Improvement of Criminal Legislation], *Sovetskoe gosudarstvo i pravo* [Soviet State and Law], no. 5, at 65, 67 (1987).

76. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 690.

77. Vondracek, "Defamation in Czechoslovak Law as a New Legal Concept," 1 *Review of Socialist Law* 281-307 (1975); Gyula Eörsi, *Comparative Civil (Private) Law: Law Types, Law Groups, the Roads of Legal Development* 390 (1979).

78. F.H. Lawson, A.E. Anton, & L. Neville Brown, *Amos and Walton's Introduction to French Law* 200-238 (1963).

79. Lawson, supra n. 17 at 783.

80. Glendon, in Glendon, Gordon & Osakwe, supra n. 13 at 117.

cally apply the laws of the state."[81] In civil law jurisdictions the doctrine of parliamentary supremacy prevails. Courts are not conceived to play a norm-creating function. The effect of court decisions is typically limited to the parties to the case at bar. *Stare decisis* is not recognized. However, if lower courts depart from a rule stated by a supreme court, they will be reversed.

These propositions hold for socialist courts as well. In one respect, socialist courts hold powers broader than courts in other civil law countries. Socialist supreme courts issue so-called "guiding explanations" of code provisions, outside the context of a particular case.

The U.S.S.R. Supreme Court, for example, gives guiding explanations "on various aspects of the application of legislation. . . . The guiding explanations . . . shall be binding on the courts."[82] In Poland, the binding nature of a Supreme Court guiding explanation is indicated by the fact that violation of it by a lower court is a ground of appeal.[83]

The Soviet Supreme Court has created important rules in issuing such explanations. It has developed the sparse code provisions on tort into a full law of tort. In criminal law, it has taken a one-sentence provision on self-defense and elaborated extensive rules.[84] As a result of this function of issuing explanations, Soviet high courts are said to "exercise a more powerful leadership than their older counterparts in Western Europe."[85]

Like courts in other civil law countries, socialist courts fill gaps in code provisions when necessary to decide a case. In so doing, they fashion rules of law. In 1981, for example, the Supreme Court of the

81. Id. at 273.

82. Law on the Supreme Court of the U.S.S.R., art. 3, 30 Nov. 1979, *Vedomosti verkhovnogo soveta SSSR* [Gazette of the Supreme Soviet of the U.S.S.R.], no. 49, item 842 (1979). This provision gives Supreme Court explanations "general normative character," S.L. Zivs, *Istochniki prava* [Sources of law] 184-185 (1981). "The Supreme Court of the USSR and the supreme courts of the republics have the power to issue binding explanations of the law. They use this power to supplement the very general provisions of the codes and other laws with detailed rules for situations that arise frequently." Olimpiad S. Ioffe and Peter B. Maggs, *The Soviet Economic System: A Legal Analysis* 55 (1987).

83. Frankowski, "Polish Supreme Court Directives as Sources of Criminal Law," in *Anglo-Polish Legal Essays* (W.E. Butler, ed.) 55, 61 (1982).

84. Guiding Explanation, Decree No. 14 "On Application by the Courts of the Legislation Guaranteeing the Right to Necessary Defense from Socially Dangerous Attacks," 16 Aug. 1984, *Biulleten' Verkhovnogo suda SSSR* [Bulletin of Supreme Court of the U.S.S.R.], no. 5, at 9-13 (1984), analyzed in W.E. Butler, *Necessary Defense, Judge-Made Law, and Soviet Man*, in *Law After Revolution: Essays on Socialist Law in Honor of Harold J. Berman* 99-130 (1988). See also Rudden, "The Role of the Courts and Judicial Style under the Soviet Civil Codes," in *Codification in the Communist World* (Donald Barry, F.J.M. Feldbrugge, Dominik Lasok, eds.), in series *Law in Eastern Europe* no. 19 (1975).

85. Mirjan R. Damaska, *The Faces of Justice and State Authority* 196 (1986).

Russian Republic heard a criminal case of unlawful possession of cartridges. The only incriminating evidence was cartridges seized by authorities during a search of the accused's house. The search had been conducted in violation of the search provisions of the criminal procedure code. The code does not specify the consequences of the fact that items are seized in violation of these provisions. With no citation to any code provision, the Court excluded the items: "Because of the violation of the law on the procedure for conducting a search, the items seized in this investigation cannot be considered evidence in the case." The court ordered an acquittal.[86]

Until the mid-1950s courts in socialist countries did not review the constitutionality or legality of administrative decrees, but by 1970 courts in Bulgaria, Yugoslavia, Hungary, and Romania had been given such power. Since 1963 Yugoslavia has used constitutional courts to annul statutes or ministerial decrees that violate the constitution.[87] A 1980 Polish statute authorizes judicial review of ministerial decrees, and Polish courts frequently rule in favor of a citizen challenging such a decree. A 1985 Polish statute permits certain government bodies (though not citizens) to challenge the constitutionality of legislation before a newly created constitutional court.[88] A 1987 U.S.S.R. statute lets courts annul unlawful actions by bureaucrats upon suit by a citizen affected by the action.[89] The U.S.S.R. Supreme Court has proposed allowing Soviet courts to annul ministerial regulations that violate a statute.[90]

F. Prerogativism

Zweigert and Kötz find as the major feature separating socialist law from civil law the fact that "Marxism opposes the view that the law may set limits to political action by guaranteeing to the individual citizen certain spheres of freedom immune from control by the state." They find that Western law recognizes "autonomous zones of

86. Case of Gioev, *Biulleten' verkhovnogo suda RSFSR* [Bulletin of the Supreme Court of the R.S.F.S.R.], no. 11, at 5 (1981).

87. Hazard, supra n. 9, at 93-95. Rhett Ludwikowski, "Judicial Review in the Socialist Legal System: Current Developments," 37 *Int'l & Comp. L.Q.* 89, 92 (1988).

88. Ludwikowski, supra n. 87 at 95-108. Bomba, "Control of Conformity of Normative Acts to the Constitution in the Polish People's Republic," *Sovetskoe gosudarstvo i pravo* [Soviet State and Law], no. 5, at 119-125 (1987).

89. Law on the Procedure for Appealing to Court the Unlawful Actions of Officials that Infringe the Rights of Citizens, 30 June 1987, *Vedomosti verkhovnogo soveta SSSR* [Gazette of the Supreme Soviet of the U.S.S.R.], no. 26, item 388 (1987), reprinted in Izvestiia, 2 July at 1, col. 3. On this Law, see Quigley, "The New Soviet Law on Appeals: Glasnost in the Soviet Courts," 37 *Int'l & Comp. L.Q.* 172-177 (1988).

90. *Law and Democracy* (interview of Vladimir Kudriavtsev, Director of Institute of State and Law, U.S.S.R. Academy of Sciences), Izvestiia, 4 Oct. 1986, at 3, also in *Current Digest of the Soviet Press*, 19 Nov. 1986, at 1. On the proposal, see Quigley, supra n. 27 at 462.

freedom for the citizen which cannot simply be taken over in the interests of society as a whole. This may be seen," they say, "in the constitutional guarantees of civil rights, in the many rules of criminal procedure which protect personal freedom and in the institution of judicatures, especially constitutional courts, which are independent of the executive."[91]

Matsushita also finds socialist legality opposed to the concept of *Rechtsstaat*, or rule of law. Political needs, he says, prevail over legal norms. He cites a 1961 case in which the death penalty was applied retroactively for illegal currency transactions, by decision of the Presidium of the Supreme Soviet. He finds this prevalence of political needs to constitute a fundamental contradiction to the concept of rule of law.[92]

Osakwe makes a similar point, calling socialist law reflective of "prerogativism," by which he means violation of norms "to suit the needs of the party for strengthening the needs of the state."[93] He concedes that this notion of "legal irregularity or legalized lawlessness" is "less developed in some individual socialist countries."[94]

Osakwe adduces four examples of "legalized lawlessness," all in Soviet criminal procedure. The first is that the Committee for State Security (K.G.B.) has a right, he asserts, to take over the investigation of any offense.[95] It does not. The K.G.B. has the right to investigate only certain offenses enumerated in the criminal-procedure legislation. All the enumerated offenses relate to state security.[96]

The second example is that "anyone who is charged with a crime that falls under the investigative jurisdiction of the KGB is not entitled to the right of counsel at any point in the pre-trial phase of the proceedings."[97] In fact, if a crime falls under the investigative jurisdiction of the K.G.B., no special rule exists as to the time at

91. Konrad Zweigert & Hein Kötz, 1 *An Introduction to Comparative Law: The Framework* 299 (1977). Emphasis in original.

92. Matsushita, "Legality in East and West: A Comparative Study of 'Socialist Legality,'" in *Perspectives on Soviet Law for the 1980s* (F.J.M. Feldbrugge and William B. Simons, eds.) 99, 104-06 (1982).

93. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 679.

94. Id. Elsewhere, Osakwe states that "in Soviet law, the principle of socialist legality includes the subordination of all governmental authorities—legislative, executive, and judicial—to the principles of law." Osakwe, "The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System," 21 *Texas Int'l L.J.* 1, 10 (1985). And in another writing, Osakwe states that "modern Soviet law is solidly anchored in the notion of the supremacy of law *à la Anglais*." He cites the delictual liability of the state as "demonstrable evidence of the rule of law in the Soviet Union." Osakwe, "Introduction: The Greening of Socialist Law as an Academic Discipline," 61 *Tulane L.R.* 1257, 1272 (1987).

95. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 883.

96. See, e.g., Russian Republic Code of Criminal Procedure, art. 126.

97. Osakwe, supra n. 61 at 344.

which right to counsel attaches.[98] When the K.G.B. handles an investigation, it is bound by the procedures applicable to criminal investigations generally.

Osakwe's third example is that for enumerated minor offenses, right to counsel attaches later in the process.[99] But in many legal systems procedural rights, including right to counsel, are more limited for less serious offenses.[100] He states that "the only conceivable basis for such discriminatory treatment under law is the political character of the crimes with which such defendants are charged."[101] In fact, these cases involve, as indicated, minor offenses. None is political in character.[102]

Osakwe's fourth example is that courts may prosecute a member of the Communist party, he asserts, only if the Party has first expelled the member. If the party refuses to expel, the courts, he asserts, have no jurisdiction. In this way, he argues, the Party shields some members from prosecution.[103]

In fact, no legislation precludes jurisdiction over a Party member. The practice is that the investigator informs the local Party organization of which the accused is a member, and it typically, though not always, expels the member prior to trial.[104] There is some indication that formerly Soviet courts sought Party assent before trying a Party member, but that practice, to the extent it existed, did not survive the 1960s.[105]

Drawing such a sharp distinction in this area is hazardous, however. Western states permit restriction of rights in times of political uncertainty, and even in normal times limits are set to allow the state to carry out policies it deems necessary. In socialist law, personal rights occupy less exalted a place vis-à-vis state policy than in Western law; the good of the individual is viewed as dependent on the good of society to a greater extent than in Western law. Yet many of the same rights found in Western law are protected in socialist law. Procedures to enforce those rights are weaker than in Western law, but reform since the 1960s to improve such procedures

98. Russian Republic Code of Criminal Procedure, art. 49.

99. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 883-884.

100. Argersinger v. Hamlin, 407 U.S. 25 (1972).

101. Osakwe, supra n. 61 at 344.

102. Russian Republic Code of Criminal Procedure, art. 126, para. 1.

103. Osakwe, in Glendon, Gordon & Osakwe, supra n. 62 at 886. Osakwe, supra n. 61 at 346-50.

104. V. Kozlov, "Vinovaty li sledovateli? [Are the Investigators Guilty?]," *Sotsialisticheskaia zakonnost'* [Socialist Legality], no. 11, at 60 (1987).

105. Peter H. Solomon, *Soviet Politicians and Criminal Prosecutions: The Logic of Party Intervention* 12 (1987) (Soviet Interview Project, University of Illinois, Working Paper 33).

militate against drawing a sharp line between Western and socialist law in this respect.

Soviet law has reflected a conflict between rule of law on the one hand and, on the other, pursuit of policies deemed necessary for the anticipated transformation of society. The two strains contended during the 1920s to 1940s, with the rule of law approach gaining significantly in the 1950s.[106] In the late 1980s that approach gained further. The Nineteenth Party Conference (1988) used prominently the concept of rule of law or *rechtstaat (pravovoe gosudarstvo)* in describing the legal order in the U.S.S.R. Gorbachev said that *rechtstaat* means that "no state agency, official, collective body, Party or social organization, and no person is freed of the obligation to follow the law. As citizens bear responsibility before the state of the people, so does officialdom bear responsibility before the citizens. Their rights must be reliably defended against any arbitrary exercise of power by representatives of authority."[107]

II. THE SEPARATIONIST THESIS AS EXPOUNDED BY SOCIALIST SCHOLARS

Many socialist jurists as well find socialist law distinct, though for reasons different from those adduced by Western scholars. Socialist jurists focus less on the issue of whether socialist law differs from civil law than on the issue of whether it differs from both civil and common law. Their argument is that the socialist countries have a socio-economic base different from that of capitalist countries, and therefore that socialist law differs from both civil and common law.

The predominant view among Soviet jurists in the 1920s was that Soviet law of that period was Western-style law appropriate for a Soviet economy that remained capitalist to a significant degree. In the mid-1930s, the economy was socialized, and the government came to view law as a mechanism for making that economy work and for achieving social stability. At that period, for the first time, Soviet jurists began to call Soviet law "socialist law."[108] To be sure,

106. Gordon B. Smith, "Development of 'Socialist Legality' in the Soviet Union," in *Perspectives on Soviet Law*, supra n. 92 at 77, 84-86. Bodenheimer, "Reflections on the Rule of Law," 8 *Utah L.Rev.* 1, 3 (1962).

107. Report of M.S. Gorbachev, 19th party Conference, *Pravda*, 29 June 1988, at 5, col. 4. Nineteenth Conference, Communist Party of the Soviet Union, *O demokratizatsii sovetskogo obshchestva i reforme politicheskoi sistemy* [The Democratization of Soviet Society and the Reform of the Political System], Izvestiia, 5 July 1988 at 2, col. 1.

108. Berman, supra n. 57 at 25. Andrei Vyshinski, "The Fundamental Tasks of the Science of Soviet Socialist Law" (address at First Congress on Problems of the Sciences of Soviet State and Law, Moscow, 1938), in *Soviet Legal Philosophy* (Hugh W. Babb, transl.) 303, 331 (1951).

in the 1930s many of the features now commonly associated with socialist law made their appearance, particularly the law of a state-planned and state-run economy.

Thus, for the first two decades following the Bolshevik Revolution, Soviet jurists viewed Soviet law as being of the civil law tradition. Since the mid-1930s, Soviet jurists have sought to demonstrate the distinctiveness of socialist law. This has been the predominant approach as well of jurists in the countries that became socialist after World War II. Their aims, which flow in large measure from the ideological struggle with the capitalist world,[109] have been to show that their societies are formed on new principles requiring new law,[110] to demonstrate the superiority of socialist law over capitalist law,[111] and to defend socialist law against Western charges that it is not law at all.[112] Thus, Gyula Eörsi, a Hungarian jurist, complains of an "underestimation and rejection" of socialist law, and of a conception that socialist law "*cannot be regarded as law*" but "is conceived almost like a kind of *cockney bourgeois law* which is lingering in misery in a very simple form somewhere on the outskirts."[113]

Like the Western separationists, socialist separationists stress the "macro" level. David says that "what leads Marxist jurists to isolate their law, to put into another category, a reprobate category, the Romanist laws and the common law, is the fact that they reason less as jurists and more as philosophers and Marxists; it is in taking a not strictly legal viewpoint that they affirm the originality of their socialist law."[114]

While they have not dwelt extensively on similarities between socialist and other civil law systems,[115] socialist jurists typically acknowledge the descendance of their legal systems from the civil law.

109. Blagojevic, "Le Caractère révolutionnaire du droit des états socialistes," 12 *Revue Roumaine des Sciences Sociales et Sciences Juridiques* 19, 37 (1968).

110. Ancel, supra n. 12 at 17. Chkhikvadze and Zivs write, "Analysis to compare the nature of the institutions of bourgeois and capitalist state and legal systems will highlight the differences." V.M. Chkhikvadze, S.L. Zivs, "L'Evolution de la Science Juridique et du Droit Comparé en U.R.S.S.," in *Livre du Centenaire de la Société de législation comparée* 581, 596 (1971).

111. S.L. Zivs, *O metode sravnitel'nogo issledovaniia v nauke o gosudarstve i prave* [On the Method of Comparative Investigation in the Science of State and Law], *Sovetskoe gosudarstvo i pravo* [Soviet State and Law], no. 3, at 23, 29 (1964). Some Western scholars have also approached socialist law from the standpoint of endeavoring to prove the superiority of Western law: Loeber, "Rechtsvergleichung zwischen Ländern mit verschiedener Wirtschaftsordnung," 26 *RabelsZ* 201, at 215 (1961).

112. Gyula Eörsi, *On the Problem of Division of Legal Systems*, in Rotondi, supra n. 64 at 179, 189.

113. Id. at 188. Emphasis in original.

114. René David, "Exite-t-il un droit occidental?" in Nadelmann, supra n. 37 at 58.

115. Loeber, supra n. 111 at 205. During the 1960s, however, there emerged a greater readiness to conduct comparative work with capitalist law. Constantinesco, "La Comparabilité des ordres juridiques ayant une idéologie et une structure polit-

They frequently cite the civil law origin of rules and institutions.[116] Nonetheless, most socialist analysts who have addressed the issue find socialist law to have moved outside the civil law family. Imre Szabó, a Hungarian jurist objects to "a view held by some observers" that the reason socialist countries use statute-based law is that "all the European countries which chose the Socialist road had formerly belonged to what is called the 'Continental' legal system and as it were 'inherited' the notion of a legal system based on statutes which, it is claimed, is not a characteristic which follows from the Socialist social system." Szabó thinks that this similarity is insufficient to infer "a general similarity between the Continental and the Socialist legal system." In any event, he finds it "only outer similarity, because the social reasons for Socialist solutions are not identical with those reasons which once set legislative activity in opposition to the arbitrary practices of feudalism making it not merely the main, but the exclusive source of law."[117]

Szabó acknowledges that "it is rather difficult to find merely outward characteristics for the delimitation of the socialist legal systems, since from the aspect of the system of legal sources—which is the most frequently used formal element—the socialist law reminds one of the continental law. Accordingly, literature is still often inclined—perhaps not openly—to regard socialist law as one belonging to the continental law, may be as a kind of illegitimate child of the latter."[118]

Like many other socialist jurists, Szabó finds socialist law different from civil law on the ground that socialist law differs from capitalist law:

> The continental and the Anglo-Saxon legal systems are, namely, the various appearances of the same type of law, measured by the same social scale, based on an identical formation of society; as against this, the socialist law is a collective noun for various legal systems based on another social order. Therefore the socialist law as a type stands on the same level with the common major premise of the said

ico-économique différente et la théorie des éléments déterminants," 25 *Rev. Int'l Dr. Comp.* 5, 13-14 (1973).

116. Kiralfy, "The Rule of Law in Communist Europe," 8 *Int'l & Comp. L.Q.* 465, 467 (1959).

117. Szabó, "The Socialist Conception of Law," in René David (ed.), *International Encyclopedia of Comparative Law: Volume II: The Legal Systems of the World, Their Comparison and Unification: Chapter I: The Different Conceptions of the Law* 72-73 (1975).

118. Szabó, "Theoretical Questions of Comparative Law," in *Socialist Approach to Comparative Law* (Imre Szabó and Zoltan Péteri, eds.) 9, 12 (1977). Szabó writes to the same effect in his "La Science Comparative du Droit," in *Annales Universitatis Scientiarum Budapestiensis. Sectio Juridica* 91, 113-117 (1964).

> two legal-system-types (i.e. the continental and the Anglo-Saxon) which is the bourgeois type of law.[119]

Szabó is reflecting the thought of historical materialism, the dominant philosophy of the socialist countries, according to which law is part of a "superstructure" whose form and content are determined by the socio-economic "base." According to historical materialism, there has been a progression since the formation of the state in ancient times through four forms of states: "*four basic types of law* may be distinguished: the laws of the *slave, feudal, capitalist* and *socialist* societies."[120]

Each of the four has had a system of law protecting the interests of the social class in power. "There is a type of law corresponding to each type of socio-economic system. The typology of legal systems is, then, in conformity with the principles of historical materialism, in the first instance a division into *social types*, corresponding to the types of law, which are divided according to their social character."[121]

Eörsi finds that though individual rules may be the same in socialist and bourgeois law, the difference in the economic base distinguishes them from each other:

> [I]t is by no means an exceptional occurrence that *similarity* of socio-economic process *results in similar solutions* being adopted in differing types of law: . . . socialism is engaged in commodity production . . . the development of transport and communication requires similar legal solutions in many respects. All these do not alter the fact that it is the socio-economic determination, function and repercussion of law which is its fundamental aspect. The complex whole, the entity is invariably of primary importance as compared to particular phenomena.[122]

While they find the socio-economic base a key determinant, socialist jurists view the superstructure of law as enjoying a certain autonomy from the base. Eörsi criticizes those who "entertain the idea that since law adapts itself only to the socio-economic situation, the formation of legal systems and concepts is merely a technical process."[123] He finds that while "law is ultimately determined by production and ownership relations," it has "an internal system and relatively autonomous institutions of its own and is in this way an

119. Szabó, supra n. 118 at 13.

120. Eörsi, supra n. 112 at 195.

121. Rozmaryn, "Les grandes controverses du droit comparé," in Rotondi, supra n. 64 at 577, 586.

122. Eörsi, supra n. 112 at 198.

123. Id. at 205.

active socio-economic force."[124] This view is in keeping with the historical materialist notion that the superstructure, while formed by the base, in turn influences the base. Law having significance in and of itself, the similarities in legal rules and institutions are important.

Some socialist jurists say that though socialist law has a unique class basis, it is not necessarily outside the civil law tradition. They distinguish between "types" of law and "families" of law. Thus, Zoltán Péteri, a Hungarian jurist, writes:

> When the need of a delimitation arises in the context of general theses about state and law, its base can be found only through different levels of abstraction. It is on this foundation that one can speak of disciplines summing up and systematizing theoretical theses belonging either to the different *families* of law (Romano-Germanic, Common Law, etc.), or—in uniting the families of law in larger entities—to the different *types* of law (socialist, bourgeois, etc.)[125]

Victor Zlatescu, a Romanian jurist, also distinguishes family from type:

> The distinction between the law of the socialist countries and the law of the capitalist countries is not of the same nature as the difference between Roman-German law and the common law, for example. Socialist law is not a third family among the others, as appears in certain writings of Western comparatists.[126]

III. VALIDITY OF THE SEPARATIONIST THESIS

The proponents of the separationist thesis distinguish between "macro" and "micro" comparison, arguing that only the former gives a true account of the differences between legal systems. What they dismiss as "technique," however, encompasses basic concepts of law. The inquisitorial style of trial, the reliance on codes, the division of law into its civil law categories, are central features of the civil law tradition and are employed in the socialist countries. The method of

124. Id.

125. Péteri, "Le droit comparé et la théorie socialiste de droit," in Péteri, supra n. 12 at 317, 343. Péteri nonetheless views socialist law as a separate "family" of law. Péteri, "The Reception of Soviet Law in Eastern Europe: Similarities and Differences between Soviet and East European Law," 61 *Tulane L.Rev.* 1397 (1987) ("The recognition of socialist law as a new, independent family of law has become gradually a generally accepted truth in the world's legal literature."); and id. at 1399-1400 (socialist law outside civil law family); id. at 1401 (similarities of socialist law to civil law only in legal technique).

126. Zlatescu, "En marge d'un débat sur le droit comparé socialiste," 20 *Rev. Roumaine des Sciences Sociales—Sciences Juridiques* 245, 246 (1976).

investigation of crime—with written documentation compiled by a law-trained investigator—is central to the civil law system of criminal procedure and has been retained in socialist law. The rules on presumptions and burdens in socialist law stem from civil law rules. A leading Soviet proceduralist, in analyzing the presumption of innocence in Soviet law, depicts it as a democratic principle developed in the civil law countries.[127]

A difference in socio-economic base is significant for the functioning of law but irrelevant on the issue of whether socialist law remains within the civil law family. This distinction is recognized by those socialist jurists who differentiate between "types" and "families" of law. Inheritance law in socialist countries, to take one example, is similar to that found in capitalist civil law countries as regards methods of distribution and mandatory shares. However, in capitalist civil law countries the means of production may be passed by inheritance, whereas in socialist civil law countries that is not the case. Thus, the law of inheritance serves a different social purpose in capitalist civil law countries.[128] The fact remains, however, that inheritance law in socialist countries is quite similar to that in Western civil law countries.

A number of socialist countries have retained pre-existing codes for considerable periods after socializing productive property.[129] Romania still uses its 1864 civil code, based on French law.[130] The German Democratic Republic retained the 1896 German Civil Code until 1976.[131] Poland adopted a civil code only in 1964. Until then different sectors of Poland used prior existing German, French, Austrian, and Russian civil codes.[132] Hungary's civil law, which had been uncodified for many years, remained so until 1959.[133] These countries, to be sure, introduced special decrees to regulate contracts

127. Mikhail Strogovich, *Uchenie o material'noi istine v ugolovnom protsesse* [Study on Material Truth in Criminal Procedure] 230 (1947). Strogovich is, however, critical of violations of that presumption in bourgeois courts. Id.

128. Markovits, "Hedgehogs or Foxes?: A Review of Westen's and Schleider's Zivilrecht im Systemvergleich," 34 *Am. J. Comp. L.* 113, 127 (1986).

129. Loeber, supra n. 111 at 213. Kiralfy, supra n. 116 at 467. Grzybowski, "Continuity of Law in Eastern Europe," 6 *Am. J. Comp. L.* 44-78 (1957).

130. Ancel, supra n. 12 at 15-16. P. Gogeanu & L.P. Marcu, *A Concise History of Romanian Law* 50-51 (1981). Michael Cismarescu, *Einführung in das Rumänische Recht: Allgemeine Grundzüge und Tendenzen* 86-87 (1981).

131. W. Wolodkiewicz, "The Continuity of Roman Law in the Civil Law Socialist Countries," 1987 *Yearbook on Socialist Legal Systems* 23, 32. Reghizzi, De Nova & Sacco, "Il Zivilgesetzbuch della Repubblica Democratica Tedesca," 1976(1) *Riv. Dir. Civ.* 47.

132. Lasok, "The Code of Civil Law," in *Polish Civil Law* (Dominik Lasok, ed.) 1, 1-2 (1973), in series *Law in Eastern Europe*, no. 18(1).

133. Ferenc Petrik, "Introduction," in Ministry of Justice, Hungarian People's Republic, *Civil Code of the Hungarian People's Republic* 19-22 (1982).

in the state sector.[134] But the old codes could still be used. And when new codes were drafted, the civilian-trained jurists drew up codes within the civil law tradition.[135] As one Italian comparatist says of socialist civil codes, it suffices to peruse any one of them "to see clearly that, behind it, there is a Romanist tradition as opposed to the tradition of common law or of Islamic *sharia*."[136]

Some socialist jurists find a continuing link of socialist law to civil law at more than the margins. Borislav Blagojevic, a Yugoslav jurist, states that while socialist law has created much that is new, a "great number of legal institutions and legal relations remain the same in socialist law." He says that it is "necessary and justified" to use them if they are "in conformity with the corresponding interests of the ruling class in the state in question."[137] That approaches taken from the civil law tradition "are maintained and used in many branches of law in socialist law," says Blagojevic, "is a fact, and there is no reason or basis to deny or hide it."[138]

Witold Wolodkiewicz, a Polish specialist in Roman law, demonstrates the identity of legal rules and institutions across a broad range, as between socialist countries and Western civil law countries.[139] Wolodkiewicz says that ownership rights in the socialist civil codes are limited in certain respects but that "both in Roman law and the law of capitalist countries ownership has never been an unlimited right." He says that the Roman law of ownership as found in capitalist civil codes "is usefully utilized in order to regulate ownership in socialist countries." He finds no break with the "tradition" and "achievements" of civilian doctrine shaped on the basis of Roman law."[140] The inclusion of delictual and contractual liability under a general law of obligations in modern civil law, Wolodkiewicz points out, derives from Roman law and is found in

134. See, e.g., Mihaly, "The Role of Civil Law Institutions in the Management of Communist Economies: The Hungarian Experience," 8 *Am. J. Comp. L.* 310 (1959).

135. Berman, supra n. 57 at 25.

136. Sacco, "The Romanist Substratum in the Civil Law of the Socialist Countries," 14 *Rev. Socialist L.* 65, 66 (1988).

137. Blagojevic, supra n. 109 at 34.

138. Id. Blagojevic stresses that his suggested approach does not negate the distinctive features of socialist law or the fact that old rules may apply differently in the socialist context: "All this does not at all negate the revolutionary character of the law of the socialist state, for this law is characterized in particular by a series of legal institutions that are new and that are proper only for socialist law and for socialist social organization, that is to say, to socialist social relations. One must add to that the fact that all this exerts an important influence on the practical application and social consequences of legal norms that have been borrowed from prior legal systems, but which are carried out and put into use in a different social order that, itself, influences in its totality the interpretation and application of these norms." Id. at 35.

139. Wolodkiewicz, supra n. 131 at 31-36.

140. Id. at 34-35.

both socialist and Western countries.[141] Many socialist scholars acknowledge the debt of socialist law to Roman law, which is taught in law schools in socialist countries.[142] The Soviet jurists Anatoli Tille and George Shvekov find Roman lawyers to have established basic legal institutions and a legal methodology relevant to Soviet law.[143] The analysis of Soviet economic law by Ioffe, a scholar of Roman law, reflects Roman law concepts.[144]

Socialist law has retained civil law institutions, methodology, and organization. The classification of law used in the U.S.S.R., says Ioffe, is that "recognized by Western European legal scholars of the nineteenth and early twentieth century and taken over by Russian legal scholars."[145] Socialist law retains the inquisitorial style of trial, law-creation predominantly by legislatures rather than courts, and a significant role for legal scholarship in construing codes. "The legislative agencies of our country," writes a leading Soviet jurist, "regularly take into account the experience of bourgeois legislation in preparing codes."[146]

One finds great similarity in the basic areas of law as between socialist law and Western civil law systems, despite notable differences on particular points. After giving a brief review of Soviet law from this perspective, Hazard acknowledges that "Romanists have had difficulty in finding sufficient novelty in the Soviet legal system to place it in an independent category."[147] Hazard then reviews similarities and differences between socialist and civil law countries. Family law and the civil code provisions on inter-personal relations do not differ from those found in other civil law countries. The civil code regulates contracts between state firms, except that additional regulations have been enacted to handle matters specific to those contracts. The "entire law of capitalism has been eliminated" by forbidding purchase of goods with an intent to profit by their re-sale. Labor law establishes what in the West is called civil service employment. In criminal law, vagrancy is broader than comparable offenses in Western civil law systems, and certain "economic" crimes have been introduced to punish failings by state managers. Civil procedure contains no essential differences. Nor does criminal pro-

141. Wolodkiewicz, "The Romanist Tradition of Civil Liability in Contemporary Poland," in *Anglo-Polish Legal Essays* (W.E. Butler, ed.) 75, 78 (1982).

142. Butler, supra n. 4 at 2.

143. A.A. Tille and G.V. Shvekov, *Sravnitel'nyi metod v iuridicheskikh distsiplinakh* [The Comparative Method in Legal Disciplines] 125-126 (1978).

144. Ioffe & Maggs, supra n. 82, chaps. 1-4.

145. Ioffe & Maggs, supra n. 82 at 46.

146. V.M. Chkhikvadze, *O nekotorykh mezhdunarodnykh aspektakh problemy prav cheloveka* [On Certain International Aspects of the Issue of Human Rights] *Sovetskoe gosudarstvo i pravo* [Soviet State and Law] 85, 90 (no. 7, 1988).

147. Hazard, supra n. 1 at 106.

cedure, except that an attorney is not admitted until the preliminary investigation is completed, and the investigator is subordinate to the procurator. A special system of tribunals has been established to resolve disputes between state-owned economic enterprises.[148]

To be sure, some of the differences reflected in this review are significant. And there are others one might add. But when one looks at Soviet, or socialist, law from a global perspective, these differences do not erase the basic identity of socialist law as part of the civil law tradition. Moreover, differences, even substantial ones, do not reflect a departure from a legal tradition. One finds major differences between United States and British law: use of a jury in civil cases in the United States but not in Britain[149]; extensive use of lay judges in Britain in magistrate courts;[150] judicial review of the constitutionality of legislation in the United States but parliamentary supremacy in Britain.[151] Yet both systems belong to the common law world.

The separationist thesis would be aided if its proponents could cite common law countries that underwent socialist revolutions and then abandoned the common law in favor of law similar to that of the contemporary socialist countries. But no common law country has established a fully socialist order.[152] Those common law countries that have taken tentative steps towards socialism, however, have not deviated from the common law. Britain and Tanzania both nationalized major industries without abandoning the common law. In Grenada a revolution with socialist aims began in 1979 and continued until 1983.[153] A certain amount of state ownership and plan-

148. Id. at 102-106. Ehrenzweig states that in criminal law and procedure in socialist countries, "old patterns have been retained." Ehrenzweig, supra n. 17 at 1006.

149. Gordon, in Glendon, Gordon & Osakwe, supra n. 13 at 217.

150. Gordon, in Glendon, Gordon & Osakwe, supra n. 62 at 319.

151. Gordon, in Glendon, Gordon & Osakwe, supra n. 13 at 57.

152. Hazard, supra n. 1 at 99. Hazard suggests id. at 100, as the reason that no common law country has become fully socialist the "long experience" in common law countries "with a balance favouring the individual over the community and a detestation of government intervention in what are considered to be private affairs." Hazard does not explore the matter further. It would seem that additional analysis is required for a conclusion that concern about government intervention is the reason that socialism has not been adopted in common law countries. Most civil law countries have not become fully socialist, a fact that suggests there may be reasons behind adoption of socialism other than the issue of whether a country follows the civil law or common law. There are other possible factors beyond a lowered level of concern over government intervention to explain why socialism took hold in Russia (weak monarchy, weak governmental institutions, weak middle class, economic backwardness). Historical (strategic, power-political) factors are strong candidates as the reasons for installation of socialism in East Europe after World War II. Western Europe has not become socialist; reasons for non-adoption of socialism in England might be the same as in Western Europe, whatever those reasons might be.

153. On the socialist orientation, see remarks of Prime Minister Maurice Bishop under the heading "Role for Progressive Lawyers," in Maurice Bishop, "A Progres-

ning was introduced. However, the common law was not abandoned. Existing laws were continued in force unless repealed or amended,[154] and Grenada's courts functioned in the common law style.[155]

Even a highly state-run economy, one may predict, could operate in a common law legal system. Administrative law, to be sure, would play a more substantial role, but courts could still employ *stare decisis* and retain other common law features. Indeed, in civil law socialist countries, even with regard to the nationalized sector, courts still shape the law to a considerable degree. Economic courts have fashioned case law on, for example, the liability of a supplier unable to ship goods for lack of input materials. A supplier may lack input materials because its own supplier, from whom it is required by planning agencies to obtain them, has not produced them. The codes call for liability only in event of fault.[156] Statutes provide little guidance as to whether a supplier can be considered at fault here. Economic courts have stepped in to develop rules.[157]

IV. NEGATIVE CONSEQUENCES OF THE SEPARATIONIST THESIS

The separationist thesis as expounded by Western scholars exaggerates the significance of those features they label as distinguishing characteristics. By dismissing the civil law aspects of socialist law as technical, they under-emphasize important features of socialist law. By stressing excessively the projected future dying out of law, the role of a dominant political party, and absorption of private law by public law, they under-emphasize the degree to which law functions in a regularized fashion in socialist countries.

It is impossible to understand socialist law without viewing it within the tradition of which it is a part, just as one cannot understand United States law without its English origins. To study the socialist law of contracts between state-owned enterprises, one must start with the civilian law of obligations. Only in putting socialist law in its civil law framework can one ascertain the distinguishing

sive Lawyer in Power: Free Press and the Role of the Media," 37 *National Lawyers Guild Practitioner* 92, 97-99 (1980).

154. People's Law No. 5, 28 March 1979, in "Grenada," in Blaustein and Flanz, supra n. 36.

155. "New Constitution to be Drafted," in *Free West Indian*, 11 June 1983, reprinted in *In Nobody's Backyard: The Grenada Revolution in its Own Words: Volume I: The Revolution at Home* (Tony Martin ed.) 63-65 (1983).

156. Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics, art. 37 (fault as basis of civil liability).

157. See, e.g., cases of Moscow Wool Outlet Warehouse v. Troitskaia Cloth Factory, and Kharkov Koopposiltorg Center v. Chernivets Chemical Consumer Products Factory, in John Hazard, William Butler & Peter Maggs, *The Soviet Legal System* 252-254 (1977).

characteristics of socialist law. A danger of the separationist thesis is that the student of comparative law will not understand what is unique to socialist law.

The separationist thesis also detracts from an understanding of civil law. Just as socialist jurists cut themselves off from their legal tradition by separating socialist law from civil law, so Western civilians who accept the separationist thesis cut themselves off from a portion of their own legal tradition. The separationist thesis makes it appear that the civil law is incapable of accommodating social change, especially state involvement in the economy, which it in fact accommodates quite readily. Western civilian scholars would gain a better understanding of civil law if they were more often to include socialist developments in their analyses of civil law.

One scholar who follows the separationist thesis suggests nonetheless that ignorance of socialist law may deter civilians from accepting it as part of civil law:

> [T]he defenders of the viewpoint that the Communist legal systems are merely a variety of civil law face a dilemma. If they really wished to count Russia and China as being within the civil law tradition, then . . . in terms of population and land area, the Communist legal systems are overwhelmingly the leading branch of the civil law tradition, and the traditional civilians have little excuse for their professed ignorance of these systems.[158]

The tendency of many civilians to focus on the differences between socialist law and other civil law systems may as well stem from the fact that the differences are what strike them as interesting. Ancel notes that during the inter-war period, "nationalization of enterprises was regarded as legal heresy" by Western civilians.[159]

One reason that socialist jurists have shied from viewing their law as part of the civil law family is that comparative law scholarship in Western Europe displays features threatening to socialist interests. Socialist jurists have reflected an understandable reluctance to engage in comparisons with non-socialist civil law systems because of: (a) an approach in West European comparative law that sought to find universal principles of law—an approach at odds with historical materialism[160]; (b) a tendency in Western comparative law to seek unification of laws[161]; and (c) a historical dominance in com-

158. Peter Maggs, "Review" of John Hazard, *Communists and Their Law* and of Samuel Kucherov, *The Organs of Soviet Administration of Justice*, in 85 *Harv. L. Rev.* 530, at 532 (1971).

159. Ancel, supra n. 12 at 17.

160. Zivs, supra n. 111 at 26, 28.

161. Hazard, "Socialist Law and the International Encyclopedia," 79 *Harv. L. Rev.* 278, 279 (1965). Hazard, supra n. 1 at 97.

parative law of the leading West European industrial powers.[162]

Despite these obstacles, Péteri makes a strong case for the importance, to socialist jurists, of comparative study: "The formulation of theses having general validity . . . requires the taking into consideration of a whole series of legal systems or institutions. Scholarly interest and practical objectives have both led socialist legal scholarship to recognize the need of a comparative approach. . . . A theory of law that pretends to true universal validity cannot neglect comparison of systems of law of an opposing type, even antagonistic ones."[163]

Many socialist jurists argue that socialist law should build on positive aspects of Western civil law. The Polish jurist Maria Borucka-Arctowa considers it useful for socialist jurists to explore other civil law systems to find "common features of progressive and democratic institutions" and "similarities in the legal technique and in legal constructions and concepts."[164] The Soviet jurist Samuel Zivs also finds it useful to study "concrete details of state administration" in Western civil law to gain "information needed in deciding a series of issues of improvement of the methods of state administration in socialist countries."[165] He notes in capitalist law "the relative progressive nature of certain bourgeois-democratic principles."[166]

Blagojevic warns socialist countries against eschewing their legal past. He says in the "construction of socialist society," it is necessary to consider "all the peculiarities of the general social and legal development of each socialist state (including the legal tradition, to the extent that it is not in contradiction with the new social order)."[167]

Even Szabó, who finds socialist law outside the civil law tradition, says that socialist jurists in their comparative law research have overemphasized the "general comparison of laws" over "purely juridical" or "juridico-technical" elements.[168] He says that "in the Marxist *legal* science this delimitation of the different levels has been often relegated into the background—simply because of the emphasis on the basic level. It often happened that we connected a given legal institution immediately with the basic character of the social system; that is, we strove to deduce the institution under

162. Péteri, supra n. 125 at 318.
163. Id. at 337-339.
164. Borucka-Arctowa, "Methodological Problems of Comparative Research in Legal and Other Social Sciences," in 6 *Archivum Iuridicum Cracoviense* 13, 24-25 (1973).
165. Zivs, supra n. 111 at 28.
166. Id. at 29.
167. Blagojevic, supra n. 109 at 34.
168. Szabó, "Theoretical Questions of Comparative Law," in Szabó & Péteri, supra n. 118 at 31.

study *directly* from the nature of production relations. . . . This over-emphasis on the social side as against the legal aspect was due to the state of development the Marxist legal science was in, and also to the fact that it had to struggle with other tenets in order to help prevail its own [*sic*]."[169]

Socialist scholars have also been under political pressure against finding socialist law to be derived too substantially from Western civil law. Zivs attributed lack of attention to comparative law research in Soviet scholarship to the personality cult of Joseph Stalin.[170] He called comparative research "one of the concrete means of application of the dialectical-materialist method in the investigation of issues of state and law."[171] He noted the significance that Marx and Lenin attributed to comparative research in understanding social phenomena.[172]

V. CONCLUSION

There is content to the term "socialist law." Socialist law contains features that distinguish it from the legal systems of other countries of the civil law family. But those points of difference have not removed socialist law from the civil law tradition. To draw that conclusion is to overlook the historical connection of socialist law to civil law and the continuing relevance in socialist law of civil law rules, methods, institutions, and procedures.

169. Id. at 32.
170. Zivs, supra n. 111 at 23-24.
171. Id. at 25.
172. Id. at 23-24.