REVIEW ARTICLE

LAW AND MARXISM

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With the publication of Evgeny Pashukanis's major work on law and Marxism,[1] an important gap in our revolutionary heritage has been filled. Not only was he a significant Bolshevik theorist in his own right, but he has been virtually the only revolutionary socialist to give us a Marxist analysis of the phenomenon of law [2]. In the course of this analysis he comes to some very radical conclusions. Legal relations are seen as being part of capitalist society's *basis*, not its superstructure, the whole notion of 'proletarian law' is dismissed as a confusion, and a general theory is developed in which not just law, but also some other guides to action—like morality—are rejected as based on exchange and therefore ultimately on capitalist relations of production.

Unfortunately, as we shall see, this breadth of vision is flawed in two ways. Pashukanis stresses the 'technical' as opposed to the 'political' nature of decisions under socialism. Writing as he did in 1924—right in the middle of the battle between Stalin and Trotsky over the necessity of inner party democracy—such a view of socialism could not but help Stalin. Secondly the real power of his analysis is in *abstraction*, in locating the source of what he refers to as the 'legal form'. But he never brings his theory back down to earth again, and this lack of concreteness prevents him understanding the role of law as capitalism itself develops and changes. He leaves us with a view of law under capitalism as an unchanging category instead of as an evolving process. These two flaws will emerge as closely related to each other.

Pashukanis's initial concern is to stress the importance of the phenomenon of law. He argues against the view, encouraged by the Marxism of the Second International, that law is an ideological phenomenon alone[3] from which no 'material' consequences follow. Such a view was quite widespread in bourgeois circles too at about this time. It is to be found in Kelsen's jurisprudence,[4] where, following Kant, law is placed in the world of 'ought', which is seen as quite distinct from the material world of

the 'is', and in which the study of law is therefore purely formal and in no way factual. It is also to be found in the positivistic school, associated with the jurist Austin,[5] who, in expressing the self-confidence of the English bourgeoisie, quite openly admits that there is no objective legitimation of the state and its laws, only the subjective consent of its citizens, and who also, therefore does not look beyond the contents of the mind for an explanation of the legal form.

Unlike the formalists, Pashukanis argues that law only exists through the institutions that express it. These institutions, organs of the state like the police, the courts, the prisons etc. are material phenomena without which there would be no law (Pashukanis, pp. 73-7). And unlike the positivists, he developes a social theory of law that because it explains the history and development of law, completely undercuts their theories. It is to this that we now turn.

LAW AND THE COMMODITY

Jurists have standardly divided law into the public (the statutes, edicts of the sovereign body) and the private (the mutual claims of one person against another). Pashukanis accepts this division and argues that private law is primary, and that without it public law would be impossible. 'Juridical thought moves most freely and confidently of all in the realm of private law . . . It is above all in private law that the a-priori principles and premises of juridical thought become clothed in the flesh and blood of two litigating parties who . . . claim 'their right' . . . private law is no more than an endless chain of deliberations for and against hypothetical claims and potential suits' (Pashukanis, p. 80).

But in public law a body which is supposed not to have any interests, namely the state in the person of the public prosecutor, steps into the place of one of the litigating parties. 'The theory of law cannot equate the rights of the legislature, those of the executive, and so on with, for example, the right of the creditor to restitution of the sum borrowed from him. This would imply (that) . . . Parliament's 'right' to approve the budget is as unstable, problematic, and in need of interpretation as the 'creditor's right' to recover the sum lent by him . . . But at the same time, every jurist is aware of the fact that he cannot endow these rights with any other content in principle without the legal form slipping from his grasp altogether. Constitutional law is only able to exist as a reflection of the private law form . . . otherwise it ceases to be law entirely.' (Pashukanis, pp. 103-6.)

Pashukanis's concern here is much deeper than pointing out the contradictions of bourgeois jurisprudence, a critique that he develops brilliantly in a chapter on 'Norm and Relation'. His overriding concern is rather to link the legal relation with a specific economic one. Having traced public law back to private law,[6] he is now able to do this. 'A basic prerequisite for legal regulation is therefore the conflict of private interests. This is both the logical premise of the legal form and the actual origin and development of the legal superstructure . . . the juridical factor in this regulation arises at the point when differentiation and opposition of

interests begin' (Pashukanis, p. 81). Law therefore is inseparably linked with private property and production for exchange—in other words with commodity production.

Indeed the connection is closer still than that. Law is not just linked to the commodity as something *separate* from it. In an important sense it *is* commodity production—or rather one aspect of it. Pashukanis here takes his cue directly from Marx's own method in *Capital*, where Marx proceeds via the commodity to 'abstract general labour' which he sees as the ultimate source of the vitality of the system.[7] For Pashukanis the 'legal' provides the form and the 'economic' the content. Thus the *law suit* is the juridical form that underlies exchange and *commodities* provide its content; the *abstract legal subject*—the bearer of formal rights—is the juridical form for the *abstract owner of property*; and the *law court* is the juridical form presupposed by the *market* (Pashukanis, pp. 109-33).

The crucial point that Pashukanis is stressing here is that legal relations are *fetishised* social relations in exactly the same sense as that involved in the fetishisation of commodities.[8] Here a relationship between people gets its only expression in society through the impersonal mediation of things. Capitalists and workers confront each other not in the transparent form that underlies the market, but cloaked as equivalent commodities that mutually exchange through the impersonal (and supposedly impartial) laws of the market. Now the market is not an illusion, nor is the commodity. They are real enough phenomena, but their appearance is systematically at odds with the reality of class domination which underlies them.

For Pashukanis 'The social relation which is rooted in production presents itself simultaneously in two absurd forms: as the value of commodities, and as man's capacity to be the subject of rights . . . If objects dominate man economically because, as commodities, they embody a social relation which is not subordinate to man, then man rules over things legally, because, in his capacity as possessor and proprietor, he is simply the personification of the abstract, impersonal, legal subject' (Pashukanis, p. 113). 'In addition to the mystical quality of value, there appears a no less enigmatic phenomenon: law. A homogeneously integrated relation assumes two fundamental abstract aspects at the same time: an economic and a legal aspect' (Pashukanis, p. 117). It is 'the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim . . . Only the continual reshuffling of values in the market creates the idea of a fixed bearer of such rights' (Pashukanis, p. 118). Now of course such rights are purely abstract and formal. Like the workers' rights to own the means of production they must always lack content and concreteness (Pashukanis, p. 127). But none the less they are *rights*, and these rights form the basis of the law upon which the *constraints* of public law are later introduced.

This analysis has implications which Pashukanis is not slow to follow. The fruitfulness of his theory is highlighted in the many places in this book where it provides new illuminations and succinct answers to a variety of historical and political problems. The more important ones are: (1) Did law begin, historically, with production for exchange?; (2) Was it incom-

plete in Feudalism where production for exchange played only a subordinate role?; (3) Is the notion of 'guilt' (as opposed to restitution of injury) lacking in pre-commodity societies?; (4) Is the enforcement of punishment to be understood as part of the principles of 'fair trading'?; (5) Does law predate the state?; (6) Can it explain war in commodity-producing societies?; (7) Can it explain the way law changes in developed monopoly capitalism?; and finally, (8); Does it tell us how social relations could be managed in a post-commodity socialist society? The first four of these we shall look at very briefly now.

We have seen already that Pashukanis's stress on the question of trade explains very well why law begins with that part of Roman law that deals with it.[9] But it is in medieval society that his theory is most illuminating. For his claim is not that exchange brings law into being on its own, but that in addition something else is needed to turn the particular and concrete demand or claim into an abstract and universal one. Feudal society, broken up as it was by landed estate, could therefore only develop the *concrete, partial* character of law—a theory that fits in very well with the facts of guild law, and municipal charters, statutes and freedoms.[10] Limited though trade was, it still took place: standardly at fairs and markets which had been guaranteed a 'market peace' by the lord (at a price). Although 'The feudal or patriarchal mode of authority does not distinguish between the private and the public . . . thanks to its new role as guarantor of the peace indispensable to the exchange transaction, feudal authority took on a hue which had hitherto been alien to it: it went *public* . . . we are faced here with an embryonic form of law' (Pashukanis, p.136).

Again in societies which had not yet developed private property and production for exchange, Pashukanis argues, based on a number of examples (p. 178), that 'guilt' as a distinct category of things that cause injury, is inknown. And in this he is on strong ground.[11] 'Punishment' only becomes 'rational' and distinct from gratuitous violence, not just in societies based on exchange, but in those in which labour itself has become alienated and exchanged as a commodity—that is in *capitalist* societies.

Pashukanis's argument here is that punishment has to be understood as 'equivalent retaliation' (Pashukanis, pp. 178-9), and that only when all things are reduced to a common measure does it become fully possible. This is uniquely provided by the operation of the measure of *value*, which requires punishment not in a concrete form (as it does for instance in the Roman principle of *Lex Talionis*—an eye for an eye, a tooth for a tooth), but in an abstracted form (p. 181), which has its expression in the institution of *prison*, in which whatever the crime, temporary deprivation of living time is the universal legal response.[13] The temporary nature of incarceration reflects the fact that the worker is not a slave and therefore cannot be sold for an unlimited period.[14]

To sum up then, at the very basis of the category of law itself is the notion of the bearer of rights, a *subject, abstracted* from real concrete people, whose interests are defined as being purely *private*, and in *conflict* with other bearers of similar rights. This is not a *different* process from that involved in commodity fetishism. It is the same process that has an economic and a legal aspect. The economic aspect occurs when social

relations appear as relations between things, and it is this aspect that most commentators on Marx's *Capital* have seen. However the commodity, upon which capital is based, is itself based not only on value *but also on law*. 'Whereas the commodity acquires its value independently of the will of the producing subject, the realisation of its value in the process of exchange presupposes a conscious act of will on the part of the owner of the commodity, or as Marx says: 'Commodities cannot themselves go to market and perform exchange in their own right. We must, therefore, have recourse to their guardians who are the possessors of commodities. Commodities are things, and therefore lack the power to resist man. . .' . . .At the same time, therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights' (Pashukanis, p. 112).

LAW AND THE STATE

An immediate consequence of the above analysis is, of course, that law is part of the *base* of society. Where then does this leave us with respect to the many times that Marx classifies juridical relations along with the ideological, the political etc. as part of the *superstructure*?[15] Must we conclude that Marx was just blind to the real consequences of his own theory or that Pashukanis has produced a theory that, far from being based on Marx, is actually in sharp conflict with him?

Pashukanis is in fact not forced to make this choice, and the reason can be found in his theory of the state and the *public* law that issues from it. Remember for him it is *private* law that is the basis for all law, and of course it is private law alone that he wants to locate in the base of commodity-producing societies. 'Marx himself' argues Pashukanis, 'emphasises the fact that the property relation of this most fundamental and lowest layer of the legal superstructure, stands in such close contact 'with the existing relations of production' that it 'is but a legal expression for the same thing'. The state, that is, the organisation of political class dominance, stems from the given production of property relations . . . (it) is a secondary, derived element'.[16]

So the most fundamental elements in society are the relations of production, and these include a legal component to do with property rights. From these are derived the rest of civil and civic society including the state. Only at this point does 'objective' law—a set of commands from the sovereign body applying to all its subjects—actually begin. Law here appears as a set of universally binding *constraints*, and this contrasts sharply with the previously-existing 'subjective' law, which consisted of a set of *rights* through which every person was permitted to further their own individual interests (however formal such rights undoubtedly were for the vast mass of the propertyless). The state and public law are thus 'secondary elements', while the forces and relations of production *including their legal form* (private law) are primary.

To put it more concretely, law begins with private law, in which private individuals with mutual rights and obligations are all that one needs to explain its existence through the act of exchange. But public law,

because it is not expressive of any individual's interests as such, because it appears as a set of constraints impersonally and universally applied, requires institutional coercive backing—ultimately the 'small bodies of armed men' that Engels and Lenin place in the centre of their theory of the state.[17] Hence 'A social organisation with the means of coercion at its disposal is the concrete totality which we must arrive at after first comprehending the legal relation in its purest and simplest form' (Pashukanis, p. 99).

Indeed without beginning with private law, we are unable to answer the question 'why does class rule not remain what it is, the factual subjugation of one section of the population by the other? Why does it assume the form of official state rule, or—which is the same thing—why does the machinery of state coercion not come into being as the private machinery of the ruling class; why does it detach itself from the ruling class and take on the form of an impersonal apparatus of public power, separate from society?' (p. 139).

The fact that Pashukanis can answer this question with comparative ease means that he has made a significant contribution to our understanding of the capitalist state. For on his account the rise of the state is to be understood as the development of universal conditions of exchange (p. 123), and as we explained earlier, the abstract subject that arises out of such a universalisation is specific not just to any mode of production based on private ownership, but to capitalism alone. In addition, 'coercion cannot appear here in undisguised form as a simple act of expediency. It has to appear rather as coercion emanating from an abstract collective person, exercised not in the interest of the individual from whom it emanates—for every person in commodity-producing society is egoistic—but in the interest of all parties to legal transactions' (Pashukanis, p. 143).

So far as the origin of capitalism is concerned, Pashukanis's theory fits the historical facts very well, for it explains why bourgeois societies had to go through a phase of absolute monarchy. We showed above how, according to him, medieval law developed through the 'market peace'. At this point 'Absolute monarchy needed only to usurp this public form of power which had originated in the cities and to apply it to a wider area' (p. 148). From this point one only needs to de-personalise the monarchy by creating a bourgeois republic to complete the process.

THE FETISHISM OF 'COMMODITY FETISHISM'

The problem with Pashukanis (and for that matter—and to a greater extent—with his contemporary, I. I. Rubin,[18] with whom there are a number of close parallels) is that he is obsessed by the commodity form and by commodity fetishism. He never goes beyond it in his development of the notion of law. This is a collossal impediment. It leaves him with an understanding of *capitalist* law that is at best embryonic, at worst static and erroneous.

For while capitalism *arises out of* the generalisation of commodity production, it is certainly not to be identified with it. Pashukanis persues the logical consequences of chapter 1, volume I of Marx's *Capital* in the

fieid of law, but he forgets about the whole of the rest of the work! He looks only at Marx's 100 page preamble, not at the 2,000 page remainder. Yet it is this latter part which shows what is distinctive to capitalism and which shows also the laws of development that are uniquely characteristic of it.

Marx begins with the commodity for two reasons. Firstly because capitalist production historically merges out of a system of commodity production as a specific variety of it as *capitalist* commodity production. Secondly because he believes that, logically speaking, the best place to *begin* to explain capitalism is with the commodity. But this is only the starting point, and the analysis can only begin to yield scientific conclusions when two further premises are added: (a) the premise that capital can be divided into constant and variable capital. and that the expansion of value unique to capital is derived solely from the latter; and (b) the assumption that capital flows to the place where it gains most profit and that therefore there is a tendency for the rate of profit to become equalised.

The consequences of this are profound. Implicit in simple commodity exchange is the assumption that commodities exchange in quantities that are inversely proportional to the socially necessary labour time needed to produce them—what Marx refers to as 'social values' (or in volume 3, 'market values'). But this can no longer hold in conditions of capitalist production. Branches of production where the technical conditions prescribe small quantities of constant capital (machinery etc.) compared with variable capital (human labour) would earn higher than average profits since only living labour can give rise to expanded values. The reverse is true for those branches with a higher than average proportion of constant to variable capital—they would earn lower profits. But the point of capitalist production is the expansion of values, the maximisation of profit, and therefore commodities are only sold on the *capitalist* market on the basis of capitalist values—what Marx refers to as 'prices of production' in volume 3 of *Capital*. These are equivalent to the value of the capital consumed in their production plus the average profit on the capital advanced to produce them.

If the technical conditions of production in all branches of production were to prescribe equal proportions of constant to variable capital in all of them, *if* the quantities of fixed capital were similarly equal, and *if* there were no rents—then and only then would simple commodity values and capitalist values coincide. But this is impossible. Therefore capitalist values *contradict* simple commodity values, and a market that contains *both* varieties of value is an unstable phenomenon that can only be rectified by the abolition of one or the other variety of value. In practice, under conditions of modern industrial capitalism, if left to themselves, capitalist values will invariably 'abolish' simple commodity values, since they alone have a built-in tendency to diminish through technical progress and thus eventually to undercut the earlier simple commodity values.

So while there is a historical and a logical connection between the commodity and capital this connection takes the form of an antagonistic *destruction of simple commodity values* and their replacement by the

capitalist values that the all-corrosive capitalist mode of production carries in its train.[19]

Therefore to restrict the analysis of law under capitalism to a set of categories appropriate for simple commodity production—as does Pashukanis—must be mistaken; for it implies that capitalist law can only exist . . . if there is no capitalist production. So any 'theory' such as Pashukanis's that fails to go beyond the logical category of the commodity is really no theory at all for explaining capitalist phenomena. It is at most a preamble for the genuine concrete theory itself. The crucial point here is not that the production of commodities ceases under capitalist production (it does not), but that it gets *subordinated* to the production of profits. The production of *self-expanding values* dominates the production of *values*; so that when there is a contradiction between the two—as for instance in the capitalist slump where in order to preserve the self-expansion of certain values (capital) the sum total of all values is sharply reduced—the dominance of self-expanding over 'ordinary' values is clearly marked. In other words commodities that are not themselves capital become just a *means* through which capital realises itself.

Now Pashukanis does realise that a concrete examination of capitalist societies shows that his theory is wrong, but (a) he falsely locates this in the monopoly characteristics of ageing capitalism rather than in capitalist production in general, and (b) he does not even try to amend his theory in the light of this. It is 'Monopoly capitalism', he argues, that 'creates the preconditions for an entirely different economic system, in which the momentum of social production and reproduction is affected, not by means of individual transactions between autonomous economic units, but with the help of a centralised, planned organisation . . .This practical modification of the legal fabric could not leave theory untouched', and leads to the replacement of the legal content in economic life by 'a purely technical determinant' (p. 139). In other words as the capitalist system ages, it abolishes law.

Pashukanis attempts to corroborate this account with an analysis of war. He argues that in pre-commodity societies war is always accompanied by plunder and the destruction of the productive forces. He asserts that all this changed at the high point of commodity capitalism in the middle of the 19th century, where not even war was allowed to abrogate property rights. And he concludes that there has been a return in the 20th century—with imperialism and monopoly capitalism now rampant—to war based on plunder and destruction again (Pashukanis, pp. 115-6).

But how seriously can we take all this? He devotes only about 4 pages or so to this whole concrete dimension, but then goes on to ignore the consequences. For if it is true, what then remains of Pashukanis's theory of law? By his own account it would be merely a historic relic of no value at all in understanding contemporary capitalism, and least of all in understanding the transition from capitalism to socialism. Yet this is precisely what he demands of it, and, above all, thinks that he has provided in many places in this book.[20] In so far as he attempts to do this—and this represents the message and real spirit of the book—we can see that he has quite simply conflated an interpretation of the category of 'commodity

fetishism' with a concrete and historical theory of how social (including legal) institutions change.

In fact the whole notion of fetishism is useless on its own. It is not the case that commodity fetishism gives rise to capitalist accumulation and to law as autonomous forms. On the contrary to explain law we need to begin not just with the foundations of capital in commodity fetishism but with its fully articulated laws of development as well. This is something that Pashukanis fails to do. Instead most of the time he proceeds as if this does not matter. And in the few places where he is realistic enough to admit that it does matter he is forced to abandon the theory altogether. Having conceived of law as an unchanging category instead of a dynamic process he has no alternative but to chuck it aside completely when the real world begins to intrude on theory.

Besides, Pashukanis is wrong about the connection between monopolisation of the means of production and the existence of the legal form. Law is no weaker today world-wide than 100 or 150 years ago even though the tendency towards centralisation and monopoly is very much stronger. In some countries (the USA for instance) 'legalism' is a powerful component of both bourgeois ideology and of actual social practice. In other areas (Ulster, Iran, the Basque country etc.) it is very weak. But this has nothing at all to do with the extent of monopoly, it is part of the general capacity (or otherwise) of the bourgeoisie to gain acquiescence from the subordinated classes short of the direct threat of physical violence, a capacity that is much more directly related to how unified the bourgeoisie is, what the level of class struggle is and so on.

Pashukanis is acutely aware of *some* of the circumstances around, and preconditions for the modern capitalist state, but signally fails to comprehend what development it goes through, and how this reacts back on the development of law itself. For the state has its origins not only in the role of the guarantor of the 'market peace', but also in its *exactly opposite* role, as the heavily armed military wing of the monopolists—particularly in the colonies. Lancashire cotton cannot be understood outside, for instance, the physical destruction of native Bengal manufacture by the British colonial state, any more than the raw cotton that Lancashire used can be understood without reference to the sweat and toil of the propertyless and right-less black slaves who produced it.[21] Because Pashukanis only considers exchange, he never gets beyond a one-dimensional view of capitalism as a system of competition. He never really raises what this competition creates—the production and realisation of surplus value as the goal of the system istelf. He is therefore in no position to explain how this latter process—the accumulation of capital—undermines earlier forms of competition and creates new forms. Least of all is he able to explain how the state can itself take on a directly productive role.[22]

Why then does the legal (as opposed to the technical) form persist? I suspect that this has little to do with the supposed fact that the law is expressive of the 'private' 'abstracted' 'conflicting' 'subject', but is due to very much the opposite reason—the separation of juridical from legislative and executive powers which institutionalises the channelling of discontent away from the process of law and toward the content of legisla-

tion and executive action. This separation serves to enshrine the principle that the 'national interest'—and the supposed neutrality between competing interest groups that it involves—is above all expressed in formal terms in the rule of law.

Now if this is so then the crucial element in law is not the identification of the interest of one individual *against another* (although this occurs too), but the identification of all citizens *with their state*. In that case the explanation for the persistence of the legal form (and by this we do not mean the sham legalism of the Moscow Trials or the 'independent' police inquiry into the SPG murder of Blair Peach), is to be found in the separation of powers—i.e. in the realm of *politics*, not in the economics of commodity production. In its fully developed form these political forms are expressed in bourgeois democracy and the 'pluralist' society. This requires the (purely formal) openness of the law's monopoly of acceptable coercive procedures to all people who invoke them by due process.

What is more, history bears this out quite well. It is not a point that we have time to dwell on, so one example will have to serve here. Compare France under the 1st and 2nd Republic with Argentina today. France was an overwhelmingly peasant country, and most of the peasants' produce was consumed by the peasants themselves rather than sold on the market as a commodity. It was however a country that (standardly) separated powers and in which the 'rule of law' was not only the dominant ideology, but was also part of the real state of affairs itself. In Argentina today all these features are neatly reversed: 'legalism' is a pale shadow but commodity production flourishes.

Once we begin to follow this line of thought and locate law and 'legalism' in the realm of *politics* more than economics in contemporary capitalism (whatever may have been the case in the society in which capitalism was born), the crucial premise of Pashukanis's account—that law is part of the base, not the superstructure—falls.

SOCIALISM, LAW AND FREEDOM

The above distortions occur through an excessively one-sided understanding of law and capitalism. Law is seen statically through its one-dimensional connection with the commodity, and this gives rise to an understanding of it that is economistic and false. But there is another area —a much more important one—where his attempt to simplify things to a one-dimensional polarity, has more debilitating conclusions. It is over the whole area of the nature of control under socialism.

Now it was a commonplace to Marx that a main difference between capitalism and socialism would lie in the realm of freedom and control. Under capitalism people are controlled by the dictates of an impersonal agency: capital. And this applies not only to its victims, the workers, whose vitality is appropriated by capital and used against them; but also to its beneficiaries, the capitalists, who also play no independent role, but are mere servants of, and 'personifications of capital'. By contrast, under socialism it is the other way about—people control things. It follows that they will no longer need the social tools for the manipulation of people,

whether of the brutal and direct variety (army, police etc.) or of the more conscious variety (religion, bourgeois democracy etc.). Instead they will only need science, for they will be concerned only with the *technical* way of subordinating things to people.

This much of Marx, Pashukanis understands and accepts. He quite correctly (and quite brilliantly) demonstrates the dominant role played by the legal form in capitalism's twisted social framework (pp. 78-9), and argues that any socially corrective measures that a socialist society would introduce, could only be determined by the *technical* question of its success or failure to correct (pp. 186-8), not by the juridical questions of guilt and so on. But he goes on to elevate the 'technical' to the supreme position in socialist society. In the economic field, the legal relationship between enterprises is replaced by 'technical co-ordination', and as a result, 'technical management . . . is undoubtedly strengthened over time through being subjected to a general plan of the economy' (Pashukanis, p. 131).

This involves Pashukanis in a quite crucial distortion. For he contrasts the legal form—which he sees as the dominant form of regulation in bourgeois society—with the technical form, which he sees as the dominant form under socialism. Now this view is not socialist, in fact it is pure Fabianism/Stalinism—the doctrine that socialism is not the act of the working class itself, but a set of changes brought about instead by the technical elite for the 'benefit' of a passive work force. For it is one thing to say that technical knowledge is needed for a socialist society, but quite another to see it as *dominating* that society. On the contrary it is, and must be, a *subordinate tool*. And this tool must be firmly in the hands of the working class and used to further the conscious goals of the class as it is expressed in the soviets, workers' councils, and other similar organs of direct working class power.

Secondly, this technologism—the logic of which must end up in elitism—is reinforced by the comment quoted above where Pashukanis sees the transition from the legal (capitalist) form to the technical socialist) form as involving the actual 'strengthen(ing) . . . of technical management'. There is not the least suggestion in this formulation that the nature of the management in question might be quite fundamentally different in the two cases. Nor is it enough that he prefaces these remarks with the statement that 'Seizure of political power by the proletariat is the fundamental prerequisite of socialism', for not only is this formulation excessively abstract (what embodies this seizure of power—workers' councils, soviets etc., or the state bureaucracy?), but in any case it is contradicted by the content of his later remarks themselves.

Pashukanis's 'socialist' programme—the replacement of the legal form in which the litigating parties are opposed and in sharp conflict with each other, with the supposedly harmonious technical regulation of the classless society—is a reactionary pipe dream. What socialism eliminates is not conflict, let alone debate and argument over our social goals and how to fulfill them, but solely the cancer of capitalism that substitutes its *own* internal dynamic for these human goals; and which therefore renders superfluous any such debate in the first place. There is no question about this

involving *less* in the way of conflict. On the contrary there will be much *more*. Debate will become sharper, more tenacious and less academic—after all so much more will be at stake with no world market around to overrule the proceedings! Pandora's box would be opened up. A vast variety of political groupings would flourish, compared with which Pashukanis's 'technical regulation' seems tepid and irrelevant at best. Socialism will eliminate *irreconcilable, class* conflicts, but at the same time it will foster and nurture the articulation of *other* human conflicts, because only through such a conflict can our social goals become rational and conscious.

When one places Pashukanis's remarks in the context of the USSR in the 1920s—when he was writing them—this criticism becomes quite crucial. For after a brief allegiance Stalin broke decisively with Bukharin and the Right in the party in 1928, and embarked on a massive industrialisation programme under the direct control of the state. The forced primitive accumulation broke the back of the peasantry, driving tens of millions of them into the factories and mines. It halved the living standards of the working class in five years and greatly increased the intensity of their work. It gave rise to a bureaucracy whose totalitarian control of the whole of society—through the armed forces and above all the secret police—was immensely powerful. In the arena of production the last vestiges of workers' control were abolished, to be replaced with one man management—appointed from above. In the party, already heavily bureaucratised, the few remaining revolutionaries from 1917 were swamped by Stalin's influx of bureaucrats, factory managers, ex-Tsarist officers and so on. The tragic result of all this was the creation of the state capitalist monstrosity that we see today.

Yet within this decay and collapse of the revolution there were those—very few in number—who organised and fought against it. The Left Opposition, centred around Trotsky, argued brilliantly—but ultimately unsuccessfully—against the onset of Stalinism. They may not have realised where the USSR was heading, but their programme—arguing amongst other things for internationalism rather than the chauvinism of '"socialism" in one country' and above all for inner-party democracy in place of bureaucracy—were absolutely spot-on.

In these circumstances it is quite clear that the consequences of Pashukanis's philosophy of law were profoundly reactionary. For in supporting the supposedly 'technical' nature of regulation under socialism, in arguing against the necessity for full, open and sharply conflicting debate, in falsely conflating socialism with utilitarianism; it is clear he was playing into the hands of the bureaucracy.

Now Pashukanis was no Stalinist. He did not believe for a moment that the USSR in the '20s was a socialist country, for on his own terms the continuation of the legal system there proved that it could not be such. But in the concrete situation of the USSR at that time, the 'left wing' side of Pashukanis was quite irrelevant: it just did not connect with *either* side in any of the crucial debates. Unfortunately this was not true for the right-wing technocratic streak in his thought. All too plainly it cut with the grain of Stalinism and against the grain of the Left Opposition.

Pashukanis himself paid for his errors with his life, at Stalin's hands in 1937. For us however, the lessons should be clear. Socialism will not remove from us the need to discuss, debate and conflict with other—it will add to it and make it all much more relevant. Secondly there is a crucial flaw in conducting theoretical discussion in Pashukanis's abstracted manner. Unless one begins, as does Lenin for instance, with a concrete situation to which one brings a concrete analysis, something that appears very revolutionary on the surface can turn out to be the very opposite underneath.

NOTES

1 E. B. Pashukanis, *Law and Marxism*, (Ink Links, 1978), £5.45.
2 K. Renner, *The Institutions of Private Law*, however, typifies the reformist approach.
3 He takes M. A. Reisner's book, *The State*, (Moscow 1918), as his stalking horse here.
4 H. Kelsen, *General Theory of Law and State*, (New York, 1961).
5 J. Austin, *The Province of Jurisprudence Determined*, (London, 1954).
6 Space prevents us showing how he does this in detail. But, briefly, he traces all law to a core of Roman law, and shows how Roman civil law can only be understood on the basis of that part of Roman law (*Ius Gentium*) which is concerned with the regulation of transactions into and out of the Roman Empire (*Ibid.*, 99.78-108 and pp. 95-6).
7 See K. Marx, *Capital*, Vol. 1, Chapter 1.
8 K Marx, *Capital*, Vol.1, Chapter 1.
9 What it does not explain, however, is why law did *not* begin with, eg. the Phoenicians, for whom at an earlier period, trade was much more important than with the Romans. I suspect that this is due to the comparatively unformalised and underdeveloped nature of Phoenician civil society, in which the law court as a *separate* institution with its own rules and practices could not have existed; a point that would not fit so easily into Pashukanis's analysis.
10 *Ibid.*, pp. 119-20. No doubt it would be along these lines that Pashukanis would try to defend himself against the criticism of note [19] above.
11 As revealed in literature from Sophocles' tragedies to the Icelandic sagas.
12 All classic vendetta societies are examples here.
13 *Ibid.*, p. 183. Pashukanis stresses that the older form, the dungeon, was (1) much less often used, and (2) was usually reserved for permanent encarceration. See also the interesting parallels to this view in M. Foucault's *Surveiller et Punir* and the interview he gave which is published in *Radical Philosophy* 16 (Spring 1977).
14 K. Marx, *Capital* (Moscow 1961), Vol. 1, pp. 167-9.
15 K. Marx, *The German Ideology* (London 1965), pp. 78-81.
16 Pashukanis, *Op. cit.*, pp. 90-91. K. Marx, *Selected Works*, Vol. 1, pp. 503-4.
17 Cf. F. Engels, *Origins of the Family, Private Property and the State*, and V. I. Lenin, *The State and Revolution*.
18 Cf. I. I. Rubin, *Essays on Marx's Theory of Value*, (Detroit, 1972).
19 Marx himself develops this argument in two stages. From the point that labour power becomes a commodity, 'the laws of appropriation or of private property, laws that are based on the production and circulation of commodities, become by their own inner and inexorable dialectic changed into their very opposite . . .The relation of exchange subsisting between capitalist and labourer becomes a mere semblance appertaining

to the process of circulation, a mere form, foreign to the real nature of the transaction and only mystifying it. (K. Marx, *Capital*, Vol. 1, (Moscow 1961), p. 583). Here Marx contrasts the new capitalist content which still persists within the old simple commodity form. This older form is cast aside as soon as Marx moves from considering capital in general (volume 1) to many capitals (volume 3). For there he points out that 'commodities are not exchanged simply as *commodities*, but as *products of capitals*, which claim participation in the total amount of surplus value, proportional to their magnitude (as capitals)'. He continues: 'The exchange of commodities at their values, thus requires a much lower stage than their exchange at their prices of production, which requires a definite level of capitalist development'; and concludes: 'so far as the commodities are products of capital, they are based on capitalist production processes, ie. on quite different relationships than the mere purchase and sale of goods. Here it is not a question of the formal conversion of the value of commodities into prices, ie. not of a mere change of form. It is a question of definite deviations in quantity of the market-prices from the market-values, and further from the prices of production' (K. Marx, *Capital*, Vol. 3, (Moscow 1962), pp. 172, 174 and 191; Marx's emphases). For a broadly parallel critique of Pashukanis also along these lines see Bob Fine, 'Class and Law' (CSE-NDC's Capitalism and the Rule of Law, 1979, Hutchinson). Bob Fine's analysis is, however, developed from volume 1 of *Capital* alone. As outlined above it seems to me that the case is stronger on the basis of the fuller analysis that Marx developes not only in volume 1 but also in volume 3.

20 For instance *Ibid*,. pp. 60-1, and again pp. 123-4, or pp. 130-2, or pp. 133-4, or pp. 151-2, or finally pp. 180-1.

21 Cf. K. Marx, *Grundrisse*, (Penguin, 1973), p. 224; and *Capital*, Vol 1, chapter 31.

22 Cf. C. Barker 'The State as Capital', *International Socialism*, 2:1, Summer 1978.