

## CLASSICS ESSAY

### PASHUKANIS AND THE “JURISPRUDENCE OF TERROR”

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The concern of this review essay is to examine carefully the thesis propounded by Eugeny Pashukanis (1891-1937), the Soviet jurist, in his *General Theory of Law and Marxism*, that law is a distinctively bourgeois form of social regulation.<sup>1</sup> Positing the roots of the juridical form in the social relations of commodity exchange, Pashukanis saw law reaching its zenith in capitalism, where exchange was fully generalized. As an architect of the Bolshevik legal programme after 1917, he believed that law would wither away along with the disappearance of market relations and that the concept of “proletarian law” was erroneous. I shall argue that although Pashukanis’s thesis is of considerable intrinsic interest theoretically and politically, it is ridden with difficulties and did in practice serve to pave the way for Stalin’s “jurisprudence of terror.” As such, it stands as an important warning to radical criminologists that the Marxist critique of bourgeois law must be carefully understood. Anarchistic or nihilist revisions of that critique could have equally damaging consequences.

Whilst Pashukanis was already well-known to specialists in jurisprudence, being perhaps the most widely read Marxist theorist of law, he has been well and truly ‘rediscovered’ in the 1970s by neo-Marxist scholars of law and criminology. Ironically, whilst bourgeois jurisprudence continues to denigrate his work as an example of the weaknesses of Marxism, the neo-Marxists of today have revived him only to criticize him heavily. If there is one single most important reason for his resurrection, it is that he denounces the very form of law and thus poses a direct challenge to leftist political anxiety and action over the current demise of civil liberties, due process, and democracy (see Sumner, 1981). In the current phase of multinational, high finance, monopoly capital, the “tough” state is emerging, a state which closes its ranks and limits public freedoms. Our political instincts demand the preservation of those freedoms, and the struggles of our day frequently take legal form. The arguments of Pashukanis demand that we

understand what that might mean.

The reconstruction of radical criminology in the 1970s has also engendered an interest in Pashukanis, for it has turned our attention to the Marxist theory of law. Parallel to work in the sociology, philosophy, and anthropology of law, this effort has challenged several tenets of classical Marxism and demanded more careful formulation of these propositions (for example, the origin of bourgeois law, and the withering away of law in socialism). This re-examination has drawn upon the re-interpretation of Marx following the recent publication or translation of some of his major texts, and following the events of Hungary 1956, Paris 1968, and Prague 1968. The structuralism and economism involved in Pashukanis’s thesis, establishing a homology between the form of law and the exchange of commodities, feeds directly into that contemporary Marxology. I shall argue that his thesis has been correctly rejected: our general critiques of structuralism and economism enable us to construct something better. Indeed the criticisms of Pashukanis have been highly instructive in themselves.<sup>2</sup>

#### THE COMMODITY-FORM THEORY OF LAW

The starting point of Pashukanis’s *General Theory of Law* is a concern to understand the development of the most fundamental and abstract juridical concepts (such as “legal subject” and “legal norm”) as distinct historical entities: in short, to explain the very form of law itself. Bourgeois jurisprudence with its neo-Kantian normativism (law as an expression of universal moral imperatives) and its modern positivism (law as the properly constituted commands of the state) refuses to blur the is/ought distinction and investigate the historical reality of law, and is therefore “a waste of time” (p. 53). On the other hand, Marxism, like other sociological accounts of law, has rested too much on the expose of legal “fictions” to reveal their class functions. The implications of Marx’s derivation of the bourgeois concept of the

legal subject from the exchange of commodities (see Marx, 1974: Ch. 2) extend beyond the demystification of the bourgeois ideologies of freedom and equality to throw much light on the character of the legal superstructure. It is not enough to describe the class content of legal norms and the historical development of legal institutions; we must, says Pashukanis, analyze "legal regulation as a specific historical form" (p. 54). Right from the beginning, Pashukanis holds that the fundamental juridical categories retain their meaning irrespective of any variation or change in their concrete manifestations. Right from the outset, he posits that the category of law is like the category of commodity: its blatantly ideological character is accompanied by its "objective" character as an organic reflection of certain social relations.<sup>3</sup> For Pashukanis, the social relations which form the logical and historical precondition of the juridical form of social regulation are the social relations of commodity exchange.

Throughout his analysis there seems to be a single problematic which surrounds two crucial questions:

- 1) Can there be such a thing as 'proletarian law' in the transitional socialist state?
- 2) Why does bourgeois class domination occur through the rule of law in an impersonal, detached, official state and not remain content with direct coercive subjugation? (See p. 139)

It has to be said that throughout his *General Theory* the answer to the first seems a *pre-given* negative (see also Warrington, 1981: 2-4) and that the answer to the second is therefore *pre-given* to be something to do with the intrinsically bourgeois character of law.

Pashukanis' enquiry was very definitely overlaid with the political demands of orthodox Bolshevism. It was designed to meet a purely political end, the speeding of the revolution which he saw as being in process, the revolution to end property relations entirely. (Warrington 1981: 2)

Why else would he make a sharp separation at the outset between the form of law and its obviously myriad and complex historical contents? To assert that form is unaffected by changes in content is to adopt an abstract *a priori* which ensures the impossibility of proletarian law, given that law is irrevocably flawed as a form of social regulation by its origins in commodity exchange.

Explicitly and lucidly reliant on Marx's methodological comments in the *Grundrisse* (Marx 1973), Pashukanis's method is to begin with the simple abstract categories which adequately express the essence of social relations and move towards the analysis of the categories' complex concrete manifestations, bearing in mind that "the dialectical development of the concepts parallels the dialectic of the historic process itself" (p. 71). He

sees the legal form emerging "in an embryonic state" early on and only reaching the mature state "after a period of gradual development" (p. 71). The simple abstract categories are derived from the analysis of the fully developed form, which he unquestioningly but significantly assumes to be bourgeois law, and then they are used to reconstruct their social evolution. Clearly this is a highly selective reading of the *Grundrisse* which produces the familiar Hegelian evolution of the categories, suppressing the Marx of *The Poverty of Philosophy* (Marx, 1955) and the rest of the *Grundrisse* (see Althusser, 1969).

Arguing that many modes of regulation are not legal modes (e.g. amongst animals, within primitive societies, or the ordering of rail traffic in train time-tables) he asserts that:

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 of the development of the legal superstructure. (p. 81)

The only basis for this bald assertion seems to be that the regulation of animals, primitive societies, and railway traffic is founded on consensus (or, at least on a lack of "differentiation and opposition of interests"). This is hardly a good example of Marx's construction of categories from the analysis of masses of data on the "fully developed forms." It looks rather like an *a priori* tautological definition of legal regulation. Throughout his analysis, any other form of regulation is considered either not juridical or merely derivative of the juridical mode: all swans are white except black ones, which are not swans at all.

According to Pashukanis, contrary to other leading Soviet jurists of the time, the juridical form is not distinguished by the fact that it is backed by state power because the state can use its power to reinforce various modes of regulation (see p. 83, fn. 16). The legal form certainly does contain a class content but the latter does not explain the roots of juridical logic. The "cell-form of the legal fabric," for Pashukanis, is the legal relation which exists within economic relations before it is articulated and stabilized through a developed legal superstructure. Historically, he says, the legal differentiates itself from the economic with the lawsuit: in the earliest courts economically active subjects appear as participants in a legal superstructure (p.93). Consequent state declarations of law may clarify and stabilize legal relations, but they do not create the premises for them "which are rooted in the material relations of production." This situation creates a problem to which Pashukanis frequently returns: "law is simultaneously the form of external authoritarian regulation and the form of subjective private autonomy." (p. 97)

Law as a synonym for official stardom,  
and law as the watchword of revolutionary

struggle: this is the field of endless controversies and of the most unimaginable confusion. (p. 97)

But "subjective law" is the primary law since it is based on material interest and exists independently of the external regulation of social life. It is this primary legal relation which Pashukanis insists we must comprehend before we can arrive at the complex concrete totality of the modern coercive state (p. 99). Moreover, taking the examples of military regulation and the Jesuit order, Pashukanis argues that any system of regulation which does not depend on the autonomous will of the participating subject cannot easily be called law (black swans again?). What is specific to legal regulation is that it "presupposes a person endowed with rights on the basis of which he actively makes claims" (p. 101). The rights of private law (the subjective claims of the egoistic member of civil society) are thus the primary (simple, clear) expression of law, whereas so-called public law is a mish-mash which tries to express the impersonal common interest in the language of private law rights. "The form of law with the aspect of subjective right is born in a society of outdated bearers of private egoistic interests" (p. 103). It thus creates difficulties for the project of establishing "subjective public rights": they appear as "ephemeral lacking genuine roots, something eternally dubious" (p. 103).

So the essence of the legal relation is not to be found in the character of state power or the forms of public law. For Pashukanis it must derive from the analysis of "the atom" of legal relations, the legal subject. Relying completely on Marx's well-known analysis in *Capital* (Marx 1974, Ch. 2), he argues that with the emergence of commodity exchange people acquire the capacity to be legal subjects (or personalities) and bearers of rights (p. 112). The growth of the legal superstructure, resulting from trade conflicts, separates the legal subjectivity from the individual personality and stabilizes property relations by attaching the right of the legal subject to the property "wherever chance may take it." Contract, personality, and property are therefore the central concepts of law, and private law is its primary expression. The establishment of permanent markets, not the rise of the state, necessitated the resolution of conflicts over the right of disposal over commodities—and therefore the law of property and the legal superstructure. So the juridical form must persist as long as commodity exchange continues: even when it does not express "the real state of affairs" as in monopolistic, finance capitalism (where, for example, ownership of property rights in shares does not guarantee control over the enterprise), and even when it contradicts the critique of law held by the ruling party, as in a transitional socialist state.<sup>4</sup> But in the planned socialist economy the legal form has only limited possibilities and a limited role: "it exists for the purpose of

being utterly spent" (p. 133).

Regular exchange necessitates a state of peace, Pashukanis continues, and the legal consequences of exchange make possible the juridical presentation of state power. Historically, the latter develops first in the market towns of medieval Europe. The class state functions on naked expediency and does not *need* to take on a juridical form; but it did, although the legal form is abandoned when class struggle is bitter. The line between domination through the rule of law and domination through "emergency powers" in time of civil war is a fine one (see p. 150, 173 and 176). Nevertheless, it is not enough to point out that the juridical sphere of universal, equal rights is an "ideological smokescreen" concealing ruling class hegemony. Bourgeois legal ideology does not merely duplicate the worker's subjugation to the individual capitalist: the state stands above each member of the ruling class as an impersonal force and does not compel the worker to work for any specific employer (as in feudalism).

To the extent that society represents a market, the machinery of state is actually manifested as an impersonal collective will, as the rule of law . . . (p. 143).

In bourgeois society the coercive imperatives of single individuals contradict the autonomous will and reciprocity produced by generalized commodity exchange. Therefore, coercion in a society of commodity exchange must come from a third party, the abstract collective person elevated above all interested parties to the transaction. In short, the juridical form of state power in capitalism is not merely an ideological mask for bourgeois domination but a valid, logical necessity for regular commodity exchange. That is why class domination in bourgeois society takes the form of the rule of law.

Pashukanis gets the full mileage (and more) from his theory when he deals with morality and criminal justice. The ethical idea of the equal worth of all personalities is declared to be an ideological reflection of the equalization of real persons as values in the exchange of commodities. "Moral fervour is inextricably bound up with and feeds on the immorality of social practice" (p. 157). Thus moral fetishes, like the fetishisms of commodities and law, will only disappear when their generative market relations disappear. Communism would replace the hypocrisy of ideological morality with "the clear and simple concepts of harm and advantage" (p. 158). In the socialist transitional stage, the moral form temporarily takes a class content but gives way to "the development of the higher forms of humanity, as the transformation of man into a species-being" (p. 161, fn. 12). Since the concept of justice only refers to the equal worth of all people, it too must be derived from the exchange relation, therefore it is hypocritical and mystificatory, and to see it as "an

autonomous and absolute criteria" is "ludicrous" (p. 161). This simplistic and naive analysis leads Pashukanis to look forward to the "morality" of the future when each person "submerges his ego in the collective," and that throwback who believes in "abstract duty" will disappear: an ominous view in the Russia of 1927. "One must bear in mind that morality, law and the state are forms of bourgeois society" (p. 160).

Criminal law, for Pashukanis, is "the sphere in which legal intercourse is most severely tested" (p. 167). He argues that law violations precipitated the rise of the legal superstructure. Private law may directly reflect the general conditions of existence of the legal form, but criminal law is the first way in which the juridical detaches itself from everyday life: "the concept of theft arose before the concept of property" (p. 167).<sup>5</sup> Modern criminal law is only a developed form of blood vengeance and the equivalent retribution of "an eye for an eye." Such equivalence in the sphere of punishment or retribution is attributed to the rise of the commodity form.

Felony can be seen as a particular variant of circulation, in which the exchange relation . . . is determined retrospectively, after arbitrary action by one of the parties (p. 168).

Quoting Aristotle, Pashukanis sees crime as an "involuntarily concluded contract" (p. 169).

The struggle for existence is, therefore, ultimately the root of modern criminal justice in that it produced self-defense (the true meaning of vengeance) which was gradually converted into juridical form through the concept of equivalence rising from the expansion of exchange relations. Matters became mystified by the subsequent introduction of public penalties for fiscal purposes and by the Church's ideological view of punishment as a divine measure (priestly castes frequently benefiting financially through confiscation of the property of guilty parties). But clarity is restored with the rise of the organized class state. In this period, "criminal justice is a means of merciless and relentless oppression" (p. 173), and we see the rise of the apparatus of policing, investigation, torture, and execution. To this day, criminal law, says Pashukanis, is only a device for class rule and oppression: it is "organized class terror." Reformers may have brought some progress for a while, but many corporal punishments remain, and penal policy is increasing in severity in the twentieth century (because of the fear of the working class movement and the experience of colonialism "which has been a school of cruelty all along"). "Only the complete disappearance of classes will make possible the creation of a system of penal policy which lacks any element of antagonism" (p. 175).

Crime and punishment become what they are, in other words they take on a juridical

stamp, through a buying-off transaction. To the extent that this form is retained, the class struggle takes place in the form of the administration of justice. Conversely, the characterization 'criminal law' becomes utterly meaningless if this principle of the equivalent relation disappears from it (p. 176).

In place of punishment and criminal proceedings, Pashukanis advocates treatment (medical-educational) and a policy of social protection (for defense). This treatment would no longer be subject to the criterion of equivalence but would be appropriate to the protection of society and the rehabilitation of the offender. It would therefore be concrete and practical, says Pashukanis, unlike the prison sentence which is only an abstract form of equivalent recompense based on the equalization of human labor in the notion of general labor (measurable in time) brought about by generalized commodity exchange.

Progressive criminologists are mistaken, argues Pashukanis, in believing that retribution can be abolished without the abolition of its generative social relations of commodity exchange. Only such professional people are really concerned with the reform of the offender—the public (and the judiciary) fetishize "just desserts" or "fair trading." Such gains made by the treatment lobby in bourgeois society are thus constrained by "the juridical abstractions of crime and punishment" (p. 184). In the USSR, says Pashukanis, the terminological abolition of "punishment" in favor of "judicial-corrective measures of social defense" does not remove the reality of the juridical form. The principle of social protection would not require the establishment of particular evidence but an exact description of the offender's symptoms and the appropriate treatment. "Evidence," for Pashukanis, appears to be merely a function in the trial form ("juridical coercion"). Social protection can also use coercion but does not need "precisely established evidence" to justify it:

Coercion as a protective measure is an act of pure expediency, and as such, can be governed by technical regulations. These regulations can be more or less complex, according to whether the purpose is the mechanical elimination of the dangerous individual or his reform (p. 187).

This chilling passage is soon followed by a clear and glib dismissal of the question of civil liberties posed against "the sociological and anthropological schools" by "bourgeois criminologists" as a question posed in the juridical mode, which thus indicates their consciousness of the importance of the legal form for the continuation of bourgeois society.

## A JURISPRUDENCE OF TERROR

In subsequent writings, in response to academic criticism and public pressure, Pashukanis changes his thesis to a more orthodox one positing that each society's legal system has been a reflection of its mode of production. By 1932, he saw law primarily as the regulation of production relationships by the class state. Class content was now more important than the form of law, and the proletarian state was simply the instrument of dominant class rule: the Stalinist line.

... by simultaneously presiding over the theoretical articulation of the Stalinist state as well as the practical process of the withering away of law, Pashukanis inevitably contributed to the growth of a jurisprudence of terror. As bourgeois criminal law and procedure were superseded in application by a simplistically vague and highly flexible "Soviet criminal policy"—shaped by Pashukanis and his associate Nikolai Krylenko through several proposed draft codes—legal forms were co-opted for extra legal purposes, judicial process was subordinated to political ends, and law itself was used to legitimate and rationalize terror. The jurisprudence of terror institutionalized and routinized political terror within the context of formal legalism (Beirne and Sharlet 1980: 29).

Even Pashukanis's earlier formulations in *General Theory* articulated a "jurisprudence of terror." *Whatever changes he made later are irrelevant: in the same way as Stalinism builds on Leninism and is not a distortion of it.* His view of law as a bourgeois form, the basic thesis, could only have had totalitarian implications since it precluded the defense of civil liberties in socialism. His analysis of the internal framework of the law (dominated by private law, with public law as a confused mystification) could only produce a cynicism about legal restrictions on state power. His narrow, simplistic view of morality was a recipe for the "submergence" of those with principles in the name of "collective progress." Pashukanis does not discuss democracy much but his theoretical position and a few odd remarks clearly show that he dismissed it as a political-ideological reflection of *laissez-faire* capitalism with no real value. It had no role to play in socialist progress. Similarly the state, in Pashukanis's view, has no intrinsic need of legitimation and can act purely on expediency: the rule of law being a form demanded of the bourgeois state merely by economic conditions. The political thus lacks any internal dynamic: such conflicts as it contains merely express economically produced class struggles. Criminal justice administration is merely class oppression and seems to lack any general values or more lasting

qualities. And his faith in medical science in "treating" crime is just comic: Pashukanis had not experienced the modern critique of science and of psychiatry. In short, Pashukanis's commodity-form theory of law paves the way for a state based on expediency and therefore for a jurisprudence of terror.

Given that the consequences of his position are so awful, it is important for us to discuss exactly what is wrong with it. In the following short space I shall attempt to isolate the key points.

Clearly Pashukanis, as Cotterrell (1979) and Hirst (1979) point out, has replaced one reductionism with another. He hangs everything on the single peg of commodity exchange. This has led critics to claim (1) that he neglected various preconditions of the modern legal form, e.g., the relations of production (all the critics), coercion and the class state (Cotterrell, 1979; Fine, 1979; and Warrington, 1981), complex historical processes (Korsch in the Appendix to Pashukanis, 1978; and Picciotto, 1979), social ideologies of all kinds (Sumner, 1979), and the practice and discourse of legislation (Hirst, 1979); and therefore (2) that the analysis of Pashukanis is only suited to petty commodity production and not advanced capitalism. It seems to me that these claims are essentially correct, but we need to be clear about exactly why.

If Jessop's arguments are correct then Pashukanis' theory would be defensible. Jessop argues that:

... although Pashukanis certainly cannot explain the particularities of bourgeois law solely in terms of commodity circulation, this can still be done by considering how the cell-form is overdetermined through the commoditification of labor-power and its implications for the creation of a legal order administered by a *Rechtstaat* (Jessop, 1980: 349).

Moreover, Jessop continues, for Pashukanis exchange is not the "solitary fount of law," merely the "site par excellence" of the juridical form which is actually appropriate to any conflict of private interests. Besides, Pashukanis did insist on the repressive role of the state, especially through the criminal law, and therefore clearly posited law as an expression of the state.

It seems to me that this is inaccurate. Firstly, Pashukanis clearly sees the origin of the legal form in trading disputes, and that is what he means when he says that the juridical form arises out of conflicts of private interests:

It is not hard to see that the possibility of taking up a legal standpoint is linked with the fact that, under commodity production, the most diverse relations approximate the prototype commercial relation and hence assume legal form (Pashukanis, p. 82).

Secondly, regarding state repression, Pashukanis regards its juridical form as a mere borrowing from private law (see for example, p. 136-7). On the third and most crucial point, the thesis that the commoditification of labor-power overdetermines the cell-form of law to produce the "particularities of bourgeois law" could not be derived from Pashukanis's work (a) because his analysis does not, and is not intended to, explain specific laws in bourgeois society, and (b) because his argument logically excludes this possibility. Pashukanis explains the juridical form as one which emerges *prior* to capitalist social formations. This demands three theoretical preconditions: (1) that there is only one form of the juridical, (2) that this form is rooted in commodity exchange, and (3) that commodity exchange develops long before capitalist modes of production. To explain either the general form or the particularities of bourgeois law as a product of the commoditification of labor-power, as Jessop suggests, is a quite different theoretical project. It seems to me that it is important to recognize this. I now want to question two of those three theoretical preconditions for Pashukanis's thesis (1 and 2).

Does the juridical only take one form? Put another way: is there a single ideological construction of the legal mode of regulation? Pashukanis' answer to this question is problematic, at a minimum, because of its tautological character (noted earlier, p. 6). He asserts a definition of the legal form and then denies that any other form of regulation is juridical: all swans are white and black ones are not swans. Also in the *General Theory*, whenever he finds juridical regulation anywhere outside private law, he dismisses it as a form of law by arguing that it is merely another mode of regulation adopting the juridical form. There is for him no question of there being more than one form of juridical ideology. That would imply that the juridical form had other origins: grey swans are really white ones in disguise.

On the substantive level, Marxists have often argued against Pashukanis that each mode of production has its own peculiar ideology of law and mode of legal regulation, and that the only thing such forms of law have in common is that they are rooted in the dominant modes of production and backed by the dominant classes. This view may be a crude conception of the general character of law, but Pashukanis's reason for rejecting it—an "empty platitude" applying equally to "all epochs and stages of social development" (p. 56)—seems weak. There is nothing wrong with adequate general concepts which "work" in the analysis of all modes of production. In the *Grundrisse*, Marx clearly argues this case in relation to the general concept of production (see Marx, 1973: 85). Moreover, Pashukanis's arguments against the view that property relations are the key to the analysis of law (another way of putting the mode of production—form of law thesis) are completely inadequate (see p. 110). He says that property only "be-

comes the basis of the legal form when it becomes something which can be freely disposed of in the market" (p. 110), that previous modes of exploitative property relations required "no specifically legal formulation," and that only capitalist property relations are mediated through the form of law (i.e., the contract). But all these arguments are entirely dependent on his limited definition of law and therefore must fall if we adopt a different definition. If we supposed crudely, for example, that forms of law are primarily determined by the forms of economy, we can see rules of kinship in communal modes of production as laws articulating exploitative property relations (e.g., between men and women), and in consequence all Pashukanis's arguments about property are invalid. This example shows that, as other critics have observed, Pashukanis fails to distinguish property from modes of appropriation, and in so doing allows the somewhat crucial concept of property to pass unquestioned.

What is more, Pashukanis does not distinguish the legal norm from other types of norm when he defines the latter as presupposing "a person endowed with rights on the basis of which he actively makes claims" (p. 101). Ethical norms can presuppose the same thing. What might well differentiate the legal from the ethical claim is the possibility of using legitimate force to realize it in practice. Subjects and rights can exist in moral ideology: what seems to give them a juridical character is their role in a socially organized and legitimated system of coercion. In short, Pashukanis does not distinguish moral ideology from the ideology of law.

As a whole, therefore, Pashukanis's insistence on the singularity of the juridical form seems indefensible. In selecting out the regulation of market relations as the essence of the juridical so as to regard other regulations as merely technical or politically expedient, his position looks rather like an ideal one for an "old Bolshevik" to take when he wants to observe and encourage the withering away of law.

To develop a more accurate analysis, I suggest that we adopt the view that juridical forms vary (primarily) with modes of production and, on that basis, investigate the suggestion made by Fine (1979), Picciotto (1979) and Jessop (1980) that the commoditification of labor-power is the key to bourgeois legal ideology. If, as Pashukanis observes, the key feature of bourgeois legal discourse is the formal equivalence of all recognized personalities (i.e., including corporations, trade unions, etc.), then the logical economic precondition does not seem to be commodity exchange, nor even private property, but the generalized exchangeability of labor-power. That is, for the legal ideological principle of equivalence of personalities to be extended beyond the privileged few, the masses had to be "free." They had to be severed from their ties to the land and from any restrictions on the disposal of their labor-power. In short,

capitalist relations of production had to supersede feudalism and slavery to provide a generalized material basis for the generalized ideology of universal equivalence. Petty commodity production does not seem a logical basis for this ideology. If this is correct, then we can understand the ideological representation of the organized coercion of the bourgeois state as "the rule of law," as precisely the philosophy of universal equivalence demanded by the capitalist form of exploitation. In bourgeois ideology, law and order must always be a complementary couplet, never an antagonistic one, precisely because the preservation of the bourgeois order really is dependent on a form of law which posits in its theory the equivalence of subjects. It is *that* theoretical equivalence which signifies the reality of our subjection to capital and the wage-labor system.

I would contend that this is also a more solid foundation for analyzing the historically incomplete achievement of legal personality. Pashukanis ignored this fact. Yet the delay or failure in achieving legal personality in capitalism by (for example) women everywhere or rural blacks in South Africa can be understood in terms of the role of these groups in the development of the capitalist mode of production. A general theory of commodity exchange cannot even approach an explanation of this phenomenon. On the other hand, the notion that full proletarianization is a basis for the achievement of bourgeois legal personality, a notion flowing from our general thesis, seems quite promising.

Such a general thesis is too complex to be developed here. We must now turn briefly to the main weaknesses of Pashukanis's theory in relation to criminal law and criminology.

Firstly, modern criminal justice is not just an instrument of class oppression, a weapon in the struggle for existence, but paradoxically also an agency in the construction of class hegemony. It subordinates and wins consent, but not in the same historical moment (see also Weitzer, 1980). It can be used purely coercively to create a labor force for capital (see Van Onselen, 1976 and Shivji, 1981), but once capitalism is established criminal justice can appear to represent the collective interest in suppressing the deviance of the few. The precondition for this latter possibility (unforeseeable in Pashukanis's analysis) is full proletarianization, full admission to the society of capital, which gives a real basis to the capitalist state's ideological representation of the penal law as the correction of "criminals" in the collective interest.

Secondly, regarding punishment, the generalized use of prison sentences is more correctly regarded as a reflection of the relations of capitalist production than the structure of commodity exchange—the system of petty commodity production only equalizes particular forms of labor at the market. Only with the transfiguration of all production into wage-labor in the capitalist system does all labor become converted into quantities of gen-

eral labor through the mechanism of exchange. In these circumstances, the seizure of quantities of general labor-time becomes a generalized form of punishment. It should also be noted that Pashukanis missed the point, logically arguable from his thesis, that the generalized use of fines as punishments must be based on the generalized use of the universal equivalent, money, arising from the full extension of commodity exchange in the capitalist mode of production.

Thirdly, apart from Pashukanis's already noted faith in medical science to cure offenders, he also completely succumbs to the positivist myth of the pathology of "the criminal." There is nothing in his work to tie the penal philosophy of social defense to a Marxist analysis of "anti-social behavior." "Social defense" is a form of penal philosophy which can be filled with sharply differing contents; he makes no contribution whatsoever to socialist penal philosophy. I would suggest that this is primarily the result of his general theoretical position on morality, which prevents him from developing an analysis of the specific moral contents of the categories of censure and from viewing psychiatry, education, and social work as a means of state control.

In conclusion, radical criminology can learn much from Pashukanis's theoretical mistakes. Most importantly, perhaps, it should appreciate more fully that law is not just a means of oppression or merely a bourgeois form of mystificatory regulation. The legitimate organization of coercion to maintain order, i.e., law, has existed in different forms hitherto, and there seems no reason why we should not expect it to continue in a new form with the rise of socialism. Indeed, we should realize that one key dimension of legal regulation (as opposed to mere coercion) is its normative and political legitimacy and attempt to preserve that dimension: now, in order to prevent the rise of fascism and to preserve civil liberties, and in the future in order to prevent an undemocratic form of law ever arising again under the banner of socialism. Without that intrinsic "democratic" element, law is nothing but a facade concealing the political expediency of the state.

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FOOTNOTES:

1. The two books underpinning this essay (Pashukanis, 1978; Beirne and Sharlet, 1980) are translations of the main texts of Pashukanis. Both greatly improve on the existing English translation (Babb and Hazard, 1951) in the quality of translation and in the quantity of his writings translated. Beirne and Sharlet (1980) have translated the first Russian edition (1924) of Pashukanis's major work *General Theory of Law and Marxism*, whilst Arthur has translated the German version of the amended and improved third Russian edition of 1927 (Pashukanis, 1978). As Cotterrell (1979) points out, there is no change in the main argument, but like other commentators I have found the Arthur edition much more readable not surprisingly since it is a translation of a translation and takes a text published and revised in the light of criticisms of the earlier editions. It is really important to read this version since it shows Pashukanis responding to criticisms which are very similar to those made today.

However, the Arthur edition only contains the *General Theory*, plus a short commentary by Korsch, whilst Beirne and Sharlet's book has Pashukanis's texts of self-criticism, recantation and apologia (for Stalinism). Pashukanis's work seems to have gone through these phases. From

1930 onwards, his ideas are clearly subject to political pressure—Stalin in 1929 announced the importance of law and state—and by 1934 his thesis is transformed to a legitimation of the official line (he was eliminated in 1937). Up to 1934, however, his self-criticisms may well be "genuine" and certainly, as all the Marxist commentators agree, involve improvements on his earlier errors. Finally, it should also be said that Beirne and Sharlet's introduction is excellent and much preferable to Arthur's somewhat uncritical defense. Further bibliographical considerations can be found in Warrington's review (1980). All textural references herein relate to the Arthur edition, except where indicated.

2. It would be facile to ignore the existing commentaries and reviews on Pashukanis. (See, for example, Arthur, 1977; Redhead, 1978; Kinsey, 1978; Cotterrell, 1979 and 1980; Hirst, 1979; Picciotto, 1979; Sumner, 1979 and 1981; Warrington, 1980 and 1981; and Binns, 1980; for other references see Warrington, 1981). But to discuss them in detail seems unnecessarily scholastic, so I shall merely try to build upon these reviews in both the exposition and critique of Pashukanis's position. Like most other commentators (except Cotterrell, 1980, and, of course, Beirne and Sharlet), I shall concentrate on the **General Theory** which, although always a preliminary draft to a never-produced definitive account, is the text that has caught all the attention, now as then, and which expresses his distinctive position. For a more extended exposition of Pashukanis, consult the essay by Warrington (1980) and the introduction by Beirne and Sharlet (1980).

3. "The Ideological nature of the concept does not obliterate the reality and the material nature of the relations which it expresses" (Pashukanis, P. 75).

4. "To the extent that state enterprises are subject to the conditions of circulations."

5. This is surely historically incorrect (see Hall, 1952).

#### REFERENCES:

- Althusser, L. (1969). For **Marx**. Harmondsworth: Penguin.  
 Arthur, C.J. (1977). "Toward a Materialist Theory of Law." *Critique* 7, p. 31-46.  
 Babb, H. and Hazard, J.N. (eds.) (1951). **Soviet Legal Philosophy**. Cambridge, Mass.: Harvard U. P.  
 Beirne, P. and Sharlet, R. (eds.) (1980). **Pashukanis**. London: Academic Press.

- Binns, P. (1980). "Law and Marxism." **Capital and Class** 10, p. 100-113.  
 Cotterrell, R. (1979). "Commodity Form and Legal Form." **Ideology and Consciousness** 6, p. 111-119.  
 Cotterrell, R. (1980). Review of Beirne and Sharlet (1980). **British Journal of Law and Society** 7 (2), p. 317-321.  
 Fine, B. (1979). "Law and Class," in National Deviancy Conference/Conference of Socialist Economists (eds.), **Capitalism and the Rule of Law**, p. 29-45.  
 Hall, J. (1952). **Theft, Law and Society**. Indianapolis: Bobbs-Merrill.  
 Hirst, P.Q. (1979). **On Law and Ideology**. London: MacMillan.  
 Jessop, R. (1980). "On Recent Marxist Theories of Law, the State and Juridico-political Ideology." **Int. Journal of Sociol. of Law** 8, p. 339-368.  
 Kinsey, R. (1978). "Marxism and the Law." **British Journal of Law and Society** 5 (2), p. 202-227.  
 Marx, K. (1955). **The Poverty of Philosophy**. Moscow: Progress.  
 Marx, K. (1973). **Grundrisse**. Harmondsworth: Penguin.  
 Marx, K. (1974). **Capital, Vol. 1**. London: Lawrence and Wishart.  
 Pashukanis, E.B. (1978). **Law and Marxism**. London: Ink Links.  
 Picciotto, S. (1979). "The Theory of the State, Class Struggle and the Rule of Law." In NDC/CSE *Supra*, p. 164-177.  
 Redhead, S. (1978). "The Discrete Charm of Bourgeois Law." *Critique* 9, p. 113-120.  
 Shivji, I. (1981). "Semi-proletarian Labour and the Use of Penal Sanctions in the Labour Law of Colonial Tanganyika (1920-1938)." in Sumner, C.S. (ed.), **Crime, Justice and Underdevelopment**, London: Heinemann (in press).  
 Sumner, C.S. (1979). **Reading Ideologies**. London: Academic Press.  
 Sumner, C.S. (1981). "The Rule of Law and Civil Rights in Contemporary Marxist Theory." **Kapitalstate** (September, forthcoming).  
 Van Onselen, C. (1976). **Chibaro**. London: Pluto Press.  
 Warrington, R. (1980). Review of Beirne and Sharlet (1980). **Int. Journal of Sociol. of Law** 8 (3), p. 325-330.  
 Warrington, R. (1981). "Pashukanis and the Commodity Form Theory." **Int. Journal of Sociol. of Law** 9 (1), p. 1-22.  
 Weitzer, R. (1980). "Law and Legal Ideology: Contributions to Genesis and Reproduction of Capitalism." **Berkeley Journal of Sociol.** 24 (5), p. 137-157.



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