Towards a Materialist Theory of Law

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Preliminary: the work of E.B. Pashukanis

As far as I know, the only man who has made a real contribution towards a materialist philosophy of law is a little known Russian: E.B. Pashukanis. He published his little book on the ‘General Theory of Law and Marxism’ in 1924. A German translation also appeared. Criticism of Pashukanis began to mount in the late twenties, and he found it desirable to publish an article correcting his errors in 1930. This did not save him from being liquidated in 1937 as a member of ‘a band of wreckers’ and ‘Trotsky-Bukharin fascist agents’ (thus Vyshinsky). Pashukanis represents the high point in the development of Soviet legal philosophy; after his fall the usual band of time-serving philistines and eclectics took over the field.

My sole source for facts about Pashukanis, and for translations of his work, is an anthology entitled Soviet Legal Philosophy that appeared in 1951 from the Harvard University Press. This volume gives us the 1924 work (translated from the third edition 1927), and the self-criticism of 1930. The above quotation of Vyshinsky’s denunciation also comes from this anthology (p. 315). Unattributed page numbers in the text below refer to this volume. Unfortunately the translations are so hopelessly bad that only an ‘educated’ reading can make sense of them. For example: ‘commodities’ is persistently mistranslated as ‘goods’, hence making points about the historically relative character of commodity production hopelessly incoherent: conversely, ‘exchange’ is often translated as ‘barter’—a particularly primitive form of exchange—thus confusing the issues still further.

In the matter that follows I am heavily indebted to Pashukanis’ ideas, even where he is not explicitly mentioned.

The Critique of Ideological Forms

One Marxist approach to the critique of law consists in demonstrating the conformity of laws and legal institutions with the material interests of the ruling class. However, what is required in the materialist explication of the legal sphere is not merely an investigation of the material content of legal regulations, but also a materialist account of the form of law itself. It is easy to point out that modern capitalism could not exist with strict prohibitions against usury. Similarly, it is perfectly clear what social forces were involved in the struggle over legal limitations on the length of the working day—so graphically depicted by Marx in Capital. Pashukanis embarks on more subtle problems: he analyses such concepts as ‘legal rule’, ‘legal person’, and so on, which, it seems, can be taken in abstraction from any specific content. In accordance with the principles of historical materialism, these concepts are

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grounded in the sub-structural analysis, but he rejects that vulgar Marxism which contents itself with reducing legal forms to their economic, or class, content. A materialist account of the specific character of the legal form is required which does not dismiss the purely legal concepts as 'ideological phantasms', but explicates them theoretically in terms of their reality and historical significance.

When Marx refers to law as an 'ideological form', what are we to understand by this? Some Marxists tend to argue that an ideological form lacks any reality, and is merely a mystificatory form of consciousness which has to be swept aside in order that science may get at the real relations. Its origins are tacitly assumed to lie in the realm of psychology--either in deliberate brainwashing of the population by the ruling class, or else in some form of self-deception. However, such a strict dichotomy between reality and illusion is worse than useless for handling the peculiarities of ideological forms. The truth is that an ideological form is the form of a certain reality—a distorted and misleading form maybe: but nevertheless an aspect of that reality, which structures, not only consciousness, but human relations in a way which reproduces the material basis of society while simultaneously obscuring its true shape. The ideological forms are not mere fairy stories arbitrarily added to the real economic content of social relations to disguise them. Their relatively autonomous forms are necessary expressions of the economic content at a specific level of the social structure, the problematics of which must be respected, however much the claims of the ideologists need to be contested in the light of the material determination of these forms by the substructure. Until the existing mode of production is overthrown, these ideological forms express the nature of social relationships with a certain validity. The task of a Marxist critique of law is not to prove that juridic concepts are consciously manipulated by bourgeois publicists in order to browbeat workers (which is indisputable), but to show that in them—in these concepts—social reality takes on an ideological form which expresses certain objective relationships arising from the social relations of production and stands or falls with them. An ideological form cannot die out except with the social conditions which generated it. The struggle against ideology, however, does help to deprive it of the capacity to mystify the social relationships out of which it grew, and to make possible a scientific politics.

**Historical Specificity**

If law is not explored in terms of its own internal structure, then its peculiar character will be dissolved away into some vaguer notion of social control. This is all most Marxists provide. What would we say of a history of economic forms in which the basic categories of economic theory—value, capital, surplus, rent, and so forth—were lost in a hazy and undifferentiated concept of 'economy'? Yet 'Renner puts at the foundation of his definition of law the concept of an imperative addressed to the individual by society (considered as a person). This artless conceit seems to him a perfectly adequate exploration of the past, present, and future, of legal institutions.' (p. 117) And Bukharin defines law as the body of coercive norms issued by the state authority in the
hands of the dominant class. Such formulae do not grasp the inner connections embraced in the concept of law.

'In place of providing a concept of law in its most complete and distinct form—and thus demonstrating the significance of that concept for a defined historic epoch—they offer us a purely verbal commonplace concerning 'external authoritarian regulation' suitable to all epochs and stages of the development of human society alike.' (p. 118)

A form of social life which undergoes a process of development, and of differentiation within the social whole, cannot be understood through the scholastic categories of genus and species. Like all social forms the legal system has an historical dimension. Instead of ranging widely over the ages it is better to focus our attention where law attains its maximum degree of completeness and distinctness. That is to say, it must be analysed in the context of the appropriate social relations.

If we look at Marx's great economic work we find that he sets out to analyse the law of motion of capitalist society. Thus he begins his investigation, not with ratiocination concerning production in general, but with an analysis of definite elements—the commodity form and value. Political economy, as a theoretical discipline employing its own specific concepts, has as its object of investigation a distinct set of social relations—not some supra-historical method of maximising scarce resources or whatever. As Engels says: 'Political economy begins with commodities, begins from the moment when products are exchanged for one another...' Naturally, insofar as economics concerns itself with production and distribution it is concerned with general features of human life. However, it is quite mistaken to try to subsume earlier and later modes of production under the same categories: nothing but trivial tautologies can be produced that way. So long as value relationships are absent, it is only with difficulty that economic activity is distinguished from the aggregate of life functions which constitute a unitary whole. With the gradual emergence of commodity relations, and especially with the advent of the capitalist mode of production, economic life becomes a separate structure without any admixture with kinship systems, political hierarchies, or whatever, and its form must be understood in terms of a set of concepts specific to it. We find that Marx studies a specific developed form of production, and that, moreover, which has attained the highest degree of determinateness, and differentiation from the rest of social life.

Similar considerations are completely applicable to the general theory of law. The fundamental juridic abstractions reflect definite social relations. The attempt to find a definition of law which would answer to human nature or social life in general—as well as to the complex and specific modern forms—must inevitably lead to scholastic and purely verbal formulae.

Against 'Proletarian Law'

A further point of note is that, since Pashukanis sets out to treat law as an historic form which achieves fullest expression in the bourgeois epoch, and ties it closely to the commodity economy, he opposes that super-proletarian-ism which demands that bourgeois forms be overthrown and replaced by
proletarian ones. For Pashukanis, this position is implicitly conservative; since it proclaims that the form of law is an eternal one capable of infinite renewal. 'The point is that the transition period—when the dictatorship of the proletariat is achieving the revolutionary transition from capitalism to communism—cannot be regarded as a special and complete socio-economic integration, and it is therefore impossible to create for it a special and complete system of law or to seek out any special form of law, starting from a symmetrical arrangement such as: feudal law, bourgeois law, and proletarian law.' (Quoted by Vyshinsky p. 331)

The dying out of the categories of bourgeois law by no means signifies that they are replaced by new categories of proletarian law—precisely as the transition to expanded socialism does not mean that new proletarian categories of value, capital, rent and interest appear, as the bourgeois forms die out. The categories of bourgeois law die out because law in general dies out—the juridic element in human relations gradually disappears.

We will come back to the future of law. Here we just mention the possible objection to the thesis that law will die out based on the claim that, even if economic conditions change greatly, there will always exist certain crimes against the person, and other non-economic offences. This is met by Pashukanis through a methodological device similar to that employed by Marx when he deals with certain commodities that do not contain labour by saying that they have a price but no value; i.e. he says that the primary basis of law is rooted in commodity relations, and hence so-called private, or civil, law, and that modern public, or criminal, law is an extension of this conceptually. Unlike civil law, criminal law has a content which is not adequate to its form.

'To reason that courts and statutes will remain for ever and aye, for the reason that certain crimes against personality and so forth will not disappear under the maximum of economic security, is to take elements which are derivative and of minor importance for the principle and basic elements.' (p. 124) For even advanced bourgeois criminology is convinced theoretically that criminality is a medical problem for whose solution the jurist with his codes, his concept of guilt' and 'responsibility' and his subtle distinctions between participation, complicity, and instigation, is entirely superfluous. If this conviction has not yet lead to the abolition of criminal courts, this is only because overcoming the form of law is associated with a radical deliverance from the entire framework of bourgeois society. For Pashukanis, the secret of the legal concepts of legal rule, legal person, and so forth, does not lie in the sphere of the matter dealt with by the criminal law as such, although the concepts are extended to this matter—which is treated as though it did conform to the basic notions, to which we now turn.

The basis of law

Pashukanis approached the solution to his problem by making a distinction between legal regulation and other forms of regulation, in the following way. He argues that the juridic element in the regulation of human conduct enters where the isolation and opposition of interests begins. He goes on to tie this closely to the emergence of the commodity form in mediating the material
interchanges of society. In illustrating the specific character of the legal regulation of behaviour, he compares it with technical regulation. 'A railroad timetable regulates the movement of trains in a sense entirely different from, let us say, that in which the statute concerning the responsibility of railroads regulates the relationships between them and the consignors of freight...' (p. 135-36)

In technical regulation unity of purpose can be assumed, but a controversy is a basic element in everything juridic. There are two contesting sides defending their rights. Pashukanis puts his view on this in a deliberately paradoxical fashion: 'Historically, law started from a controversy—that is to say from a law-suit...' (p. 147) He is claiming that law arises in order to cope with competing interests and that the cell-form of law is the legal person asserting a claim: 'The subject—as bearer and addressee of all possible demands—and a chain of such subjects bound together by the demands addressed to each other': here we have the basic juridic fabric answering to the economic fabric (that is to say to the production relationships of a society resting upon a division of labour, and exchange). (p. 152)

Pashukanis' basic materialist strategy is to correlate commodity exchange with the time at which man becomes seen as a legal personality—the bearer of rights (as opposed to customary privileges). Furthermore, this is explicable in terms of the conceptual linkages which obtain between the sphere of commodity exchange and the form of (bourgeois) law. The nature of the legal superstructure is a fitting one for the mode of production. For production to be carried on as production of commodities, suitable ways of conceiving social relations and the relations of men to their products have to be founds, and are found in the form of law. Pashukanis is claiming that the material premises of juridic relations were ascertained by Marx himself in the first volume of Capital, and that the general intimations to be found there are far more fruitful for the understanding of the juridic element in human relationships that all the bulky treatises on the general theory of law. Furthermore, the formal character of the legal subject he derives directly from Marx's analysis of commodity production.

Let us remind ourselves of the relevant points from the first two chapter of Capital. In a society based on Commodity production both products and persons appear in the process of exchange only as abstractions. The social relationships of human being take material form not as direct personal bonds, but under the guise of the value relationship between commodities. The commodity itself is here considered not as an object with a multiplicity of useful attributes but merely as a simple material wrapper of the abstract attribute of value which is manifested in the capacity to be exchanged with other commodities in a definite ratio. 'These quantities vary continually, independently of the will, foresight and action of the producers' says Marx. 'To them, their own social action takes the form of the action of objects, which rule the producers instead of being ruled by them'.

Nevertheless, even if this is so, the realization of value during the process of exchange does presuppose a conscious act of will on the part of the
possessor of the commodity. For, as Marx puts it: 'It is plain that commodities cannot go to market and make exchanges of their own account. We must therefore have recourse to their guardians, who are also their owners. Commodities are things and therefore without power of resistance against man. If they are wanting in docility he can use force; in other words he can take possession of them. In order that these objects may enter into relation with each other as commodities, their guardians must place themselves into relation with one another as persons whose will resides in these objects...'

Note here that the relation between the person and the thing is specified in terms of the appropriation of the latter through the former's will and that this relation is required for the concrete realization of the value-relation between 'things through mutual alienation by their owners.

The Marx quotation is completed as follows: 'In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in to relation to one another, as persons whose will resides in these objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must therefore, mutually recognise in each other the rights of private proprietors.'

Pashukanis's thesis therefore is summarised thus: at the very same time that the product of labour is taking on the quality of the commodity form and becoming a bearer of value, man acquires the quality of a juridic subject and becomes the bearer of a right. If things are economically the rulers of men through 'the fetishism of commodities', (Marx) then man is juridically dominant over the thing because he, as an owner, is an abstract impersonal subject of rights in things.

Marx says: 'The persons exist for one another merely as representatives of, and, therefore, as owners of, commodities. In the course of our investigation we shall find in general that the characters who appear on the economic stage are but the personifications of the economic relations that exist between them.'

It is here that Marx breaks with idealism in his analysis. Hegel, and so many bourgeois theorists, presents economic activity as the outcome of intercourse between property owners; and property right is derived from the necessity of the concept i.e. the self-determination of freedom. Marx, on the other hand, says: 'This juridical relation, which...expresses itself in a contract, whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two. It is this economic relation that determines the subject matter comprised in each such juridical act.' Social life in the present epoch has two distinctive and complementary features: on the one hand, human relationships are mediated by the cash nexus in all its forms, market price, rate of interest, credit-worthiness, etc., in short all those relationships in which persons are related in terms of things; on the other hand, we have relationships where man is defined only by contrasting him to a thing—that is to say where he is a

1. Capital, p. 84 & qu. SLP p. 162
2. Capital p. 84 & qu. SLP p. 163
3. Capital p. 84-85
4. Capital p. 84
subject—or the juridical relationships (primarily ownership). The social bond appears simultaneously in two incoherent forms: as the abstract equivalence of commodity-values, and as the capacity of man to be the abstract subject of rights.

'In the same way that the natural multiformity of the useful attributes of a product appears in commodity exchange merely as a simple wrapper of value and the concrete species of human labour are dissolved in abstract human labour as the substance of value—so the concrete multiplicity of the relationships of man to a thing appear as the abstract will of the owner, while all the specific peculiarities distinguishing one representative of the species homo sapiens from another are dissolved in the abstraction of man in general as a juridic subject.' (p. 163)

From a legal point of view, the capacity to perfect commodity exchange is merely one of the concrete manifestations of the general attribute of legal capacity and capacity to act. Historically, however, it is precisely commodity exchange which furnished the idea of a subject as the abstract bearer of all possible legal claims. It is only in the conditions of commodity production that the abstract legal form is generated—that is to say, it is only there that the capacity to have a right in general is distinguished from specific legal claims and privileges. It is only the constant transfer of rights taking place in the market which creates the idea of an immobile bearer of those rights. In the market, the obligee is himself obligated at the same time... The possibility of being abstracted from the specific differences between subjects of rights and of bringing them within a single generic concept is thus created.' (p.167)

**Property Right**

The ideological understanding of the relation of law to the substructure gets things 'upside down', in so far as perfected commodity exchange is subordinated conceptually to a generalised legal capacity.

The abstract capacity of all men to be the bearers of property right indeed makes it difficult for bourgeois thought to see in man anything else than a subject of rights. Legal fetishism complements commodity fetishism. Let us look at this more closely in connection with the ambiguities of the term 'property'. Pashukani goes into the dialectic of the twin aspects of property: the appropriation of the thing and the recognition of this possession by others as property rightfully held. On the one hand, it seems natural to develop the second out of the first. On the other hand, the organic relationships of appropriation and use which are prior to the 'recognition' of property right constitute 'ownership' only in a non-legal sense. 'Per se the relationship of man to a thing is completely lacking in juridic significance of any sort.' Hence jurists automatically try to conceive of the institution of private property as primarily a social relationship. 'They construe the relationship, however, in a purely formal manner—and their construction is moreover negative, being universal prohibition, resting upon all except the owner, against using and disposing of the thing.' (p. 170)

Pashukani comments on this latter move: 'While this conception is suitable for the practical purposes of dogmatic jurisprudence, it is completely unsuited to theoretical analysis. In these abstract prohibitions, the concept of property loses every sort of living meaning and repudiates its own pre-juridic history.'

For Pashukani the natural passes imperceptibly into the juridic as a result
of the development of exchange and circulation, which made it necessary for people to ‘don the mask of owner’ as he puts it.

Furthermore, in a completely developed commodity system the original organic unity of man with that which he has won from nature is broken. Indeed, the possibility of alienating things from one owner to another which seems such a convenient aspect of the property system reverses the meaning of property so that instead of the annexing of things to the human world, human qualities are turned into things to be bought and sold.

Pashukanis looks forward to the disappearance of property right in this passage: ‘The seizure of political power by the proletariat is a fundamental condition precedent to socialism. However—as experience has shown—it requires more than a day for production and distribution through planned organisation to take the place of the market exchange. If such a change were possible the juridic form of property would then have been exhausted historically and at the same moment have completed its cycle of development by returning to its starting point: to objects of direct individual and social utilisation. (177)

**Lessons of the ‘Critique of the Gotha Programme’**

One of the most controversial of Pashukanis’s theses was that, during the transition period to socialism, the bourgeois form of law is retained. There is no possibility of a peculiarly ‘proletarian’ legal form. He is able to base himself on one of Marx’s texts, *Critique of the Gotha Programme* (1875), which constituted, in fact, Marx’s last important political intervention. Marx’s remarks illustrate the inner connection between the form of law and the commodity form.

The occasion for Marx’s remarks was his reaction to the programme of the newly unified German workers party, which stated that ‘the proceeds of labour belong undiminished with equal right to all members of society’ and demanded ‘a fair distribution of the proceeds of labour.’

Marx seizes straight away on the pious phrase ‘fair distribution’ in order to reassert briefly the principal:

‘Do the bourgeoisie assert that the present-day distribution is fair? And is it not, in fact, the only fair distribution on the basis of the present-day mode of production? Are economic relations regulated by legal conceptions, or do not, on the contrary, legal relations arise from economic ones? Have not the socialist sectarians also the most varied notions about ‘fair distribution?’

Historical materialism holds that disputes about what is fair in abstraction from the economic basis of society are meaningless and irresolvable. All one can do is point out what form of distribution corresponds to a certain mode of production and study the conditions arising in the present making for a change in the mode of production. For Marxism, the presentation of socialism does not turn principally on distribution but on production.

Marx next considers the concept of equal right embodied in such post-revolutionary arrangements as that in which the same amount of labour which the individual has given to society in one form, he receives back in another.

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5. Marx-Engels *Selected Works in One Volume*, p. 323-24
'Here obviously the same principle prevails as that which regulates the exchange of commodities, as far as this is exchange of equal values. Content and form are changed, because under the altered circumstances no one can give anything except his labour, and because, on the other hand, nothing can pass to the ownership of individuals except individual mean of consumption. But, as far as the distribution of the latter among the individual producers is concerned, the same principle prevails as in the exchange of commodity-equivalents: a given amount of labour in one form is exchanged for an equal amount of labour in another form. Hence, equal right here is still in principle—bourgeois right...this equal right is still constantly stigmatised by a bourgeois limitation. The right of the producers is proportional to the labour they supply; the equality consists in the fact that measurement is made with an equal standard, labour.

But one man is superior to another physically or mentally and so supplies more labour in the same time, or can labour for a longer time; and labour, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labour. It recognises no class differences, because everyone is only a worker like everyone else; but it tacitly recognises unequal individual endowment and thus productive capacity as natural privileges. It is, therefore, a right of inequality, in its content, like every right. Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded only as workers and nothing more is seen in them, everything else being ignored. Further, one worker is married, another not; one has more children than another, and so on and so forth. Thus, with an equal performance of labour, and hence an equal share in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on.

To avoid all these defects, right instead of being equal would have to be unequal.

But these defects are inevitable in the first phase of communist society as it is when it has just emerged after prolonged birth pangs from capitalist society. Right can never be higher than the economic structure of society and its cultural development conditional thereby.'

Pashukanis thinks that Marx here characterises as a bourgeois limitation any external application of an equal standard which, necessarily, ignores the real differences between individuals; and that Marx is therefore stigmatising law as a bourgeois limitation.

There is subtle dialectic here, for it is not only allegedly 'unequal' law but any law whatever that gets caught up in the problem that individual differences make it the case that 'right instead of being equal would have to be unequal.'

Although Marx does not remark it, the application of the standards that guarantee 'equal right' involves also a centre of authority—even when

'exploitation' has been abolished. Lenin takes this up in his analysis of this passage in *State and Revolution*:

'If we are not to indulge in utopianism,' he says, 'we must not think that having overthrown capitalism people will at once learn to work for society without any standard of right; and indeed the abolition of capitalism does not immediately create the economic conditions for such a change.

And there is no other standard than that of 'bourgeois right'. To this extent therefore there still remains the need for a state, which while safeguarding the public ownership of the means of production, would safeguard equality in labour and equality in the distribution of products.'

The eventual destiny of communist society is to pass beyond this whole complex of relationships: exchange of equivalents—equal rights—public authority. However, they are inevitable in the first phases of post-capitalist development (viz. 'socialism' as Lenin labels it, rather unhappily). Marx again:

'In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life's prime want; after the productive forces have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly—only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!'

This idea of a passage beyond the narrow horizon of bourgeois right needs careful scrutiny. For example, in his commentary Lenin talks, on the one hand, about this transition producing 'justice and equality' or advancing humanity from formal equality to actual equality; and on the other hand he stresses that it involves the replacement of abstract standards by direct voluntary participation in labour and the free satisfaction of needs.

'It will become possible for the state to wither away completely when society adopts the rule: "From each according to his ability, to each according to his needs" i.e. when people have become so accustomed to observing the fundamental rules of social intercourse and when their labour becomes so productive that they will voluntarily work according to their ability. The narrow horizon of bourgeois right, which compels one to calculate with the coldheartedness of a Shylock whether one has not worked half an hour more than someone else, whether one is not getting less pay than anyone else—this narrow horizon will then be crossed. There will then be no need for society to regulate the quantity of products to be received by each; each will take freely according to his needs.'

Taking Marx's discussion as a whole it is clear that the 'rule' (from each according to his ability, to each according to his need') is not a prescription (not even one prescribed to the individual by himself) issued by an appropriate authority, assigning various rights and duties, but simply a description of the state of affairs obtaining when labour has become 'not only

a means of life but life's prime want and the springs of cooperative wealth flow more abundantly.'

Examples of principles which are applied equally to all members of society by an authority capable of enforcing them, are those cited by Lenin in his discussion of 'socialism': 'He who does not work, neither shall he eat'; and 'An equal amount of products for an equal amount of labour.'

The 'rules' of the higher phase is not such a principle enforced in order to realise 'justice and equality' even 'actual equality'—because it is not enforced at all. It is clear that both 'ability' and 'need' are to be determined by the possessor. Under the conditions of a 'realm of freedom' it is clearly absurd to suppose that anybody could be accused of slacking, or of being greedy; rather all expressions of individuality will be just that—expressions of free subjectivity—not obedience to an objective norm.

In this context we are not only envisaging the disappearance of public authority but also of such 'internalisations' as 'habit' or 'conscience', because labour has become unalienated and free—'life's prime want' as Marx puts it in the Critique. It is envisaged that the material basis of society in the higher phase of communism characterized by the features mentioned by Marx, will make possible spontaneously produced forms of social behaviour, and organisation, unmediated by prescriptions enjoining justice and equality, fairness, or whatever. It would therefore be mistaken to read the rule as a rule of equality which for the first time in history gets beyond taking people from one definite side only, and instead allows for individual differences by taking people as human beings with indeterminate ranges of abilities and needs. There is no way in which such an indeterminate principle could be adjudicated in the phase of its application. No one can tell me what my abilities and needs are. Only I can be the final authority on that. In dialectical terminology—the normative element in the rule is sublated when material conditions make its realisation effectual.

People can be 'measurable by an equal standard only in so far as they are brought under an equal point of view' and yet, Marx reminds us, 'they would not be different individuals if they were not unequal.'

For Marx, therefore, the presentation of socialism turns on the new mode of production rather than questions of distributive justice and he complains about the crime of perverting the realistic outlook by means of ideological nonsense about rights and other trash so common among the democrats and French socialists.'

To return to Pashukanis: he sees here two things: first of all, that there is a close connection between the form of law and the equal standard implicit in commodity production and exchange; secondly, that there is no proletarian stage between bourgeois right and the dying out of law altogether.

For law will die out 'when an end shall have been put to the form of the equivalent relationship,—a relationship already stigmatized by Marx as in principle 'bourgeois right.'

Pashukanis believes that in the passages discussed above, Marx roots the legal form in economics. He opens up the profound inner connection between the form of law and the commodity form. He argues that a society which is constrained to preserve a relationship of equivalency between labour
expenditures and compensation therefore preserves also the form of bourgeois law.

Law and the State

The view that law essentially mediates the competing claims of legal persons was criticised by other Marxists because it seems to abstract from State coercion. To argue that ‘a subject, or legal person, is the cell form in juridic theory, and that every sort of legal relationship is a relation between such subjects,’ was said to ignore the fact that it is not characteristic of preceding historical epochs—for example the notion of ‘the King’s peace—and that it does not focus on the relationships of domination and subordination found in class societies based on various property relationships. (p. 160)

Pashukanis argues that property attains its highest development (in the shape of unimpeded possession and alienation) only in modern society, and that this freedom of disposition can be closely related to the legal category of ‘person’. It is only by starting here that one can go on to explain precisely why class dominance in modern society is mediated by the rule of law and the modern state, as we shall see. (The procedure is no odder than that of Marx who starts his economic exposition in Capital with the commodity in order to arrives later at the concept of surplus value which is the specific form of appropriation of surplus labour in capitalism—albeit that exploitation has existed in non-commodity producing societies.)

Pashukanis thinks that the view of law as an external regulation imposed by command of authority does not bring out the specific character of legal regulation. This does not mean that the juridical superstructure does not ensure, none-the-less, the dominance of the ruling class. However, formally, the courts act as umpires in a law suit. This form must be recognised for what it is if a materialist analysis is to expose its class character and effectively demolish its ideological function. In analysing the rule of law we need to explain why the mechanism of constraint is dissociated from the property owners themselves, taking the form, instead, of an impersonal mechanism of public authority isolated from everyday life. In feudal times, all relationships were mediated by personal dependence and authority. The obedience of the villeins to the feudal lord was the direct and immediate result of the fact that the latter had an armed force at his disposal and his authority was an inescapable God-given fact. The dependence of the wage-labourer on the capitalist is not so enforced in such an immediate fashion. Firstly, the armed force of the State is a public power standing above each individual capitalist. Secondly, this impersonal power does not enforce each relationship of exploitation separately, for the reason that the wage-labourer is not compelled to work for a given entrepreneur but alienates his labour-power through a free contract. Since this alienation is established formally as a relationship of two independent and equal commodity owners—(one of whom sells labour-power that the other buys)—therefore class authority takes the form of a public authority which guarantees contracts in general but does not normally constrain the independent juridic subjects to accept any particular price. If the law does intervene in this way, as it is today, then law becomes much more clearly class law—albeit that the bourgeoisie scream the more loudly that it is not the capitalist class that rules but ‘the law’—that is to say
the authority of an objective and impartial norm.

However, even in the most liberal state the rule of law is an ideological superstructure that endorses and enforces class rule. For, of course, the free subjects of the theory of contract are not all equally equal except in the context of the juridic framework which recognises alienation only in its most abstract form. For basic material reasons, such as the danger of imminent starvation, the labouring class have no option but to sell their labour. They are thus dependent as a class on the capitalists as a class (albeit that each is free to chose his exploiter) and are hence justifiably characterized as wage-slaves.

There is, therefore, the coexistence of a legal form relating 'independent and equal persons' on the one hand and, on the other, the material reality of the rule of one class over another in the bourgeois state—but mediated, as we have seen, through the rule of law.

**Law and the Proletarian Dictatorship.**

As we have seen, Pashukanis argues that the rule of bourgeois law is preserved during the transition to socialism even when capitalist exploitation no longer exists. There is no such thing as proletarian law; eventually law dies out together with the state.

In this concluding section, we will look at the criticisms of this view advanced by Pashukanis's Stalinist foes. Their basic claim is that the proletarian dictatorship must work through law of a new type—Soviet democratic law. In 1937, Pashukanis was anathematized officially in an article by one P.F. Yudin, and the notorious A.Y. Vyshinsky followed close behind. Their main argument was that 'the state—an instrumentality in the hands of the dominant class—creates its law, safeguarding and protecting specifically the interests of that class. There is no law independent of the state "for the reason that law in nothing without a mechanism capable of enforcing observance of the norms of law."' (Lenin)' (p. 286) It follows that, when the proletariat smashed the old bourgeois state machine and created a new revolutionary mechanism of state authority, it 'inflicted a death blow on bourgeois law.' (p. 287)

It should be noticed that in quoting Lenin's phrase about right being nothing without a mechanism capable of enforcing it, the Stalinists always fail to give the context of this remark—which context is a quite extraordinary claim by Lenin which leads in an entirely different direction from that taken by Yudin and Vyshinsky. Lenin, in his comments on Marx's point in the Critique of the Gotha Programme about the continued existence of bourgeois right in the transition period, goes much further than Marx.

'In its first phase' he says, 'communism cannot as yet be fully developed economically and entirely free from traces of capitalism. Hence the interesting phenomenon that communism in its first phase retains the narrow horizon of bourgeois right. Of course, bourgeois right in regard to the distribution of articles of consumption inevitably presupposes the existence of the bourgeois state, for right is nothing without an apparatus capable of enforcing the observance of the standards of right. It follows that under communism there remains for a time not only bourgeois right, but even the bourgeois state—without the bourgeoisie!'
As Lenin indicates in his last phrase, this is a paradoxical state of affairs. In view of the fact that Lenin is above all the theorist of 'smashing the bourgeois state machine' and of 'proletarian dictatorship', this claim that under communism remains 'the bourgeois state' seems to throw his whole theory into intolerable confusion. Only a couple of pages before, when he demanded 'the strictest control by society and by the state of the measure of labour and the measure of consumption', this was to be 'exercised not by a state of bureaucrats, but by a state of armed workers.' (And he reverts to the same formulas later: thus the phrase 'there remains the bourgeois state' stays an isolated reference which is never organically connected with the main drift of his argument.) Furthermore his argument is a non-sequitur anyway: as we will argue later, there is no reason why the authority which regulates the distribution of consumption goods should be the 'bourgeois state'.

However, if Lenin can argue 'bourgeois right—hence bourgeois state', why may not the Stalinists argue, with more justice, 'proletarian dictatorship—hence proletarian law'? Yudin again:

'The dictatorship of the proletariat is a state of a new type, and the law created by that state is a law of a new type; Soviet, democratic law which protects the interests of each and every one of the majority of the people: the toilers.' (p. 290)

The muddle in the reasoning of the Stalinists consists in their sliding from Lenin's formula that 'law is nothing without an apparatus capable of enforcing observance', to the formula that 'the state creates its law.' It is true that the proletarian dictatorship is crucial to the transformation of society from a capitalist basis to a socialist one, and that is uses the legal form in order to facilitate this. However, no amount of repetition of the platitude that the law is nothing without a mechanism of compulsion, can establish the larger claim that the state actually 'creates its law.' This claim is, in reality, implicitly idealist. The materialist method would rather locate the conditions which 'create' laws in the economic basis of society, for, as Marx puts it, 'right can never be higher than the economic structure of society and its cultural development conditioned thereby.'

A later Stalinist, I.P. Trainin, takes a more eclectic view of the relation of state and law: 'The very controversy as to which came first—the state or the law—is a scholastic controversy: there is—and can be—no state (that is to say, an organisation of the dominance of a definite class) without law, precisely as there can be no law (that is to say, a system of coercive norms by means whereof that class safeguards its dominance) without a state.' (p. 436). This formula bears a superficial resemblance to Marx's trenchant statement (in the Grundrisse introduction) that 'club law', too, is law, and that the law of the stronger prevails in a different form even under 'the rule of law'. On that occasion Marx was concerned to demystify the alleged opposition between 'club law' and the 'rule of law'. However, as the qualification 'in a different form' suggests, Marx does recognise a difference of some sort, and this is indeed very important. We have already analysed earlier in this paper the peculiarly mediated form of capitalist class rule. In any case, just as we have already argued, Marx, just before mentioning 'club law', had made very clear what it is that 'creates': 'Every form of production creates its own legal relations, form of government, etc.'

8. Grundrisse (Penguin ed.) p. 88
Thus the fact that the proletarian dictatorship is the crucial 'moment' in the period of revolutionary transformation should not lead to adventurist (and idealist) conclusions about the omnipotence of the state power. What it can accomplish at any time remains limited in extent. This is precisely why a more or less long period of transition is necessary. When Marx speaks of the persistence of a form of bourgeois right through the lower stages, he is emphasizing in the most dramatic way that 'right can never be higher' etc. However, it is confusing of Lenin to refer also to the persistence of a 'bourgeois state'.

The issue here can also be approached through the more sophisticated objection made to Pashukanis' views. The argument is that he was mistaken at the outset in setting himself the task of analysing the legal form, abstracting from the question of content. (See p. 294 & 251ff). So no wonder he ends up by positing a bourgeois form as the structure of Soviet law. The critics hold that the inseparability of form and content ensures that law which is proletarian in its content must be proletarian law tout court, and no question of a bourgeois form can arise. However, this is just as problematic a standpoint as that which would assume that any content can be 'poured' into a certain form. If the distinction between form and content has any value, which it obviously has, it must be precisely that we can abstract from different contents a certain form. The problem is to establish the limits within which such a form must confine itself if it is not to break down. Pashukanis believes that the legal form is not conformable with communist social relations but it is flexible enough to be put to use during the transition period in order to facilitate the development of the socialist economy, to the level at which its usefulness is undercut.

Of course, the state is also supposed to wither away, and the proletarian dictatorship is hence a transitional form. However, whereas it is useful to stress the continuity of form of Soviet law with the past, the question of state power is crucial for the whole direction of society, and hence we need to be very clear about the necessity to exclude the bourgeoisie. This is why Lenin emphasizes that, ideally, the state should be a state of 'armed workers' rather than bureaucrats. It should be as proletarian in form as possible if it is going to guarantee the inauguration of socialism. Nevertheless—as a coercive power—it is analogous to previous state forms and this does indicate the limitations inherent in the transitional situation. So at one point in the State and Revolution Lenin does talk about the survival as a bourgeois survival, as we have seen. The above discussion has shown that it is important not to be confused about the significance of that. Such an isolated reference cannot negate the burden of his overall message—that the bourgeois state must be 'smashed' and a proletarian dictatorship set up. As we have seen in our analysis of the Critique of the Gotha Programme, the nature of the transitional situation makes it necessary to use the form of bourgeois right: but it is equally important that this form is under the administration of the proletariat organised as the ruling class if the direction of social change is to be towards socialism—so that public functions eventually lose their political character. (When this happens we are left with different levels of administration without a distinct sphere of legal persons.) Lenin is guilty of a non-sequitur when he deduces that to enforce 'bourgeois right' a 'bourgeois state' is required. If it
was a bourgeois state, not only the form but the content of the law would be bourgeois through and through. The proletarian content of the law of the transition period is indicated by such measures as the forbidding of markets in means of production and the abolition of exploitation by capital. These measures have the negative effect of blocking a reversion to capitalist production. However, until the socialist mode of production is capable of a sufficiently abundant supply of goods, we have, perforce, to put up with a bourgeois mode of distribution of consumer goods and the associated legal forms.

SOZIALISTICHES OSTEUROPAKOMITEE

Wir haben uns zur Aufgabe gesetzt, Berichte und Dokumente von und über die linke Opposition in den osteuropäischen Ländern und Analysen der gesellschaftlichen Entwicklung dieser Länder abzudrucken.


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