DISCUSSION NOTES

The Discrete Charm of Bourgeois Law: A Note on Pashukananis

STEVE REDHEAD*

Whilst Chris Arthur’s lucid exposition of the significant work on Marxist theory of law by Evgenii Bronislavovich Pashukanis (Critique 7, Winter, 1976-1977) should be welcomed, there are a number of issues which require some comment. It is important to revive the Bolshevik debate about law and the state, particularly for analysis of transitional social formations; as important for Soviet Studies now as it was in the 1920’s. It is also necessary to develop an historical materialist theory of law in capitalist societies. However, this task must be firmly grounded in a Marxist theory of the state, a project begun by Marx but not coherently developed since his death. In eulogising one contribution to the development of Marxist understanding of legal and state forms of capitalist social relations there is a danger that the essentials of Marx’s critique of bourgeois legal and political philosophy will be missed. It must not be forgotten that Marx himself made “a very real contribution towards a materialist philosophy of law” and that the major contribution of Pashukanis, though important, was to expand Marx’s notion of “fetishism” for a theory of law.

It is worth noting that lip-service was paid to the importance of the theory of fetishism for an understanding of law by Austrian social democrat Karl Renner¹ (albeit in an isolated reference) and in recent years Renner’s work has mistakenly been praised as making a major contribution to Marxist theory of law, by Marxists as well as bourgeois legal philosophers. Pashukanis, too, has received acclaim from bourgeois jurisprudence (Lon Fuller² called his work “an ingenious development of Marxist theory . . . work in the best tradition of Marxism . . . the product of thorough scholarship and wide reading”) as well as those on the left,³ and that at least might make readers of The General Theory of Law and Marxism suspicious. That is not at all to argue that the work of

*Steve Redhead is Lecturer in Law at Manchester Polytechnic, England.

Pashukanis was, like Renner’s, in any sense “outside” Marxism, but it is to sound a note of caution and to read Pashukanis slightly more critically than other commentators to date.

There appear to be three important areas of discussion. Firstly, there is the question of Pashukanis’ debate (particularly in the 1920’s) with contemporaries in the USSR which does not receive adequate attention in Chris Arthur’s essay and which points to problems with the “commodity exchange theory of law” (as the work of Pashukanis and P. I. Stuchka came to be known). Secondly, the precise nature of Pashukanis’ extension of the theory of fetishism needs to be assessed. Lastly, the limits of Pashukanis’ theory of the state need to be recognised.

The Bolshevik Debate on Law

To understand correctly the contribution of Pashukanis4 to Marxist work on law, it is necessary to explore the context of his polemics against Bolshevik contemporaries and bourgeois legal theorists. A full exploration is not possible here but the most important of such debates can be considered, namely that with Stuchka, who was seen as the “main representative of the moderate wing of the commodity exchange school,”5 the more “radical” aspect of which was Pashukanis’ work. Stuchka, appointed Commissar of Justice in 1918 and for many years afterwards a leading figure in the debates on law, produced his major theoretical text, “The Revolutionary Part played by Law and the State — A General Doctrine of Law”, in 1921 (also in Hazard (ed) Soviet Legal Philosophy). The Pashukanis-Stuchka debate is emphasised here at the expense of other of their contemporaries, for instance Dozenko and Krylenko, because of the important link between them, which is their explicit theorisation of law as social relations.

Pashukanis specifically congratulated Stuchka in The General Theory of Law and Marxism on such conceptualisation: “From our point of view Stuchka was perfectly correct in putting the problem of law as a problem of social relationship” (page 139). But he also perceived a fundamental difficulty; how does law regulate social relations? Pashukanis said that the answer became, in Stuchka’s work, tautological; that is, social relations regulate themselves. The key to this problem was to perceive law as “some specific relationship wrapped up in mystery” (page 131, my emphasis). By analysing law as a form of a special social relation the problem was solved to Pashukanis’ satisfaction. The question of law regulating social relations became, instead, that of the regulation of social relations in certain circumstances taking on a legal character. For Stuchka, legal relations were indistinguishable from social relations in general. Pashukanis counterposed the idea of law as a form of specific social relation. To determine

4. Particularly in the General Theory of Law and Marxism which as Arthur and others have observed is appallingly translated in J. Hazard (ed) Soviet Legal Philosophy. Cambridge Mass., Harvard University Press 1951, though “worker strength” (for labour power) has a certain propagandist attraction!
that specific social relation he had to posit a link between the form of law and the commodity form (see Arthur's discussion). The answer to the question — which social relations are legal relations? — Pashukanis gave as the relationship of private individual possessors of commodities, the exchange relations of commodity production. He had asserted that "Marxist theory must indubitably not merely investigate the material content of legal regulation during definite historical epochs but furnish to legal regulation itself — as a definite historical form — a materialist interpretation" (page 116), and clearly moved beyond Stuchka's problematic formulation in his subsequent theorisation. But he produced a theory of law in commodity producing societies and not specifically in bourgeois ones, where there is generalised commodity production.

It was not simply an accommodation to Stalinist pressure (which in fact did lead him to denounce "Trotskyism with its denial that it is possible to build Socialism in one country") but genuine awareness of theoretical problems, which led Pashukanis, in an early self-criticism, to acknowledge that the:

"basic defect of my first work was that the problem of the transition from one social economic conception to another — and particularly the transition from feudalism to capitalism (with which the transition from one system of law to another is associated as well) was not posed therein with historical concreteness . . . my work is in need of important correction. The correction should consist in a recognition that other systems existed side by side with the bourgeois (the most developed) system of law" (page 259-260).

Pashukanis considered that "his basic mistake was to confuse the specific indicia of the bourgeois juridic form with law in its entirety", an error which Stuchka had warned against. Similarly he reproduced the misconception when analysing state forms. In 1930 Pashukanis had to confess that:

"The bourgeois state with its special form of political domination is only one of the forms of state, and side by side with it other forms existed" (page 264).

His earlier work at times then came dangerously close to the bourgeois anthropological notion that primitive, ancient and feudal law was really only bourgeois law in a less developed form, with, of course, in Pashukanis' case the important distinguishing proviso (as Arthur clearly shows) that it would "wither away" in communism.

There was also raised in the Pashukanis-Stuchka debate the question of law in its relation to class domination. In another self-criticism Pashukanis admitted an "overestimation of market relations" in his theory of law and its important consequences:


“It was a gross theoretical error to identify law which is a historical phenomenon cutting across diverse class systems, with the aggregate of those features of bourgeois law that flow from the exchange of equally-valued commodities . . . such an understanding of law removes class coercion from the foreground of events.”

Here, clearly, the Stalinist pressure had a more direct impact, since Pashukanis’ earlier identification of law with commodity exchange relations had led him to deny the possibility of “proletarian law.” The possibility of its existence was continually denied in his work. The self-criticisms remained unsatisfactory; hence his disappearance in 1937. However all this can obscure Pashukanis’ genuine perception that Stuchka had a point. In the 1930 and 1932 pieces Pashukanis admitted that his particular conceptualisation of exchange relations and legal form caused a failure to recognise the class content of law. In 1924 he had warned against the mere introduction of notions of class struggle into previous work on law to obtain a Marxist theory of law, whilst himself neglecting the problem of class domination through law. He later wrote that:

“Law in bourgeois society serves not only to maintain exchange; simultaneously and (in fact) predominantly it supports and consolidates the unequal distribution of property and the capitalists’ monopoly of the means of production. Bourgeois property is not restricted to the relation among owners of commodities who are tied to each other by exchange and by contractual relations as a form of exchange. Bourgeois property also includes in a disguised form, the same relations of domination and subordination which stood in the foreground of feudal law as personal subordination.”

His earlier failure to see this led, in Pashukanis’ own view, to separation of “content” from “form”, or “form from substance”, the clearest example of which he considered to be his theorisation of criminal law as being based on exchange of equivalents. The content or “basic core of each historical system of law” was, by 1932, for Pashukanis as well as Stuchka, “the relationship between the owners of production and the immediate producers”.

However, this poses a serious problem; namely, the identification of legal relations with relations of production, which stems in Marxist theory from a problematical, over-literal reading of a section of the 1859 Preface, in which Marx wrote:

“At a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production, or — what is but a legal expression for the same thing — with the property relations within which they have been at work hitherto”.

Merely accepting that legal relations always equate with, or reflect, relations of production begs the crucial question for Marxism of the complex relation

8. Ibid., page 235.
9. Ibid.
10. Ibid.
between, say, bourgeois relations of production and bourgeois law. This was precisely the question to which Pashukanis in his early writings addressed himself. To take capitalist property relations as the fundamental relations of production in bourgeois society is to misread Marx and to misunderstand the mode of analysis in Capital. By 1932 Pashukanis and Stuchka shared this confused view of the “content” of the bourgeois legal form, with Pashukanis left arguing for a “synthesis” of their respective standpoints. However, even dialectics could not produce a satisfactory fusion of the two opposing wings of the commodity exchange conception of law.

An examination of the Bolshevik debate on law, then, reveals the suspect nature of some of the formulations in Pashukanis’ early work. It has been argued that theoretical issues raised in his self-criticisms need to be taken seriously. Nevertheless, the later writings displayed, on the whole, a capitulation to a more reactionary position — that of Stuchka, whose own self-criticism did not need to be anything like so far-reaching. They did not represent a resolution of the theoretical problems illuminated by his important historical materialist analysis of law.

Law as Fetished Form

The theory of commodity fetishism, utilised by Pashukanis for a theory of law, is obviously controversial within Marxism. There are Marxists who, following Louis Althusser, argue for its complete rejection, but even those who see it as central to Marxist analysis of capitalism do not necessarily understand it in the same way. The use of the notion fetishism raises important questions about the status of concepts like “alienation” and in fact the value of the entirety of the earlier writings, especially for theoretical work on law. Those who have attempted to develop a theory of “legal fetishism” have often obscured these questions by their particular usage. Karl Renner, for example, wrote that:

“...The same society which economically transforms the wage labour of the miner into stocks and bonds transforms it legally into the clauses of a statute or deed. This comparison is not based upon a mystical falsification of facts. Just as the fetish ‘commodity’ reflects the actuality of use value, so the fetish ‘law’ reflects the actual relations of human beings.”

Pashukanis himself subjected Renner’s work to a lengthy critique and his conclusions concisely criticised such statements:

“in comparison with the first volume of Das Kapital, Karner’s (Josef Karner was one of Renner’s pseudonyms) investigation ... furnished extremely little that is new ... where Karner tries to be independent, he introduces confusion” (page 175).

Unfortunately, Renner’s confusion was not entirely avoided in Pashukanis’ development of the theory of fetishism. In the 1930 self-criticism Stuchka was...

14. op. cit., page 53.
specifically cited as defending the importance of Pashukanis’ work on law as fetished form whatever else he may have criticised. However, Stuchka’s own understanding of the theory, like much else in his writing, was highly problematic:

“Our definition (of law) seeks actually to put people once more on their feet in their mutual relationships by recognising that the most fundamental problem in law is the relationship of man to man; whereas in bourgeois society, we see a dead norm lording it completely over a living man — where man exists for law rather than law for man” (page 26).

This contained a crude, distorted conception of the theory of fetishism of commodities and does not help us to understand the ideological importance of law. It remained closer to bourgeois sociology’s version of “reification” than Marx’s and can lead to Pashukanis’ own confusing point:

“Stuchka came out with a criticism of my work but he always recognised that it caused bourgeois law to lose its fetishism once and for all when the real basis of that fetishism was revealed.” (page 256).

This is a dangerous position to come to. Despite Pashukanis’ sophisticated Marxist analysis of commodity exchange relations and their legal form, in contrast to Stuchka’s, often, vulgar Marxism, his work tended to fall into the same trap as many other Marxists who have failed to distinguish Marx’s theory of fetishism from the Hegelian distinction of “essence and appearance”. Both Pashukanis and Stuchka were keenly aware that Marxist writings which saw law only in terms of ideology had to be criticised, yet in their work produced a conception of law as a mystification of social relations which simply requires a process of “uncovering” for the real content to be revealed. The reality of appearances is thus not sufficiently theorised in their work. As Isaak Rubin, a liquidated contemporary of Pashukanis and Stuchka, put it:

“Thus in the capitalist society the ‘material’ element, the power of capital, dominates. This is not an illusory, erroneous interpretation (in the human mind) of social relations among people, relations of domination and sub-ordination; it is a real social fact.”

It is not, then, simply enough to expose the fetishism of bourgeois law, its separateness, its discrete nature; rather Marxism must show how the existence and continuation of bourgeois society depends on the separation of economic and legal (and political) forms of capitalist social relations. It is to Pashukanis’ credit that his early work, though not without its contradictions, laid something of the foundations for this task.

Law, Repression and the State

However, Pashukanis’ writings on law — despite rhetoric about the need to see the state as the organised form of class dominance — ultimately failed to

15. For instance see P. Berger and T. Luckmann, The Social Construction of Reality, Harmondsworth, Penguin 1971, which has influenced “left” theories of legal relations.
produce, and hence operate within, a coherent historical materialist theory of the
state. His 1930 self-criticism admitted that earlier he had pushed the analysis of
the state into the background with a “narrow” approach to law. Nevertheless,
the 1924 text did raise the question of the relation and distinction between class
dominance and state dominance — why does the dominance of a class take on
the form of official state domination? — although this was confused by the
identification of diverse possible forms of state authority with the bourgeois
state. By 1930 he had come to recognise the error in his earlier argument that the
need for a state “disappears in the event that one class were victorious”. He
acknowledged that:

“The victory of the exploiters signified the making of their dominance and
their pressure stronger — and it is precisely for this that a state is
necessary. Only the seizure of state power by the proletariat discloses the
perspective of abolishing classes — and with them the state.” (page 264).

The “repressive” aspect of legal and state forms was emphasised in this
particular self-criticism but generally it represented a swing to Stuchka’s crude
version of law and the state as “tools of repression,” constructive opposition to
which was the impetus for the 1924 work. Thus the self-criticism revealed a
notion of the state as simply “a special force for crushing and oppressing the
exploited class” in whatever mode of production.

The promise, then, of using Marx’s categories in Capital to develop a critique
of bourgeois legal philosophy, and hence bourgeois legal forms, a project which
The General Theory of Law and Marxism suggested, was never fully realised in
Pashukanis’ work. The failure to theorise successfully the repressive nature of
bourgeois law and the bourgeois state was an important error and most clearly
displayed by what he later called a “mechanistic formulation” of the problem of
criminal law:

“In the chapter in my book devoted to the criminal law, there was perhaps
the clearest expression of the divorce of form from content, for the reason
that here there is the sharp antithesis between repression on the one hand,
as a means of safeguarding class dominance and criminal law on the other
as a form of the intercourse of subjects economically isolated (that form
being subordinated to the principle of equivalency).” (page 267).

His early theorisation of criminal law was certainly bizarre, bearing more
relation to ancient legal philosophy than Marxism, but once again the self-
criticisms did not resolve the problems. Pashukanis eventually argued that
criminal law in bourgeois society is “repressive” in that it preserves bourgeois
property relations:

“Criminal law is an ancillary branch of law. Its function is to maintain,
reinforce and safeguard fundamental relationships consisting of the
relationships between the persons who possess the means of production
and the immediate producers.” (page 267).

Here, again, the error was to see property relations as the fundamental relations
of production. The repressive character of bourgeois criminal law has proved
particularly elusive for Marxist theory and its political practice. The issue is
more complex than the law simply guaranteeing private property relations.
The "repressive" nature of bourgeois criminal law is instead to be sought in the social production process, the production and reproduction of capitalist social relations by which such property (legal) relations are established. The crucial question is how law preserves, historically, a process by which capitalists and workers come to meet in exchange as owners, of capital on the one hand and labour power on the other.

However, Pashukanis' work which did not explore such problems, and which has been subjected here to something of a critique, remains valuable for historical materialist theory of law. It erected signposts for future Marxist analysis of legal relations without submitting to the stranglehold of the base/superstructure metaphor and, despite immense pressure, resisted to the end the reactionary position of arguing for "proletarian law". Just as in the destruction of the bourgeois state apparatus, Pashukanis saw that the "withering away" of bourgeois law involves its disappearance as "a power separate from and counterposed to the masses." 18

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