LAW AND *GLASNOST'*: SOME THOUGHTS ABOUT THE FUTURE OF JUDICIAL REVIEW UNDER SOCIALISM

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As part of the dramatic reforms now sweeping through Eastern Europe, a number of socialist states have enacted new legislation enabling courts to review the legality of administrative decisionmaking. In this essay, I will speculate about the likely development of a socialist rule of law. Using examples from capitalist and socialist law, I will argue that judicial review is at odds both with the long-range ideological goals of socialist societies and with the daily constraints operating on socialist officials and citizens. However, even if judicial review itself is unlikely to gain significant impact in socialist societies as we know them, other changes brought about by socialist law reforms will increasingly help to shelter a socialist citizen against the arbitrary use of state power.

I. INTRODUCTION

Right under our eyes, the legal and political landscape of Eastern Europe is shifting and changing. With each day, socialist governments are becoming more open; courts appear more self-confident; citizens grow bolder in the pursuit of their rights. Under the influence of Mikhail Gorbachev's amazing reform programs in the Soviet Union, the rules for the relationships between socialist citizens and their states are being re-written.

A. Traditional Socialist Attitudes Toward Judicial Review

One important area of reform involves the citizen's right to challenge executive authority in court. In the past, socialist legal systems provided little room for the judicial review of administrative decisionmaking. While socialist governments from their very beginnings insisted on the strict observance of their laws, "revolutionary legality" (as it was initially called in the Soviet Union), or "socialist legality" (as it was renamed in 1933) (Oda, 1980), was meant to advance the interests of the state and only indirectly to protect the welfare of individual citizens. When Lenin searched for an agency to supervise administrative legality, he thus chose

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not the judiciary but the Procuracy: a highly disciplined, centralized, investigative body, exploring violations of the law at the state's own initiative and offering no means of pressure to individual citizens pursuing their rights. To counterbalance the centralized Procuracy, a populist Workers-Peasants Inspection was set up to utilize individual input from below—but again, not by encouraging the individual pursuit of rights, but by involving huge numbers of lay inspectors in the control of economic efficiency.[1] In this scheme of things, individual entitlements could at best have instrumental utility (as they did, for instance, under the New Economic Policy [NEP] in the 1920s) but no dignity of their own. As Alexander Goikhbarg, the author of the 1922 Soviet Civil Code (which provided the NEP's legal underpinnings), put it despite his involvement in the new legislation: law is "a much more poisonous and intoxicating opium for the people" than religion (quoted in Bilinsky, 1988: 222). It might encourage people to pursue their own egotistical goals, to absent themselves from collective action, to frustrate society's progress toward a communist future, and thus to delay that stage at which all law and all rights were expected to wither away.

Those voices that raised the issue of judicial controls over the bureaucracy at various stages of socialist legal history (and, with the exception of the silent years under Stalin, there were always a few) thus drew their inspiration not from socialist ideology but from Western *Rechtsstaat* models (Fincke, 1966a, b, c). Gorbachev, too, is in this sense a "Westernizer" (Berman, 1988), and today the more outspoken Eastern European reformers openly acknowledge their intellectual debt to Western legal systems (see, e.g., *Religion in Communist Lands*, 1989). That socialism, in the past, had little interest in judicial review did not mean, however, that socialist courts were never allowed to investigate the legality of administrative decisions. In fact, all socialist legal systems knew at least a few instances in which citizens could take their administration to court. Some socialist states, like Rumania and Bulgaria, even put laws on their books that ostensibly offered citizens standing to sue the administration whenever their rights were invaded by public authority (Leonhardt, 1984). But these provisions were unsupported by any ideological commitment to judicial review and looked strangely out of place in legal systems that did not accept the possibility of legitimate conflict between individual and state. Accordingly, cases in which individuals could sue the state were haphazardly chosen,[2] often of no practical significance,[3] contained

[1] On the history of Soviet controls over administrative legality, see Fincke (1966a, b, c; 1967) and Bilinsky (1972).

[2] See, for instance, Kuss (1981a), for the Soviet Union, and Wittenbeck (1989), for East Germany.

[3] The administrative decision most commonly open to judicial review in

provisions riddled with exceptions,[4] and for all we know rarely exploited in practice.[5] All socialist legal systems, regardless of the judicial review procedures provided by their black-letter law, preferred instead to enforce administrative legality through state-controlled institutions and procedures: public monitoring agencies like the Procuracy, which investigates misuses of public authority at the state's own initiative, and internal administrative review procedures, set into motion by citizens' petitions and complaints.

In all Eastern European states, complaint procedures thus became the common and universally applicable method for voicing grievances against the administration. From a citizen's viewpoint, these procedures have some advantages over more cumbersome lawsuits. They are informal, cheap, easily accessible, and without restrictive standing requirements: anyone can complain about any shortcoming to any agency of his choice. But unlike judicial proceedings, socialist complaint procedures hold out no promises of legal entitlements and are entirely without bite.[6] A citizen's grievance will simply be examined by the office complained about and, if rejected, will be reviewed by the next higher agency. If the petitioner is still dissatisfied with its decision, he can try another complaint. But he has no right to a hearing, no access to the record, no possibility to challenge the evidence, and either no right to a lawyer or little use for one, since the procedure offers no forum and no formal structure that a lawyer could exploit to the client's advantage. Public monitoring agencies like the Procuracy or the Workers-Peasants Inspection are also easily accessible to individual citizens (whose complaints are needed to inform the authorities of breaches of the law) but offer a complainant no means to compel a decision in his favor. At all stages of the proceedings, a petitioner thus has no choice but to rely on the benevolence of the administration. He plays the role of informant, collaborator, and eventual beneficiary of any corrective measures, but not that of an autonomous, self-serving agent.

By removing investigations into the misuse of public authority from private initiative and control, socialist legal systems wanted to make sure that societal interests were not compromised by the inertia or greed of a private plaintiff and that every investigation remained firmly in the hands of the state. Administrative justice, under this approach, appeared not as a matter of private importance but as a public concern, calling for a public solution. If pressured by Western criticism, socialist lawyers might admit that

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socialist legal systems thus involved a citizen's wrongful exclusion from the voters' registry; see, e.g., Kuss (1981b: 46); Wittenbeck (1989: 90).

[4] The Rumanian statute on judicial review, for instance, provided for so many exceptions that it was called a "phantom statute" (Leonhardt, 1984: 94).

[5] See the text accompanying notes 40–42 below.

[6] On the actual workings of socialist complaint procedures, see Markovits (1986: 733).

their system's weakness lay in the identity of investigator and investigated and thus in the absence of neutral controls. But they would also attack the belligerence and spontaneity of our system of private litigation and claim that socialist methods of ensuing administrative legality, whatever their faults, were more caring, more rational, more principled, and better attuned to societal needs than our capitalist recourse to courts.

B. The Recent Reforms

Now all this appears to be changing. In 1980, five years before Gorbachev's rise to power, Poland became the first socialist country to establish a separate administrative court system: its High Administrative Court (HAC) in Warsaw, with six branch offices throughout the country, adjudicates citizens' grievances against the executive on the basis of a generous statutory catalogue of justiciable issues that covers most areas of contact between citizen and administration (Kuss, 1987b). A year later, Hungary considerably enlarged its very limited list of justiciable administrative decisions dating from 1957 (Kuss, 1986b). Both Poland and Hungary have since expanded their judicial review systems to cover also the constitutionality of legislation: the Poles with their Constitutional Tribunal established in 1986, the Hungarians with their Council of Constitutional Law of 1983 (Kuss, 1986a). In 1987, after a decade of foot-dragging, the Soviet Union fulfilled the promise it had made in its 1977 constitution by passing a law on the judicial review of administrative decisions, providing access to court on the basis of a general clause with some exceptions (Quigley, 1988a). And in December 1988, against the predictions of Western experts (Markovits, 1987), even East Germany passed a statute on judicial review (Gesetz über die Nachprüfung von Verwaltungsentscheidungen of December 14, 1898 (GBl. I. 327)).

Meanwhile, the trend toward more legal controls over socialist executives is gaining momentum. In Poland, the number of citizens' suits against the administration is steadily rising,[7] and the High Administrative Court has increased its personnel from nine to sixty-seven judges in the first five years of its existence (Kuss, 1987b: 203). HAC judges are using their new powers with confidence and determination (Izdebski, 1984), while the new Polish Constitutional Tribunal came out in favor of the plaintiff in all of its first nine decisions (Działlocha, 1987: 254). In the Soviet Union, the Supreme Soviet amended its original statute on judicial

[7] The number of administrative lawsuits in Poland since the inception of the High Administrative Court's operations on September 1, 1980, are as follows: 927 in 1980; 7,200 in 1981; 8,829 in 1982; 9,582 in 1983; 11,413 in 1984; and 13,170 in 1985 (*Statistical Yearbook of Poland*, 1981–86). I have not been able to find more recent official data. However, Professor Eva Letovska, the new Polish ombudswoman, in a talk at King's College, London, on February 15, 1989, put the number of administrative lawsuits in 1988 at roughly 18,000.

review, less than four months after passing it, to also allow for appeals to the next higher court level (Quigley, 1988a: 174). In 1988, finally, the Soviet Communist Party's Nineteenth Party Conference produced such a ringing endorsement of legal controls over Party and administration that one would expect socialist judicial review to grow at an even faster pace in the future. Already, Soviet authors are suggesting that the USSR Supreme Court be given the right to review legislation (*Recht in Ost und West*, 1988a, e), and Hungary has announced a sweeping reform of its system of judicial controls.

C. *The Goals of This Essay*

What are we to make of all this? Are we witnessing the birth of the "socialist *Rechtsstaat*,"[8] a new kind of socialist state in which law does not primarily serve to direct individual behavior toward the realization of societal goals, but in which it also steers and controls the exercise of political power? Can socialist law be transformed from a tool of the state into an individual weapon against the state? In this essay, I will speculate about the likelihood of such a development. It is a risky time to engage in such speculation: events move fast, maybe too fast, and many of the reformers' hopes may be outpacing reality. Moreover, I have little factual evidence upon which to base my conjectures. Most Eastern European legislation expanding judicial review is new and barely tested in practice; court statistics are meager, judicial decisions often inaccessible, and empirical studies almost non-existent. Nevertheless, present developments in the socialist world seem too momentous to patiently wait with an evaluation until the dust has settled. And some information does exist that allows us to speculate about the likely course of affairs. While we do not know much about socialist uses of courts to control administrative behavior, we do know something about the socialist legal process in general that can inform our analysis. We also know a lot about our own attitudes toward judicial review.

I will make use of both these sources of information. In the first part of this essay, I will investigate whether Western attitudes toward judicial review allow any inferences about the likely development of judicial review under socialism. To this purpose, I will examine the ideological premises implied in our review system and ask whether these premises might not clash with a socialist's view of the individual's place in society. Looking at instances in which we, too, have misgivings about the involvement of courts in administrative decisionmaking, I will identify the fact-patterns that give rise to our doubts and will ask whether socialists are likely to face similar situations and thus to share similar reservations. In the second part, I will approach my topic from the opposite direction

[8] The term is used for East Germany by Wittenbeck (1989: 278).

and ask what we know about socialist governments, socialist judges, and socialist citizens that can help us predict the likely future of socialist judicial review procedures. Finally, in a third part, I will combine the results of both surveys, will try to draw a composite picture of a possible socialist rule of law, and will examine in what ways other than judicial review, socialist law might be able to protect a citizen against trespasses by public authority.

Some caveats about my comparative method are necessary at this point. When talking about "Western" or "capitalist" approaches to judicial review, I paint with a very broad brush. The American system of judicial review is shaped by the existence of semi-autonomous rule-making agencies; the availability of internal, neutral review by administrative law judges and other hearing officers; the importance of corporate litigation and of class actions; and the traditional American preoccupation with procedural justice. This system is structurally very different from the Continental (especially the West German) model, which is shaped by the existence of a centralized ministerial bureaucracy knowing no formal equivalent to American rule-making procedures; the absence of independent administrative hearing officers; narrow standing requirements which focus judicial activity on discrete administrative acts affecting primarily individual citizens; and a traditional preoccupation with substantive justice. Given their historical background, Eastern European reforms will follow primarily the West German model of judicial review;[9] already, the socialist academic debate employs its vocabulary.[10] I could thus simply restrict my comparison to West German doctrine and case law. But to do so would miss an important point which the similarities between my examples from different capitalist countries will illustrate: namely, that despite all their structural differences, capitalist judicial review procedures share fundamental assumptions about the individual's place in society that determine their attitudes toward the judicial control of administrative authority and that legitimate the communal "we" I shall use in this essay in those situations in which common convictions lead different capitalist legal systems—despite their structural dissimilarities—to reach similar results.

A parallel argument applies to socialist legal systems. While their institutional structures are relatively alike, their historical backgrounds vary significantly, and considerable differences exist,

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[9] Consider, for instance, the words of the Hungarian minister of justice Kulcsár (*Religion in Communist Lands*, 1989: 141):

> We are now trying to move to the idea of the "rule of law." Perhaps it would be more precise to use the term "*Rechtsstaat*," rather than the "rule of law" because we have a continental rather than an Anglo-Saxon tradition.

[10] See, for example, the Polish and East German debate on the review of administrative interpretations of so-called indeterminate legal concepts (*unbestimmte Rechtsbegriffe*) as distinct from the exercise of administrative discretion (*Ermessen*) reported by Izdebski (1984) and Schulze (1989).

say, between the political liberalism of Polish judges and the conservatism of their Soviet colleagues, or between the apathy of Soviet bureaucrats and the relative diligence of their East German counterparts. Under Gorbachev's policy of national pluralism, these differences are likely to grow. Yet, as my examples will show, despite all these variations socialist countries still share enough of a common approach to law and legality to allow one to speak of "socialist" attitudes toward judicial review. Since this paper examines the affinity between socialist traditions and beliefs and the rejection of judicial review mechanisms, a possible crumbling of socialist allegiances in Eastern Europe over the coming years thus would not invalidate my argument but only restrict its applicability.

II. CAPITALIST ATTITUDES TOWARD JUDICIAL REVIEW

A. Underlying Assumptions

I will begin with the ideological assumptions underlying our own approach to judicial review. Some of these assumptions, while still reflected in our doctrine and case law, today are either disputed or under attack. Critics challenge the traditional premises of capitalist procedural thinking: deny that modern legal man is as isolated and self-sufficient as our rules of standing might make him appear, or, if they do not deny it, want to change the law to make room for more community-oriented forms of dispute resolution. Such capitalist self-reassessments may be found particularly in the areas of welfare law and public interest litigation in both the United States and, to a lesser extent, Western Europe. But enough of the unspoken premises of our system of judicial review still are commonly shared to suggest that this system must be at odds with a socialist understanding of the proper function of courts.

1. Focus on Private Interests. Our first and decisive supposition, often honored in form more than in substance—that courts are meant for the defense of private, not societal interests—is accepted by all capitalist legal systems providing for the judicial examination of administrative decisions. All require the allegation of an individual injury: some personal stake, some private harm, before they allow a citizen to challenge the administration in court. Standing thus presupposes the violation of an individual interest close enough to a plaintiff's personal life-sphere to single him out from the rest of the citizenry. Some legal systems are more generous than others in finding such an injury to be sufficiently burdensome to an individual plaintiff to allow him to sue. While West German administrative law, for instance, requires violation of a specific individual right or statutorily protected interest, American law allows complaints based on moral or aesthetic inju-

ries as long as they are allegedly suffered by the plaintiff himself. All legal systems, however, agree that a plaintiff must be personally affected by the administrative decision he wants to challenge. Citizens who want to air "generalized grievances about the conduct of government" (*United States* v. *Richardson*, 418 U.S. 166 (1974), at 173) have no access to court.

Public interests, then, find judicial protection only if they can be disguised as private concerns: if, for instance, an opponent of nuclear energy can claim that a building permit authorizing construction of a reactor poses a threat to his own personal safety. There are statutory exceptions to this rule. If legislatures are worried that some public interests are too weak, too diffuse, or too faintly linked to private advantage to find individual sponsors in court, they may grant standing to a wider circle of plaintiffs, as environmental or consumer protection legislation has done in the United States.[11] But unless a citizen is thus elevated by statute to the role of an advocate for the public, our system of judicial review will acknowledge him only in the role of the egotist. Capitalist courts, if you believe their rules of procedure, protect the *bourgeois*, not the *citoyen*.

2. Confrontation of Individual and State. Our law's focus on the citizen as egotist rather than altruist reflects a second premise of judicial review: the confrontation of individual and state. The plaintiff, pursuing his private benefit (or at least pretending to do so), challenges the state, pursuing the general welfare (or pretending to do so). The court becomes an arena in which the individual takes on the administration. Opposition between them seems natural and inevitable, language is hostile and confrontational, and the rules of due process try to assure an equality of weapons between the combatants.

Courts thus become a "battleground of competing interests" (Aleinikoff, 1987: 946), and the judicial methods for resolving the conflict reflect a capitalist legal system's initial non-commitment in each new confrontation between individual and state. The demands of due process—taking into account the plaintiff's private interests, the risk of their erroneous deprivation, and the government interests involved (*Mathews* v. *Eldridge*, 424 U.S. 319 (1976), at 335)—imply that every administrative decision may be potentially wrong, that there are two sides to each policy issue, and that in a clash between individual and society the outcome is by no means determined in advance. The techniques of balancing imply a horizontal understanding of justice: citizen and state are posed in a bi-polar relationship, both of potentially equal importance,

[11] See, for instance, the Toxic Substances Control Act of 1976 (15 U.S.C. § 2601), which holds that "any person may file a petition for judicial review"; and the Consumer Product Safety Act of 1972 (15 U.S.C. § 2051), granting standing to "consumers and consumer organizations."

with no a priori ranking of societal over individual welfare (although the scale may be weighted in favor of one or the other side depending on whether an issue is seen as affecting primarily public or private interests).[12] If we insist that the imposition of burdens on the individual may not be out of proportion to their intended societal gains,[13] we suggest that state interference with individual rights needs special legitimation and is not a matter of course.

Our system of judicial review thus rejects the notion of a permanent bond between individual and collective: societal demands on the individual are the exception, not the rule. The law builds fences around us, safeguards the areas "beyond the power of the State to control" (*Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), at 220), protects our "right to be left in peace" (West German Constitutional Court of July 1, 1969, BVerfGE 27, 1, at 6). Capitalist judicial review is premised on the isolation of man, not on his connectedness with others.

One can see how all these assumptions might trouble a socialist. He would have to object to the isolation of an individual plaintiff in the courtroom, pursuing only his own interests apart from those of society. He should dislike the privatization of public interests implicit in judicial review, the acceptance of bargaining between individual and state, and the fact that public concerns are not addressed for their own worth but only if, by chance, they find a private sponsor sufficiently affected to have standing. A socialist could be expected to disapprove of the techniques of capitalist judicial review: the agnosticism implied in our balancing procedures, taking for granted the conflicts between equally legitimate values; our readiness to accommodate, to compromise, to hand out "small 't' truths" (Aleinikoff, 1987: 961). What about the "big truth," we would expect him to ask: society's historical move toward communism, to which each judicial decision should owe allegiance? As someone concerned about managing social progress, a socialist also would have to be suspicious of the unpredictability and uncontrollability of judicial decisionmaking: of the indeterminacy of judicial concepts, the "creative freedom" (ibid., p. 958) that balancing tech-

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[12] See, for instance, *Roe* v. *Wade*, 410 U.S. 113 (1973) (unlimited right to abortion as long as only the mother's privacy is affected but possible state regulation once the public interest in healthy citizens is involved) West German Constitutional Court of June 11, 1958, BVerfGE 7,377 (free choice of occupation, since this choice affects primarily one's personal self-definition, but legitimate regulation of the exercise of occupation since this exercise affects the well-being of others and of society).

[13] See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), at 142, which held that the state may not impose an "undue burden" which is "excessive in relation to the . . . benefits" intended. For the similar West German principle of *Verhältnismässigkeit* (the state-imposed burden may not be out of proportion to the social benefits intended), see West German Federal Constitutional Court of March 16, 1971, BVerfGE 30, 292, at 315.

niques accord individual judges, the difficulty, under such circumstances, of using law as a social and political tool.

3. The Problem of Public Law Litigation. One could argue, as some have done, that my description of capitalist litigation as an essentially private affair is outdated:[14] that in view of environmental litigation, school desegregation suits, prisoners' rights cases and the like, judicial challenges of administrative decisionmaking no longer appear as one-time, past-oriented, bi-polar contests aiming for the vindication of personal rights but as open-ended, future-oriented, "polycentric" (Ackerman, 1983: 109) attempts to affect public policy, with the judge in the role of active manager rather than passive adjudicator (see Chayes, 1976), and the plaintiffs as socially conscious public advocates rather than self-centered representatives of private interests. This blurring of the public-private distinction,[15] in turn, might make administrative litigation more palatable to socialist jurists, who always have rejected the juxtaposition of state and society and thus the polarization of public and private spheres of activity. In fact, one might claim that the modern capitalist "activist state"—at least with respect to its mingling of public and private affairs—is not all that different from its socialist counterpart, that socialist judges have all along engaged in what might be called "public interest" adjudication, and that judicial procedures acceptable to us should therefore no longer be anathema to socialists.

If our modern practices of judicial review really implied the collectivization of formerly private concerns, socialists should indeed not object to them. Since Lenin's famous instruction at the drafting of the first Soviet Civil Code—"all law is public" (cited by Hazard, 1975: 77)—socialist law has emphasized the public importance of private rights and has devised many substantive and procedural mechanisms for infusing public considerations into the adjudication of private disputes.[16] But capitalist law has never been very serious about, nor very successful at, the collectivization of private litigation. Government agencies, given the task of enforcing consumer or welfare rights or of protecting the environment, for example, have on the whole been far less effective and energetic in their use of the law than individual plaintiffs who embrace the same public causes.[17] State attorneys, authorized to initiate or

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[14] See, for instance, Cappelletti (1979: 860): "The traditional view of civil litigation as a merely private affair is no longer acceptable."

[15] See the symposium on the public/private distinction in *University of Pennsylvania Law Review* (1982).

[16] See, for instance, socialist procedural practices such as the requirement of judicial approval of settlements or of the withdrawal of claims, or the "review in supervisory instance" under which the Procuracy or certain high courts can appeal a decision even after it has become final between the parties themselves.

[17] Cappelletti (1979: 821): "Perhaps with the sole, but brief, exception of

intervene in civil cases to protect public interests, have used their participation rights only rarely and reluctantly (Cappelletti, 1979: 788). If capitalist state representatives do get involved in private litigation, they will usually do so to protect the interests of plaintiffs too weak to fend for themselves—that is, to protect some individual interest (ibid., p. 792). And even if a state advocate interferes in a civil case to raise public concerns—if, for instance, the French *Ministère public* attached to the Court of Cassation files a rare autonomous appeal *"dans l'intérêt de la loi"*— capitalist law will tend to respect the private parties' control over their own dispute; in this case, will leave a decision, even if it is overturned, still binding between the parties (ibid., p. 780). Under socialist law, where the procurator regularly exercises his right to appeal civil cases "in the interest of the law" (ibid., p. 797), such concern for individual autonomy would be seen as counterproductive to the protection of "socialist legality" (ibid., p. 798).

Given this capitalist reluctance to "socialize" private rights it would be misleading, I believe, to view the recent capitalist phenomenon of "public law litigation" (Chayes, 1976) as a "public" procedural takeover of formerly private affairs. Rather the opposite interpretation, I think, would be warranted: public interest litigation has "privatized" concerns we normally think of as public. While issues like pollution, public housing, abortion, and the like obviously are of great interest to the polity at large, "public law litigation" places the vindication of these interests at the mercy of an individual plaintiff. Without his individualized stake, his procedural energies, his willingness to sue in the first place, the court, in most cases, would have no chance to scrutinize the legality of agency decisions. As the German proverb says, *Wo kein Kläger ist, ist auch kein Richter*—where no individual plaintiff (or interest group) raises the alarm, the court will take no notice of the law's violation. Hence we attempt to attract private plaintiffs when without their involvement interests of public concern (like consumer welfare or the competitiveness of the market) would remain unprotected: by lowering court costs, by raising incentives to sue with treble-damage awards, or by allowing large numbers of individuals to join in class actions. But even class actions are not seen as truly collective endeavors but only as the sum total of numerous individual concerns; hence our insistence on the homogeneity of the class and on the protection of absentee interests to ensure proper representation of each individual member (see Fed. R. Civ. P. 23(a)(2) & (3)).

We therefore rely primarily on individual initiative, not on

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the OEO Program, no governmental agency has achieved the same degree of imagination, impetus, and promptness in dealing with welfare, consumer, environmental, or civil rights problems as have the individuals and spontaneous organizations that have been encouraged to represent public interests in court."

collective action, to ensure judicial control over our bureaucracies. Not surprisingly, given our market culture, public interests seem to do much better in the hands of private litigators than in those rare instances in which public agencies do sue to enforce the law. Perhaps also not surprisingly, individual victories in public interest litigation may not affect administrative behavior all that much in the long run (Grossman and Sarat, 1981; Mashaw, 1983). But whatever the practical merits of our system of judicial review, socialists cannot be expected to gladly embrace judicial procedures that abdicate the enforcement of administrative legality to individual initiative and control. They should object to exposing public interests to the uncertainty of whether a particular plaintiff will be found to champion their cause. Socialists should feel threatened if individual plaintiffs take it upon themselves to enforce their private definition of what "public interests" imply—against the "public interest" as defined and ostensibly pursued by the state. And they should be offended by the bargaining between individual plaintiff and state (as if both could be equals!) that is so common to capitalist public law litigation (see Winter, 1985), where public interests are subject to private deals, public values compromised by party concessions, and where consent decrees, falling short of the law's full demands, are the rule rather than the exception (Chayes, 1976: 1299).

If in the past socialist governments have felt ambivalent about the judicial review of administrative decisions affecting only individual citizens, they thus should feel all the more hesitant about tolerating Western-style public interest litigation. That would explain why the Soviets, when passing their new Law on Appeals in 1987, not only rejected suggestions to allow some form of popular action independent of whether a plaintiff's personal rights are concerned (Kuss, 1987a: 283), but also restricted judicial review to decisions reached by individual officials, thus excluding from court supervision the (presumably politically more sensitive) acts of collective bodies such as executive committees of local soviets (Quigley, 1988a: 176).[18] Policy and planning decisions, which have no immediate bearing on individual entitlements but are seen as affecting a citizen's rights only if specific administrative acts are issued on their basis, are not reviewable anyway. The more private the purpose of an administrative law suit, the more acceptable it seems to socialists—not because socialists approve of individual egotism but because individual assertiveness seems less threatening to political cohesion if it is preoccupied with the pursuit of mere personal interests than if it becomes presumptuous enough to want to affect collective decisions. Already existing socialist re-

[18] The new Soviet decree on public demonstrations of July 1988, for instance, requires a permit for all public assemblies, which is issued by a collegial administrative body at the local level. The permit's denial, therefore, cannot be contested in court (see *Recht in Ost und West*, 1988b).

view procedures thus tend to focus on the protection of material benefits (Kuss, 1987a: 284), and reform suggestions, pleading for the expansion of judicial review, equally aim for the safeguarding of property-like private possessions.[19]

Socialist judicial review, as preached and practiced today, thus appears as a largely apolitical extension of private law protections. Most administrative law suits, to the extent that they are already permissible, deal with consumption rights. Even in Poland, "political" cases probably make up no more than 5 to 6 percent of the High Administrative Court's caseload.[20] In line with this private approach to judicial review, the court makes relatively little use of its right to critique administrative mismanagement with the help of "court censure" (Kuss, 1988: 25). Just as in the past socialist law has been more willing to accord rights status to civil or labor law rights than to political freedoms such as speech or assembly, socialist judicial review, too, seems more willing to protect a citizen's private than his public *persona*. If the premises implied in our *traditional* approach to judicial review thus seem at odds with socialist notions of the proper relationship between individual and society, our present-day *public law* litigation and its view of the citizen as private watchdog and ideological competitor to the state should be even less acceptable to socialist reformers.

B. Capitalist Reservations About Judicial Review

There are situations in which we, too, have been reluctant to allow judicial review, in part are still reluctant to allow it, or in which—if we do permit a citizen to sue the administration—we at least feel the need to limit the intrusiveness of judicial scrutiny and to censor only egregious misuses of administrative discretion. Our reservations have been motivated by specific fact-constellations: the characteristics of certain social settings, of types of decisions, or of the people involved. Examining these characteristics may help to predict whether socialists, in similar situations, will have similar misgivings. In all these situations, I will argue, our capitalist rejection of judicial review mechanisms is motivated by "socialist" concerns which real socialists, *a fortiori*, can be expected to share.

1. "Conditions of Special Dependency." One set of circumstances that capitalist law, traditionally, has exempted from court review involves what the Germans call *besondere Gewaltverhältnisse*: situations in which a citizen has a close affiliation

[19] See Brachmann and Christoph (1988: 574), who suggest that future East German reforms should allow judicial review of those administrative decisions "which either touch upon or resemble those subject matters which now are the business of courts: criminal law, civil law, family law, and labour law."

[20] This estimate is based on the 1985 HAC case break-down reported by Kuss (1987b: 205).

with a specific state institution, is intimately involved in its mission, owes special loyalty to its goals, and thus finds himself in a position of "intensified dependency" (Ronellenfitsch, 1981: 933) toward the state. The German doctrine of the *besondere Gewaltverhältnisse* dates back to Otto Mayer, who distinguished between the external affairs of the state and its occasional, isolated contacts with citizens on the one hand, and the state's internal domain, its domestic management, so to speak, on the other, under which Mayer included the internal organization of the bureaucracy and the military, whose members he saw as permanently linked with vital state tasks and thus as functionally part of the state (Mayer, 1888: 54).

While law, in Mayer's view, should regulate the external, ad hoc contacts between ordinary citizens and the state, the more intimate relationships between the state and its vassals would not be subject to judicial review. In these areas, the citizen's usual distance from the state was transformed into a kind of symbiotic proximity. Mayer thus accepted the traditional capitalist distinction between state and society (and therefore the need for judicial protection against the state) only as far as an ordinary citizen's everyday life was concerned. But he rejected it for "conditions of special dependency": like a socialist, he saw no room for law in a situation in which citizen and state were united in the pursuit of a common goal. Mayer's civil servants and soldiers—like socialist citizens today—were seen only as *citoyens*, only as members of the body politic, and therefore—again like socialist citizens—were presumed to be in no need of judicial protection against a state of which they themselves were part.

Today, West German courts have largely rejected the doctrine of the *besondere Gewaltverhältnisse* and insist on the review of all areas of administrative decisionmaking (see Fuss, 1972). But the doctrine's underlying rationale is still valid: namely, that the missionary urgency of certain state functions, the disciplinarian structure of certain institutions, and the intimate involvement of citizens with their tasks may lead to a lessening of judicial controls (Ronellenfitsch, 1981: 939). American law shows similar misgivings about judicial review and in similar contexts: in relation to the military, to schools, or to prisons. Even today, military law may simply subordinate individual rights to state goals rather than balance, in usual fashion, individual against state interests (*Goldman* v. *Weinberger*, 475 U.S. 503 (1986)).[21] Even today, the military need for "habits of discipline and unity" (ibid., at 508) may

[21] In this decision, which dealt with whether Air Force regulations could prevent an Orthodox Jew from wearing a yarmulke, the majority opinion did not even address the issue of the appropriate level of constitutional scrutiny, an approach that was criticized by Justice O'Connor: "No test for Free Exercise claims in the military context is even articulated, much less applied" (ibid., p. 1324).

seem to outweigh the need for individual protection. Military review procedures—like socialist complaint procedures—may reject the "adversary mode of dispute resolution" in favor of more flexible procedures, showing "a high degree of informality and solicitude for the claimant" (*Walters* v. *National Association of Radiation Survivors*, 475 U.S. 305 (1985), at 311). Military judges—like socialist judges—have no life tenure, no constitutionally protected salaries, and, as instruments of the executive, are not shielded by separation-of-powers constraints (see Cox, 1987). And both American military law and socialist law have a history of distrusting lawyers, whose proclivity "to interrogate, to except, to plead, to teaze, perplex & embarrass by legal subtilties & abstract sophistical Distinctions"[22] is seen as a threat to their respective missionary causes.

Capitalist school law, at least in its historical form, can serve as another example of how notions of an institution's particular mission, of its indenture to larger societal goals, can reduce the legal protection its members enjoy against the state. In West Germany, for instance, the relationship between pupil and state was seen as a *besonderes Gewaltverhältnis*, entitling the state to enforce its pedagogic authority without regard to due process concerns, and thus largely exempt from judicial review. With the demise of the doctrine of "special dependencies," student-state relationships have been increasingly legalized (see Staupe, 1982), and school law cases by now make up a significant percentage of West German administrative law litigation. In the United States, more of the doctrine's rationale seems to have survived. Last year, the Supreme Court reaffirmed school authorities' control over students' free speech rights by pointing to the "special characteristics of the school environment" and its "basic educational mission" (*Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), at 266). Due process protection against the administration of corporal punishment has been rejected because it presumes an "adverse atmosphere" between pupil and teacher which would "hardly serve the interests of . . . those involved" (*Whatley* v. *Pike County Board of Education* (N.D. Ga. 1971), cited in *Ingraham* v. *Wright* 525 F.2d 909 (1976), at 919). As socialists would claim for the relationship between their state and its citizens, the relationships between our schools and their pupils are seen, at least by some, as harmonious, not adversarial, with all participants' interests "essentially congruent," and with the state, like the "parental" socialist state (Berman, 1963), in the role of "educator, adviser, friend, and, at times, parent substitute" (*Goss* v. *Lopez*, 419 U.S. 565 (1975), at 594, Powell, J., dissenting). Accordingly, as under socialism, needs-talk tends to replace the language of rights and, as under socialism, in-

[22] General Wilkinson at the 1809 court-martial of Captain Wilson, cited by Wiener (1958: 27).

formal complaint procedures have to serve as substitutes for due process.

The same point can be made with respect to prisons. While American law no longer insists on the state's *parens patriae* attitude toward those it detains (*Morrissey* v. *Brewer*, 443 F.2d 942 (1971), at 949, rev'd, 408 U.S. 471 (1972)), some of the old misgivings about due process protections remain and for reasons that socialists might appreciate: because too many procedural niceties, like the insertion of counsel into prison disciplinary proceedings, would "tend to reduce their utility as a means to further correctional goals" (*Wolff* v. *McDonnell*, 418 U.S. 539 (1974), at 570). One need not equate socialist countries with prisons to accept the point: that procedural fastidiousness may impede a state's educational goals and that informal complaint procedures may stand less in the way of creating "new socialist man" than would an effective system of judicial review.

2. Prognostic and Planning Decisions. The second group of administrative decisions that capitalist law has traditionally exempted from full judicial review involves complex and far-reaching planning decisions. Our classical model of judicial review is designed to deal with individual clashes between citizen and state authority, not with long-term policy debates affecting society at large. Ordinarily, a judge investigating the legality of a specific administrative decision will look to the past to determine whether the challenged act interfered with an individual's rights—a typical instance of the judicial application of a priori standards to concrete, ascertainable facts. But if the administration's decision has far-reaching implications for the future—if it concerns not only the plaintiff's individual interests but also larger issues of economic development or social control—our conventional paradigm of judicial review is put into question. We are no longer so confident that a judge is either able or authorized to fully review technically complicated policy choices. Not able, because his lack of the administrator's expertise, firsthand exposure to the facts, and familiarity with the setting might prevent him from appreciating the complexities of the issues. Not authorized, because judicial review in these instances cannot be confined to a judge's typical task: the legal evaluation of isolated events of the past. An administrative act concerned with the planning of road networks or the satisfaction of future energy needs, for instance, not only affects individual interests but also sets the stage for future developments. If a court would review and quash such an act, it would not only undo an individual wrong inflicted in the past but would also, at one and the same time, frustrate policy choices made for the future. Such choices, we believe, properly belong under legislative or executive, but not under judicial, control.

For these reasons, capitalist courts have shown much more

deference toward administrative decisions involving policy and planning choices than toward other administrative acts. West German law, for instance, offers many examples of judicial reticence when courts are confronted with complex planning issues. Occasionally, statutory law simply exempts such issues from judicial review, as in German anti-trust law, which provides that decisions of the Federal Cartel Agency, while reviewable for excess and misuse of discretion, cannot be reviewed to the extent that they are based on "the Agency's assessment of the macro-economic situation and its likely development" (Gesetz gegen Wettbewerbsbeschränkungen of September 24, 1980, § 70 V [1980], BGBl.I 1761). But even without such statutory constraints, West German courts, while ordinarily most aggressive in their readiness to censure administrative behavior (see Ossenbühl, 1974), show deference when faced with cases involving prognostic (see Tettinger, 1982), and planning (see Bullinger, 1984: 1008) decisions. In these instances, West German courts police only the outer boundaries of discretion: ask whether the administration's decision was based on a careful assessment of the facts, employed legitimate criteria, and respected due process requirements. But they do not preclude the executive's "freedom to plan and to shape events" by putting their own forecasts in place of the agency's (West German Federal Administrative Court of July 7, 1978, BVerwGE 56, 110, at 116).

These examples suggest a connection between faith in planning and a reluctance to subject such planning to the constraints of judicial review. Judicial review, in our eyes, should above all correct legal mistakes of the past, not preclude policy choices for the future. The more ready we are to believe in the effectiveness of planning, in the special expertise of administrators, or in the power of the state to shape and improve our future, the more unwilling we will be to allow judges to cross such plans in the name of individual rights. In American legal history, judicial deference toward the administration thus decreased together with our beliefs that the state, through vigorous planning, could change our lives for the better. While during the can-do years of the New Deal, for instance, courts were willing to defer to the "bureaucratic specialization and professionalism" of administrative experts, our growing technological skepticism and our increasing awareness of scientific uncertainties have led courts to be "uneasy about the old claims for deference to expertise" (Rabin, 1983: 1182). Hence the resulting activism of more recent judicial decisions.

Socialists, however, should not share our wariness of the marvels of progress. They still believe (or claim to believe) in the perfectability of the world; put their hope in "the scientific-technical revolution" (East German Constitution of 1974, arts. 17, 24, 25); strive to "impart a planned, systematic and theoretically substantiated character to their struggle for the victory of communism" (Soviet Constitution of 1977, art. 6, para. II). If our Western reluc-

tance to allow judicial interference with far-reaching government plans is any indication, we thus should expect socialist judges to show even greater deference to administrative expertise. Indeed, Rumanian law—probably because of the incompatibility between past-oriented adjudication and future-oriented planning—has simply exempted all "planning decisions" from judicial review (Leonhardt, 1984: 91). Strict standing requirements (limiting judicial review to those administrative decisions that directly interfere with a citizen's rights) and the exemption of all collegiate decisions from court review shelter planning acts against judicial critique in other Eastern European states.[23] But in a socialist society worth its name, *all* administrative policy should strive to bring about the realization of future prognoses, and *every* administrative act should be determined by some plan. In virtually every situation, the reasons calling for deference toward the executive should thus be present. Unless socialism abandons its hopes for society's organized progress through history toward a communist future, it is hard to imagine how judicial review could ever fully emerge from the shadow of the plan to become as non-deferential and aggressive toward administrative authority as it has become in the West.

3. Children and Welfare Recipients. The third group of cases in which Western courts, too, have been hesitant to award due process protection against the state concerns types of people: plaintiffs or defendants perceived as too weak or too dependent to oppose the state on an equal footing. Going to court, to us, seems an act of autonomy and strength, and we have been reluctant to listen to the legal argumentations of people too young to be autonomous—juveniles—or too weak to make it on their own—welfare recipients. Distinguishing between "rights" and "privileges," American law, for a long time, thus refused to apply due process strictures to the distribution of welfare benefits. Until under the influence of "New Property" thinking (Reich, 1964), the Supreme Court began to analogize welfare payments to common-law property rights (*Goldberg* v. *Kelly*, 397 U.S. 254 (1970)),[24] these payments were seen not as a recipient's statutory due but as "charity" (*Wilkie* v. *O'Connor* 25 N.Y.S. 2d 617 (1921), at 620), as a "gratuity" (*Lynch* v. *United States*, 292 U.S. 571 (1934)), at 577 (Brandeis, J.) offered by the state, which a citizen might need to survive but to which he was still not entitled. Like socialist law, American benefits law rejected due process restraints with the best of intentions: it claimed to pursue "the welfare of the aid recipient" as its "primary objective" (*Wyman* v. *James* 400 U.S. 309 (1970), at 323). But what constitutes a person's "welfare" (unlike his "entitle-

[23] This restriction applies not only to Soviet judicial review (see n. 18 above and accompanying text) but also to the new East German legislation; see Schulze (1989: 298).

[24] The Court cites Reich (1964) at 262 n. 8, 265 n. 13.

ment") is something that is other-defined rather than self-defined, that protects not individual autonomy but some ulterior standard of well-being, and that is determined not by the taker of help but by its giver.

If American welfare bureaucracies have been reluctant to accept their clients' challenges "as of right" because they have presumed to know what was best for the people in their care, the same argument applies, *a fortiori*, to socialist administrations. Unlike capitalist states, which feel justified to display parental attitudes only toward the weakest of their members, socialist states see themselves as parents and teachers of their entire citizenries (Berman, 1963). Socialist law has never operated with rights-privileges distinctions because *all* socialist rights have essentially been perceived as privileges in our sense; "granted for the purpose of the development of the productive forces of the country"—as the NEP Civil Code put it (RSFSR Civil Code of 1922, art. 4)—and therefore to be "applied"[25] to further the construction of communism. Like the American pre-*Goldberg* welfare state, the socialist state thus never liked to be bound by rules constricting its generosity. Neither sees nor saw any harm in conditioning the payment of benefits upon the recipient's good behavior, thus using the law as a means to reinforce conformity with the collective. Both old American welfare law and socialist law claim to be motivated by care and concern for the citizen with the state, so "we trust," in the role of "a friend to one in need" (*Wyman* v. *James*, 400 U.S. 309 (1971), at 323), and neither socialist nor American law is (or was) much troubled by the question of whether that trust indeed was shared by the law's supposed beneficiaries.

It is thus the very claim to warmth and concern, the pretense of harmony between administration and citizen, that led American welfare law to reject the need for due process protections and that still does the same in socialist states as we know them. That the rejection of procedural safeguards may be based on the noblest of motives has also been demonstrated by the American juvenile court movement. It proceeded from the assumption that delinquent children needed some better protection than the cold technicalities of procedural justice—namely help, attention, "care and solicitude" (*In re Gault*, 387 U.S. 1 (1966), at 15); treatment rather than punishment; a response generously attuned to the child's needs rather than meticulously measured by the severity of his offense. Hence the search for "administrative" rather than "criminal" methods of adjudication, the rejection of adversarial safeguards assuring the fairness of bargain between juvenile offender

[25] The expression was used by Leonid Brezhnev in his speech introducing the 1977 Constitution before the Supreme Soviet (quoted in Brunner, 1978: 80).

and state, and their replacement by informal, flexible, tailor-made attempts to do substantive justice.

The Supreme Court's decision in *In re Gault* marked the defeat of the reformers' hopes to cure rather than punish juvenile delinquency and prompted a return to more conventional notions of criminal justice. But in its heyday, the American juvenile court movement proceeded from the same optimistic assumptions about the nature of man as socialist law professes to do today: a belief in the essential goodness of man, in his perfectability through education, and in the capacity of the state to sustain a truly " 'parental' relationship" (*Kent* v. *United States*, 383 U.S. 541 (1966), at 555) with its citizens. From these assumptions followed procedural conclusions that shaped American juvenile court rules and that still shape the way in which socialist courts operate today: the attempt to focus on the whole man rather than on isolated incidents of the past; the proclivity for flexible, informal procedures; the involvement of lay personnel; the distrust of lawyers; and the general disrespect for procedural technicalities.

C. Lessons from Capitalist Law

My survey of situations in which capitalist law, too, denies or at least downplays a citizen's need for legal defenses against the state was meant to show the affinity between certain political beliefs and a disregard for due process. If we view a citizen as intimately connected with the state and as indentured to its mission, if we believe in the goodness and efficaciousness of state planning, or if we perceive a citizen as dependent and in need of rehabilitation and reform, we will be much less likely to insist on his procedural protection against the administration than if we view him as separate from the state, in control of his own life, legitimately pursuing his private interests. Judicial review, I want to argue, presupposes a certain image of man as self-sufficient, assertive, and strong that we too do not always embrace. But if we are "socialists" only on occasion, socialists themselves should be expected to show more consistency. After all, every Eastern European government, even today, professes to believe in the missionary tasks of the state, in its power to move and transform society, and in the educability of its people. To socialist officials, every citizen thus should need the discipline of the soldier, the loyalty of the civil servant, the compliance of the prisoner, and the application of the student. To them, all administrative activity should be part of a comprehensive, scientific, and farsighted plan. And to them, every man and woman is the "dependent and growing youth" (Berman, 1963: 384) of a parental legal tradition. Those reasons that occasionally move us to turn our backs on our *Rechtsstaat* ideals should always be present for socialists. Past socialist governments, as we have seen, have thus made only little and half-hearted use of judicial review proce-

dures. Does this suggest that future socialist societies (presuming the survival of socialist ideology) would also have to remain inhospitable to judicial review and that present reform attempts are likely to fail?

III. SOCIALIST ATTITUDES TOWARD JUDICIAL REVIEW

Legislation fundamentally at cross-purposes with the philosophical beliefs upon which it supposedly builds can be successful only if it finds extra-ideological support. Turning from the theoretical underpinnings of judicial review to the actual political climate in which it would have to take root, I will investigate whether such support is likely to develop in Eastern Europe. If socialist governments (their professed ideological purposes aside) would push for judicial review, if socialist judges (whatever their political constraints) would make aggressive use of their new powers to review, if socialist citizens (regardless of previous behavior patterns) would avail themselves of the possibility to sue the state, the rule of law might spread in socialist countries against all ideological odds. But even if that should happen, it will take a very long time.

A. Socialist Governments

When socialist governments enacted the new legislation providing for judicial review, they seemed in part to respond to liberal demands in the literature. Ever since the Soviet Twentieth Party Congress in 1956, intellectuals in Poland, the Soviet Union, and elsewhere in Eastern Europe had asked, in increasingly audible voices, for more court protection against the executive (Kuss, 1986b). But it seems unlikely that socialist governments were moved by the same rule-of-law concerns as their critics. From the governments' point of view, judicial review was meant to serve more tangible purposes: the rationalization of an ineffective and unresponsive administration and the appeasement of an increasingly dissatisfied citizenry. Of course, one set of motives need not exclude the other. Socialist governments might espouse rule-of-law techniques for philosophical *and* practical reasons: to protect the autonomy of the individual citizen and to keep a sluggish bureaucracy on its toes. But certain restrictions and inconsistencies accompanying the new legislation suggest that, at least as of now, utilitarian motives probably were decisive. These motives are likely to affect the impact of the reforms.

Socialist governments began in the 1970s to enlist the law's help in their fight against official corruption and civic demoralization. The first phase of reform focused on "legal propaganda"; namely, the teaching of legal rules of behavior to citizens and functionaries alike on the optimistic assumption that greater knowledge of the law would lead to better compliance. At least at

this stage, socialist legality was clearly perceived as a means to achieve order rather than justice (Markovits, 1982). The second reform phase (there has always been some overlap) switched from admonitions to incentives. It saw the creation of a number of new rights meant to motivate individuals to pursue interests of their own when doing so would also advance the welfare of society. The 1977 Soviet Constitution, recent legislation expanding the rights to engage in private enterprise,[26] policies providing more recognition for those lawyers connected with individual rights (jurisconsults and advocates), as well as the legislation widening the scope of judicial review (which is the subject of this essay), all can be interpreted in this light. But although the techniques associated with this second wave of reform are different from the techniques of the first, their justification need not be. In both phases, it seems to me, "legality" serves as a tool of the state: the new rights are seen as means rather than ends. By encouraging citizens to insist on their rights and by providing mechanisms for their enforcement, socialist governments seek to prod managers and bureaucrats, until then a law unto themselves, into more responsible action.

The Eastern European governments' decision to provide for more judicial review thus cannot simply be interpreted as more respect for the rule of law. That respect may come later, when one distant day legal argumentations have so saturated the relationship between citizen and state as to be accepted by all as a matter of fact. But today law should rather be seen as a newly discovered medicine for socialist ills. During a recent debate in an East German law review about "perfecting the management of the socialist state," for instance, almost all contributors favored the introduction of rules and procedures which would make administrative decisionmaking more rational, more consistent, and easier to monitor. They suggested two ways of achieving this end: giving law a greater role in the management of the state and making more extensive use of computers (*Staat and Recht*, 1985). Law, in this view, has a social utility similar to electronics: it facilitates the management of complex technical tasks. But it need have no dignity of its own, no place above the state which it serves, other than that inviolability required to avoid defeating its own purpose.

When they established the new rights, socialist governments at the same time thus tried to make sure that these rights would not be used to defeat the purposes for which they were enacted. The new Soviet Law on Appeals, for instance, not only authorizes a citizen to sue the administration but also penalizes those suits submitted "with libelous intent" (§ 10). In a similar vein, recent official endorsements of the free-speech rights of journalists exposing corruption have been accompanied by warnings not to risk

[26] On the Soviet Law on Individual Labor of 1983, see Schweisfurth (1988).

criminal penalties "by grossly distorting the materials" (*Soviet Law and Government*, 1987). The new Soviet statute on individual labor, legalizing family-style entrepreneurial activities, is counterbalanced by a number of decrees curbing the accumulation of "unearned income" (Schweisfurth, 1988: 5), which in Soviet parlance means income derived from the private resale of goods (that is, from entrepreneurial activity). And recent Soviet policies to tolerate political demonstrations have been put into question by the decree of July 28, 1988, which penalizes public gatherings without prior permission and which in numerous instances has been strictly enforced (*London Times*, November 11, 1988: 12).

Legislation like this enables the socialist state, if need be, to take with the one hand what it just has given with the other. Considering such official ambivalence about the blessings of *perestroika*, it seems unlikely that socialist governments will allow judicial review to seriously challenge the way their administrations are run. In many instances, of course, court review of legally faulty administrative decisions would re-affirm bureaucratic discipline and accountability and thus appear to be state-supportive. But in some cases judicial review could threaten crucial political tenets, and—to keep the distinction between acceptable and unacceptable forms of review under official control—socialist states will be tempted to restrict the power of courts in ways that are likely to compromise the reforms themselves.

Take, for example, the issue of administrative discretion. Judicial review of discretion is a touchy subject not only for socialist courts, because it affects the very fundamental question of who, in borderline disputes between judiciary and administration, should have the final word: our principles or our pragmatism, the law or the demands of political expediency. Western courts, too, as we have seen, may show great deference toward the executive's better judgment, especially with respect to "socialist" forms of decision-making involving the management and planning of social developments.

But Eastern European law, even after the recent reforms, seems far more restrictive than this, although it is still unclear how far the courts' power of review will actually reach. The new Soviet statute on judicial review, for instance, is said to apply only to "strict legislation"; that is, courts may review only those administrative decisions based on "precise statutory directions" (Kuss, 1987a: 289), not those in which the statute empowering agency decisions employs indeterminate concepts (like "public interest" or "societal requirements") or in which the administrator in the field is given no directives at all. But the violation of strict legislation can play only a minor role even in capitalist administrative law. Most legislation authorizing administrative decisions uses more or less vague general guidelines, thus leaving the choice between several courses of action to an agency's discretion. Accordingly, citi-

zens' suits against the executive complain of an agency's illegitimate use of this discretion: of faulty balancing procedures, violations of a statute's legislative purpose, improper agency motivations, or the consideration of unacceptable criteria like race or sex. The question of whether and to what extent courts are authorized (and willing) to review discretionary decisions—the "reach" of judicial review—is thus crucial to a citizen's effective protection against misuses of public authority. Indeed, since most decisions affecting a citizen's interests not only are based on fairly loose legal standards but take place in a setting in which "front line bureaucrats" can themselves fashion the fact-pattern to which legal criteria are then applied (through the management of their workload, the identification of clients, and the like), such pre-legal "informal discretion" (Handler, 1988: 1020) may undermine even a capitalist citizen's judicial protection in situations in which the court would review the misuse of an administrator's more visible "legal" discretion.

Judicial protection against the executive thus will be meaningful only in a legal system that thoroughly tackles the tricky issue of administrative discretion. Considering that socialist legislation—to facilitate its adaptation to the policies of an activist state—tends to be especially vague, the problem of discretion is particularly critical under socialist conditions. Until now it has not been seriously addressed by the reformers. In the Soviet Union, as we have seen, the issue is officially ignored. In Hungary events are in flux, but presently courts are authorized to review only the "legality" of administrative decisions, namely, their formal compliance with statutory language (Zsuffa, 1983). Rumanian and Bulgarian courts reportedly investigate whether the administration has overstepped the boundaries of discretion, although not the exercise of discretion itself (Leonhardt, 1984: 91), and whatever this may mean, there is no indication that these courts use their powers to effectively curb the abuse of administrative authority. And while in East Germany the issue of discretion is beginning to surface in the academic debate, the reform statute itself speaks only of the review of a decision's legality, thus excluding discretionary decisions from court supervision.[27]

Until now, one exception in this line-up of deference and caution is Poland. Although the 1980 Code of Administrative Procedure which established the HAC (Administrative Procedure Act of

[27] Section 9 of the Gesetz über die Nachprüfung von Verwaltungsentscheidungen of December 14, 1988, provides that the court shall review whether a particular administrative decision "violates a law or other statutory regulation." However, to increase the effectiveness of judicial review, the East German legislature also amended several statutory provisions now subject to review to include more specific guidelines for administrative decisionmaking. To limit the number of instances in which discretionary decisions can escape review, East German authors are calling for more precisely worded administrative regulations; see Christoph (1989: 13).

January 31, 1980, Dz. U. (1980) no. 4, item 8) provides for the review of only the "legality" of administrative decisions, Polish judges indirectly review the use of administrative discretion by examining the decision's factual basis, the agency's interpretation of statutory law, its observance of procedural rules, and, at times, even its motives for action (Kędzia and Schweisfurth, 1987: 333). In the few years since its establishment, the Polish High Administrative Court has indeed become an advocate of citizens' rights, prodding the administration to use its discretion whenever possible in favor of the citizen and trying to turn around the "bad traditions" of socialist bureaucrats by teaching them to replace their former knee-jerk "general no with a general yes."[28]

But Poland is a more likely candidate for judicial reform than most of the other socialist countries. Judicial review in Poland could build upon pre-war *Rechtsstaat* experiences (Bilinsky, 1979: 428) and could profit from the existence, since 1960, of rules of administrative procedure (Administrative Procedure Act of June 14, 1960, Dz. U. (1960) no. 3, item 168) that allow judges to review the procedural underpinnings of discretionary decisions without trespassing upon the administration's substantive decisionmaking prerogatives. Soviet reformers, for instance, however zealous in their endorsement of judicial review, can build on neither foundation. And while the Soviet Union, despite the inspirational impact of the Gorbachev reforms, provides the least promising setting for effective judicial change, other socialist countries, even with lingering memories of a more liberal bourgeois past, may still lack the openness and reformatory energy that would allow them, like Poland, to make use of their heritage.

Moreover, Polish judges have been able to expand the impact of judicial review into the realm of discretion by drawing not only on their legal past but also on their nationalism and their Catholicism (interestingly, most of the few HAC decisions restricting censorship have favored the Catholic weekly *Tygodnik Powszechny* [Kuss, 1987b: 213]). Polish judges are operating under legislation far more supportive of court control than that of other socialist countries and under a government besieged and worn down by demands for political reform that originate among the people at large—and not, as in the Soviet Union, under reforms that a central government tries to impress from above upon a bewildered bureaucracy. Without such a combination of forces propelling the expansion of judicial review, other socialist governments (already, as we have seen, mistrustful of the review of discretion) will be reluctant to tolerate Polish-style inroads into the exercise of state power.

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[28] High Administrative Court Justice Z. Mańk cited by Kuss (1981a: 299).

B. Socialist Judiciaries

The second prerequisite for effective procedural reform is an energetic and supportive judiciary. All in all, socialist judges are not very likely to fill this role. Throughout their careers, jurists in socialist countries are far more dependent upon their governments than are their capitalist colleagues. They will not be admitted to law school unless considered politically reliable—even today, official Soviet plans to reform legal education stress the importance of an applicant's political activism (Schroeder, 1987: 257). While in university, future judges will be exposed to thorough ideological training (see, e.g., Meador, 1986); once in office, they will continue to be vulnerable to state interference. The election and re-election process, in practice subject to government and Party approval, impresses upon a judge the need to retain political favor and thus makes sure that "only persons loyally devoted to the people and their socialist state"[29] will remain on the bench.

Beyond the selection process, a socialist judge's day-to-day work may be affected by various outside pressures. Phone calls from above may attempt to tell him how to decide a particular case, a practice that in the Soviet Union is known and now criticized as "telephone law" (Hastrich, 1988: 216). A judge may also be publicly faulted for having reached wrong decisions: "many" Soviet judges, for instance, have been subjected to disciplinary proceedings when their decisions were too mild or were overturned on appeal,[30] or have been exposed to media derision for being "too liberal" (ibid.). Even if, in the future, state and Party should refrain from interfering in specific court cases—and total abstention (especially of local bosses) is very unlikely[31]—political practices such as the participation of government representatives in important court meetings, the influence of state officials on the drafting of court directives, or the supervision implied in the workings of democratic centralism will continue to ensure that judges do not deviate from their state-supportive role. Note, in this context, the relatively high rate of Party membership among socialist judges.[32]

But while demands on their political compliance are high, the social status of Eastern European judges, again compared to their Western counterparts, is relatively low. Socialist legal education,

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[29] This is a requirement for election listed in the East German Constitution of 1974, art. 94 I.

[30] This was stated by the Soviet Minister of Justice Kravcov as cited in *Recht in Ost und West* (1988d).

[31] According to two Soviet polls of People's Court judges, incidences of "unlawful influence" on the judiciary have increased from 10% in the 1970s to 25% in the 1980s (Petrukhin, 1988–89: 20). The figures may reflect increased judicial sensitivity to such influences and a greater willingness to report them.

[32] Meador (1986: 136) reports that 70 to 75% of East German judges are party members. In the Soviet Union, party membership stands at 100% (Ginsburgs, 1985: 300). In Yugoslavia in 1979–80, 84.7% of all law court judges were members of the League of Communists (Cohen, 1985: 336).

largely obtained through evening and correspondence courses,[33] is often of poor intellectual quality and does not attract the best minds. Salaries, by Western standards, are modest,[34] and the physical equipment of socialist courts can be deplorable.[35] Accordingly, many more judges are women in socialist than in capitalist countries,[36]—a fact that, under socialism as elsewhere, reflects the low social esteem in which a profession is held.

Perhaps, in the past, Eastern European judges did not enjoy higher status because they neither occupied positions of political influence (like Party or government functionaries), nor possessed substantive skills (like scientists or engineers) that in a society without much legal conflict resolution could find an alternative market. But whatever the reason, the combination of low professional status and high political dependency is unlikely to produce socialist judges willing to take on their state. They have not done so in the past: Soviet criminal judges, for instance, when faced with demands for harsh penalties from their higher-status colleagues in the Procuracy, have tended to comply and thus have contributed to the "accusatory bias" of Soviet criminal justice, which is now being criticized by the reformers (Petrukhin, 1988-89: 21).[37] Nor can a socialist judge willing to stand up to the state always rely on help from the socialist bar: the few attorneys in socialist countries have learned to adopt low profiles and cautious techniques when defending their clients against the state (Huskey, 1986) and must themselves gain in status and influence before they can be expected to challenge authority aggressively. In view of all these constraints, lower court judges in particular can be expected to err on the side of political caution when confronted with a citizen's suit against government authorities. In the past, Soviet local

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[33] Schroeder (1987) reports that in the Soviet Union 56% of all law students are enrolled in correspondence courses, 15% in evening courses, and only 29% in full-time study. In East Germany, 39% of all law students are part-time students (Meador, 1986: 113).

[34] Solomon (1987: 553 n. 76) reports that, until the 1970s, salaries of Soviet court workers were "too low to live on" and that most judges interviewed in his study of Soviet emigré lawyers "testified that the temptation for them to take bribes was great."

[35] For instance, in a recent report to the Hungarian Parliament, the Hungarian undersecretary of justice criticized shortcomings such as the miserable quality of typewriters and carbon paper, the shortage of rooms to accommodate judges, and even the absence of running water in some Hungarian courthouses (reported in *Recht in Ost und West*, 1988c). Ginsburgs (1985: 310) describes the physical condition of Soviet courthouses as "lamentable."

[36] In 1985, 14.9% of the judges in West Germany were women (*Statistical Yearbook of the FRG*, 1986: 328), as were 13.3% of all American federal judges and 7.9% of all state and local judges in 1980 (Curran, 1985: 40). By contrast, 44.5% of all Soviet judges are women (Hastrich, 1988: 216), as are 55% of all state court judges in East Germany (Meador, 1986: 138).

[37] The fact that, in 1987, 700 Soviet judges were convicted of criminal offenses (mostly, I presume, of corruption) equally suggests that Soviet judges may not always be willing or able to resist temptation (see *Recht in Ost und West*, 1989b: 32).

and regional courts, for instance, have often been reluctant to hear certain cases against housing authorities even in situations in which Supreme Court case law had consistently affirmed the civil law character, and thus the justiciability, of the issues in question (Schmidt, 1987: 7). Such instinctive deference to the state cannot be easy to outgrow.

Socialist judges thus would have to overcome many political and psychological obstacles if they were to apply their newly expanded powers of judicial review in ways that would seriously challenge the uses of government power. Even the Polish High Administrative Court has hesitated to censor government violations of constitutional rights when court intervention seemed more risky than usual (although the Court, on these occasions, has still insisted on its competence to review and in this fashion has kept a foot in the door to more effective review in the future).[38] Even in Poland, even in 1986, 25 percent of the respondents of a public opinion poll believed that judges took bribes, and 44 percent believed they were subject to political pressures (Frankowski, 1987: 1334). In the Soviet Union, a quarter of judges questioned complained about pressures "from above" (ibid., p. 1328 n. 84).

We know from our own (and from the Polish) experience that judicial review will curb governmental abuses only to the extent that judges are willing to make energetic use of their powers. West Germany would not have matured into a *Rechtsstaat* (and some even say a *Justizstaat*: a state not only under the rule of law but under the rule of judges) without the courts' aggressive supervision of the exercise of administrative discretion. In the United States, the scope of judicial review has always been determined by "the spirit or mood in which the judges . . . approach their tasks" (Jaffe, 1951: 1236), with review wavering between judicial activism and passivity, between procedural and substantive surveillance, between "democratic" and "technocratic" traditions (Shapiro, 1983: 1496), depending upon the spirit of the times and the judges' trust or distrust of technological progress. But how can judges in socialist countries, who are so exposed to the authority of the state, so dependent upon its support, muster the energy to truly censor abuses of government power? Soviet reformers themselves worry about their judiciary's political limitations. The chairman of the Supreme Soviet's Legislative Proposal Commission, referring to the new Law on Appeals, recently stressed the need for "greater boldness, initiative, and principle" on the part of the judges who will have to apply it (cited in Quigley, 1988a: 177). Debates are under way about how to strengthen judicial independence: through better pay, longer or possibly lifetime appointments, or

[38] See the censorship case decided by the HAC in May 1985 as reported by Kuss (1987b: 212).

the exclusion of local authorities from the appointment process.[39] A statute penalizing interferences with judicial decisionmaking and the "denigration of courts" is at the drafting stage (*Recht in Ost und West*, 1988d: 239). But all these calls for change come from above and may find little echo among a cautious and conservative judiciary. Soviet reformers themselves admit that the task of reeducating legal officials will be "anything but easy" (Hastrich, 1988: 221). It thus remains to be seen how much of the new spirit of reform can survive its transmutations through several layers of a complacent and conformist judicial bureaucracy.

C. *Socialist Citizens*

But even if socialist governments were to endorse judicial review without qualifications, and even if socialist judges were eager to censor abuses of government power, it is questionable whether socialist citizens would make much use of the right to take their administrations to court. To the extent that suing the state is already possible under socialist law, comparisons of Eastern and Western litigation rates suggest that this possibility is rarely exploited. While in 1985 1 West German citizen in 421 sued his administration, only 1 in 3893 did so in Hungary (in 1983), 1 in 2,662 in Poland, and 1 in 1,176 in Yugoslavia.[40] Instead of suing, socialist citizens prefer to raise their objections to administrative decisions through complaints. Roughly 560,000 complaints involving citizens' personal interests were submitted in Rumania in 1981 (Kuss, 1986a: 438); 150,000, in Bulgaria in the same year (ibid.); about 1.6 million in East Germany in 1987.[41] Even in Poland, where supposedly 96 percent of all administrative decisions affecting individual rights *could* be contested in court (Reid, 1987: 91), citizens filed about 18,000 administrative suits in 1988 (see n. 7 above), but at least an estimated one million complaints (cf. Frankowski, 1987: 1322).[42] Many of these complaints will not concern individual rights but mere preferences or needs (that is, will concern matters

[39] See Quigley (1988b) and the report on the Soviet conference on law and *perestroijka* of May 1987 in *Recht in Ost und West* (1988a).

[40] My figures are based on the following: *Statistical Yearbook of the FRG* (1988: 335); *Statistical Yearbook of Hungary* (1985: 384); *Statistical Yearbook of Poland* (1986: 513); and *Statistical Yearbook of Yugoslavia* (1986: 412). The West German figure also includes litigation before the Finance Courts, since tax matters, insofar as they were justiciable, have also been included in the Eastern European data. Like most comparative litigation rates, my figures should be taken with a great deal of caution, since differences in procedural and substantive law among the respective countries make the definition of exactly comparable categories of disputes almost impossible.

[41] My estimate is based on Bernet *et al.* (1988), who in an empirical study of 16 East German local government organizations reported an average number of 12 registered complaints for 100 citizens over the age of 14.

[42] Frankowski's estimate relates to the year 1983, but in view of experiences in other socialist countries, it is likely that the number of complaints submitted in Poland has since risen.

that capitalist citizens, too, could not raise in court). But many complaints will deal with justiciable issues. In the Soviet Union, for instance, objections to administrative fines (one of those issues subject to judicial review even before the 1987 statute) are often not raised in court but instead submitted to local executive councils, which handle them like complaints (Kuss, 1984: 136). And although it has been possible for decades to litigate tort claims against the government, citizens nevertheless are reluctant to sue (ibid., p. 153). Compare this to the United States, where in 1983 roughly one out of every 300 federal officials was personally named in a tort suit charging violations of constitutional rights (Schuck, 1983: 43).

Why are socialist citizens so hesitant to sue the state? As it turns out, they shun courts not only in matters involving administrative law. Civil litigation rates too (if available data are halfway reliable) are surprisingly low under socialism: while in 1984 West German courts handled 255 civil suits per 10,000 inhabitants, Polish courts handled 73; Hungarian courts, 62; Soviet courts, 34; and East German courts, 32. Only Yugoslav courts, with 205 civil suits per 10,000 population, seem to have to deal with capitalist-style litigation rates.[43]

Rather than going to court, socialist consumers, again, prefer to raise their civil law grievances by way of complaints. In East Germany, for instance, tenants' complaints about the bad upkeep of state-administered housing are eight to fifteen times more likely to be submitted to local government bodies than to be litigated in court (Lieske and Nissel, 1984: 97; 1982: 26). Employee claims against their employers are also unlikely to be subject to litigation: in 1982, 1 in 55 employees sued his employer in West Germany, but only 1 in 433 employees did so in the East Germany (Markovits, 1986: 707).

In all areas of law involving personal claims against the state (be it as landlord, as employer, as purveyor of services, or as sovereign), socialist citizens thus seem to avoid the confrontation im-

[43] My figures are very tentative. Since the sources do not always indicate what kind of disputes are combined under headings like "civil suits," comparisons among legal systems are extraordinarily difficult. I have based my calculations, to the extent possible, on first-instance suits only and have excluded family, labor, and social security matters, as well as those disputes recognizable as administrative law cases (which in Hungary, for instance, are listed under "civil actions"). My Yugoslav figure may also include family law cases (which in the Yugoslav *Statistical Yearbook* are not registered separately) and thus may be grossly inflated. My calculations all relate to 1984, with the exception of the Soviet figure, which refers to 1977. The sources were: *Statistical Yearbook of the FRG* (1986: 329); *Statistical Yearbook of Poland* (1985: 506); *Statistical Yearbook of Hungary* (1984: 356); *Statistical Yearbook of the GDR* (1986: 391); *Statistical Yearbook of Yugoslavia* (1986: 412); and Van den Berg (1985: 144, 145).

plied in a suit and instead seek redress through the less assertive complaints procedure. With respect to civil and labor law claims, such behavior makes sense. Capitalist claimants, too, will sue only if social ties to their opponents are broken (or not worth preserving) and if a successful suit will allow them to obtain real compensation (goods or services) for the injury or loss the defendant inflicted upon them. In socialist countries, where consumer and labor relationships can rarely be severed in practice and where, absent a market, a successful plaintiff cannot hope to replace his losses with the damages awarded in court, it is indeed more reasonable to try one's luck with informal complaints than with cumbersome and costly lawsuits (ibid.).

But administrative law suits involve a different constellation of plaintiff and defendant and seek different satisfaction. Such suits, as a rule, do not aim for monetary damages but for substantive goods: access to housing, a license, admission to university. A plaintiff's prospective win will thus not, as in many civil law cases, be made worthless by the fact that money cannot buy much compensation in socialist economies. On the contrary, administrative law suits should provide successful plaintiffs with goods of great value to socialist citizens. Moreover, even in capitalist countries, such suits cannot sever relationships between plaintiff and defendant: a citizen remains, as before, a part of his administration's constituency. Yet this fact does not seem to dissuade capitalist citizens from suing their governments.

Does this suggest that the reasons that keep socialist citizens from using their courts in civil and labor law matters—namely, the inevitable proximity between plaintiff and defendant and the low utility of socialist money—should not keep them from suing the state? Might the present low litigation rates between citizen and socialist administrations be only a matter of habit, a question of time, until citizens have adjusted to the new legislation and learn to make use of their rights?

One could draw this conclusion if the continuous relationship between socialist and capitalist citizens and their respective states were indeed comparable. But they are not. A capitalist plaintiff suing an administrative agency will not be afraid that his suit might have repercussions affecting his interactions with other government offices. His dependence upon government help is sufficiently compartmentalized, his contact with the state multi-faceted and diffuse, and his civic status protected by numerous rules and conventions. While the basic relationship between capitalist citizen and state continues beyond the suit, it is nevertheless formal, abstract, and mediated by many non-state institutions that shield the citizen against intrusions of government power. He will not be kept from suing the state for fear that—as, for instance, in civil cases against colleagues or friends—his suit might damage per-

sonal bonds. His bond to the state is not personal and needs no protection.[44]

Not so under socialism. Socialist citizens are much more dependent upon their governments than their capitalist cousins are. The state provides for them as employer, landlord, and purveyor of goods and services, as teacher and disciplinarian, and in all these incarnations is guided by one set of principles: the Party's. The different segments of a citizen's life are thus interconnected and porous: his behavior in one area may affect his status in another.[45] As in a family setting, rights and obligations are blurred and interdependent. Relationships between citizen and state take on a personal character, and the administration prides itself on its warmth and human touch. Like parents, administrators, for instance, may time certain services as "presents to the people" to coincide with national holidays;[46] like children, citizens will use occasions for public celebration to increase their demands upon the state.[47]

Litigation does not flourish in such a political climate. Rights recede behind needs, and human language replaces the language of law. "Write a letter to Erich" was a typical response in East Germany to my question of what one should do if one found oneself at an impasse with the administration. "Erich" is not someone you take on in a lawsuit. Rather, he stands for the parental socialist state, which both guides and provides for a citizen's everyday life. Convinced of their all-pervasive dependency, even disgruntled socialist citizens, when approaching their administrations, will not think of themselves as bearers of rights but rather as supplicants.

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[44] My description does not fit capitalist welfare clients who depend on the state in many of their daily activities and whose relationship to the state is personalized in the figure of the social worker. Accordingly, like socialist citizens, welfare clients seem to be reluctant to litigate; see Handler (1969: 20).

[45] Perhaps a socialist citizen's experience of pervasive dependence can best be conveyed by an anecdote. A few years ago, a fellow passenger on an East German train told me about her difficulties in persuading local housing authorities of the need to repair her roof, which had been leaking for almost 10 years. At the end of her tether, she had finally threatened the local representative of the National Front (the all-party socialist umbrella organization coordinating most civic activities) that she would not vote in the upcoming elections unless repairs were under way by election day. She could not threaten to vote for an alternative candidate (there being none), but she knew that her abstention from going to the polls would mar the performance record of local officials who were expected to mastermind the usual socialist 99% voter turnout. The National Front man had listened to her threat and had said, "Don't vote then. But you know as well as I that there are other things you will be wanting from us in the future." And had she voted in the end? "Well, yes," the woman said with a rueful little smile. And had the roof been repaired? "Not yet."

[46] Piskotin (1987–88: 32) reports that this is a "very common practice."

[47] Pohl and Schulze (1981: 401) report that East German citizens tend to increase their complaints at election time. For example, 140,000 complaints were submitted on the occasion of the election of the People's Chamber in 1976, and 63,000 on the occasion of the local elections in 1979.

Hence the widespread socialist preference for complaints over lawsuits.

Socialist governments, I believe, have been successful in imprinting upon their citizenries the image of the familial state. They now learn that, as in a family setting, connectedness and interdependence breed disinterest in formal rules. Not only are complainants reluctant to litigate against the state, but state officials, for their part, do not treat the relationship between citizen and administration as one that is governed by legal rules. Socialist administrators are thus just as likely to neglect the enforcement of legal prohibitions as to ignore the legal safeguards of rights. In East Germany, for instance (probably the most law-abiding of all Eastern European countries), local authorities only rarely impose penalties for the violation of administrative regulations and virtually never enforce those penalties that are actually imposed. Socialist citizens, like unruly children, in turn do not seem to perceive administrative sanctions as legitimate responses to violations of civic discipline but as hopefully avoidable risks to be included, as one factor among others, into their private cost-benefit calculations of whether to engage in prohibited behavior (Schöwe, 1986: 101, 106, n. 9). In this climate of informality and license, legal niceties no longer seem important. The distinctions between a citizen's different means of asserting his rights are blurred and disregarded in practice: complaints are submitted not only to administrators but also to courts (Müller, 1987: 243), justiciable claims are handled like administrative complaints (Kuss, 1984: 136), and even statutory language, at times, confuses the distinction between suits and petitions.[48]

Unless a generous infusion of pluralism and individual enterprise into everyday socialist life begins to loosen the symbiotic bond between citizen and administration, it therefore seems unlikely that judicial review will be sufficiently utilized by prospective plaintiffs to do what socialist governments hope it will do: domesticate and help control their bureaucracies. Even in Poland, where litigation rates have steadily risen since the establishment of the HAC, administrative law suits are still only 18 percent of the comparable West German caseloads.[49] If socialist citizens will sue their governments, it will most likely be about issues affecting

[48] Kuss (1984: 136) points out that article 39 of the Soviet Fundamentals of Administrative Offenses of October 23, 1980, uses the same word—*zhaloba*—to refer to complaints (addressed to the local executive council) and to suits (addressed to the People's Court).

[49] The comparison includes litigation before West German tax courts (since in Poland tax matters are handled by administrative courts), but not before West German social courts (since in Poland social insurance matters are handled by regular courts). My calculation is based on the Polish figure of 18,000 administrative lawsuits in 1988 provided by Professor Letovska (n. 7 above) and on the most recent West German data for 1986 contained in the *Statistical Yearbook of the FRG* (1988: 335).

their material well-being: social security payments and similar benefits.[50] As one would expect in a parental state, socialist rights consciousness seems most developed with respect to support claims, that is, with respect to claims reflecting a citizen's dependence upon the state. Suits that challenge the exercise of political power, even where possible, will continue to be rare. And all citizens' claims, for a long time to come, will more likely be raised by way of complaints than through suits.

Socialist governments themselves seem to agree with this prediction: their most recent legislation on legal controls over the bureaucracy indirectly acknowledges their citizens' preference for informal mechanisms of redress. Four months after passing its statute on judicial review, the Soviet legislature thus amended it to abolish a previously mandatory, preliminary administrative complaint procedure. Under the new law, a citizen can go straight to court to challenge an administrative decision (Quigley, 1988a: 174). While capitalist law needs to discourage citizens from engaging in unnecessary litigation—hence, for instance, the preliminary complaint procedure mandatory under West German law (Verwaltungsgerichtsordnung of January 21, 1960, BGBl.I 17 § 68 *et seq.*)—socialist legislators presumably were worried that their citizens would never get beyond the preliminary internal review stage and therefore wanted to facilitate access to court. And in July 1987, Poland, despite the availability of judicial procedures, established an ombudsman's office to protect civil rights (British Institute of International and Comparative Law, 1987: 200)—yet another acknowledgment that complaints, with their admixture of informality, warmth, and dependency, come more naturally to socialist citizens than litigation. The new institution, accordingly, was an immediate success: in her first thirteen days of office, the new ombudswoman[51] received more than five thousand complaints (*Recht in Ost und West*, 1988f).[52] Ironically, the largest group of complaints concerned the Polish administration of justice (*Recht in Ost und West*, 1988g)—more liberal, more independent, and more open to litigation than any of its socialist counterparts, yet

[50] While West German citizens are roughly 5 to 6 times as likely to sue administrative agencies than are their Polish neighbors (see n. 49 above and accompanying text), in 1984 social insurance litigation rates in West Germany were only about twice as high as in Poland (adjusted for population size); cf. *Statistical Yearbook of the FRG* (1986: 332); *Statistical Yearbook of Poland* (1985: 506). Since 1985, Polish Social Insurance Commissions have been reintegrated into the regular court system.

[51] The new ombudswoman is Professor Eva Letovska, who was elected by the Polish Parliament in November 1987. Reported in *Recht in Ost und West* 48 (1988a).

[52] From January 1988 to January 1989, the ombudswoman's office received 55,000 complaints as reported by Professor Letovska (see n. 7 above). By comparison, in 1981 the Swedish ombudsman received 3,458 complaints, and in 1979 the French ombudsman, 4,361 complaints (*Recht in Ost und West*, 1988f).

still viewed with skepticism by socialist citizens even as assertive as the Poles. While under capitalism, "it is to the courts . . . that we ultimately turn for the implementation of a regularized, orderly process of dispute settlement" (*Boddie* v. *Connecticut*, 401 U.S. 371 (1971), at 375, Harlan, J., concurring), socialist citizens, even in Poland, still prefer to turn to a human being they trust.

IV. OUTLOOK

My survey has produced a sobering prognosis for the future of judicial review procedures in Eastern Europe. Viewed from both capitalist and socialist perspectives, judicial review seems to clash with the ideological assumptions and social realities of present-day socialist governments. Western misgivings about judicial review suggest that we, too, are reluctant to allow court review precisely in those situations in which we are "socialists," that is, in which we believe in the activist role of the state and in the dependency of its citizens. Socialist experiences up to now suggest that socialist governments feel ambivalent about the recent reforms, that socialist judges are unlikely to actively push for them, and that socialist citizens will be slow to use their new rights. For many years to come, I believe, administrative law litigation will not significantly challenge the exercise of public authority under socialism.

This does not mean, however, that the present legal reform movements in the socialist world—the demands for better protection of civil rights, for fairer and more open distribution procedures, for more responsive officials—are inevitably destined to fail. It means only that if law is to assert a domesticating influence over socialist bureaucracies, it will probably have to be in other ways than through the judicial review of administrative decisions. Even with Gorbachev at its helm, it is hard to imagine a Soviet Union in which, American-style, two-thirds of the republics' prison systems are under some kind of court order (Grossman, 1987: 250), in which interest groups, industry, and government wage "gladiatorial" court-battles over issues of regulation (Braithwaite, 1987: 560), in which local communities can no longer afford their tort liability insurance (Lieberman, 1981: 57), or in which ordinary citizens regularly take their administrations to court. But there are many ways other than through judicial review in which socialist law could cushion civic life against transgressions by public authority.

A. The Need for More Law

Socialist governments themselves are keen to strengthen the legal controls over their bureaucracies. They badly need more of what Lenin (1966) called "legal culture": the uniform, consistent, and even-handed application of the law. More than sixty years after Lenin's exhortations, "legal culture" still does not come natu-

rally to socialist administrators. Arbitrary decisions are frequent in all branches of the administration, but from a citizen's perspective, "legal culture" seems most needed in the area of distributive justice, where the perennial socialist problem of public corruption is compounded by persistent shortages of desirable consumer goods. Socialist citizens depend on their state for the satisfaction of almost every need: housing, education, health care, leisure, to name only a few. Yet given their scarce public resources, socialist administrators must ration their handouts: rank applicants, restrict services, cut quality, and often deny even the most legitimate consumer request. After decades of deprivation, it now has become crucial for the socialist state to make restrictions at least appear reasonable and fair if it is not to lose all support by its citizenry.

Current procedures to protect a citizen against illegal administrative decisions have not been sufficient to convince socialist consumers of the even-handedness and benevolence of their executives. The Procuracy—in theory responsible for censuring all types of illegal behavior—is preoccupied with crime prevention and economic violations. Judicial review, if it is already available, has not yet taken root. And administrative complaints, as we have seen the most common form of redress, come too late to affect the decisionmaking process itself, are too easily warded off by officials to promise much chance of success, and are handled in an internal review-process unbound by precedent and so hidden from a petitioner's view that he will hardly be persuaded of the inevitability and justice of an unfavorable response. Hence the dissatisfaction and grumbling so common among socialist citizens and hence, I believe, the likelihood of multi-faceted attempts at reform: "After all, this is a matter affecting the trust between citizen and state" (Heuer, 1986: 439).

In the end, only a significant rise in their standard of living will restore socialist citizens' confidence in their administrations. But short of such an economic solution, and even alongside it, what could the *law* do to increase civic faith in the socialist state? Judicial review of administrative decisionmaking might not be the best answer anyway. Most cases in which a petitioner questions the legitimacy of agency decisions will involve needs rather than rights and thus issues that in the West, too, would not be subject to litigation:[53] a bigger flat, better public transportation facilities,

[53] One might object that my distinction between rights and needs follows typically capitalist categorizations, which fail to do justice to the traditional socialist concern for a citizen's material welfare. Since socialist law has always ranked substantive over procedural justice, so the argument would go, socialist judiciaries would be unlikely to insist on a formal definition of rights. In fact, they might find support for a needs-oriented approach to their decisions in their socialist constitutions, which—unlike capitalist constitutions—couch many of their promises to fulfill social needs in the language of rights: guarantee a "right to work," a "right to rest," a "right to housing," and the like

paint and cement to repair one's apartment. Most complaints will charge insensitivity and inefficiency rather than outright illegality of official decisions and thus, again, could not be raised in a lawsuit—especially if, as in most socialist legal systems, the exercise of discretion is still largely immune to court scrutiny. And, in most cases, socialist governments themselves will not want to depend on their citizens' unlikely litigiousness to hold their officials accountable for illegal actions. Hence other ways are needed to strengthen the law's hold over socialist administrations.

1. Administrative Procedure. One way of improving administrative legality without having to rely on the courts would be to increase a citizen's due process protections before the agency's final decision is reached. An applicant might be given a hearing to explain his needs, might be permitted access to the records, or might be allowed to be assisted by counsel when stating his case.

(see, e.g., the Soviet Constitution of 1977, arts. 40, 41, 44). Encouraged by such provisions, socialist judges might use their new powers of judicial review to enforce citizens' substantive claims to a job, an apartment, etc. In this fashion, socialist judicial review, bolstered by generous constitutional promises of providing for a citizen's welfare, might actually be more beneficial to ordinary citizens than the more formal review of largely procedural justice is to the average capitalist man.

But such speculation would ignore the specific nature of socialist constitutional rights. They have never been "rights" in our capitalist sense. The constitutional texts themselves seem to rule out their judicial enforcement by providing "material" rather than "legal" guarantees: The right to work, for instance, is safeguarded by the "continuous growth of the productive forces" (ibid., art. 40, para. 2) or the right to housing by "the development and protection of the state and social housing fund" (ibid., art. 44, para. 2). Most constitutional provisions, furthermore, list numerous qualifications restricting their original promises. The Soviet right to work, for example, is limited by the requirement "to take into account the needs of society" (ibid., art. 40, para. 1), or the East German right to housing is guaranteed only "in accordance with economic possibilities and local conditions" (East German Constitution, art. 37, para. 1). Accordingly, socialist constitutional rights are not considered to be directly enforceable law but to need translation into ordinary statutory provisions. While there is some academic debate on this point (see Blankenagel, 1976: 27; *Recht in Ost und West*, 1989a: 226, 227; 1989b: 28, 29; 1989c: 171), it is extremely unlikely that socialist courts will do what even capitalist courts have not done in the past: enforce a citizen's substantive constitutional claim to be provided for by the state without specific legislation spelling out the conditions of entitlement.

Rather than stimulate the judicial enforcement of largely unenforceable promises, the recent reforms will in turn lead to the restriction of these promises and encourage a more careful rewording of the constitutional texts. Already, socialist constitutions have become less reckless than in the past in proclaiming their goals. While, for instance, the Stalin Constitution of 1936 "guaranteed" the right to social insurance to all citizens—despite the fact that the Soviet social security system was extended to cover collective farm workers only in the 1960s (Bilinsky, 1988: 224)—the new Soviet Constitution of 1977 (art. 41, para. 2), in establishing a right to rest by reducing the length of the work week, realistically exempts collective farmers from its promise and points to the need for local regulations. Far from being evidence of decreasing social commitment, such legislation is a sign of growing *Rechtsstaat* concerns: socialist legislatures are beginning to take rights seriously by making only those promises they can hope to fulfill.

In this fashion, administrative decisions could be made more sensitive to a citizen's needs and could anticipate and hopefully defuse his objections without the agency's losing control over its policy choices to an outside supervisory institution. To socialist bureaucracies fearing for their omnipotence, administrative due process thus should be less threatening than judicial review. It would also better conform to the warm and familial picture socialists like to draw of the relationship between their state and its citizens: rather than fighting it out in court, applicant and agency together would strive for a commonly acceptable solution. As in a family setting, a decisionmaker would listen to a citizen's objections (hearing), would openly explain the problem (furnishing of reasons, access to the record), and would even consider the good word of a trusted friend (counsel). But, as in a family, the final decision would still rest with the *pater familias*, the state.

In the past, the internal regulation of administrative behavior thus has come easier to socialist systems than have external judicial review procedures. Poland, for instance, introduced a Code of Administrative Procedure long before establishing administrative courts (see Kuss, 1985: 624); the Soviet Union allowed lawyers to represent clients in dealings with the administration before accepting their arguments in judicial proceedings (see the Soviet Statute on the Colleges of Advocates of November 30, 1979, §§ 6 II, 9 I); and even East Germany began to strengthen citizen involvement in the administrative process itself before making first concessions to demands for judicial review (Markovits, 1987: 279). Socialist citizens, well accustomed to informal encounters with public officials from their complaint procedures, might also be more ready to use participation rights in the administrative process itself than to risk a step further and take the state to court. It therefore seems possible that future reforms might increase a citizen's rights to be involved in decisions affecting his interests—through hearings, participation in fact-finding, representation by counsel, and the like—and that the resulting greater openness and sensitivity of socialist administrative decisionmaking might decrease a citizen's feelings of helplessness and alienation even without an effective system of court review. The recent growth of socialist interest in administrative procedure supports this prognosis (Poppe, 1989: 284; Pohl, 1989: 309).

2. Civic Participation. A second way of improving the legality of administrative decisionmaking—and again a way compatible with the self-characterization of socialist legal systems—would be to increase the input of public representatives and organizations into decisions affecting individual citizens. Socialist law has always stressed the importance of public participation in the administration of justice; hence, for instance, the widespread use of comrades' courts and other social tribunals, of lay assessors and social repre-

sentatives in regular courts, or of social defenders and accusers in criminal trials. In the past, such public participation was used mostly to impress collective interests upon the individuals at court and to educate both parties and audiences about the importance of obeying the law; that is, participation rights, looking more like participation duties, served to weaken individual independence and to strengthen the dominance of the state. But given the changes in the political climate, it seems possible that public involvement eventually might also be used to shelter a citizen against transgressions by public authority. Recent socialist reform legislation seems to use participation in this protective sense to strengthen individual input into decisions affecting one's own welfare. The new Soviet statute on labor collectives (Fogelklou, 1986), however vague, thus seeks to increase workers' influence over their enterprise, and recent Soviet[54] and Polish[55] legislation on the popular discussion of important social questions, although still ambivalent and unsatisfactory, aims to do the same for citizens' influence over social developments in general.

It is thus conceivable that socialist legal systems, in a similar vein, might use social organizations to represent citizens' interests in a number of administrative settings: involve house committees in landlord-tenant disputes, buyers' *aktivs* in consumer affairs, parents' associations in decisions affecting schools, or citizen advisory panels in the admission process of such state institutions as universities and homes for the aged. In fact, numerous organizations already exist under socialism, many of them with tasks to participate in the distribution of scarce public resources, which could be used to monitor the legality of administrative decisions. In the past, social participation rights were too ambiguously structured, and participation duties too much of a political chore, for social institutions to be able or willing to function effectively as citizens' interest groups. But if the authority of such social organizations were strengthened and better defined, they might one day take on the role of safeguarding individual rights against arbitrary and illegal administrative decisions. After all, socialist unions, formerly little more than support organizations for enterprise managers, are now slowly evolving into institutions that at least also see it as their duty to represent members' interests *against* their employer. Socialist political deputies, until now essentially public relations representatives for their governments, may also gradually begin to function as real representatives of the people if recent socialist attempts to reform election procedures and to increase the power and diversity of parliamentary bodies should actually take root. As they slowly emerge from total gov-

[54] See the Soviet Statute on the Public Discussion of Important Questions of Public Life of June 30, 1987.

[55] See the Polish Statute on Social Consultations and Referenda of May 6, 1987.

ernment control and take on a life of their own, socialist collectives of all sorts could thus begin to shelter a socialist citizen—until now all on his own when facing the state—against the cold wind of arbitrary government power. The growing pluralization of socialist societies that we are presently witnessing thus should affect not only their political climate but also the extent to which socialist administrations are bound by the law.

3. More Room for Lawyers A third factor which could hasten the legalization of administrative decisionmaking in socialist countries would be the growth and the rise in status of the socialist legal profession. Up to now, lawyers—especially those lawyers associated with individual interests, attorneys—have had only a minor impact on everyday socialist life. Few attorneys are available to socialist clients: while Americans will find 1 lawyer among 426 citizens (Galanter, 1983: 52, 54) and West Germans 1 among 1,232 (Statistical Yearbook of the FRG, 1988: 330, 654), Soviet citizens can count on only 1 among 13,000 inhabitants (Hastrich, 1988: 218), and to East Germans, their 1 attorney among 29,412 citizens[56] must look more like the proverbial needle in the haystack. Those socialist lawyers who do engage in private practice must do much of their work free of charge (a reflection of the value placed on their efforts by the socialist state), must be careful not to seem too pushy on behalf of their clients (Huskey, 1986), and often must rely on payments under the counter to make an acceptable living. Official providers of legal advice—like the legal-information bureaus often attached to socialist courts or like an enterprise jurisconsult holding office hours for the benefit of employees—may seem too closely linked to authority to inspire unguarded confidence and will have neither the time nor the energy to throw their weight behind a client's case. Socialist citizens who feel aggrieved by some administrative decision thus cannot naturally turn to a legal profession ready to stand up for their rights.

All this is unlikely to change overnight. But the present wave of reforms may encourage the slow growth and strengthening of the socialist legal profession, which in turn might lead to an increased willingness by officials to listen to legal argumentation and to observe legal rules. Socialist governments today are talking about the reform of their legal profession, and socialist lawyers are pushing for an extension of their numbers and rights. In the Soviet Union, for instance, the Ministry of Higher Education recently decided to improve the quality of legal education and to reduce the number of evening and correspondence students (Schroeder, 1987). Work is under way to expand the rights of defense counsel (Solomon, 1987: 546). In East Germany, a current revision of the Code

[56] My calculation is based on Brandt (1985: 166), who reports that, as of last count, 568 attorneys were practicing in East Germany.

of Criminal Procedure will also increase the rights of defense lawyers (Beyer, 1988: 336). And in June 1988, the East German system of legal education, while still bifurcated into an "economics" curriculum (training future jurisconsults) and a "justice" curriculum (training judges and attorneys), was amended to allow for a "specialization in administrative law," designed to deepen and better focus the legal knowledge of future public servants (*Neue Justiz*, 1988). While reforms like these will not give a citizen more claims on his administration, they should nevertheless increase respect for the law, legitimate law-talk, and thus bolster an individual's position when he insists on fair treatment by administrative authorities.

B. Socialist Legality

Even without a full-fledged system of judicial review, without the vigorous judicial scrutiny of discretion, and certainly without class actions, public interest litigation, and similar political uses of judicial review, socialist law thus might slowly begin to soften a citizen's dependence on the all-powerful state. Should this happen, it would still be too early to speak of a socialist "rule of law." Given the ambivalence of the recent statutory reforms, their apolitical nature, the likely reluctance of socialist judges to censure the state, and the unwillingness of socialist citizens to sue it, socialist law reform will have to work in indirect ways: through the gradual raising of official respect for a citizen's rights rather than through litigation. If we define a *Rechtsstaat* as a state in which power is limited by law even against the will of the powerful, socialist states are still unlikely to deserve the description. Their law will only rarely be used to challenge state authority on behalf of individual self-determination. The state will still be a parental authority, permitting itself to be sued for pocket money, but otherwise using the law to further its own designs.

But for the ordinary socialist citizen not much may turn on whether his government's policies can be effectively challenged in court. No law, however cutting and powerful, could alter the fact that for most of his everyday needs he must continue to rely on the state. The heroic model of most capitalist public law litigation—the autonomous individual using the law to protect private prerogatives against transgressions by public authority—does not correspond to a socialist citizen's daily experience of all-pervasive dependence. The role of David, slinging legal arguments at Goliath the state, does not fit him.

It may not fit many capitalist citizens either. We know that our law is more accessible to the strong than the weak, more useful for the "haves" than for the "have-nots" (Galanter, 1974). Hence our growing doubts about the effectiveness of our adversarial model; our worries that litigation may in fact not achieve

"the translation of rights into social reform" (Grossman and Sarat, 1981: 136) at least in those settings in which prospective plaintiffs, like socialists, depend on the state for sustenance and support. Especially in the field of welfare law, capitalist scholars today are wondering whether the judicial enforcement of rights will be of much use to their clients; whether judicial review can ever effectively control administrative discretion; whether instead of celebrating an illusory legal autonomy, we should not acknowledge the reality of dependence (Simon, 1986), and whether rather than trying to break this dependence through litigation, we should not try to soften and humanize it through participation, cooperation, and the establishment of a "dialogic community" between administrators and citizens (Handler, 1988).

All this, of course, is what socialists claimed to be doing all along in their administrative complaint procedures: allow an aggrieved citizen to raise his concerns in an informal, easily accessible process that would enable officials, often through personal talks,[57] to assess an applicant's needs and to work together with him, "in cooperative fashion" (Bernet *et al.*, 1986: 614) for a solution acceptable to both sides. Yet for all their supposed warmth and sensitivity, socialist complaint procedures have not successfully curbed the license and arrogance of socialist state officials. The complaint process failed in this respect, because without any real legal or political accountability to their constituencies, socialist administrators saw no need to enter into a meaningful dialogue with their clients. Socialist law, up to now, has not cast enough of a shadow in which individual and administration would effectively bargain with each other.

It is unlikely that the new legislation on judicial review, on its own, will very much change this balance of power between socialist citizen and administration. It may have symbolic impact and encourage petitioners to voice and to insist on their rights. But the mere availability, on paper, of a right to sue the state in a limited number of instances will not be enough of a bargaining chip to persuade socialist administrators of the need to listen to their clients. Like capitalist welfare clients, socialist clients will be reluctant to sue, will often pursue claims that because of their substantive nature do not lend themselves easily to litigation, and will have difficulties finding judges willing to censure the misuse of administrative discretion. Judicial review alone cannot settle what one American welfare-law scholar has called "the question of power" (Handler, 1988: 1020), Lenin's famous question "who—whom?" — which needs to be addressed and resolved if administration and citizen are to deal with each other in open and cooperative fashion.

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[57] Semler (1985: 233–34) reports on the practice of some local government bodies in East Germany of dealing with "the vast majority of complaints in personal talks with the complainants."

But unlike capitalist welfare clients, socialist citizens do have some hold over their state. Their support is essential if socialist systems are not only to survive but to flourish. The socialist state's desperate need for legitimacy and compliance (of which the new statutes on judicial review are just one expression) may thus provide that bit of civic "power" that could persuade socialist administrations to listen to their constituencies and that, I believe, will lead to the slow and gradual permeation of socialist bureaucracies with more law and more lawyers. If, in the old days, totalitarian administrations could occasionally be made more human with the help of corruption—"You'll find a *Mensch* if you find a civil servant who takes bribes" (Brecht, 1988: 74)—modern socialist administrations, I believe, will be increasingly humanized through the power of law. But it will require a slow and diffuse growth process and a long time before socialist citizens will look to a court as their natural refuge against the state.

V. POSTSCRIPT

My survey of the likely future of a socialist rule of law has not until now questioned one essential assumption: the continued existence of socialism. These days, when each morning newspaper brings astounding reports of events in the socialist world, I find myself wondering how long that assumption will hold. No political system, no ideology, can expect immortality. When I was a little girl in the British Occupation Zone of Germany, I had a dress that my mother had made out of an old Nazi flag, received in exchange for a few Lucky Strikes or some similar currency from someone who saw no further use for it. My mother removed the white circle with its black swastika and, with relief I imagine, cut into the solid red cloth. Today, East European law reforms are cutting into a different kind of red cloth: the ideological fabric of socialism as we have come to know it over the decades. No one can foretell what garment will be fashioned from it in the end. Maybe the socialism of the future will renounce its claim to collective cohesiveness, give up its trust in central planning, forsake its efforts to educate the new man. Maybe the goals of socialist law, thus redefined, will cease to be at odds with the premises of judicial review. The growth and acceptance of judicial review procedures in Eastern Europe, no longer hampered by the incompatibility of rule-of-law strictures and socialist ideology, might then in turn serve as a measure of ideological change.

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