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CLEANSING SOVIET INTERNATIONAL LAW OF ANTI-MARXIST THEORIES

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No more acrid struggle raged in Soviet legal circles during the year 1937 than that over the search for a suitable theory of international law. For eight years lawyers had turned to Eugene B. Pashukanis as the leading Soviet theoretician in this field, but today his position is gone, his books are banned, and he is called an enemy of the people.

This is not the first occasion of a transition from one theoretician to another. Pashukanis himself had risen to prominence on criticism of the ideas of Professor Eugene A. Korovine, whose books had made him the accepted theoretician of the first decade of the revolution. After Pashukanis began his criticism, Korovine gradually recanted over a period of years, but not until 1935 did he fully acknowledge his errors and adopt the new principles which had partly replaced his own ideas.

The repudiation of Pashukanis has been of a more violent and sudden sort, covering but a few months and resulting in the complete annihilation of his ideas as not alone harmful but as the ideas of the enemy. The field has been cleared for an entirely new interpretation. Critics have counseled against a return to Korovine’s earlier explanations as not fitting the needs of the day. To be sure, some of Korovine’s ideas which Pashukanis had denounced now seem to have been more nearly correct than the principles propounded by his critic, but writers demand a reworking of the whole subject. Only months after the first attacks on Pashukanis appeared did material begin to find its way into print hinting at an interpretation which jurists may now be willing to accept. When read in the light of previous theories these articles provide a suggestion as to the future progress of Soviet theoretical work in the sphere of international law.

No theory in this field can be termed an official one, for each represents only

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1 Mezhdunarodnoe Pravo Perekhodnogo Vremeni (Moskva, 1924) [International Law of the Transition Period]; and Sovremennoe Mezhdunarodnoe Publichnoe Pravo (Moskva, 1926) [Contemporary International Public Law].


3 See M. Yakovlev i G. Petrov, Protiv burzhuznykh teorii mezhdunarodnogo prava [Against Bourgeois Theories of International Law], Pravda (1937), No. 116 (7082), April 27, 1937, p. 3. Also see M. Rapoport, Protiv vrazhdebnikh teorii mezhdunarodnogo prava [Against Hostile Theories of International Law], Sovetskoie Gosudarstvo (1937), No. 1–2, p. 92. This issue was not distributed until September, 1937.

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the opinion of a single legal theoretician or his school.⁴ In consequence, Soviet jurists would hasten to explain in the present transition that it would be incorrect to say that the official theory of international law is undergoing a change. Communists point out that what has happened is no more than the exposure of theories presented by poorly trained self-styled Marxians and the acclaiming of principles propounded by persons better versed in fundamentals. Even though this is but a transition within the unofficial scholastic world, it is calling forth such comment in the Party press that those who would understand the Soviet approach to international law cannot ignore it.

Both Korovine and Pashukanis might present from their works statements showing a grasp of the essential idea of Marxian legal science: that law is a class tool, and international law as an extension of internal law must likewise perform its part in the struggle between classes.⁵ Although scattering this idea throughout their books, they did not formulate it concretely in their definitions, and today’s attacks show that the giving of a general impression is not enough.

Pashukanis’ two major additions to Soviet literature on international law were in the form of an article on the subject in the *Encyclopedia of the State and of Law*, published in 1929,⁶ and a textbook published in 1935.⁷ Comparison of the two works shows that even the author himself had changed his theories over the years intervening between publication dates.

Attempting in the earlier work ⁸ to define the substance of international law, he found it to be a struggle of capitalist states among themselves, organized into several isolated competing state-political trusts in order to put into practice their rule over the proletariat and over colonial countries. In the textbook ⁹ he varied this, although not essentially, to say that international law as practiced between capitalist states was one of the forms with the aid of which imperialist states carry on the struggle between themselves, consolidating the division of booty, i.e., territory and super-profits. He had

⁵ For example—“As the single source of international law in the first meaning of this term we recognize class (at a given stage in the historical process) consciousness of the ruling groups as the source of all existing law, including international law.” See E. A. Korovine, *Sooremennoe Mezhdunarodnoe Publichnoe Pravo*, pp. 8-9, cit. supra, note 1. Also—“The new quality which international law has acquired as a tool and formulation of the policies of the proletarian state is to be found in the fact that for the first time in history a state has appeared in the international arena where power belongs to the proletariat, a state which reflects the interests of the toilers and sees in the international solidarity of the toilers one of its chief supports.” See E. B. Pashukanis, *Ocherki po mezhdunarodnomu pravu* [Outlines for International Law] (Moskva, 1935), p. 18.
⁸ See *op. cit.*, p. 862, supra, note 6.
⁹ See *op. cit.*, p. 9, supra, note 5.
retrogressed, for although some slight mention of the purpose of international law as a means of ruling the proletariat appeared in his first definition, he left out all mention of it in the second. Here it is pointed out that he made a great mistake, and critics castigate him for failure to show that the struggle of capitalist states, although having the outward manifestations of a division of profits and territory, is certainly not carried on with that as its ultimate aim. Territory and profits would not be desired unless they performed some function and satisfied some need, and he is criticized for failing to show the underlying reasons for this fight for colonies. Explanation should have made clear that these struggles are the result of the crying need faced by every capitalist state to increase production, reduce costs, and satisfy the demands of its people, who are constantly being pauperized by a system which is no longer capable of meeting their needs. He failed to emphasize Lenin's teaching that foreign policy cannot be separated from internal policy, and that international law as practiced by capitalist states in their relations among themselves is directed towards a consolidation of the ruling position of capital. New definitions will not be accepted unless they can cover the whole field and show the link between exploitation of the worker, the growing mass discontent, and the consequent search for new territory and new profitable relationships which may facilitate temporarily the dulling of this discontent by the satisfaction of popular needs at home through the exploitation of weaker and colonial peoples abroad. International law must be defined as class law in terms so simple and expressive that no one could possibly be deceived.

The Soviet press has long rung with revelations of this character. Every Soviet reader knows of the conflict of British and Japanese interests in India and China, both states seeking colonial markets to make possible continued employment and lower cost mass production. Soviet readers find these explanations supported by Japan's military advance into China where her conflict with other imperialist Powers, long waged by peaceful tools of international law, at last broke out into the open so that all could see its nature. Soviet economists have linked these military moves with Japan's deteriorating internal economy bringing with it the increasing discontent and unrest of the masses. The Soviet reader finds simple proof of the theoretician's argument that foreign policy is shaped to fit the demands of the struggle between the classes, and that international law as the tool of that policy is no more than a reflection of class conflicts calling for some attempts at solution.

10 "There is no more erroneous nor harmful idea than the separation of foreign and internal policy." See leading article published in Pravda (1917), No. 81, June 27 (14), 1917. Also published in Leninski Sbornik (Moskva, 1935), Vol. 21, p. 66. While the article was unsigned, the editors of the Sbornik have reached the conclusion that beyond a shadow of a doubt Lenin was the writer. See idem., pp. 60–61.

11 Taracouzio draws this general conclusion, although Soviet jurists would not now concur with his formulations. See op. cit., p. 12, supra, note 5.
In considering the next step, and treating of international law as used not between capitalist states alone, but by the Soviet Union in its relations with the imperialist world, Pashukanis set forth a definition which is now the butt of criticism. In the *Encyclopedia* he called the law used in these relationships a temporary compromise between two antagonistic class systems—a compromise concluded when the bourgeois system can no longer secure for itself absolute control and the proletarian-socialist system has not yet conquered the field. For him it was a law between classes, and as such he thought that it might be termed a law of the transition period. Here he was treading perilously close to a law above class and having a palliative effect upon the class struggle. He is criticized because this definition concealed the class nature of law. He saw the error himself, for in his later publications he repudiated the first theory by saying that international law as used in the relations between the Soviet Union and imperialist states was not a compromise but one of the forms in which the struggle between the two systems flows along. He saw it as a struggle between two different and opposed economic and social systems, and as reflecting the basic fact that the whole world is breaking into two camps, capitalist and socialist. Now he is criticized because he merely stated the conflict as between systems and did not declare in unmistakable terms the class aims distinguishing these systems.

Any definition in the future must contain an explanation of the contrasting basic class interests which international law is serving in the socialist state and in the imperialist capitalist states or it will not meet the demands of today’s critics.

Soviet writers find a wealth of illustrative material on this point in the Spanish conflict. Every Soviet reader knows of the maneuvers within the League of Nations, led, on the one hand, by Italy and her bloc supporting the landlord, Church, and wealthy bourgeois elements, and, on the other hand, by the Soviet Union supporting the democratic groups—the worker, peasant, petty bourgeois and intellectual elements. Both sides rested their actions on alleged principles of international law, but writers find the basic contrasting class interests so near the surface that their influence upon the use of international law norms is apparent. Soviet readers have little trouble in drawing the conclusion that international law is being used to further class aims, and from that point the step is short to call it in substance class law.

Any writer cannot limit his explanation to the importance of class interests in the formulation of international law as used in these relationships between the Soviet Union and other states. He must go further and show how these class interests have developed so far within recent years as to bring about a change in the substance of international law as used by imperialist

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12 See op. cit., p. 862, supra, note 6.  
13 See op. cit., p. 17, supra, note 5.  
14 See Taracouzio, op. cit., p. 3, supra, note 5. The author does not, however, analyze the facts supporting the Marxian contention that before the proletarian revolution all states were slaveholding, feudal, or bourgeois dictatorships. Marxian authors will be required to make this analysis before they will now be accepted for Soviet students.
states even among themselves. He must show the increasing class conflicts within France and England and link them to the policy of these states in permitting Japan to begin her advance into Manchuria unchallenged, even though it occurred in violation of all the principles which international law held sacred at the time. He must explain that French and British ruling groups reckoned on a stronger Japan as an Eastern thorn in the side of the only socialist state. He must review the attitude of a certain part of the French and British press which has looked on in Spain without objection while a kindred economic class began its fight to regain its lost control while violating all of the rules formerly generally accepted by French and British leaders as the norms of international law.

Pashukanis' errors as to the substance of international law were serious, but critics find even more dangerous his treatment of the form of international law applied by the Soviet Union. Quite in the face of Professor Korovine's theory that the Soviet Union had brought with it a new form of international law which he dubbed the international law of the transition period, Pashukanis saw no change in form at all. He was merciless in his criticism of Korovine, saying that no new form had been created, but that quite the contrary was the case in that the Soviet Union was applying many forms analogous to those applied by capitalist governments. He called attention to the Soviet espousal of generally accepted principles, such as the exchange of diplomatic representatives, the immunity of diplomatic persons and correspondence, and the use of international treaties as proof of his thesis. At the same time he recognized that in substance the law was class law even though he did not put this into his definitions. To explain the contradiction of bourgeois form and socialist substance, he outlined the theory that the exterior similarity of forms does not stand in the way of the Soviet foreign policy differing in principle from the policy of any capitalist state. He thought that in many cases one and the same form might be used with different class aims, and for different class purposes.

Korovine had previously pointed to the innovations practiced by the Soviet Union in her international relations—to the refusal to recognize capitulations and extraterritoriality in Turkey, Persia, Egypt and the Far East, to the reclassification of ambassadors and ministers as equally ranking representatives of the Soviet Union, to the creation of the trade delegation demanding rights of diplomatic immunity, to the advocacy of complete and general disarmament, to the espousal of the right of self-determination, and to non-aggression pacts. These innovations had led Korovine to the conclusion that form had changed with substance, and that when international law became a tool of the proletariat it was no longer even in form the same international law used before. He had good Marxian theory to support him, for dialectic materialism rests one of its corner-stones upon the principle that

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15 See Sovremennoe Mezhdunarodnoe Publichnoe Pravo, p. 8, cit. supra, note 1.
16 See op. cit., p. 16, supra, note 5.
17 See idem, p. 17.
form and substance progress together. A change in form must of necessity follow a change in substance.\(^{18}\) Even some non-dialectic materialists had long ago recognized that such a change occurs.\(^{19}\) Pashukanis, fearing apparently that a negation of the continuation of old forms would lose for the Soviet Union the protection afforded by diplomatic immunity and the exchange of representatives, as well as other privileges conferred by established international law, was loath to claim a change in form.\(^{20}\) The innovations introduced by the Soviet Union did not seem to him to amount to an evolution of international law, a change from bourgeois to socialist law after having passed through a transitional period.

He overlooked the philosophical meaning of a change in form, and, being without a philosophical turn of mind, he struck out against any statement defining a change. This same approach was used by him in his treatment of Soviet municipal law, which he declared to be bourgeois in form although socialist in substance.\(^{21}\) That error had led to his misinterpretation of the principle of the withering away of the state, and by this error he proved to Soviet administrators the practical danger in what may have appeared earlier to be only a tempest over theories. While his errors in the field of international law do not have as immediate practical danger as the error in the field of municipal law, they are nevertheless criticized because of potential harm.

Critics now point to this threat of harm by declaring that Pashukanis' line on the identity of form and substance was an attempt to prove that Soviet legal forms were merely the successors of bourgeois legal forms. They find this approach an attempt to subordinate Soviet policy to the practice of

\(^{18}\) "Substance and form are in dialectical unity: one grows into the other, one manifests itself in the other, the development of one depends upon the development of the other. Hegel says that form is substance converted into form, and substance is form converted into substance. Therefore, form is not passive in the process of development: as an essential element of substance, form actively reacts upon the course of development of substance and upon its modification." See Dialekticheskii i Istoricheskii Materializm (Chast 1), Kollektiv Institut Filosofii Komakademii pod rukovodstvom M. Mitina [Dialectic and Historical Materialism (Part 1), by the Collective of the Institute of Philosophy of the Communist Academy, working under the direction of M. Mitin.] (Moskva, 1933), p. 179.

\(^{19}\) "The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received." See Holmes, The Common Law (1881), p. 5.

\(^{20}\) See op. cit., p. 15, supra, note 5.

\(^{21}\) For criticism of this aspect, see P. Yudin, Protiv Putanitsy Poshlosti i Revisionizma [Against Confusion, Platitudes and Revisionism], Pravda (1937), No. 20 (6986), Jan. 20, p. 4. Also see P. Yudin, Sotsializm i Prawo [Socialism and Law], Bolshevik (1937), No. 17, Sept. 1, p. 31.
bourgeois international law. They link it with the attempt of Trotsky and Zinoviev to bring the Soviet system down to the level of the capitalist system. Pashukanis' theory is thought to be dangerous because it would require the U.S.S.R. to delimit its foreign policy by that order of relationships which imperialist states adopt for the purpose of consolidating the hegemony of imperialism. Theoreticians now demand recognition that the Soviet Union has developed a new form of international law, so that the Soviet Union may be free to develop its own forms and use them as it finds necessary in its struggle to prevent war. This policy has borne fruits in the pact defining aggression, in the increasing number of non-aggression pacts, in the tendering of cultural, medical, and technical aid to backward neighbors, and in the sponsorship of international policing of troubled zones.

Pashukanis is criticized not only for his errors in the realm of general theory, but also because of his espousal of specific principles long controversial in international law circles. He is now particularly belabored because he called the principle of *rebus sic stantibus* "healthy." Critics announce that this amounts to support of the German declarations to the effect that various previous treaty obligations are no longer binding due to the changed conditions resulting from the *faits accomplis* with which the Germans have presented the world. Pashukanis' views are in direct conflict with the oft-repeated demand of the Soviet Commissar for Foreign Affairs that any change in existing obligations occur only with the approval of all parties concerned, as was the case at Montreux, 1936, when refortification of the Straits was considered.

In reading that unilateral application of the principle of *rebus sic stantibus* is not acceptable to Soviet theoreticians, an international lawyer may ask whether Pashukanis was also wrong in citing with approval acts of the French National Assembly of 1790 annulling certain Bourbon treaties. This principle had been used in framing the instructions given the Soviet delegation to the Genoa Conference of 1922 as to the argument to be used in explaining the government's refusal to honor Tsarist debts.

In 1922 it was argued that after a class revolution conditions change to such an extent that the new class cannot be expected to pay the very debts contracted to keep the old order in the saddle in the face of revolutionary pressure from beneath. There is no reason to believe that this argument has lost its support within the Soviet Union, and the conclusion presents itself that this part of Pashukanis' theory was correct and that his error lies in failing to distinguish between the usual application of the principle and repudiation after a class revolution of obligations contracted to prevent that revolution. The very fact that German lawyers cite Pashukanis in support of their repudiation of World War obligations is taken as a measure of the

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22 See *op. cit.*, p. 864, supra, note 6.
danger of Pashukanis' theory, especially at a time when the Soviet Union is
struggling for strict observance of international agreements as the last bar-
rier against world-wide war.

As a parting shot, critics suggest that they are substantiated in their
claim that Pashukanis mouthed socialist phrases while espousing bourgeois
ideas because of his explanation as to the source of international law. In
the Encyclopedia 24 he advocated the theory propounded earlier by Profes-
sor Korovine that international law arose with exchange between tribes in
preclass tribal society. This would mean that class elements need not be
present in international law, and, in consequence, it would negate the basic
principle of Marxism that all law has been and will continue to be class law.
Pashukanis saw this basic error himself and discarded this interpretation in
the textbook, 25 in which he declared that the earliest international law ap-
peared with the earliest class society, i.e., with the development of the slave-
holding state which grew out of the tribal civilization of primitive man as
division of labor and acceptance of the concept of private property strati-
fied society into classes. With this change he brought himself more nearly
into keeping with Marxian theory, but his delayed correction is not helping
him with his critics today, for they still decry the error of his first position.

With these criticisms in mind, the American lawyer may piece together
the elements which Soviet theoreticians are now demanding in any treat-
tions of that creative genius there must be an outline of the Union's additions to the body of international law.

Throughout the whole of any future discussion, the writer must reëmphasize the struggle for peace which is being waged by the U.S.S.R., and show how this struggle rests upon the sanctity of treaties and the observance of international obligations.