INTRODUCTION: THE GREENING OF SOCIALIST LAW AS AN ACADEMIC DISCIPLINE*

Christopher Osakwe**

Both in terms of its general acceptance by curriculum planners and the scope of the subject matter that is covered in the course, the teaching of socialist law in American law schools has come a long way from its modest beginnings in the late 1940s when the idea was grudgingly accepted by only a handful of in-

* The title of this essay was influenced by a book that was published in 1970 by C. Reich entitled The Greening of America.

** Eason-Weinmann Professor of Comparative Law, Tulane University; Director, Eason-Weinmann Center for Comparative Law; LL.B. 1966, LL.M. 1967, Ph.D. 1970, Moscow State University; J.S.D. 1974, University of Illinois.
stitutions. Today the growth in the number of law schools that teach a course in socialist law can truly be described as phenomenal.1 This progress, to a large extent, is attributable to the devotion and pioneering spirit of men such as Professors John Hazard, Harold Berman, Leon Lipson, and Peter Maggs. Along with the change of attitude on the part of curriculum planning committees at American law schools regarding the teaching of socialist law, one has also noticed among American scholars of comparative law a generally maturing process that has resulted in what I call the greening of socialist law as an academic discipline.

In comparative legal literature emanating from the West, one can identify four competing schools of thought pertaining to the study of socialist law. The first advocates the benign neglect of socialist legal systems. The second revolves around the general belief that the only aspect of socialist law that is worth studying is the part which regulates East-West commercial relations. The third school resembles the Critical Legal Studies movement in the United States, both in its methodology, as well as in its singleness of purpose. As a frame of mind, this third trend promotes the “deconstructing”2 of socialist law. The

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1. Today many of the leading law schools in the United States offer courses dealing with some aspects of socialist laws, notably Soviet and East European law. These include, but are not limited to, the law schools of the University of California at Berkeley, Columbia, Duke, Harvard, Illinois, Michigan, Pennsylvania, St. Louis, Ohio State, Virginia, Texas, Tulane, and Yale. More recently many law schools, such as those of Georgetown University, UCLA, and the University of Washington at Seattle, have added courses on Chinese law to their curricula either under the rubric of Asian law or as part of a general course in comparative law. Schools with a strong interest in Latin American law, such as the law schools at the University of Miami, Arizona State University, University of California at Los Angeles, University of Florida at Gainesville, University of Houston, and Southern Methodist University, take occasional glances at Cuba’s socialist law. At the end of 1986-87 academic year, my survey indicated that seventy-five American law schools were offering courses in various aspects of socialist law. By this total number, sixty-seven courses dealt specifically with Soviet law. The most comprehensive survey of Western literature dealing with Soviet law may be found in Minan and Morris, Unraveling an Enigma: An Introduction to Soviet Law and the Soviet Legal System, 19 Geo. Wash. J. Int’l L. & Econ. 1-58 (1985).

2. The term “deconstructing” is borrowed from the language used by the Critical Legal Studies movement. Writing in The New Republic, Louis Menand explains the thrust of this movement as follows:

The typical Critical Legal scholar considers himself a “deconstructionist”—he is interested above all in demonstrating the semantic incoherence of legal texts. Stanford professor Mark Kelman... calls the method “trashing.” The premise is that once the theoretical incoherence of liberal legalism has been exposed,
fourth school treads a middle ground between the deconstructing and the outright glorification of socialist law. It calls for an analytical approach that carefully searches for the comparative merits and demerits of socialist law.

For the purposes of this analysis, I will refer to these four systems of thought respectively as the "benign neglect," "commercial exploitation," "methodical deconstructionalism," and "analytical detachment" schools. Each of these tendencies more or less dominated the position of scholars towards socialist law during a given historical period. However, at any given time in the development of the study of socialist law during the past seventy years, elements of all four tendencies have more or less coexisted.

The first of these tendencies reflects a pervasive attitude of nihilism towards the study of socialist law. According to this thinking, socialist law is undeserving of any serious study by scholars of comparative law, either because it is viewed as a bastard child of the civil-law system, or because it is believed to be fundamentally lawless. During the period that was dominated by this thinking, studies in comparative law made only fleeting references to socialist law. Most of these references tended to draw attention either to the political character of socialist law or to its lack of originality. At this time, it was thought that socialist law was an oxymoron and that the study of socialist law did not deserve the attention of any self-respecting student of comparative law. Nihilistic literature about socialist law dominated the scene during the 1940s and 1950s. Even as late as the 1970s, some ma-

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we will be able to reconceive all our political values because we will now understand what is really going on.


3. Typically, proponents of this school of thought operate from within the respective socialist countries. In their writings they contend that socialist law reflects the will of all the people who are governed by it, harmonizes the interests of all the friendly classes in society, and embodies a higher degree of social justice and morality. By contrast, Western law or bourgeois law, according to these scholars, operates as an instrument of class oppression and as a weapon placed at the generous disposal of the ruling cliques. In short, they see Western law as fundamentally immoral because it institutionalizes the social inequities that exist in a capitalist economic and political system. See Osnovy Sovetskogo Prawa (The Fundamental Principles of Soviet Law) 5 (S. Korneev ed. 1985).
jor works in comparative law still refused to include any meaningful reference to socialist law.⁴

When commercial contacts between the West and the socialist countries began to develop, it was soon felt that the West did not know enough about the laws of its trading partners. The West particularly wanted to find out something about the commercial laws of the Eastern bloc countries. This realization called for a rethinking of the attitude of benign neglect of socialist law. This soon launched a new era in the study of socialist law—the commercial exploitation of the knowledge about socialist law. All of a sudden, the West became interested in the compilation of the commercial laws of the individual socialist countries. In doing so, however, no attempt was made to understand socialist law beyond the point of its commercial appeal. Pocket-book scholars of socialist law produced instant digests of the commercial laws of socialist countries. Today this trend is particularly noticeable with regard to the study of Chinese law.

The third tendency in the study of socialist law by Western scholars is manifested in what appears to be a carefully orchestrated effort by many individuals in the West to stress the evil character and systemic defects of socialist law. Scholars of this persuasion tend to concentrate their studies on the aspects of socialist law dealing with individual rights. In an effort to give their studies a semblance of respectability, they use a type of language that gives the illusion of science without any of its substance. In reality what they are doing is passing off political opinion as if it were science. The prevailing view in studies influ-

⁴ This attitude of benign neglect of socialist law was for a long time reflected in the selection of materials by editors of American casebooks on comparative law. For example, the first generation of leading American casebooks on comparative law did not devote a single chapter to the problems of socialist law. See A. von Mehren & J. Gordley, The Civil Law System: An Introduction to the Comparative Study of Law (2d ed. 1977); J. Merryman & D. Clark, Comparative Law: Western European and Latin American Legal Systems—Cases and Materials (1978); R. Schlesinger, Comparative Law: Cases—Text—Materials (4th ed. 1980). The first major American casebook on comparative law to be published by one of the big four casebook publishing companies (West Publishing Company, Foundation Press Publishing Company, Little Brown Publishing Company, and The Michie Company) that devoted equal attention to socialist law, along with the civil and common law systems, was M. Glendon, M. Gordon & C. Osakwe, Comparative Legal Traditions: Text, Materials and Cases (1985). This was preceded by an earlier monograph that was written by the same co-authors. See M. Glendon, M. Gordon & C. Osakwe, Comparative Legal Traditions in a Nutshell (1982).
enced by this thinking is the belief that socialist law is nothing more than a totalitarian machine for the suppression of individual freedoms and liberties. Emphasis is placed on those aspects of socialist law where these violations are thought to occur more frequently: criminal law and procedure, law on religious associations, the bill of rights provisions in the respective socialist constitutions, and the law governing trade unions. This tendency which encourages wholesale condemnation of socialist law acknowledges the basic fact that there is law in socialist law, but quickly modifies its stance by insisting that this law is only what may be described as "soft law," as opposed to "hard law."

As a frame of mind, methodical deconstructionalism has a singleness of purpose and that purpose is to show that there is no redeeming goodness in socialist law, that socialist law is absolutely immoral, and that socialist states together constitute an evil empire. The deconstructionalist scholar of socialist law delights in what may be described as the "trashing" of socialist law. He has tunnel vision when it comes to the study of socialist law. This enables him to ignore everything that is comparatively admirable about that law and to see only a dim light getting brighter as the end of the tunnel comes into focus. The result of such efforts is tantamount to pseudoscience and nothing more. At the core of this tendency is a deep feeling of critical negativism towards communists and their law. Literature of this type proliferated in the 1960s and 1970s. Some deconstructionist writings about socialist law have also appeared in the 1980s.  

I must say, however, that deconstructionist writings about socialist law are not totally devoid of any redeeming value. To some extent they are helpful in understanding the full dimension of that law. They irritate the mind of the reader who does not quite see things in a similar fashion. By so doing, they compel others to think of ways to balance the viewpoints expressed by the deconstructionist. The principal fault that I find with deconstructionist literature on socialist law is that invariably it suffers from intellectual myopia, an attitudinal nearsightedness,

5. This term was coined by adherents of the American Critical Legal Studies movement. *See supra* note 2.

which enables the writer to bring his enormous power of intellectual analysis to bear only upon the negative aspects of socialist law.

Characteristically, these first three tendencies in the study of socialist law in the West did not encourage genuinely disinterested investigations into the nature of that law. It is only when one looks to the fourth tendency that one notices a serious devotion to the study of socialist law as an intellectual discipline. This fourth trend recognizes socialist law as a sophisticated system and calls upon the scholar to predicate his investigation upon the principle of analytical detachment. This means a willingness to probe all aspects of socialist law and to note its merits as well as demerits in comparison to other modern legal systems. In the West, this attitude provided a framework for serious scholarship in socialist law. Because of this new attitude, for the first time in the study of comparative law, comparativists are becoming more sensitive to the basic philosophical issues of socialist law by casting off the nihilistic, commercial, and negativistic restrictions on objective scholarship in the area of comparative law. It is this new posture that has encouraged what I perceive as the greening of socialist law as an academic discipline. 7

Among the many questions that are being asked about socialist law by modern comparativists are the following: 8 when, judged by its taxonomic characteristics, is socialist law an autonomous legal family; should socialist law be considered a part of the Western family of law; what are the intrinsic qualities that make socialist law socialist; to what extent are there differences within the socialist legal family; are there variations in the role of the communist parties in the respective socialist constitutional systems; what is meant by the principle of socialist legality; has socialist law made any original contributions to the con-

7. The principle of analytical detachment in the study of socialist law began to take hold during the late 1970s. By the 1980s, it had gained quite a few converts among Western comparativists. In the late 1960s, there were a few isolated instances in which Western scholars produced genuinely balanced analyses of socialist law. Brilliant examples of this sort of study include: H. Berman, Justice in the U.S.S.R.: An Interpretation of Soviet Law (rev. ed. 1966); J. Hazard, Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States (1969).

8. Arguments on both sides of each of the questions enumerated here are briefly restated in M. Glendon, M. Gordon & C. Osakwe, supra note 5 at 671-964.
cept of law; and, can the legal system of the People's Republic of China truly be characterized as socialist? On these questions, as in any other areas of comparative legal scholarship today, there is no consensus among Western scholars.

There are a few viewpoints, however, that are widely, though not unanimously, shared by comparative law scholars of socialist law. These include the beliefs that (1) despite the fact that socialist law borrowed some of its features from the civil law system, it is fundamentally an autonomous legal family different and distinct from the civil law system; (2) as a system of ideas, socialist law is very much a part of the Western family of law; (3) there are quantitative differences among the respective socialist legal systems even though the Soviet legal system is regarded as the "parent" system within this family; (4) there are shades of differences in the role of the ruling communist parties within the individual socialist countries; (5) socialist law has made many original contributions to the concept of law; and (6) Chinese law qualifies as a member of the socialist legal family even though it manifests elements of pre-revolutionary Chinese legal tradition. The prevailing view among Western deconstructionist students of socialist law is that the principle of socialist legality is fundamentally different from the Anglo-American notion of the rule of law or the principle of Rechtssstaat in German law. There is no majority view on the question of what makes socialist law socialist. The debate on these and other probing issues in socialist law continues.

In an effort to encourage this new spirit of genuine scholarship in the area of socialist law, the Eason-Weinmann Center for

9. The most authoritative study comparing the roles of the ruling communist parties within the individual socialist constitutional systems may be found in RULING COMMUNIST PARTIES AND THEIR STATUS UNDER LAW (D. Loeb ed. 1986).


11. See infra note 13 and accompanying text.
Comparative Law at Tulane University School of Law devoted its eighth annual colloquium to “An Examination of the Unity and Diversity Within the Socialist Legal Family.” The conference was held on October 24-25, 1986. Panelists were picked from across the United States, as well as from three socialist countries, Japan, and Hong Kong to discuss ten specific topics. The invited speakers at the conference were Professor Harold J. Berman of Emory University School of Law, Professor Stanislaw Frankowski of St. Louis University School of Law, Professor Leszek Garlicki of the University of Warsaw Faculty of Law and Administration, Professor John N. Hazard of Columbia University School of Law, Professor Chin Kim of California Western School of Law, Mr. Frankie Leung who is a barrister at law in Hong Kong, Professor Hiroshi Oda of the University of Tokyo Faculty of Law, Professor Zoltán Péteri of the Institute of Legal and Administrative Sciences of the Hungarian Academy of Sciences, Professor Stanislaw Pomorski of the State University of New Jersey (Rutgers) School of Law, and Professor Kresimir Sajko of the Institute of International Law and Relations of the University of Zagreb’s Faculty of Law. The moderators at the conference were Dean Dietrich A. Loeber of the University of Kiel Faculty of Law, Professor Paul B. Stephan of the University of Virginia School of Law, and Professor Christopher Osakwe of Tulane University School of Law.

The ten individual topics addressed three general problems: A Biopsy of the Principle of Socialist Legality; Diversity Within Socialist Enterprise Organization Law: The Search for “Market” Elements Within the Respective Systems; and A Search for the True Identity of the Three Sub-cultures Within the Socialist Legal Tradition. Professors Garlicki, Oda, and Frankowski examined the first problem. The papers by Professors Pomorski, Sajko, and Leung were structured around the second problem. Professors Péteri and Kim were assigned the task of addressing the third problem. Professors Hazard and Berman, the two leading figures in the study of socialist law in the United States, were to be the designated hitters at the conference—both were invited to serve as luncheon speakers. Due to unforeseen circumstances, Mr. Leung and Professor Berman could not attend the conference. What follows is a brief summary of eight essays based on the latter presentations.
INTRODUCTION

In his essay entitled, Constitutional and Administrative Courts as Custodians of the State Constitutions—The Experience of East European Countries, Professor Leszek Garlicki looks at the nature of socialist legality and the extent to which it is protected by the courts. In his opening paragraph, he defines for us what the East European states mean by socialist legality and then goes on to say that socialist legality differs structurally from the Anglo-American notion of rule of law. In his view, these two notions differ because, even though they both subscribe to the idea of the supremacy of law, they hold different views of what is law.

Turning to the question of the role of the state constitution in maintaining legality in a socialist state, Professor Garlicki tells us that such a role is traceable only to recent (beginning with the third decade after World War II) developments in socialist constitutionalism. Prior to that time, socialist constitutions operated as ideological and political documents rather than as direct sources of law. In his view, the socialist constitution, prior to the late 1960s, was treated as an august document that merely declared the fundamental principles of the allocation of power but had no direct application in the lives of ordinary citizens. Accordingly, the ordinary citizen looked to statutes to articulate his basic rights. However, because the notion of judicial review was alien to the socialist system, it was presumed that an act passed by the legislature was ipso facto constitutional. In the view of the author, the mechanisms of political authority constituted an adequate guarantee that the legislature would not enact an unconstitutional statute. In other words, because the political authority is self-policing, it cannot be expected to enact unconstitutional statutes.

In the 1960s, according to Professor Garlicki, the legal significance of the state constitution began to gain some recognition in socialist law. Today, he says, it is a widely held view in all socialist countries that the constitution, by virtue of the fact that it is the supreme law of the land, is superior to any other act of the legislature. While adopting this uniform position, the individual socialist systems have devised radically different procedural mechanisms for enforcing the conformance of ordinary legislations to the supreme law of the land. Among such devices, the author lists judicial proceedings as the foremost. In his opinion, the courts, for the last two decades, have emerged as the
fundamental custodians of individual rights and liberties. He notes, however, that in many socialist states, the court's jurisdiction over such disputes is limited to those in which an individual citizen is a party. This effectively places outside the scope of judicial intervention many controversies relating to the application of the constitution by various state administrative bodies. From this analysis, he draws the conclusion that the mission of the socialist court is to ensure legality for the individual and that the protection of the constitution is ancillary to this mission.

Another interesting point that Professor Garlicki examines in his paper is the gradual resurrection of the notion of judicial review of administrative decisions in individual socialist countries. Prior to World War II, many East European countries, following the models of Austria and Germany, permitted special courts placed outside the system of the regular courts to review decisions of administrative bodies. This practice was discontinued under the influence of the Soviet model which chose to rely instead on the office of the procurator to remedy any administrative wrongs. The politically sensitive process of reinstating the notion of judicial review of administrative actions began in Yugoslavia in 1952. This was quickly followed by similar moves in Hungary (1957), Romania (1967), Bulgaria (1970), and Poland (1980). In these systems, however, the pattern and scope of review differ from one country to another. Remarkably, the Soviet Union still refuses to join this movement even though the provision of Article 58, paragraph 2, of the 1977 USSR Constitution hinted that the issue is undergoing some rethinking. A substantial portion of Professor Garlicki's paper is devoted to an analysis of the differences in the mechanisms for judicial review of administrative actions in Yugoslavia, Hungary, Romania, Bulgaria, and Poland.

The last and perhaps the most politically sensitive issue that is raised in Professor Garlicki's paper is the judicial review of acts of the legislature. He states outright that such a notion is foreign to the legal traditions of East European countries. A limited version of judicial review was vested in the USSR Supreme Court by the Constitution of 1924. This short-lived experiment quickly evaporated with the establishment of the Office of the Procurator General of the USSR in 1933. The timidity of socialist constitutions on this question was broken in 1963 when Yugoslavia created a constitutional tribunal (separate from the sys-
tem of regular courts) and vested it with the authority to review the constitutionality of acts of the legislature.

For quite a long time, no other state dared to follow Yugoslavia along this path. In 1968, Czechoslovakia provided for such a constitutional court in its Constitution. The provision remains on the books, but the institution was never put in place. A 1982 amendment to the Polish Constitution contemplated the establishment of a constitutional tribunal. A 1983 amendment to the Hungarian Constitution also called for the creation of a constitutional council. Both bodies are endowed with the power to review acts of the legislature. Both bodies operate outside the system of regular courts. Both institutions are now in place, thus making Poland and Hungary, along with Yugoslavia, the only East European socialist countries that have courts that can review acts of the legislature for conformance with the basic law.

Professor Hiroshi Oda’s paper is entitled, The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East-Asian States. He begins by defining socialist legality as the principle which requires the strict observance of law by state agencies, government officials, social organizations, as well as citizens. In his view, this principle is unique to socialist countries and must not be treated as being equivalent to the Anglo-American concept of rule of law or the German notion of Rechtsstaat. On this point, he agrees with Professor Garlicki. However, the reasons he adduces in support of his conclusion are different from the ones put forward by Professor Garlicki.

Professor Oda tells us that traditionally the primary agency that was charged with the responsibility to oversee the observance and implementation of socialist legality was the procuracy. The procuracy as an institution of socialist law was first introduced in Soviet Russia in 1922. In recent years, however, some East European countries have introduced other devices for the protection of socialist legality, including the creation of special administrative and constitutional courts which are endowed with the authority to review acts of the administrative and legislative departments of government. In the rest of his paper, Professor Oda describes in great detail the various devices employed in the Asian socialist countries to safeguard legality. In this regard, he notes that the Asian socialist countries that are dealt with in his paper, China, Vietnam, and North Ko-
rea, did not adopt the Soviet notions of general supervision by the procuracy, complaint procedure, and an embryonic form of judicial control.

In section III of his paper, Professor Oda returns to his initial theme, that the principle of socialist legality is fundamentally different from the notions of rule of law in Anglo-American law and Rechtsstaat in German law. To prove his point, he describes the intrinsic features of socialist legality, including the use of the complaint procedure as a method for the protection of legality. He finds this method to be grossly inadequate because the complaint is made to an agency within the executive branch and thus, ipso facto, permits the administration to be the judge in its own case. Second, socialist legality stresses the need for citizens to observe the law at the same time that it calls upon government agencies and officials to obey the law. Professor Oda feels that the constitutions of states that adhere to the concept of rule of law or Rechtsstaat do not address the issue of the obligation of citizens to obey the law. Third, systems that adhere to socialist legality do not have an effective device, notably judicial review, to control the constitutionality of acts of the legislature. Fourth, socialist legal theory does not acknowledge the existence of any fundamental rights which supersede the constitutions as is the case in Western democratic countries. In his analysis he concludes that socialist legality can be and has been subordinated to political expediency.

Each one of these arguments is true with regard to socialist law. But, what Professor Oda fails to note is that all of the flaws of socialist legality that he identified in the foregoing paragraph have corresponding analogues in the laws of many of the Western democracies where the principle of the rule of law prevails. For example, in the French system, the complaint procedure requires that challenges to acts of the administration must be taken to the administrative tribunals and ultimately to the Conseil d'Etat. All of these institutions are integral parts of the executive department of the French government. Also, the French Conseil constitutionnel (the organ which is charged with the pre-promulgation review of acts of the legislature for constitutionality) and the English House of Lords (which serves as the highest court of appeals in England) are structurally a part of the respective legislative bodies. No one has suggested that these agencies are not independent in the exercise of their judicial
functions merely by virtue of the fact that they are structurally integrated into the executive or legislative departments of the respective governments.

Second, although the constitutions of Western democracies do not incorporate provisions on the obligations of citizens to obey the law, these duties are tucked away in other legislations. This is certainly so in the case of the United States. It is conspicuously so in the case of England, which neither has a written constitution nor a system of entrenched statutes pertaining to human rights. It seems to me that it would not be less burdensome on the citizens of a state if their legal duties and obligations are spelled out in the basic law or in constitutionally valid legislations. Third, neither England nor France has a system of judicial review which permits courts to review acts of the legislature for constitutionality. Finally, the recognition of natural law rights of citizens is not a principle of the constitutional law of all Western democracies. American constitutional law, for example, does not recognize natural law rights if such rights have not been selectively incorporated into the positive law of the state. As for the statement that the principle of socialist legality can be violated if it is politically expedient to do so, one needs only remind Professor Oda that in recent American experience the principle of the rule of law did not prevent the political authorities from ordering the internment of Americans of Japanese descent during World War II.12

In an earlier study, Professor Oda resorted to yet another tortured reasoning in order to distinguish the principle of socialist legality from the rule of law by saying that the former, unlike the latter, "is not a meta-legal principle binding the legislative

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the 35-year-old McCarran-Walter Act . . . permits the exclusion of aliens on a variety of vaguely worded grounds, including political beliefs . . . . The law contains no provision for judicial review of a refusal by the Government to issue a visa . . . . [B]oth Democratic and Republican Administrations had invoked the law to exclude writers and political figures with unpopular political views.

power.”13 Such a statement must come as a surprise to any student of English law who is familiar with the principle of parliamentary sovereignty. Under English constitutional law parliament is supreme. There is no principle of law which restricts the power of parliament in English law. Professor Yardley put it even more bluntly. He states:

It is common to say that Parliament may do anything it wishes, that it is supreme. In law this is true, and it is perhaps the most fundamental rule of British constitutional law. The only limitation [on the power of parliament] is not a legal one but that of political expediency.14

English constitutional law recognizes parliament as “all-powerful, for it may do anything [it] . . . wishes.”15 Despite this arrangement the rule of law remains one of the cornerstones of modern English law.

Quite obviously there are structural differences between the principle of socialist legality and the overlapping ideas of the rule of law and Rechtsstaat. However, they do not lie in the examples that are offered by Professor Oda. Professor Oda noted two other differences in his discussion: the legislative process in socialist legality countries is fundamentally undemocratic, and the ruling communist parties in socialist legality countries exercise close control over the procuracy and the courts. With regard to the latter point, however, what matters in determining whether the principle of legality is adhered to is not whether the procuracy is closely controlled by the party, but whether the party itself accepts the notion of the supremacy of law.

The principal fault that I find in Professor Oda’s analysis of socialist legality is that it treats the rule of law as if it had a universally accepted meaning in all legal systems that adhere to that principle. It does not. A leading English jurisprude, Professor David Walker, opines that as a concept the rule of law has “no defined, nor readily definable, content.”16 As an illustration of this point he goes on to say that

[i]n England, as a result of the constitutional struggles of the seventeenth century, in which Parliament and the common

15. Id. at 28.
By contrast,

[in the U.S., the legislative power of Congress is limited in general terms by the terms of the Constitution, including the Bill of Rights, and the ultimate power lies with the Supreme Court which says what, in particular circumstances, the Constitution means and allows or forbids.]

Following the English model the principle of socialist legality, like the concept of the rule of law in England, “implies the subordination of all authorities, legislative, executive, judicial, and other to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process.” In the Soviet Union, as in England, the supremacy of the law has come to mean the supremacy of the legislature which always operates under the moral guidance of the communist party. Agreeing with Professor Garlicki, Professor Walker states that “[a]n important issue in relation to maintaining the rule of law is: what law?” I share this viewpoint and hence submit that in comparing socialist legality with the rule of law, the fundamental question that we should be asking is whether there are radical differences between the meaning of law in both models.

My view is that the meaning of law in the modern Soviet system is much closer to the English notion of law and that the

17. *Id.*
18. *Id.* at 1094.
19. *Id.* at 1093.
20. *Id.* at 1094.
21. Elsewhere I have argued that the principle of socialist legality, even though it operates in a different legal culture and therefore has its own institutional peculiarities, is functionally similar to the notion of the rule of law in English law. See, Osakwe, *The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System*, 21 Tex. Int’l L.J. 1, 10-12 (1985).
Soviet notion of socialist legality is functionally equivalent to the English notion of the rule of law. The Soviet state may not be a Rechtsstaat like Germany or the United States. Neither is England. Soviet law may not have a system of judicial review like those of Germany and the United States. Neither does England. The inescapable point, nevertheless, is that modern Soviet law is solidly anchored in the notion of the supremacy of law a' la Anglais. It goes without saying that the notion of the rule of law in England is structurally different from the similarly designated principle in American law as well as from the German idea of Rechtsstaat. All of these meta-legal principles—English rule of law, American rule of law, German Rechtsstaat, and Soviet socialist legality—are species within the same genus. In addition to all of the foregoing argument, one other demonstrable evidence of the rule of law in the Soviet Union is the delictual liability of the State.

Professor Stanislaw Frankowski's paper looks at The Procuracy and the Regular Courts as the Palladium of Individual Rights and Liberties—The Case of Poland. He sets the theme for his analysis in an opening paragraph in which he asserts that individual rights and liberties cannot be analyzed in a political vacuum since their substance is determined by the socio-economic and political conditions that prevail in a given society at a given historical period. He notes that the whole post-war history of Poland manifests a tension between two models of government. The first is represented by the Western ideas of liberal democracy coupled with the teachings of the Roman Catholic Church, and the other is derived from the Marxist-Leninist ideology.

The first model, according to Professor Frankowski, provides that man is endowed with certain inalienable rights which exist independent from state power, that these rights are subjective in nature, and that these are rights of citizens against the state. This model, the author admits, has never been given a chance to be tested in post-war Poland. By contrast, the second model operates on the assumption that no conflict exists between the state and the individual, that the basic rights of citizens are those that are enshrined in the constitution. This model further assumes that no enforcement mechanism is needed for these constitutional rights because the interests of those who govern and those who are governed overlap. Under this model,
the role of law is not to limit the state power but, to the contrary, to strengthen and develop the existing political and social economic order. Under this model, according to the author, there is no rule of law. Rather, there is a notion of rule by law. In effect the author equates the principle of socialist legality with the idea of rule by law but not of law. Citing Professor Brunner approvingly, the author states that a communist state is not a Rechtsstaat, but a politischer staat. In Poland this second model of government is in effect.

Operating from this conclusion, the author goes on to say that Polish constitutional rules are not intended to recognize or confer any enforceable rights to the citizens but are meant to express purported policy goals; nor are they meant to be self-executing but must be given concrete substance by subordinate legislation. For this reason, the author thinks that the constitutional foundations of citizens' rights and liberties are rather shaky. Turning to the question of the role of the procuracy and the courts in the protection of the constitutional rights of Polish citizens, Professor Frankowski notes that neither of these institutions can be trusted to discharge this function effectively. He views the procuracy as an instrument of the regime, not of justice. He finds the courts too subservient to their political masters.

In his piece entitled, The Future of the State Enterprise and the "Restructuring" of the National Economy in the USSR, Professor Stanislaw Pomorski offers a sober assessment of the state of the Soviet economy. He starts off by drawing attention to the current campaign by Comrade Mikhail Gorbachev to restructure the Soviet economy. A new economic enterprise law is promised by the Soviet leadership. Until that law is unveiled, one can only judge the future of Soviet economic reform by its track record during the past 20 years. Professor Pomorski reviewed that record in his paper and concluded that it does not hold too much hope for the future.

Professor Pomorski feels that the key to any meaningful reform of the Soviet economy is its decentralization. In the past, the author states, some crumbs of authority were reallocated from the all-powerful ministries to the enterprises. But in practice, however, even these pathetic crumbs were wrestled back from the enterprises by their administrative superiors. Thus, ac-
cording to Professor Pomorski, reforms without change have become a new Soviet invention.

Turning to the issue of what one can expect from Comrade Gorbachev, Professor Pomorski notes that there are two schools of thought in the West on that issue: one school views Gorbachev as a radical reformist who is inclined to change the system; the other views him as a conservative rationalist who merely plans alterations within the system but wants to preserve its essential traits. Professor Pomorski says that he has seen nothing yet in Gorbachev’s record of actual performance so far to indicate that he is a “socialist marketer.” His conclusion is that, regardless of which school of thought turns out to be correct, the situation of the socialist enterprise in the Soviet Union will not change significantly in the foreseeable future. There are, he says, good historical reasons to be skeptical about genuine economic reforms in the Soviet Union.

Professor Kresimir Sajko’s paper looks at Enterprise Organization of East European Socialist Countries—A Creative Approach. In it he reviews some of the recent reforms in the economic laws of East European systems. As a historical background to his analyses, he lists the following features among the landmarks of the first generation of the economic laws of all the countries in question: nationalization of private companies, introduction of a centrally planned economic system, creation of state-owned enterprises, and the superimposition of a state planning body over these enterprises. In the early 1950s, Yugoslavia became the first socialist country to defy this orthodox model. She was followed at a later stage by Hungary and Poland. In the view of Professor Sajko, the process of reorganization of the national economy is continuing at varying degrees in other East European countries. In the remaining parts of his paper, the author focuses on the three most interesting current socialist experiments in economic reform: Hungary, Poland, and Yugoslavia.

He notes that in Hungary and Poland the state enterprise continues to play the leading role in the economic life of the system. In Hungary, for example, state enterprises account for seventy percent of the gross national product. In Yugoslavia, by contrast, the centrally planned economic system has given way to a new model which relies on the concepts of workers’ self-
management and social ownership. The author provides a fascinating analysis and comparison of all three models.

Professor Zoltán Péteri's paper, entitled The Reception of Soviet Law in Eastern Europe: Similarities and Differences Between Soviet and East European Law, treats Soviet law as the "parent" system within the legal family and then goes on to examine the indigenization process to which that law has been subjected in the respective countries of Eastern Europe. He starts by noting that East European law can no longer be automatically equated with Soviet law because there are significant, quantitative differences between both laws. This latter fact, he says, is now generally acknowledged in the literature of socialist countries.

His paper moves on to a discussion of the criteria used in the classification of laws into legal systems. He reviews the various criteria put forward by different European and American scholars including Rene David, John Hazard, Harold Berman, G. Eorsi, L. J. Constantinesco, A. Pizzorusso, K. Zweigert, Christopher Osakwe, and Lloyd Hampstead. In the final analysis, he disagrees with those who classify socialist law as a member of the Western family of law. In his view, socialist law has some similarities to Roman-Germanic law. However, these similarities relate to the secondary features of socialist law. A closer look at the core of socialist law, according to Professor Péteri, soon reveals that it is essentially a new type of law. It is, in his view, fundamentally different from the law that was in existence at the time of its inception during the first years of the October Revolution in Soviet Russia. In short, socialist law is anything but Western. Turning to the issue of the reasons for the variations within the socialist legal family, he attributes them to differences in the historical and present developments in each of the member states. He devotes the rest of his paper to a detailed examination of these differences.

Professor Chin Kim's paper provides a general profile of the Modern Chinese Legal System. It begins by noting that the People's Republic of China existed for three decades following the revolution of 1949 without any comprehensive set of codes. As a result of this fact, the study of Chinese law during the period from 1949 to 1979 was hampered by the unavailability of normative materials. It was only in 1977 that the Chinese leaders considered the establishment of a legal system to be a task for the immediate future. As a result of this awakening to the
need for a more formalized legal system, a series of basic codes has been enacted in China. New and revised laws and regulations are being adopted in a number of areas.

Professor Kim notes that the period from 1954 to mid-1957 was the height of China's legal development. During this period, considerable progress was made in the creation of the Chinese legal order. This new legal order was primarily patterned after the Soviet and East European models. This trend was interrupted by the anti-Rightist campaign that began in mid-1957. According to Professor Kim, the years from 1966 to 1976—the period of the so-called Cultural Revolution—marked the dark age of legal development in China.

In the remaining portions of his paper, Professor Kim examines the similarities and differences between modern Chinese law and Soviet law. To do so, he focuses on the following aspects of the Chinese legal system: constitutional law, Marxism-Leninism and Mao Zedong thought, independent judiciary and the Communist Party, trial and procuratorial committees, legal actors, traditional law, mediation, provisional and experimental law, marriage law, criminal law, law of civil and criminal procedure, civil law, and economic law.

The author notes that whereas the 1982 Chinese Constitution refers to China as a dictatorship of the proletariat, the Soviet Constitution of 1977 refers to the USSR as a state of the whole people. In my view, this merely supports the Soviet claim that the Soviet state is more advanced on the road to communism than is China. We should not forget the fact that the previous USSR Constitution of 1936 also referred to the Soviet State as a dictatorship of the proletariat. In other aspects of the modern legal system, Professor Kim suggests that Soviet law manifests a higher level of sophistication by comparison with its Chinese counterpart. For example, the 1980 Chinese Criminal Code still embodies the concept of crime by analogy that was repudiated in Soviet law soon after the death of Joseph Stalin in 1953. The modern Soviet Criminal Code carefully delineates among such crimes as treason, espionage, sabotage, anti-Soviet propaganda, and agitation. The Chinese Criminal Code, by contrast, embraces all of these crimes under one category as counter-revolutionary crimes. In all the other major categories involved in this comparison, Chinese law essentially follows the Soviet model.
INTRODUCTION

On a few minor details, however China seems to have done some things differently. For example, in China, unlike the situation in the Soviet Union, the procuracy does not have the power of general supervision over legality in relation to state organs; lawyers are classified as state employees and as such are guaranteed a minimum salary by the state; part-time lawyers are admitted to the practice of law; Professor Kim’s overall conclusion is that Chinese law is undeniably a member of the socialist legal family, albeit with a touch of pre-revolutionary Chinese traditional law.

During the luncheon, Professor John Hazard took the podium to share with the conference participants his reflections on Socialist Law as an Academic Discipline. He began by noting the traditional skepticism and outright hostility that many years ago was generated by any mention of a course in comparative law to a curriculum planning committee at any American law school. Today, however, that distrust seems to have abated, and comparative law scholars are engaging themselves in some of the deeper philosophical issues in comparative law as an intellectual discipline. Among the problems that currently confront comparativists, Professor Hazard listed the following: the need to take into consideration the cultural underpinnings of legal systems, to limit the comparison of laws that share a common cultural heritage, and to avoid the temptation to transform the comparison of laws into the comparison of civilizations.

Turning to the question of the classification of laws into legal families, he cited approvingly Professor Rene Rodiere’s conclusion that socialist law is a member of the Western family of laws because it rests on a millenial-old Christian base. He further pointed to some of the striking similarities between socialist law and the civil-law system. For this reason, he noted that European students have little problem adjusting their thinking to a socialist-oriented legal system.

He particularly warned teachers of socialist law not to confine the subject matter of the course to just the law of East-West trade. This is a great temptation for the teacher who wishes to make his course relevant to the law school mission of teaching only “bread and butter” courses. The socialist law teacher, according to Professor Hazard, should also see himself as preparing the students for statesmanship in a world that is now concerned with etatisation. He summed up his message by saying
that for him at least the future of socialist law as an academic discipline lies in its potential for raising what seems to him to be the primary issue for lawyers and statesmen of our time. That issue, in his view, cannot be reduced to just the nuts and bolts of East-West trade law. It is much more than that. It was indeed refreshing to hear the 

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of American scholars of Soviet law urge his younger colleagues to look beyond the pocket-book aspects of socialist law and concentrate instead on the rigorous intellectual inquiry into the changing nature of that law.

I am deeply grateful to the editors of the Tulane Law Review for editing and publishing these symposium essays. It is hoped that those who could not attend the conference will be able to share the insights into socialist law, which these distinguished scholars hereby offer to the readers of the Review. May the readers of these essays view them as our lasting contribution to the greening of socialist law as an academic discipline.