The growing political significance and increasing internal social stabilization of communist systems of government are leading to a much deeper awareness of the analytic, conceptual, and macro-sociological problems surrounding the nature and function of law and legal administration in communist countries. In the past there have been three main trends or styles of approach, which can and do mingle in the work of a particular writer. The first has seen communist states and communist systems of government as above all extra-legal and anti-legal, deriving their power from no recognized legal or constitutional continuities, cynically using legal procedure and legal decrees in the service of a regime and of a political ideology untrammelled by law or the respect for law. The second has emphasized that systematic legal provisions and legal procedures do arise in communist states and have a certain, if often limited, field of operation; these provisions and procedures, on the second view, show that there is a law of communist states and that it is part of the Romano-Germanic or civil law tradition, coming into other communist forms of government through the influence of the Soviet model with its reliance on pre-revolutionary tsarist and post-revolutionary Bolshevik borrowings from continental civil law. A variant of this second view emphasizes more strongly the specific national traditions of various communist societies and the re-emergence of the prerevolutionary legal attitudes and procedures of that particular society, as, for example, in communist China. The third trend or approach, emphasizing the extent to which communist ideology and the communist political style have been incorporated into the legal systems of communist countries, sees these systems as belonging to and constituting a specific family or type of legal systems, the communist type as distinguished from the common law, civil, Islamic, etc., types.

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†The authors would like to take this opportunity of thanking, for their comments and ideas, the participants in two seminar discussions of early versions of this paper: in the Bundesinstitut für ostwissenschaftliche und internationale Studien, Cologne, in January 1970, and in York University, Toronto, in February 1970. They would also like to express their indebtedness to the Research Institute on Communist Affairs of Columbia University which has co-sponsored the research of which this article is a part.

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The classification of legal systems, of course, is a difficult and contentious matter. The common lawyer, through the combination of cultural tradition and professional training, is ill at ease with the macro-sociology of law and especially with distinctions between different kinds or systems of law in terms of 'essential' or 'formal' characteristics or of broad social attitudes that seem to him either dangerously metaphysical or sweepingly general and imprecise. For decades, both the belief in a heaven of juristic concepts and the historical school of jurisprudence have ceased to command respect. Comparative law in common law countries has, for the most part, meant looking at specific national legal arrangements and comparing their treatment of specific legal problems that arise in the conduct of common human affairs. In so far as such comparative lawyers have concerned themselves with the classification of legal systems, they have tended to use the criterion of national and historical continuity in place of structural, sociological, analytical, and ideological-conceptual criteria. They have distinguished the common law system from the civil law or Romano-Germanic or Napoleonic system that spread across the continent of Europe and both of these from Islamic law and Chinese law and from other Roman-based systems that developed comparatively independently, such as the Roman-Dutch law of South Africa and Ceylon, and Scottish law. More recent developments, however – the rise of communist states and communist legal systems mentioned above, the increased consciousness of the problems of legislation and legal administration in Asia, Africa, and underdeveloped and primitive societies generally – have led to a remarkable revivification of the more macro-sociological approach to law and of the attempt to distinguish legal systems in terms of their structure, content and implied perception of society and social relations.

The classical Marxist distinction between feudal law, bourgeois law, and the regulation of human affairs under communism was one early, no doubt crude, but also very important example of this kind of macro-sociological approach. While the growth of communist power has led to renewed interest in this particular classification, it has also brought out its inadequacy. There is a very important sense in which there was a bourgeois legal revolution; there is not, we shall attempt to show in this paper, a similar sense in which there has been a socialist legal revolution, or even a socialist anti-legal revolution. The classification of communist legal systems, the discussion of their relationship to past and present legal systems in the rest of the world, requires categories other than the distinction between the feudal, the bourgeois and the socialist stages of human development. Yet it must be able to subsume these traditional categories and give some account of them. Particularly valuable, perhaps, was the recognition by the best of the Marxist thinkers – by Karl Marx himself and by the great Soviet jurisprudential writer of the 1920s and early 1930s, E.B. Pashukanis1 – that a legal system

1. Evgenii Bronislavovich Pashukanis (1891–1937?) whose work is to be discussed below, was born in the city of Staritsa in the Russian Province of Tver. In 1908, while a
was not merely a passive, flexible tool, that it did imply a conception or a perception of a particular organization of society and of social relations. Positive law, legal ideology or jurisprudence and socio-political policy are not three discontinuous levels of legal action and legal thinking. The content, structure, and arrangement of laws into a particular legal system do carry with them jurisprudential assumptions, legal and social ideologies, social and political policies, and ways of looking at life. Law as a system is in this sense, as Pashukanis emphasized, a material force: the bourgeois revolution was, in part, a legal revolution, a new radical judicialization of human affairs. To many a common lawyer, the phrase 'nulle terre sans seigneur' has been no more than a half-forgotten maxim of old French law—but because legal maxims do carry with them legal and social attitudes, Karl Marx was able to grasp the whole essence and point of one of the most momentous legal and social revolutions in the history of mankind by con-

student in Petersburg, he joined the Russian Social Democratic Party and took part in student revolutionary activity. Arrested in 1910, he was exiled from Russia and enrolled as a law student in the University of Munich. Here he gained his doctorate (in law) with the dissertation, 'A Statistical Study of Infringements of Labour Legislation.' In 1914, back in Russia, Pashukanis, according to Soviet sources, took part in drafting the anti-war declaration of the Bolshevik faction in the Duma; from April to September 1917, he belonged to the group of Menshevik Internationalists. After the October Revolution, in August 1918, he joined the Bolshevik (Communist) party in Moscow, where he undertook party work and served as a people's judge. By 1919, he was a member of the Presidium of the Moscow Soviet of People's Judges and a member of the Appeal Tribunal attached to the All-Union Central Executive Committee of the party. From 1920 to 1923, he worked in the People's Commissariat of Justice. In 1924 he published The General Theory of Law and Marxism, which went through three Russian editions in five years and gained him an international reputation; he argued there for a commodity-exchange theory of law as a typically commercial phenomenon, reaching its apogee in bourgeois society. In the same year he transferred to academic work in the Communist Academy. He was elected a full member of the Academy in 1927 and subsequently its Vice-President. He played an important role in the training of legal 'cadres,' lectured at the Moscow Juridical Institute, and represented Soviet legal science at a number of international conferences. The views expressed in his General Theory of Law and Marxism, however, had a mixed reception from other Soviet lawyers and from 1929 onward, as Stalin began imposing stricter ideological control, Pashukanis came to modify or recant some of his views. Though he wrote over 100 articles, pamphlets, and books, collaborating on a wide range of Soviet legal textbooks, he did not ever elaborate or re-examine, at a sustained jurisprudential level, the doctrines put forward in his best-known work. By the late 1920s, his main academic efforts were devoted to working out a Marxist (and Soviet) position on international law. In 1931, he became Director of the important and influential Institute of Soviet Construction and Law; in 1936, at the peak of his outward success, Pashukanis was appointed Deputy Commissar of Justice of the USSR and proposed, by individual scholars and research institutes in Moscow and Leningrad, for full membership of the Academy of Sciences of the USSR. Less than a year later, E. B. Pashukanis was the 'unmasked traitor and wrecker' Pashukanis, propounder of 'rotten theories,' an alleged ally of Trotskyism and Bukharinism, a 'liquidator' of socialist law and socialist legality, who had drowned law in a flood of economic categories and thus displayed his ignorance of Marxism and Marxist philosophy. The campaign began with a denunciation by P.F. Yudin in Pravda of 20 January 1937; in April, A.Ya. Vyshinsky, in another article in Pravda, linked Pashukanis' activity with the left-wing and right-wing deviationists in the party, and directly charged him with treason. Pashukanis was removed from his post as Director of the Institute of Soviet Construction and Law (he was replaced by Vyshinsky) and arrested. He has not been heard of since. It is assumed that he perished shortly after his arrest in the first half of 1937. For a brief account of Pashukanis' main contribution to jurisprudence, and of his career and posthumous reputation, see Eugene Kamenka and Alice Erh-Soon Tay, 'The Life and Afterlife of a Bolshevik Jurist' (1970), 29 Problems of Communism 72.
 contrasting that phrase with a later maxim central to the legal ideology that replaced European feudalism, the maxim ‘l’argent n’a pas de maître.’

If classical Marxism—the popularized version of the thought of Marx and Engels—was distinguished from anarchism by its emphasis on the proletariat’s need to capture and use the coercive force of the state, it was distinguished from étatist socialism by its vision of the withering away of the state and law as part of the full development of the communist society and of rational and intelligible relations among men. In the transitional period between the proletarian revolution, which immediately abolished all forms of capitalist property, and the achieving of Communism—that is, during the period commonly designated by Marxists ‘the socialist stage of human development’—the proletariat would continue to use the coercive power of state organization, including law. The *Critique of the Gotha Programme*, written by Marx in 1875, suggests clearly enough that such socialist legal regulation would still move ‘within the narrow horizons of bourgeois right’ until it was replaced by the spontaneous, informal operation of collective consciousness and collective will; there is no suggestion in Marx of a full-blown socialist system of law or a full-blown socialist state, but rather of the proletariat’s bending of bourgeois forms to its own will and use until these forms lose all point and relevance. This vision of the fully and consciously co-operative communist society, of a voluntary participatory community knowing neither state nor formal law, still lay at the core of Lenin’s *State and Revolution*; it has long since ceased to command any respect or to promote any hopes among those who live in communist society or among those who study it seriously. As we shall see below, the belief that there is a specifically socialist view of law and a specific socialist form of legal administration and adjudication has become part of the ideology of communist states, fully supported by their actual practice, save, perhaps, in China where both the ‘material’ and the ideological positions are still in flux. Nevertheless, the communist analysis of the specifically socialist nature of communist legal systems is not one that would help any serious enquirer: it is fence-straddling, uncertain, often dishonest and systematically ambiguous. This ambiguity, we shall argue, has roots that go back further than the October Revolution of 1917 to the ambivalence with which the socialist sects of the 1830s and 1840s, including Marxism, and their successors, both socialist and communist, viewed the great French Revolution of 1789.

Karl Marx, the greatest of the socialists, is said to have ‘combined’ the German philosophy, the French politics, and the English economics of his age. Certainly, it was Marx who brought socialism to self-consciousness, to an understanding of itself as the critique of economic liberalism. He was able to do so because he did not mechanically ‘combine’ the philosophy,

economics, and politics of his era, but recognized that they were all concerned, in different forms, with one of the greatest revolutions in the history of mankind: the rise of the bourgeoisie, the inauguration of political democracy, and the growth of the industrial system, which were—in Europe—part and parcel of the one development. Marx began as an heir of the Enlightenment, of the German idealist philosophy of Kant, Fichte, and Hegel and of the critique of these at the hands of Feuerbach and the Left Hegelians. At the opening of his career, in the early 1840s, he stood for a rational society, in which man would be self-determined, co-operating rationally and spontaneously with his fellows, mastering nature and social life instead of being mastered by them. He thus shared and extended the European Enlightenment’s belief in human liberty as human self-determination. He accepted the Enlightenment’s faith in science and rationality and in their connection with progress; he, too, had the optimistic conviction that man can and must mould the universe (both nature and society) to his requirements. Throughout his life Marx was to have nothing but the deepest contempt for nihilism, for the denial of culture and rationality, for the nameless authoritarianism of terrorist individuals or terrorist groups. He was always to loathe that crude ‘barracks-communism’ (Kasernenkommunismus) which pretends to achieve equality by forcing men into an undifferentiated mass, by rejecting talent, education, all that which cannot be reduced to a common measure. In 1843/4 Marx became a communist because he saw true communism as the fullest possible development of human potentialities, of human culture, of man’s self-determination as a social being who could find freedom only within a community.

A year earlier, in 1842/3, when Marx had begun reading French political pamphlets and French histories of the Revolution of 1789, he was not merely mechanically supplementing his German philosophical training with French political thought. He was recognizing the inadequate limits within which German philosophical ‘criticism’ still moved; he was recognizing that it had failed to penetrate to the roots of the problem. German idealist philosophy, Marx argued, was the German metaphysical version of the French Revolution, also enthroning abstract Reason in place of gods and kings. The Left Hegelians in Germany were attempting to criticize Hegelianism from within, on the basis of Hegel’s own assumptions about freedom and rationality, drawn as they partly were from the philosophy of Kant and of the Enlightenment. The socialist and pre-socialist sects in France, Marx came to realize, were making a similar but more radical and far-reaching criticism of the French Revolution in terms of its own assumptions, also drawn from the Enlightenment and thus paralleling some of Hegel’s and Kant’s. The real problems, however, were obscured in the German development and made clear in the French. The Revolution of 1789 that swept aside the government and law associated with a system of feudal privileges and estates had proclaimed—in one ‘world-historical’ act of liberation—the slogan
‘Liberty, Equality, Fraternity’; it had fixed in an egalitarian, universal, political constitution the rights of man and of the citizen. This political liberation, however, resulted in a thorough-going economic ‘liberation’; the ‘civil society’ of Hegel and the English economists, the ‘material world’ of industry and trade, was freed from the political, social, and moral restraints that feudalism had always imposed upon it. The abstract slogan ‘Liberty, Equality, Fraternity’ thus could and did lead to a social order that was profoundly individualistic, weighted in favour of a minority of property owners, spelling danger rather than the promise of freedom to those who were excluded from any significant chance of acquiring property.

The term ‘socialism,’ foreshadowed in its adjectival form by Robert Owen and his followers, made its first appearance in the early 1830s, among radical sects in France. The concept defined a movement of thought by its criticism of bourgeois society, of bourgeois rights, or, in a word, of the economic liberalism which they assumed and furthered. It brought together, as aspects of one movement, the beginnings of workers’ associations and workers’ protests in Germany, the abortive 1830 revolution in France and the Chartist agitations in Britain. It fused, or held in loose relation, the Ricardian labour theory of value, the communitarian doctrines of Fourier, the étatist beliefs of the socialist Saint-Simonians, and the radical egalitarianism of the extreme democrats of the French Revolution. Socialism, thus, was a critique, made in the light of the industrial revolution, of bourgeois society, of the hopes and assumptions of the Enlightenment, and of the political theory enshrined in the (bourgeois) republic. It shared with the prophets, utopians, radical reformers, and rebels of earlier days a common hostility to private property, to the inequalities of economic position and of social opportunity which resulted from the uneven distribution of property, and to the power that this gave some men over others. Consciously or unconsciously, it saw these evils as flowing from and safeguarded by the abstract slogans concerning individual liberty, political democracy, and the rule of law. It thus substituted concrete man in a concrete historical situation for the abstract ‘man’ of the German philosophers and of the French declaration of the rights of man. While the Germans were still seeking to consummate the French Revolution, and were thus finding themselves caught in its ‘contradictions,’ the French had recognized, in concrete terms, where those contradictions lay. French and German were, even if unconsciously, taking part in what Lichtheim correctly calls the one great debate, the debate on the meaning of humanism, of liberty, of equality and fraternity, in the light of bourgeois society and of the industrial revolution. The French recognized that the issue lay in property—a private right or a social function? The question of property thus became for Marx and for socialism the central question of the age—the real issue behind the construction of philosophers and the slogans of political rebels.

Before the rise of the industrial system, the protest against existing society,
on which socialism to some extent drew, was limited to the two most important features of traditional agrarian society - its coercive hierarchy of authority and its distribution (or non-distribution) of property in land. Both these features appeared to be based on and safeguarded by law. The heroes of socialist pre-history were thus led into inevitable and quite fundamental hostility to law, at least to law as mankind had hitherto known it. The distinguishing mark of the 'progressive' thinker, of the early utopian socialist or 'enlightened democrat,' came to be his belief in the intrinsic goodness and sociability of man, and/or in the view that property or the desire for property was the true source of all significant evils. Not infrequently he saw law, together with private property, as either the cause or the symbol of human misery. Government was for Rousseau and Morelly, as for Thomas Paine, 'like dress ... the badge of lost innocence.'

With the rise of the industrial system, the attack on property gained a new impetus. It was helped by the concentration of the propertyless in the new industrial towns and barracks, but it rested, above all, on the perception that ownership, now of capital and of machines, had, in these new conditions, vastly increased social ramifications. These ramifications stood in direct contradiction to the egalitarian hopes and pretensions of the French Revolution and to the scientific and economic optimism surrounding the industrial revolution. The machines that were to make man rich and free were in fact making or keeping thousands poor and dependent. By the late 1820s, some of the followers of Saint-Simon had developed his unflattering contrast between the 'bourgeois' and the 'industriels' into a far-reaching attack on the role of bourgeois private property in industry. To make the ownership of industrial capital and of the means of production a private concern was immoral because it enabled one man to exploit the labour of others; it was uneconomic because it failed to provide for the proper planning of industry, for the optimal allocation of resources throughout that vast industrial workshop into which each nation was being turned. Bourgeois society treated property as a private function, when the industrial system was converting it into a social function.

Socialism may be revolutionary or evolutionary, anarchist or étatist. Whether its criticism of law is particular or universal, a criticism of a specific legal system or of law in general, is not always clear. As a movement of the deprived and the oppressed, socialism of all types reflected the latter's intense antagonism toward the existing state and the existing system, and toward those who seemed to know how to manipulate the rules of the system to their own advantage. The French Revolution had swept away the centuries-old legal traditions of the ancien régime, with their estates, privileges, and feudal dues, and had enacted a series of constitutions followed by a code that was to be the glory of modern Europe. Socialists, however, as we have seen, stood in a relation of radical criticism to the rights of the citizen and to the civil and political arrangements embodied in these constitutions.
and this code. They rejected not only feudal law, but bourgeois law as well. Was their rejection of bourgeois law, then, 'concrete' or 'abstract,' particular or universal?

The Rousseauean-anarchist tradition in socialism gave a clear answer to this question. It believed in the fundamental and natural co-operativeness of men, in the triumph of reason and of the general will. In a truly human society, there would be no need for a coercive state and a system of law. In a speech to the German Workers' Educational Association in London, in June 1845, the quasi-religious German communist Wilhelm Weitling declared: 'In my opinion, everyone is ripe for communism, even the criminals. Criminals are a product of the present order of society, and under communism they would cease to be criminals. Humanity is of necessity always ripe for revolution, or it never will be.' At that time, neither Weitling nor the German workers in London had yet made the acquaintance of Dr Marx, but that anarcho-communism of which Weitling was a simple-minded exponent had already found its place in the infinitely more sophisticated Marxian system.

If the anarchists and anarcho-communists clearly rejected law in general, and not merely particular law or laws, the connection between this rejection and socialism as the critique of bourgeois society remained — before Marx — unclear. Proudhon's famous slogan 'Property is Theft' implied — as Marx was quick to note — that very concept of property which many socialists and anarchists were claiming to expose, for theft is the taking of something that 'belongs' to another. Was the abolition of property to be followed by legislation creating a new legal system for a socialist society? Morelly's attack on property and the desire for property was followed by an elaborate model code — the Code of Nature — with its sacred and fundamental laws, distributive or economic laws, agrarian laws, edile laws, police laws, sumptuary laws, etc., etc. The statist Saint-Simonian socialists clearly thought in terms of state regulation to direct and control the material foundations and social life of a socialist society. Yet socialism, as Dicey's discussion of 'collectivism' notes, did not come upon the world with a socialist theory of law and in England it has never attained to one. The early socialists, no doubt, had their attention engaged upon other matters: economics and the problem of smashing or gaining state power. As revolutionaries they naturally provided no blueprint for the future; as evolutionary reformers they worked within an existing system. There was, however, that fundamental ambiguity in the pre-Marxian socialist relation to law that cut deeper than this. Socialists saw the existing legal system, and all major legal systems before it, as involving,


4. This is so, even though Proudhon made it very clear that the 'property' he was denouncing as theft was property in the means of production and in the labour of others, not property in general. However, Proudhon himself was therefore not guilty of self-contradiction.
in a fundamental and pervasive way, the concept of property and of state or individual rights as opposed to social responsibilities. When the concepts of property and of the independent self-contained individual were excised from law, as they would be from social life, what would remain? Some veered to the view that the new order would be based on new social customs and habits rather than law, on moral conviction and social pressure rather than on formal indictments and the possibility of formal litigation. Courts would give way to popular assemblies. Others, like Morelly, saw the new society as based on a complex and pervasive set of regulations, administrative arrangements that defined duties, allocated resources, and conferred or denied material and political rights, but which converted all legal problems and disputes into matters for administrative or political decision. To unravel the relation between 'law,' property, and the individual as the bearer of rights, and thus uncover the seeds of the early socialists' vacillation and ambiguity, is to raise some of the most exciting and important questions about the nature and function of law in general and in particular types of society. Marx was the first socialist to see at all deeply just what is involved here and the only socialist to create a system and a corpus of thought in terms of which the problem can still, in principle, be fruitfully approached. For Marx, of all the socialists, was the one who saw most clearly the relation between modern law, property, and individualism and who attempted, with genuine insight and awareness of the complexities, to trace this back to the emergence of the greatest social and cultural revolution in the history of mankind—the bourgeois revolution, with its market society, its individualism, its belief in 'abstract' rights and the rule of law, and its enormous industrial productive potential. That potential, as Marx also saw, was so quickly to be realized and to transform the whole life of modern man, while threatening the very foundations of the bourgeois society that gave it birth.

Karl Marx himself, so far as the future of law was concerned, belonged to the Rousseauean-anarchist tradition of socialism, though he ended by immeasurably deepening its criticism of law. He began, in the spirit of the Enlightenment, by insisting that true law must be a form of freedom. It must be universalizable, it cannot prescribe for one man what cannot be consistently prescribed for all; it cannot be based on principles that divide men or on individual arbitrariness and caprice. On this basis, in 1841 and 1842, before he had become a communist, Marx explicitly rejected feudal law and the feudal organization of society, with their elevation of status and estates, because they made a principle of separation, a principle of partiality, into a universal political and legal principle. By 1843 and 1844, as a Communist, he went beyond this to insist that freedom and rationality required the complete Aufhebung (dissolution and supersession) of all external constraints and of all specialization of legal, administrative, and political functions; they required the dissolution of the state and of law as specific, partial,
and particular phenomena confronting the rest of society as external powers. 'Where the law is true law, that is, the existence of freedom, it is the true existence of the freedom of man ... law retreats before man's life as a life of freedom,' Marx had written in the *Rheinische Zeitung* in 1842. By 1844, he was insisting in the *Deutsch-französische Jahrbücher*, that 'the criticism of religion ends in the teaching that man is the highest being for man, it ends, that is, with the categorical imperative to overthrow all conditions in which man is a debased, forsaken, contemptible being forced into servitude.' Punishment and coercion were for Marx contrary to human conduct; they treat man as an animal, to be determined by external constraints. In a truly human and truly free society, law as a coercive system of external rules and sanctions would disappear. Man, as a truly social being, would recognize his own wrong-doing, and in co-operation with his fellows, 'punish' and reform himself.

In the short period between the article on the draft Prussian divorce bill that Marx wrote for the *Rheinische Zeitung* in 1842 and his *Economico-Philosophical Manuscripts* of 1844, Marx deepened his initial criticism of existing laws in terms of universalizability, impartiality, and of the moral autonomy of man to a more radical criticism of all law as a form of alienation. It was not enough to remove privilege and religious concepts from the legal code; it was necessary to realize that all formal or codified laws and formal sanctions were necessarily forms of estrangement, of alienation. They were premised on the fact that man's life in his every-day 'material' pursuits was not a genuine, free community life. They strove – unsuccessfu - to overcome the divisiveness and conflict of human life from outside, by external coercion. They thus aggravated the situation instead of curing it; they added a further form of alienation, further coercion and separation, to a life that was already full of coercion, separation, and conflict. They separated the political or general interest from the private interest; they made public affairs a private province of the (coercive) state and its bureaucracy.

The fact that law is a form of alienation, that it expresses an illusory and not a genuine community life, is demonstrated for Marx in the fact that it has to abstract man from his real life, that it has to treat man as a criminal, as a citizen, as a contracting party, etc., but not as man. Law can maintain its illusory concept of the free and autonomous man, acting by free will, only by ignoring everything in society which contradicts this, including man's circumstances. Law rests on the illusion of free will, and this illusion rests on abstraction. One of the things that Marx has in mind here was set down rather clearly by Feuerbach, more than twenty years later, in the ethical fragments of the late 1860s, first published posthumously, in 1874. (Marx, by this time, had long ceased to read Feuerbach, but Feuerbach's views here spring from the philosophical attitudes that he and Marx, especially the young Marx, had in common.) True morality, Feuerbach argues in
these fragments, is not a theological imperativist structure of rights and
duties, but a habit, a way of living that comes spontaneously or not at all.
‘Morality is nothing but the true, complete, healthy nature of man, and
error, depravity ... are nothing but a distortion, imperfection, abnormality,
often a true abortion of human nature. The truly moral man is not moral
because of duty, because he wills it – this would be creating morality out of
nothing. He is moral by and out of his nature.’6 People, Feuerbach insists,
do act morally out of inclination and not out of duty. Sanctions can produce
the semblance of benevolence, and can prevent men from overtly harming
others – but they can do so only to a limited extent and they can never
produce true benevolence. Thus, the criminal law, in wishing to enforce
the moral injunction ‘thou shalt not steal,’ has to abolish (hang) the thief in
order to abolish theft.8 ‘The arrogant categorical imperative is impressive
when viewed from the standpoint of abstract philosophy, but from the
standpoint of nature it is a very humble pious wish.’7 Law, for Feuerbach,
is nothing but a wish backed by power. ‘Thou shalt not steal’ is the wish that
there would be no stealing, accompanied by sanctions. It is the wish ex-
pressed in imperative form: ‘It ought to be or it ought not to be is nothing
but a wished being and non-being. “I wish,” says man as a private person;
“I want no theft, therefore I believe that one cannot steal,” says man as an
empowered legislator. Volo, ergo cogito.8 I want to make theft impossible
through law. I do believe that the thief is free to steal without law, but, to
stop him, I arrogantly decide that all he needs is the consciousness of law
and that my consciousness of it is enough to justify taking his life to do
away with his theft. Just as law is not interested in the connection between
the thief and the man, so man is not interested in the connection between an
action and its determining circumstances.9 Much of this Marx would have
agreed with, as passages in the Holy Family and the German Ideology
indicate.

In its alienation, then, in its lack of a real correspondence with the society
it pretends to control, law (like the state) comes to suffer from delusions of
grandeur that mask an underlying impotence. It creates an illusory world
and ascribes everything that runs counter to its wishes to an external force
or consideration, to something outside its competence and control. Where
the law and state do attempt to impose their will on civil society, they can
do so only by violence, by despotic inroads, by terror. Law, like bourgeois
society generally, then, rests on contradictions; it can neither presuppose nor
achieve freedom, rationality, universality.

In 1887, four years after Karl Marx’s death and more than four decades

5. Ludwig Feuerbach, 10 Sämtliche Werke, ed. by Bolin and Jodl (Stuttgart-Bad Can-
statt, 1960-4), at 289, as translated in Eugene Kamenka, The Philosophy of Ludwig
6. Supra note 5, Feuerbach, at 135; Kamenka, at 136.
7. Supra note 5, Feuerbach, at 289; Kamenka, at 136.
8. Supra note 5, Feuerbach, at 135; Kamenka at 136.
9. Ibid.
after Marx began denouncing the alienation of capitalism, the great German sociologist Ferdinand Tönnies published the first edition of his great work, *Gemeinschaft und Gesellschaft*. It adopts for its theme, and attempts to erect into fundamental sociological categories, these two contrasting concepts: the agrarian community of ancient and feudal times, and the commercial civil society of atomized economic individuals typical of the modern period.

Tönnies takes his departure from the subtle differences between the two German words. Both can mean a society, an association, a community, or a fellowship. But *Gemeinschaft* tends to be used of an association that is internal, organic, private, spontaneous: its paradigm is the *Gemeinschaft* of marriage, the *communio totius vitae*. *Gesellschaft*—comparatively new as a word and as a phenomenon—usually refers to something external, public, mechanical, formal, or legalistic. It is not an organic merger or fusion but a rational coming together for ends that remain individual. The 'secret' of the *Gemeinschaft*, for Tönnies, lies in the household and the concept of kinship, in the ties of blood, friendship, and neighbourhood. The 'secret' of the *Gesellschaft* lies in commerce and the concept of contract, its ties are the ties created by the transaction between (abstract) persons, its measure for all things is money. The *Gemeinschaft*-type of society we find in the village and the feudal system based upon the village. Here, the idea of a natural distribution, and of a sacred tradition which determines and rests upon this natural distribution, dominate all realities of life and all corresponding ideas of its right and necessary order, and how little significance and influence attach to the concepts of exchange and purchase, of contract and regulations. The relationship between the community and the feudal lords, and more especially that between the community and its members, is based not on contracts, but, like those within the family, upon understanding.10

On the other hand,

The theory of the *Gesellschaft* deals with the artificial construction of an aggregate of human beings which superficially resembles the *Gemeinschaft* in so far as the individuals peacefully live and dwell together. However, in the *Gemeinschaft* they remain essentially united in spite of all separating factors, whereas in the *Gesellschaft* they are essentially separated in spite of all uniting factors. In the *Gesellschaft*, as contrasted with the *Gemeinschaft*, we find no actions

10. Ferdinand Tönnies, *Community and Association* [*Gemeinschaft und Gesellschaft*], translated and supplemented by Charles P. Loomis (London, 1955), at 67–8; also published (with slight variations) as *Community and Society* by the Michigan State University Press and Harper and Row (New York, 1957, paperback), at 59. Tönnies, as we shall see, is not committed to the view that any society, such as European feudal society, is a pure *Gemeinschaft* any more than modern commercial society is a pure *Gesellschaft*. Nevertheless, he does very much underestimate the importance of contractual relations, and especially of the feudal contract as such, in pre-bourgeois European society. This will be evident to those who take legal history seriously, but it will be especially evident, as Professor Karl August Wittfogel argues in his *Oriental Despotism* (New Haven, 1957), to those who compare European feudalism with the bureaucratic-despotic landholding arrangements of Islam and China, where 'privileges' as such are not contractual in nature, are not in principle maintainable against those who grant them, but are gifts from the *parens patriae*, revocable at will.
that can be derived from an *a priori* and necessarily existing unity; no actions, therefore, which manifest the will and the spirit of the unity even if performed by the individual; no actions which, in so far as they are performed by the individual, take place on behalf of those united with him. In the *Gesellschaft* such actions do not exist. On the contrary, here everybody is by himself and isolated, and there exists a condition of tension against all others. Their spheres of activity and power are sharply separated, so that everybody refuses to everyone else contacts with and admittance to his sphere; *i.e.*, intrusions are regarded as hostile acts. Such a negative attitude towards one another becomes the normal and always underlying relation of these power-endowed individuals, and it characterises the *Gesellschaft* in the condition of rest; nobody wants to grant and produce anything for another individual, nor will he be inclined to give ungrudgingly to another individual, if it be not in exchange for a gift or labour equivalent that he considers at least equal to what he has given.\(^\text{11}\)

*Gesellschaft*, then, in its paradigmatic form, is the society in which the cash nexus has driven out all other social ties and relations, in which men have become bound only by contract and commercial exchange. Where *Gemeinschaft* is associated with the village, the household, and agricultural production directly for use, the *Gesellschaft* is associated with the city, the factory, and commodities production for exchange.

The head of a household, a peasant or burgher, turns his attention inwardly toward the centre of the locality, the *Gemeinschaft*, to which he belongs; whereas the trading class lends its attention to the outside world; it is concerned only with the roads which connect towns and with the means of transit. This class seems to reside in the centre of every such locality, which it tends to penetrate and revolutionise. The whole country is nothing but a market in which to purchase and sell.\(^\text{12}\)

The ‘common sphere’ of *Gemeinschaft* rests on a natural harmony, on the ties of tradition, friendship, and common acceptance of a religious order; the common sphere of the *Gesellschaft*, in so far as it exists at all, is based on the fleeting moment of contact within the commercial transaction—the moment when the object is leaving the sphere of influence of A but has not yet entered the sphere of influence of B. At this moment, for the contact to be successful, the wills of the two individuals need to be in accord, there has to be what the law of contract calls ‘a meeting of minds.’ It is a meeting which takes place only in connection with an offer and holds good only in return for a consideration.

The distinction between *Gemeinschaft* and *Gesellschaft*, for Tönnies, is intimately associated with the distinction between two kinds of will, each characteristic of one of the two societies. The *Gemeinschaft* is based on the *Wesenwille*, the natural or integral will in which a man expresses his whole personality, in which there is no developed differentiation between means and ends. Against this type of will stands the *Körwille*, the rational but in a sense capricious or arbitrary will developed in the *Gesellschaft*, the will in

12. *Supra* note 10, at 90; paperback at 79.
which means and ends have been sharply differentiated and in which Max Weber's *zweckrationale* behaviour prevails. Tönnies emphasizes and develops this distinction in his paper 'Zweck und Mittel im sozialen Leben' (1923) and illustrates its application to property in his short pamphlet *Das Eigentum* published in Vienna and Leipzig in 1926. Property which is the object of the natural will is so closely bound to the essential nature of the person that any separation from it necessarily produces unhappiness. The property of this kind and the person tend to fuse together, it becomes part of him, loved as his own creation; it is not a commodity. Men tend to behave thus toward living things which they own, to their house and yard, to the 'sod' that they and their forefathers have worked for generations, and toward other persons who are the objects of their direct affirmation, of love, trust, or of feelings of duty. In the relations that result from the natural will there is no sharp dichotomy of pleasure and pain, of satisfaction and dissatisfaction; there is rather a complex unity of feelings in which satisfaction and dissatisfaction, enjoyment and trouble, happiness and sorrow, right and duty, feeling honoured and feeling burdened are all bound together. The rational will, on the other hand, finds its paradigmatic expression in the relation to money, to property that is expressed as credit or debit in a ledger, to goods and commodities that one acquires with no other aim but to be rid of them, as quickly as possible, at a profit. The ultimate consummation of the rational will and its attitude to objects is found in the commercial *share*, which can be held by a man who has never even seen the property it confers on him and who has no interest in it whatsoever except as an item of credit. In such relations joy and sorrow, satisfaction and dissatisfaction, are sharply differentiated: profit is *plus*, joy, satisfaction; loss is *minus*, sorrow, dissatisfaction. Everything is abstracted, torn out of its living context, subsumed under an inviolable end. The distinction between these two kinds of will is indeed central, though not explicit, in Marx's concept of 'free' labour as opposed to *forced* labour, to labour performed under the domination of need or of the desire to have rather than to enjoy.

*Gemeinschaft* and *Gesellschaft* for Tönnies are not close, accurate descriptions of two different existing kinds of societies. They are rather what he calls *Normalbegriffe*, a forerunner of Max Weber's concept of ideal types and of the modern concept of models. They are two opposed sets of connected presuppositions, two ways of seeing social reality and human relations, on which societies can be based. Feudal society tends toward one, modern commercial and industrial society toward the other. Any particular period, or any particular country, will fail to display either set of presuppositions in its purity; it will be a mixture of both. But the historical trend, Tönnies believed, lay in the direction of transforming a society primarily based on *Gemeinschaft*-relations into a society primarily based on *Gesellschaft*-relations. Man was

passing from the primacy of the social unit, custom, tradition, and religious order, to the primacy of the abstract individual, of trade, calculation, abstract law, and the arithmetical summation of 'public opinion.'

Marx would not have cared for Tönnies' tendency to idealize the agrarian community or for the positive emphasis that Tönnies places on the role of a sacred tradition and an accepted hierarchy within the Gemeinschaft. Above all, Marx would have rejected the view that Gesellschaft and Gemeinschaft are the two primary categories in terms of which society is to be understood. The Gemeinschaft of feudalism for Marx was a totally different thing from the Gemeinschaft of communism, and the intensified alienation of capitalism, its creation of the Gesellschaft was, for Marx, a necessary step in the development from the Gemeinschaft of bondage to the Gemeinschaft of freedom. Marx and Engels themselves do not use the word Gemeinschaft to contrast their concept of a community with the state or the bürgerliche Gesellschaft (civil society) of capitalism; in its place they use the allied (but less hierarchical) word Gemeinwesen. Nevertheless, Tönnies has portrayed quite accurately, in his account of the Gesellschaft, those features and presuppositions of modern capitalist society which struck Marx and so many socialists as being its essential and totally inhuman features. Socialists, in the first half of the nineteenth century, were deeply conscious—as were Marx and Engels in The Communist Manifesto—of an intensification of alienation, abstraction, and atomization produced by the fully developed bourgeois-commercial society; they did contrast this (unfavourably) with the community life of traditional feudal-agrarian society. Marx and Engels themselves rejected, quite bluntly, what they scathingly called 'feudal socialism'; as socialists, they had to dissociate themselves from that backward-looking romantic and conservative elevation of the feudal community, so prominent in the work of Carlyle, and to stress that the feudal community was a community in bondage. Nevertheless, those who predict the future draw on the past: a strong nostalgia for an idealized version of the social relations found in the village Gemeinschaft is characteristic of the anarcho-communist strain in socialism and forms part of the vision of communism that we find in the work of Marx and Engels.

The history of legal ideology in the Soviet Union, as of ideology generally, has been characterized by radical reversals of line and furious denunciation of earlier orthodoxies. The same has been true of Communist China and, even more derivatively, of other communist states. The history of the Soviet Union opened with a period of 'war communism' from 1918 to 1921, emphasizing the Gemeinschaft concept of revolutionary justice, based on informal popular procedures as well as the intense politicalization of law and administration, mixing these with the deliberate use of terror as an instrument of social policy. Then, suddenly, the Soviet government proclaimed its New Economic Policy, encouraging state-controlled capitalist development,
and from 1922 onward promulgated a whole series of formal codes of law and procedure, which borrowed freely from the 'bourgeois' codes of the continent, and laid the foundations of what was later called 'socialist law.' The withering away of state and law, seen as imminent during the period of 'war communism,' was now pushed further into the future, while the administrative trends inherent in the NEP were brought to their fullest economic development with the abolition, in 1927, of the NEP's licensed capitalism and the inauguration of the two five-year plans, spanning the period from 1928 to 1936. These latter years formed the heyday of Pashukanis' influence: codes of law, it was proclaimed, would soon be replaced by principles of socialist construction. Plan was to do for socialist society what Law did for bourgeois society. In fact, however, legal provisions and legal procedures continued and judicial interpretation became, if anything, increasingly formalistic and legalistic.14

The brutal realities of the forced collectivization of the peasants in 1929 and of Stalin's relentless drive toward military industrialization and massive prestige projects were, of course, a far cry from either formal legality or the alleged unity and harmony of a whole people spontaneously striving to fulfil a rational economic plan. They were based on naked power, on the ruthless imposition of an extra-legal and supra-legal domination-submission. The tendencies toward total intellectual control, inherent in communist party practice from 1918 onward (they began with the re-establishment of censorship and police measures against dissident socialist groups in the very hour in which freedom was being proclaimed) and in communist party theory since Lenin's insistence on 'democratic' centralism, reached their peak with the consolidation of Stalin's power in 1930-1. By 1936-7 he had virtually stifled all public manifestation of independent critical thought in the Soviet Union. In all matters within the province of the secret police, and in many other matters, regarded as politically relevant, legal procedures and legal rights formally recognized in the Soviet Union were cynically manipulated or openly disregarded without being replaced by any other form of public control. Up to the 1930s, however, such leading Bolshevik legal theorists as Reisner, Krylenko, Pashukanis, and Stuchka had attempted to develop, with reasonable intellectual honesty, a radical Marxist critique of law as a phenomenon characteristic of class society, to be dealt with in sociological terms and to be replaced, in socialist society, by political policy ('the community interest') and 'rational' economic planning.

14. For an attempt to bring out, in the case of Soviet civil law, the growing formalism of Soviet legal provisions and their interpretation, as well as their steady retreat into 'bourgeois' positions, see A.E.-S. Tay, 'The Foundations of Tort Liability in a Socialist Legal System: Fault versus Social Insurance in Soviet Law' (1969), 19 *U.T.L.J.* 1 (1969) and 'Principles of Liability and the "Source of Increased Danger" in the Soviet Law of Tort' (1969) 18 *Int. and Comp. L.Q.* 424. More generally, the extent to which Soviet civil law is, as we shall see, of the Gesellschaft may be brought out by noting that the new Civil code of the RSFSR promulgated in 1964 treats the relation of plaintiff and defendant as a relation of creditor and debtor and makes no serious attempt to ground the civil action as such in a concept of social as opposed to individual harm.
In 1936, the second five-year plan was completed ('over-fulfilled' in four years) and a major theoretical upheaval began. The period of the construction of socialism was over. The Soviet Union — it was proclaimed — had reached socialism, the first stage of the classless society. It now contained two 'non-antagonistic' classes, the workers and the peasants, and a 'stratum' serving their interests, the intelligentsia (ie, party and government administrators, scientists, artists, professional men, and white-collar workers generally). These made up friendly and mutually supporting sections of the Soviet state; they were not the necessarily hostile economic groupings of the society of class antagonisms and exploitation. Yet the conclusions which, on earlier Marxist theory, should have followed from this announcement did not follow. The state was not to begin withering away, law was not to begin disappearing. On the contrary, Stalin now proved — by dialectic — that before the state and law could wither away they would have to be strengthened, their full potentialities would have to be exhausted. Pashukanis and Stuchka were denounced as traitors and wreckers. The Stalin Constitution was drawn up, complete with a bill of rights, and proclaimed to be both the most advanced, the most free, constitution, in the world, and a specifically socialist law; Soviet law generally — under the new slogan of 'socialist legality' — was suddenly portrayed as the truest, most legal, law.

Formally, the theoretical backing for this quite radical shift in Soviet theory lay in the doctrine of 'socialism in one country.' Soviet theoreticians have at no stage openly denied, and do not quite openly deny even now, that state and law will ultimately wither away. (In the 1920s, however, many Soviet theoreticians probably believed this; now their practical attitudes and behaviour vis-à-vis law strongly suggest that they do not.) From 1936 onward, however, the withering away was made contingent on the establishment of communism throughout the world, and this was pushed into a remoter future. As communism gained more successes, the Stalinist line ran, the capitalist world became more, not less, hostile. Surrounded by this capitalist world, therefore, Soviet society needed the protection of a strong state and such a state inevitably needed law. During the Stalinist period, it was primarily the criminal, repressive functions of law that were emphasized, its role was rooting out and punishing the enemies of the new order; since Stalin's death in 1953, the emphasis has been much more on the civil, regulative, and administrative functions of law.

The period from 1936 onward, then, may be regarded as the period of the dissolution of the utopian dream, of the attempt to work out a theory of socialist law and government that recognizes, implicitly at least, a certain continuity of social problems within society and a concept of law as something not exhausted by the economic description of society. In Stalin's
period, much of this was a facade attempting to create an appearance of consensus and to hide the realities of a brutal police state and party dictatorship, but it was also a reversion to more traditional methods of government, and to more traditional moral and ideological appeals in an attempt to create and strengthen foundations for social stability. Since the death of Stalin and the admission, by the party leadership, of the gross abuses of the period of the cult of personality, there has been an ever-increasing concern, on the part of Soviet intellectuals and more liberal lawyers at least, with law and legality as checks to individual and personal power, as restraints on what the young Marx called arbitrary caprice. This aspect of Soviet developments in legal theory, paralleled in other parts of the communist world, marks a quite fundamental disintegration of Marxism as an intellectual system, but it is of crucial importance to understanding the sociology of law under communism and, more generally, in the world today. It culminated in N.S. Khrushchev’s proclamation that the Soviet state was now the State of All the People and no longer a class dictatorship and in the enactment of a whole series of revised codes of criminal law, civil law, criminal procedure, civil procedure, family law, etc., which seem ever more ‘bourgeois’ in form and yet are treated as specifically socialist in character.

The fall of Khrushchev from power has not led to a repudiation of the concept that the Soviet state is a state of all the people and not a class dictatorship. One Soviet writer has stressed that penal sanctions and the criminal law are no longer matters involving the concept of class—criminals he argues do not constitute a class in Soviet society: individual parasitic elements do not constitute a class. The new codes of law in the Soviet Union, and this includes the Criminal Osnovy (Fundamental Principles) and codes of 1956–60, do not refer—as the codes of the 1920s did—to class interest or to the concepts of class origin, class affiliation, and ‘enemy of the people,’ which have now been formally excised from the law. Neither has Khrushchev’s fall led to any formal repudiation of his widely publicized doctrine that the Soviet Union has now entered upon the accelerated building of communism and that state and law will therefore begin, selectively, to wither away. The boasts about the speed with which Russia will reach communism have ceased. And the concept of ‘withering away’ has been given a rather technical meaning that is perhaps rather too subtle for Khrushchev
himself, though he initiated the notion that a withered-away state would not be as different from an existing state as some people had naively thought. The theoretical writing since Khrushchev’s fall rather suggests a return to caution instead of boldness, a greater emphasis on social and theoretical complexity, and a temporary stalemate between certain fundamental tensions or trends in Soviet society. It is still proclaimed that law will in a sense wither away, but this withering away is no longer seen as involving the disappearance of codes of law or of courts. The suggestion is rather that informal courts will replace formal courts and that the ratio of persuasion (censure?) to compulsion will be significantly altered. Here one can discern a clear tension between the desire to make justice popular and a fear of the forms that popular justice can take and the abuses it is open to. It is also interesting that the advocates of a jury system, defeated in the legal discussions of the mid-1950s, returned to the fray (for instance, in Pravda of 22 September 1965) by suggesting—for discussion—an increase in the number of lay judges as a step toward ‘popularizing’ justice. They have not been successful. But while some of the ideologists talk about the educative function of law and the passing over of law into moral and social norms, the legal journals call for more detailed and more technical legal research, for a deeper appreciation of the complexities involved in the legal structure and regulation of society.

The emphasis on complexity is now becoming evident in all branches of the theory of state and law. The moral norms of full developed communism are already being presented as having all the complexity, differentiation, and system interrelation of a code of laws. It is even conceded that they will almost certainly have to be written down. The same complex differentiation and interrelation is seen in virtually every other social function and social activity. While the question of professional administration and full-time administrators is obviously a peculiarly touchy one, the most recent Soviet writers have no doubt that the services of professional experts will play a vital part in any system of economic planning and social administration and cannot be fully dispensed with. Thus Yu.A. Tikhomirov in an article significantly headed ‘Division of Powers or Division of Labour?’ argues that to ‘single’ out a special group of persons to exercise the functions of state powers is to create not a social stratum but merely ‘a portion of the labouring population that has been given shape in an organizational and legal sense.’ He distinguishes three forms of participation in power (or decision-making, as our own amateur social theorists now call it); the direct, the representative, and the professional. All three, it appears, will always be with the Soviet citizen and the rest of humanity.

While scholars with different attitudes or purposes have found different

ways of dividing the economic or political history of the People's Republic of China since 1949 into specific periods, so far as law and our interest is concerned there is general agreement that it is most useful to distinguish four periods: 1949–54, a period of revolutionary expropriation and consolidation of power, involving the intense politicalization of all legal measures and the open use of terror against selected sections of the population - landlords and counter-revolutionaries - with great emphasis on law as a weapon of class rule and on informal on-the-spot action by the masses; 1954–57: a period appearing to herald a comparative stabilization with some emphasis on formal legalism, which opens with the proclamation of the first constitution of the Chinese People's Republic, witnesses calls for draft codes of law and the promulgation of the organic laws of the courts and procuracy, and ends in the brief blossoming of the quickly suppressed 'Hundred Flowers' movement to discuss frankly the ills of China; 1957–65: a period in which the economic failure of the Great Leap Forward and the withdrawal of Soviet help result in a sharp reversal of the more formal and legalistic attitudes of the preceding period, and in a re-emphasis on Gemeinschaft strains, on informal procedures, popular participation, and the union of theory and practice under the slogan 'Smash All Permanent Rules, Go One Thousand Li A Day'; 1965–9: the period of the Great Proletarian Cultural Revolution, now ended, in which the primacy of politics, revolutionary enthusiasm, and a levelling version of the Gemeinschaft spirit are encouraged to turn against all Gesellschaft and bureaucratic-administrative structures and tendencies (except the military) with a deliberate destruction of legal organs and institutions by a discrediting of their function and an unleashing of violence against their personnel.\textsuperscript{18}

Any detailed examination of the fortunes of law and of legal ideology in the Soviet Union, or Communist China, or any other communist country, thus once again brings out the existence of competing strains and of radical shifts in administrative practice and legal ideology. Karl Marx presented his followers with a very ambiguous legacy indeed and its contradictions become sharply evident when we look at the Soviet Union, Communist China, and those - few - other societies in which the communist method of government is not simply foreign-imposed. Marx's rejection of economic and political individualism, his radical critique of the abstraction and alienation of the bourgeois commercial-industrial Gesellschaft, his emphasis on man's social nature and man's need of a community can be presented as having a certain continuity with traditional Russian and especially Chinese attitudes; there are areas of communist ideology, for instance, and strains within it where it is not at all easy to distinguish the heritage of Marx from that of

\textsuperscript{18} For an attempt to discuss in detail the fortunes of law and legal ideology in China and the mixture of competing strains, so reminiscent of the Soviet Union, which have characterised the development of law and administration in Communist China, though the relative strength of these strains is rather different, see A.E.-S. Tay, 'Law in Communist China' (1969-71), 6–7 Sydney L.Rev. 153.
Confucius, or Stalin from a mixture of Ivan the Terrible and Arakcheev. True, Marxism is normally presented as rejecting completely and unequivocally the concept of hierarchy implicit in the old Gemeinschaft; in practice, the Leninist elitist doctrine of the party and the Leninist insistence on 'democratic centralism' (ie, on complete obedience to party decisions by those who opposed them in discussion) call for the surrender of judgment and the acceptance of hierarchical authority. The cult of Mao, Father of his people and Light of the Universe, may have elements of backsliding from Marxism to traditional Chinese emperor-worship; it is also that same culmination of Marxist-Leninist elitism that we had in the cult of the personality of the vozhd (Stalin) in the Soviet Union. The continuity between Bolshevik methods of government in the Soviet Union and those of the tsars has often been remarked; so have the Byzantine pretensions and style of Stalin and the clique around him. In so far as communism in China and in the Soviet Union has involved totalitarianism—the total union of church and state and the subordination of all significant social activity and organization to the centralized bureaucratic church-state—there are areas of Soviet and Chinese communist ideology and practice in which it is not at all easy to distinguish the nature or impact of the Leninist-Stalinist version of Marxism from the continued influence of the traditions of Chinese imperial and Russian tsarist ideology and organization, or from the 'oriental despotism' approached or aped by Byzantine emperors.

Yet there is also another side to Marx's legacy; his rejection of rural idiocy, his emphasis on the central economic, political, social, and cultural role of the process of industrialization, his insistence on rationality, calculation, and planning, his implicit acceptance of the concern with personal freedom and individual self-development preached by the European Enlightenment, his recognition of the world-historical consequences of capitalism, with its opening up of totally new concepts of human dignity and human capacities. It is this which makes Marxism an heir as well as a critic of the French Revolution and enables communists, in China as in the Soviet Union, to vacillate between the affirmation and rejection of westernizing trends. Both can be presented as Marxist positions; each has a history outside Marxism and can draw on traditions and attitudes independent of Marxism. In both China and the Soviet Union, then, Marxism has played and can continue to play both a westernizing and an anti-westernizing role; it can strengthen native traditions or weaken them, for Marxism both assumes and rejects the modern commercial-industrial Gesellschaft. We therefore cannot counterpose, at all sharply or effectively, the 'native' Chinese or Russian tradition in general and the 'foreign' Marxist tradition in general; they come together at some points and conflict, often confusedly, at others; the points of conflict and of agreement can change with bewildering rapidity as either Marxism or the native popular tradition or both are reinterpretated by political leaders and ideologues. If we consider further the
'Oriental despotic' component in Chinese and in Russian traditions of government (whether we attribute the latter to the direct impact of the Tartar yoke, to Byzantium, or to geographical and military factors that produce a similarly strong centralized bureaucracy), the specific communist element in either Soviet or Chinese administration becomes particularly difficult to isolate and define. All this suggests that the distinction between communist legal attitudes and western legal attitudes, or between Marxism and traditional society, may not be a good way of approaching the sociology of law in communist society.

How can the problem be solved? Let us suggest that we approach the account of legal developments under communism not with a distinction between 'native' tradition, Soviet Marxism, and western trends, or between common law, civil law, and (possibly) communist law, but with a set of categories derived from our study of Marx and of Tönnies and from the history of socialism and its relation to the French Revolution. These categories cut across the distinction between native and foreign traditions and help to explain why these traditions intertwine in the most complex of ways, why communism sees the struggle of competing attitudes to law. We distinguish, on the basis of the material we have been discussing, four 'ideal types' of social regulation: the Gemeinschaft type, the Gesellschaft type, the bureaucratic-administrative type, and the domination-submission type. In the Gemeinschaft type of social regulation, punishment, and resolution of disputes, the emphasis is on law and regulation as expressing the will, internalized norms, and traditions of an organic community, within which every individual member is part of a social family. Here there tends to be no sharp distinction, if there is any formal distinction at all, between the private and the public, between the civil wrong and the criminal offence, between politics, justice, and administration, between political issues, legal issues, and moral issues. There is little emphasis on the abstract, formal criteria of justice and the person at the bar of judgment is there, in principle, as a whole man, bringing with him his status, his occupation, and his environment, all of his history and his social relations. He is not there as an abstract right-and-duty-bearing individual, as just a party to the contract or as owing a specific and limited duty to another. Justice is thus substantive, directed to a particular case in a particular social context and not to the establishing of a general rule or precedent. The formalisms of procedure in this type of justice, which can be considerable, are linked with magical taboo notions, are emotive in content and concrete in formulation; they are not based on abstract rationalistic concepts of justice and procedure. The almost overwhelming strength of this Gemeinschaft strain in traditional Chinese legal procedure, with its emphasis on the emperor and the magistrate as the father of his people, and in popular Chinese concepts of the political order, justice, morality, and the place of the individual in society, is widely recognized; it
was also characteristic of proceedings in the Russian peasant mir. In Marxism, this same strain is represented by the Marxist critique of bourgeois democracy and bourgeois law, by the Marxist emphasis on man as a member of a community who cannot confront the community or the state on the basis of abstract equivalence and claim abstract rights as an abstract citizen-individual, by the Marxist rejection of political and legal formalism in favour of concrete social emancipation through the substitution of social action for merely political and legal action. In the Soviet Union, this strain has competed with other strains. It came very much to the fore in the period of war communism from 1917 to 1921, with its emphasis on popular tribunals, simplicity, informality, flexibility, and 'the revolutionary consciousness of justice' as opposed to the application of written codes, specific definitions, and formal procedures. It was revived, to a more limited extent, by Khrushchev in the early 1960s, with his proclamation of the accelerated building of communism and the increased participation of the populace in justice and administration through the informal comrades' courts in the work-place and housing units and through the volunteer citizens' police, the druzhinniki.19

The Gesellschaft type of law and legal regulation is in all respects the very opposite of the Gemeinschaft type. It arises out of the growth of individualism and of the protest against the status society and the fixed locality; it is linked with social and geographical mobility, with cities, commerce, and the rise of the bourgeoisie. It assumes a society based on individual as opposed to organic solidarity, made up of atomic individuals and private interests, each in principle equivalent to the other, capable of agreeing on common means while maintaining their diverse ends. It emphasizes formal procedure, impartiality, adjudicative justice, precise legal provisions and definitions, and the rationality and predictability of legal administration. It is oriented to the precise definition of the rights and duties of the individual through a sharpening of the point at issue and not to the day-to-day ad hoc maintenance of social harmony, community traditions, and organic solidarity; it reduces the public interest to another, only sometimes overriding, private interest. It distinguishes sharply between law and administration, between the public and the private, the legal and the moral, between the civil obligation and the criminal offence. Its model for all law is contract and the quid pro quo associated with commercial exchange, which also demands rationality and predictability. It has difficulty in dealing with the state or state instrumentalities, with corporations, social interests, and the administrative requirements of social planning or a process of production unless it reduces them to the interests of a 'party' to the proceedings.

19. There is a good deal of reason to suppose that Khrushchev's enthusiasm about these, which was not shared by the leaders of Soviet academic legal thought at the time and which has not been fully maintained by Khrushchev's successors, is an instance of Chinese developments reacting back on the Soviet Union and providing a Soviet leader with the ideas for reviving popular enthusiasm.
confronting another ‘party’ on the basis of formal equivalence and legal interchangeability. The American constitution and bill of rights and the French declaration of the rights of man and the citizen are the fundamental ideological documents of the Gesellschaft type of law, which reached the peak of its development in the judicial attitudes of nineteenth-century England and of nineteenth-century German Civilians. It is enshrined, at least in part, in the concept of the Rechtstaat and the rule of law. In the Soviet Union, Pashukanis argued with great cogency that this Gesellschaft concept of law is the characteristically legal or juridical concept, intimately connected with money economy, commodity production and the rise of the bourgeoisie, reaching its apogee in bourgeois society, and totally inimical to (Marxian) socialism, to pervasive revolutionary transformation, socio-economic planning, and the elevation of the community.20 The point on which any account or analysis of law must concentrate, Pashukanis argues, is that not all rules or norms are legal rules or norms, not all social relations are legal relations. It is not sufficient to refer to the state sanction behind them. Although most Marxists before him had taken the element of state compulsion to be the characteristic or defining element of law, Pashukanis insists that this element is not the characteristic or defining one. Army regulations, rules binding members of an order or of the priesthood, the authoritarian prescriptions of a family head or elder do not constitute or become law if or merely because they are sanctioned by external authority, be it even that of the state. They are not law, they do not have the form of law, because they are based on relations of domination and submission, because they involve obedience to rules rather than the determination of rights. What is characteristic of law, according to Pashukanis, what constitutes the ‘essence’ or formal quality of law, is the concept of a juridical subject confronting other juridical subjects on the basis of equality and ‘equivalence.’ Law is thus characteristically adjudicative and thereby distinguished from administration; its essence is involved and revealed in the concept of contract and not in the concept of the decree. The categories and principles characteristic of law (of a legal system) presuppose the legal subject as an individual, acting ‘freely’ in his relations with other ‘free’ individuals, having rights as well as duties. Such legal subjects must, in law, be abstracted from their social context, reduced to legal individuality and abstract equality, so that even the state can appear in litigation only as another individual subject, as having rights and duties vis-à-vis the citizen in the same way as the citizen has rights and duties vis-à-vis it. In line with this, Pashukanis attempts to show how the contractual model in fact dominates all areas of law: public law, with its concept of the social contract and of the rights of the citizen, criminal law, which makes the wrong-doer ‘pay’ for his crime by

20. E.B. Pashukanis, Obshchaya teoriya prava i Marksizm (Moscow, 1924), translated into German from the third Russian edition as Allgemeine Rechtstheorie und Marxismus (Berlin-Vienna, 1929) and into English by Hugh W. Babb in Babb and Hazard, Soviet Legal Philosophy (Cambridge, Mass., 1951), at 111–225.
assigning fixed penalties, matrimonial and family law, which dissolves familial relationships into a system of reciprocal rights and duties. Here Pashukanis is much closer than Lenin or Reisner (or Vyshinsky and the contemporary Soviet legal theorists) to Marx's fundamental critique of 'abstract' law and 'abstract' bourgeois justice as proclaiming a formal equality which—in the concrete social situation of class societies—amounts to imposing real inequality. 'The “Republic of the Market,”' Pashukanis writes in the preface to the second Russian edition of the General Theory, 'conceals the “Despotism of the Factory.”'

Marxist writers, in treating law as ideology, in emphasizing the element of state compulsion and of hypocritically concealed class interest, Pashukanis argues, fail to notice the much more direct connection between law and the economic structure of society. The fundamental presupposition of law, the principle of the legal subject—involving the formal principle of freedom and equality, the autonomy of the person, etc.—is not merely a hypocritical tool used by the bourgeoisie to enslave the proletariat. It is a real, active principle embodied in bourgeois society once it breaks free from the feudal-patriarchal order. The victory of law is not merely an ideological process, but a real material process—a judicializing of human relations which accompanies the development of commodity and money economy (in Europe, of capitalism). It involves the overthrow of serfdom and the separation of political power from society as a particular, partial power. Law is not just the 'ideology' of the bourgeoisie, it is a reflection of the assumptions of commodity exchange—it reflects and secures the conditions necessary for the barter and exchange of products on which commodity production (production for a market) is built. Legal categories, Pashukanis goes on to argue, are a precise parallel to the (similarly 'abstract') economic categories of commodities-producing societies, value, capital, labour, rent—categories that are fundamental to bourgeois economics and economies, and to all commodity-producing economies, but that simply lose their medium of existence in societies not oriented to exchange, in societies where production, for example, is for use. Just as bourgeois society is the most highly developed and most abstract form of commodity-production, so bourgeois law is the most highly developed and abstract form of law and legal relations. The juridical subject is the abstract goods-possessor elevated to the heavens; the legal relations into which he enters correspond to the commercial relations into which he enters in the market place, express them, and safeguard the conditions of their existence. It is thus, according to Pashukanis, that law in the proper sense develops around the activities of barter and trade, finds its initial strongholds in cities, comes into conflict with patriarchal relations and all other relations of formal political or legal domination and submission, finally reaching its apogee in bourgeois society. In socialist society, in which production is no longer for exchange, the categories of law become as irrelevant, are as fatally undermined, as the categories of market economics. Policy,
economic planning, administration replace law. The concept of the juridical
subject is as inapposite in socialist society as it is in a primitive commune, an
army, or a work-team. Thus Pashukanis insisted that the codes enacted in
the Soviet Union in the 1920s were in no sense socialist law—a contradic-
tion in terms—but were bourgeois law, necessary because exchange relations
had not yet been eliminated in the Soviet Union. Even in criminal law, he
argued, the Soviet codes were still bourgeois in being permeated through
and through with the principle of equivalence of retribution. The systematic
development of a genuine socialist principle—the principle of the protection
of society—would require not a tabulation of the separate constituents of
crime (with which the measure of punishment ... is logically associated)
but an exact description of the symptoms characterizing a condition which
is socially dangerous and an elaboration of the methods which must be
applied in each given case in order to make society secure. In economics and
administration generally, the socialist and social principle of khozraschet—
of social cost and social accounting—would replace the bourgeois legal in-
dividualist principle of ownership.

Pashukanis' attack on 'law' (by which he meant Gesellschaft law) was
partly linked with the fact that communist régimes, as revolutionary régimes,
are concerned with mobilization and far-reaching social transformation:
therefore they have—initially—seen law not as the foundation of their rule
and their form of social and political organization, but rather as an instru-
ment for furthering radical change. This attitude was spelt out clearly—too
clearly for Stalin's taste—by Pashukanis, during an important speech in
1930:

In bourgeois-capitalist society, the legal superstructure should have maximum
immobility, maximum stability, because it represents a firm framework for the
movement of the economic forces whose bearers are capitalist entrepreneurs ...
Among us it is different. We require that our legislation possess maximum elas-
ticity ... law occupies among us ... a subordinate position with reference to
politics. We have a system of proletarian politics, but we have no need for any
sort of juridical system of proletarian law.21

Behind this, however, was a more fundamental break, not only with the
individualism of Gesellschaft law, but—implicitly—even with the static
community of Gemeinschaft law. Pashukanis was concerned to elevate the
social interest, but he linked this interest very closely indeed with technical
and administrative requirements.22 He elevated, in other words, the socio-

21. As translated in Babb and Hazard, Soviet Legal Philosophy (Cambridge, Mass.,
1951), at 279.
22. This view of law, recognized and rejected by Dicey as the concept of law associated
with 'the period of collectivism,' had been put forward rigorously and systematically by
Duguit, who saw law as serving social, collectivist, solidarist interests and flatly rejected
the concept of individual rights and of the individual subject as providing the real content
of law. Law served social interests, social purposes, and bound individuals in their name.
In a milder form, this new emphasis on the social purposes enshrined in law can be traced
in the criteria with which the non-Marxist German Social Democrat Gustav Radbruch
technical norm in place of the individual and the community. He thus brought out another element implicit in socialism and extremely prominent in the Soviet Union at the height of Pashukanis' influence — the element of bureaucratic-administrative regulation, which provides the third of our categories. It is this category which has strong links with the Saint-Simonian, étatist strain in socialism and with communism as a technique for industrialization; it also accounts for the ambiguous relation of both socialists and communists to Gemeinschaft and Gesellschaft law. For while Gemeinschaft type law takes for its fundamental presupposition and concern the organic community, Gesellschaft type law takes for its fundamental presupposition and concern the atomic individual, theoretically free and self-determined, limited only by the rights of other individuals. These two ‘ideal types’ of law necessarily stand in opposition to each other, though in any actual legal system at any particular time both strains will be present and each type may have to make accommodations to the other. In the bureaucratic-administrative type of regulation, the presupposition and concern is neither an organic human community nor an atomic individual, it is a non-human ruling interest, public policy, or on-going activity, of which human beings and individuals are subordinates, functionaries, or carriers. The (Gesellschaft-) law concerning railways is oriented toward the rights of people whose interests may be infringed by the operation of railways or people whose activities may infringe the rights of the owners or operators of railways seen as individuals exercising individual rights. (Bureaucratic-administrative) regulations concerning railways take for their primary object the efficient running of railways or the efficient execution of tasks and attainment of goals and norms set by the authorities and taken as given. Individuals as individuals are the object of some of these regulations but not their subject; they are relevant not as individuals having rights and duties as individuals, but as part of the railway-running process and its organization, as people having duties and responsibilities. Such people are seen as carrying out rôles, as not standing in a ‘horizontal’ relation of equivalence to the railway organization or to all their fellow-workers, but as standing in defined ‘vertical’ relations of subordination and sub-subordination. Bureaucratic-administrative regulation, thus, is quite distinct from both Gemeinschaft and Gesellschaft law, but it does not stand in quite the sharp uncompromising distinguishes law from morality or custom: 1 the externality of the interests served; 2 the externality of evaluation and judgment (contrast between morality and law); 3 the externality of the aim; 4 the externality of the source of legitimacy or validity (contrast between heteronomy and autonomy): see Gustav Radbruch, Einführung in die Rechtswissenschaft (Leipzig, 1925, 5th and 6th eds.), at 17–19. Radbruch's defining characteristics, of course, are devised with a number of past disputes in mind, including the question of autonomy or heteronomy in law, and put special emphasis on distinguishing law from morality. This is a concept of law drawing on very different sources and sets of assumptions than those of Gesellschaft law: on the French droit administratif, on public, as opposed to private, law, on solidarist political traditions (whether they be socialist or those of the corporate state), on a concept of law as serving interests higher than those of the individual. Pashukanis' work is a continuation as well as a radical criticism of Duguit; it is also perhaps the clearest appreciation of what is involved in 'the concept of law' in the Gesellschaft sense.
opposition to them that they do to each other; pursuing different aims, it
nevertheless finds points of contact and affinity with each of the other forms.
The bureaucratic-administrative emphasis on an interest to which individuals
are subordinate, on the requirements of a total concern or activity, brings it
to the same critical rejection of Gesellschaft individualism as that which is
characteristic of the Gemeinschaft; it gives it a similar interest in maintaining
harmonious functioning, in allowing scope for ad hoc judgment and flexi-
bility, in assessing a total situation and the total effects of its judgment in
that situation. This is why the growth of corporations has produced Gemein-
schaft-like features in the internal direction of the corporation, even while
the corporation maintains Gesellschaft relations with its external counter-
parts. At the same time, bureaucratic-administrative regulation is a pheno-
menon of large-scale, non-face-to-face administration, in which authority
has to be delegated. As the scale grows, bureaucratic rationality—regularity
and predictability, the precise definition of duties and responsibilities, the
avoidance of areas of conflict and uncertainty—becomes increasingly im-
portant. This requirement of bureaucratic rationality in the bureaucratic-
administrative system stands in tension with Gemeinschaft attitudes, unless
they are strictly limited in scope. It finds a certain common ground with the
distinguishing features of Gesellschaft law in the emphasis on the universality
of rules and the precise definition of terms, in the important role ascribed to
the concepts of intra and ultra vires, in the rejection of arbitrariness and of
the excessive use of ad hoc decisions to the point where they threaten this
rationality. In the Soviet Union, the bureaucratic-administrative strain has
been very strong indeed, imperfect as the execution may often have been.
While earlier Soviet theoreticians saw law being replaced by the plan, which
would strengthen the Gemeinschaft side of socialism, in fact the influence of
plan and of bureaucratic requirements in the Soviet Union has been notably
in the direction of strengthening the presuppositions of bureaucratic ration-
ality and of thus strengthening, at least to some extent, the respect and need
for Gesellschaft law. This point, of course, is of crucial importance for
assessing future development in China, where the prospects of Gesellschaft
law are intimately associated with the elevation or non-elevation of bureau-
kratic-administrative features and requirements and the consequent growth
or retardation of interest in bureaucratic rationality.

Much of the argument in jurisprudence has been concerned with judging
the merits of competing prescriptions for the use of the term ‘law,’ though
the dispute has rarely been purely verbal. There is a strong tradition which
wants to reserve the word ‘law’ for use in a narrow sense (as in ‘the rule of

23 The demarcation between Gesellschaft law and bureaucratic-administrative regulation has been partly obscured by that bureaucratic rationality which gives them some common elements and features. It is made even more complex in western societies, especially in the British Commonwealth and the United States, by the extent to which Gesellschaft law has shaped social attitudes and expectations and has made respect for the legal rights of those involved an important condition for successful bureaucratic direction and adminis-
trative control.
law’) to refer to what we have called the Gesellschaft type. Others would say that Gemeinschaft law is also law and some use the word ‘law,’ at least in one sense, broadly enough to include bureaucratic-administrative regulation, even in its pure ideal type form, as well. Domination-submission, however, is clearly extra-legal and supra-legal in that it neither implies nor requires a structured system of regulation incorporating certain values and moral or socio-political assumptions; gangsters can and do rule by terror and the imposition of force and they need not ideologize their pretensions. Domination-submission therefore does not inevitably confront the Gemeinschaft, the Gesellschaft, and the bureaucratic-administrative form as a fully blown rival pattern of a social structure or value-system; it can, to some extent, live above or within all of them, modifying or shaping the conditions in which they operate. It is also, to some extent, implied by each of them. The ideals of Gemeinschaft, in their classic formulation, incorporate domination-submission in so far as it can be plausibly presented as voluntary exercise of ‘parental’ responsibility and voluntary submission to ‘parental’ will. As such, they are particularly susceptible to degeneration into naked relations of personal domination and helpless or hopeless submission. The French Revolution and the ideals of the Gesellschaft were, in fact, a protest against precisely this sort of degeneration, an attempt to create a political and legal system that was by its very nature inimical to the institutionalization of status, of dependence, of relations of personal dominance and submission. It was an attempt to replace the government of men by the government of law. Gesellschaft law as a pure ideal type is indeed inimical to the recognition of social hierarchies; it does presuppose the equality and equivalence of all the parties before it and it operates best when those parties are in fact equal and do not stand, one to the other, in a relation of pervasive dependence or subordination. 24 The bureaucratic-administrative form, on the other hand, lends itself much more readily to an institutionalization of domination-submission. In communist countries, including China, the domination-submis-

24. The criticism of the Gesellschaft and of Gesellschaft law is that dependence and subordination manifest themselves in extra-legal areas, in difference of economic power, education, etc. and that the legal fiction of equality and equivalence in fact promotes inequality and inequivalence. The Republic of the Market, as we have seen Pashukanis saying, conceals the Despotism of the Factory. Concern with this aspect of the matter has produced and is still producing the heavy inroads of social regulation, partly of a Gemeinschaft and partly of a bureaucratic-administrative character, into contemporary law in the west, resulting in mixed forms born of attempts to elevate ‘public’ interests and ‘social’ requirements while keeping some presumptions in favour of individualism and individual rights as a barrier against the tyranny of the state or of the majority. In many communist states, especially in eastern Europe, liberals and ‘revisionists’ have been striving for the same optimal pragmatic mixture by seeking to emphasize and develop a ‘socialist’ doctrine of natural justice and individual human rights that would strengthen Gesellschaft-like conceptions of legality and effectively check the manipulation, terror and tyranny not made impossible by the ‘parental’ legal procedures and attitudes linked with the Gemeinschaft elements in communism or by concentration on the bureaucratic-administrative concern with ‘social’ policy, the ‘public’ interest, and the maintenance of order and ‘proper’ functioning as the real subject of law, having primacy over all other interests. China may seem still remote from this stage of development — yet it formed an important theme in the Hundred Flowers period of comparatively frank expression.
sion relation has been institutionalized, or at least ideologized, in the doc-
trine of the leading role and historical infallibility of the communist party
and in the proclamation of ‘democratic centralism’; a vast range of legal
and extra-legal measures have been taken to ensure that that domination
remains secure. The overwhelming basis of domination is, in the narrower
senses of law, extra-legal. Though Gemeinschaft attitudes and bureau-
cratic-administrative structures are more easily manipulable in the interest of
domination than Gesellschaft attitudes and structures, Gemeinschaft can
produce a dangerously uncontrollable popular enthusiasm or resistance
through its implicit elevation of fellowship, of popular participation and
non-impersonal relations, and its stress on the mutual ties between rulers
and ruled. On the other hand, bureaucratic rationality can produce attitudes
highly critical of irrational bases for domination and ‘inexpert’ personnel in
control. The history of the Soviet Union in the past fifty years confirms all
of these points: the Soviet régime has been able to manipulate all three of
the ideal types in the interest of its domination, but it has also been con-
fronted by limited challenges from each. The Soviet government, indeed,
has not committed itself exclusively to any of the three types. It has kept all
the options open and has quite skilfully balanced Gemeinschaft and bureau-
cratic-administrative attitudes and procedures with appeals to socialist
legality and limited but patent Gesellschaft guarantees and assurances.

The state-imposed laws of imperial, traditional China, where they are
not primarily rules of bureaucratic organization, as they so largely were, may
be seen in either of two ways. They presuppose and seek to maintain the
social life of the Gemeinschaft and even the emperor’s seemingly arbitrary
exercise of judicial and punitive powers is taken to be part of his parental
function. In this sense, they are the laws of a Gemeinschaft concerned with
a whole man and an organic society. At the same time, the dominant
Confucian tradition with its strong internalization of Gemeinschaft values
had to insist that rigorous punitive intervention by the state and its magis-
trates was a sign that social harmony had been breached, that the Gemein-
schaft had been broken. It thus presents state law, not as a product of the
Gemeinschaft, but as an attempt to restore the Gemeinschaft through a
basically external intervention, through the iron-fisted exercise of power
relations, of domination and submission. The external intervention was
justified or ideologized in so far as its aim was to restore the Gemeinschaft
and in so far as it was based on the emperor’s recognition of his duties as
parens patriae, but the punitive laws themselves could be seen, in this con-
text, as terroristic interventions, as resting immediately if not ultimately on
bare domination and submission. Imperial China, indeed, went much further
than this; it enforced and symbolized, in the kowtow, the institutionalized
acceptance of total imperial power, the citizen’s complete prostration before
the emperor and the magistrate.
This aspect of terroristic intervention, of total domination and submission, is stressed by the theorists of totalitarianism and in Professor Wittfogel's theory of the hydraulic society and its agro-managerial despotism. It cannot be counterposed, as a 'native' Chinese tradition, to the Marxist-Leninist view of state administration and judicial or extra-judicial punishment. The systematic use of legal and extra-legal terror as an exercise of naked domination has played an important role in the development of all communist states; it is given ultimate ideological foundation, but no coherent legal or ideological form, by the doctrine of the leading role of the party and of the necessarily ruthless dictatorship of the proletariat. It is best understood, however, in relation to the Gemeinschaft concept or aspirations that strive to give it legitimacy, for even a heavily terroristic government, especially in modern conditions, will seek to legitimize its despotism and conceal its arbitrariness; it will argue that terror is used to restore or create a Gemeinschaft and applies only to the violator who has put himself outside it. There is thus again a complex intertwining of traditional and foreign themes, of universal problems and trends which emerge just as clearly in other communist societies and are as much Marxist-Leninist as Chinese. The use of terror in the pre-1949 Red Areas of China and the further developments since bring this out clearly; they also indicate the care that the Chinese communist party has taken to limit the application of terror, at any particular time, to a specifically circumscribed section of the population small enough to be treated as standing outside the Gemeinschaft and to limit the duration of any specific terror-campaign in such a way as not to threaten the underlying Gemeinschaft legitimation of the party. This is the aim and significance of the important distinction re-emphasized by Mao Tse-tung in his famous 1957 speech on contradictions between the (Gemeinschaft) ways of handling contradictions among the people and the (domination-submission) use of coercive terror in handling contradictions between the people and its enemies.

The history of any society is not a monolithic story, however much its rulers may wish it were. At the ideological level, we have attempted to show, the Soviet Union since the 1920s has seen a tension between three mutually antagonistic concepts of the regulation of social life. The Gemeinschaft strain, linked with the anarchist component in Marxism and drawing to some extent on the traditions of the peasant mir, rejects legalistic and bureaucratic methods of control and relies on spontaneous, informal community pressure, 'revolutionary justice,' and social opinion. It puts a heavy premium on conformity, in principle completely rejects legal safeguards that would protect the individual from social persecution, and provides, in Soviet conditions, forms of social pressure that are hard to resist and are yet almost completely manipulable by the party and the authorities. It also enables the
régime to turn to its own use popular anti-semitism, dislike of intellectuals, resentment of dissident nationalisms by increasing the role played by popular prejudice in a way that would look far worse in formal legal proceedings.

The second strain, the administrative-bureaucratic strain, sees law as concerned with social regulation in terms of the state and party interests and not as adjudication between private or individual interests. It is still the strongest strain in the Soviet Union; it is entrenched in various ways in the civil and criminal codes, which see all rights as granted by the state and wrongs as those activities which are socially dangerous. It accounts for the concern, in Soviet administration and Soviet legal proceedings, with a kind of bureaucratic correctness and pedantry. Soviet courts will ride blatantly over constitutional and individual rights; but they are genuinely shocked if the file is not in order, if the proper bureaucratic preliminaries to the trial have not been carried out in proper bureaucratic form.

The third strain, the Gesellschaft strain, stems from the emphasis on socialist legality, impartial arbitration and formal constitutions beginning with the NEP and given some ideological foundation during the period of Stalin, mostly with an eye on internal stability and foreign propaganda. It involves at least lip-service to constitutionality, independence of the judiciary, formal legal correctness, and the protection, even if in a limited way, of individual rights and some civil liberties. The de-Stalinization campaign initiated by Khrushchev raised the expectation that this strain in Soviet life would now be strengthened. In fact, the Soviet government has continued to opt for its sophisticated and quite subtle policy of using all three strains while playing each off against the other, in a so far successful bid to ensure that there is no significant social organization, tradition, or movement challenging the primacy of the party and the state. In Communist China, the same trends and tensions are at work, but the Gemeinschaft strain has been far stronger; the bureaucratic-administrative strain, while far from absent, has been seriously weakened by the failure of China to embark on massive industrialization; and the situation is still in flux. Its future, we would argue, depends on the comparative balance and the interrelation of those fundamental strains or 'ideal types' of social regulation that we have attempted to isolate and describe in this article.

25. The expectation has proved false: in the last three years, the power of the KGB-MVD has again enormously increased; the extent of legal repression and the number of illegalities perpetrated by the authorities have increased and have become more blatant. But, for the first time since the 1920s, Soviet citizens are beginning to challenge these acts as illegalities and, for the first time since the 1920s, they are able to have their protests heard, in the first place, of course, in the west, but through the west and through foreign communists to a growing extent within the Soviet Union itself.