

ARTICLES

SOCIALIST CONSTITUTIONAL LEGACIES

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With the end of the Cold War, many assumed that socialism, together with the specific constitutional values and political structures was dead (or dying). This article will challenge these assumptions. Post-Cold War reality did not, however, follow these assumptions. Some countries, especially in Asia, continue to adhere to socialist constitutional approaches. Some cannot fully overcome their socialist legacy. And still others include socialist values in their constitutions and practice. These values and ideas warrant study. Most notably, socialism carries with it a certain set of values and, consequently, a corresponding pressure on legal institutions. The authors, guest editors of this special issue of the Russian Law Journal on the socialist legacies in the world constitutions, outline a general approach for the study of socialist constitutional legacies. The article therefore addresses (a) the methodology of socialist constitutional legacies analysis, (b) the core values of the socialist constitutions and (c) ways in which socialist constitutional ideas and concepts can be combined with the principles of constitutionalism. This analysis raises a number of important – but under-researched questions. One is the extent to which these socialist ideas or concepts are actually socialist. Another is the extent to which these ideas can be included in constitutional discourse.



Keywords: socialism; socialist law; post-socialist constitutions; comparative constitutional law; constitutional structure; transformative constitutionalism; comparative methodology.

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Introduction

With the end of the Cold War, many assumed that socialism was dead (or dying), at least as a paradigm of social and political structure, promoted as an alternative to the Western democracy. A state-directed, command economy had lost the global competition with market economies; a centralized “people’s democracy” would be replaced by a Western-style “bourgeois” democracy. This was part of a greater set of assumptions about the end of history in the wake of the end of the Cold War.¹

Post-Cold War reality did not, however, follow these assumptions. Many countries – particularly in Asia – are still committed to socialism. Other countries that were formerly socialist still adhere to some of the values of socialism. Finally, some of the values widely associated with socialism have important legacies in non-socialist societies today.

These values and ideas warrant study. Most notably, socialism carries with it a certain set of values and, consequently, a corresponding pressure on legal institutions. In fact, the social and legal orders of many constitutions in the world are the result of social notions, concepts and ideas that stem in part from the socialist world. Some of them are obviously influential today, others only implicitly left their marks, though displaying of them could show social systems in various dimensions and in dynamic. In this interplay, socialist legal ideas continue to exert influence. The

¹ Francis Fukuyama, *The End of History*, 16 *National Interest* 3 (1989).



socialist legal system comprises an important part of the legal map of the world. Its existence – both as a historical fact and ongoing practice – raises questions concerning its specific features and its impact on modern states. The nature of this socialist system of law is often debated; however, we argue that it is a special type, essentially different from the others, in technical as well as in ideological characteristics.²

For comparative constitutional law, socialist constitutional law remains an important topic for expanding the geography of research. The constitutional systems of the socialist and especially post-socialist world are frequently ignored in textbooks and studies, even in those specifically devoted to legal families and traditions.³ Many casebooks include a minimum of materials for these countries⁴ or do without them at all.⁵ The key principles of socialist constitutions remain a gap in comparative constitutional studies. These constitutions should be studied in a way that are as free from ideological prejudices and the preconceptions associated with specific political traditions. Embracing the diversity of global experience can also be defended at the philosophical level: it is a question of pluralistic principles of recognizing the existence of various communities, and the absence of pluralism deprives comparative legal studies of epistemological validity.⁶ Hence, the idea of “equal discursive dignity to non-Euro-American traditions” requires further development.⁷ This article will seek to understand socialist constitutions by looking to how and why it should be studied, the key values it includes, and how it can helpfully contribute to ongoing constitutional discourse across the world.

1. Methodology of Socialist Constitutional Law Studies

Given the unique nature of the socialist legal system and its continuing influence on other systems, several preliminary methodological considerations should be made. The assessment of legal institutions should attempt to be as unbiased as possible. Constitutional law should not be bound by rigid ideological constructions that limit the questions we ask and proclaim the unconditional advantages of one

² William Partlett & Eric C. Ip, *Is Socialist Law Really Dead?*, 48(2) N.Y.U. J. Int'l L. & Politics 463 (2016).

³ On the problem of a set of systems to study see, e.g., Peter de Cruz, *Comparative Law in a Changing World X* (3rd ed. 2008).

⁴ See Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (2010); Ugo A. Mattei et al., *Schlesinger's Comparative Law: Cases – Text – Materials* (7th ed. 2009). An exception is provided by works devoted to certain regions, see, e.g., Wen-Chen Chang et al., *Constitutionalism in Asia: Cases and Materials* (2014) – this book reflects different agendas, including socialist.

⁵ See Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (2006).

⁶ See Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 2(1) J. Comp. L. 365, 369 (2006).

⁷ Upendra Baxi, *The Colonialist Heritage in Comparative Legal Studies: Traditions and Transitions* 46, 50 (Pierre Legrand & Roderick Munday eds., 2003).



system over others. Constitutionalism is not a project of converging toward one optimum text or set of best practices. The principles that underpin constitutionalism such as the separation of powers and the rule of law can advance a wide range of values or goals (including an effective state focused on collective well-being).⁸ Scholarly work therefore should seek to assume as politically neutral a position as possible to ensure an unprejudiced assessment of the history of success and failures in the constitutional development of countries with different legal systems.⁹ This research approach should instead seek to understand the particular requirements and contributions of different contexts.

This pluralistic approach to research opens the way for improving the typologies of constitutional institutions, building theories explaining the reasons for choosing a particular policy by certain actors and forming normative projects for the future on this basis. The implementation of constitutional norms depends on a number of conditions and context, and the attempt to trace a socialist trajectory contributes to a better understanding of these conditions for some countries.

Studying this socialist heritage also requires attention to several aspects. First of all, as will be described in more detail in the next section, socialist constitutions are not neutral or strictly instrumental; socialism entails a commitment to a particular set of values. This poses challenges to the concept of research neutrality and makes it difficult to reject moral assessments completely.¹⁰ The category of justice directly invites evaluative judgments which are often included in the comparative research framework, all the more so considering the generally recognized pragmatic goal (the improvement of norms, practices, arguments, etc.) of the latter. One system should not be assessed from the standpoint of another, but it is often difficult to exclude the researcher's worldview and her manner of defining the theoretical meaning of the grid of concepts that are used. It might be possible to find "ideal" (in the Weberian sense) types and ideologically uncolored categories – such as forms of ownership, restrictions on human rights, principles of constitutional order. However, the question remains whether, in this case, there will be a complete picture of the objects under investigation and how they are adapted to a particular context. In any case, the fact that the researcher's worldview is a part of the research should be reflected and accounted for. This positionality of the research will affect the posing of questions as well as the promotion of hypotheses and will therefore help to determine the results to which she comes.

⁸ Nick W. Barber, *Principles of Constitutionalism* (2018).

⁹ On the problem of studying other countries from the standpoint of one's own value attitudes see, e.g., David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36(1) *Yale J. Int'l L.* 2, 22–23 (2011).

¹⁰ On the role of neutral concepts in comparative study see Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 10 (1998). However, the research area (constitutional law) matters in this context.



The focus on socialist law allows us to identify at least three types of countries. First, we can study socialist constitutional law in the remaining socialist states.¹¹ Second, we can understand post-socialist countries, where the socialist “underside” is noticeable in many modern processes, despite the disintegration of formal adherence to socialism. Here it is necessary to distinguish the following: the reaction to socialism in the form of emphatically new principles of the constitutional order; the unobvious reproduction of previous patterns in political processes; and the undisguised preservation of the consequences of choices made during the socialist period, although it does not necessarily reflect a specific socialist ideology. Third, we can better understand non-socialist states that include provisions in their constitutions, which may be not directly borrowed, but reflect values or ideas from the socialist system (the stressed role of labor, social justice and solidarity, overcoming poverty). The latter are the most complicated object of analysis, because we have to distinguish the values, ideas and principles that are rooted in the socialist ideology from that are based on alternative theories and ideologies (e.g. Confucianism). This purpose requires not to judge on the legal texts only, but to study constitutions on the basis of their historical and ideological background.

Correspondingly, the choice of objects of research deserves special attention. Most often, the starting point is the text of the constitution. However, the “socialist legacy” is often not found in the “black letter” of constitutions and instead requires studying the implementation (or non-implementation) of norms. With regard to many post-socialist constructions, the matter is complicated by the closure of their true meanings and by putting forward imitative mechanisms. For this reason, referring only to the text of the constitution may be insufficient and may even lead to false conclusions. Study therefore requires that the texts “be seen in their political context and in the light of legislation and constitutional interpretation by political institutions and the courts.”¹² In a broader interpretation, there is the need to search for information on various legal formants, including not only normative legal acts and judicial decisions, but also a doctrine, as well as subtle intellectual and emotional forms, summarizing the law “in the text,” “in action,” and “in mentality.”

The comparison of different systems and especially work with socialist “transplants” requires an answer to the question of whether and to what extent the broader political, economic, social context of the operation of legal norms should be taken into account. The problem of “old wine in new bottles” (preservation of the socialist heritage) should be understood in relation to constitutional provisions that are sensitive enough (perhaps, in contrast to the institutions of some other branches of law) to the environment in which they operate. Will the constitution be regarded as a phenomenon strictly legal or also a socio-political and concrete

¹¹ See Ngoc Son Bui, *Constitutional Change in the Contemporary Socialist World* (2020).

¹² Monica Claes, *Constitutional Law in Elgar Encyclopedia of Comparative Law* 189 (Jan M. Smits ed., 2006).



historical one? The answer changes the “exploring” research potential, as well as the measure of understanding of the impact of the constitutional provisions on the real conditions of public life.

Finally, a critical methodological challenge is to determine the extent to which socialist ideas are actually socialist. Many political communities have values that are far from liberal democratic aspirations. Nevertheless, it would be wrong to attribute these ideas simply to socialism. For example, when considering the balance between the interests of the individual and the collective, some civilizations focus on collective interests. However, this choice may be based on a different, “non-socialist” history grounded in religion or tradition. For instance, the ideas of social solidarity can be perceived in states that do not intend to share other socialist values. The rejection of the principles of the organization of power, which are usually associated with constitutionalism in the Western sense, is also not necessarily a part of the socialist ideology. Authoritarian governments existed both before socialism and without socialism. The situation is especially complicated with states that have had experience of “building socialism” in the past. It may seem suitable to explain some of their contemporary political features by an unconquerable socialist experience. But, in reality, the story can be longer and more complex. What elements form the constitutional tradition, and what kind of “pastness” matter and how it manifests itself in the present¹³ are questions to answer.

Therefore, when we try to seek to understand the socialist heritage, it is very important to present the sum of the values that determine this type of legal system, the history of their development and to use the possibilities of detailed analysis in the study of specific countries.

2. Socialist Constitutional Values

To identify socialist constitutional systems, this section will turn to the dominant foundations, values, and principles of socialism and their impact on socialist constitutions. It will describe how socialist constitutions sought to define themselves. In so doing, this section will simply describe these values and ideas without taking a normative position on them.

2.1. The State and the Individual

Constitutions play a critical role in defining the relationship between the individual and the state. Socialist constitutions adopted position in opposition to that of written constitutions in the west.

Social responsibility vs individual liberty. Collectivism is balanced with individualism in every society in different ways. Socialism sought to move away from placing a central

¹³ On the relationship between tradition and time (and on the fact that the socialist tradition itself was of rapid formation) see Patrick H. Glenn, *Legal Traditions of the World* 5–13 (2014).



value on the liberty of the individual and the minimum invasion of society or the state into his or her freedom. Instead, socialism favored social integrity, the mutual responsibility of individuals to society, and minimum individual responsibility for own wellness. It therefore stressed how the whole society or separate collectives embody the highest value, and how the interests of the whole prevail over the interests of its parts. In this collectivist approach, each person as well as the entire community prioritize care about the common good over personal benefits. Social standards and morality dominate in the motives of social behavior and not the profit motive.

This position had an impact on socialist constitutional text and theory. In constitutional practice and theory, the judicial protection of individual rights and freedoms has been a central aspect of “western” constitutionalism. In this set of practices, constitutionalism *is frequently* associated with the value of personal rights and freedoms, which prevail over any competing collectivist interests. This is most clearly found in the practice of American and (west) German constitutionalism since the end of World War II.

Socialist constitutions, by contrast,¹⁴ seek to transmit the philosophy and values of collectivism into the social, political and legal order. Socialist constitutions strongly focus on the design of the state, the social structure (which declared to be regulated and constructed by the prescriptions of the constitution), while the position of individuals remained to be a secondary matter for regulation. In the regulation of the position of individuals, individual rights were placed alongside duties, and both were of the same legal nature and importance. While some liberal, western constitutions recognize rights and liberties as inalienable ones drawn from natural law, socialist rights are established depending on social circumstances (rights are determined by socio-economic reality, the character of political order, level of democracy and culture)¹⁵ in favor of common interests¹⁶ and providing functions of social institutions.¹⁷ A person has freedom within the social environment, i.e. in that

¹⁴ As examples – the Czechoslovakia Constitution of 1960, Poland Constitution of 1952, Hungary Constitution of 1949 (amended in 1972), Bulgaria Constitution of 1971, USSR Constitution of 1977.

¹⁵ Чиквадзе В.М., Лукашева Е.А. Социалистическая концепция прав человека [Viktor M. Chkhikhvadze & Elena A. Lukasheva, *Socialist Concept of Human Rights*] 3, 6–7, 32 & others (1986).

¹⁶ Советское конституционное право [*Soviet Constitutional Law*] 208 (Sofia I. Rusinova & Vasilii A. Rianzhin eds., 1975).

¹⁷ Constitution of the USSR of 1977, Art. 50: “*In accordance with the interests of the people and for the purposes strengthening and developing the socialist system* <italics by authors> for the citizens of the USSR freedoms are guaranteed: of speech, press, assembly, rallies, street processions and demonstrations”; Constitution of the USSR of 1977, Art. 51: “*In line with the objectives of the communist construction* <italics by authors>, citizens of the USSR have the right to unite in public organizations contributing to the development of political activity and amateur performance, the satisfaction of their diverse interests”; para. 65(2) of the Hungary Constitution of 1949 (1972) reads very like: “*To protect the socialist system and the gains of socialism, actively participate in socialist construction and social life, expand cultural and educational work, implement the rights and obligations of the people, maintain international solidarity* <italics by authors>, workers can create mass organizations and mass movements.”



extent when socialist constitutions establish both rights and duties as determined by the needs and interests of the society,¹⁸ opposing the idea of natural rights. A person can enjoy rights only in return for fulfilling the duties¹⁹ implied by the social roles of the individual – at first, the roles of a citizen, employee, member of social units like professional unions, member of family, etc.

The practical outcome of this general approach in some post-socialist constitutional courts in formerly socialist countries is “*reverse proportionality*.” The ordinary (“direct”) proportionality supposes that individual rights and freedoms can be restricted no more than strictly necessary to protect legitimate aims, namely *inter alia* common interests of the entire community. Courts are the critical institutions for making these determinations. The reverse proportionality principle defines the limits of individual rights with the common interests but with the opposite presumption: the individual rights can be recognized and realized only until they do not assault collective public interests. The latter prevail in the value hierarchy or at least equal to individual rights and interests. Courts accomplishing constitutional review use mostly the rational basis test as a universal approach, following the path of judicial self-restraint. If the legislator protects public interests restricting individual rights, the legislative decision will withstand judicial review, unless the decision is absolutely arbitrary and irrational. This deferential approach suggests a very minor role for courts.

Socio-economic welfare rights vs individual, political rights. Socialism is based on the ideology of materialism and the priority of economic well-being over spiritual values or the political interests of an individual. This order of values is very definite if we look into the socialist constitutions of the past: the bill of rights sections usually opens with socio-economic rights (rights to labor, to repose, health care, social security, dwelling, education) and only after all these rights the constitution mentioned political, and after them – personal rights.²⁰ Among the latter rights to life,²¹ human dignity and the right to travel were often not mentioned.²²

These different concepts of human rights were a matter for discussions in the period of working out an international human rights covenant of the U.N. in 1950 and 1960s. In the end, this was finally divided in two: (1) The International Covenant on Civil and Political Rights and (2) The International Covenant on Economic, Social,

¹⁸ Constitution of the USSR of 1977, Art. 39: “The use of rights and freedoms by citizens should not cause damage to the interests of society and the state, the rights of other citizens.”

¹⁹ Constitution of the USSR of 1977, Art. 59: “The exercise of rights and freedoms is inseparable from fulfillment by a citizen of his duties.”

²⁰ Constitution of the USSR of 1977, Ch. 7. But see the Chinese Constitution which does the mention the individual rights first.

²¹ Protected in the Hungary Constitution together with “physical integrity and health” (para. 57).

²² The Constitution of the German Democratic Republic of 1949 opened the bill of rights with political rights, established protection of human dignity as a duty of the state and the right to travel.



and Cultural Rights. In this Cold War dichotomy, the socialist world and the West accepted two different types of rights.²³ In the western approach individual rights are legally justiciable and are therefore a matter for legal action and judicial protection. In the socialist concept, by contrast, individual interests become rights when they are provided with actual and real (i.e. factual and economic) conditions of realization. Most of rights were seen through these lens, focusing on “positive” side (what is quite logical in terms of rights mostly considered not as freedoms, but as social privileges) – the actual possibility of the state to provide them. The socialist constitutions did not guarantee the right to travel not only because of the need to control migration in state-controlled economy, but also because of no certainty that the state could provide the right with necessary means of transport – roads, airlines, cars, etc. These kinds of rights guaranteed in the USSR constitutions increased: the right to education appeared in 1936, the right to dwelling and healthcare – in 1977, according to the economic possibility of the state to support these rights.

The material background together with ideological control stood behind the socialist concept of individual freedoms: for their recognition, they needed to have economic ground: i.e. the state did not guarantee the freedom of speech, as mass media depend on the sources of their funding – if this is the state, media provides the state ideology. There is no freedom of speech if there is no real chance to publish an opinion contradicting the interests of the state within the state-command economy, no freedom of travel if there is no money to go, no right to be elected if there are no means (including financial resources) for promotion and advertising of the candidate.

Socialist tradition focuses on socio-economic rights arguing that an individual mostly and critically needs a particular standard of welfare: labor as source to earn for life; education for a better labor and social position; rest and leisure to recondition; social security as the social guarantee in the situation of illness, retirement or the incapacity to work, pregnancy and child care; medical help for health care. These are the basic needs of a person and if one could survive without political freedoms, there is no way to ignore these vital interests. Thus, these economic rights – and not the political and personal rights – are the critical minimum for a person. Thus, it is acceptable to sacrifice these rights for the interests of welfare.

2.2. Constitutional Design and the Proper Organization of the State

Constitutions are first and foremost about the proper organization of the institutions of the state. Socialism took a different approach to the state; this different approach was reflected in the constitutional organization of the state.

Solidarity vs competition. In the socialist worldview, solidarity was placed in opposition to social or political competition (one of the basic ideas of constitutionalism).

²³ Hector Gros Espiell, *The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches in Human Rights Thirty Years After the Universal Declaration* 41 (Bertrand G. Ramcharan ed., 1979).



The concept of social solidarity is close to the idea of social responsibility, though it addresses other individuals than entire community. Socialist constitutions therefore regulate “healthy” competition both in economic (market economy) and political (pluralism of political parties and their political programs, ideas and ideology) spheres. The example of contemporary China shows that in the socialist tradition, the regulation of economic competition is not as crucial as control of political competition.

In socialist law, economic and political competition are described as managing competition for a very different ideological reason: to ensure social solidarity or responsibility. Unregulated economic competition, it was thought, causes immoral and unfair distribution of riches within the society, leading to concentration of property in the hands of a community minority. The initial principles of the Socialist system, based on the economic theory of Karl Marx, required the nationalization of means of production and putting the end of exploitation of one man by another, preventing the wealth of one person at the expense of others. Socialism as such does not ban economic competition and does not require state-governed economy, but it bans the co-existence of wealth and poverty, presuming that one causes the other. Within a market economy, it is difficult to prevent a disproportional distribution of the property that is why the administrative regulation and management appears in the economy. The practice of socialist countries demonstrated that this type of economy has low effectiveness, and in today’s world, we can find only a few examples of inheritance of the principles of socialist economy, especially in the constitutions. This socialist approach requires the constitutional declaring “forms of property,” which is not legal category but a notion of political economy. The main and leading form of property is socialist property, divided in two: state (all-people’s) and cooperatives’ property. State (communal) property is the main and default form, while personal property could be based only on labor incomes along with the constitution describing what can belong to individuals (items of household and personal consumption, dwelling house and labor savings).

The negation of political competition has other roots. It also reflects a specific feature of culture, which could also appear in many countries, which did not belong to the socialist tradition, namely the principle impossibility of more than one right and proper decisions or response to a political question. The space for social debates on political matters is not as wide as in societies where the competition of political alternatives generates new political programs and ideas. This kind of political culture makes the transition of the state power from one person to another very difficult (while there are no way to replace one governing party with another). For instance, the transition of powers is especially difficult for centralized presidential systems.

Friendly people’s state vs Leviathan. Socialist ideology took a very different conception of the state in comparison with that of the west. The socialist concept of social order did not require shackles or limitations on the state. Underlying this was a positive view of the state as the representation of the people. There were a number of formal signs and suggestions. For example, in a socialist state there were no police,



but militia – this term points that it is not an organ of state coercion, but structure of providing public security by the people themselves. Furthermore, in a socialist state there was no clear difference between public authorities and other organization (like professional unions, the Communist party, etc.): e.g. both could issue binding rules and norms. Further, in the west, public authorities are to be under effective control of the society to prevent the misuse of their power. Socialist ideas of a “people’s” state presumes that this kind of state does not protect interests of one economic class against interests of other classes, therefore misuse of the power is excluded, while a misuse of certain officials could be prevented through centralized control within the system of public bodies. Therefore, there is no necessity to establish through the constitution control of the people over the government.²⁴

In the legal system in general and in public law (including the Constitution) this meant no legal guarantee of protection against an arbitrary execution of state power because in the socialist concept there were no need of this. One of the clear consequences is the lack of need to apply the separation of powers principle, as there is no threat of the misuse of powers. Another practical consequence of this approach – that the matter of the constitutional regulation is not the design of political power, but the rules of organization for all social spheres – economy, culture, education, science, “social development,” national defense and foreign policy. Official state policy was a matter for regulation in constitution, because it was not a subject for determination by results of elections, as is usual in the democratic world.

In this conception of the state, therefore, the Communist Party and professional unions²⁵ express the public interests of the entire Socialist society, because (unlike in a capitalist society) there are no classes, no economic and therefore political contradictions and collisions of interests. Therefore other organizations, established by individuals has no comparable place in the political system: they cannot pretend to take part in execution of state power, though they can play a role of arranging a social activity (like sports, philatelist and other associations of this kind) and even represent political interests (labor collectives, collective farms, consumers’ cooperatives).

Finally, in socialist theory, the state plays a key role in expression of the interests and needs of the society and this point has far-reaching consequences, namely a positivist (i.e. originated from the will of the state) view on law and on the human rights. The individual interests are subordinated to the common interests of the society, therefore there is only one way to defend individual rights – to persuade the state that this is the interests of the state to recognize and legally protect individual rights. The lack of rule of law (replaced with socialist legality) caused the uncertainty of the scope of collective interests. The law itself in the socialist tradition played not the role of protection of individual interests, but the role of instrument of social

²⁴ Ngoc Son Bui, *Globalization of Constitutional Identity*, 26(3) Wash. Int’l L.J. 463, 476 (2017).

²⁵ *Soviet Constitutional Law*, *supra* note 16, at 108–109.



management and protection of public interests, using the specific features of law – at least formal definiteness and enforceability.²⁶

Effect on constitutions. This positive approach to the state and the focus on solidarity have important ramifications for socialist constitutions. Socialist constitutions reflect this approach by defining the main directions of state policies to narrow the questions for debates on elections and in parliament. In the radical version, this means declaring one party to express the will and interests of the whole society. When several parties are allowed to compete for seats in the parliament, this political struggle means rather fight of persons than competition of ideas and programs, in spite of proportional representation or other attributes of political rivalry.

On the institutional level, the focus on solidarity instead of competition means that the socialist understanding of separation of powers was only as design principle and idea of distribution of functions, but not as checks and balances of one branch over others. This emphasis on centralism manifested itself in a constitutional design where all formal constitutional power was concentrated in legislatures that were dominated by an executive committee called the “Presidium.”²⁷ The presidium dominated the legislative branch, ensuring that policy formulated by the Communist Party was implemented. This system rejected the principle of judicial review over the constitutionality of legislation as incompatible with the principles of democratic centralism which prioritized the supremacy of legislature.²⁸ This was thought to reflect the idea that “the legislature is conceived to be the supreme expression of the will of the people and beyond the reach of judicial restraint.”²⁹

3. The Possibility of a Synthesis?

Socialist constitutions defined themselves in opposition to non-socialist ones. This opposition was grounded in the Cold War ideological struggle between the United States and the Soviet Union. In particular, the Cold War posed the non-socialist, liberal constitutions of “the West” against the socialist constitutions of “the East.” And the claims made were exclusive – that is, much as individual countries were

²⁶ Thiem H. Bui, *Deconstructing the “Socialist” Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam’s Constitutional Reform Process*, 36(1) *Contemp. Southeast Asia* 77, 82 ff. (2014).

²⁷ Soviet Constitution of 1936, Art. 49 (describing the vast powers of the Presidium). See William Partlett & Mikhail Krasnov, *Russia’s Non-Transformative Constitutional Foundation*, 15(4) *Eur. Const. Law Rev.* 644 (2019).

²⁸ Similar approaches alongside with idea of necessity to introduce specific constitutional review mechanisms still exist in Vietnam, Laos and China. Refer further to Keith J. Hand, *An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: The Constitution as Commander? in China’s Socialist Rule of Law Reforms Under Xi Jinping* 30 (John Garrick & Yan Ch. Bennett eds., 2016); *Socialist Law in Socialist East Asia* (Fu Hualing et al. eds., 2018).

²⁹ John N. Hazard et al., *The Soviet Legal System: The Law in the 1980’s* 320 (1984).



often forced to take sides in the Cold War, a constitution had to choose between protecting the individual or the state.

In this Cold-War construction, non-socialist, western constitutions were described as *only* focused on a negative theory of limited government and therefore placed *constraints* on the state's exercise of political power.³⁰ These constraints on power – implemented by courts in the post-WWII period (particularly in the United States and West Germany) – were then described as preventing the state from abusing its powers and are therefore aimed at preserving *individual* liberty and rights. In this conception, legitimate constitutional action lies in protecting individuals and in preserving the private social ordering but does *not* extend to a social state or liberal egalitarian measures, particularly those aimed at regulating redistributing wealth and overcoming poverty.³¹ Its central critique of socialist constitutions is that they ultimately lead to centralized, authoritarian dictatorship.

Socialist constitutions of the East, by contrast, were thought to be *solely* grounded on a positive theory of “democratic centralism” in which state power is centralized in order to better advance the collective interests of the people (see previous section). This executive centralism was viewed as necessary for allowing the state to effectively make the decisions necessary for the “material well-being of the living conditions of the local people.”³² This centralized structure therefore allows the vanguard communist party to formulate policy according to socialist ideology, centralization and concentration of powers leads to authoritarianism, degrading to tyranny and dictatorship. Its central critique of non-socialist constitutions is that they ultimately enable class domination and of capitalist economic power by failing to attack economic inequality.

Table 1. Cold-war binary

	Non-socialist constitutions	Socialist constitutions
Central state-building principle	Separation of powers; checks and balances	Democratic centralism; centralization of power in the legislative branch
Central goal	The preservation of individual liberty and rights (negative rights)	Empowering the state to provide collective well-being such as overcoming poverty and providing security (positive rights)
Critique of the other	Lead to dictatorship or totalitarianism	Lead to continued economic poverty/exploitation

³⁰ Barber 2018, at 2–3.

³¹ *Id.*

³² Bui 2020, at 20.



The legacy of this opposition between socialist and non-socialist constitutions has lingered in constitutional theory after the Cold War. In the socialist world, for instance, centralism is still justified as the only way to ensure the achievement of collective goals.³³ Furthermore, in parts of the post-socialist world, the centralization of constitutional power continues to be justified as the only way to achieve collective, developmental goals. A notable example is the centralization of power in the office of the president in Eurasia and Africa as the only way to ensure strong government.³⁴

However, the opposition of political structures need not always correspond to the values and goals of socialist and non-socialist constitutions. Most notably, constitutional theorists have recently argued that non-socialist constitutions, which divide and limit state power, are not just about protecting individual liberty, but could be about common good – well-being of the people. The division of state power is also a critical part of enabling an effective state that can provide for the material. Vicki C. Jackson has argued that

the purpose of a domestic constitution is to design and enable not only legitimate, but also effective government, through provisions specifying lawmaking power, powers of execution and administration of the laws, and providing for control over the use of coercive force.³⁵

Further, Nick W. Barber has more recently stressed that the principles of constitutionalism – including the separation of powers – are not just a way of ensuring “limited government.”³⁶ Instead, constitutionalism itself plays an important role in creating an effective state. Barber describes how key constitutional principles ultimately seek to ensure that the state “possesses a set of institutions that are able to act” in advancing the general well-being of the people.³⁷

The combination that focuses on collective goals but also divides power can be found in constitutional practice. For instance, during the Cold War, the drafters of the Indian Constitution worked to create a constitution that would both divide power as well as overcome economic poverty. To this end, they created a constitutional system of separation of powers system that was grounded on checks and balances. At the same time, they also relied heavily on socialist practice in inserting directive principles into the constitutional text that also sought to advance particular developmental goals for the state. A reflection of this blending of socialist and non-

³³ Bui 2020, at 20.

³⁴ William Partlett, *Crown-Presidentialism*, Int. J. Const. Law (accepted for publication and forthcoming 2021).

³⁵ Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* 259 (2010).

³⁶ Barber 2018, at 2 (calling this the idea of “negative constitutionalism”).

³⁷ *Id.* at 8.



socialist ideas is the Forty-Second Amendment to the Indian Constitution which inserted “socialist” into the description of India as a “secular democratic republic.” Moreover, the Australian Constitution, adopted in 1901, before the first socialist constitution and heavily influenced by the constitutions of the United States and the United Kingdom, does not contain any individual rights provisions. Instead, the Australian drafters consciously rejected the inclusion of judicially enforceable rights into the constitution, reserving the core aims for the collective goals. For instance, they gave the federal government the power to make laws with respect to the “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.”

This combination of socialist-style collective goals and western-style political institutional structure appeared in the last years of the USSR. Constitutional judicial review, had been rejected for many years, was established in socialist Poland in 1982³⁸ and in the USSR 1988³⁹. Still being a socialist state in 1990 the Russian Soviet Federative Socialist Republic recognized the principle of separation of powers⁴⁰. In these contexts, this limitation on legislative and executive power was justified as contributing to a more effective state. In particular, it was justified as contributing to the supremacy of statute.

The mixture of socialist values and non-socialist institutions in constitutions requires further study to determine the extent to which of these different values and approaches can be combined. Clearly some are not compatible. Constitutionalism’s institutional focus on the separation of powers is not compatible with socialism’s institutional commitment to centralism. But one area where we can see an attempt to combine these two approaches is in “transformative” or “new constitutionalism.” This new wave of constitutionalism – seen most clearly in Colombia and South Africa – further combines the separation of powers design with a set of constitutional values committed to the implementation of positive, socio-economic rights. In this way, it draws on the hybrid approach taken in the Indian Constitution.

Transformative constitutionalism’s combination of socialist values and non-socialist constitutional structure reacts to two problems in modern constitutional practice. First, it reacts to the weakness of non-socialist constitutions in addressing the collective problems of economic or social inequality. For instance, some have

³⁸ Dziennik Ustaw z 1982 r. N 11, poz. 83 (Feb. 7, 2021), available at <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19820110083>.

³⁹ Закон СССР от 1 декабря 1988 г. № 9853-XI // Ведомости Верховного Совета СССР. 1988. № 49. Ст. 727 [Law of the USSR of 1 December 1988 No. 9853-XI, *Vedomosti Verkhovnogo Soveta SSSR*, 1988, No. 49, Art. 727].

⁴⁰ Декларация о государственном суверенитете РСФСР от 12 июня 1990 г. // Ведомости Съезда Народных Депутатов РСФСР и Верховного Совета РСФСР. 1990. № 2. Ст. 22 [Declaration of State Sovereignty of the RSFSR of 12 June 1990, *Vedomosti S'ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR*, 1990, No. 2. Art. 22].



argued that the focus on individual rights has arguably contributed to growing economic inequality that is helping to fuel significant problems in governance in many established western democracies.⁴¹ The socialist tradition and its positive obligations on the state offer insights into how to use constitutions to overcome material inequality and therefore advance general social welfare.

Second, transformative constitutionalism also seeks to avoid the dangers of centralized power for the creation of effective state governance. As described above, socialist constitutions intentionally centralize formal power in order to allow one party to formulate policy. This authoritarian use of constitutional law often descends into personalized governance that concentrates power in the hands of one individual. This personalization of power can in turn weaken institutional effectiveness.⁴² A constitutional separation of powers and checks and balances can help to avoid these problems of personalization. Moreover, it might be the case that the separation of powers is a more effective way of building a state that has responsive institutions which can advance collective well-being. For instance, independent institutions can help to root out corruption.

The innovations of transformative constitutionalism show how moving beyond Cold War binaries can open new possibilities in constitutional design and practice. In particular, it raises the possibility that constitutions can be grounded on constitutional principles such as the separation of powers, the rule of law while also focusing on enabling the state to facilitate collective transformation while also avoiding the pitfalls of centralized and personalized leadership. This is a reminder that constitutionalism is not a convergence project with the most influential constitutional systems. It is instead a debate about how best to adapt constitutional principles to advance both individual rights and the collective well-being of the people.

Conclusion

This paper's brief overview of socialist concepts and values suggests a new perspective for comparative constitutional research. Prior approaches which condemn socialist constitutional systems as out of date or irrelevant to ongoing constitutional developments should be revised. Instead, the authors show that collective socialist values such as overcoming poverty or environmental problems can be a part of very different constitutional systems, both socialist, post-socialist and non-socialist. Moreover, these values can exist in the constitutions alien to socialist political structures. This conclusion opens an important debate about the role of socialist values or ideas in theoretical constitutional discourse.

⁴¹ Samuel Moyne, *Not Enough: Human Rights in an Unequal World* (2018).

⁴² Barbara Geddes et al., *How Dictatorships Work* (2018) (arguing that personalized dictatorships are less stable); Erica Frantz, *Authoritarianism: What Everyone Needs to Know* (2018).



This debate focuses attention squarely on which socialist values can be usefully included in the canon of constitutionalism and which cannot. Socialist constitutional design and its structural centralism are clearly not compatible with constitutionalism. But other socialist values potentially are. For instance, transformative constitutionalism opens the possibility that constitutions can both seek to advance collective goals while also avoiding the formal centralization of power. Transformative constitutionalism is only the beginning of this overall critical project. It is our hope that this article will provide some further inspiration for this project.

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