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WHAT MAKES SOCIALIST LEGAL SYSTEMS SOCIALIST?

Abstract. The author re-examines in this article the foundations for the traditional classifications of legal systems in comparative legal studies and suggests the usefulness of a kaleidoscopic perception of legal classifications and change, commencing from the revolutions of 1917 down to the present with special reference to the enduring impact on Asian legal systems. China, Mongolia, Vietnam, and Laos, together with Cuba and Ethiopia, are arguably the surviving systems of the socialist legal tradition – few in number but massive in population. Various perspectives are suggested for classifying legal systems. None are regarded as mutually exclusive; that is, a single national legal system may display features of several familial characteristics. A substantial list of possible characteristics of socialist legal systems is given, as is a lengthy enumeration of possible categories of families of legal systems: socialist/totalitarian, technocratic, formalist, transitional, Romano-Germanic, mixed, Slavic, Eurasian, among others.

With respect to Asian socialist legal systems, the article asks whether it is descriptively and analytically more correct to, for example, describe China as a "socialist legal system with Chinese characteristics" or a "Chinese legal system with socialist characteristics". In either event, or a modification of the juxtaposition, the question remains: what factors make China one or the other? Whatever the answer at any given moment in time, a kaleidoscopic perception of legal change and movement looks less for eternal verities than for constant readjustment, constant re-evaluation of the balance of factors that comprise a legal system, and the development of additional relevant criteria that help identify the forces at work in legal development.

Keywords: socialist legal system, totalitarian, technocratic, formalist, transitional, Romano-Germanic, mixed, Slavic, Eurasian, China, Mongolia, Vietnam, Laos, Ethiopia, Cuba, classifications of legal systems, legal family.

The question embedded in the title above[1] has a venerable history in twentieth century political philosophy, comparative law, socialist legal studies, and other elements of the social sciences. At one time the question perplexed

[1] The title is deliberately purloined and adapted from a "symposium" instituted by the late A. Brumberg (1925-2008) in the USIA journal *Problems of Communism.* Among the contributors were H. J. Berman (1918-2007), J. N. Hazard (1906-1995), and L. Lipson (1931-1996). See note 20 below.

a Bolshevik leadership that unexpectedly found itself ruling the former Russian Empire: demolition of the pre-existing legal order was one matter; whether to replace it with something else was another. Marxism-Leninism provided no blueprint for the role of law or legal system in a post-revolutionary society. That question became pertinent to "Asia" sooner than many anticipated: Central Asia, Mongolia, and then China (Chinese Soviet Republic, 1931–1934). What were the ruling authorities on these territories expected to abolish and/or introduce in order to commence the sequence of social change needed to achieve socialism and eventually communism?

More recently the question has acquired an elevated ideological cachet. In China it has been accepted for some time that China has a socialist legal system with "Chinese characteristics" – whatever precisely those may be. In October 2017 the XIX Congress of the Communist Party of the People's Republic of China formally embodied that characterization in the Constitution, or Charter, of the Communist Party.

The question is therefore multi-dimensional. At one level it was and remains a prescriptive policy issue: what in the legal fabric comprises those elements that distinguish a socialist legal system from a non-socialist legal system and when and how should those elements be introduced? For those intent upon achieving a "socialist revolution", what precise measures need to be introduced, and in what sequence, to achieve "socialism" – however defined – or "communism". At another level this is an analytical category: in the domain of comparative law, for example, on the basis of what criteria do we distinguish a "socialist legal system" individually or as part of a "family" from all others? At yet another level, partly geopolitical, the question arises as to what is "Asia" for these purposes: Russia sees itself as a "Eurasian" power. There are conceptions of Asia that regard all territory from the Atlantic Ocean in the west or all territory eastward of the Polish frontier as Asia and much of what others classify as the "Near East"[2].

For the moment the tides of history have transformed the geographical locus of socialist legal systems from the former Soviet Union, Mongolia, and Central Europe to Asia and outlying continents (from an Asian perspective). Socialist legal systems proper now occupy an Asian heartland (China, Korean People's Democratic Republic, Vietnam, Laos)[3], a Caribbean island (Cuba), and

[2] The "land of Eurasia" is seen in this light by geographers: 'Eurasia, the largest of the continents <…> spans the globe from the tropics to the tundra (c.10°-c.70° north)', and from the Atlantic to the Pacific. See: Barry Cunliffe, *By Steppe, Desert, and Ocean: The Birth of Eurasia* (2015) 4-5.

[3] H Glenn, *Legal Traditions of the World* (5th ed, 2014) 348. In his section entitled "Socialist Law in East Asia", Glenn took the position that '<…> the tradition of socialist law, in its Soviet or European variant, has gone into a state of suspended animation, surviving only in partial or attenuated form in currently communist-governed jurisdictions such as Cuba, North Korea or Vietnam' (pp. 347-8). Note the omission of China.

an African nation (Federal Democratic Republic of Ethiopia)[4]. Six countries in number only, but in population exceeding 1.7 billion persons and in territory occupying a substantial land mass. Some comparatists, moreover, would doubt whether the former Soviet republics have introduced sufficient change to necessarily be excluded from the socialist family of legal systems (raising in a different context the classification criteria), or to be classified as "transitional legal systems" from the socialist to another family as yet undetermined, or to have moved irrevocably into the Romano-Germanic family of legal systems. On this basis the status of the five Central Asian countries[5] (Kazakhstan, Kyrgyzia, Tadzhikistan, Turkmenistan, and Uzbekistan) and Mongolia is in question.

On a more general level it should be emphasized, in the present writer's view, that the purpose of classifying and grouping legal systems is not an end in itself, nor is it necessarily a description of fact. Rather, it is a kaleidoscope through which, from constantly differing angles of vision, it is instructive to view legal systems in their development and continuous interaction with one another. In the case of socialist legal systems, the emphasis upon characterization and classification has sometimes been an ideological fetish, which is hardly productive in an academic comparative legal context – although the dialogue itself can be instructive.

Nonetheless, although the classification of legal systems is not as trendy in comparative law these days in the West, in the post-Soviet Independent States classification remains an important issue. For some it is a measure of progress – the distance traveled from the Soviet legal model since 1991. For others, however, the very exercise of classification – whatever the result – is central to jurisprudence. Law is a science. Scientific phenomena need to be identified on the basis of their generic characteristics, their similarities and differences from one another noted and described, grouped into generic units or families or clusters, and the like based on these similarities and differences, and generalizations made or conclusions drawn. Law, just as any other science, is expected to behave accordingly, and the data accumulated is regarded as hard fact. Our legal colleagues in post-Soviet legal systems are nurtured in this tradition, and their comparative-legal mentality is shaped accordingly. For them, "families" of legal systems are not an analytical prism or a metaphorical kaleidoscope; they are a scientific conclusion based on the deployment of the comparative method.

[4] See: S Abebe, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia* (2014): Ethiopia is '<…> fundamentally a socialist federal system based on the Stalinist notion of 'the right to self-determination of nationalities' and Marxist-Leninist organizational principles of the state' (p. 2).

[5] See: A Saidov, *Comparative Law* (transl, W E Butler (2000) 379: 'The contemporary legal system of Uzbekistan is characterized above all by its affiliation to the Romano-Germanic family. The formalized, rather abstract legislative norm predominates there over other legal sources and there is a trend towards replacing them completely'. On constitutional law in Central Asia, see: Newton S, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (2017), reviewed in Journal of Comparative Law, XIII (2018) 223-32.

On the Origin of Multiple Socialist Legal Systems

To play with the pawns on the board for the moment, at what point in time is it appropriate to speak of multiple legal systems in connection with the emergence of others besides the former Soviet Union and when, if at all, did some or all become "socialist"? The "revolution" that has served as the benchmark occurred in the former Russian Empire during October/November 1917 (depending upon what calendar is used), being ruled at the time by a Provisional Government – the monarchy having abdicated earlier that year. Within months the former Empire had fragmented into units associated historically with their own legal traditions and systems – some supplanted by Russian law and others coexisting within the Russian Empire and allowed to continue to operate side by side with Imperial Russian law. Therefore, multiple legal systems operated within the Russian Empire (customary law, canon law, khanate law, local civil and administrative law (e.g., the Baltic provinces), Imperial law of general application, and others). Moreover, the Union of Soviet Socialist Republics (USSR) itself did not come into being prior to 30 December 1922, when the Treaty of the Union was concluded. The Treaty of the Union initially engaged four soviet socialist republics, each with its own national legal system: Belorussian SSR, Russian Soviet Federated Socialist Republic (RSFSR), Transcaucasian Soviet Federated Socialist Republics (TSFSR), and the Ukrainian Soviet Socialist Republic. The TSFSR was short-lived and soon thereafter disintegrated into its three constituents: Armenian Soviet Socialist Republic, Azerbaidzhan Soviet Socialist Republic, and Georgian Soviet Socialist Republic.

Viewed, therefore, solely from the vantage point of international law and constitutional law, multiple socialist legal systems existed from the outset; several, after five years, "merged" into a supranational federation known as the USSR. Prior to 30 December 1922, it would have not been inappropriate to already speak of a "family of socialist legal systems", or at least a "family of soviet legal systems", who were, sharing a common ideology, bent upon distinguishing themselves from the rest of the world and proceeding collectively upon their chosen path of building a communist society. Whether other legal systems would join them was at the time an open but real question. There were episodic revolutions in Hungary, Germany, and China[6], and an enduring revolution where it was least anticipated – Mongolia[7]. Each, however briefly, had to come to terms with legal change occasioned by their accession to power. And insofar as two or more national legal systems can be said to constitute a

[6] W Butler (ed), *The Legal System of the Chinese Soviet Republic* (1983).
[7] See: W Butler, *The Mongolian Legal System* (1982).

"family", there is a strong argument that a "family" of socialist legal systems has existed from late 1917 onwards.

That argument in comparative law circles, at least, was deemed to be beyond doubt after the Second World War. The Central European countries were all viewed as being members of the family of socialist legal systems (German Democratic Republic, Poland, Romania, Czechoslovakia, Hungary, Romania, Bulgaria, Albania, Yugoslavia), together with what today are widely regarded as the residual socialist legal systems (China, North Korea, Vietnam, Laos, Cuba, and Ethiopia). The fact that some were designated a "people's democracy" and others a "socialist republic" in their official names was for these purposes treated as a minor detail rather than a distinction of comparative legal significance. The period from roughly 1946 to 1991 was the apogee, numerically speaking, for the family of socialist legal systems.

The post-1991 period has raised new conundrums in this context. The Central European countries began to follow their own paths from the late 1980s. The German Democratic Republic reunited with the Federal Republic of Germany and has been reintegrated into the German legal system. Czechoslovakia divided into the Czech Republic and Slovakia, and both joined the European Union, thereby importing a massive corpus of European Union law. Bulgaria, Hungary, Poland, and Romania likewise were admitted to the European Union. Yugoslavia fragmented into constituent entities, all of which either joined or intend to become part of the European Union. Albania has pursued its own course amidst these changes, but with sufficient autonomy so that she is no longer regarded by most observers as a socialist legal system. In the Far East, the Mongolian People's Republic introduced political and economic reforms to a degree that suffices many observers to consider that country to be no longer a socialist legal system, although some would contest that generalization.

On the other hand, the dissolution of the USSR on or about 25 December 1991[8] completed the process of enlarging the "family" of "transitional" or, some would say, still "socialist" legal systems. The Baltic republics (Estonia, Latvia, Lithuania) saw their independent statehood restored from 1989 onwards. The remaining twelve Soviet republics achieved uncontested independent statehood with the denunciation of the 1922 Treaty of the Union in December 1991; whether they remain part of the "family of socialist legal systems" or are to be regarded as part of a "family of transitional post-socialist legal systems" or something else remains the subject of lively consideration. If the concept of transitional post-socialist legal systems is pursued seriously, the implication is that a new family of legal systems exists side by side with the earlier models.

[8] For the relevant documents, see: W Butler, *Basic Documents of the Russian Legal System* (1993) 3-11; id, *Russian Public Law* (3d ed, 2013) 1-3.

On the Arrival of Socialism: Legal Criteria

When and on the basis of what criteria the legal systems concerned were or are deemed to have reached the stage of "socialism" is a question that has bedeviled comparative lawyers, among others, from time to time. No legal system is regarded as having moved from the category of "bourgeois" to "socialist" in one jump or transition. Rather these systems are expected to have passed through intermediate stages, such as "people's democracy", or "proletarian dictatorship", and the like. For the purposes of this article these intermediate stages are being, as a rule, enveloped into the designation "socialist". It would be possible and not inappropriate to consider subdividing acknowledged socialist legal systems into "people's democracies" and "socialist republics", but for whatever reasons this approach has never commended itself to comparative lawyers. We have been content to lump together people's democracies and socialist republics for classification purposes even though the ideological distinctions were recognized at the time.

The processes of "transition" and how to achieve the transition are challenging issues. Some have argued that transition "back" from a "socialist legal system" to being a "Romano-Germanic legal system" is a matter of reverse social engineering. Just as the movement from being a "bourgeois" legal system to becoming a "socialist legal system" is "merely" a matter of removing the bourgeois elites from power, nationalizing the instruments and means of production, introducing the leading role of the Communist Party or other political entity leading the revolution, repealing and replacing "socialist" legislation with "market economy legislation", and the like, translating from a socialist legal system to a market-economy legal system simply means reversing the process[9]. Although no one known to this writer has expressed the position in precisely this way, the argument is reminiscent of a mechanical perception of legal transplants, pursuant to which legal change is achieved by substituting one "part" or "component" of a legal system with another.

[9] See: Glenn (n 3) 348:

> If you are a western lawyer with no previous experience of Soviet or socialist law, there are no major conceptual problems in understanding it. Simply assume a hyper-inflated public law sector in the jurisdiction in which you presently function. Historical fields of private law such as contract, commercial law, civil responsibility or torts, property, bankruptcy or competition simply shrink away to relatively insignificant proportions, to be replaced by public law variants or replacements. State contracts <…> largely displace private contracts; private commercial law and bankruptcy become essentially irrelevant; public compensation regime replace, almost totally, court-ordered compensation; land is made public or collectivized. There need not be repeal of existing private law; it simply finds little application. This public law regime relies intensely on formal law, which is even more visible than in non-socialist western law. It is formal law with a difference, however, since its application is entirely in the hands of the guardian of 'socialist legality', the communist party, which exercises its influence through an entire network of organizations, shadowing those of the state and the courts. Judicial decisions, of allegedly independent judges, are subject to party control and revision. The inherent western tendency to corruption, through the creation of large, instrumental bureaucracies, is exacerbated enormously.

For those experienced with law reform in the post-Soviet legal systems, no approach could be more harmful[10].

"Transition" is not necessarily, however, back to what existed previously. If that were the case, the appellation "transition" may be inappropriate; "restoration" or "reinstatement" may be what is desired. Part of the post-Soviet transition in the Baltic republics has been precisely a process of "restoration", including the reintroduction into force of laws dating from the interwar period that were succeeded by Soviet legislation. The term "transition", moreover, suggests movement from one place to another, or one phase to another, or from one destination to another. The "destination" of the movement away from the socialist legal model is, at least in the post-Soviet republics, undetermined. All acknowledge that the previous system was unsatisfactory; no one known to the present writer has defined where these legal systems wish to go or the criteria that determine whether and when arrival has transpired.

That in turn raises the issue of comparative law: what makes a socialist legal system "socialist"?

What Makes a Socialist Legal System "Socialist"?

So far as can be determined, this was not a question that arose, at least in comparative law circles, prior to the end of the Second World War. Whatever may have been said above about multiple socialist legal systems, this was not a perception pursued in comparative legal studies, where notions of "families" of legal systems, or equivalents thereto, did not single out those in which communist parties had come to power.

Without ascribing primacy of place, among the works that popularized the notion of a family of socialist legal systems was a treatise by René David (1906–1990) on the major legal systems of the world[11]. In due course this led in general comparative studies to attempts to locate the "common core" of the socialist legal systems – what they shared in common, notwithstanding the differences amongst them. That shared commonality presumably

[10] So far as I am aware, the most profound attempt to structure law reform priorities and to seek to determine precisely in what branches of law any such "reverse engineering" should commence was a Report undertaken for the European Communities. See: *Shaping a Market-Economy Legal System: A Report of the EC/IS Joint Task Force on Law Reform in the Independent States* (1993).

[11] R David, *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative* (1950). This was followed four years later by a two-volume work, the first volume by David, Le droit soviétique (1954) and the second a French translation of John N. Hazard (1909-1995), *Law and Social Change in the U.S.S.R.* (1953). These were drawn upon for David's magisterial and still influential, especially in Central Europe and the former Soviet Union, *Les grands systèmes de droit contemporains (droit comparé)* (1964); translated by J. E. C. Brierley, as *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* ([1968]; 2d ed, 1978; 3d ed, 1985), based initially on the second French edition. The French text is now in its eleventh edition (2002), as revised and updated by Camille Jauffret-Spinosi, who joined from the eighth edition (1982).

differentiated them collectively from other families of legal systems[12]. In the domain of socialist legal systems, the common core approach was most extensively pursued by Hazard[13]. Not all comparatists accepted that socialist legal systems constituted a distinct family separate from the Romano-Germanic legal family, at least in the realm of private law – notwithstanding strenuous Bolshevik efforts to establish the Soviet legal system as something unique among all existing and previous legal systems. Reviewing Hazard's work, A. Ehrenzweig (1906–1974) observed that if the Soviet legal system could validly be segregated as unique in the traditional realm of private law, he would be obliged "to abandon the philosophical pattern of two and one-half millennia and the comparative concern of a thousand years". Although there might well be innovations in public law, he considered that the "essentially civilian structure" in the law of the family, property, succession, contract, and tort remained unchanged, and he perceived only minor changes in established European patterns of criminal law and procedure[14].

Others suggested that the Soviet legal system was merely a variant of the European Romano-Germanic civil law system embellished with ideological encrustations[15]. This view continues to be widely held in two versions. To some, Russia never left the Romano-Germanic family, having entered at some point in the past (usually seen as the tenth or the eighteenth century), whereas for others the disintegration of the former Soviet Union itself returned Russia to the Romano-Germanic family[16]. Both positions minimize the Soviet legacy as unimportant, of little long-term consequence, or business as usual. Those who truly do know and understand Soviet law will have found the post-Soviet quarter century enormously challenging, for the efforts to "democratize" and to "marketize" the Soviet legal legacy have proved to be a formidable task that goes far beyond merely the rejection or replacement of "forms" or "mentality", and the importation of legal transplants from market economies.

[12] Among the works that influenced the quest for a common core was Rudolf Berthold Schlesinger (1909-1996), *Formation of Contracts: A Study of the Common Core of Legal Systems* (1968).

[13] Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* [1969].

[14] See: Ehrenzweig's review of Hazard, *Communists and Their Law (1969), (1970) LVIII California Law Review* 1007.

[15] F Lawson (1897-1983), cited in the preface to J Hazard and W Butler and P Maggs, *The Soviet Legal System* (3d ed, 1977) vi. This section of the present article draws upon my earlier reflections on the subject. See, in particular, W Butler, *Russian Law and Legal Institutions* (2d ed, 2018) 1-21; id, 'Ukraine on the Legal Map of the World', in V Tatsyi and Petryshyn O (ed), *Ukrainian Legal Doctrine* (Butler W English version transl and ed, 2015) I, 179-90.

[16] See, for example, J Quigley, *Soviet Legal Innovation and the Law of the Western World* (2007). A Ukrainian jurist wrote that with the collapse of the "socialist commonwealth of countries" of Central and Eastern Europe '<…> the 'family of socialist law' completely disappeared, which in the view of many western and Ukrainian comparatists comprised a specific block of national legal systems of countries rather proximate in geographical position and socio-economic and political orders, but heterogeneous according to national, cultural-historical, and ethno-legal indicia'. See: M Koziubra, 'The Legal System of Ukraine: Quest for Identity' in Butler W and Kresin O (eds), *The Interaction of Legal Systems: Post-Soviet Approaches* (2015) 226. This observation was made without any regard to Asian socialist legal systems.

The accumulated wisdom from this era is of considerable relevance for modernizing Asian socialist legal systems.

As for Soviet jurists themselves, they were quite adamant that the Soviet legal system was the core socialist legal system and that in its capacity as a socialist legal system, the Soviet legal system was demonstrably different from and superior to all pre-existing or other extant legal systems.

Many western comparatists found themselves somewhere in between these two polarized positions. They accepted that the Soviet legal system was different and not part (or no longer part) of the Romano-Germanic legal family, were disinclined to accept Soviet claims to superiority, but differed, often dramatically, in their perceptions as to what was different and, most importantly, why such differences existed. Perceptions of uniqueness in the classification of foreign legal systems depend partly upon developments within our own. René David was among those, for example, who in the early post-1945 era attributed significance in analyzing Soviet law to the differences in economic system between East and West and observed the replication of national economic planning in Central Europe and China and greater reliance upon the same in Mongolia. By the mid-1980s the enhanced role of the State and greater commitment to social welfare in Western economies and further recourse to decentralization and economic accountability in enterprise management in socialist economies had reduced a distinction initially seen as one of principle to one of degree[17]. The policies of perestroika introduced under M. S. Gorbachev reduced and mutated the elements of distinction all the more. The accession of many of the post-Soviet and Central European jurisdictions to the Council of Europe and the accession of most socialist legal systems, former or present, Asian or European, to the World Trade Organization have entailed further legal accommodation to a common human rights and (or) trade regime and introduced greater legal approximation in consequence.

"Transition" seems to be a constant in any discussion of socialist legal systems. Marxist-Leninists have taken the position that "socialism" is an intermediate and transitory status between imperialism as the highest stage of capitalism and the creation of a communist society. Post-Soviet comparatists, or at least a substantial cohort of them, consider that former socialist legal systems, if no longer socialist, fall into some transitional category as the move on to another status, whatever that may be. Some regard this status as a return to the Romano-Germanic family (assuming they were part of that family), although that is a novel status for the Central Asian, Caucasian, and Mongolian legal systems. Yet others, including the present writer, see "transitional" as a position in itself – a species of mixed legal tradition (rather than system) that incorporates substantial key elements of the socialist legal

[17] Compare David (1950) (n 9) with the Brierley translation (1985) (n 7).

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system with others which originate in the presocialist past of the legal system concerned or in adaptations of modern market-oriented mechanisms. The Zweigert/Kötz treatise on comparative law, which had treated socialist legal systems as a distinct family, was obliged in its third edition to omit the chapter completely – an enduring symbol of the lacuna left in comparative legal circles by the collapse of the former Soviet Union[18]. In a sense this article and the Conference to which it is addressed ask whether Asian socialist legal systems might appropriately fill the gap left by the disintegration of the Soviet Union.

Before proceeding to the common core of socialist legal systems, if such there be, it is appropriate to observe that there have been at least three distinct dialogues about the nature and distinctiveness, or lack thereof, of Soviet/socialist legal experience. One addressed "Stalinism" and asked whether it was possible to isolate and identify what was distinctively "Stalinist" about Soviet law in comparison with the post-Stalinist period[19]. A second dialogue asked what was distinctively "Soviet" about Soviet law, in essence a microcosm of the issue now being raised with respect to Asian socialist legal systems[20]. The third, alluded to above, inquired whether there was a common core that distinguished socialist legal systems as a family and differentiated them from other families of legal systems – chiefly the Anglo-American and Romano-Germanic families[21].

The Russian science of comparative law – still greatly attracted by the concept of "families of legal systems"[22] – remains divided as to whether Russian law (and presumably other CIS legal systems) is within or outside the Romano-Germanic legal family. Some comparatists consider this to be so, others do not. Many see Russian law as falling within the category of "transitional" legal systems whose ultimate destination, for comparative law classification purposes, remains as undetermined as it is uncharted[23]. Some recognize that Russia and other CIS countries may become "hybrid" legal systems[24]. Glenn

[18] K Zweigert and H Kötz, *An Introduction to Comparative Law* (Weir T transl, 3d ed, 1998). Even in the second English edition (1992) the authors had cautioned: 'Today, however, the very existence of a socialist legal family is seriously in question' (p. 297).

[19] See: D Barry and G Ginsburgs and P Maggs, *Soviet Law After Stalin* (1977-1979) 3 vols. The specific legal component(s) in a "totalitarian" State and its legal system could not be satisfactorily isolated and identified. In particular, it has been difficult to identify uniquely totalitarian elements of law and legal systems which cannot be otherwise described (authoritarian, dictatorial, and so on). Although examples of "totalitarian" legal systems cited in the literature happen to be associated with a particular ideology, the presence or absence of an ideology does not appear to be decisive. The "seeds of totalitarianism" have been traced as far back to China in 210 to 258 bc. See: В Лафитский, *Сравнительное правоведение в образах права, т II* (2010-2011) 394.

[20] See: H Berman, 'What Makes Socialist Law Socialist?' (1971) 5 Problems of Communism XX 24-30.

[21] Hazard (n 13).

[22] For recent examples, see: В Чиркин, *Основы сравнительного правоведения* (2014); В Власов и Г Власова и С Денисенко, *Сравнительное правоведение* (2014).

[23] See the Uzbek jurist, Saidov (n 5); Ю Тихомиров, *Курс сравнительного правоведения* (1996); М Марченко, *Сравнительное правоведение* (2001); id, *Правовые системы мира* (2001).

[24] P de Cruz, *Comparative Law in a Changing World* (3d ed, 2007) 193.

saw "force" as the overriding characteristic of Soviet law and gave but the most cursory attention to Russia at all[25].

Before proceeding further, a brief comment on terminology. The term "Soviet law" here is usually being used in multiple senses to refer to the law in force within the Union of Soviet Socialist Republics from 1917 to 1991 (and thereafter as it still may be in force in the post-Soviet States), including the years from 1917 to 1922 before the USSR was formally created. From approximately 1936 onwards the term "socialist law" emerged to act as a characterization of a level of societal development that the USSR and eventually some other countries achieved even though no country was ever named "socialist", although that word was sometimes incorporated into the name of the country (e. g., Czechoslovak Socialist Republic; nonetheless, the law was still Czechoslovak law, and the extent to which that law was "socialist" was an attribute of content rather than a consequence of statehood). Similarly, the appellation "socialist legal system" is used without the country concerned necessarily having been regarded ideologically as achieving a fully-fledged "socialism" in the Marxist-Leninist meaning and constituting, for example, a "people's democracy" or a "people's democratic republic").

Although comparatists share different views with regard to what the distinguishing indicia of a socialist legal system were/are, the following would figure in the discussion[26]:

1) private ownership of the means of production leads to the exploitation of man by man and should be replaced by socialist, State, and social forms of ownership, usually achieved by the nationalization of private property and State predominance in the economy;

2) capitalist anarchy in production and distribution relations is replaced by State economic planning and centralized distribution; five-year and one-year economic plans are issued in the form of a law;

3) antagonistic class elements are eliminated or isolated through various means of legal discrimination (deprivation of some civil rights, class justice);

4) the laboring masses comprise the people and those who use hired labor for their personal enrichment do not fall within the concept of the "people";

5) class struggle is the driving force of historical change, and class enemies may take the form of exploiters or enemies of the people;

6) members of the working proletariat are accorded certain advantages in comparison with the peasantry and intelligentsia, at least in principle;

[25] Glenn (n 3); the second edition was collectively reviewed in *The Journal of Comparative Law*, I (2006) 100-176 (Russia, reviewed by W Butler, pp. 142-146). Russian, Ukrainian, and Kazakh law students have enjoyed access to several editions of David since 1967 in the Russian language, as well as to Zweigert and Kötz.

[26] These are abstracted and conflated from a number of works by, principally but not exclusively, Soviet and post-Soviet comparatists, but set out in my own formulations. All are legitimately the subject of discussion and would generate disagreements or reformulations in the hands of any general comparatist.

7) the Communist Party or leading party under another name plays the role of vanguard in the State and enjoys a monopoly of political power;

8) social (that is, non-State) organizations must be under Party direction; religious organizations may be tolerated, but are not encouraged, and experience various levels of persecution;

9) Marxism-Leninism operates as the official State and Party ideology, in some countries complemented by the doctrinal writings of indigenous leaders;

10) drawing upon the experience of the Paris Commune in the early 1870s, the foundation of the State system is the "soviets", or councils, which acted as agencies of State power (as distinct from agencies of State administration);

11) the separation of powers is recognized, but not the principle of checks-and-balances;

12) the principle of democratic centralism within the State system means that medium-level and local soviets are subordinate to superior soviets, and the principle of dual subordination means that executive committees of soviets are subordinate to their own soviet and to their superior executive committee;

13) courts at the lowest levels are elected directly by citizens and at the higher levels by the respective soviets. The principle that judges may not be removed is not recognized in socialist legal culture;

14) the exercise of rights and freedoms is subject to the cause of achieving socialism or communism and to the leading role of the Party;

15) the distinction between public and private law is not recognized;

16) unequal forms of ownership, discouragement of personal enrichment, cooperative marketing of goods; civil marriage; duty to rescue socialist property; greater emphasis given to crimes against the State and ideological crimes; discouragement or prohibition of strikes in labor relations; and many others are features of the socialist legal tradition.

These are regarded in combination as salient features of socialist legal systems as they existed in the twentieth century. Their precise configuration may differ from one socialist legal system to another. The question with respect to Asian socialist legal systems is whether they are present and to what extent; if present, are they reinforced, counter-balanced, overshadowed, or otherwise altered by local considerations and factors within each Asian socialist legal system. Nonetheless, taken together these are among the major criteria by which one might judge what makes an Asian socialist legal system socialist.

Competing Characterizations of Legal Systems in the Socialist Tradition

But the foregoing are not the only criteria for classifying legal systems into families. We turn to others, each of which insofar as applicable is capable of offering insight into the legal life and stature of the legal system concerned.

Socialist-Totalitarian Legal System. In the post-Soviet era some jurists have reclassified the Soviet legal system as a "totalitarian" system which was not truly "socialist" and which, in their view, belongs in a distinct family of legal systems. They regarded Russia as being within this family and doubtless would consider Asian socialist legal systems to be of this type[27]. This classification has not been widely accepted in comparative law circles because it is, in effect, a classification based principally upon political characterizations of leaders (Stalin, Hitler, Pol Pot, and so on) rather than legal principles and institutions[28].

Socialist Legal Systems as Technocratic Legal Systems

The observation has been and is being made in comparative-law circles that the legal systems of western countries, including the former Soviet republics and the former Central European socialist legal systems, are becoming increasingly "technocratic". For these purposes "technocracy" means that normative legal acts are being drafted more in the style of "technical documentation" than in the style of "legislation". The excessive detail means the enactments lose any link with reality, reflecting, as Lafitsky expressed the position, "the illusions of their compilers"[29]. The more they are divorced from reality, the greater the reliance upon sentences and words that are meaningless.

In effect, a technocratic legal system moves away from setting out general principles of law in the texts of legislative acts and indulges in excessive legislative activity, "over-legislates". Partly this trend results from the absence of a clear doctrine and principle determining the spheres of social life in which it is inappropriate for the State to intervene. Legal theorists devise concepts of the "perfect legal system" to which ideal legislation should correspond, but fail to indicate those domains of human existence which the State in the broadest sense of the word should refrain from regulating. In practice, legislation becomes increasingly fragmentary as it explodes in quantity and more easily reflects the interests of special groups.

The language and terminology of legislation is no longer comprehensible by the average citizen in a technocratic legal system. Judicial practice tends to follow legislative patterns, and as a result in a technocratic legal system the

[27] See, for example: С Алексеев, *Теория права* (1993); Чиркин (n 22) 315-30.

[28] The term originated in the Italian as "totalitario" and first appeared in its English language guise in the translation of Luigi Sturzo (1871-1959), *Italy and Fascismo,* transl. *Barbara Barclay Carter* (1926). As a political characterization it received considerable purchase in the philosophical analysis by Hannah Arendt, *The Origins of Totalitarianism* (1951), originally published at London as Arendt, *The Burden of Our Time* (1951). I. Il'in, a leading émigré Russian legal philosopher, introduced the term in his work on the essence of legal consciousness when he completed his final emendations to that work ca. 1953. The term did not appear, presumably because it did not exist, in the 1919 proofs of this work. One may reasonably assume that Il'in became aware of the term as part of its cold war currency and, indeed, may have been among the first Russian jurists to include the term in his doctrinal oeuvre. See: Ю Лисица, (ред), И Ильин, *Сочинения в двух томах,* т 1 (1993) 107; I Il'in, *On the Essence of Legal Consciousness* (Butler W ed and Grier P, 2014).

[29] Ibid.

issues confronting the courts move away from the application of legal principles towards the application of technicalities of construction that defy sound reason.

Measured by the standard of "technocracy", the Romano-Germanic, Common Law, and former socialist legal systems form a single family. One may conjecture about the extent to which elements of technocracy were accelerated by the introduction of national economic planning within the socialist legal tradition and continue to be reflected by the introduction of "administrative reglaments" and similar normative legal acts in the post-Soviet legal systems. Technology itself doubtless furthers "technocracy" by reducing the costs of publication and dissemination of the texts of normative legal acts.

The Asian socialist legal systems may well regard themselves as falling within the technocratic category and for good reason. Nonetheless, many comparatists might suggest that the Asian socialist legal systems embody a different approach to the systematization and codification of legislation than European socialist legal systems had done. Asian legislation tends to be less specific and detailed than European counterparts[30], and to this extent, less, arguably, technocratic.

Socialist Legal Systems as "Formalist"

Modern legal systems may be characterized not only by the volume of normative legal acts which they adopt, but by the way in which those acts are interpreted and applied. Comparative lawyers, legal practitioners, and socio-legal specialists have noted the extent to which post-Soviet legal systems have preserved, some would say reinforced, the "extreme formalism" as a characteristic Russian pattern of thinking about what law is and how it should be understood. The origins of this phenomenon have yet to be fully explored. Whether it originated in Soviet legal experience or existed previously and merely found a congenial context in national economic planning remains to be explored, not least in comparative studies of legal systems whose historical experience differs.

The formalist approach is embodied in Article 213 of the Civil Code of Ukraine, which instructs courts when interpreting contracts: "if the literal meaning of the words and concepts, and also the terms generally-accepted in the respective sphere of relations, does not make it possible to elicit the content of individual parts of the transaction", their content shall be established, in the event of ambiguity, by comparing the contract provisions with other provisions and the sense of the contract as a whole. Only if that approach fails may the court take into account the purpose of the contract, including preceding negotiations,

[30] Compare, for example, Russian constitutions of most any period and civil codes with Chinese counterparts. For that matter, Central Asian codifications have been, as a rule, less detailed than those of European socialist legal systems.

practices between the parties, customs of business turnover, and subsequent conduct of the parties. This formulation, it should be stressed, is a post-Soviet formulation, but one which departs but little from the earlier Soviet civil codes[31].

The plausibility and efficacy of a Planned Economy from a legal perspective depends upon the rationality of the planning "command system" of normative legal acts implementing the Plan and disciplining the discretion of actors within the system. There can be minimal scope, if any, for human volition, lest the symmetry of Plan relations be disturbed. A literal approach to the interpretation of contracts (and of legislation and treaties) is essential. Whether the "characteristic" was created by the Soviet Planned Economy or originates in earlier Russian experience requires further investigation. Whatever, the answer, there is a mental set in post-Soviet legal systems and among legal professionals that finds reflection in the general population. With reference to Russia, two observers have commented:

> The manner in which law is interpreted is formalistic in the extreme; law in practice is expected to be equated with the letter of the law. In other words, the characteristic Russian vision of law does not allow space for interpretations that would give prominence not so much to what the law actually says, as to what its makers intended to bring about, with an appreciation that any given legal principle or situation should be adjusted to fit the circumstances. However, in extreme formalism, the legal space of law is restricted to the law as it is written down. It is assumed that if the law is a good law, it must be applicable to any relevant circumstances just as it is written; when the time comes to implement the law there can be no legitimate requirement for flexibility or adjustment. It follows that there is very limited provision for a judge to exercise discretion and adapt the content of the law to specific circumstances of a particular situation, as judges do in many other jurisdictions[32].

In the language of socio-legal studies, this would appear to be an example of where the "law in the books" and the "law in action" coincide and the "law in the books" has an overriding impact on law in practice. Although Article 431 of the Russian Civil Code and the equivalents in other post-Soviet civil codes address the interpretation of transactions or contracts, it has been generally

[31] See: W Butler (ed and transl), *Civil Code of Ukraine and Law of Ukraine on Private International Law* (2011) 66; also see: Article 431, in Butler (ed and transl), *Civil Code of the Russian Federation* (2016) 245-6. In 2015 Article 431 was amended to provide that if the literal interpretation does not enable the content of the contract to be determined, the "true common will of the parties" is to be taken into account by eliciting all the respective circumstances.

[32] M Kurkchiyan and A Kubal (eds), *A Sociology of Justice in Russia* (2018) 268. In ca. 1999 a member of the United States Supreme Court and a senior appellate judge were sent to Russia in order to explain to Russian judges of all the court systems why and how in corporate cases it would be advisable for Russian courts to have regard to the interests of parties (for example, stockholders) who were not before the court but nonetheless might be affected by the outcome of litigation between the parties – an approach that would have required a modification of the principles set down in Article 431 of the Civil Code.

understood to extend to all interpretation, including statutory interpretation, and is an integral element of legal education in all post-Soviet law faculties.

Socialist Legal Systems as Transitional

All modern legal systems experience legal change of greater or lesser moment, but few claim to be in "transition" from one developmental stage to another. As noted above, Russian legal doctrine during the Soviet era claimed to be constantly in transition towards the creation of a socialist and, ultimately, a communist society. Asian socialist legal systems presumably have not abandoned that ideological position, although it may have been sublimated to other considerations. In the post-Soviet period, Russian law has purported to be in transition while dismantling the legal norms and legacy of the Soviet era. In this sense, Russian law in the Soviet and post-Soviet periods has been avowedly "transitional" since 1917. The element of "transition" does not appear to be as salient in Asian socialist legal systems, although they would, in principle, appear to fall within the framework of being transitional not in a movement away from socialism towards a market economy but in the direction of continuing to perfect socialism and move on to what they consider to be higher levels of societal development.

The question within comparative law is: "transition" from what to what, or from where to where? Modern Russia is plainly no longer part of the socialist family of legal systems. Some comparatists believe that Russia already has returned to, or always been a part of, the Romano-Germanic family of legal systems. Although Russia is a member of the Council of Europe and in the process of doing so received elements or standards of European human rights law into the Russian legal system, and likewise has modified its legislation to accommodate membership in the World Trade Organization, that "approximation" or "harmonization" of the legal systems is far from completed[33].

Russia has never officially declared an intention to become part of the Romano-Germanic family of legal systems in the non-EU sense of the word, and it remains unclear what the threshold criteria would be to qualify for classification in that family. Whatever the criteria may be, it is not simply a matter of "reversing", or "repealing", or "substituting" the legal changes from the Soviet era, as some comparatists have suggested[34]. With respect to Asian socialist legal systems, the same question would arise: is it possible, even

[33] Both the Council of Europe and the World Trade Organization are international organizations established by treaty and subject to the law of treaties. Within their respective parameters, however, both are developing a body of law applicable to the legal relations that arise under their respective treaties. To the extent that law is formulated, articulated, and enforced by Council of Europe and WTO institutions, it is not inappropriate within the framework of comparative legal analysis to refer to the constituents of those legal rules as members of the Council of Europe or WTO family.

[34] See: Glenn (n 3) 348.

conceivable, that economic and other reforms could proceed to such a stage that any one of the present Asian socialist legal systems could be regarded as falling within the Romano-Germanic legal family, or would they be expected to "transition" to something quite different from European legal models.

It is worth bearing in mind that for Asian socialist legal systems the advent of Marxism-Leninism and its legal accoutrements is a European import.

Socialist Legal Systems and the Romano-Germanic Family

Those comparatists who regard the Russian legal system as an integral part of the Romano-Germanic family of legal systems have emphasized the influence of continental European legal traditions, values, and rules upon the development of Russian law, the existence of Russia within continental historical experience and legal development, the numerous similarities of Russian approaches to law and legal institutions with those of continental Europe[35], and an alleged impact of the Roman law tradition upon Russian legal developments, whether received via Byzantium or through western Europe[36]. For those comparatists who perceived the "socialist legal tradition" to be a development within the Romano-Germanic legal tradition, *a fortiori* Russia continues to be a part of that tradition. Many modern Russian and Ukrainian comparatists describe the Russian legal system as "gravitating" towards the Romano-Germanic family[37].

While some observe that 'the legal system of Russia has no distinctions of principle' when compared with the legal systems of continental Europe, nonetheless the 'Russian legal system has still not become fixed in comparison with the leading legal systems of the family of continental law'[38]. It is, in other words, a legal system still in transition from its socialist past to its undetermined future.

While it would be a bold comparatist who placed China, Laos, North Korea, or Vietnam within the Romano-Germanic family of legal systems, there are undeniably certain features of the Romano-Germanic legal family to be found in each of those legal systems, although one may argue whether their presence is to be attributed to their pre-socialist legal experience or to the Soviet influence

[35] Some jurists believe that the legal systems of Russia and Ukraine, as well as the other post-Soviet legal systems, belong to the Romano-Germanic system or continental legal family without any reservations. See: Л Луць, *Сучасні правові системи світу* (2003) 111, 114.

[36] But for an analysis of European private law experience that distinguishes between the Eastern and Western European approaches, see E Kharitonov and O Kharitonova, 'Classification of European Systems of Private Law' in Butler W and Kresin O and Shemshuchenko Iu (eds), *Foundations of Comparative Law: Methods and Typologies* (2011) 255-75. On the reception of Roman law generally in Eastern Europe, including Russia and Ukraine, and studies of the Roman legal heritage, see E Kharytonov and O Kharytonova, 'From Comprehension of the Reception of Roman Law to a General Theory of the Interaction of Legal Systems: Raising the Issue', in Butler and Kresin (n 16) 108-132.

[37] See: *Порівняльне правознавство* (2003) 46.

[38] See: Власов и Власова и Денисенко (н 22) 220, 221.

on their early development[39]. China and Vietnam have assuredly adapted elements of Anglo-American legal experience too, and in general adapted themselves to global legal requirements laid down in the GATT and the treaty framework of the World Trade Organization.

Asian Socialist Legal Systems as "Mixed" Legal Systems

There is no such thing as, and perhaps never has been, a "pure" legal system. All legal systems are "mixed" systems; the mere fact that an individual legal system is, for the purposes of classification, thrown together with others suggests an analytical "mixture", if nothing else. The term "mixed legal system" is used variously in doctrinal writings, sometimes to refer merely to legal systems combining elements of the "civil law" and "common law" traditions; sometimes to refer to a "third family" of legal systems having overlapping civil law and common law elements; sometimes to describe other combinations of legal traditions (religious, tribal, socialist, customary, civil, common, and so on). Although the subject of "mixed" legal systems has generated a substantial literature in recent times, Russia does not figure in these writings except for the most passing mention as a "transitional" legal system and Asian socialist legal systems would appear not yet to have been a component of this discourse[40].

The history of Russian law gives more than ample evidence of the multiple influences of other legal traditions throughout Russia, but not the classic juxtaposition of "civil law" and "common law" influences. If there is to be any serious trace of "common law" influence in Russia, this is a development of the period since 1991 and the outcome of individual law reform undertakings that deliberately drew upon Anglo-American legal experience or upon "common law" elements of European legal institutions and rules. Under any definition of a "mixed legal system", Russia would constitute one of the most complex (and interesting) examples.

The same would seem to apply to the Asian socialist legal systems. All have been exposed at some moment of their history to at least the importation of Soviet legal experience and Soviet legal models. Generations of jurists from each Asian socialist legal system were educated in the former Soviet Union. Each

[39] See Jerome Cohen, 'Introduction to Part V', in John Gillespie and Albert H Y Chen, *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (2010) 271:

> <…> the Soviet model <…> continues to rule Vietnam's legal system from the grave. Yet, although the subject has attracted too little attention, China's experience in adapting the Soviet legal system to a Confucian/Buddhist tradition that had not been deeply affected by previous importation of Western law proved useful to Vietnam <…> Vietnam's largely unobtrusive borrowing from China's experience is reminiscent of China's more visible adoption, in the early decades of the twentieth century, of aspects of the Continental legal model via Japan <…> as well as directly from Europe".

[40] See: Esin Örücü, 'What is a Mixed Legal System? Exclusion or Expansion?' in Örücü (ed), *Mixed Legal Systems at New Frontiers* (2010) 77.

Asian socialist legal system was the recipient of substantial foreign assistance from the USSR that included legal assistance. At various times and to varying degrees, there were in essence "Soviet legal transplants" introduced into the Asian socialist legal systems, the full measure of which remains to be analyzed. In addition, each Asian socialist legal system contains elements of customary law or traditional law that operate side by side with modern legislation.

Eurasianism and Asian Socialist Legal Systems

What constitutes Asia, a question raised at the outset of the present article, and how Russia relates to what constitutes Asia, cannot be overlooked in a discussion of what makes Asian socialist legal systems socialist. After a quarter-century of introducing Western market-orientated legal reforms, for the moment at least Russia has decided not to pursue a closer association with European institutions and would appear to have resiled from any wish to become a member of the North Atlantic Treaty Organization or the European Union. There are strong indications that Russia will join or encourage efforts to disengage in some measure from the effects of decisions of the European Court for Human Rights. There has been simultaneously a revival of interest in two-related notions: Slavonic identity and Eurasianism.

Family of Slavonic Legal Systems

Russians are among the early Slavic peoples[41], although Belarus and Ukraine figure marginally in most discussions, if at all[42], in comparative law circles with respect to the existence of a Slavonic family of legal systems. A "native, pure, and distinctive Slavic legal system" never came to pass, as Wigmore observed, yet he devoted nearly 80 pages of his treatise on the world's legal systems to those inhabited principally by Slavs[43]. The category of "Slavonic law", as a term, poses some of the same conundrums that "comparative law" does. There is no country called "Slavonia" and therefore no positive law which purports to govern all peoples of Slavonic ethnic affinity or origin.

Instead we are dealing with an etnos whose rulers formed sundry entities and allegedly gave expression in their positive-law enactments to Slavonic mores, values, traditions, folkways, and the like. Slavonic law, insofar as expressed in norms, is customary law, or is a body of values reflected in particular

[41] S Plokhy, *The Origins of the Slavic Nations: Premodern Identities in Russia, Ukraine, and Belarus* (2006).

[42] A recent major multi-volume treatise on comparative law begins with the "legal systems of Eastern Europe" and, following introductory chapters on the history and subject-matter of comparative law, devotes chapters to the "national legal systems of the Slavonic world": Russia, Poland, Czech Republic, Bulgaria, and Croatia. Ukraine and Belarus are not given separate treatment. See: В Лафитский (ред), *Сравнительное правоведение: национальные правовые системы, т 1* (ИЗиСП, КОНТРАКТ 2012) 119-527.

[43] J Wigmore, Panorama of the World's Legal Systems (Library ed, 1936) 733-808. Others who singled out "Slavonic law" as a basis for classifying families of legal systems included Adhémar Esmein (1848-1913) and Adolf F. Schnitzer (1889-1989). See: A Schnitzer, *Vergleichende Rechtslehre* (2d ed, 1963).

formulations of positive State legislation in countries where the Slavonic population is predominant, or is a sub-stratum of natural law founded on the religious principles of Christian Orthodoxy. For some comparatists the concept of a family of Slavonic legal systems falls within a larger classification of the "legal community of the Christian tradition of law", which includes Slavonic, Romano-Germanic, Common Law, Scandinavian, and Latin American legal families. Jurists of this persuasion emphasize the Christian writings that determine the "spiritual heart", distinctive features, and, ultimately, the fates of the major legal systems of the world. The Christian roots of individual legal enactments are traced[44].

Comparative research on Slavonic legal systems originated in the nineteenth century within the Eastern European countries concerned and eventually became known to western European comparatists[45]. The pioneer in this field was the Polish legal scholar, W. Maciejowski (1793–1883), who published a four volume history of Slavonic legislation between 1832 and 1835. The purpose of his work was to demonstrate that there existed in Europe, in addition to Roman and German law, legislation distinctive in its foundation and original in its development – Slavonic legislation[46]. The immediate German translation of this work made it accessible to an all-European audience.

Within the Russian Empire, Russian and Ukrainian jurists elaborated his approach. Among these was N. Ivanishev (1811–1874), who argued persuasively that Russian criminal legislation could only be understood against the background of Slavonic legislation generally. A national school of Slavonic law emerged which led to the conviction that medieval Russian law should be studied by means of comparing it with the law of other Slavonic peoples. M. Vladimirskii-Budanov (1838–1916), F. Leontovich (1833–1911), I. Sobestianskii (1856–1896), Baltazar Bogišić (1834–1908), F. Taranovskii (1875–1936), and others became active proponents and followers of the proposition that Slavonic law should be studied comparatively and distinguished from other legal traditions[47].

In his Ilchester Lectures at Cambridge University in 1900, F. Zigel (1845–1921), *professor ordinarius* at Warsaw University, suggested that Slavonic law was the

[44] See, for example, Р Папаян, *Христианские корни современного права* (Норма 2002); Ю Зюбанов, *Христианские основы уголовного кодекса Российской Федерации* (Юстина; Проспект 2007).

[45] Among the western comparatists who drew attention to Slavonic law was R. M. Dareste de la Chavanne (1824-1911), who published several articles during the 1880s and collected these in *Études d'histoire de droit* (2d ed, 1908), later published in Russian as Р Дарест, *Исследования по истории права* (репринт изд, 2012). One modern comparatist believes that the reception of Byzantine legal forms and norms was facilitated the fact that '<…> in Byzantium itself they were drawn up under the influence of a Slavonic element'. В Синюков, *Российская правовая система: введение в общую теорию* (2-е изд, 2010) 106.

[46] В Мацеровськи, *История славянских законодательств* (1958) I, 3. A German translation was published at once. See: Maciejowski, *Slavische Rechtsgesichte* (transl, 1835-1839) 4 vols.

[47] See, generally, M Damirli, 'Comparative-Legal Science in Ukraine: Theoretical-Methodological Traditions' (2013) VIII Journal of Comparative Law 1-44.

law of an agricultural people and, insofar as the Slavic peoples lived according to their old customs and usages preserved only by tradition, was perhaps nearer to English and American law than to the law of continental Europe. In his view the rules of Slavonic law were more independent of Roman and canon law that in Europe. The Slavs elaborated their legal rules themselves; the undoubted substantial influence of foreign ideas was confined to ideas and did not affect the legal rules themselves[48].

The fundamental approach developed by Russian, Ukrainian, and other comparatists during the nineteenth century is mostly shared by their modern colleagues who support the idea of a family of Slavonic law and legal systems. They believe that Slavonic law is where "Christian values find their fullest embodiment"[49]. The Slavs, they observe, are the largest and probably the most ancient ethnos in Europe, today comprising about one-third of the inhabitants there. They believe that Slavonic law is developing during recent decades at the greatest rate, increasingly exerting more influence on other Christian legal families.

Specific features of Slavonic law, including, in this view, Russian and Ukrainian law, are identified as a distinctive relationship among the State, the law, and the citizenry which emphasizes (notwithstanding historical experience to the contrary) the depersonalization of authority, a non-class and non-estate organization of society, and an unusually strong sense of collectiveness and community. Economic development, in this view, has proceeded on the basis of collective forms of economic management expressed in the peasant community, artel, agricultural cooperative, labor democracy, traditions of local self-government, and others. The individual has a special type of social status in which collectivist elements predominate in legal consciousness and a sharp line is not drawn between the individual (and individualism) and the social State.

Eurasianism and Asian Socialist Legal Systems

At first glance, the notion of Slavonic legal systems would appear to preclude any interest or concern with respect to Asian legal systems, none of which are Slavonic in origin or nature. As it happens, however, doctrines of Eurasianism are indebted to many of the same intellectual forces that reinvigorated interest in Slavonic law. Since about 2011 there has emerged a pronounced Russian "pivot to the East". Economic communities that existed as essentially "customs

[48] See: F Sigel, *Lectures on Slavonic Law* (1902).

[49] Лафитский (н 42) I, 200. But compare D Lukianov, 'Religious Legal Systems: Features and Classifications' in Butler and Kresin and Shemshuchenko (n 36) 304-17. Legal systems in the Christian tradition are not singled out by Lukianov. Also see, with emphasis on the religious dimension, the dissertation by M Рязанов, *Слов'янське право і слов'янська правова культура: загальнотеоретичний аспект* (2013): '<…> Slavic legal culture as a culture with general religious penetration in the form of Orthodoxy, the complex of religious and ethical factors that define a special (Slavic) outlook, a special world of spirituality – the Slav's sense of justice and legal mentality; law is always synonymous with righteousness, truth, and justice'.

unions" were reorganized and endowed with broader functions under the guise of being "Eurasian" in membership and scope. Belarus, Kazakhstan, and Russia were joined by Kyrgyzia and Armenia, with other Central Asian members in prospect. This is a legal framework that the European Union regards as inconsistent with membership in or even close association with the European Union.

The notion of Eurasia was elaborated in the early 1920s by patriotic Russian émigrés who found themselves exiled from their home country and sought to find an alternative to Bolshevism that would secure for Russia a major role in the international community as a powerful State[50]. Two individuals closely associated with Eurasianism were P. Savitskii (1895–1968) and Prince N. Trubetskoi (1890–1938)[51], both devoted to their language, culture, and the Eastern Orthodox Church. The movement was and is not regarded as racial or ethnic, but rather as a vision of a 'unique, economically self-sufficient continent dominated by Russia'[52] – the continent for these purposes being roughly that of the Russian Empire prior to 1914; that is, encompassing the Central Asian States as an integral part thereof[53]. In its original version the doctrine is regarded as opposed to Eurocentrism, as anti-Western in substance, and as requiring Russia to formulate and elaborate a position in the world community that does not share the full foundations of western democracy and liberty.

The gravitation towards the East, if perpetuated, cannot fail to have implications for the legal development of the Asian socialist legal systems and their Central Asian siblings.

Asian Socialist Legal Systems with National Characteristics

For all of the undoubted influence of the Soviet legal model upon the legal systems of Central Asia, China, Laos, Mongolia, North Korea, and Vietnam, those legal systems were never clones of the Soviet legal system. Adaptations of greater or lesser moment were introduced from the outset. By the 1980s, China was describing itself as a 'socialist legal system with Chinese characteristics'[54] – a euphemism that asserted and rationalized departures in legal structures and

[50] See the essays in M Bassin and S Glebov and M Laruelle (eds), *Between Europe and Asia: The Origins, Theories, and Legacies of Russian Eurasianism* (2015).

[51] As part of a series of books entitled the "Eurasian Path", founded in 2015, twenty-five collected papers of Trubetskoi were assembled without any introductory preface or annotations and on some occasions reprinted without any reference to the original source. See: Н Трубецкой, *Евразийство. Избранное* (2015).

[52] See: Lesley Chamberlain, 'New Eurasians' Times Literary Supplemen (15 September 2015) 14.

[53] 'The conception of Eurasianism was created in order to overcome the linguistic limitation of the conception of Slavic unity and to impart a more global character to it, for Eurasianism is based not on linguistic, but on continental, unity'. See: Koziubra (n 16) 237.

[54] See: W Butler, 'China in the Family of Socialist Legal Systems' (1080) 91 (July/August) China Now 11-4; id, 'The Chinese Soviet Republic in the Family of Socialist Legal Systems', in Butler (n 6) 1-6.

law reform which distinguished the Chinese (and other Asian legal systems) from the Soviet and Central European versions[55].

The rationales differed from one to another, but insofar as can be determined (and this deserves closer study) their differences lay in divergent national experiences, cultures, languages, social systems, traditions rather than in elements common to Asian socialist legal systems but distinct from European socialist legal systems. Mongolia for some time was touted as a potential model for third-world countries that had not experienced an industrial revolution. The Mongolian model was" transition to socialism while bypassing capitalism"; this, however, seems never to have been a principle that was espoused by the other Asian socialist legal systems, although possibly the Chinese Soviet Republic during the early 1930s flirted with the substance of the principle.

Conclusions

Classifications of legal systems into "families" or other categories are an exercise in the application of the comparative method. Each classification offers insight into what are perceived to be meaningful distinctions and similarities within and between the groups identified. However, these distinctions and similarities are not fixed, not permanent; indeed, they appear to be experiencing constant change, sometimes rapidly, sometimes gradually. Nor are they physically tangible; they are not res, a thing, something one can hold or inspect, or subject to chemical or physical analysis. Depending therefore upon the nature and purpose of the categorization, a legal system or parts thereof may possess characteristics or indicia that fall into multiple categories of legal systems. No scientific canon precludes an analytical framework that illuminates the multi-facetedness of a system of law and its components. Legal systems may be reasonably regarded as "members" simultaneously of several families, depending upon the criteria for identifying one or the other[56]. Given the pace and nature of change, these are necessarily tentative or conditional classifications whose constituency may change or which may outlive their usefulness. The "validity" turns upon the quality of insight each offers into the domain of law, not upon a preordained function or purpose within

The concept of legal families is merely an application of a broader comparative principle, that legal systems on this planet can be grouped into various categories that share distinct common features and that we find such categories instructive in better understanding the nature of law, legal institutions, legal processes, legal traditions, legal cultures – anything useful that we can learn about law. The Asian

[55] Leaving us with the perplexing but challenging analytical perspective: is China, for example, a socialist legal system with Chinese characteristics, or a Chinese legal system with socialist characteristics?

[56] Indeed, some national legal systems constitute "mini-families", being composed of multiple legal orders (Common Law, canon law, *lex mercatoria*, admiralty, civil law) which operate simultaneously within State boundaries. For some purposes these are labeled "mixed legal systems", as noted above.

socialist legal systems are no exception. They deserve analysis in their own right, but they are not a static category. Doubtless they deserve consideration from various vantage points, each of which will be instructive in illuminating aspects of their place on the legal map of the world.

A residual issue remains from the past: whether Asian socialist legal systems can be plausibly compared with other legal systems or families within the traditional framework of comparative law. John Hazard doubted this in the 1960s:

> Traditional methods of comparing legal systems fail the analyst who seeks to establish the distinguishing features of the family of Marxian socialist legal systems. The methods of finding and applying law have been the criteria of comparatists for nearly three-quarters of a century. The Anglo-American and Romanist systems have usually been distinguished by differing concepts of sources of law and by contrasting attitudes of judges, clustered around the core concept of the role of the judicial decisions in the legal process <…>. Judges by these criteria the family of Marxian socialist legal systems offers no novelty. Its method is the method of the Romanist, although to a distinguished Islamic scholar skilled in the comparison of laws, there is also an element of holy writ technique in the Marxist system.
> Because the family of Marxist systems offers no novelty in attitudes taken toward sources of law or in attitudes shown by judges toward these sources, it has lost the interest of some professors of law engaged in the comparison of legal families as such[57].

There is a certain ironic justice in the question addressed by this article. The Asian socialist legal systems have become the common core of the socialist legal family, whereas when as late as 1967 it was still the Soviet practice to name and rank those States that were within the socialist legal family and those without, China was not included on the list of countries "building socialism" at the time (nor was Albania)[58]. Mongolia, North Korea, and Vietnam were included on the List.

It should be noted, at least in passing, that there is a counter-thesis implicit in the analysis above. Reduced to its simplest, it would suggest that perhaps rather than inquiring into socialist legal systems with, say, Chinese

[57] Hazard (n 13) 520-1; H. J. Berman remarked in 1971: 'It is becoming harder and harder to find any single characteristic that is common to the legal systems of the 14 countries generally called Communist'. Berman (n 20) 26.

[58] Ibid 520:

> Neither the Chinese nor the Albanian Communists have been ranked as meeting the supreme requirements. The Moscow guardians of the socialist commonwealth have drawn a line semantically between the twelve that maintain among themselves "eternal, indestructible friendship and cooperation", and the Albanian and Chinese peoples, who are said to exist only in a state of "friendship and cooperation" with the others. The Chinese would rank the same group in reverse order, placing Yugoslavia outside the family and the USSR in the position of a state on its way out.

characteristics, one should instead be pursuing Chinese law with socialist characteristics. The kaleidoscope would permit both lines of inquiry to be undertaken simultaneously.

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ЩО РОБИТЬ СОЦІАЛІСТИЧНІ ПРАВОВІ СИСТЕМИ СОЦІАЛІСТИЧНИМИ?

Анотація. У цій статті автор переглядає основи традиційних класифікацій правових систем у порівняльному правознавстві і робить наголос на доцільності калейдоскопічного сприйняття правових класифікацій та відповідних змін, починаючи з періоду революцій 1917 р. і дотепер, з приділенням особливої уваги довгостроковому впливу на азіатські правові системи. Можна стверджувати, що Китай, Монголія, В'єтнам і Лаос разом із Кубою та Ефіопією є останніми системами соціалістичної правової традиції – їх небагато, але за чисельністю населення вони є досить великими. Пропонуються різні підходи до класифікації правових систем. При цьому жоден із них не розглядається як взаємовиключний, тобто окрема національна правова система може демонструвати характеристики декількох правових сімей.

У статті наведено змістовний перелік можливих характеристик соціалістичних правових систем, а також розгорнуте перерахування можливих категорій сімей правових систем: соціалістичних/тоталітарних, технократичних, формалістичних, транзиційних, романо-германських, змішаних, слов'янських, євразійських тощо.

Стосовно азіатських соціалістичних правових систем, автор ставить питання про те, чи буде більш правильним у контексті опису й аналітики характеризувати, наприклад, Китай як "соціалістичну правову систему з китайськими характеристиками" або як "китайську правову систему з соціалістичними характеристиками". У будь-якому разі запитання залишається: на підставі яких чинників Китай можна характеризувати одним або іншим чином? Якою б не була відповідь у певний момент часу, калейдоскопічне сприйняття правових змін і тенденцій спрямоване не так на пошук вічних істин, як на постійне коригування й переоцінку балансу чинників, які формують правову систему, і розроблення відповідних додаткових критеріїв, які допомагають виявити сили, що діють у правовому розвитку.

Ключові слова: соціалістична правова система; тоталітарна, технократична, формалістична, транзиційна, романо-германська, змішана, слов'янська, євразійська правові системи; Китай; Монголія; В'єтнам, Лаос; Ефіопія; Куба; класифікації правових систем; правова сім'я.