Review Essay

The History of Normalcy: Rethinking Legal Autonomy and the Relative Dependence of Law at the End of the Soviet Empire

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Inga Markovits, *Imperfect Justice: An East-West German Diary.* New York: Oxford University Press, Clarendon Press, 1995. Pp. ix + 204. $45.00 cloth; $19.95 paper.

The year 1989 will be one of those years like 1776, 1789 or 1848, where the date says more than any slogan can. The fall of the Wall. The regime change. The end of the Soviet empire. The beginning of the "transition." In 1989, history speeded up, substantial change was a routine phenomenon, and major news drove out major news nearly every day.

But even, or perhaps especially, in times of rapid social change, not everything changes at once. Or in the direction expected. What is portrayed after the fact as the moment of change is of course simply a symbolic marker for a time when certain kinds of changes seemed too powerful to stop or when an ending of something major became clear to all, rather like at that point in a murder mystery when you know for sure who the killer is. So 1989 was the year when the Soviet Union, itself still intact, nonetheless decisively loosened its grip on its previously tightly held empire, and it seemed clear that the face and fate of Europe would no longer be the same. And 1989 was followed by the year of German unification and then the year that the Soviet Union itself fell into separate pieces. That was the surface of dizzying change that was greeted in the West with near universal glee.

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Eventually, the unseemly gloating over the "end of history" or the "triumph of liberalism" will give way to more somber and balanced assessments of just what happened to the daily lives of people who wittingly or unwittingly were the subjects and objects of these changes. Behind the large political, economic, social, and cultural changes that have caught the attention of the world, the "history of normalcy" in the former Second World also needs to be examined.[1] The history of normalcy is the history of what passes for normal—daily routines, rituals, the part of daily life that "goes without saying," the hidden assumptions that are so basic that they don't need to be discussed. The history of normalcy explores the meaning of practices that make people feel at home in one place rather than another or that reassure people with their sheer familiarity or that people are capable of getting bored by. This sort of sheer normalcy exists in every social setting, even settings that are pathological in other ways. But in an ideological war, the appearance of normalcy on the other side vanishes or is replaced by something else entirely. Normalcy appears to be only what one's own side has, something the other side could not possibly have as well.

What makes East and West so strange to each other after the changes of the last half-decade is not that they were on opposite sides of the big historical events of the post–World War II period but instead that they developed small and momentous differences in the fabric of daily life. These differences were invisible outside the immediate context in which people lived, and they were impossible to convey to the outside through the communications barriers that characterized the Cold War. Senses of normalcy change much more slowly than institutions or political attitudes, and it is the "normalcy gap" that will continue to be difficult to talk across for awhile.

During the Cold War, the extreme was portrayed as typical on both sides of the line, and it is this image of the extreme (and its confusion with what passed for normalcy) that confuses observers crossing the East-West line since the moment of 1989. This was especially true in the field of law. For many Westerners, confident in their belief that they lived in regimes operating under the rule of law, the legal world of the East was constituted by show trials, miscarriages of "justice," torture, imprisonment on trumped-up charges, "telephone justice" in which party officials directed decisions in concrete cases, political persecution, the Gulag. Of course, those things existed. But was this really the way that the legal systems of the Soviet world operated on a day-to-day basis? Was every legal proceeding preordained? Was the Party so implicated in every instance of legal practice that there

[1] For that matter, the history of normalcy also can be differently understood in the First World in light of the collapse of the image of the enemy that permeated deeper than First Worlders realized during the Cold War.

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was no room for independent judgment among lawyers, judges, prosecutors, professors? Now that the fall of the Wall allows those from the West to see what was actually behind it (and also allows those from the "East" to ask questions in new ways as well), it is important for sociolegal scholars to consider just what the legal systems of the former East were like in their day-to-day operations, in what passed for normalcy, as free from Cold War prejudices as possible. Along the way, as I hope to show, we will also learn a lot about the legal systems that constitute "the West."

Inga Markovits, a law professor at the University of Texas, was born in Germany and has spend 25 years peering behind the Wall. She was one of the first on the scene after "1989" with this set of questions—to explore the dailiness of law in the former East Germany on the eve and in the immediate aftermath of German unification. Arriving in September 1990 with an academic year's leave, she set about to document the last days of the GDR legal system as it was on the verge of being closed down and consolidated with the legal system of the West.[2] Written in the form of a diary (though as she admits, much of her theorizing along the way was added after the fact), her book on the shutdown of the East German legal system is nothing short of extraordinary. Her patient and careful observations, her tremendously revealing interviews, her deep knowledge and understanding of the East German legal system over time, and, above all, her reflexive wisdom about her position as a witness and participant make for great reading and also for a sort of insight that is truly rare in the literature on comparative law. I'm tempted to say simply "Just go read it" and leave it at that—but let me try to explain why.

Markovits documents not only the events that led up to the shutdown of the East German legal system, but perhaps even more importantly, the *mentalités* that both held up that system and survived its institutional demise. For Markovits, the legal world of the GDR did not consist *just* of the horror of horrors that everyone on the outside knew—political persecutions, telephone justice, the radically circumscribed independence of legal officials. Since such overtly political intrusions did not happen in every case, nor even in the typical one, Markovits asks what it was that legal officials thought they were doing when they had no explicit instructions (and even, as it turns out, in cases where they did). The result of her inquiry is the history of normalcy in the GDR legal system. As a result, she admits that her book "puts

[2] Markovits spent most of her time in Berlin which, as she notes, was an unusual case. While the rest of the GDR was allowed some transition time and the transformation of the court system took place over a longer period, in Berlin the East's court system was definitively shut down right after the unification agreement and integrated with the court system of West Berlin. Cases were reassigned from Eastern to Western judges, old courthouses were occupied by all new staffs, the old employees were usually summarily fired and only occasionally reassigned, and the whole legal apparatus that once presided over East Berlin disappeared with all its participants virtually overnight.

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less emphasis on the oppressive features of socialist law than some readers may expect" (p. 3). Why? Because she

> looked just as much for the non-scandalous, everyday aspects of socialist law; for that side which now, in the hullabaloo of one ideological system's victory over the other, is most easily lost: for its normalcy. Because it is not through its excesses but through its familiar, commonplace habits—on both sides of the former Wall!—that the past will longest exert its hold over the future. (P. 3)

In this judgment I think she's right, and as she tells her story, heavily annotated with reflections on law, legality, mentalité, and legal theory, one learns a great deal more about socialist law—as well as about the rule of law—than from the standard academic tomes on the subject.

Markovits shows how judges in East Germany (all of whom had to be Party members to retain their jobs) proceeded in individual cases ranging from family law to contract disputes to labor law to the politically more sensitive *Ausreiser* cases which involved people who sought to leave the country at a time when applying for a passport turned someone into a public dissident. Instead of using overtly political criteria or blindly following the instructions that came on the telephone, judges prided themselves on being able to resist much of the routine political pressure and to decide cases on what they saw as the legal merits (though they also had their blind spots, particularly with respect to the *Ausreiser* cases). As Markovits shows, the "merits" of a particular case might be quite different in the GDR than they would be in West Germany or in the United States. With more emphasis on sorting out a conflict once and for all (taking a broader rather than narrower view of what "the trouble" was all about), East German trial judges typically acted more like mediators than judges do in the West. They tried to avoid and minimize future conflict, to create a sense of resolution among the litigants, to protect the social order first and then try to reconcile private interests later. Procedural questions were not allowed to stand in the way of substantive settlement of disputes; language used in the courtroom was simple and direct, without legal jargon or technical terms. East German judges spent more time on individual cases to make sure that disputes were really resolved before letting them go, and they also spent more time counseling, advising, trying to talk to both sides of a dispute in an effort to forge some shared agreement among the parties.

This is not to say that they ignored "the law." Instead, judges tried hard to keep track of what formal laws they were supposed to be applying. Since regulations and even statutes were not always promulgated in a public and timely manner, judges kept in their personal files handwritten notes that documented meetings with Justice Ministry and other officials in which the latest rules

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and interpretations were announced. Markovits describes one judge who used her shoebox full of little handwritten pieces of paper to answer questions about how certain sorts of cases should be decided, and another judge who described conversations among all the judges in a particular courthouse aimed at developing a common sense of how the law was to be applied in individual cases. While it's certainly true that this lack of publicity of the legal rules falls short of rule-of-law standards, it also seems from Markovits's descriptions that judges tried—however they could—to get a fairly consistent and nonarbitrary practice of interpretation set up across jurisdictions and across judges. (Does the common law system really do much better, one might ask?)

In Markovits's "archeology" (Foucault 1972) of the East German legal system, the most haunting observations concern how the "obvious" differences between East and West[3] seemed to melt away and sometimes even reverse themselves as she got to understand the legal mentalités of the East. For example, when she learned the lengths to which many judges went to avoid doing what they had been told to do in specific cases when the famous telephone calls came through, she began to wonder about what judicial independence really meant. Of course, Western judges are supposed to be independent; Eastern judges were supposed to be mere tools of the Party. But Markovits was not, in the end, so sure:

> I am no longer so certain that the East German judges were less "independent" than their Western colleagues. As I write it down, the statement looks ludicrous. But if we measure independence not by the extent to which a country's courts are actually insulated against interference from the outside but by the energy spent in warding off impositions—measured in units of resistance, as it were, a sort of judicial "ohm"—then many of the judges I talked to must have manifested more rather than less resistance than their West German counterparts. They operated under incomparably larger pressures. (Pp. 63–64)

By switching the perspective from the outsiders (How many judgments were dictated by the Party?) to the insiders (How did we fend off those phone calls last week?), Markovits shows much better how it was possible for judges to carve out little spaces of independence for themselves that allowed relatively autonomous

[3] A word about the uses of "East" and "West" in this article. When used with respect to Germany, the terms' meanings are reasonably clear. But I mean the terms to apply to the differences between those states that were in the Soviet empire (the "East") and those that were outside in Europe and North America (the "West). These terms are deeply inadequate, not least because they put together societies and polities that are very different within each category, and they tend to reify precisely what I am trying to problematize here, the very sense it makes to think of these worlds as so different. The problem is that some terms need to be used to point to the distinction one later wants to undermine, and so I barrel on, with this brief notice that I see the problems in this construction.

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legal norms to survive and even be applied. And this confounds the usual things said about socialist legality from the West.

The stakes in Markovits's project went up immeasurably when, as the result of her affiliation with the law faculty of Humboldt University, she found herself elected by the East Germans as a representative to the committee that both reviewed individual faculty members for political competence in the new Germany and made recommendations on their fates. It was not only judges and legal officials who lost their jobs automatically with the Unification Treaty; law professors from the East also were to be fired unless they could demonstrate that they had a sufficient distance from their "ideologically tainted" departments. Having won the trust and respect of her East German colleagues, Markovits was faced with the task of reviewing the life work of 106 faculty members in a period of just six weeks on a joint East-West Committee that decided the future of the former professoriate in the East.

Here, she was caught between the mentalités of West and East in trying to sort out the standards to be applied. It turned out to be impossible to read everyone's work, or to make much sense out of it, given the huge differences in academic conventions between East (where minor encoded deviations from the official line were risky innovations) and West (where carving out your own place was more important and more possible). Interviewing candidates also presented problems: Did you reward someone for their candor (a "Western" value) or punish them for what they told you they did? Easterners warily eyed the Westerners who sat in judgment, suspicious of the Westerners' obviously felt sense of superiority; Westerners deeply suspected that everyone in the East was already compromised by association with what had passed for law. "So here they are again," Markovits wrote, "the old Cold War reflexes we thought we had finally outgrown" (p. 146).

Could the Westerners trust what the Easterners said? Markovits, as outsider and insider to both sides, developed a humane standard under the circumstances. "I decided," she wrote, "that you probably come closer to the truth believing everything than believing nothing" (p. 147). Such was the methodology of her book and such, too, was the methodology of her conduct on the faculty review panel.

What were they looking for in deciding whether to recommend that a professor be allowed to teach in the new unified Germany? "A good question," replied Markovits. "For the misuse of political and intellectual authority, of course. But no less, it seems to me, for the right mixture of guilty feelings and self-confidence" (p. 137). In the hurried reviews that had to be done, Markovits and the others did the best they could. But Markovits at least, despite her evident good faith, was not so confident her-

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self that they had always gotten the right answers or had followed the best procedures. The same applied to the committee that vetted the judges, one chaired by Herr Ritter:

> I realize from our conversation that Herr Ritter obviously does not measure his committee's work by the procedural yardstick he would usually apply to West Berlin administrative practice. The East German applicants, it appears, are not yet part of the rule of law community. They are huddling in its antechamber, waiting to be let in. Even if untainted by political corruption, they have no right to regain their former offices. They have no right to be notified of the committee's selection criteria, no right to a speedy decision, to interim responses, to reasons should their application be rejected. . . . As under socialism, they have no legal entitlements but are dependent upon the goodwill of the decision makers. (Pp. 144–45)

And here was one of the many ironies that Markovits discovered in her deeply canny book. What, after all, did the Westerners who sat in judgment believe that the rule of law entailed? Did they really act on these values all the time themselves?

After the review was over and the East German professors were sorted into the acceptable and the unacceptable, Markovits then learned that the Berlin Senate Administration wanted to amend the Statute on Universities to prevent any Easterners, even those who made it through the anxiety-producing vetting process, from serving on the Humboldt University administration. Seeing the new law as "disenfranchis[ing] East Berlin professors at the very moment in their history when they should learn to do free scholarship in a free society," she added:

> To me, the planned amendments so obviously violate the Constitution's guarantees of academic freedom and equal protection that I ask myself how they could ever have reached the stage of a final draft. . . . Did it occur to [the West German lawyers who drafted it] to consult the Constitution in the process? I have spent almost a year asking East German judges and academics about the influence of socialism on their life and work. Now I realize I have no idea how important the Basic Law is to the thinking of West German lawyers. (Pp. 195–96)

And so her project come full circle, Markovits discovered in the end that the East-West difference was not at all what she initially imagined, but might be more nearly (in some interpretations at least) the reverse of the stereotype. What was once clear, laid out as unquestionable in the Cold War beliefs that even the most resistant Westerners carry around, now turned out to be hardly adequate and perhaps downright misleading. The East-West boundary was no longer where she thought it was.

I must admit to a very personal reaction upon reading this book. I cried at the end. I can't remember the last time when a work of nonfiction brought me to tears, nor does it seem like a dreadfully professional reaction to have upon completing a book

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one is supposed to review for a major journal. But I say this because Markovits's experiences have been so close to my own in two years of doing fieldwork in legal institutions in Hungary. I, too, thought I knew what I would find when I went and I, too, discovered more nearly the reverse of what I anticipated. I, too, have found thoughtful, educated, idealistic, and clearly qualified lawyers, judges, law professors, and other legally trained Easterners being lectured down to, humiliated by, judged over by less thoughtful Westerners, as if only one's place of residence during the Cold War qualified one to understand what the rule of law might mean. It has been so hard to explain this to many of my Western colleagues—how many of the things we in the "West" learned about the rule of law, about our own system's commitment to it, about the nature of socialist legality, and what life was like behind the Wall—how all those images and prejudices and implicit comparisons we made are more disorienting than orienting when we go and live in the "East" now.

What Markovits and I have both concluded is that people who didn't have a rule-of-law system may understand even better how such a thing should work than those who had the incredible historical luxury of never having to go without. People who learned about human rights from theory books may have a more coherent dedication to legal ideals than those who have learned about rights from flawed practices or from the cramped interpretations of the U.S. Supreme Court. It's not at all clear to me—as I believe it is not at all clear to Markovits—who the expert is in these things anymore: those who lived with the practices or those who longed for them.

Markovits treated the people she interviewed with respect and basic decency—listening, trying to understand, questioning her own presuppositions and not her research subjects' veracity when she found she didn't understand. There are few Westerners who go into the East these days with such an attitude, and consequently very few who find what she does. Markovits conveys her respect and understanding for those she writes about in her preface when she says, "Without my East German colleagues, this book could never have come about. They are its authors no less than they are its subjects" (p. iii). At the end when she finds that some Easterners in the new unified system use the law the same instrumental way that the Westerners do—to pursue their private interests rather than fight for social justice—Markovits is initially disappointed. But then, with her usual reflexivity, she pauses. No, she says,

> what should entitle me to sit in judgment over my colleagues' motivation for enforcing their rights? . . . If the new citizens decide to use the law in defense of their self-defined interests—whatever those may be—then the law will do the job it is supposed to do: protect and strengthen individual autonomy. Not

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> a sad story. Rather an occasion for salute. Welcome, we should say. Welcome to the rule of law! (P. 199)

This was what brought on the tears, this recognition that the new normalcy means in the end that Easterners are free to stop acting like heroic dissidents every time they assert their rights. That they don't have to be guided by larger purposes and with the intention of being moral models all the time. That they can finally stop having to bear the burdens of "transition" and can rely on a fact—that democratic institutions, political pluralism, and the rule of law are simply there, without daily struggle. The "transition" is over when the rule of law becomes something it is possible—at last—to take for granted. And after a few short years, there are now places in the former Soviet world where that has already happened.

Rather than go on about the emotional quality of the sense of recognition, however, I will try in more academic form to reflect on why I think Westerners have in general got Easterners so wrong, and why so much writing by Westerners across the East-West line has been misguided. Markovits's work is a model of understanding, and it is important for future research to understand why. My discussion will proceed in two parts, titled "Methodology" and "Autonomy." In each section, I would like to explore how the insight Markovits gives us into the workings of a system of socialist legality challenges what Westerners took for granted about them—and how these insights should challenge aspects of the West's sense of its own legal world as well.

Methodology

If comparative law is done well—and here I agree very much with William Ewald's (1995) call to rethink the field—then it should give us a sense of "what's it like"-ness. That is to say, comparative law should allow us to think our way into the position of someone operating with a different set of legal ideas than the ones that we have started from in our own home system. And thinking with another set of legal concepts and categories, we can then look back at our own legal world with a sense of it as newly strange. Then, we can see things that we couldn't see when we took our own context for granted.

Under the banner of "methodology," I want to raise questions about possibilities, pitfalls, and promises of comparative research and to ask how it is that scholars might get themselves oriented to understand the insides of another legal system. How do any of us approach the "otherness" implicit in comparative work? And how do we bring that otherness back to more insightfully analyze our own home institutions?

The scholarship of otherness, of which there is now quite a lot in sociolegal studies, has emphasized how the ideal of the

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universality of law and legal concepts is itself an historically contingent idea. Recognizing plurality and diversity has become crucial to thoughtful sociolegal work. But most sociolegal scholarship has focused on the "otherness within"—domestic divisions along lines of gender, ethnicity, race, class, and other group status that produces disadvantage within what used to be portrayed as a unitary national community. Critical race theory and feminist scholarship have been at the forefront of these important rethinkings. These lines of inquiry are of course important, and we should think of them as forms of comparative law research.

But the events of that go by the name of "1989" open up another possibility for considering otherness and reflecting on those things that sociolegal scholars have taken for granted. The divide that separated the Second World from the First and the way in which it insinuated itself into even the most overtly unpolitical scholarship is perhaps the most undeconstructed otherness of our age. But the deconstruction is now beginning. Michael Burawoy and János Lukács in their book *The Radiant Past* (1992) point out how much scholarship written from West to East and from East to West across the Cold War divide suffers from a fatal flaw. That flaw is "comparing an empirical reality of one society with an ideal type of another" (p. 60). As Burawoy and Lukács explain, and as any reader of the relevant literatures will quickly recognize once it is pointed out, Marxist economists contrast ideal socialism with the reality of actually existing capitalism while neoclassical economists contrast ideally functioning markets with the reality of actually existing socialism.

The same thing happens in law. While Marxist legal theorists compared the ideas of socialist legality (harmony, substantive justice, actual equality) with bourgeois legal practice (class conflict put down with the power of the state), liberal legal theorists were apt to do the reverse: compare the idea of the rule of law (procedural regularity, separation of powers, respect for rights and individual liberty) with the Stalinist practices of political persecution, show trials, and lack of respect for the individual. If one were, however, to compare ideals with ideals or practices with practices, the moral judgments become much less certain—and the ambiguities and shades of gray are more prominent than they are in the black and white of ideological scholarship. This can be seen in the obvious superiority of *any* ideal relative to *any* practice even within one system: Would you rather have the abstract rights of liberal legalism or the practice of police brutality in an American city? Would you rather have the solidarity and substantive equality of socialist legality or Party-dictated show trials? It's no contest within one system, and also no contest across systems. Ideals always win. If you compare Western ideals to Eastern practices, the West always wins. But if you compare Eastern ideal to Western practices, the East would win for the same reasons.

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With the events of 1989 and after, only liberal legalism is left standing (in Europe at least), but many of its advocates insist on holding up the past or current practices of the East to ideal standards that the West has never actually achieved.[4] This sort of disparaging analysis is common practice at East-West law conferences since the changes; Westerners come to lecture Easterners on the values of democracy, the rule of law, procedural regularity, and separation of powers as if those values were in constant real practice in Western democracies. At the same time, these righteous speakers don't see the relevance of questions about the incomparably higher crimes rates in the United States, or the shocking (for Easterners) practice of plea bargaining, or the evidently barbaric use of the death penalty (banned in the sixth protocol to the European Convention on Human Rights), or the obvious inequalities of a system in which an O.J. Simpson gets a team of expensive legal counselors while an inner-city kid gets an overworked state-appointed lawyer who can barely keep up with the flood of files.

Of course, most Easterners who attend these conferences deeply believe in the ideals of the rule of law also, but they may be justifiably insulted at the double standard that is used to determine whether they have achieved such a state or not. To Westerners who see from within their own set of assumptions, the wave of Mafia killings in Moscow becomes evidence that there is no rule of law in Russia at all; teenagers gunning each other down in inner-city Detroit become evidence merely that criminal punishment in America is not harsh enough or perhaps that the welfare system needs to be changed. But there is no problem with the rule of law in America!

This raises another methodological question, which we might call the "attribution" problem. How do you know when you've actually got the attribution of causes right in the natural (rather than experimental) world? If the wave of killings in Moscow is attributed to the breakdown of the rule of law, then why isn't the wave of killings in inner-city America taken as a sign of the same thing? The unexamined assumptions of researchers about causation in "foreign" societies often get them to attribute causal force to ideological preconceptions. Westerners who go to the former Soviet world looking for the remnants of the collapse of communism will often attribute everything they see to—well—the legacy of communism. It's like the old joke about the little boy who is given a hammer, and suddenly discovers everything needs hammering. The little boy can say that the need for hammering is given by the world, but one might reasonably expect from watching the conduct of the boy that the need for hammering was produced by his getting a hammer. Much of the research now being

[4] An extreme version of this can be seen in Hendley (1996).

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done in the name of transitology is being done by researchers acting like little boys with hammers.

In two years living in Budapest, I've seen the way that Westerners (even social scientists who should know better) explain what is happening now against stereotyped backgrounds of social expectation. In other words, what they see is often what they expected to see. What is familiar to them they attribute to the West; what is strange to them is attributed to communism.

Sometimes the same thing that happens in the West gets one explanation while that very thing happening in the East gets another. For example, an express mail package fails to arrive. In America, Americans say that the company made a mistake; in Hungary, Americans say that the old communist-trained employees don't know how to be efficient. Or the state requires foreigners to register their locations in the country. In America, Americans say that, of course, the state has to control potential illegal immigrants. In Hungary, Americans say that this is a remnant of the police state, where continued surveillance of foreigners is one more sign of the previous oppression. Or the high court makes a decision with confused reasoning. In America, Americans say that the particular judge is not very talented or the reasoning represents a compromise to get the requisite number of votes. In Hungary, Americans say that the whole judiciary is inexperienced and needs advice from Westerners.

Most of the examples one can locate in daily life are merely humorous. But sometimes such reasoning can get in the way of understanding the deeper significance of the changes that are occurring in the former East. For example, the Hungarian Constitutional Court, which I have been studying for the past two years, has taken the constitutionally explicit right to social security and used it to block parts of the government's International Monetary Fund–mandated austerity program. Commentators have taken this use of the idea of social rights as yet another legacy of communism, believing that the Court is stuck in state socialist ways of thinking from which they somehow cannot escape. Social rights were always given more value under communism than under capitalism, they say. But if these commentators poked a bit further, they would see that the general right to social security was one of the rights *added* in the constitutional modifications of 1989; before that date, social security benefits were dependent on one's workplace. It was the intention of those who proposed the constitutional amendments of 1989 that such entitlements *become* universal (that is, not manipulable) in the new regime. If one sees this, then one can interpret the Court's decisions upholding the universality of social rights as *critiques* of the communist system; the old regime could take away anything from anyone arbitrarily, with no notice or concern for the well-being of the person affected. Under a system of the rule of law that has

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rejected this arbitrary treatment of citizens, the state cannot take away benefits selectively, arbitrarily, or without notice because the realization of universal rights now requires both concern for the lives that are affected and the equal treatment of citizens. Or at least, this was the reasoning of the Court. The commentators, wanting to see the influence of communism everywhere, disparagingly cluck and sigh. When will these judges, they say sotto voce, give up communist ideology?

These commentators have got it exactly backwards, in my view. They couldn't imagine a justification for social entitlements that wasn't somehow linked to their image of communism. But focused only on the superficial similarity of the ideals of socialist legality and the commitment to social rights, they don't understand the precise ways in which communism was oppressive in practice and the ways that it would be important to overcome the oppressiveness. The ideals of communism may have included equality and social security, but the practice involved arbitrariness and insecurity. The new defense of social rights is not primarily a throwback to the past, but is an attempt to break away from how the previous regime concretely worked in practice.

Markovits's research got her deep enough into the "what's it like"-ness of the former GDR that she was able to see other examples of this. For example, in one of the retooling courses taught by West Germans that was supposed to bring East German judges up to speed on constitutional principles, the teacher lectured about how the law should bind even the lawmakers. About how the German constitution guarantees the fundamental quality of some principles so much that these parts of the constitution cannot be amended even by majority vote. About assumptions underlying the rule of law. The students did not take notes. Nor did they ask questions. Markovits, having just begun her study, assumed that the students "do not want to be converted" (p. 67). Much later in her stay, she observed another class. The students, lawyers from the former East, were inattentive and fidgety as the subject turned to constitutional rights. Were these students also "unconvertible"? Finally, the instructor inquired about the students' restlessness. Had they read the *Luth* case? The *Blinkfuer* case? All the assigned readings? Yes. Hence the fidgeting at the lecture which merely summarized these cases. It was not that the students didn't care but that they wanted material that was more advanced. "It appears," notes Markovits, "that the students have been more diligent in their studies of the new law than their Western teachers anticipated" (p. 68).

If the Easterners are bored being lectured by Westerners, it could be that the Westerners are underestimating what the Easterners know already and are therefore talking down to them. But the Westerners, if they don't inquire, are likely to believe that bored students are another legacy of communism: they are

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so dulled by the lack of incentives under communism that they can't learn about the rule of law. (Would these same Western lecturers assume that the students were incapable of learning about the rule of law if the students were from the West?)

These assumptions afflict not only Western teachers and researchers but also Westerners who are in positions to advise, supervise, consult. Markovits gives an example. When one West German judge was complaining about the lack of discipline of the Easterners under her supervision in the new unified system, she insisted that they were like children. Why?

> The East Germans cannot manage without somebody to lean on, she said. They don't identify with their work. At five o'clock sharp, ball-point and fountain-pens will drop from Ossi [Easterners'] hands. (P. 164)

But when Markovits checked the story, she got a very different view about the competencies of Easterners. The Easterners were managing the triple burden of working in a new system, taking retooling classes, and coping with the vetting processes, handling far more pressure than the Westerners. They asked for frequent advice because the system was new, and they were trying to learn it. And as for leaving at five? It turned out that those who left so promptly were women with small children who had to pick up their kids at the daycare precisely at that time. West German women either didn't have children or took maternity leave; the East German women tried to combine child-raising and work—and they didn't take such leaves in the new system for fear of losing their jobs. What the Westerner in this workplace interpreted as signs of Eastern laziness and irresponsibility was actually the sign of the double and triple shift of mandatory overwork so common in the poorer East and which those from the more affluent West have trouble understanding.

Westerners who don't know about life outside their immediate vision (and who aren't necessarily understanding what they see either) often recognize only what they expected to find: the ossified remains of a state socialist system choking on its own lethargy, caught up in its own turgidness, inflexible, lazy, fat, and stuck. So they turn to advising and consulting, even in areas where they have little expertise and no knowledge of the world on the other side. Westerners who go to do comparative research in, say, Germany or France generally go without the slightest expectation of being able to influence the direction of government or law—but when these same people go to the East, they feel entitled to lecture, advise, and harangue governments and legal officials, even without invitation to do so.

Though I went to Hungary to do research, not to advise or consult, I have been routinely introduced by Westerners to other Westerners as someone who is a "consultant to the Hungarian government" or who is "writing the Hungarian constitution." My

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reply is usually that I think the Hungarians are perfectly capable of running their own government or writing their own constitutions, and then Westerners think I'm simply being modest. When one of my well-meaning left-leaning law students wrote me a letter after I had spent a year in Hungary, she said in her closing that she hoped I was "whipping those Hungarians into shape." I dropped the letter with disgust. How could it be that thoughtful people who would never in a million years dream of saying this about African Americans or women—that I should be expected or allowed to discipline them into complying with my expectations—that these thoughtful people would not think twice saying this about Hungarians or Albanians or Bosnians or Russians? Whipping them into shape, indeed!

In my research in Hungary, I have felt incredibly privileged to be let into these institutions to learn from people who were so smart and thoughtful, and it was evident that Markovits felt the same way about the people she met in the former GDR. If Westerners only go to the former Soviet world to advise, often without consent, then they will have missed a great opportunity to learn.

Autonomy

So what can be learned about law in both East and West from studying the systems of the former Soviet world? Many things, I think—but in this last section I will concentrate on the elaboration of just one concept: the relative autonomy (or, put differently, the partial dependence) of law.

The legal systems of state socialist polities and the legal systems of constitutional democracies are generally compared on one point: in socialist legal systems, law is used directly as a tool of the state while in liberal legal systems, law is walled off from overtly political institutions by enforcement of the separation of powers. Of course, law is connected in complex ways to society, economy, polity, culture—but the relative autonomy thesis indicates that law is also distinct in its internal logics. In systems of liberal legalism, this separation is described in the phrase that the law is "relatively autonomous."

The relative autonomy of law is a neo-Marxist conception emphasizing that law is not merely ideological superstructure growing from a material economic base, nor does its content represent merely the inevitable victory of the ruling classes (Balbus 1977; Thompson 1975; Gordon 1984). The power of the "legal field" (in Bourdieu's (1987) sense) consists precisely in its ability to defend itself against external ideologies and to develop its own concepts and categories within its own domain and relatively free from outside agendas. Law in liberal societies has some substantial autonomy from politics because institutional differentiation

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allows legal officials to elaborate law's intellectual structure with the claim of having a distinct expertise. Law in liberal societies, as a result, can sometimes constrain power. It is this achievement that can be described as the rule of law.

The idea of relative autonomy has largely replaced the idea of complete dependence among Marxist analysts of law. As Marxist historian E. P. Thompson concluded in his remarkable study of the application of the clearly class-biased Black Act in England which criminalized many activities that involved theft by the poor from the rich:

> I have shown in this study a political oligarchy inventing callous and oppressive laws to serve its own interests. I have shown judges who, no less than bishops, were subject to political influence, whose sense of justice was humbug, and whose interpretation of the laws served only to enlarge their inherent class bias. . . . But I do not conclude that the rule of law itself was humbug. . . . I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposition of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. (Thompson 1975:265–66)

Choosing a case where he expected to show the clearest influence of class power on the application of laws in England, Thompson—perceptive historian that he was—had to admit in the end that what he found was not what he expected. He found instead that the rule of law, however imperfect and partial, nonetheless produced the effect of sometimes stopping overwhelming class power in its tracks. Law could not be completely dependent on class power if it could have this effect against it.

So how does law get this sort of autonomy? And what exactly is it autonomous from? The concept of "relative autonomy," by itself, leaves all this rather vague. But a comparative analysis of the legal systems of East and West helps to fill in what this might mean.

The legal systems of the former East were thought of in the West as being completely dependent on politics, on the Party, on extralegal factors. (And this image was aided by earlier Marxist theories of law in which law was not *supposed* to be autonomous, even in the ideal.[5]) Telephone justice is often given as the classic example; in Soviet legal systems, judges sometimes received calls from Party officials telling them what to do in particular cases. No apparent autonomy for legal officials there. Also in Soviet legal systems, law was supposed to be completely instrumental, to

[5] See Collins 1982:61–74 for an explication of the movement of Marxist theory from the instrumentalist to the partially autonomous conception of legal doctrine.

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be used as a tool for accomplishing the goals of the Party and the State. The fact that often constitutions and codes were amended after the fact to take account of the changes that had already been put into effect is frequently cited to demonstrate this (see, e.g., Markovits 1982).

In addition, judges were subject to close political scrutiny. Judges in East Germany were required to notify their superiors of any noteworthy event, where "noteworthy" was defined in political rather than legal terms: for example, was there a pending divorce case involving a high Party official? Did a case involve a foreign, particularly Western, litigant? Judges also could always call up the Administration of Justice division of the Central Committee of the Communist Party if they were uncertain about how to think about a legal problem, and people at that division freely gave "helpful" advice. And a system of court administrators kept tabs on judges, reporting back to the Party when judges did unusual things (p. 70).

Admission to the judge track in law schools in the former GDR was controlled through the Justice Ministry. The Justice Ministry also controlled the publication and distribution of textbooks, checking every edition for political solidity. Between controlling entry into, conditions of work in, and even concrete decisions from the judiciary, the Party exerted its control over the law. If anything constitutes complete dependence, one might say, this is it.

But of course, things were more complicated than that in the world of Soviet legality. Markovits enables us to see behind this structure. Was this picture of the complete lack of autonomy true? Many of the judges whom Markovits interviewed didn't obey the phone calls. In fact, they tried hard to avoid deciding according to this sort of political pressure. Several judges that Markovits interviewed said, "A good judge did not pass on such messages [from the Party], and certainly did not act upon them" (p. 11). These judges gave personal examples to back this up. These same judges were shaken when they were accused of having upheld an *Unrechtsstaat*—a non–rule-of-law state. Of course, the GDR was not a *Rechtsstaat*, they realized, but still "taking political orders would deeply offend their sense of self-worth" (p. 11). Most family law disputes, in fact most civil cases, had no political significance, and there were no phone calls, no political direction in any event.

But what would judicial independence mean in a system of near-complete dependence of law on the Party? Markovits, trying to get one of the East German judges she was interviewing to distinguish between legal and political reasons for deciding a case, realized after a while that it was hopeless to press:

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> To distinguish between political and legal considerations may seem natural to me. But it must seem spurious to Herr Beckert. All law, to a socialist, is political. An East German decision was legally correct only if it displayed "Party spirit": indebtedness not to one or the other party before the court but to the Party and to its policies and goals. (P. 70)

Still, this spirit meant that good socialist judges were not *supposed* to be influenced by calls from a Party secretary, if these calls pushed a judge to decide "without consideration for [a decision's] political and social implications" (p. 70). While the judges in East German decided cases according to radically different principles than those in the West, it was considered bad judging in both East and West to allow the outcome in a particular case to be dictated by someone outside the court.

Some buffer for ordinary court judges was also built into the institutional structure. Most overtly political cases were sent off to special courts, where special judges reviewed evidence compiled by special police and presented by special prosecutors. In East Germany, there was the Ia; in Hungary, there was the III/III. However horrible they might have been, the existence of these structures nonetheless revealed that some grudging amount of recognition was given throughout the former Soviet world to the independence of legal institutions. By separating out the worst of the political persecutions from ordinary dispute resolution, they preserved some small amount of integrity in the ordinary courts and police.

Even legal doctrine was the subject of some debate within law schools in the East. Markovits traces fights on the Humboldt law faculty to divisions among the pro-Babelsbergers (after the city in which a 1958 conference was held that consolidated the official view that law cannot be independent from the state), the anti-Babelsbergers (who largely wrote "for the drawer" rather than for open publication), and the Positivists (who avoided overtly ideological battles and stuck to the narrower questions concerning validity of the positive law). There was disagreement, though the Babelsbergers always had it easier than the rest. But there was not uniformity of views.

Markovits paints a picture of legally trained elites sometimes going along with Party power and often resisting it. These resisters were by and large not flamboyant dissidents but instead people who kept their heads down and tried to stay out of the line of fire by focusing on things that were not coded as politically controversial. And often both judges and academics were allowed to do what they felt was professionally best, as long as they confined such views to routine cases.

So even in state socialist systems, it was possible to find some places where the partial autonomy of law survived. Civil cases. Family law. Even labor law in most cases. In these areas, judges

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decided cases according to the rules and based on evidence. Which sounds quite like the rule of law.

So one way we might learn in the West about the characteristics of our own legal system is by pointing to a clear example of what it is not. Negative examples—like the Soviet-style legal systems—may serve the purpose of clarifying a positive conception. We in the West do not, at least, do these things. We, at least, have the rule of law. But do we?

If the systems of the East had more autonomy of law than the stereotypes from the West would lead one to suspect, it is also true that the legal systems of the West reveal more dependence of law on politics than that stereotype would indicate as well. And this is where the comparison helps at self-understanding. What, after all, would it mean for law to be completely autonomous from politics?

American judges, for example, are not called directly by politicians and told how to decide in particular cases (or at least, if such a thing were to occur, it would be thought deeply improper by nearly all judges and politicians alike). But there is a steady drumbeat of pressure on American judges to simply "interpret but not make the law." As a exhortation to judicial nonactivism, this phrase indicates instead that judges should take the law as written by politicians and use that law without regard to the identity of the litigants or the content of their own beliefs about justice or politics. So judges do take directions from politicians; it's just that the directions are filtered through institutional processes that allegedly clean the commands of autonomy-threatening taint. So is law in the West independent of politics? Not if one considers that laws have political origins, that both ordinary laws and extraordinary constitutions are themselves the results of political processes.

But what exactly is the theoretically significant difference between judges taking orders from politicians in the individual case and judges taking orders from politicians about the general rules to use to decide an individual case? A big one, but not one coded easily in terms of the separation of law from politics. Politics is embedded in the content of law all the way down, and the more judges are told that they should follow the law as written and not make it, the more similar they become to judges who are dependent upon the political sphere to tell them what to do. If we believe that the American system preserves legal independence while the Soviet one does not, this belief depends more on a judgment about the legitimacy of the particular type of politics at issue than it does on the strict formal separation of law and politics.

Let's take another example to make the point more strongly: Think about the way in which GDR judges are controlled through reports sent up through superiors to higher level official

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who review their conduct. And think about the most similar parallel in the American legal process: the system of appeals. When a lower judge decides a case and the litigants decide to appeal it, the trial judge is subjected to a review and possible censure (i.e., reversal) of her decision in the particular cases. And in the American context, the higher up you go in the judiciary, the more likely the judges who sit there are to have been selected for political and not strictly legal reasons. In the federal courts, for example, the president who appoints the judges pays a lot more attention to the political leanings of a prospective nominee when that nominee goes on the Supreme Court than when that nominee gets a district court position. District judges in the United States are, then, supervised directly by other judges who have stronger political ties. Of course, one might legitimately say that judges reviewing other judges still keeps the legal business in-house, as it were. But even in the GDR, the justice ministry that reviewed the judges was also full of legal officials, often trained in the same tracks in law schools and with the same sorts of backgrounds as the judges. The justice ministry was "in-house" there, unlike the Department of Justice in the United States. But how damaging is this for legal autonomy? If we think that justice ministry control of judges is automatically political while Supreme Court control of judges is not, this could be a function of a particular picture of separation of powers, which is not absolutely necessary to have a rule of law state.

Imagine a test question: Consider the merging of executive and legislative powers in a parliamentary system. Is there no rule of law or autonomy of law because functions are merged across institutions that would be separated in the American theory? No, it seems that rule of law can survive this, as we can see from the examples of most European democracies. Then consider whether one might reasonably feel the same way about law. Could one merge executive and judicial functions without compromising the rule of law? Or are courts institutions that have to be separate from other power centers to have the rule of law? Why? I'm not saying that one can't or shouldn't make a case for this. In fact, I believe that one can and should make exactly the case for separation on the grounds that some institution has to be reliably independent from directly political ones to stand in judgment of them, and so independent judiciaries are a positively good thing. But it doesn't automatically follow from this that one cannot have a rule-of-law state unless one has this particular institutional arrangement. If justice ministries had only the abstract interests of justice in mind (a relatively autonomous legal ideology!) and did not have only the particular interests of a particular administration or government in mind, would that be enough to guarantee that this arrangement would preserve the rule of law?

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Take another point. If state socialist systems were known for amending laws after they had already been differently used in practice, revealing the dependence of law on politics, then it is likewise not so clear that American practice, under this description, is radically different. Bruce Ackerman, for example, has been arguing in his recent work that the Constitution can now for practical purposes be amended without going through specified procedures in the Constitution; implicit amendment through Supreme Court decisions has become accepted as an alternative (Ackerman 1991; Ackerman & Golove 1995). In strictly technical terms, this amounts to the same thing as the state socialist practice: changing the laws by doing something different than what they appear to be saying and then, when there is no objection, bringing the formal legal rules into line with the existing practice. Here again, one may be tempted to say, "but there is such a difference!" And I agree completely that there is one. But it becomes much harder in the comparative framework to say what that difference is. Here again, I suspect that the argument in favor of the American practice and against the Soviet one has to be a substantive and not purely procedural one about the *type* of politics one has. Doing this in a democracy (and we can argue about the extent and form of democracy) is a very different thing from doing this in a state-party system. But if one makes that argument, then the judgment of the difference rests on a normative conception of politics rather than on a formal definition of the differentiation of law and politics. The "relative autonomy of law" argument, then, is not enough to distinguish socialist from liberal legal systems. Structurally, there are many more similarities than differences. The justification for one over the other can only be made in light of an explicitly normative theory of politics.

I could go on. But you probably get the point. Once you see detailed descriptions of how other legal systems work, you can look around in your own to ask whether it works exactly as you thought it did. As I consider and often try to explain American law to my Eastern colleagues, I am struck more by the similarities than by the differences. Differences, of course, do exist. And it makes absolutely no sense to deny the abuses of communist legality just as it makes no sense to pretend that the American system always lives up to its ideals. But the differences are not what I thought they were, and they are certainly not correctly described by saying that socialist legality is more dependent on politics than liberal legality is. They are both partially dependent and partially autonomous. The differences lie in the precise mechanisms of control of law by politics, in the resources available to legal officials for resisting such attempts at control when they occur, and most importantly, in the substantive things that the "political" is trying to do.

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Conclusions

What's remarkable in retrospect about the Cold War division of the world into First and Second is how much each side needed the other to understand itself. (The same can be said for the Third World, and the point has been made by Anderson 1985 and Stoler 1995.) We are always in significant measure shaped by the preoccupations of our "significant others," regardless of whether those significant others are friends or foes.

For Markovits, members of the GDR legal community became her significant others as she worked on this book. As she wrote, she publicly explored the effects of her own Cold War thinking on what she was finding, how she was understanding, what conclusions she drew. Despite her long career of involvement in the legal system of the former East Germany, she found herself stopping to notice that despite it all, she kept thinking like a Westerner. But she noticed, and gradually through her diary format, she showed herself changing to be legally ambidextrous. Because her own sense of belonging changed as she worked on the book, she was able to describe in moving insider's terms just how it was possible to think about another law.

I also found in moving to the former East that it was very hard to discard old Cold War ideas. My Cold War thinking came with an arrogance that I understood legal and constitutional basic concepts because, after all, I came from the West. But in the East, or at least in Hungary, where new legal institutions are building new senses of legality and justice based on idealized images of the West rather than on its practices, my previously taken-for-granted sense of legal concepts has had to be revised.

What was the rule of law, for example, to those of us from the West? It wasn't until I moved to Hungary that I learned that the version I had been satisfied with was a very cramped and modest one. In Hungary, for example, many constitutional principles constrain private actors as well as state actors. Why should I have been satisfied before that freedom of speech or the right to personal data protection could only be claimed as against the state?

And what were human rights? Here again, Hungarian constitutional lawyers seem to me to have a more expansive and attractive conception of rights than American constitutional lawyers because Hungarians lived too long without these rights. Americans have become accustomed to the limited protections the constitution affords; in Hungary, for example, the constitution does not ignore the horrible effects of material scarcity on the ability to realize rights.

Now, as with the recognition and exploration of so many otherernesses, thinking through the end of the Cold War can reveal the similarities across and pluralities within these categories. And the very solidity of our previous conceptions must be shaken in

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consequence. Everywhere we look closely, the world is more complicated than it seemed when we were looking more casually. Nowhere is this more true than when we try to understand how daily practices map onto labels like advanced capitalism, state socialism, state-party systems, democratic governance—and the rule of law.

Markovits's book provides one of the best ways to see the complexity of comparative legal systems while not losing their humanity, to see the theory without losing a sense of concreteness. Because of the many levels on which it is written, the book could be usefully assigned in courses ranging from the beginning undergraduate legal process courses to the most sophisticated jurisprudence classes in graduate programs. Her book provides a great deal of material to spark informed discussions about the most basic organizing concepts of our law and our sociolegal practices. And besides, it is written beautifully.

One of the wisest analysts of American law was, like Markovits, also a long-time resident of Germany who settled as a law professor in the United States. This detailed experience of another law also gave Karl Llewellyn an ability to understand law as well as he did precisely because he knew it could be otherwise:

> Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time: *We* are the Greeks; *all* others are barbarians. . . . (Llewellyn 1960:43)

Knowing the "what's-it-like"-ness of other legal systems provides that sort of armor.

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