Civil Law in East Germany—Its Development and Relation to Soviet Legal History and Ideology

Inga S. Markovits†

The Bürgerliches Gesetzbuch (BGB), the German civil code of 1896, is still in force in both East and West Germany. Despite important modifications on both sides and despite special East German legislation on exchange relationships within the state-owned economy, the civil law of contracts, torts, property, and inheritance is still governed by largely the same provisions and concepts. It is questionable, however, whether this legal unity will last much longer. Since the partition of Germany into eastern and western zones, and particularly since the foundation of the German Democratic Republic (GDR) and the Federal Republic in 1949, jurists and government officials in East Germany have attacked the bourgeois civil code and asked for new “socialist” civil law.

As early as 1952 at the Second Party Conference of the Socialist Unity Party, Ulbricht suggested the theoretical necessity for a new civil code. He reiterated his request at the Fifth Party Congress in 1958, after which legislative commissions were established to work on the preparation of a draft code. Although the new code was originally intended to take effect on January 1, 1962, it has not yet been


1. Throughout this article the term “civil law” is used in its German sense, that is, in contrast not to “common law” but to “public law.” It thus closely corresponds to the American notion of “private law.”

2. The Socialistiche Einheitspartei Deutschlands (SED) is the ruling party of the German Democratic Republic.

3. Due to political and doctrinal changes, new commissions were appointed after the Sixth Party Congress in 1963.

4. Perspective plan of the East German Ministry of Justice, published in 12 Neue Jusrez 551, 552 (1958) [hereinafter cited as NJ].
published even in draft form; however, the existence of an unpublished draft—heavily criticized, but no less a point of departure—and the gradual stabilization of East German civil law doctrine suggest that a code may appear within two or three years.6

East German deliberations about civil law reform have throughout been influenced by Soviet politics, Soviet ideology, and Soviet legal doctrine. It is the purpose of this article to investigate the scope of this influence and to compare the solutions which Soviet and East German jurists have proposed for the various problems connected with replacing an inherited bourgeois legal system with a socialist legal system. The East German developments will be traced chronologically, and each stage examined for similarities and differences between the respective German and Soviet positions in civil law thinking.

Many of the arguments discussed will seem highly conceptualistic. Communist legal thinking in general tends to be far more dogmatic than common law thinking. The combination of a civil law system (with its emphasis on the general rule over the individual case and its formally deductive rather than inductive method) and Marxist ideology (with its belief in one right answer and intolerance for compromises and tentative definitions) occasionally produces a formality and scholasticism in legal thought reminiscent of nineteenth-century Begriffsjurisprudenz. In East Germany, this tendency has been reinforced by the fact that the new civil code is supposed to be based on a conception of civil law yet to be fully developed. Discussions in the GDR have thus moved on a particularly theoretical level.

Nonetheless these disputes should not be dismissed as insignificant. Communist legal debates, in the Soviet Union as well as in East Germany, have to be looked at not so much as causes but as symptoms of

5. For discussion of the unpublished draft, see Ranke, Neues ökonomisches System und aktuelle Probleme des sozialistischen Zivilrechts, 21 NJ 201 (1967); Panzer & Penig, Vertragsgesetz und Wirtschaftsrecht, 15 STAAT und RECHT 603 (1966) [hereinafter cited as STAAT u. R.].

In a February 1967 article Hilde Benjamin, GDR Minister of Justice until July 1967, questioned whether the time was ripe for the legislation of a new East German civil code. She referred in particular to the problem of German legal unity. Benjamin, Sozialistische Gesetzgebung—eine der wichtigsten Formen staatlicher Leitung, 16 STAAT u. R. 164 (1967). But only two months later, Hans Ranke, first representative of the Minister of Justice, reported "considerable progress" in the field of civil law legislation and declared:

The tasks of the comprehensive and complete construction of socialism in the GDR call for the codification of these [civil law] relationships in a new civil code, especially since the necessary conditions have now ripened. Ranke, supra note 5, at 202. This looks very much like a reply to Benjamin, particularly since the thought of German legal unity has not restrained the East German government from the recent enactment of a new constitution and new codes in the areas of family law and criminal law.

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social and political change. Even where theoretical tenets seem to have no practical consequences, they are highly indicative of the underlying political situation—more so than in the West, where changes find easier and undisguised expression in the political process and where theory and practice permeate each other far less. The intensity with which even the most esoteric theoretical issues are debated in Communist jurisprudence reflects the political significance attributed to them: for the participants, these are not nice points of legal aestheticism, but essential questions concerning society's progress towards communism.

I. 1945-1952: The Early Years

In the years immediately before and after the foundation of the GDR in 1949, Soviet influence on German civil law was restricted to political influence and remained untranslated into legal concepts. The legal problems created by the nationalization of large segments of industry after 1945, the land reform, and the introduction of the first two-year plan in 1949 were treated practically, not theoretically. State interference with private-law relationships had been common during the war years, and its expansion still fit within the traditional legal system. Furthermore, as long as the division of Germany was widely regarded as temporary, there was little reason to question the adequacy of traditional civil law. Very few East German jurists in the late forties considered the use of the bourgeois BGB a political problem at all; even those few Marxists who during their émigré years had received legal training and indoctrination in the USSR and who criticized the formality and inadequateness of bourgeois norms said no more about a new legal system than that it had to be "different." The only specific suggestions for changes in civil law doctrine in this period, despite the Marxist terminology in which they were phrased, had their origins in

6. The fading of belief in an early reunification of Germany was reflected in the pages of the first East German legal periodical, Neue Justiz, founded in 1947. During its first years Neue Justiz carried reports and bibliographies mainly on the literature of the three Western Zones of Germany. In mid-1949 (the year of the foundation of both the Federal Republic and the German Democratic Republic) East German publications began to receive more and more attention and by mid-1950 all West German periodicals were dropped from the bibliography. At the end of 1951 even book reports on West German literature were discontinued.

7. Like the late Karl Polak, later a member of the Staatsrat (comparable to the Presidium of the Supreme Soviet of the USSR) and legal advisor to the Central Committee.

8. K. POLAK, JUSTIZERNKURUNG 42 (1948).
the German school of interest-jurisprudence of the twenties and thirties.

To the extent that the creation of a new socialist law was discussed at all, the discussion followed the Marxist doctrine that society's political and legal superstructure depends on the development of its economic base—its relationships of production. According to this doctrine, East Germany, still lacking a socialist base, could not yet have a socialist superstructure or, in particular, a socialist law. Socialist law could replace bourgeois law only after "our new socialist forms of economy . . . are victorious over the old capitalist ones." This belief, founded primarily on Marx's statement in the *Critique of the Gotha Program* that "law can never be higher than the economic order and the cultural development of society thereby conditioned," was one of the reasons why the discussion about the legal nature of the new *Volkseigentum* did not equate this "people's property" with socialist state property as in the Soviet Union. Since East Germany's industry and agriculture were only partially nationalized, its "mixed" economic structure could not yet engender a "socialist" property right.

The quotation from the *Critique of the Gotha Program* also served to refute suggestions that in a planned economy juridical relationships preceded production relationships, a theory which would have made possible the existence of socialist law in the GDR from the first. Pointing to Marx, Hilde Benjamin (later Minister of Justice) denounced this notion as a misconception of historical materialism. The creation of a socialist legal system would apparently have to await the creation of a completely socialized economy.

II. 1952-1958: Rehabilitating Inherited Law

Early in the new state's existence Marxist orthodoxy became bothersome. On the one hand, allegiance to the Soviet Union demanded that East Germany differentiate its law from German legal traditions; on the other, the absence of an available substitute prevented the East Germans from simply discarding the legal institutions and concepts at

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10. K. Polak, supra note 7, at 85.
hand. The inherited capitalist legal system in the GDR thus had to be
given socialist respectability.

In civil law the problem was particularly acute. Experience with the
first two-year plan had shown the impracticability of total planning.
With the first five-year plan, therefore, East Germany introduced in
1951 the so-called “General System of Contracts” (Allgemeines Ver-
tragssystem), which required state enterprises to translate their plan
obligations into contractual relationships among themselves, in order
to utilize the contract mechanism and its penalties to improve eco-
nomic performance. This new system—introduced in the Soviet Union
in 1928, at a similar stage of development—called for socialist legiti-
mation of one of the key concepts of bourgeois civil law.

In other areas the use of traditional civil law concepts was no less
necessary. Volkseigentum, for instance, had to be accorded the quality
of state property to fall within the civil law provisions which tradition-
ally governed the activities of the capitalist fiscus, and in 1952 was in
fact declared to be “socialist state property.” In general, the GDR at
this early stage could not afford to spend much time and effort question-
ing the validity of the BGB, which simply had to be cleansed of its bour-
gegeois disrepute. All the more so, since at the Second Party Conference in
July 1952, Ulbricht had declared that the GDR had entered the stage
of “construction of the foundations of socialism.” Fortunately, civil law
document in the Soviet Union during these years was itself rather close,
at least in appearance, to continental legal traditions and did not stand
in the way of an East German rehabilitation of the German private law
system. Thus the main problem was not whether to continue to use
that system under new political conditions, but how to justify its use ideologically.

A. Stalin’s Influence

Stalin himself provided the solution to the problem of making bour-
gegeois law look like socialist law. In the summer of 1950 Pravda pub-

15. Loebel, Plan and Contract Performance in Soviet Law, in LAW IN SOVIET SOCIETY
128, 179 (W. LaFave ed. 1965).
15a. Traditional German legal doctrine distinguishes between the state’s activities as
sovereign and as fiscus, that is, between the state as an administrative authority and the
state as a private law subject, contracting on an equal legal footing with other private law
subjects. In the former case, the state’s activities are governed primarily by administrative
law rules; in the latter, by civil law rules. I shall use the term “fiscus” in the traditional
sense in order to indicate the continuity in the legal treatment of capitalist state property
and socialist people’s property.
16. Dornberger, Die verschiedenen Eigentumsarten und Eigentumsformen und das
Eigentumsrecht in der DDR, 6 NJ 16 (1952).
lished a discussion of Soviet linguistics to which Stalin contributed a series of letters on Marxism and linguistics. These letters promulgated the theory of the active role of the superstructure, according to which elements of the superstructure, such as law, not only reflect the base but influence and shape it as well. From this one could conclude that, contrary to Marx's statement in the *Critique of the Gotha Program*, law could be—in fact, had to be—higher than the economic order of a given society and that the legal system of the GDR, though lacking a socialist base, could already be socialist in character.

After a time East German jurists did indeed draw this conclusion. In June 1951 the propaganda department of the Central Committee of the Socialist Unity Party held a conference on "the importance of comrade Stalin's work on Marxism and Linguistics for the development of sciences," which was followed by a series of individual conferences in different academic fields, including law. During the following six years Stalin's *Linguistic Letters*, together with his last work, *Economic Problems of Socialism in the USSR*, provided East German civil-law theorists with their major arguments (and excuses) in dealing with bourgeois law. Regardless of ideological merit, therefore, Stalin's theses deserve to be treated here in some detail.

1. The Active Role of the Superstructure

In the *Linguistic Letters*, Stalin described the superstructure as both depending on and influencing its base. A change in the base, he argued, causes a change in the superstructure, which then in turn strengthens the base and "actively helps it to take shape and consolidate itself ...." From this the East German jurists reasoned that the bourgeois BGB, now part of the new superstructure, was also performing new functions. Since no base could have two superstructures—an old one and a new one—both old and new laws in the GDR must of necessity be serving socialist purposes:

Every civil law norm conforms to the base of our society and helps as part of the superstructure to consolidate that base. This is true also of the norms of sanctioned laws, the content of which is determined by our social order.

This argument eliminated any apparent contradictions between old and new norms in the East German legal system: bourgeois norms could now be applied with a clear socialist conscience.

2. The Indifference of Language to Classes

The immediate topic of the Linguistic Letters—language—served Stalin mainly as a vehicle to develop his views on superstructure and base. Stalin denied the class-character of language. According to him, it belongs neither to the base nor to the superstructure of a given social order, but represents a third category, independent of and indifferent to classes. Thus language is an instrument which like machinery or mathematical rules can serve different societies equally well.

This theory could easily be extended to cover legal concepts. Although Stalin did mention the phrase “to trade” among his linguistic examples, he himself did not speak of legal rules but only of geometry, which creates its laws by a process of abstraction from concrete objects, regarding objects as bodies without any concreteness, and defining the relationship between them, not as the concrete relations of concrete objects, but as the relations of bodies in general, without any concreteness.

But this description fitted the traditional civil law system perfectly. It is not surprising, therefore, that both East German and Soviet jurists felt justified in using bourgeois legal concepts as uncontaminated tools.

3. Continued Commodity Production under Socialism

Stalin’s Economic Problems of Socialism supplied the most important justification for the continued use of bourgeois legal concepts. In this pamphlet, Stalin defended “commodity production” against more utopian-minded party members who doubted that this originally capitalist form of production could be reconciled with a socialist econ-

23. Id. 24.
24. N. TIMASHEFF, SOZIALISTISCHE RECHTSTHEORIEN, 5 OST-PROBLEME 147 (1953).
25. The East German professor Nathan, for instance, wrote in 1956 in defense of a traditional structural argument:
   "If there is one teaching of Marxist dialectics which we had occasion to learn particularly thoroughly during the last years, it is the doctrine that no norm, no legal method is “bad” in itself, but receives its value only in connection with concrete historical circumstances; in particular in connection with the social system under which it is applied."
   Nathan, Der Allgemeine Teil des Zivilrechts, 5 STAAT U. R. 507, 509 (1956).
omy. Stalin admitted that commodity production and circulation would eventually be replaced by the direct distribution of goods under Communism, but he argued that this stage could come only after the two existing production sectors—the state sector and the collective-farm sector—were replaced by one all-embracing production sector. Until then, he said, the production of goods for the market with its accompanying economic laws would continue, although as commodity production of "a special kind." 27

Stalin thus defended, though only conditionally and far more reluctantly than Communist economists today, a form of production that Marxism had always identified with capitalist economy. The point has legal significance because the exchange of commodities takes place within the framework of traditional forms of civil law, especially contract law, and the continuation of commodity production under socialism thus implies that the civil law rules for the exchange of goods must continue to exist. At least this was the way East German civil-law scholars interpreted Stalin. Professor Such wrote in 1953:

Stalin's statements about the prerequisites for continued commodity production under socialism and about its special character are of extreme importance for our contract law . . . . The continuation of commodity production under our conditions implies that numerous individual contract rules which are the juridic expression of relationships under commodity production . . . can be used and exploited for the consolidation and development of the socialist production relationships in our order. 28

4. The Gradual Change of Social Conditions

A final argument against radical change in East German legal doctrine was derived from both the Linguistic Letters and Economic Problems of Socialism. Speaking about language, Stalin pointed out that the transition of language from an old to a new quality does not occur "by way of an explosion" but "by the gradual accumulation of the elements of the new quality, and, hence, by the gradual dying away of the elements of the old quality"—a theory which he extended from language to social phenomena belonging to the superstructure and the base as well. 29

Stalin thus rejected the necessity of "explosions"—that is, of revolu-

tion—as a prerequisite for all social change. He spelled this out in *Economic Problems of Socialism*:

> The fact of the matter is that in our socialist conditions economic development proceeds not by way of upheavals, but by way of gradual changes, the old not simply being abolished out of hand, but changing its nature in adaptation to the new, and retaining only its form; while the new does not simply destroy the old, but infiltrates into it, changes its nature and its functions, without smashing its form, but utilizing it for the development of the new.\(^\text{30}\)

Applied to law, this meant that bourgeois legal concepts could, at least for a time, acquire socialist content and serve socialist purposes without having to change their traditional form. The notion was not entirely Stalin's invention. It corresponded to the Marxist doctrine of the dialectical relationship between form and content, according to which both originally harmonize until a change in content creates a contradiction, which finally is resolved by the destruction of the old form and the creation of a new one corresponding to the new content. But Stalin played down the third step of the dialectical process. In this respect he was followed by the East German jurists as well. Interested primarily in the continued use of the traditional civil law system, they contented themselves with pointing to the "new" functions of old norms which they did not bother to replace. The dynamic concept of a dialectical contradiction between form and content thus was suspended by a static concept of new socialist content in old bourgeois forms.

**B. Bourgeois Forms with Socialist Content**

Once they had assumed that under the new political conditions in the GDR traditional civil law concepts had acquired new socialist content, East German scholars saw no reason for not applying them. Moreover, since the new content supposedly came into existence automatically with the change of the economic base, a special socialist construction of old norms was not even necessary.\(^\text{31}\) Bourgeois norms were granted the same dignity as the few newly legislated East German provisions:

> Our civil law is uniform in quality and class-character. The BGB as well as other laws which originated under capitalism are com-

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ponents of the democratic civil law of the German Democratic Republic.\textsuperscript{22}

This position legitimized the continued use of practically the entire traditional German private law system. Civil-law relationships continued to be defined as legal relationships based on cooperation (in contrast to the subordination in relationships governed by administrative law) and included contractual relationships between state enterprises.\textsuperscript{33} Accordingly, private law property rules governed the use and transfer of state property—allegedly a qualitatively new concept in East German civil law—as they generally govern that of fiscal property under capitalism.\textsuperscript{34} The concept of contract, particularly needed after the introduction of the Contract System in nationalized industry, occupied a position of "great and continuously growing importance."\textsuperscript{35} The occasional modifications of private law rules in these years were peripheral and did not involve conceptual changes: for example, the notion of "good faith" which was now determined by the moral notions of "the working class and its allies,"\textsuperscript{36} or the exclusion of bona fide purchases of state-owned property. Purported changes in civil law doctrine, such as the new distinction between means of production and means of consumption,\textsuperscript{37} were not carried over into legal practice but remained ideological embellishments of no consequence.

Despite constant declarations to the contrary, East German scholars

\begin{footnotesize}
\begin{enumerate}
\item The traditional German legal problem of distinguishing between civil law and public law was posed by East German jurists as the problem of distinguishing civil law from administrative law. The difference, however, is largely terminological. East German legal theory discards the concept of "public law" since it suggests that other areas of law might not be "public" and thus might be outside the concern and influence of the state. This in turn would imply the possibility of conflict between the interests of the Individual and the state, a notion which until now has been unacceptable to East German legal doctrine. That there are different ways of posing the question, however, does not do away with the problem at hand: how to differentiate legal relationships between autonomous citizens or juridic persons from those relationships in which the state is involved as sovereign.
\item For the use of "fiscal" here see note 15a supra.
\item On a theoretical level, Stalin did not consider means of production to be commodities, since the central ownership of the state excluded legal transfer of property in means of production from one state enterprise to another. Nevertheless, he also provided a justification for including them under the civil law rules governing commodity exchange. Since means of production, according to him, retained "the outward integument of commodities," civil law was judged to be applicable to their transfer within the state economy as well as outside it. J. Stalin, Economic Problems of Socialism in the USSR 41 (1922).
\item Das Zivilrecht der DDR, supra note 32, at 308 (1955).
\item A distinction which traditional bourgeois doctrine allegedly did not make in order to conceal the use of means of production as instruments of exploitation.
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recognized that the conceptual differences between East and West German civil law were negligible. Once more, this fact could be justified with the help of Stalin. Professor Such, referring to *Economic Problems of Socialism*, wrote in 1953:

> Until now we lacked sufficient theoretical explanation for the fact that the definition of different contract relationships . . . did not reveal their class-character. This class-character was and is visible only through an analysis of the class position of the parties and of the functions which contracts serve under different economic conditions. Only this kind of analysis showed the essence of a concrete contractual relationship and made it possible to reveal the fundamental difference between contracts under our law and capitalist contracts.

Stalin's teachings about the continuation of commodity production under socialism explain this particularity of contract definition. They demonstrate emphatically that commodity production as well as its abstract juridic expression [in civil law] "must not be regarded as something sufficient unto itself, something independent of surrounding economic conditions" but that its concrete quality . . . must be determined on the basis of the specific laws of a particular form of society.\(^{39}\)

Whether a civil law concept is capitalist or socialist in character, then, does not depend upon its particular legal characteristics but upon the political and economic conditions under which it is applied. Given this premise, all that was necessary to demonstrate the new quality of East German civil law was to point to the nationalization of industry and to political changes in the GDR.

C. Revisionism

Political circumstances further encouraged the acceptance of bourgeois legal concepts, already rendered palatable by the doctrine of their new socialist content. Moscow's reconciliation with Belgrade in May 1955—with its implicit Soviet recognition of a separate Yugoslavian way to socialism—and the Twentieth Party Congress of the Communist Party of the Soviet Union in February 1956 brought about a two-year period of revisionism in East Germany, which mainly by way of economics affected law as well.\(^{40}\) The revisionists directed their main attacks against the oppressive centralism and bureaucratism of the East German party state. The economists Fritz Behrens and Arne

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\(^{38}\) J. STALIN, *ECONOMIC PROBLEMS*, supra note 27, at 15.

\(^{39}\) Such, *Die Lehre von den Schuldverhältnissen*, supra note 28, at 59.

\(^{40}\) M. JANEEZ, *Der Dritte Weg 77*, 112 (1956).
Benary in particular criticized the suffocating omnipresence of the state and demanded a democratization of the economic process: replacement of the centralized state-apparatus with a system of economic self-management of individual enterprises, reliance on economic instead of administrative methods, greater trust in and opportunity for the spontaneous cooperation of the masses and finally, as a consequence of the postulated dismantling of the centralized administrative apparatus, a gradual withering away of the state.\footnote{41}

The revisionist jurists were less outspoken, but their criticism ran in the same vein. The legal theorist Klenner, for instance, defined law as "a kind of touchstone for the reality content . . . of human thinking,"\footnote{42} thus implying that the validity of a law should depend on its public acceptance—a test which in effect would subject the party itself to spontaneous criticism.\footnote{43} Professor Such stressed the autonomy of contracts in East Germany’s planned economy and declared that non-fulfillment of a contract was a "critique by the sphere of praxis of a shortcoming in some phase of the preceding total process of planning and execution,"\footnote{44} thus also ascribing an important role to a form of spontaneous criticism from below.\footnote{45} Other jurists advocated—on a more practical level—the admission of bankruptcy proceedings against state-owned enterprises,\footnote{46} a suggestion which reflected Behrens’s and Benary’s demands for the economic independence of individual state enterprises and for the supremacy of economic over administrative criteria in the ordering of the economy.

On the whole, however, the revisionist influences on civil law during the years 1955-1957 did not lead, as in other intellectual fields, to a preoccupation with Reform-Communist ideas, but rather to an open return to pre-Communist civil law concepts and doctrines. This reaction can be explained by the weight of the traditional civil law system

43. Klenner also declared it to be the task of socialist ideology to "march at the head of the spontaneous movement" and accepted as good socialist law only law which did so. \textit{Id.} 101.
45. Such admitted this criticism to be spontaneous but called for the lifting of "the spontaneity of this critique into consciousness in order to help eliminate shortcomings at an early stage." \textit{Id.} 362.
46. Reported by Ulbricht at the Babelsberg Conference, \textit{Protokoll der staats- und rechtswissenschaftlichen Konferenz in Babelsberg} 28 (1958).}
still in use in the GDR and only formally repudiated by the theory of its new socialist content. Under the temporary relaxation of the political atmosphere, the "new socialist content" was progressively ignored. In universities lecturers would separate "old forms" and "new content" by giving a political introduction and then teaching straight traditional law. The use of old commentaries and textbooks was widespread; law schools even began to ask for more West German literature. East German civil law doctrine, until then carefully disguised as socialist, began giving up its pretenses.

But if the period of revisionism did not affect East German civil law doctrine more than by bringing its traditional character out in the open, it is yet important for another reason. Revisionism did not basically change civil law theory up to 1957; but without an understanding of the Party's reaction to revisionism and the total change in intellectual climate accompanying it, civil law development during the following years would be incomprehensible. This reaction set in at the 30th plenary session of the Central Committee early in 1957, at which the party, in Ulbricht's words, "proceeded to the counter-attack" and at which the major revisionists, among them Behrens, were officially criticized. From then on the dominant role of the state was stressed against all earlier notions of participation or criticism from below.

The role of the state was also the main topic of discussion at a conference on general questions of law and the state held in Babelsberg in April 1958. Organized by the Central Committee and headed by Ulbricht, the Babelsberg conference established the direction of all legal development during the following years. Ulbricht again attacked Behrens and Benary for their "revisionist theory of the dismantling of the state," rebuked revisionists like Klenner and Such for misunderstanding the class-character and function of socialist law, and then spelled out this function: law had to be an instrument of the state for the transformation of society. It would be judged by its

47. Bönninger at the Babelsberg conference, in id. 62.
48. Schirmer at the Babelsberg conference, in id. 100.
49. M. Jäncke, supra note 40, at 84.
50. Id.
51. Ulbricht at the Babelsberg conference, PROTOKOLL, supra note 46, at 28.
52. Id. 29. For further criticism of Klenner see Helmbrecht, "Zur ideologischen Natur des Rechts" im Lichte des Grossen Oktober, 7 STAAT u. R. 244 (1958).
53. PROTOKOLL, supra note 46, at 56. For additional criticism of Such, see Panzer, Zur Rolle des sozialistischen Zivilrechts bei der Verwirklichung der Wirtschaftspläne, 7 STAAT u. R. 535 (1958).
54. PROTOKOLL, supra note 46, at 40: "Our science of state and law [can] do justice to its tasks only by approaching problems of our state and law from the viewpoint of its role in the process of revolutionary transformation, from the viewpoint of its role in the formation of the new socialist society."
efficiency as a tool for state purposes: “The criterion for the scientific character of our theory of state and law is its usefulness in the praxis of the construction of socialism.” Ulbricht’s concept of law as a transmission belt between the leading state and the led masses ran counter to everything the revisionists had wanted to achieve: instead of decentralization, spontaneous participation from below, and the eventual withering away of state and law, it meant more administrative interference, conscious ideological guidance from above, and a strengthening of state and law. The educative function of law was particularly stressed after the Babelsberg conference. A self-critical editorial in the leading legal journal Staat und Recht stated in 1958:

It is the main task of the science of state and law in the German Democratic Republic to educate men . . . to think in terms of dialectical materialism in dealing with questions of state and law, and to propagate insight into the requirements for development of our state and law during the construction of socialism.

Civil law doctrine reacted accordingly. Instead of primarily defining and ordering the relationships of conflicting interests, civil law was now above all supposed to generate socialist consciousness:

Civil law is not an immediate instrument for regulating economic processes . . . but, as a manifestation of the will of the socialist state, it is an instrument to influence the consciousness of our people.

With the inherited civil law system still in use in the GDR, such a goal was unattainable. In order to exploit “the great mobilizing force of civil law,” East Germany would need, first of all, a new kind of civil law. Accordingly, when Ulbricht announced the beginning of the new stage of the “completion of socialism” in the GDR at the Fifth Party Congress in July 1958 (three months after the Babelsberg conference), he also asked for a series of new laws, among them new codes of civil law and civil procedure. Work on the new civil code started immediately.

55. Id. 30.
57. Panzer, supra note 53, at 537.
III. 1958-1961: Searching for “Socialist” Civil Law

The three years following the Babelsberg conference and the Fifth Party Congress are the most radical, the most dogmatic, and the most creative in the short history of East German civil law. While at all other periods of its development East German theorists relied at least to some extent on Soviet doctrine for support, the theories developed after Babelsberg seem to be independent of—even largely contradictory to—such doctrine. Efforts during these years to create a “socialist” civil law system ignore practical considerations and show little awareness of the course of Soviet legal history. In a way, they seem very German in their intense, if critical, preoccupation with the traditional key concepts of German private law dogma, such as the “subjective right.” Without delineating in any detail the devious routes by which they were reached, I will first describe the most striking tenets of civil law doctrine during these years, then look for Soviet parallels.

A. Civil Law vs. Economic Law

Until 1958, civil law in East Germany had been distinguished from administrative law by its specific method of legal regulation: coordination of the parties instead of subordination of one participant under the other. After Babelsberg, this traditional distinction was criticized as abstract, formal, and lacking a “political message.”\(^{60}\) It was to be replaced by a systematization based not on the method but on the purpose of legal regulation: regardless of juridic distinctions each branch of law should provide concrete guidelines for a concrete area of activities. This legislative goal of having different branches of law correspond to different complexes of societal life soon led to the separation of civil and “economic” law.

1. Economic Law

While until 1958 business relationships between state enterprises had been governed by civil law, it was now held that all legal relationships in the field of the state economy should be embraced by one new branch of law. Such an “economic law,” in this form unknown to traditional German legal doctrine, would combine horizontal relationships between the different state enterprises (contracts) with vertical relationships between individual enterprises and the administrative au-

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authorities responsible for their economic performance. It would thus be
an amalgam of former civil and administrative law elements.

The justification for distinguishing contracts within the state econ-
omy from contracts between individual citizens or between citizens
and state enterprises such as state-owned department stores was found
in the decisive influence of planning on the first type of contract. The
civil law classification of contractual relationships between state enter-
prises before 1958 had concentrated on the rights and duties of the
immediate parties and had left the influence of planning (and thus of
the state) to other branches of law. With the new insistence on the
transformation of society from above, however, the state was to re-enter
these exchange relationships as an immediate participant. Contracts
between state enterprises, it was now said, could not be understood
without taking their planning aspects into account; a neat legal sepa-
ration between their horizontal and their vertical elements would be
impossible. Both elements of planned contracts, therefore, had to be
governed by one legal discipline, which would be the expression of
democratic centralism in the area of the economy, dialectically com-
bining its centralistic aspects—planning—with its “democratic” aspects
—economic cooperation between state enterprises.

Practically speaking, however, centralism far outweighed coopera-
tion in the new economic law. Given the emphasis on the state in this
period, the combination of administrative and civil law elements in
one branch of law took place at the expense of the civil law elements.
Suspicious of the voluntaristic and individualistic features of civil law
traditions, the post-Babelsberg economic law theorists tended to ne-
glect problems of horizontal economic cooperation between state enter-
prises and concentrated instead on the “perfection of state guidance”
(a favorite slogan in these years) through directives from above. The
legal position of the individual enterprise in East Germany's economy
became a problem of secondary importance. Even the Contract System
which had been introduced in 1951—the system of contractual instead
of administrative distribution of goods within the state-owned econ-
yomy—was occasionally called into question. Hemmerling, for instance,
asked in 1961 “whether after all it is still correct to speak of a contract

61. Definitions of democratic centralism in this period placed the centralist aspect
very much in the foreground. Heuer, for instance, spoke of democratic centralism as
the “principle of the guidance of socialist society through the socialist state,” a definition
omitting the democratic aspect completely. Normally, the democratic pole of democratic
centralism would be mentioned, but it would not receive much attention. Heuer, Demo-
kritischer Zentralismus und sozialistische Moral, 4 VERTRAGSSYSTEM 99 (1960) [hereinafter
cited as VS].
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system or whether this conceptual approach may not, in the long run, create ideological obstacles to the development of the complex planning and guiding [of the economy].”62 No longer were contracts viewed primarily as mechanisms for coordinating interests between two enterprises, but as “a means of [state] power, an instrument of [state] guidance.”63 “Economic accountancy”—requiring state enterprises to achieve profitability on the basis of their own individual accounts64—was declared to be “not simply an economic lever, but mainly a political principle: a method of educating the workers . . ., a mirror image of the degree of maturity of consciousness of the collective in question.”65 Economic incentives were viewed with suspicion as an appeal to capitalist instincts instead of socialist responsibility.66 Not the allocation of material advantages or disadvantages, but new consciousness was to be the socialist answer to old problems. Above all the struggle to fulfill contracts (a perpetual problem for East German officials because of the ill-functioning of economic sanctions for nonfulfillment) was supposed to rely primarily not on material incentives but on “socialist consciousness as the decisive force.”67 No wonder that the violation of contracts was viewed above all as “a moral question.”68

The new doctrine of economic law thus showed the typical features of a reaction to revisionism: stress on consciousness instead of spontaneity, on administrative instead of economic methods, on planning instead of the contractual initiative of the individual enterprise, on the interests of the state instead of those of the individual. Preoccupation with the educative role of law, furthermore, produced an ideological perfectionism which left little room for practical deliberation. Much of the energy of economic law scholars was spent on translating political tenets into legal concepts, delineating different branches of law, and developing ideologically correct definitions. Nor were these

63. Id. 34.
64. This was a main feature of the contract system, introduced by decree of March 20, 1952, [1952] GB1 225.
66. Heuer, supra note 61, at 105:
A system of material incentives is not only an expression of the stage of productive forces but also an expression of an as yet insufficiently developed socialist consciousness, of the contradiction between narrow (subjective) personal interests and the interests of society.
68. Id.
characteristics restricted to the development of economic law doctrine. They can be found in the civil law doctrine of this period as well.

2. Civil Law

With exchange relationships within the state-owned economy transferred to the new discipline of economic law, civil law was to be left with the sphere of consumption. It was to embrace all legal relationships among individual citizens as well as their relationships to state-owned stores or public utility organizations, including those to such administrative authorities as housing or public health agencies, which formerly would have been covered by administrative law. In accordance with the consciousness-forming role of law, the future civil code in this area would organize and eventually help to collectivize the traditionally individual business of providing for the material needs of oneself and one’s family, making them a matter of general social concern. The civil code, therefore, should not merely offer instructions for the decision of possible conflicts of interest; it should also serve as a manual for socialist behavior. Devised as a means of political education, it would have to be ideologically persuasive and understandable, speak a simple language, contain as few legal abstractions as possible, have a structure geared to the different areas of consumption (e.g., sales, leases, housing), and demonstrate the importance of social over individual interests.

The aim is really this: that being provided with food, clothing, housing and cultural goods must in the minds of our people cease to be a private affair and be understood as a matter of public concern, with every citizen in our republic entitled and obligated to participate in its organization.69

Two examples will illustrate how East German civil law theorists tried to achieve this goal.

a. The Subjective Right

Favorite child of German civil law doctrine, the subjective right70 was particularly obnoxious to East German jurists. Viewed by tradi-

70. The German term subjektives Recht is here translated as “subjective right” since the simple translation as “right,” although less confusing to a common law reader, would fail to convey the dogmatic weight attributed to this concept in German law. The subjective right is a general concept for any legally enforceable right of the individual. Subjective rights thus are the subjective counterparts of the objective body of laws (objektives Recht) on which enforceable individual claims are based. Although not confined to the area of private law (subjective rights exist in public law as well, e.g., civil rights), private law doctrine is centered around this concept and contributed most to its systematic development.
tional theory as a legally protected private enclave for the individual, it was now in East Germany seen as "in reality demarcating the elbow-room of the individual capitalist."71 East German scholars in this period saw the subjective right primarily as a negative concept, a legal weapon directed against others, warding off society. Since during these years the possibility of contradictions between the interests of the individual and those of society was not admitted theoretically—the two merging in the interest of the state—the traditional doctrine of subjective rights was to be "demolished down to the foundations."72

Of course this could not mean that the future civil code should contain no property or obligatory rights; but these rights should be geared to the needs of society as well as the individual. For example, instead of treating property as a primarily exclusive right,73 the civil code should take into consideration the general functions of personal property under socialism—in particular, the consumption function. Instead of placing the right to dispose of one's property at the center of legal regulation, as does the BGB, the new code should focus instead on the rights of possession and use.74 In order to reduce the private and autonomous nature of civil law relations even further, it was planned to introduce into the civil code provision for collectives like house-committees or store-committees, which (beyond their established political functions) were to be legally entitled to participate in quarrels and law suits concerning certain civil law claims, such as those arising out of rents or sales. This innovation would at least have influenced the climate in which individuals assert their rights, and thus indirectly those rights themselves.

On the whole, however, the suggestions for getting away from the doctrine of subjective right were not very convincing. The proposed changes were largely doctrinaire and more concerned with ideological than with legal clarifications. A case in point was the theory that under socialist conditions the traditional German distinction between subjective right (the individual claim) and objective law (the body of law giving rise to that claim) was superfluous—a thesis supposed to demon-

73. See Section 903 of the BGB: "The owner of a thing is entitled, as far as the rights of others allow, to dispose of the thing as he pleases and to exclude others from any interference with it."
74. From this, for instance, would follow the abolition of certain types of mortgages provided for in the BGB, which serve as negotiable instruments rather than as security for debts connected with the property. Oechler & Rohde, Einige Probleme des Bodenrechts und ihre Regelung im künftigen Zivilgesetzbuch, 15 NJ 567, 572 (1961).
strate the identity of individual and societal interests under socialism. Posch wrote on this subject:

The law itself and its realization through society . . . are the direct guarantees of the realization of rights and duties. It is no longer necessary to differentiate between objective law and a separate subjective right which must serve as the individual's weapon in his fight for existence. The dogmatic juxtaposition of objective law as the general legal order and subjective right as private legal power has no foundation in a socialist society.\footnote{75}

No practical conclusions about the limitation or abolition of individual rights were drawn from this thesis. But the attempt typifies the ideological attitude of the period, both the eagerness to dissociate East German civil law completely from its bourgeois past and the dogmatic and fundamentalist way of doing so.

b. \textit{Contracts}

The most important area of contract law, the exchange relationships between state enterprises, had already been taken over by economic law. This left to civil law only contracts between citizens and state enterprises (chiefly public utilities) and between citizens themselves. Civil law doctrine reduced the importance of the remaining contract law still further. The concept of contract, like the concept of subjective right, was regarded as a bourgeois phenomenon which required total remodeling to be acceptable under socialism. In capitalist society, it was said, contracts were necessary as artificial bonds to unite temporarily otherwise isolated individuals and hence had to be used to explain all kinds of social organizations, from the \textit{contrat social} to the marriage contract. Under socialism, however, with the interests of individual and society no longer opposed, social relationships would not have to rely on temporary ties, and contracts would necessarily lose significance. This theory was most completely developed in connection with the rules which were to govern the relationships between citizens and socialist trade organizations. Following a theory first developed by Posch,\footnote{76} it was postulated that a permanent legal bond, a kind of general socialist status relationship, already existed between the citizen and "his" state-owned trade organizations. This so-called "general juridic relationship" (\textit{allgemeines Rechtsverhältnis}) was supposed to in-

\footnote{75. Posch, \textit{Das Rechtsverhältnis im Zivilrecht}, 10 STAAT u. R. 15, 26 (1961).}
clude all basic rights and duties of state-owned shops and department stores and of consumers. Under the new civil code particular contracts would be required only to specify additional rights and obligations—in cases of purchases on an installment plan, for example.

The concept of the general juridic relationship was in a sense a conceptualistic attempt to extend the influence of civil law beyond the individual's initiative, for this legal relationship would have existed without and even against the individual's volition. The theory thus reflected the expansion of state interference typical of this period. But while great effort was expended on the elaboration of this favorite theme of East German civil law scholars, it is difficult to see how the concept could have been applied in practice. A "general juridic relationship" might have been possible in those state-consumer relationships where prices and all other terms of business were already legally fixed; there one could just as well speak of standardized contracts, especially since some kind of offer and the acceptance of the consumer would still be necessary. Everywhere else, it would seem, East German doctrine would be forced to fall back on traditional contracts, as indeed it did, although it tried to interpret the elements of offer and acceptance as objectively as possible, placing subjective elements—for instance, intent in cases of mistake—in the background.77 The theory of the general juridic relationship failed at least in part because it tried to anticipate by way of legal institutions social conditions not yet in existence—in particular, direct distribution of consumer goods, predicted only for the final stage of Communism.

B. Soviet Parallels

As noted earlier, East German legal development after the Babelsberg conference must be understood as a reaction to revisionist stirrings in the wake of Soviet de-Stalinization. To this extent civil and economic law developments in the GDR, although a consequence of Soviet events, do run counter to the liberalizing trends set off by the Twentieth Party Congress. It is interesting to inquire, therefore, whether Soviet influences continued to be felt in East German law and whether Soviet legal history provides any precedents for the post-Babelsberg developments. To trace such influences and the parallels between East German and Soviet civil law thinking requires a review of Soviet legal history.

77. Posch, Der Vertrag im Zivilrecht, 9 STAAT u. R. 1768, 1786 n.30 (1960).
1. War Communism

During the first years after the Revolution, attempts were made to run the Soviet economy without the help of traditional bourgeois civil law, particularly without contracts. Practically all contractual relationships within the economy were replaced in August 1918 by a system of direct distribution of products, working exclusively with bookkeeping entries. In 1920 several decrees relating to consumption ordered the abolition of any payment for rationed goods, fuel, communal housing, or postal and telegraphic services. All private ownership of land and the right of inheritance were abolished. In addition to the expropriation of banking, shipping and insurance businesses, and of all but the smallest industrial enterprises, private property rights on a more modest level were largely disregarded by both central and local Soviet authorities.

But similarities between actual practices during the early Soviet years and the legal theorizing of East German civil law doctrine after Babelsberg, especially the common disdain for contracts and individual rights, are misleading. While the East Germans believed enough in law and the adjudicative process to work on new codes in civil law and procedure, the Soviets distrusted all formalized legal procedure and relied instead on revolutionary justice. Their early decrees were an attempt to move away from the rigidity of law itself, not just from bourgeois law. Pre-revolutionary laws were to be applied only if they harmonized with "revolutionary conscience and consciousness of Justice." Even new Soviet decrees were not sacrosanct but were viewed merely as political guidelines; they could be disregarded if "extraordinary circumstances of the civil war and the combat of counterrevolution" required it. In contrast to the East German jurists of the Babelsberg period, Soviet jurists during these years wasted no energy on the development of new theoretical concepts. In contrast also to the traditional German faith in legal expertise, they assumed "that the fundamental problems of social administration were very simple, and

78. Loeber, supra note 15, at 18.
79. V. Gsovski, Soviet Civil Law 13 (1948).
80. Id. 10-11.
81. Id. 11-13.
82. Id. 16.
83. According to article 5 of the First Decree on the Courts of November 27, 1917, as reported in R. Schlesinger, Soviet Legal Theory 63 (1945).
84. Lenin wrote in 1917: "It does not matter that many points in our decrees will never be carried out; their task is to teach the masses how to take practical steps . . . We shall not look at them as absolute rules . . ." Quoted by K. Grzibowski, Soviet Legal Institutions 42 (1969).
85. Decree of November 8, 1918. Quoted by V. Gsovski, supra note 79, at 154.
could dispense with the elaborate legal machinery accessible only to specialists."\(^{86}\)

The introduction of the New Economic Policy (NEP) in May 1921 marked the end of such beliefs in the feasibility and simplicity of administrative solutions, especially in relation to the economy. As Lenin wrote in 1921:

> It was intended to exchange in a more or less socialist manner ... the products of industry for the products of agriculture ... But what happened? ... Nothing came of the exchange of goods, the private market proved to be stronger than we and instead of an exchange of goods we ended up with ordinary purchase and sale, trade.\(^{87}\)

The return to more orthodox economic forms entailed a return to civil law methods as well. From now on, codification of Soviet law replaced the system of ad hoc decrees. The experiments in revolutionary justice were over.

2. The NEP Period

As far as legal philosophy is concerned, the NEP period represents no deviation from the early revolutionary years, but a logical, if more realistic, continuation. Expectations about how quickly Communism could be attained were less optimistic, but the attitude toward law remained basically the same.

Outwardly, there seemed to be a renaissance of bourgeois law. The restoration of civil law, begun with a decree of May 1922 entitled "On Fundamental Private Property Rights Recognized by the Union of Soviet Republics, Secured by Its Law, and Protected by Its Courts," was completed with the enactment of the Civil Code of the Russian Socialist Federated Soviet Republic in October 1922. Many of the Code's provisions were virtually copied from Western codes, especially the BGB. Unlike the BGB, the Russian code excluded family law and included commercial law, but from its conceptual framework down to individual provisions it was "strongly reminiscent" of the Western European legal tradition.\(^{88}\) Only occasionally was its conventionality modified in favor of the state: especially by Section 1, "Civil rights shall be protected by law except in instances where they are exercised

\(^{86}\) R. Schlesinger, supra note 83, at 65.
\(^{87}\) Quoted by Loeber, supra note 15, at 129.
in contradiction with their social-economic purposes," and by a number of other provisions safeguarding state interests.\textsuperscript{89}

The contrast between these rules and the traditional provisions of the code is symptomatic. The Civil Code of 1922 was conceived as a bourgeois code, to be used temporarily for reasons of expediency. Little effort was made to mitigate its conservatism or to hide its provisional character. The NEP code so unashamedly drew on traditional Western European legislation as well as on an old Russian draft code prepared under the Czarist regime,\textsuperscript{90} in fact, that its drafting took only four months.\textsuperscript{91} In a textbook on Soviet economic law, edited by Pashukanis and Gintsburg, it was frankly admitted that "separate specific 'soviet' articles were sprinkled here and there . . . amidst a mass of articles from bourgeois codes."\textsuperscript{92}

This legislative method was consistent with the general tenor of legal thinking during the NEP years. Not only was it assumed that law together with the state would wither away under Communism (at least for the final stage of Communism this was never disputed in Soviet ideology), but it was also believed that the legal provisions temporarily necessary during the transition period would have to be bourgeois law, not some kind of socialist law. By extending Marx's analysis of commodity exchange from economics to law, Pashukanis developed this most clearly. For him, all law (not just private law, although Pashukanis saw private law as law \textit{par excellence}) is an expression of the exchange of goods on the market. Such exchanges demand a mutual recognition of property rights,\textsuperscript{93} and law furnishes the framework in which such recognition takes place. As for Marx value provides the common denominator which enables the exchange of otherwise incommensurable goods on the market, for Pashukanis law provides the formal equality necessary for the regulation of this exchange. The economic exchange relationship takes on the legal form of the juridical relationship; commodity dealers are abstracted into legal subjects. Law is thus the "inevitable reflection"\textsuperscript{94} of commodity exchange. Since this

\textsuperscript{89}. Section 4: legal capacity is not acquired at birth but granted by the state "for the development of the creative forces of the country"; Section 18: juridical persons can be dissolved if their activity is contrary "to the interests of the state"; Section 39: legal transactions are void if "directed against the obvious prejudice of the state"; Section 60: no bona fide purchase of state property.

\textsuperscript{90}. Gsovski, \textit{The Soviet Concept of Law}, 7 FORDHAM L. REV. 1, 27 (1938).

\textsuperscript{91}. H. Berman, \textit{Justice in Russia} 25 (1950).


\textsuperscript{93}. 1 K. Marx, \textit{Das Kapital} 90 (1955).

mode of distribution of goods has reached its highest form under capitalism, capitalist law is law in its highest and final stage. There is no law beyond it:

The dying out of the categories . . . of bourgeois law by no means signifies that they are replaced by new categories of proletarian law—precisely as the dying out of the category of value, capital, gain, and so forth will not (with the transition to expanded socialism) mean that new proletarian categories of worth, capital, rent, and so forth appear. The dying out of the categories of bourgeois law will in these conditions signify the dying out of law in general . . . .95

Pashukanis's conclusions, if not his reasoning, were shared by his colleagues. For them as well, law was a bourgeois, not a socialist phenomenon. Goikhbarg wrote in 1923: “We refuse to see in law an idea useful to the working class”;96 Reisner, more carefully, wrote in the same year: “We still do not know whether we need law, and to what extent we need it”;97 and Stuchka, in 1927: “Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will disappear altogether.”98 As a result of these theories, civil law during the NEP period was tolerated but otherwise neglected. Since it was bourgeois law, the notion of traditional bourgeois “legality” was for the time being accepted. The private rights guaranteed in the NEP code were thus given a certain stability. But apart from its temporary usefulness for the NEP, law was granted no future. Under Pashukanis’s influence even the teaching of civil law was discontinued in Soviet universities, except for a few hours devoted to bourgeois law of the Soviet Union at the end of the year.99 No one during the NEP years ever dreamed of developing a new “socialist” civil law.

The difference from East German teachings after the Babelsberg conference is obvious. The East Germans, planning to replace bourgeois civil law by socialist civil law, not only wanted to preserve the category of law, but intended to use it as an instrument for the creation of socialist society. With the help of law, they hoped to bring about social conditions which the NEP jurists believed would exist only after the withering away of all law: for example, direct use of public utilities

95. *Id.* 111, 122.
97. *Id.*
98. *Id.* 170.
without contracts (though still on a limited scale and not yet without
the use of money) or participation of citizens in the administration of
consumer-good distribution. The East Germans, at first sight more
radical than the NEP jurists in their rejection of bourgeois law, were
in reality much less radical.

The same is true of their separation of civil and economic law, which
appears to echo Soviet ideas developed during the NEP period. But
the differences between the East German and Soviet attitudes toward
law in general are reflected in different concepts of economic law
as well. The theory of economic law appeared in the Soviet Union
after the introduction of the first Five-Year Plan in 1928, which was
aimed at the immediate construction of socialism. Based on the experi-
ences of the NEP with its two economic sectors (private and planned),
Soviet scholars saw economic law as an outgrowth of the planned sector
and as antithetical to the bourgeois civil law of the NEP code. This
followed directly from Pashukanis's commodity-exchange conception of
law. 100 If law served as a mediator between conflicting interests of
commodity owners exchanging their goods, then the absence of con-
flicting interests in an economy owned by the state alone and run like a
gigantic factory must render this law superfluous. In Pashukanis's
words:

The opposition of private interests is . . . a fundamental premise
of legal regulation. At the same time this is a logical premise of
the juridic form . . . . Conversely, unity of purpose is a premise of
technical regulation. 101

Pashukanis accordingly distinguished between two modes of regulating
the economy: "the purely juridic—that is to say, the legal form" with
"links between economic units expressed in the form of the value of
circulating goods," and the method "of direct—that is to say, techni-
cally fertile—instructions in the forms of programs and plans of pro-
duction and distribution and so on." 102 The first method was bourgeois
civil law and was doomed to disappear under Communism. The second
method was a kind of nonlaw or antilaw, involving technical instruc-
tions and direct regulations that were supposed to survive under Com-
munism. This "economic law" was not, like bourgeois law, interested
in legal stability but in scientific progress, "changing constantly as the

100. See Dobrin, Soviet Jurisprudence and Socialism, 52 LAW Q. REV. 402 (1936).
101. Pashukanis, supra note 94, at 137. See also the statement by Ginsberg, in 1927,
as quoted by Dobrin, supra note 100, at 419: "The existence of a single owner and of a
single organizer excludes private law and law in general."
102. Pashukanis, supra note 94, at 178.
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conditions change” comparable rather to railway regulations or rules for medical treatment than to law in the traditional sense. As Pashukanis wrote in 1930:

[W]e need the utmost elasticity in our legislation. We cannot tie ourselves to any system because we are every day breaking up the economic system. Policy is law; we have a system of proletarian politics, but we do not have a system of proletarian law.

East German jurists after Babelsberg did not share this legal nihilism. Their “economic law” was clearly law in the traditional sense; they simply favored administrative law over civil law methods. Barely interested in questions of economic expediency, they looked at their economic law from an abstract legal point of view, mainly concerned with the structure of authority in a planned economy and with the legal and ideological niceties of the relationship between the plan and different types of contracts. The “legal” nature of economic law was never denied, and no reference appears to have been made to Pashukanis or his followers during this period. Like their civil law colleagues, East German economic law scholars viewed their discipline as a new type of socialist law and saw no contradiction between the words “socialist” and “law.” Economic law, like all law, was to be an instrument of the state, not allowed to wither away but to be strengthened in the interest of the transformation of society.

Despite superficial similarities, then, East German legal theory after the Babelsberg conference had little in common with the Soviet jurisprudence of the NEP period. The differences in outlook can be explained at least in part by a lack of knowledge of Marxist theory among East German jurists; no East German was ever able to handle Marx’s writings with the intellectual dexterity of a Pashukanis. But the chief explanation for Soviet legal nihilism on the one hand and East German faith in law on the other probably lies in the different historical contexts: the eschatological hopes still vivid in the Soviet Union of the twenties and early thirties could not very well be shared by East Germans of the late fifties.

3. The Stalinist Period

After 1936 these hopes were not shared by the political leadership of the Soviet Union either. In 1936, Stalin announced the end of the period of socialist reconstruction and the beginning of socialism. A

103. Id.
104. Quoted by V. Gsovski, supra note 79, at 186.
The new constitution was adopted in the same year. The Soviet Union needed, in Stalin's words, "stability of laws now more than ever."\footnote{105} A legal philosophy which denied the possibility of socialist law was incompatible with the political aim of consolidating Soviet society. On April 27, 1938, Vyshinsky, Prosecutor of the USSR, announced new guidelines for jurisprudence at the First Congress on Problems of the Sciences of Soviet State and Law in Moscow. He severely criticized the legal positions of the preceding years, denouncing Pashukanis in particular as a "traitor" and "wrecker." NEP jurisprudence in general was criticized for its lack of political usefulness: "The trend of our science of law has not been in accord with the interests of the cause of socialist building . . . ,"\footnote{106}—that is, for Vyshinsky, with the interests of the Soviet state. Advancing these interests would now be the main task of Soviet legal science under Stalin: "to strengthen the soviet state and soviet law in every possible way."\footnote{107}

The thesis of Vyshinsky's 1938 speech was just the opposite of Pashukanis's: not only could there be socialist law, but law under socialism would be "elevated . . . to the highest state of its development. Only in socialist society does law acquire a firm ground for its development."\footnote{108} Since a good deal of Soviet law at least closely resembled bourgeois law—not only the Civil Code of 1922, but large parts of the new Stalinist constitution as well—this thesis needed explanation. Vyshinsky defended it with the same arguments East German jurists later used before the Babelsberg conference to rehabilitate the BGB for their purposes: the thesis of bourgeois form and socialist content deriving from the assertion that the character of law was determined by the character of the society using it.

The form and content argument had already been held against Pashukanis in 1937 in an article by a relatively unknown jurist named Yudin, who is supposed to have written his attack on higher orders.\footnote{109} Yudin declared that "the content itself defines the form"\footnote{110} and, having thus got rid of the problem of bourgeois legal forms, that the content in turn was defined by political circumstances: "From bourgeois law, socialist law is distinguished as having socialist production relations as
its content and its form.”111 Vyshinsky argued the same way: “Law, or the legal superstructure, can and must be explained in the last analysis out of the economic structure of society, out of its relationships of production.”112 Since Soviet law, based on socialist production relationships, thus necessarily had to be socialist law, it could absorb elements of formerly bourgeois law without losing its socialist character:

[W]hatever has been created by centuries of judicial culture in the field of legal form, Soviet socialist law examines, develops, and enriches, but rejects absolutely all that is foreign to the new society.113

With this justification for the presence of seemingly bourgeois elements in Soviet socialist law, even patently traditional codes like the Civil Code of 1922 became respectable, not just as temporarily useful bourgeois law (as the NEP jurists had argued) but as socialist law. Despite the anti-individualistic political atmosphere of the Stalinist era, civil law attained a certain degree of stability.114 The abolition of the private enterprise sector of the NEP economy greatly diminished the field governed by civil law, but the Civil Code regained some of its importance through the conversion of Arbitrazh (the settlements of disputes within the state-owned economy) from a purely administrative into an adjudicative procedure. The State Board of Arbitration (Gosarbitrazh), which under the influence of “economic law” theory had been intended to be an administrative agency basing its decisions not on civil law but on economic policy and expediency, was converted by the mid-thirties into what amounted to a commercial court. Adhering to the rules of the Code of Civil Procedure, it treated disputes arising out of planned contract relationships between state enterprises as civil law conflicts governed by the provisions of the Civil Code and other Soviet laws.115 Former contentions that only courts should consider themselves bound by law were rejected as “clearly untrue”:

It is proper definitely to condemn and to punish those arbiters who imagine that an arbitral decision may go contrary to law because a decision not corresponding to law is “economically convenient.” Gosarbitrazh does not have the right to depart from law even by one step . . . 116

111. Id. 295.
113. A. Vyshinsky & M. Kakeva, Soviet Socialist Law 3 (Univ. of Texas transl. 1950).
114. Westen, supra note 88, at 35.
115. H. Berman, supra note 91, at 64.
116. Id. 66.
Although introduced not out of respect for the principle of due process but for purely instrumental reasons, this new stress on socialist legality had a conservative effect on civil law. This was true not only with regard to the legal position of state enterprises but—at least in theory—with regard to the rights of the individual as well. According to Vyshinsky:

Socialist law gives great attention to the preservation of personal and property interests of citizens, to private property, and to strengthening the guarantees of individual liberty, that is, the inviolability of person and home, and of secrecy of communication.

The Stalinist constitution of 1936 contained a whole catalogue of civil rights, including rights of property and inheritance. During the forties these rights were further expanded, by abolition of the inheritance tax in 1943, enlargement of the circle of legal and testamentary heirs in 1945, and permission to construct private housing under certain conditions in 1948. Although during all these years they were in practice exposed to political interference, civil law rights under Stalin were, at least in legal theory, respected and interpreted in traditional fashion. Vyshinsky’s socialist civil law was basically the civil law of the NEP period, deprived of both its bourgeois unrespectability and some of its bourgeois security. All Vyshinsky added was a certain normativism (later criticized) and a strong emphasis on the coercive functions of the state. But although these features are symptomatic of the political vulnerability of civil law positions in this period, Soviet legal doctrine under Vyshinsky’s leadership never produced anything close to the East German preoccupation after Babelsberg with introducing the state into formerly private law.

Soviet civil law theory from 1938 to the Twentieth Party Congress in 1956 is rather comparable to East German doctrine between 1952 and 1958, the pre-Babelsberg period. Similar political problems (consolidation of a socialist state under conditions of inner instability and...

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117. Cf. Mozheik & Shkundin: “The defense of the interest of the state, of socialist ownership, is achieved by means of the defense of individual enterprises and organizations representing that ownership.” Quoted in id. 68.
119. Westen, supra note 88, at 36.
120. Vyshinsky’s definition of law as an aggregate of rules expressing the will of the dominant class granted weight to law only as an objective body of norms authorized by the state and left out the legal significance of individual initiative expressed in juridical relationships. See Vyshinsky’s definition in Vyshinsky, The Fundamental Tasks of the Science of Soviet Socialist Law, in Soviet Legal Philosophy, supra note 94, at 303, 336. See also Bilinsky, Zur Problematik des subjektiven Rechts in der sowjetischen Rechtslehre, 1 JAHRBUCH FÜR OSTEREICH pt. 2, at 137, 148, 151 (1960).
121. See p. 31 infra.
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outer hostility) produced similar legal solutions (utilization of traditional law labelled socialist law) similarly rationalized (new production relationships infuse bourgeois laws with socialist content). But it was precisely this position from which East German civil law theorists after Babelsberg were trying to escape. Except for a certain hostility towards individual rights—expressed largely in political terms under Vyshinsky and in theoretical concepts by the Babelsberg version of socialist civil law—there are no direct parallels between pre-Stalinist and Stalinist Soviet legal history and the East German developments of the Babelsberg period.

4. After Stalin

Since the Stalinist period of civil law in the Soviet Union was already over by the time the Babelsberg tenets were being developed, even a common hostility towards the individual could no longer support East German doctrines. Shortly before the Twentieth Party Congress in February 1956, the individual's position with respect to civil law had become a new object of discussion in the Soviet Union. The debate centered in particular around the nature of the juridical relationship and the origin of subjective rights.122 Vyshinsky's definition of law, which included only the body of norms sanctioned by the state and regarded juridical relationships as mere emanations from these norms, was now attacked as one-sided and rigid. According to this definition, it was said, legal relationships came into being only because some norm provided for and regulated their existence. Vyshinsky's concept of law thus attributed to norms "magical qualities of omnipotence" and overlooked the fact that norms are realized through the actions of people and thus through juridical relationships. Furthermore, Vyshinsky was accused of disregarding the subjective rights originating in juridical relationships.124

The new doctrine, therefore, incorporated the juridical relationship into the definition of law as "the legal norm in its realization." This abstract proposition was of more than theoretical importance since it reflected a new emphasis on the role of individual initiative in civil

122. Bilinsky, supra note 120, at 150.
123. Stalgewitsch, Einige Fragen der Theorie der sozialistischen Rechtsverhältnisse, transl. from the Russian in 6 Rechtswissenschaftlicher Informationsdienst col. 583, at col. 587 (1957) [hereinafter cited as RID].
125. Id. at col. 187; Ketschekjan, Rechtsnormen und Rechtsverhältnisse, transl. from the Russian in 5 RID col. 197, at col. 198 (1956).
law relationships, particularly in the area of contracts. It accompanied the awakened interest in the individual and his rights after Stalin's death, an interest shared even by those jurists who rejected the recently broadened definition of law.

Thus at the same time that the East Germans were attacking the concepts of subjective right and contract, interest in these concepts was growing in the Soviet Union. The liberalization and new waves of activity inaugurated by the Twentieth Party Congress eventually led to the long-planned enactment of new civil law: the Fundamentals of Civil Legislation of the USSR and the Union Republics, begun in 1957 and first published in draft form in 1960. The Fundamentals ran counter to virtually every civil law tenet developed in East Germany in the years after Babelsberg. In particular, they perpetuated the traditional distinction between civil law and administrative law on the basis of co-ordination versus subordination, thus rejecting the East German concept of a special branch of economic law comprising all legal relationships in the field of the state economy, vertical as well as horizontal.

This conceptual problem, however, was settled only after a long and sharp dispute which provides the only instance in which East German jurists of the Babelsberg period and a number of their Soviet colleagues agreed. This time the Soviet debate over economic law did not, as during the late twenties and early thirties, concern the question of legal versus technical norms. Although the early economic law theorists were commended for having directed attention to the special problems associated with relationships within the state-owned economy, their accompanying legal nihilism was plainly rejected. After the Twentieth Party Congress in 1956, when the pre-Stalinist taboos on legal

126. E.g., Joffe, Der zivilrechtliche Schutz der Interessen der Person in der UdSSR, transl. from the Russian in 5 RID col. 507 (1956). Joffe also demanded civil law protection for hitherto unprotected subjective rights of a non-property variety, such as honor and dignity. Id. at col. 517.
130. Although a defender of economic law, Pawlow in this respect approved the outcome of the debates introducing the Vyshinsky era: "One of the main positive results of the scientific discussion [from 1938 to 1940] . . . consisted in the refutation of all objections against the construction of a system of socialist Soviet law." Pawlow, supra note 129, at 628.
debates were lifted and the second economic law discussion began, Tadewosjan wrote:

The question is not whether to restore the science of economic law to the form it had before the acceptance of the constitution of the USSR in 1936, with all the erroneous theses which in that period were advanced by its supporters. The aim is rather to create a correct conception of this branch of law which actually exists within the system of Soviet law.¹³¹

Thus even its defenders did not see economic law as a qualitatively new kind of law, but as one branch beside others.

Unlike the pre-Stalinist days, the dispute this time did not concern the role of law in Communist dogma, but the best way of organizing the Soviet economy. On one side were those who advocated improving the quality of planning through more efficient administrative control over the individual enterprise's economic performance; on the other those who would place greater reliance on economic initiative from below by establishing a system of material incentives and safeguarding and enlarging the individual enterprise's economic rights and responsibilities. The Soviet "economists," pointing to the interdependence between plan and contract, favored the first approach and insisted on an economic law which would combine vertical and horizontal modes of economic organization of state enterprises, assuring the predominance of the plan over contractual relationships. They emphasized the need for complex legislation concerning both production and distribution and for specialized training and research in this field. The "civilists," on the other hand, favored the second approach and pleaded for a unified civil law that would embrace both the relationships between state enterprises and those between citizens. They stressed the close interdependence of exchange relationships at all levels and the functional similarities between all types of contracts. Strict separation of civil-law contract relationships and administrative planning should protect the individual enterprise's civil law rights and obligations (within the limits of the plan) from administrative interference.

The controversy was closely watched by theorists in East Germany and in other Eastern European countries, who participated indirectly in the dispute through the choice of Soviet articles appearing in their journals. The East Germans favored pro-economic law articles; the Poles, for instance, the civilist ones.¹³² At a conference of the Law

¹³¹ Tadewosjan, supra note 129, at col. 15.
¹³² Bilinsky, Ringen um das Zivilrecht im Ostblock, 7 OSTEUROPA-RECHT 174, 179 (1967).
Institute of the USSR Academy of Sciences in 1958, to which representatives of other socialist countries were invited, a majority of the Soviet participants, supported only by the East German delegates, advocated a special economic law. But although a second conference held in May 1959 without foreign delegates came out even more strongly in favor of economic law, the economists were finally overruled after the personal intervention of Kosygin, who preferred the civilist arguments. With the publication of the draft of the Fundamentals in July 1960, the question seemed to be settled. In his presentation of the final draft, Poljansky, chairman of the legislative commission of the Soviet of the Union, referred to the practical economic motives for accepting the civilist solution, particularly to the “actively organizing role of contracts” in the Soviet economy. Similar reasons were explicitly stated in the Fundamentals’ preamble:

Full use in Communist construction is being made of commodity-money relations in keeping with their new content under the planned socialist economy, and use is also made of such important instruments of economic development as khozraschyot [economic accountancy], money, price, cost, profit, trade, credit, and finance. Communist construction is based on the principle of material incentives for citizens, enterprises, kolkhozes, and other economic organisations [sic].

The civilists appeared to have won in the Soviet Union.

The East Germans at first showed no inclination to side with the winners. Their ideological investment in the Babelsberg economic law theory was too great to be given up easily. Even when Russians and East Germans were still in agreement on the existence of economic law, German doctrine was much more fundamentalist than its Soviet counterpart. Weichelt, for instance, reporting on the conference of the USSR Academy of Sciences in 1958, which came out in favor of economic law, nevertheless noted critically:

Nearly all contributions to the discussion took as their point of departure the established categories and the conceptual system of

133. Weichelt, Wissenschaftliche Konferenz zu Fragen des sozialistischen Rechtssystems und der sozialistischen Gesellschaft in der Sowjetunion, 7 STAAT u. R. 849 (1958); Bilinsky, supra note 132.
134. Pawlow, Zur Kodifikation der sowjetischen Zivilgesetzgebung, transl. from the Russian in 8 RJD col. 481, at col. 482 (1959); Bilinsky, supra note 132.
137. See supra note 64.
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the existing legal framework. They thus could not come close to the problem of economic law, which on the contrary is excluded by the existing system of categories and concepts.\(^3\)

To the East Germans, the theory of a separate economic law was primarily a matter of ideological concern; it was their most important evidence for the claim that the bourgeois legal heritage had been successfully discarded. To reject this theory and to return to the traditional notion of a comprehensive civil law would amount to the renunciation of all efforts made since Babelsberg to create a new socialist legal system. The East Germans hesitated to do this as long as possible. Although a German translation of the Soviet draft was already published in September 1960,\(^{140}\) the first East German article dealing extensively with the Soviet conception of civil law did not appear until July 1962,\(^{141}\) nearly two years later. As late as August 1961, an economic law conference recommended legislation of a special economic code.\(^{142}\)

Throughout 1961, however, resistance to the Soviet influence among East German jurists progressively weakened, particularly among civil law scholars. On December 8, 1961, the Supreme Soviet of the USSR ratified the final draft of the Fundamentals. A week later, a civil law conference in the GDR Ministry of Justice called the Soviet example an “invaluable aid” to work on the East German civil code and demanded a “clear decision” as to which relationships between state-owned enterprises should be included in it.\(^{143}\) From then on, the tenets developed following the Babelsberg conference were gradually disavowed; the most radical period of East German civil law was over.

IV. 1961 to the Present: Civil Law and Economic Reforms

East German civil law development since the ratification of the Soviet Fundamentals has been influenced not only by the legal tenets of that codification but also, though somewhat less directly, by Soviet economic doctrines and developments. While the Fundamentals caused a retreat from the radical Babelsberg theories to more conservative

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139. Weichelt, supra note 133, at 852.
140. 9 STAAT u. R. 1563 (1960) (German translation).
doctrines, the Liberman economic debate in the Soviet Union helped precipitate the recent economic reforms in the GDR, which have not only surpassed their Soviet counterparts, but also to some extent modified the conservative influence of the Fundamentals on East German legal thought. Before investigating their effect on East German civil law doctrine, these two sources of influence should be examined in some detail.

A. The Soviet Fundamentals

Even apart from their rejection of a separate economic law, the Fundamentals are basically conservative. East German jurists initially went so far as to accuse them of "preserving bourgeois elements," a reproach which was not difficult to justify. Like bourgeois civil codes, the Fundamentals are structured around the concepts of property and contract, and treat both in the Western European legal tradition.

Property is defined, conventionally enough, by the trichotomy of possession, use, and disposal (Article 19). The code comprehends all kinds of property, from state property down to personal property, thus lumping together types of ownership which the East Germans sought to treat in two separate branches of law. The area of subjective rights in general is enlarged. The right of inheritance is completely restored by allowing testaments in favor of persons other than legal heirs (Article 119 1). In contrast to the NEP code, which furnished rules only for the protection of rights of ownership, the Fundamentals introduce the protection of possession without ownership (Article 29). Finally, they extend civil law protection to the non-property rights of honor and dignity (Article 7, a provision which was lacking in the original draft), although not by granting financial damages but through the establishment of a right to obtain retraction. The main "socialist" feature of the Fundamentals is an emphasis on the consumption function of personal property, embodied particularly in the rule that "personal property of citizens may not be used to derive unearned income" (Article 25 I). This provision was added to the draft only after this feature of socialist personal property had been emphasized in the public discussion.

The treatment of contracts in the new code is equally conservative.

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The fact that the Fundamentals include both contracts between citizens and contracts between state enterprises, in spite of the influence of planning on the latter, has already been mentioned. The legal definition of an obligation (Article 33 I), which closely resembles the analogous provision in the BGB,\textsuperscript{146} is also indicative. Furthermore, the final version of the Fundamentals, unlike the draft, introduces a traditional legal definition of contracts (Article 34 I), and names contracts as the first cause of legal obligation (Article 33 II). More important, the Fundamentals state that civil rights and duties arise “from transactions provided by law, and also from transactions which, while not provided by law, do not contradict it” (Article 4 II), thus to a certain extent recognizing the civil law principle of private autonomy. Finally it is provided that legal capacity is automatically acquired by birth (Article 8 I), not “granted,” as in Section 4 of the NEP code, in the interest of the state.

On the whole, then, the Fundamentals follow the Western private law model.\textsuperscript{147} Their civil law is the traditional law of property and exchange relationships in which the state, through its enterprises, plays the role of a privileged\textsuperscript{148} civil law partner. No mention is made of separate regulation of production and consumption relations, of a “general juridic relationship,” or of the influence of socialist collectives on civil law rights as in the East German proposals after Babelsberg.

B. Soviet Economic Reforms

The economic proposals brought to public attention in the Liberman discussions of September 1962 had already been debated in the Soviet Union for a number of years; some reflections of these debates can even be found in the Fundamentals, particularly their preamble. Liberman’s demands for more freedom of decision for the individual enterprise, fewer plan targets and more contracts, and a relation of premiums\textsuperscript{149} to profit instead of output were not entirely new.\textsuperscript{150} But the publication of the Liberman discussions in Pravda seemed to imply official approval, if not of Liberman’s tenets at least of the discussion itself and thus for the first time gave liberalizing economic proposals the appearance of socialist respectability.

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\textsuperscript{146} Cf. BGB § 241.


\textsuperscript{148} No bona fide purchase of state property, Art. 28 IV, and no application of the statute of limitations to certain of the state’s claims, Art. 17.

\textsuperscript{149} Premiums are monetary rewards given to individuals or collectives for superior economic performance.

\textsuperscript{150} Nove, \textit{The Liberman Proposals}, 4 SURVEY 112 (1963).
The Liberman discussions were published at a time when East Germany's economic situation looked particularly bleak. Besides the usual problems of socialist planned economies, East Germany had special troubles with its labor shortage (the emigration of thousands of skilled workers was stopped by the Berlin wall only in 1961) and, after Czechoslovakia, the lowest growth rate in the Eastern Bloc, dropping from 12.8 per cent in 1959 to 4.9 per cent in 1963.15 The Seven-Year Plan of 1959 fell so far behind schedule that it had to be replaced by the Seven-Year Plan of 1964, with considerably reduced targets.

Obviously reform was necessary—a conclusion which, if not directly encouraged by the Liberman discussions, could at least be justified by pointing to the Soviet debate. At the seventeenth session of the Central Committee in October 1962, only a month after the publication of Liberman's proposals in the Soviet Union, Ulbricht referred to the "very interesting discussion" among Soviet economists and suggested changes in the system of incentives as well as in the "petty patronizing" of individual enterprises in East Germany. At the Sixth Party Congress in January 1963, he repeated his demand for economic reform in stronger terms, announcing as one of the first and most important steps the transformation of the associations of state-owned enterprises (Vereinigungen Volkseigener Betriebe—VVB) from administrative into economic organizations. The final reform, the "New Economic System of Planning and Guiding of the National Economy," proposed by a joint Conference of the Central Committee and the Council of Ministers in June, was ratified on July 11, 1963. Besides the changes in the VVB, it contained many proposals to be found in all programs of economic reform adopted in East Europe in the next few years: reduction of plan targets, expansion of the authority of individual enterprises, strengthening of the system of economic incentives and their relation to economic performance measured by profits, promotion of contracts between economic units. In December 1965, the New Economic System was further elaborated by a new method of planning introduced at the eleventh session of the Central Committee: a system of partial planning from below, according to which individual enterprises and their associations (on the basis of fewer general plan targets than before) conclude economic contracts amongst each other,

which then in turn (subject to their approval from above) are to be incorporated into the central plan, thus helping with its preparation.\textsuperscript{154}

In the Soviet Union, economic reform came later than in East Germany. The Liberman proposals were originally rejected in Khrushchev’s reforms of November 1962, which tried to strengthen instead of weaken party control over the economy by organizing the party into an industrial and an agricultural branch. Under the new leadership after Khrushchev, economic reform was finally introduced in September 1965. It is the least daring of all recent Soviet bloc reforms, retaining most physical production targets and the rigid system of material allocation.\textsuperscript{155} Reliance on horizontal cooperation between individual enterprises seems to play a lesser role than in East Germany. Branch associations like the East German VVB, which could replace much of the centralized planning through contractual coordination, are only now being experimentally introduced in the Soviet Union,\textsuperscript{156} and the utilization of contracts in the preparation of the plan seems to be much more limited than in the GDR.

C. Effects on Civil Law Doctrine

As we have seen, once the Soviet Fundamentals were ratified, East German jurists quickly began to re-examine and renounce their former positions. In July 1962, the civil law legislative commission decided to follow the Soviet example and to include contractual relationships within the state economy in the new code.\textsuperscript{157} This return to traditional civil law was confirmed a year later by the New Economic System, which in checking the influence of the bureaucracy and encouraging the initiative of individual enterprises also switched from administrative to civil law methods, particularly contracts.

By 1963, traditional concepts like contract and subjective right had been largely rehabilitated. Since in a system of economic incentives the protection of the individual’s rights is particularly important, all former criticism of the concept of subjective right was disavowed:

Only if we stop associating notions like right, obligation, claim

\textsuperscript{155} Grossman, supra note 153, at 50.
\textsuperscript{156} Tantschuk, \textit{Die Rechtsformen der wirtschaftlichen Rechnungsführung in der Sowjetunion}, 11 VS 500 (1957).
\textsuperscript{157} See Für ein einheitliches Zivilrecht: Bericht über die Hallenser Tagung vom 4. 10. 1962, 16 NJ 667, 669 (1962).
etc. ... automatically with isolation, egotism, etc., will we be able
to create a new law corresponding to social necessities.\textsuperscript{158}

Civil law was no longer regarded primarily as a means of political edu-
cation and indoctrination as it had been after Babelsberg, but was
simply to protect certain rights and obligations. In Ulbricht's words at
the Sixth Party Congress:

One should not believe that it is possible to overcome by appeals
to morals and ideological consciousness those shortcomings which
are caused by a faulty attitude towards the material interests of
our citizens.\textsuperscript{160}

And translated into new civil law:

Educating citizens to respect socialist legality and completely pro-
tecting their property rights and other rights are two sides of one
and the same thing.\textsuperscript{160}

In contract law, the Babelsberg concept of the "general juridical rela-
tionship" was attacked as artificial and impractical. Contracts were
again recognized as the most efficient method of coordinating interests
and were defined in the traditional fashion. In keeping with the Soviet
discussion about the nature of the juridical relationship, civil law
norms were seen not as the direct source of rights and obligations but
only as guidelines. The fact that these guidelines had to be realized
through the actions of citizens led the East German jurists to rediscover
the principles of freedom of contract "under socialist conditions,"\textsuperscript{161}
in accordance with Article 4 of the Fundamentals.

On the whole, then, the combined influence of the Fundamentals
and the new economic reform led to a renaissance of traditional civil
legal thinking in East Germany. In the course of the years, however,
the implementation of the New Economic System again caused a de-
parture from conventional doctrine. Originally it had been assumed
that the new economic reform, with its stress on contracts at the ex-
 pense of administrative directives, required a traditional civil law
system patterned after the Soviet model, which would comprehend

\textsuperscript{158} Grandke, Einige Fragen der Weiterführung des Grundrechts der Bürger auf
Mitwirkung bei der Leitung und Gestaltung des gesellschaftlichen Lebens durch das

\textsuperscript{159} 1 \textit{Protokoll des VI. Parteitags der SED} 100 (Berlin, 1963).

\textsuperscript{160} Bley, \textit{Ober die rechtliche Schadensersatzung und die außervertragliche zivilrecht-
liche Verantwortlichkeit bei der Schadensverhütung und beim Schadensausgleich, in Proble-
me des Sozialistischen Zivilrechts} (Deutsche Akademie für Staats- und Rechtswissen-

\textsuperscript{161} Drews, Prüschel & Schumann, Einige Schlussfolgerungen aus dem 17. Plenum des
contract relationships both between citizens and between state enterprises and would treat the economic relationships between these enterprises as a matter of individual cooperation rather than subordination under administrative authorities. During the first years under the new system, however, it became obvious that economic reform could not wait for the enactment of the new code (which, after all, was already overdue by several years). In February 1965, therefore, a new version of the Contract Law (Vertragsgesetz) of 1957 was enacted to regulate contract relations in the state-owned economy. Although still generally viewed as a civil-law lex specialis, the new law encouraged the "economists" among the East German jurists to proclaim once again the necessity of a special branch of "economic law." As after Babelsberg, they based their arguments on the close connection between plan and contract within the state-run economy and argued that the interdependence of economic contracts and the central plan did not permit their being lumped together with contracts between citizens.

Since 1965 this new economic law theory has been gaining ground; it is at present the prevailing doctrine. In 1966, chairs for economic law were created in East German law schools; at the Seventh Party Congress in April 1967 Ulbricht seems to have settled the question by asking for "thoroughly developed economic law." At first glance, East Germany would seem to have returned to its position after the Babelsberg conference.

There are decisive differences, however. For one thing, what is left of East German civil law proper no longer contains any of the radical features of the Babelsberg period but remains, although deprived of a large area of application, as conventional as its Soviet model. The new economic law doctrine, furthermore, is much more liberal than its Babelsberg predecessor. As critical of administrative interference with economic decision-making as the "civilists," the "economists" reason with pragmatic rather than dogmatic arguments. They do not insist on a special economic code (at least not at present) but concentrate instead on individual laws regulating particular complexes of economic problems, such as the Decree of February 1967 on the legal position of

164. With the establishment of the new doctrine of economic law, however, the first demands for a general economic code are already appearing. Pfliche, Die Entwicklung der Rechtsstellung der volkseigenen Produktionsbetriebe, 11 VS 724, 738 (1967); Pfliche, Zur komplexen Entwicklung des Wirtschaftsrechtssystems, 17 Staat u. R. 595, 600 (1968).
state-owned enterprises. Nor are they particular about an exact line of demarcation between civil and economic law, as were the Babelsberg economists. On the contrary, they are quite willing to draw on the future civil code as far as general rules of contract and property law are concerned. Compared to the doctrinaire and esoteric economic law theory developed after the Babelsberg conference, the present discussions in economic law are lively, open, and unideological.

In the Soviet Union the present situation is somewhat comparable, although the established position of the civilist Fundamentals and of Republic codes based on their approach, seems to hinder discussion more than in the GDR. In accordance with a decision of the Central Committee of the CPSU, economic law is already taught in Soviet universities; furthermore, a special section for economic law was created in the Institute for State and Law of the USSR Academy of Sciences in 1965. On the other hand, the fact that certain Soviet "economists" in 1967 still cite East German sources to support their theories seems to indicate that the outcome of the dispute is not yet certain in the USSR. At the end of 1966, on Soviet invitation, an East German civil law delegation, headed by the GDR Vice-Minister of Justice, discussed the question of civil versus economic law with leading officials and jurists in Moscow. The Germans in this discussion represented their compromise concept of civil law, that is, the Soviet concept deprived however of the whole area of contract relations with the state-owned economy. The cautiously phrased East German report on this visit, while mentioning specifically neither agreement nor disagreement between Russians and Germans, suggests the latter.

However, the economic reforms which brought about the recent revival of economic law theory in both East Germany and the Soviet Union have also decreased the importance of the old controversy. The decision of the Fundamentals for the civilist approach in 1960 still reflected a political decision against excessive administrative interference and in favor of greater economic initiative from below. Since the introduction of the economic reforms, however, these tenets have been shared by the economists as well as the civilists. In fact, one can even notice a certain reversal of positions. While the civilists were

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165. Decree of February 9, 1967, GB1 II, at 121.
originally pragmatists, ready to use traditional civil law mechanisms in the interest of economic efficiency, they now seem to have become somewhat rigid in their contention that civil law should embrace contractual relationships between state enterprises as well as between citizens, regardless of practical differences between the two types of contracts and also, it appears, regardless of whether the civilists' original aim—decentralization—would best be served by such an amalgamation. The economists, on the other hand, have in recent years quite ingeniously attempted to defend the individual enterprise's position against bureaucratic interference. In response to the civilist assertion that only a strict legal separation of administrative and civil law can insure the protection of contractual relationships from undue administrative intervention, Laptjew for instance has argued that on the contrary only an economic law can provide adequate safeguards: since the source of trouble normally lies in the abuse of administrative authority, civil law protection alone can be nothing more than a "civil law illusion"; it must be replaced by more complex legal controls. In East Germany, economic law scholars have even used the civil law concept of the subjective right as a means of defending the individual enterprise against the excessive influence of the state. In current debates about the legal status of state enterprises, the East German "economists" try to decentralize the concept of state property by ascribing to individual enterprises not just the "operative administration" of given material and financial funds, but property-like rights of their own: "subjective rights" or "legitimate rights, to be legally protected, whose attributes are based on objective conditions and not subject to the state's 'arbitrary interventions.'"

With these changes in economic law thinking, the outcome of the current economic versus civil law controversy, both in the GDR (where it seems to be at least temporarily decided) and in the Soviet Union (where support for economic law is increasing), has become far less important than the practical success of the economic reforms, on which the more or less liberal character of both economic and civil law theory will eventually depend.

169. Laptjew, supra note 167, at 1169.
D. Changes and Trends

The development of the economic law debate illustrates the influence which the new economic reforms have had on legal thinking in both East Germany and the USSR. Most obvious is a new relaxation in the style and tone of legal discussions. More fundamentally, the changes in economic theory brought about a change in legal theory as well, particularly in the assessment of how and how fast law would wither away in the future. Finally, and going far beyond the area of law, economic developments since 1963 seem to have stirred up a still tentative and timid reappraisal of political dogma, which in legal writings is reflected in a new interest in the relationship between law and democracy.

1. The New Style of Legal Debate

In the last few years, the atmosphere of legal debate has changed markedly. Economic pragmatism has led to a degree of legal pragmatism as well, and issues are gaining in importance at the expense of dogma. In East German-Soviet relations, genuine legal discussions have become possible, with participants taking positions quite independent of national lines. Especially in East Germany, where a brief and unstable Communist past in combination with the constant confrontation with its West German bourgeois counterpart had produced a considerable need for dogmatic rigidity, a new openness of self-assuredness is visible. Concentration on economic utility instead of dogmatic correctness has placed ideology more in the background; it is still the basis of legal arguments, but no longer dictates every step. The attempts made after Babelsberg to define economic law in terms of democratic centralism, for instance, have been rejected with the remark that “one cannot delineate the social complexes necessary for the formation of a special branch of law with the help of a principle.” It no longer seems necessary to find the one and only correct definition: “Overlapping at the fringes [of a concept] are normal and in no way alarming.” The attitude towards German legal traditions in particu-

173. At the East German conference on socialist economic management and law in October 1967, for example, a dispute arose about the legal character of state enterprises. While Bratus (USSR) and Heuer (GDR) emphasized the basic differences between state enterprises and state organs in this discussion, Laptjew (USSR), Hochbaum (GDR) and Friedrich (GDR) insisted on defining the state enterprise as the nucleus of the planning apparatus of the state. See Langer, Bericht über die Diskussion in der Arbeitsgruppe “Die Entwicklung der Rechtsstellung des sozialistischen Industriebetriebes,” 11 VS 755, 756 (1967).
175. Pflicke, Die wirtschaftsrechtliche Orientierung ist für die Lösung der künftigen Aufgaben notwendig, 10 VS 227, 229 (1966).
lar has become more relaxed. In contrast to the studious avoidance of private law terms characteristic of the Babelsberg period, it has become possible to speak of "classical"\textsuperscript{176} or "time-tested"\textsuperscript{177} bourgeois concepts and to admit their usefulness openly:

One should not fail to recognize that new legislation corresponding to the conditions of socialist society cannot be accompanied by the negation of terms and concepts generally valid in legal sciences. Certain "iconoclastic" tendencies from the first period of the debate about the delineation of different branches of the law after the Babelsberg conference . . . . It seemed natural . . . to include somewhat indiscriminately the traditional legal concepts and categories in the necessary controversy with bourgeois law. In the battle against formalism and positivism, however, several sham fights have been fought, and without compelling reason new concepts have been sought even where the traditional concepts reflected processes which—although differentiated, with different nuances—exist as well in our period. This has occasionally caused difficulties of communication. The concepts "contract," "juridic person," "invalidity" and "liability" are not useless simply because they have been used by bourgeois jurists.\textsuperscript{178}

2. The Future of Law

The relaxed attitude towards bourgeois legal traditions is closely related to another change: a new conception of the role of law under socialism and Communism. Law at present is apparently seen neither as a capitalist relic (as it was in the Soviet Union during the NEP years) nor as an instrument of immediate ideological change (as in the GDR after the Babelsberg Conference), but rather as a neutral phenomenon, safeguarding and furthering political and economic conditions which can in turn serve as the basis for political innovations. Although the withering away of law has never ceased to be one of the predicted features of the final stage of Communism, its demise seems to have been postponed for the foreseeable future without much regret.

This attitude follows directly from the new emphasis on economic decentralization and fits well into Pashukanis's analysis of law. Pashukanis, it will be remembered, considered centralized planning and law

\textsuperscript{176} Niethammer, *Der Streitcharakter des sozialistischen Zivilprozesses*, 12 STAAT u. R. 496, 504 (1963), referring to rules for the allocation of burden of proof.

\textsuperscript{177} Paischel, *Grundätze des künftigen Zivilverfahrens*, 20 NJ 623, 627 (1966), referring to the rule that civil law courts are bound by the claims raised by the parties.

to be mutually exclusive, since the "unity of purpose" within a central-
ized economy renders law—a means of coordinating conflicting interests
—unnecessary. With the increasing delegation of decision-making and
other functions from a central planning authority to relatively inde-
pendent economic units, however, the "unity of purpose" of which
Pashukanis had spoken was gradually displaced or supplemented by
competing interests of individual enterprises. Law as a coordinating
mechanism thus became increasingly necessary. Heuer, for instance,
listed as the three most important tasks of East Germany's New
Economic System "the fight against railway-time-table ideas, against
the conception of the omniscience and omnipotence of superior au-
thorities"; "the fight against underrating the importance of economic
levers"; and finally, "the fight against underrating law." The three
tasks are links in a rational chain, with the emphasis on law a direct
result of growing misgivings about the practicability of exhaustive
planning.

Given this connection, Pashukanis had thought it necessary for
Marxists to decide against law and for central planning. In 1929 he
wrote:

He who refuses to admit that planning and organization are
incompatible with law is really convinced that the relations of

179. In East Germany this development is reflected in an Ideological reassessment of
the relationship between individual and societal interests. While during the Babelsberg
period the possibility of contradictions between interests of the individual and those of
the state was denied with the contention that both interests were merged into the in-
terests of the state, since the early sixties this equation has no longer been accepted. The
harmony of personal and collective interests under socialism today is seen not as an
automatic identity but as a harmony that must be created. Thus Ulbricht stated at the
Sixth Party Congress in 1965: "The task consists in bringing the personal interests of
the individual into harmony with the interests of society as a whole." 1 Protokoll der
Verhandlungen des VI. Parteitages der Sozialistischen Einheitspartei Deutschlands
vom. 15. bis 21. Januar 1965 192 (1965). The recent economic reforms in particular, are
based on the realization that in a planned economy of the old style the interests of in-
dividual enterprises can very well run counter to those of the economy as a whole, e.g.,
in cases of quantitative overfulfillment of the plan at the expense of quality. The New
Economic System thus can be seen as an attempt to coordinate possibly conflicting in-
terests in a more successful way, especially through an elaborate system of economic
incentives.

180. Heuer, Wissenschaftliche Wirtschaftsführung und sozialistisches Recht, 18 STAAT
u. R. 985, 996 (1964), seems to echo Pashukanis's theories:
There is only one system which can do without permanent definitions of areas of
responsibility: that is a consistently administrative system in which the whole economy
is considered and treated as a single factory, which works exclusively with plan
targets and directives.

Such a system is inflexible and rigid, it limits initiative and creativity and reduces the
efficiency of work . . . . Under our present conditions, however, the relative
autonomy of economic units and thus the expansion of their rights and obligations
must play a role of growing importance. Without the unequivocal definition of
rights and obligations formal administration cannot be overcome . . . .

181. Id. 996.
capitalist economics are eternal and that their present eclipse is merely a passing abnormality which will yet be removed.\textsuperscript{182}

The social economists of the sixties, however, although probably not convinced that the capitalist mode of exchange is “eternal,” certainly do not regard it as passing. In the USSR, the acceptance of the notion of a socialist market is visible in a new evaluation of the NEP period, which is no longer seen as a temporary “resurrection of capitalism” (as Stalin had described it in 1933\textsuperscript{183}), but as the “model of a socialist economy”; while the direct exchange of products, once thought to be the socialist rule, is now interpreted as a “temporary phenomenon, introduced by extraordinary circumstances.”\textsuperscript{184} The East Germans not only agree with this assessment of the NEP period,\textsuperscript{185} but have applied it to their present economic reforms as well, now characterizing what was originally called the “New Economic System” as the “proper economic system of socialism in the GDR.”\textsuperscript{186} Commodity production is now declared to be an “integral component of a socialist planned economy.”\textsuperscript{187} At the fifth plenary session of the Central Committee in February 1964, Ulbricht rebuked those “comrades who . . . criticize the present economic policy from the viewpoint of the future period of completed Communism” and emphasized instead the tasks of the present:

[We] do not discuss . . . whether the law of value will disappear in 30 or 50 years—we do everything to turn the consistent utilization of the law of value . . . into a strong weapon in the economic fight against imperialism.\textsuperscript{188}

The acceptance of commodity production under socialism has been further justified by Ulbricht’s recent description of socialism as “not a short-term transitional period,” but a “relatively independent socio-economic formation in the historical epoch of the transition from capitalism to communism.”\textsuperscript{189} From this, it follows that

\textsuperscript{182} Quoted by Dobrin, \textit{supra} note 100, at 420.
\textsuperscript{183} Quoted by V. Gsovskij, \textit{supra} note 79, at 23.
\textsuperscript{185} Heuer, \textit{Entwickeltes gesellschaftliches System des Sozialismus und Wirtschaftsrecht}, 11 \textit{VS} 641, 642 (1967), characterized the New Economic Policy as “decisive progress compared to all former achievements, both in theoretical and practical respects.”
\textsuperscript{187} Heuer, \textit{supra} note 185, at 643.
\textsuperscript{188} W. ULBRICHT, \textit{Die Durchführung der ökonomischen Politik im Planjahr 1964 unter besonderer Berücksichtigung der chemischen Industrie} (report on the fifth session of the Central Committee of the SED from February 3 to 7, 1964) 27 (1964).
\textsuperscript{189} Quoted by Heuer, \textit{supra} note 185, at 643.
Socialist law is no more only transitional law than the socialist economy is only a transitional economy, or the socialist society only a transitional social order.  

Contrary to Pashukanis's aims, but in line with his analysis, the rehabilitation of law proved to be particularly important in the area of the economy, where the growing relative independence of individual enterprises demanded an exact demarcation of their rights, responsibilities, and areas of competence with respect to one another as well as with respect to their superior authorities. Both in the Soviet Union and in East Germany, new decrees on the legal position of state enterprises were enacted to broaden and safeguard such rights. Although the East German decree granted the enterprise a number of rights against its superior authority (among others a right of compensation in certain cases of plan changes), it does not yet satisfy East German economists. Pflicke has voiced hope that it will be "only a forerunner" of a more extensive law still to be enacted which should expand the legal weapons of individual enterprises against administrative interference. Heuer has extended the demand for "more law" to other areas of the economy as well and suggested that not only the rules for exchange relationships but also the principles guiding administrative decisions should be legally fixed, thus introducing Rechtsstaat notions into socialist economic law. It seems that far from withering away, law under socialism very slowly emerges not only as an instrument of the state for bringing about desired conditions, but also as a means of controlling the state itself.

3. Law and Democracy

It would be surprising if the new importance attributed to law since the economic reform in East Germany remained confined to the eco-

The allotment of areas of self-organization to individual enterprises ... renders it necessary to grant these enterprises genuine subjective rights ... These rights must be assured to them in vertical relationships of state regulation as well as in horizontal relationships of cooperation.
193. Section 17 of the decree of February 9, 1967, GBl II, at 121. The legal details of this right to compensation are not specified but are left to be regulated by the Council of Ministers.
194. Pflicke, supra note 191, at 727.
195. The term Rechtsstaat signifies the concept of a state subjected to the rule of law.
nomy alone. The new emphasis on subjective rights, for instance, although intended to bolster the effectiveness of economic incentives, inevitably means better protection of individual rights in general. The revival of contracts, aimed at a more efficient utilization of personal initiative in economic relationships, at the same time entails greater respect for the autonomy of the individual. It is thus to be expected that beyond its economic rehabilitation, law will become increasingly important in other areas of social life as well.

In East Germany, a remarkable attempt to translate the new economic functions of law into political terms was made by Heuer in 1965 in a book called Democracy and Law under the New Economic System. Heuer extends the concept of competing economic interests to competing political interests, and the notion of economic self-management to political self-management. His analysis is largely based on (and to some extent disguised in) cybernetic concepts. Cybernetics was officially endorsed in the Soviet Union in 1961 and soon after appeared in East German legal argumentation. Heuer, however, applied cybernetics not only in a technical sense, to such matters as documentation and legislative techniques, but in a much broader sociological sense as well. As a parallel to the self-regulating process within a cybernetic system and its subsystems, Heuer tried to explain the organization of socialist society in terms of an interplay between society as a whole and its self-organizing subsystems. He thus arrived at the problem of self-regulation and self-management of individual social and economic units within the society, which he considered to be vital for the efficient functioning of the system as a whole. From there it was only a short step to the question of democratic participation in the political sense: "Self-organization in the social sphere finally and above all means self-determination, individual or collective, of one's own affairs." Law, through the establishment of clearly defined individual rights and duties and rules of conduct, has to further this process: "It is in particular the task of law to develop this self-organization."

Heuer's book, although initially acclaimed in a journal for economic law, was soon criticized for reducing the concept of democracy to

200. Id. 200.
self-determination and self-management, thus excluding from the definition of democracy the guiding role of the state.\textsuperscript{202} In October 1966, a special conference convened in the East German Academy of the Sciences of State and Law to denounce Heuer’s thesis and to determine the correct approach to similar problems for the future.\textsuperscript{203} But contrary to what would have happened only a few years earlier, official criticism did not close the issue. At a conference on socialist economic management and law, organized in October 1967 in honor of the fiftieth anniversary of the October revolution, Heuer reasserted his thesis:

If we look at socialist society, in cybernetic terms, as an extremely complicated system with sub-systems existing at several levels; if accordingly in these sub-systems processes of self-regulation and self-determination take place; if human beings and human collectives with the need for autonomous and creative activity . . . are involved, then an effective coordination of the system as a whole with its sub-systems at different levels . . . is impossible without socialist law. The stability of the system as a whole is impossible without the stability of the sub-systems.\textsuperscript{204}

These theories were taken up by Pflicke\textsuperscript{205} and were apparently approved in the general discussion at the conference.\textsuperscript{206}

What interpretation do they warrant? It would be wrong, I think, to construe theories like Heuer’s simply as indirect attempts to return to traditional bourgeois notions of law and democracy. In contrast to East German civil law scholars before the late fifties, and probably to civil law scholars of today, the East German “economists” do not seem to share the legal values of West German jurists, despite common concepts. Their attempts to break out of the ideological framework defined by the Party should rather be seen as timid versions of Communist reform theories; as attempts to humanize socialism, not to undermine it. Heuer for instance says in his book:

[W]e must always realize that we as socialists fight for a new social order not merely because it will bring with it a higher efficiency of social productivity, but also because in this society and only in it will man no longer be an enemy to man, but his friend, comrade,

\textsuperscript{203} See the report on this conference by Stüber, \textit{Neues ökonomisches System und sozialistische Demokratie}, 16 \textit{STAAT u. R.} 92 (1967).
\textsuperscript{204} Heuer, \textit{supra} note 185, at 647.
\textsuperscript{205} Pflicke, \textit{supra} note 191, at 724.
and brother; because men will together determine their destiny; because it will be a democratic society.

How seminal these stirrings of humanist socialism in East German legal doctrine will eventually be depends largely on the outcome of the current economic reform. If the new tenets of political economy prevail and prove successful, one can expect law to be further rehabilitated and divorced from ideology. Whether these tenets will prevail, however, is another question. The reform’s original emphasis on decentralized decision-making seems to have already been watered down by administrative opposition. If a half-hearted implementation of the economic reform should lead to failure and from there to what Grossman calls the “recentralization process” in a socialist economy, new reliance on administrative over economic controls will undoubtedly affect not only the importance of law in East Germany but its protective and (eventually) democratizing functions as well.

207. U.-J. Heuer, supra note 190, at 169.