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# Rereading: Pashukanis: Discussion Notes

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### **Abstract**

This article was published in Italian in 1973 and, together with an afterword written in 2016, has been offered by the author in response to the theme of the current issue of *Stasis*. In this work, Negri insists on radical difference of Marxist juridical theory, developed by the most important Soviet legal theorist, Evgeny Pashukanis (1891–1937), and on the revolutionary foundations of his thought. In his analysis—against normalizing and institutional readings—Negri both meticulously and polemically reconstructs these radical contents. He does so with impressive movement from Marx’s analysis of value-form, the State and capitalist command, to Pashukanis’s analysis of relations of these elements to juridical forms and the genesis of law in bourgeois society. This substantial reading of Pashukanis, together with Negri’s own political thought that emerged in the 1970s and prefigured his later works on the juridical forms of the global “Empire,” is an important contribution to political philosophy and Marxist legal theory,

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<sup>1</sup> Originally written in 1973.

and is internationally available for the first time in English and in Russian. In his Postface, written forty years later, Negri resumes and updates his account in the view of current debates and literature, and reconfirms “the greatness of Pashukanis’s work.”

### Keywords

Evgeny Pashukanis, Marxist legal theory, Soviet Marxism, law, value-form, capitalism, the State, Italian Workerism

## Law in the World of Commodities

“In as much as the wealth of capitalist society appears as an immense collection of commodities, so this society itself appears as an endless chain of legal relations” (Pashukanis 2002: 85).<sup>2</sup> This is how Pashukanis introduces us to the world of legal mystification, reminding us at the same time that if law is ideology and fetish, it is nonetheless real. “The state is not merely an ideological form, but is at the same time a form of social being. The ideological nature of the concept does not obliterate the reality and the material nature of the relations it expresses” (Pashukanis 2002: 75). Now, “we formulate the question as follows: can law be conceived of as a social relation in the same sense in which Marx called capital a social relation?” (Pashukanis 2002: 74).

Social relation; world of social relations; world of commodities: we are fully in Marx’s own territory. In the first section of Book I of *Capital*, while he is still analyzing the phenomenology of exchange value, Marx already claims that in the current regime, exchange presupposes agents who “mutually recognise in each other the rights of private proprietors. This juridical relation, whose form is a contract, whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two. It is this economic relation that determines the subject-matter comprised in each such juridical relation” (Marx 1887: 60). This is the—internal and material—nexus between the juridical will and its economic content; this and nothing else. “The persons exist for one another merely as representatives of, and, therefore as owners of, commodities” (Marx 1887: 60). On

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<sup>2</sup> Where necessary English translations have been modified to fit the Italian translations used by Negri—*Translator’s Note*.

the contrary, every idealist grants an autonomous reality to this relation. Let us consider Proudhon. Marx says that he

begins by taking his ideal of Justice, of “justice éternelle,” from the juridical relations that correspond to the production of commodities: thereby, it may be noted, he proves, to the consolation of all good petit bourgeois, that the production of commodities is a form of production as everlasting as justice. Then he turns round and seeks to reform the actual production of commodities, and the actual legal system corresponding thereto, in accordance with this ideal. What opinion should we have of a chemist, who, instead of studying the actual laws of the molecular changes in the composition and decomposition of matter, and on that foundation solving definite problems, claimed to regulate the composition and decomposition of matter by means of the “eternal ideas,” of “naturalité” and “affinité”? Do we really know any more about “usury,” when we say it contradicts “justice éternelle,” “équité éternelle,” “mutualité éternelle,” and other “vérités éternelles” than the fathers of the church did when they said it was incompatible with “grâce éternelle,” “foi éternelle,” and “la volonté éternelle de Dieu”? (Marx 1887: 64).

At this point, Marx’s investigative project is fully clarified: “In the course of our investigation we shall find, in general, that the characters who appear on the economic stage are but the personifications of the economic relations that exist between them” (Marx 1887: 60).

But the form is not only a reference to the materiality of the content of the exchange and to the general exchangeability of commodities; it is at the same time a mystification of the capitalist command over the exchangeability of commodities:

It is by no means self-evident that this form of direct and universal exchangeability is, so to speak, a polar form of commodity, and as intimately connected with its opposite pole, the absence of direct exchangeability, as the positive pole of the magnet is with its negative counterpart. It may therefore be imagined that all commodities can simultaneously have this character [direct exchangeability] impressed upon them, just as it can be imagined that all Catholics can be popes together. It is, of course, highly desirable in the eyes of the petit bourgeois, for whom the production of commodities is the non plus ultra of human freedom and individual independence, that the inconveniences resulting from this form, and especially from this character of commodities not being directly exchangeable, should be removed. Proudhon’s socialism is a working out of this Philistine Utopia (Marx 1887: 56).

The form of the commodity is therefore essentially antagonistic: “We saw that the exchange of commodities implies contradictory and mutu-

ally exclusive conditions. The differentiation of commodities does not sweep away these contradictions, but develops a form in which they can exist side by side” (Marx 1887: 71).

However, Marx’s reasoning is completed only when the essential contradiction of the form of the commodity is realized in the commodified form of labor, that is, in labor-power.

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 exchange of equivalents, which seemed to be the original operation, has now become turned round in such a way that there is only an apparent exchange. This is owing to the fact, first, that the capital which is exchanged for labour-power is itself but a portion of the product of others’ labour appropriated without an equivalent; and, secondly, that this capital must not only be replaced by its producer, the labourer, but replaced together with an added surplus. 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 content of the transaction, and only mystifying it. The ever repeated purchase and sale of labor-power is now the form; the content is this—the capitalist again and again appropriates, without equivalent, a portion of the previously materialised labour of others, and exchanges it for a greater quantity of living labour (Marx 1887: 412).

The abstraction “commodity” actualizes in this way its antinomic content and analysis reaches here its fundamental center, namely, the determination of the fabric of exploitation and of the conditions of class struggle: “At first the rights of property seemed to us to be based on a man’s own labour [...] Now, however, property turns out to be the right, on the part of the capitalist, to appropriate the unpaid labour of others or its product, and to be the impossibility, on the part of the labourer, of appropriating his own product. The separation of property from labour has become the necessary consequence of a law that apparently originated in their identity” (Marx 1887: 412–13).

In the form of the commodity and of law, and thus in the overall world of commodities, the organization of labor-power and the command for the exploitation of labor-power necessarily coexist. The antagonism of the form is first of all this coexistence—which would like to present itself as a mystification of exploitation and a negation of class struggle. But retracing this relation, the young Marx already sees in it not only the antagonism of the form but also its antagonistic development:

The relations of private property contain latent within them the relation of private property as labour, the relation of private property as *capital*,

and the *mutual relation* of these two to one another. There is the production of human activity as labour—that is, as an activity quite alien to itself, to man and to nature, and therefore to consciousness and the expression of life—the *abstract* existence of man as a mere *workman* who may therefore daily fall from his filled void into the absolute void—into his social, and therefore actual, non-existence. On the other hand, there is the production of the object of human activity as *capital*—in which all the natural and social characteristic of the object is *extinguished*; in which private property has lost its natural and social quality (and therefore every political and social illusion, and is not associated with any *apparently* human relations) [...] This contradiction, driven to the limit, is of necessity the limit, the culmination, and the downfall of the whole private-property relationship” (Marx 1959a: 37).

The antagonism covered by the form is the active motor of the extinction of this very form, and the struggle of the workers will destroy the form insofar as it will develop itself as a moment of a necessary antagonism. Moreover, this is not an indefinite process: it takes place along with class struggle; the juridical illusion is attacked directly insofar as communist struggle increases and—in this case—it is also demystified directly. Marx adds sarcastically: “Linguet overthrew Montesquieu’s illusory ‘Esprit des lois’ with one word: ‘L’esprit des lois, c’est la propriété’” (Marx 1887: 491).

Pashukanis’s question has enabled us to follow the concept of legal form in Marx; it originates from exchange value, deep into the world of commodities; covers its appropriative contents; sketches its own specific antinomic figure out of the form of the commodity in general (between organization and command—an organization of and for exploitation); and while it attempts to control this antagonism it submits to the tendency of its own destruction. Pashukanis’s question worked well: he is in fact among the first<sup>3</sup> (and unfortunately also the last) Marxist theorists of law who grasped the Marxian standpoint for which, beyond the abstract and scholastic opposition between structure and superstructure, law is dialectically considered as a form of the real process of exchange, and as the face of exchange value. Before him, only a careful observer such as Emil Lask (who, however, was external to Marxism) and Georg Lukács’s tumultuous but partial investigation had insisted on this motif.<sup>4</sup> But is Pashukanis’s analysis of the legal form as radical as Marx’s? Is it capable of developing itself with Marxian intensity to the point of grasping within the phenomenology of the form the scope of antagonism and the destructive force that class struggle exerts on it?

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<sup>3</sup> Pashukanis himself rightly claims this, against Piotr Stuchka’s polemic, especially in the preface to the second edition of his *General Theory* (2003).

<sup>4</sup> See Lask (1923a, 1923b), and Lukács (1971). On these antecedents, see Korsch (1970: 12).

Raising these questions is justified by the fact that a series of contemporary interpreters of Pashukanis's juridical thought have insisted on the realistic outcome of his work rather than admitting its fundamentally revolutionary tone; or better, they have attempted to curb it to a revisionist and merely modernizing perspective with regard to the theories in force in bourgeois law—that is, to give credit to a sociological and institutional version of his work.<sup>5</sup> It is for this reason that I want to try to measure the actual degree of Pashukanis's participation in the Marxist theory of law, that is, assess the extent to which the consideration of law on the level of structure and form can indeed support the revolutionary standpoint.

Now, it is beyond doubt that the revisionist reading of Pashukanis has some validity. He in fact moves from the search for what is “specific” in law—a search that repeats an age-old tradition and, in particular, resumes a problem stressed by juridical Neokantianism. “But if abstract definitions of the legal form not only imply certain psychological or ideological processes, but are concepts which express objective social relations, in what sense can it be said that law regulates social relationships? Do we not want to say by this that social relationships therefore regulate themselves? Or when we say that this or that social relationship takes on a legal form, then does this not imply a simple tautology: law adopts the form of law?” (Pashukanis 2002: 78). The answer is that “we escape the apparent contradiction if we succeed in establishing, by analyzing its fundamental definitions, that law represents the mystified form of a *specific* social relation.” That is to say, “under certain conditions the *regulation* of social relations assumes a *legal character*” (Pashukanis 2002: 78–79). What are these conditions? Following on from Ludwig Gumplowicz, Pashukanis believes that “the hardest core of legal haziness [...] is to be found precisely in the sphere of the relations of private law” (Pashukanis 2002: 80). “A basic prerequisite for legal regulation is therefore the antagonism of private interests. This is both the logical premise of the legal form and the actual origin of the development of legal superstructure. Human conduct can be regulated by the most complex regulations, but the juridical factor in this regulation arises at the point when differentiation and opposition of interest begin” (Pashukanis 2002: 81). The specificity of the juridical relationship must therefore be looked for in that “social relation *sui generis* [...] whose inevitable reflex is the legal form,” that is to say, in “the interrelationship of the owners of commodities” (Pashukanis 2002: 82).

There is no big difference between this stance and a privatistic and institutional genesis of the juridical order; at times it seems like reading

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<sup>5</sup> See “Introduzione” in Cerroni (1964, especially p. XXXIII ff.); see also Guastini (1971, especially p. 392–400, 401–08).

passages and texts by the early Croce or Santi Romano on the “right of private individuals”! But let us follow Pashukanis: “The path from production relationships to legal or private relationships is shorter than so-called positive jurisprudence thinks, unable as it is to do without a mediating connecting ring, state authority and its norms. The precondition from which economic theory begins is man producing in society. The general theory of law, in so far as it is concerned with fundamental definitions, should start from the same basic prerequisite” (Pashukanis 2002: 93). The thesis outlined here is then proposed again from a historical and dynamical point of view: the privatistic genesis of law is enriched from the procedural perspective, where it is dispute that gradually improves and determines the figures of the juridical superstructure (Pashukanis 2002: 93). “Not only did I point out that the genesis of the legal form should be sought in the relations of exchange, but I also stressed the aspect which in my view represents the most consummate manifestation of the legal form: the law-court and the judicial process” (Pashukanis 2002: 43). Moving from these presuppositions, another element of the institutional, privatistic, and sociological conception of law is repeated and reinforced: the polemic against state-controlled normativism. “The state authority introduces clarity and stability into the structure of law, but does not create the premises for it, which are rooted in the material relations of production” (Pashukanis 2002: 94). And, also: “It is readily evident that the logic of juridical concepts corresponds to the logic of the social relations of a commodity-producing society. It is precisely in these relations—and not in the permission of authority—that the roots of the system of private law should be sought. Yet the logic of the relations of dominance and subservience can only be partially accommodated within the system of juridical concepts. This is why the juridical conception of the state can never become a theory, but remains always an ideological distortion of facts” (Pashukanis 2002: 96).

There is sufficient evidence to ground a revisionist interpretation of Pashukanis’s thought. If, to put it with Hans Kelsen, in Pashukanis “all law is private law”; if “public law is a mere ideology of bourgeois jurists” (Kelsen 1955: 95–96); if the genesis of the juridical order is straightforward and institutional, then the antagonistic and dialectical coexistence of organizational functions and command for exploitation that constitutes the fundamental characteristic of the Marxian conception of law seems to be left aside. The structural determination of law necessarily becomes generic insofar as it excludes, at its basis, not exchange in general but that specific exchange between labor-power as commodity and capital on which the capitalist process itself is founded as well as the social existence of this mode of production. And this generality soon becomes unilateral to the extent that the absence of the scientific concept of exchange and exploitation prevents research from determining the link between exchange in the world of commodities and overall capital (autho-

rity; command of the State). The private is thus exalted in a radicalism of the founding functions of the juridical order that is purely illusory. Revisionism grasps these elements and uses them to develop a reading of Pashukanis that is presented as scientifically productive, or worse, authentically Marxian. Whereas, if this were really Pashukanis's only claim, we would rather be facing a radical conception of the philosophy of juridical action, of the *actio* as a teleological moment of the formation of order—as supported especially in the (here aptly updated) tradition of the Romanists.<sup>6</sup> But can Pashukanis really be limited to this?

In point of fact, beside this tendency and in a dialectical articulation with it, Pashukanis develops an approach that is far more correct and effective; ultimately, the overall framework of his thought turns out to be irreducibly opposed to that proposed by revisionism. The categories—subject, contract, property, legal process—that seemed to be given in line with a formative and institutionalizing process are given instead as contradictory and discontinuous, and as reassembled only by the dialectic of capital. What is capitalistically “general” is not constituted following the rising rhythm of the relation “subjective claim—market (dispute)—institution,” but explained in its articulations of exploitation and the mystification of exploitation.

Let us consider a fundamental category, that of legal subject. Now, as in Marx, the analysis of the form of the subject needs to be unfolded directly from the form of the commodity; just as a commodity is the form in which capitalist production is stabilized, so is the subject constructed in his abstraction and formality by capitalist development. “At the same time that the product of labor becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights” (Pashukanis 2002: 112). “Legal fetishism complements commodity fetishism” (Pashukanis 2002: 117). Here it is, the whole of capitalist society that prefigures and forms its own components. “At a particular stage of development, the social relations of production assume a doubly mysterious form. On the one hand they appear as relations between things (commodities), and on the other, as relations between the wills of autonomous entities equal to each other—of legal subjects. 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 2002: 117) “As socially regulative forces become more powerful, so the subject loses material tangibility. His personal energy is supplanted by the power of social, that is, of class organization, whose highest form of expression is the state. In this form, the impersonal abstraction of state

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<sup>6</sup> Updated with respect to the classical conceptions of Rudolf von Jhering and Bernhard Windscheid. A similar point of view can be found in Lask, perhaps not so much in his “Rechtsphilosophie” as in “Fichtes Idealismus und die Geschichte” (1923a).

power functioning with ideal stability and continuity in time and space is the equivalent of the impersonal, abstract subject” (Pashukanis 2002: 118–19). The form of the subject is thus necessarily antinomic; in its abstraction it attempts to encompass claim and norm, property and market, the struggle for rights and capitalist development. Subject and State become here the extreme terms of the total interchangeability of the components of capitalist society, whose unity is therefore necessarily contradictory and liminally antagonistic. The process of constitution of the legal categories then loses its “naturalness” and becomes a form of the capitalist mystification of the circulation and reproduction of capital, as an extension and deepening of exploitation.

Certainly, we at times register even in these pages a sort of reduction of the legal categories and of the form of law to the field of mere commodity exchange—as if the legal ruling of capitalist society dealt with this. As Sweezy puts it in another context, at times it seems that Pashukanis has a conception of exchange that is more Smithian than Marxian, in the sense that he seems to link very closely the main technical phenomenon of economic life, that is, the division of labor and authoritative subordination, to pure and simple exchange—while on the other hand, in Marx, it is the capitalist production of commodities and its basis of exploitation that determine this quality of the exchange (Sweezy 1942). In the second place, it is beyond doubt that even here, in some passages, the centrality of the exchange between labor-power and capital—a fundamental key to every authoritative articulation—is underestimated. However, Karl Korsch misses the point, or better substantially distorts the state of affairs, when he denounces in these pages “an overestimation, extremely strange for a Marxist, of circulation, which Pashukanis does not conceive only as a determinant reason of the traditional ideology of property, but rather as the sole economic foundation of actual property” (Korsch 1930: 21). Korsch distorts Pashukanis’s thought because what definitely stands out here, despite the ambiguities, is the Marxian qualification of the overall framework. Arguing against Renner-Karner, Pashukanis in fact explicitly expresses the radical character of the Marxian assumption: the accomplished formation of the capitalist market determines a qualitative leap in the legal form, where the conceptual or functional continuity of the legal categories disappears. There is an absolute difference between “private appropriation” for use and “private appropriation” for capitalist exchange. It is the whole that qualifies the parts; the phenomenon of exchange now lives only within the dynamics of exploitation and cannot be separated from it; even the hypothetical privatistic genesis of law is completely absorbed by and transfigured into the totality of the capitalist project of exploitation.

This is what matters when we answer the initial questions concerning the radical character of Pashukanis’s Marxist thesis. Here the overall structure of capital becomes central, and this structure is constituted by

exploitation, in the simultaneity and coexistence of organization and command for exploitation, civil society and the State. At this point, critique recovers and shows the authoritative specificity of the legal relation: it does not see this specificity as a realist illusion of society as opposed to the State but understands it in a materialist way as the form of the interpenetration of society and the State. Class struggle will be able to go down this path, not in the name of society's approach to the State, but rather directly, as the class struggle of the exploited against the State aimed at destroying the society of capital. As in Marx, the contradictions of institutionalism are then solved when we attribute to law—that is, the form of the commodity—the general quality of the world of commodities, that is, fetishism, and this enigma is at the same time unveiled while the reality of the antagonism it hides is offered to the struggle of the workers. At this stage, what is left of legal institutionalism and of the privatistic genesis of law is only the emblematic reference to a series of relations that are identifiable but unsolvable on the plane of law. Here we are thus given the first possibility to reclaim Pashukanis's work for revolutionary Marxism, a work that is like a “torso,” at times ambiguous and incomplete but after all overwhelmingly constructive from the point of view of the workers.

## Law in the Process of Surplus-Value

Thus “the critique of bourgeois jurisprudence from the standpoint of scientific socialism must follow the example of Marx's critique of bourgeois political economy. For that purpose, this critique must, above all, venture into enemy territory. It should not throw aside the generalisations and abstractions elaborated by bourgeois jurists, whose starting point was the needs of their class and of their times. Rather, by analyzing these abstract categories, it should demonstrate their true significance and lay bare the historically limited nature of the legal form” (Pashukanis 2002: 64). But, as seen, this is not enough; while, like political economy, “the theory of law makes use of abstractions that are no less ‘artificial’,” nonetheless “behind these abstractions lie perfectly real social forces”—and it follows that “law as a form [...] exists only in antitheses” (Pashukanis 2002: 58–59). Yet this is still not enough. If “it is only with the advent of bourgeois capitalist society that all the necessary conditions are created for the juridical factor to attain complete distinctness in social relations” (Pashukanis 2002: 58), how do contradictions—regulated by law and producing law—unfold in the process that sees the accomplishment of the juridical form and the realization of its utmost specificity?

Now, the overcoming of the initial difficulties we identified in Pashukanis's thought and the possibility of using its theoretical framework in the analysis of the present situation depends on the answer we give to

this question. It is in fact here that, beyond the ambiguities we registered, the concept of law is not simply bound to the world of commodities but to the law of value, its functioning, tendency, and outcomes. By scrutinizing the relation between contradictions and tendency Marxist science becomes an explosive practical science.

A substantial part of Pashukanis's discourse is methodological. The first chapter of his *General Theory* ("The Methods of Constructing the Concrete in the Abstract Sciences") is an excellent reading and elaboration of Marx's *Grundrisse: Introduction to the Critique of Political Economy* (Pashukanis 2002: 65–72; see also Guastini 1971: 379–92). The three fundamental concepts Pashukanis resumes here are the determined abstraction of totality, the principle of dialectical determination, and finally the principle of tendency. These concepts "are directly pertinent to the general theory of law. The concrete totality—society, the population, the state—must in this case, too, be the conclusion and the end result of our deliberations, but not their starting point" (Pashukanis 2002: 66). This is made possible by the fact that in the social sciences, unlike in the natural sciences, "associated with the history of this concept [of value], as part of the history of economic theory, there is a real history of value as well, a development in social relations which has gradually turned the concept into historical reality" (Pashukanis 2002: 67). "The development of the concepts corresponds to the actual dialectic of the historical process" (Pashukanis 2002: 67). "Hence law in its general definitions, law as a form, does not exist only in the heads and the theories of learned jurists. It has a parallel, real history which unfolds not as a set of ideas, but as a specific set of relations which men enter into not by conscious choice, but because the relations of production compel them to do so. Man becomes a legal subject by virtue of the same necessity which transforms the product of nature into a commodity complete with the enigmatic property of value" (Pashukanis 2002: 68). If this is the case, "we can reach clear and exhaustive definitions only by basing our analysis on the fully developed legal form, which recognises itself in embryo in preceding legal forms. Only then shall we comprehend law not as an appendage of human society in the abstract, but as an historical category corresponding to a particular social environment based on the conflict of private interests" (Pashukanis 2002: 71–72). The overall dialectic of the historical process leads law to "that superior stage of development" starting from which the entire process can be grasped.

Now, we need to dwell on this materiality of tendential development. Law, as the authoritative form of the social relation of exploitation, must show its embryonic form in the tendency, just as we could grasp the tendency in the law's embryonic form. In its movement, law too is "an abstraction *in actu*" (Marx 1956: 61), but science unveils its materiality. What is then the sense of the movement? "The attempt to make the idea of external regulation the fundamental logical element in law leads to law

being equated with a social order established in an authoritarian manner. This current in juridical thought accurately reflects the spirit of the age in which the Manchester school and free competition were superseded by the monopolies of large-scale capital and by imperialist policies” (Pashukanis 2002: 101). In this context the opposition between private and public, the organization of interests and capitalist command—which is an extremely typical peculiarity of the legal form as such—is deepened from both the logical and historical point of view. The tendency of capitalist development and of its juridical form is to exacerbate the contradiction that law embryonically controls and mystifies. In the realized tendency, one detects the mystified genesis of law.

However, Pashukanis does not manage to abide by this level of the analysis. In approaching the real, the Marxian accuracy of the methodological proposal reaches the level of prediction only just for a moment; it barely touches on it. The analytic outline is disappointing. If the tendency is the one we defined, how can one match it with the refusal of normativism? This is the question that Pashukanis has to ask himself. His answer is a somersault into utopianism. “It is not difficult to establish that the idea of unconditional subjection to an external norm-setting authority has nothing whatever to do with the legal form” (Pashukanis 2002: 101).

“Public law is only able to exist as a reflection of the private-law form in the sphere of political organisation, otherwise it ceases to be law entirely. Every attempt to present a social function as it is, simply as a social function, and a norm simply as an organisational regulation, would mean the death of the legal form. The real prerequisite for such an abolition of the legal form and of legal ideology is, however, a society in which the contradiction between individual and social interests has been broken down” (Pashukanis 2002: 103–04). This may well be the case! But, actually, the approach to the tendency showed—by way of approximation, yet in real terms, as always happens when we deal with tendential laws (See Marx 1894)—that, in its highest stage, capitalist development tends to dissociate organization from command, and power from the legitimacy of power. The privatistic mythology of Pashukanis’s formalism cannot mask the effectiveness of the process. Certainly, the tendential process is determined by approximation and through the most diverse interferences, but it is also the case that ultimately it manifests itself in terms that are completely opposite to those Pashukanis uses here: “The very concept of ‘public law’ can only be developed through its workings, in which it is continuously repulsed by private law; so much so that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity” (Pashukanis 2002: 106). No! It is public law that, in the development, grants an exclusively dialectical autonomy to private law!

And yet, in spite of these serious limitations, it is precisely within this tendential theme that Pashukanis’s work comes closest to the Marx-

ian analysis and develops it; it comes closest to it in the method and innovates it in the content. In fact, Pashukanis shows in the first place how the determination of the legal form can be, positively or negatively, obtained only in the movement of its tendency; in the second place, he grasps that the tendency is the outcome of essentially antagonistic functions. This applies to the standpoint of method. From the standpoint of substance—whatever his choice is, which, as we shall see, is in any case bound to the contemporary limits of the Soviet communist program—that is, from the standpoint of content, Pashukanis focuses especially on the determination of command as a fundamental moment of the development (and destruction) of law, and in any case of the juridical tendency of capitalism “at the highest stage.” Implicitly, this prediction implies the comprehension—no longer methodological but substantial—of the nexus between law and surplus-value—or better, between law and the vicissitudes of exploitation in terms of surplus-value. What we grasped at the end of the analysis of law in the world of commodities in a static form is here presented again in a dynamical and historical form. In fact, the analysis of the functioning of contradiction turns into a tendency, that is, the history of the process of exploitation and of class forces within this process. The totality of a social phenomenon, in this case of law as something specific, can actually be appreciated only from this standpoint—that of the tendency that realizes itself.

This is also Marx’s standpoint. But in order to show it we need to return again to the point where the definition of law as a form of the capitalist relation between owners of commodities is confronted with the historical texture of exploitation. “Capital presupposes wage-labor, and wage-labor presupposes capital. They condition each other [...] Capital can multiply itself only by exchanging itself with labor-power, by calling wage-labor into life. The labor-power of the wage-laborer can exchange itself for capital only by increasing capital, by strengthening that very power whose slave it is” (Marx 1902: 40). The historical passage is decisive. Here law as the form of the capitalist relation between owners of commodities fully flows back into the form of the relation between labor-commodity and capital, that is, into the form of the relation of surplus-value. Law is the form of the relation between organization and command for exploitation. And it is only when capital exhaustively develops this relation (“division of labor necessarily draws after it greater division of labor, the employment of machinery greater employment of machinery, work upon a large scale work upon a still greater scale” [Marx 1902: 54]); it is only at this moment that the role of law becomes central. Is therefore law the authoritative form of the social relation for the production of surplus-value, and, in particular, of relative surplus-value—in the form of the mode of production that aims at the prominence of the organization for exploitation? This is a first hypothesis to be credited to Marx’s analysis. The second hypothesis is that, in Marx, the capitalist development ten-

dentially leads to the reading of the symbiosis between organization of labor and command over this organization. Without a positive answer to the first question we cannot tackle the second hypothesis. Let us then take one thing at a time. It is only this series of relations that, in being constituted, can configure the basis of a dynamical consideration of law à la Pashukanis.

Now, in *Capital*, the background against which modern law starts to be determined is that which immediately overcomes the level of primitive accumulation. The couple primitive accumulation–violence is not the couple economy–law; a “free natural market” or a “natural civil state”—permeated by the violence of primitive accumulation—have nothing to do with law; they are utopian embellishments of historical society. “It is only after men have raised themselves above the rank of animals, when therefore their labour has been to some extent socialised, that a state of things arises in which the surplus labour of the one becomes a condition of existence for the other [...] Capital with its accompanying relations springs up from an economic soil that is the product of a long process of development. The productiveness of labour that serves as its foundation and starting-point, is a gift, not of nature, but of a history embracing thousands of centuries” (Marx 1887: 361). Or better, moving from these pre-suppositions—that is, studying hoarding and usury as fundamental passages from “natural” society (primitive accumulation) to the society of capital—Marx notices: “What distinguishes interest-bearing capital—in so far as it is an essential element of the capitalist mode of production—from usurer’s capital is by no means the nature or character of this capital itself. It is merely the altered conditions under which it operates, and consequently also the totally transformed character of the borrower who confronts the money-lender” (Marx 1894: 447; See also Marx 1887). The crucial point is the “altered conditions” of negotiation; the “altered conditions” of the relation of capital. A capital, such as the usurer’s, that presents “the method of exploitation characteristic of capital yet without the latter’s mode of production” does not alter the social relation in essential terms (Marx 1894: 446). In order to be able to speak of capitalist society and thus of law as the form of capitalist exchange between owners of commodities in the society of capital, it is first necessary that the social relation become internal to capital—and this starting already from its first molecule, the factory. It is necessary that capital seize all the conditions of productivity; that—in Marxian terms—we move from a phase of production of absolute surplus-value to one of production of relative surplus-value (indeed, the latter “revolutionises out and out the technical processes of labour, and the composition of society” [Marx 1887: 360]). “The production of relative surplus-value pre-supposes a specific mode, the capitalist mode of production, a mode which, along with its methods, means, and conditions, arises and develops itself spontaneously on the foundation afforded by the formal subsumption of labour to capital. In the

course of this development, the formal subsumption is replaced by the real subsumption of labour to capital” (Marx 1887: 360).<sup>7</sup> It is at this point that the violence of command becomes internal to labor and its organization; it is here that law acquires its specificity of form of exchange, and then, in the case of the exchange between labor-power and capital, of form of surplus-value.

Law and the process of surplus-value. The form of bourgeois law is thus consolidated in its complexity on the twofold side of the process of development of relative surplus-value—that is, of the articulation of organization and violence, production and command. “Capital is not only, as Adam Smith says, power over labour. It is essentially power over unpaid labour,” and hence organization and command; in the second place, it is the power that dissolves in the mystery of its self-valorization every trace of the division of the work-day and of the articulation between organization of labour and command for exploitation. And it is this mystery that “forms the basis of all the juridical notions of both labourer and capitalist, of all the mystifications of the capitalist mode of production, of all its illusions as to liberty, of all the apologetic shifts of the vulgar economists” (Marx 1887: 381). Law subtly accompanies the entire process of surplus-value and finds its form on the capitalist mystification of the latter.

But as a matter of fact, as Pashukanis stresses, the fact that law is a mystified form does not make it any less real. It is “directly” organization and violence: in Marx, the entire process of surplus-value—the process that leads from simple cooperation to the most evolved forms of the capitalist mode of production—goes together with the direct function of law and its consonant transmutation. At first sight, it seems to be a simple mystification of productive cooperation, that is, a capitalist assumption of the *contractum unionis*.<sup>8</sup> But actually its function is soon interiorized: the *contractum unionis* blends into the *contractum subjectionis*. Marx says that up to this point “the command of capital over labour was only a formal result of the fact, that the labourer, instead of working for himself, works for and consequently under the capitalist.” It was a fact. But in cooperation the form of the fact is turned into its necessity, that is, it becomes an unavoidable condition. “By the co-operation of numerous wage-labourers, the sway of capital develops into a requisite for carrying on the labour-process itself, into a real requisite of production. That a capitalist should command on the field of production, is now as indispensable as that a general should command on the field of battle.” In the end, “the work of directing, superintending, and adjusting, becomes one of the functions of capital from the moment that the labour under the control of

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<sup>7</sup> On the process that takes us from formal to real subsumption, see also Book I, Chapter VI.

<sup>8</sup> See in this regard Marx’s notes on simple cooperation in *Capital*, I (1887).

capital becomes co-operative” (Marx 1887: 231). Again, it seems that the decisive element in this transformation is the new type of organization of labor. But this is not the case: the subjection of workers is made “possible” by the organization of capital, and “actual” by its structure and nature, which are driven to maximal self-valorization. “The control exercised by the capitalist is not only a special function, due to the nature of the social labour-process, and peculiar to that process, but it is, at the same time, a function of the exploitation of a social labour-process, and is consequently rooted in the unavoidable antagonism between the exploiter and the living and labouring raw material he exploits.” In this context, the subjection of workers grows “in proportion to the increasing mass of the means of production, now no longer the property of the labourer, but of the capitalist”; it grows “as the number of the co-operating labourers increases,” until “the connexion existing between their various labours appears to them, ideally, in the shape of a preconceived plan of the capitalist, and practically in the shape of the authority of the same capitalist, in the shape of the powerful will of another, who subjects their activity to his aims.” If, then, “the control of the capitalist is in substance two-fold by reason of the two-fold nature of the process of production itself, which, on the one hand, is a social process for producing use-values, on the other, a process for creating surplus-value”—nonetheless, “in form that control is despotic. As co-operation extends its scale, this despotism takes forms peculiar to itself” (Marx 1887: 231). But this is still not enough: the articulation between organization and command, after being applied to the totality of the process of production, flows back and reproduces itself internally up to the point that “the functioning working organism is a form of existence of capital [...] The productive power resulting from a combination of labours appears to be the productive power of capital. [Therefore] manufacture proper not only subjects the previously independent workman to the discipline and command of capital, but, in addition, creates a hierarchic gradation of the workmen themselves” (Marx 1887: 248) The regime of the factory with its hierarchy, discipline, and codes (“in which capital formulates, like a private legislator [...] a factory Lycurgus [...] its autocracy over workers” [Marx 1887: 286]) amounts to the ultimate and fundamental figure of law in its direct relation to the production of relative surplus-value.

And yet, precisely at the moment when the articulation of law and surplus-value seems to have reached its maximal intensity, or better, at the moment when the dialectic of organization and command seems to have established an identity, maximal antagonism arises again. The mystification begins to appear; its elements begin to become explosive. If it is true that “what is lost by the detail labourers, is concentrated in the capital that employs them” (Marx 1887: 249), it is also true that this gives rise to the most acute antagonism. Law, which was summoned as an authoritarian guarantor of the relation of surplus-value, is involved at the fore-

front of the crisis. Marx notices that “machinery revolutionises out and out the formal mediation of the capitalist relation, that is, the contract between the labourer and the capitalist” (Marx 1887: 272). Previously, the presupposition of this exchange was that people that entered into it were free: now, on the contrary, “the revolution effected by machinery in the juridical relations between the buyer and the seller of labour-power” causes “the transaction as a whole to lose the appearance of a contract between free persons” (Marx 1887: 273). Here the worker “sells wife and children. He has become a slave dealer” (Marx 1887: 272). But this crisis of law does not concern only its content; it is indeed deeper and pertains directly to its form. Within the unveiling of contradiction, command must gradually isolate itself, and the reasons for the socialization and the concentration of capitalist command must gradually acquire their own value. Just as surplus-value changes into different forms according to its internal process, so does law. “Even if when it entered the process of production that capital was acquired by the personal labour of its employer, it sooner or later becomes value appropriated without an equivalent, the unpaid labour of others materialised either in money or in some other object” (Marx 1887: 403). In this development of capital both its mass of value and the social relations on which it is founded are also developed. “The labourer therefore constantly produces material, objective wealth, but in the form of capital, of an alien power that dominates and exploits him; and the capitalist as constantly produces labour-power, but in the form of a subjective source of wealth, separated from its means of objectification and abstract realisation, which exists in the pure and simple abstract corporeality of the labourer; in short he reproduces the labourer, but as a wage labourer. This incessant reproduction, this perpetuation of the labourer, is the sine qua non of capitalist production” (Marx 1887: 403). Ultimately, “capitalist production under its aspect of a continuous connected process, of a process of reproduction, produces not only commodities, not only surplus-value, but it also produces and reproduces the capitalist relation” in an always more intensive and absolute manner (Marx 1887: 407). Law is directly inherent to this economic process since it is one of the faces of its form, that is, it is inherent to the socialization of capitalist organization, the simultaneous concentration of violence against society, and the mechanism of the continuous reproduction of the capitalist relation. If “accumulation is the conquest of the wealth of the social world, it increases not only the mass of human beings exploited but also the direct and the indirect sway of the capitalist” (Marx 1887: 417).

The emergence of antagonism and its crisis determines immediate contradictions. In the first place, there is a highlighting of the contradiction between factory and society, between the form of accumulation and reproduction of the capitalist relation on the one hand, and the general conditions of the social relation of capital on the other. “The same bourgeois mind which praises division of labour in the workshop, life-long an-

nexation of the labourer to a partial operation, and his complete subjection to capital, as being an organisation of labour that increases its productiveness—that same bourgeois mind denounces with equal vigour every conscious attempt to socially control and regulate the process of production, as an inroad upon such sacred things as the rights of property, freedom and unrestricted play for the bent of the individual capitalist. It is very characteristic that the enthusiastic apologists of the factory system have nothing more damning to urge against a general organisation of the labour of society, than that it would turn all society into one immense factory.” Actually, “in a society with capitalist production, anarchy in the social division of labour and despotism in that of the workshop are mutual conditions the one of the other” (Marx 1887: 246–47). But in the second place there is a much more fundamental contradiction (more fundamental to the extent that the contradiction between factory and society can tend to a solution in the average course of development); this is the contradiction between the alienation and concentration of command and the overall social conditions of production.

We have seen that the growing accumulation of capital implies its growing concentration. Thus grows the power of capital, the alienation of the conditions of social production personified in the capitalist from the real producers. Capital comes more and more to the fore as a social power, whose agent is the capitalist. This social power no longer stands in any proportional relation with that which the labour of a single individual can create. It becomes an alienated, independent, social power, which stands opposed to society as an object, and as an object that is the capitalist’s source of power. The contradiction between the general social power into which capital develops, on the one hand, and the private power of the individual capitalists over these social conditions of production, on the other, becomes ever more irreconcilable, and must lead to the dissolution of this relation (Marx 1894: 184).

We should bear in mind that capital has lost every proportional relation with labour. But this is the moment when the form of surplus-value loses every legitimate reference to the functions that sustain it; organization and command are implemented as such, outside the legitimizing functioning of the law of value. The process that began with the—mystified yet effective—symbiosis of organization and command has exploded into a contradiction. The tendency exacerbates the separation of the terms that are otherwise unified or legitimize the unification (in the mystified form of law). Maximal antagonism between the immediate producer and the means of production (i.e., the command over them) is the tendential conclusion of the process (See Marx 1894: 184). “The capitalist mode of production has brought matters to a point where the work of supervision, entirely divorced from the ownership of capital, takes its own path”

(Marx 1894: 263), that is, it tends to be identified, as law, with sheer command—we thus obtain a hegemony of public law, of the State as the hegemony of a political reason for the organization and perpetuation of command that must by now arbitrarily and forcedly rule over every reason for exchange, and every fiction of juridical legitimacy.

We reach here the conclusion of this reasoning. As a matter of fact, two assumptions can be verified in Marx: that law lives the process of relative surplus-value to the end, and that capitalist development leads to the breakup of the symbiosis between organization and command over labor, polarizing command as an absolute function. And it is precisely on the threshold of this tendential prediction that we can prove Pashukanis's Marxism. He grasps the tendency and sees that on its premise "the main bulk of capital becomes an utterly impersonal class force"; that private property (and private law) become mere covers for a situation in which "actual dominance extends far beyond the purely legal framework" (Pashukanis 2002: 129). "This practical modification of the legal fabric could not leave theory untouched," from which follows the attempt of the bourgeois science of law to blend private and public elements, and to invent a sort of "legal socialism" that corresponds only to the general interests of such a capitalist power (Pashukanis 2002: 129). In Pashukanis the demystification of the "socialization" of capital, the State, and law is at this point accomplished. Of course, this does not amount to a marginalization of law, as Pashukanis seems to think at times; this is rather the new form that law assumes insofar as it is a copy and a guarantee of the process of surplus-value. As Marx—quoted by Pashukanis—affirms, "even club-law is law" (Pashukanis 2002: 134). Thus the underestimation of the legal figure unfolded by the process of surplus-value does not invalidate in any way the correct definition that Pashukanis gives of the outcomes of the legal process of capital. "Whoever wants to depict some living phenomenon in its development is inevitably and necessarily confronted with the dilemma of either running ahead or lagging behind" (Lenin 1960: 324); if this is the case, the price Pashukanis pays for the risks of the Marxist science of revolution is very low.

## Law and Social Capital

But if capital experiences the process of surplus-value and, starting from it, is subjected to the rhythm of the tendency, ideology too has its force; if law can scientifically be interpreted only as a "product of the material relations of production," it is also the case that "from the standpoint of juridical illusion the relations of production are products of the law" (Marx 1887: 491). At times they indeed are such products; ideological mystification does not annul reality. Here critique must then scrutinize its relation with real illusion, that is, the world of mystified consciousness. This

passage is essential: it is not enough to define the legal standard as a part of the world of commodities; analyze the form of commodities; connect it with the form of surplus-value; follow the latter's process; identify the antagonism of the tendency; politically aim for a revolutionary solution of antagonism. It is also necessary to penetrate the mechanism of illusion and demystify it in its determinateness. The confrontation between workers' science and juridical science cannot be only general; it needs to be determined also in particular and concrete cases. This applies especially to us, as in socializing itself the process of capital has led law to renew its texture, by tending to the utmost comprehension of the law of value, clinging to the illusion of a non-antinomic efficacy, and hiding—all the more firmly as the process of the tendency was becoming real—the explosive contradictions that it had to undergo. Can Pashukanis say anything in this regard? Can he say anything that is founded in a Marxian way?

“Marxist theory should not only analyse the material content of legal regulation in different historical epochs, but should also provide a materialist interpretation of legal regulation as a specific historical form” (Pashukanis 2002: 52). This means that, if it is necessary to move from the totality of the definition and of the material mystifications in which legal regulation operates in general to the analysis of its form as a determined function in the world of commodities, in the second place, and fundamentally, it is also necessary to move from the analysis of the tendency to the principles of law, to their critical consideration, considering them as functions of a determined stage of the circulation and reproduction of surplus-value. Only in this way can historical materialism be dialecticized and, exiting the unsophisticated opposition between structure and superstructure, become a positive instrument for analysis. This is how Pashukanis puts it. In other words, a Marxist consideration of law can neither be simply posited from the point of view of the history of political economy nor from that of the materialist critique of law, which is in the end the same thing; in more contemporary language, we will then say that it is precisely at the meeting point between the historicity of legal experience and the determinateness of the mechanisms of capitalist rule, between the history of exploitation and the regime of the relations of production, that it is legitimate to carry out an in-depth analysis of the specificity of law and its movement.

However, the methodological clarity of Pashukanis's assumption immediately clashes with a material antithesis. He in fact poses here for the first time the problem of what law is, not when it faces political economy but particular legal cases; he thus poses the problem of the reality and nature of legal science, in the context of a consideration that assumes a totalizing and systematic perspective as the ground for analysis. Such is in fact the consequence of the tendential approach. Is therefore law a coherent schema, an overall moment of reconstruction of the real, such that the validity of the rules and the effectiveness of the order can cover and

justify each other? Or is law a purely technical schema, such that a considerable amount of legal constructs actually present traits of great instability and conventionality? The antithesis we read in Pashukanis has a general character in “legal Marxism,” that is, it presents a fundamental antinomy between a consideration bound to the process of the tendency and one anchored to a materialist critique of rules. Having posed it in such a dramatic manner is Pashukanis’s merit.

However, at first sight, Pashukanis seems to be moving within this antinomy in a confusing way. On the one hand, there is his strong attack against Kelsen and, at any rate, Neo-Kantian positions on law—an attack that supposes and leads to a technical conception of legal science, in spite of the fact that (from the point of view of the analysis of form) this conception is explicitly refused (Pashukanis 2002: 51 and ff). Actually, the critique of Kelsen, and of the early Kelsen in particular,<sup>9</sup> is extremely robust; his “undaunted consistency” is considered as a *reductio ad absurdum* of Neo-Kantian dualism (Pashukanis 2002: 52); the pure theory is a “theory of chess” (Pashukanis 2002: 53); “the extreme formalism of the normative school (Kelsen) expresses the general decadence of the most recent bourgeois thinking, which spends itself in sterile methodological and formal-logic humbug and parades its own complete dissociation from actual reality. In economic theory, the representatives of the mathematical school would fill the corresponding position” (Pashukanis 2002: 70). From this follows an attack against every theory of the production of legal standards that intends to be genetic—from the standpoint of objective law—and founded on the self-justifying schema of formal validity. In the end, the attack is aimed at the Kelsenian conception of the State, which would exist “only in theory, as a closed system of norms or obligations” (Pashukanis 2002: 148). Now, this attack could not be stronger and more exhaustive, especially when Pashukanis is motivated by Stuchka’s orthodox historical materialism. It is moving from these critical presuppositions that Pashukanis’s institutionalism and the technical temptations of his legal Marxism emerge together: “The more or less unfettered process of social production and reproduction—formally carried out in commodity-producing society through individual private legal transactions—is the *ultimate practical purpose* of legal mediation” (Pashukanis 2002: 44).

But on the other hand, the schema of tendency, form, and totality puts pressure on Pashukanis. From here follows the attack against every technical or psychological conception of legal science; from here also follows the attack against every historicistic and positivistic stance that encloses the scientific consideration of law into a mere objective positivity, which is quintessentially chaotic and empirical. In this perspective, what was reject-

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<sup>9</sup> On the history of Kelsen’s thought, see the excellent article by M. G. Losano that introduces the Italian translation of Kelsen’s *The Pure Theory of Law* (Losano and Kelsen 1966).

ed—a certain formalism—returns through the back door—as embedded in the argument about the tendentiality of the form of the commodity. In Pashukanis’s view, social development seems to acquire a determined individuality that unilaterally and straightforwardly arranges legal development. The polemic against sheer positivism is replaced by a conception of law as coherent effectiveness—one that is to say the least optimistic. Even the polemic against Kelsen is obfuscated: “Even the most consistent follower of the normative method, Hans Kelsen, had to admit that some part of real life, that is to say of people’s actual behaviour, must in some way be injected into the ideal normative system” (Pashukanis 2002: 86). But acknowledging this, that is, acknowledging that—starting from *Der soziologische und der juristische Staatsbegriff* (1922)—Kelsen tries to put back together the system of validity with that of effectiveness, involves locating oneself on a level where differences disappear—as the compact reality of law gradually shows an adequate opening towards both the constructive ideality of the system of norms and the founding positivity of the totality of facts. When the polarity of norm and fact (or relation) is overcome, it is not Pashukanis’s specific insistence on one of the elements that frees him from the overall and systematic project of juridical science. It is then not a coincidence that his polemical interlocutors will accuse him of wanting to construct a theory of pure jurisprudence; and in this context—very limited with respect to Pashukanis’s wide-ranging analysis, yet real—the accusation is on target. The world of the validity of norms will be subordinated to the effectiveness of the system, but if the exchangeability of horizons is total, then there is no difference; there will only be a privileging of a point of view within a totality that is in any case coherent.

It is actually only in the chapter on “Law and the State”<sup>10</sup> that the antinomy, which up to this point Pashukanis passively sustains with uncertain outcomes, is finally dominated. In this conclusion, the relation between the two essential moments of the description of legal reality is effectively dialecticized; the alternative is transformed into a scientifically conclusive process.

Pashukanis begins his conclusion as follows: “Whenever people portray the legal relationship as organized and well-ordered, and thus equate law with legal order, they forget, in so doing, that this order is actually a mere tendency and end result (by no means perfected at that), but never the point of departure and prerequisite of the legal relationship” (Pashukanis 2002: 135). Law and the legal order must therefore dissolve their abstract identity in the concrete movement of the tendency. With this the whole methodological and substantial setting of the general analysis carried out so far is confronted with the problems at stake; if the tendency is

<sup>10</sup> In this regard, see Riccardo Guastini’s previously quoted contribution (1971: 408–14).

a unifying process but only on the basis of a necessarily antinomic relation, this will mean that the nexus between law and order is presented to the critique of legal science as both unitary and antagonistic. That is to say, if the State, as a legal order, is the product of the legal process (i.e., is “the guarantor of the peace indispensable to the exchange transaction” [Pashukanis 2002: 136] and here its role is entirely actual); if, in parallel, “only the development of trade, and of the money economy, make the juridical, or rationalistic, interpretation of the phenomenon of power possible” (Pashukanis 2002: 136), this should nonetheless not lead us to overlap the sphere of the State with that of law. The State is the product of the legal process but it is not the totality of the legal process. “The state as an organization of class rule, and for waging external wars, neither needs nor admits of any legal representation. This is an area where so-called *raison d'état* holds sway, which is nothing but the principle of naked expediency. In contrast to this, power as a guarantor of market exchange not only employs the language of law, but also functions as law and law alone, that is, it becomes one with the abstract, objective norm. Consequently every juridical theory of the state which attempts to encompass *all* state functions is nowadays inadequate. It cannot accurately reflect all the facts of state life, it gives a purely ideological, that is, a distorted reflection of reality” (Pashukanis 2002: 137).

We are thus at the heart of the Marxian approach. The irreducibility of the State to law, and at the same time the very strong dialectical nexus that links them, are always present in the Marxian analysis of capital as a whole. Marx writes that

the contradictory social features of material wealth—its antagonism to labour as wage-labour—are expressed in capitalist property as such independently of the production process. This particular fact, set apart from the process of capitalist production itself, from which it constantly results and as whose constant result it serves as a constant prerequisite, expresses itself in that money and commodities alike are latent, potential, capital, so that they may be sold as capital, and in that they can in this form command the labour of others bestowing a claim to appropriate the labour of others, and therefore represent self-expanding values. It also becomes clearly apparent that this relationship, and not the labour offered as an equivalent on the part of the capitalist, supplies the title and the means to appropriate the labour of others (Marx 1894: 240).

We witness here the latency and potentiality of the State as a power opposed to labor, and, at the same time, the turning of power into a valid title and an effective means of appropriation.<sup>11</sup> In discussing the formation

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<sup>11</sup> On the concepts of “latency” and “presence” as developed by Marx, see also *Capital*, II (Marx 1907).

of the average rate of interest (Marx 1894), Marx develops and further elucidates this concept; here the irreducibility of profit as norm of development is articulated with interest as an average that is necessary for individual capitalists to be able to act on the market. “Habit and the legal tradition” have a fundamental role in the construction of this mediation—which finally sees the omnipotence of profit bowing to the necessity of “legal persons.” In this sense, the autonomy of the State and profit is dialecticized with the whole social process, maintaining however the actual command over it. Here every romantic theory of state power as an undialecticizable Moloch reveals the banality of its content, not because State and profit do not have autonomy but because they have it to the extent to which they are available to the process of reproduction and circulation of commodities.<sup>12</sup>

But let us return to Pashukanis’s reasoning. We have said that the State is—as legal order—the product and the guarantee, the latency and the potentiality of the legal process, but is not the legal process itself. The analysis is therefore developed, and we begin to meet the conditions for the form of the commodity to be read also in the figure of the State. The fact that the State is the “party” of the ruling class (and here Pashukanis seems to correct in a Leninist sense some of Engels’ statements [2002: 138–39]); that the State as “class State” manifests itself as both direct and indirect rule, as violence and law—all this does not solve the problem of the State but simply depicts its phenomenal sphere and polarities. In other words, the problem of the State, “which poses no lesser difficulties for analysis than the problem of the commodity,” emerges when “there arises, besides direct, unmediated class rule, indirect, reflected rule in the shape of official state power as a distinct authority, detached from society” (Pashukanis 2002: 138). However, with this move we are also given the basis for the Marxian solution of the problem, which—as we have seen—can be obtained only through the duplication of order and law, violence and legitimizing authority. But “comrade Razumovsky accuses me of transposing questions of dominance and subservience to the ambiguous realm of the ‘duplication of reality,’ and of not granting them their rightful place in the analysis of the category of law” (Pashukanis 2002: 140). No, it is precisely and only this dialectical duplication that can explain the legal specificity of the relationship law-State! Following the functioning of the law of value, it is only this articulation that enables law and the State to assume the separate existence and the unitary function that capital assigns them. “To the extent that society constitutes a market, the machinery of the state is actually manifested as an impersonal collective will, as the rule of law, and so on” (Pashukanis 2002: 143). This is the same as saying that it is only maximal organization that allows for maximal subordination; it is only law that evidences as its dialectical op-

<sup>12</sup> On all this, see Marx (1894).

position the general rule of man over man. Paradoxically, the only “legality” that can be granted to a theory of the State amounts to the fact that it “must of necessity posit the state as an independent power separated from society” (Pashukanis 2002: 145). Throughout its history the bourgeoisie understood this very well, and with the doctrine of natural law it embedded this concept at the center of its legal development (Pashukanis 2002: 145–46).<sup>15</sup>

But even the bourgeois solution of the antinomies of legal science is historically determined and limited. The tendency shows how the illusion of an articulation of the functions of State and law ends up exploding. From this standpoint the analysis carried out so far is confirmed; here a new horizon of scientific and political consideration is opened. “The state as a power factor in internal and foreign policy—that is the correction which the bourgeoisie was forced to make to the theory and practice of its ‘rule of law.’ The more the hegemony of the bourgeoisie was shattered, the more compromising these corrections became, the more quickly the ‘rule of law’ was transformed into a disembodied shadow, until finally the extraordinary sharpening of the class struggle forced the bourgeoisie to discard the mask of the rule of law altogether, revealing the nature of state power as the organised power of one class over the other” (Pashukanis 2002: 150). This is the same as saying that the relation between the State and the legal order, between validity and efficacy on which the whole conception of the rule of law and of law in its modern development relies, is overcome and liquidated by the emergence of a capitalist class will that can justify itself before the workers’ attack only in terms of an adequate answer, that is, of necessary violence. The ideological mystification of the rule of law—which was truly lived as an organizing and legitimating force during the centuries of the rise of the bourgeoisie—clashes with the implacable alternative of communism.

The Marxian radicalism of Pashukanis’s discourse can be ascertained all the more positively if, answering the initial questions of this essay, we assume his schema to analyze the vicissitudes of law at the present time—because we here seize the limit of the tendency, and the utmost duplication of the ideological schema of the State and the law is given in bourgeois praxis.

But let us be clear: the antinomic explosion of the legal dimension of our times, the breaking up of the contradictory continuity of the formal (legal) schema of the process of surplus-value are not given against the background of a mere recurrence of the rule of law. Perhaps, they are initially given along with the attempt of a more rigorous interpretation of the categories of the rule of law, of which one tries to provide a reading in

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<sup>15</sup> Pashukanis’s analysis of natural law is very important. Elsewhere we should consider it in detail and compare these pages with Lukács’s arguments in *History and Class Consciousness* (1971).

democratic and planning terms—rather than liberal and liberalistic. But with what results? Very few indeed. Rather, it is precisely out of the failure of the attempt to render the structure of the rule of law specular to the rhythm of the total unfolding of the law of value that there emerges an anticipated but already definitive clarification of its impossibility of configuring the antinomic nature of law—which is all the more antinomic the more class antagonisms are made explicit. Even when strongly dislocated as in the second Kelsen,<sup>14</sup> the rule of law cannot cope with the urgencies of our age; it is in any case the State of private guaranties; the State that assumes and guarantees, in the form of law, what the economical world produces spontaneously. Certainly, when Kelsen carries out that formidable reversal that leads the State from being a “mere point to which is attributed” the normative order—a mere “personifying expression of the normative order,” the “final point of reference of all the acts of the state, qualified as specifically normative, the common point of intersection of all facts qualified as acts of the state” (Kelsen 1932: 8–11)—to rather representing itself as a dynamic moment of the production of law with regard to the whole of the order’s conditions; when Kelsen thus articulates very closely the constitutive moment and that of implementation<sup>15</sup> (a reversal that is resumed and qualified again in his later works, and supported by the contribution of social sciences), we are perhaps getting closer to the new model; validity and efficacy, the mechanism of production of norms and the guarantee of effectiveness, deductive and inductive processes, all seem to identify with and condition one another. The rhythm of the law of value that dictates the working process and the process of valorization, organization and command, cooperation and subordination as elements of a straightforward continuity, or an incorruptible synthesis, seems to have been interpreted. Actually, such a process could not have been effectively understood and mystified in legal terms before the pompous list of the inalienable rights of man, the “Freedom, Equality, Property and Bentham!” (Marx 1887: 123), was left aside. In fact, a quality leap forward had taken place in the structure of capital, such that those formulas became obsolete; in parallel, the level of class struggle did not allow for this obsolescence to be disavowed. “The capital, which in itself rests on a social mode of production and presupposes a social concentration of means of production and labour-power, is here directly endowed with the form of social capital [...] as distinct from private capital, and its undertakings assume the form of social undertakings as distinct from private undertakings. It is the abolition of capital as private property within the framework of capitalist production itself” (Marx 1894: 310). Now the new legal science needs to be practiced on this form of capital. And it is this new form

<sup>14</sup> Here I am essentially referring to *General Theory of Law and State* (1945) and the final edition of *Reine Rechtslehre* (1960).

<sup>15</sup> See Kelsen (1967 [1934]).

of capital that Kelsen and all the apologists of the rule of law cannot reach.

However, this practice is more difficult than we may think, even for the new legal theorists—first of all, Kelsen’s critics; like the legal science that is applied to them, the “social State,” the “State-as-Planner” actually live an ephemeral life.<sup>16</sup> And many efforts have been made in order to give legal solidity to these images—that is, this functioning of the law of value. The history of legal science after 1929 (sooner or later one will have to tackle this theme generally from the workers’ standpoint<sup>17</sup>) actually seems to be just one coherent attempt to provide a laborist [*laborista*] and social ground to law and the State. Nothing has been left untried: from the assumption of labor (of the law of value) as the exclusive criterion of social valorization to the “laborist” foundation of the material constitution; from the critique of the system of the sources of law to the critique of the dogma of the sovereignty of law; from the reconfiguration of a specific mode of production of law in the social—conflictual and planned—State to the definition of jurisdictional functions that immediately create law and are immediately confirmed by practice. Paradoxically, the science of law has tried—especially in border territories (such as employment law and administrative law qua planning law)—a sort of capitalist validation of the “withering away of the State,” and at times has methodologically mimicked a sort of “permanent revolution.” All in vain; in spite of this capitalist enlightenment, these attempts to vindicate concrete labor in the reduction of law to processing [*processualità*], these projects of “social State” as a democratic programming and an Eden of free labor, have only shown the true and ineluctable functioning of the law of value—which is the law of exploitation. The dialectical adventure of the new law has become a Sisyphean task. The whole process has again shown workers that “all political upheavals only improve this machine instead of breaking it” (Marx 1948: 173).

On its part, social capital demands law something very different—as soon as the workers’ struggle has induced these levels of crisis even in its science. It is useless for “the political economist [to apply] the notions of law and of property inherited from a pre-capitalist world with all the more anxious zeal and all the greater unction, the more loudly the facts cry out in the face of his ideology!” (Marx 1887: 543). Harmony is no longer possible, because social capital is now being opposed by a working class that is socialized and unified. From the point of view of capital, the relation between law and the State will then have to be constructed paying the utmost attention to this antagonism, and the tendential movement towards the explosion into an opposite polarity, which the development of

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<sup>16</sup> See entries “Riformismo,” “Stato pianificato,” “Politica di piano,” “Stato di diritto,” and the related bibliography in Negri (1970).

<sup>17</sup> Some initial elements of such a history can be found in Bologna et al (1972).

the law of value impresses also on the legal form, will be taken into account. If the antagonism of the tendency can no longer be dominated through a sheer mystification—as in the rule of law and the constitutional State—if it cannot be regulated from within—as in the social State of the plan—then it will have to be practically recognized and dominated. The duplication of State and law, which Pashukanis read in a Marxian way as the outcome of class struggle, is proposed again as the fundamental tendency in the crisis of the State-as-Planner.<sup>18</sup> As for the science of law, in its internal chaos it repeats the simultaneous awareness of the real crisis and its own current incapacity to dominate it.

## Class Struggle and the Extinction of Law

Pashukanis can therefore be read in a non-revisionist way. Certainly, there are many contradictions in his thought, but, in the entanglement where they often intersect, it is always possible to find the thread of Marxist analysis and the revolutionary project. In these pages we will try to understand the contradictions of Pashukanis's thought in terms that are less abstract than those used so far; that is, we will try to find their historical origin, which is embedded in the very theme of the transition and the political limits in which the Russian revolution and Bolshevism had to confront this theme. First and foremost, Pashukanis was and wanted to be a revolutionary, a participant in the necessities and vicissitudes of the masses—this is an element of great importance in order to comprehend his thought.

There are therefore essentially two themes that the very nature of the question we asked compels us to highlight: on the one hand, law and transition; on the other, class struggle and law; it is only at the intersection of the matter of fact of capitalist development and the leading force of class struggle that we can begin to pose the problem of the extinction of law correctly.

In a Marxian way, Pashukanis had no doubt that law is not only a form of the society of capital but *exclusively* a form of the society of capital. There is no proletarian law. “With the transition to fully developed socialism [...] the withering away of the categories of bourgeois law will [...] mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations” (Pashukanis 2002: 59). In fact, already at present “in our transition period, the legal form as such does not contain within itself those unlimited possibilities which lay before it at the birth of bourgeois-capitalist society. On the contrary, the legal form only encompasses us within its narrow horizon for the time being.

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<sup>18</sup> For some useful developments of this theme, see Negri (1974).

It exists for the sole purpose of being utterly spent” (Pashukanis 2002: 133). To those who object to him—that is to say, the first theoreticians of proletarian law—Pashukanis replies easily by following *The Critique of the Gotha Programme* and *The State and Revolution* (Pashukanis 2002: 61–63).

On the other hand, in his analysis of the actual situation in the USSR, Pashukanis has few illusions; he defines the entire contemporary economic system as “proletarian State capitalism,” and his later self-critique does not make the solidity of his belief any weaker. Moreover, the New Economic Policy (NEP)—rightly—appears to him as a stage extremely less developed than the one glimpsed by Marx’s analysis of the initial conditions for the process of the extinction of law (Pashukanis 2002: 61–62). Despite this, Soviet society presents some important characteristics with regard to the process of the extinction of law, but these are essentially emblematic characteristics whose definition needs to be examined within the complex limits of the ongoing process—which is indeed that of the strengthening of the capitalist structure of the State. However, there seem to be two realities of exchange in proletarian State capitalism: the first is an economic life that follows modalities that are already rational and no longer based on commodities (“the method corresponding to this involves direct, or technically-determining prescriptions in the form of programmes, plans for production and distribution, and so forth” [Pashukanis 2002: 131]); “on the other hand, we have a relation between economic units expressed in the form of the value of commodities in circulation and consequently in the form of legal transactions” (Pashukanis 2002: 131). Now, “obviously the first of these tendencies offers no long-term prospects for law. The victory, by degrees, of this tendency means the gradual withering away of the legal form altogether” (Pashukanis 2002: 132). As for the second tendency, in it the permanence and the reproduction of the legal form appear as evident necessities; but it seems to Pashukanis that, to the extent that “proletarian State capitalism abolishes every real conflict of interest within nationalised industry,” the legal form can “retain the distinction between, or autonomy of individual economic organisms (on the model of the autonomy of private production) *only as a method*” (Pashukanis 2002: 132–33).

One could smile at the “few” illusions that Pashukanis still has in this regard. However, besides the excessive enthusiasm for the legal forms of war communism—the method of direct prescriptions is reduced to this—the structure of his discourse is broader and correct; the real limits should be identified elsewhere. Since here, beneath his weak indications, Pashukanis actually grasps the fundamental moment of the theme of transition, that is to say, the constitution not so much of the little and insignificant forms of the extinction of law (which are proposed only by misery and the precapitalist conditions of backwardness, as well as by the

desperate urgency of the intervention) but rather of the State as what society is overall attributed to, following a tendential process that maximizes antagonisms and only thus paves the way to a transition based on proletarian struggles. The leading, modernizing, and hence revolutionary function of the Russian movement is here acknowledged, insofar as it determines the highest level of antagonism. Law really begins to fulfil the conditions for its extinction when, in the new capitalist configuration, the contemporary form of the State shows the necessity to intensify command as opposed to law. Upon closer consideration but no less explicitly, Pashukanis's analysis of proletarian State capitalism therefore includes the analysis of the contemporary form of the State of capital. In both cases the problem of transition is posed through the definition of the contradiction between law as form of the exchange value and the command of the capitalist State. The subjective will attributed to the capitalist State of the proletariat does not change the reality of the problem, nor does it solve it. Actually, driven by the vehemence of the tendential analysis he carried out with respect to the law and the State of the bourgeoisie, Pashukanis here glimpses and correctly advances the problem of transition and of the conditions for the extinction of law. The latter lie in the irreversible contradiction between State capitalism and exchange value as the law of the world of production and circulation of commodities. This is another way of saying that the rule of law is definitely dead, and that the fall of the form of the State which the bourgeoisie carved out in order to exist and develop itself opens the real and fundamental conditions to pose the problem of transition as a field that the workers' struggle will have to go through, and as a possibility to be realized.<sup>19</sup>

But once the problem is posed correctly it is nevertheless still far from being solved. It is rather made more difficult because it is presented in a tendential framework that is strongly characterized in objectivistic terms (when one leaves out of consideration the irrelevant conditions of transition presented by the Russian situation). But could one provide a more credible approach to the solution of the problem? Could one get closer to a theoretical condition capable of dialecticizing the tendential framework of the theme of transition and an analysis of the subjective forces active in it? It is precisely on this—so intimately dialectical—rela-

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<sup>19</sup> Guastini claims that the “formalist” Pashukanis who analyzes the law is replaced by a voluntaristic Pashukanis when it comes to the problem of transition (1971: 414–20, 500–06). This definition does not seem to be accurate, whatever may be Pashukanis's limits; what one should here speak about is not voluntarism or subjective limits but a new problem that class struggle actualizes. It is however typical of all current revisionist positions to consider class struggle as a merely “subjective” and voluntary factor, and the equivocal fortune of Althusserianism can be explained in this light; the attack on subjectivism becomes an attack on class struggle. For a critical approach, see Rovatti (1973a: 5–23).

tionship that in fact rely the minimal conditions for an effective approach to the solution of the problem, if—moving from Marx’s and Lenin’s formidable pages—we have to propose it again on the basis of the most recent revolutionary experience; and it is again starting from these peaks of analysis that new light is dialectically thrown on the whole setting of the Marxist science of revolution.<sup>20</sup> Going back to Pashukanis, are the overall conditions within which his revolutionary problem is developed such that he is enabled, in addition to correctly approach the problem, to comprehensively and realistically attempt a solution?

Here, so to speak, all the chickens come home to roost. The Bolshevik level of the analysis of the transition heavily turns against Pashukanis (as it already did against Lenin) in spite of the will to force reality. In fact, the whole argumentation relies on an equivocation and a limit; it is the equivocation of the limit where capital can effectively be cornered. Bolshevism conceives the problem of socialism and of the conditions for the extinction of the State and law in terms of the socialization of property, of a mere reappropriation of property; it intends to replace the market relation with a relation of organization of social property and social labor. But this is utterly insufficient; the workers’ struggle does not simply move against property but against the basis of property, against the law of labor-value as the basis of property and the rule of exploitation. Property is nothing but the determined concretization of a level of capitalist command, namely, the validity of the law of value:

*Labour is the living basis of private property, it is private property as the creative source of itself. Private property is nothing but objectified labour. If it is desired to strike a mortal blow at private property, one must attack it not only as a material state of affairs, but also as activity, as labour. It is one of the greatest misapprehensions to speak of free, human, social labour, of labour without private property. Labour by its very nature is unfree, unhuman, unsocial activity, determined by private property and creating private property. Hence the abolition of private property will become a reality only when it is conceived as the abolition of labour (an abolition which, of course, has become possible only as a result of labour itself, that is to say, has become possible as a result of the material activity of society and which should on no account be conceived as the replacement of one category by another). An “organisation of labour,” therefore, is a contradiction. The best organisation that labour*

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<sup>20</sup> In correct and modern terms the new problem of transition is dictated especially by the experience of the cultural revolution, or better of the Chinese “uninterrupted revolution”; see especially the works of Charles Bettelheim, starting from *Calcul économique et forms de propriété* (1971) and the recent *Révolution culturelle et organisation industrielle* (1973). For what concerns Western societies and the highest levels of class struggle the work remains to be done.

can be given is the present organisation, free competition, the dissolution of all its previous apparently “social” organisation (Marx 1975: 277).

Social property is not as such the condition for the extinction of law, and is rather perfectly compatible with the progress of capital; as Marx reminds us, it “is the abolition of capital as private property in the very field of the mode of capitalist production.” And when the Marxist reasoning on law stops at a lower level of analysis it cannot but fall into a series of inextricable contradictions.

This is indeed what happens to Pashukanis. His thought is always a registration of the contradiction that the workers’ movement brings with it, namely, the contradiction between demystification and struggle against property, on the one hand, and determination and struggle against the law of value, on the other. Both when he confronts the definition of law as commodity and when he faces the problem of legal science; when he analyzes the developmental tendency of law in the society of capital and when he studies the transition, Pashukanis has to deal with and often suffers from a partial and determined image of the functioning of the law of value, a unilateral image of the process of exploitation, which sees only the backwardness of the validity of this law. Law, so to speak, is rescued in this situation by clinging to the mythology of a social working process that could be developed outside—and anyway autonomously from—the process of valorization.

But there is always in Pashukanis a concomitant force that overcomes this one-sidedness of the analysis. The working process and the process of valorization can be distinguished only from the standpoint of the analysis. From the standpoint of the revolutionary social practice they instead always constitute a compact bloc, that is, the subject who exploits and the object of revolutionary action. Even when it is engaged with the working process, law is not a function that can be disengaged from the process of valorization. When this takes place, when the revolutionary process is deployed as a new model for the organization of labor, it might well be necessary, yet it has nothing to do with the theme of transition, but rather with that of capitalist development. Therefore, within the theme of the communist transition law cannot be disengaged from exploitation. Nor does the revolution want it, since the transition that workers ask for is not definable within the theoretical rhythm of the categories of analysis (labor and value); it is instead an action that attacks the totality of the relation of capital and destroys it as such. Every illusion about labor and its value must at this point disappear. The communist struggle coherently becomes a struggle against labor, against the State, and against the law that constitutes the specific authoritarian form of the relation between the State and the organization of labor.

The solution of the problem of the transition and of the extinction of law and the State is therefore to be proposed again within this radicalism

of the presuppositions, which were glimpsed by Pashukanis throughout his analysis. In Pashukanis's age and within analogous limitations, this path corresponds in part only to Lenin's path in *The State and Revolution*—and it is to Lenin as well as to the Maoist theory of the uninterrupted revolution as form of the transition, and to the Marx of the *Grundrisse* and its formidable theoretical predictions, that we will have to return to elaborate the problem.<sup>21</sup>

The point of view of the totality of the project of destruction is always present in the workers' class struggle. Just as the request for a struggle against labor is always present in it. In the factory the struggle is incessant. In Marx's chapter on the working day the description gets to the bottom of the process. In the factory, with regard to the working day, "there is, therefore, an antinomy, right against right, both equally bearing the seal of the law of exchanges" (Marx 1887: 164). And, Marx adds, "between equal rights force decides" (Marx 1887: 164). "Hence is it that in the history of capitalist production, the determination of what is a working day, presents itself as the result of a struggle, a struggle between collective capital, *i.e.*, the class of capitalists, and collective labor, *i.e.*, the working-class" (Marx 1887: 164). From the workers' standpoint this determination is the product of the struggle, and the legal concretizations are the outcome of the struggle against labor. Moreover, the validity of these conquests from the workers' point of view does not take away from law the characteristic of being the form of exploitation. "If the *Réglement organique* of the Danubian provinces was a positive expression of the greed for surplus labour which every paragraph legalised, the English Factory Acts are the negative expression of the same greed" (Marx 1887: 166). "Factory legislation, that first conscious and methodical reaction of society against the spontaneously developed form of the process of production, is [...] just as much the necessary product of modern industry as cotton yarn, self-actors, and the electric telegraph" (Marx 1887: 315). Following Pashukanis, the complete estrangement of law from class struggle, even during the period of transition, was already clear to us—independently from the limits of his reasoning on the conditions of transition in the Soviet Union of the NEP. Now we need to understand the implications of this new determination of the Marxian estrangement of the worker from capital. In Pashukanis these implications begin to manifest themselves where—in the last two chapters of his work (Pashukanis 2002: 151–88)<sup>22</sup>—he resolutely refuses to submit class struggle to the new rules of law, be it "socialist" or otherwise. Is this a utopian refusal given by the conditions of the Russian transition? Perhaps. And yet the polemical tension included in this theory cannot be disposed of by

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<sup>21</sup> For a positive methodological introduction to these themes, see Rovatti (1973b).

<sup>22</sup> Korsch's critique of these chapters in "En guise d'introduction" is extremely unfocused (1930).

means of such an acknowledgment—since it goes to the heart of the problem and defines the stage of transition outside any possibility of a revisionist reclamation of Pashukanis's thought; the transition can only be a space for struggle, a process of proletarian estrangement interpreted by the struggle against any form of institutional actualization of the relations of force between the classes that confront themselves. There is no alternative use of law that can replace this process of struggles. There is no dualism of power that can be managed institutionally. The transition distinguishes itself from every previous phase of the rule of law only if it is a period of struggles against legal estrangement—and these are struggles that cannot be re-included in any reconstituted balance. The struggle against labor and against law as the specific form of the organization of labor cannot be contained by any limit.

Obviously, in the case that one could truly read in Pashukanis this theoretical certainty—as we believe—and that all the contradictions of his thought can be superseded by this tension he derives from the living revolutionary movement, there will still be those who recognize in it an element of utopia. But even the latter disappears if we place ourselves in the field of the tendency, which Pashukanis intuited and Marx described. For instance, as when Marx writes the following:

The great historic quality of capital is to create this *surplus labour*, superfluous labour from the standpoint of mere use value, mere subsistence; and its historic destiny is fulfilled as soon as, on one side, there has been such a development of needs that surplus labour above and beyond necessity has itself become a general need arising out of individual needs themselves—and, on the other side, when the severe discipline of capital, acting on succeeding generations, has developed general industriousness as the general property of the new species—and, finally, when the development of the productive powers of labour, which capital incessantly whips onward with its unlimited mania for wealth, and of the sole conditions in which this mania can be realized, have flourished to the stage where the possession and preservation of general wealth require a lesser labour time of society as a whole, and where the labouring society relates scientifically to the process of its progressive reproduction, its reproduction in a constantly greater abundance; hence where labour in which a human being does what a thing could do has ceased. Accordingly, capital and labour relate to each other here like money and commodity; the former is the general form of wealth, the other only the substance destined for immediate consumption. Capital's ceaseless striving towards the general form of wealth drives labour beyond the limits of its natural paltriness, and thus creates the material elements for the development of the rich individuality which is as all-sided in its production as in its consumption, and whose labour also therefore appears no longer as labour, but as the full development of

activity itself, in which natural necessity in its direct form has disappeared; because a historically created need has taken the place of the natural one (Marx 1973: 325).

This is therefore the field of transition. Pashukanis pays the price for the terrible distance that separates it from the Russian conditions, while however being highly aware of the formidable force of the revolutionary process. The gaze of the one who analyzes the transition cannot but focus on the growth of the new proletarian individual; and it is only the struggle that interprets this growth—the struggle against labor, its organization, the struggle against law. Every kind of legal circumstance, institution, and Statute can well amount to a workers' victory but only to the extent that we consider them as the registration of the effects of the struggle and of the appropriation of the many possibilities of growth of the collective proletarian individual who rejects labor. On the other hand, from the point of view of state implementation and legal effectiveness, every institution is only a reconstruction of capitalist rule. "So soon as the gradually surging revolt of the working-class compelled the state to shorten compulsorily the hours of labour, and to begin by imposing a normal working day on factories proper, so soon consequently as an increased production of surplus-value by the *prolongation of the working day* was once for all put a stop to, from that moment capital threw itself with all its might into the production of *relative surplus-value*, by hastening on the further improvement of machinery" (Marx 1887: 279). From the point of view of effectiveness every moment of victory on the part of workers must become a technical and legal restructuring of the production of capital; every moment of the reorganization of labor is simultaneously an expansion and intensification of its valorization, that is, of exploitation. Only a gaze focused on the struggle and its continuity can represent the workers' point of view. What is utopian is not the distance between the struggle and the communist aim, but believing in the possibility of navigating the institutions of capital in order to destroy exploitation. The field of transition is only the separation from capital that the working class finds again in the struggle; it is only the totality of the project of destruction that destroys utopia.

"Another of the things with which comrade Stuchka reproaches me—namely that I recognise the existence of law only in bourgeois society—I grant..." (Pashukanis 2002: 44).

## Postface

It is difficult to return to a text published more than forty years ago.<sup>23</sup> The historical conditions of my intervention need to be contextualized in

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<sup>23</sup> Negri (1974b).

the 1970s, in an Italian political climate that was almost insurrectional. From the theoretical standpoint, these were also years agitated by the polemic on the theory of law, in which I opposed Norberto Bobbio, and his juridical formalism and positivism, with an openly critical conception of the late capitalist State. Those were unique years. But, taking a close look at the bibliography on Pashukanis, I now realize that this distance of forty years does not simply concern my political attention to his work; it is rather to be located within the periodization of the Western interest in the great theoretician of law that Evgeny Pashukanis was. In the years following World War II, in the age of the Cold War, there was in the West a harsh obstructive blockade against the interest shown in the October Revolution during the 1930s, 40s, and 50s; it was an attempt to submit to critique or even ban the reception of the formidable power of critical thought and theoretical innovation that had accompanied it. That blockade was broken by 1968. We used to say then that a revolution calls for another revolution, and this break determined an awakening and resumption of Russian revolutionary thought—for an all too brief period of time. However, among others, Pashukanis became relevant again in the debate on the materialist theory of law. Shortly after, with the beginning of the 1980s—a decade before the fall of the Wall and in concomitance with the emergence of neoliberal governments—a new repression was rigorously implemented; they wanted to erase the memory of the Revolution forever. But the reactionary orchestration of oblivion worked badly and today the resumption of the critical debate on the Russian revolutionary event and the culture that accompanied it appears as a moment of truth, possibly as an effective and profound sign of the conclusion of the modern history of capitalism, as if an ontological rupture—the October Revolution—had determined it and could not be taken away. Probably it is only by crossing this breach that a new world will be possible.

For what concerns the dissemination of Pashukanis's work in the West, my reference to that cycle of interest, renewed and repressed, is easily verifiable. After a first reading of his work that dates back to the 1930s–1950s (Kelsen 1955; Hazard 1951; Fuller 1949; Schlesinger 1951; Korsch 1974: 130), we had to wait the 1970s before seeing a revival of his thought among subversive militants (Negt 1975; Paul 1972; Reich 1978; Poulantzas 1967; Cossutta 1992). It is in this context that my essay should be situated. But why is there today a resurgence of interest in Pashukanis in debates and research? In my view, unlike the first wave, what is now at stake is no longer curiosity, or a program of information (what was law in the Bolshevik revolution? What was its role in the destruction of the bourgeois orders of property and State, and in the construction of communism?), or a polemical confrontation (the denunciation of a barbarian law, followed by its definition as the quintessence of totalitarianism). Unlike what happened in the 1970s, the focus is not only on the ideological dimensions of the Soviet theory of law. Today the focus is on its merits; it

confronts the theoretical kernels of the juridical discipline elaborated by Pashukanis and asks how, in its materialist framework, it enables us to better understand international law, or penal law, or other legal fields, in addition to answer the question concerning the nature of law.<sup>24</sup> We thus understand the reason of this new interest—the attention paid to the merits of the theory. We perceive that this theory suggests a clarification for the solution of the impasses that currently destabilize the functioning of legal orders in the globalized world.

In the world globalized by financial power, which is ideologically impregnated with individualist and proprietary liberalism, the Marxian insistence, resumed and developed by Pashukanis, on the commodity relation as the foundation of law stands in fact out with great evidence. It offers an immediate key to read this world. Pashukanis's insistence on this point is well known: "Legal fetishism complements commodity fetishism." If this is the case, the privatistic genesis of law is immediately revealed as a process that goes from individual appropriation to the construction of the legal subject and the stipulation of a contract in which the law of the stronger subjects the weaker. Pashukanis states that "property precedes commodity"; law is an order that is owned only by the bourgeoisie and capitalism, and which they have implanted at the center of society (Max Weber's opinion was after all not so different).

To this first point there follows in Pashukanis a second point of great interest for current legal opinion (or science), namely, his construction of the "form" of law as the changing "form" of the legal investment of the social. What is then the "form" of law according to Pashukanis? He notices that we are dealing with the concept of the "form" whenever we not only pose the problem of the (economic) base from which legal power is promulgated and its systemic functioning developed, but also define the unfolded power of the legal order and that convergence of legitimacy and effectiveness that stands as its force—the force of the enemy, for whoever sees in capitalism a power that destroys freedom and common-wealth. Now, Pashukanis insists that the "form" of law is imposed on the complexity of the social conditions that it embodies and expresses. It is not a simple technical form, nor a mere projection of normative contents, but the institution of the social value of labor and of the balances/imbances that are developed in the processes of institutional determination. As happens in the pages that Marx devotes to fetishism, the constitutive rule of the "form" is the very one that demystifies it, since it shows the relations of force that constitute it.

Now, some critics have insisted on the inadequacy of the demystification of the legal form carried out by Pashukanis. They argue that if it is

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<sup>24</sup> Here I mention only a few works dealing with these new readings of Pashukanis: Miéville (2006); Koen (2011); Head (2004, 2008); Kamenka & Tay (1970); Arthur (1976–77); Redhead (1978); Warrington (1981; 1993); Lapenna (1964: 55 and 94n).

simply configured by the social relation that constitutes capital, then we do not understand how it can give rise to a superstructure as complex as that of law (or norm) under capitalist rule. However, in order to comprehend the legal “form” as advanced by Pashukanis, we have to assume that these objections are not pertinent. The concept of “base” and that of superstructure had for Pashukanis a purely pedagogical value; social reality (and even more so law) is rather a set that embodies economical facts and expresses their value. The question of law, as the question of fetishism, leads us to the theme of the “form of value” in all its complexity. What is then the “form”? Over the same years, studying *Capital*, Isaak Rubin redefined the law of value (1972 [1928]); in addition to pointing out its substance (labor) and magnitude (measure) he in fact insisted on its “form,” that is, the “form of social labor,” the overall shell of production—which is historically modifiable, technically combinable, and politically articulated. Now, the concept of “legal form” in Pashukanis corresponds to that of “form of value” in Rubin. Both these concepts include “base” and “superstructure,” but unpack their interweaving and figure against the background of the socialization of production, that is to say, of the social totality. In addition to Rubin’s theory of value Lukács’s idea of “totality” resonates here.

Pashukanis’s legal form is therefore the norm of social organization and of the productive system. Law is a contradictory institution; its movement can be described as moulded by the variability of the commodity relation. If we want a final proof of all this let us consider Pashukanis’s complex definition of “norm” and compare it with Foucault’s. If for Pashukanis the norm is an objective fact that is determined and determines its functions as a “social relation” within a history determined by commodity exchange (Head 2004: 284–86), for Foucault the notion of norm emerges when, with the exhaustion of sovereign command, discipline begins to organize the productive society. The norm is expressed and defined within this passage as a historically given fact that objectively transforms the reality of command (indeed, from sovereignty to discipline) (Revel 2008: 97–99). The definitions coincide. And it is evident that, in both authors, “norm” has a meaning that widely differs from that normally attributed to “juridical norm”; in both Pashukanis and Foucault, “norm” is a path needed to go through the “form of value”—by expressing it—which is the set of social relations in their objective and historical determination.

The third point with respect to which there is a resurgence of interest in Pashukanis emerges when the legal form, as understood above, is historicized, that is, presented in its becoming. In his work Pashukanis compares the legal form not only, in a systematic manner, with bourgeois law but also with the becoming of Soviet society. When the NEP is imposed, he stresses the permanence of elements of the bourgeois order (the right to property, for example) in Soviet law and thus registers the coexistence of antagonistic orders. On this basis a strong constituent dynamics is however im-

pressed on socialist normativity, and Pashukanis brings into play, as a dynamic element in the construction of the new socialist world, a fundamental political model of Marxian theory, namely, “the withering away of the State.” This is a dynamic, affirmative, and constituent proposal—and it is above all a position that radically refuses and excludes every possibility of defining a proletarian “right” or “a” proletarian law. To break with the illusion of a proletarian law was for Pashukanis a way to keep open the path of accomplishment of the communist revolution. Against this, at Stalin’s command, Vyshinsky restored in socialism the normativity of law that is typical of bourgeois and capitalist societies. Pashukanis was put to death at the very moment when Stalin pompously proclaimed the perfection of the “law” in the realization of socialism in Russia.

It should not be seen as contradictory (and/or opportunistic) that in this climate of struggle Pashukanis tactically assumed, throughout his militant experience and work, a position of relative belittlement of the use of force and of the mechanisms of normative consolidation of legal action. To contrast these tendencies—which violently emerged in Soviet society—meant to keep open the development of the revolution for workers’ democracy and the movement of masses. To contrast the tendency to establish a Soviet Code meant to keep class struggle open. Is it anyway not the case that Pashukanis remained too close to the development of soviet law and accompanied it in the Stalinist era? Along with his “opportunism” one should however not forget his staunch endorsement of an unparalleled principle: in the revolutionary society law had to wither away and, if one had to use it during the transition, it had to be refashioned to keep it open to new matrixes of freedom that class struggle could determine. And this in order to save the Revolution.

Finally, as if to diminish the political soul of Pashukanis’s theoretical struggle, it has often been written that his formula “law as commodity relation” had been derived not from the Marxian pages on production but simply from the pages of *Capital* on distribution. This is a nice hypocrisy that mirrors the old times in which the production and reproduction (and circulation) of capital were non-overlapping schemas! In any case, Pashukanis’s insistence on the necessity to keep the socialist legal horizon always open and bind it to the problem of the destruction of the State and the withering away of law involves on the contrary a profound scrutiny of the Marxian chapters on production and an understanding of how deeply class struggle is present in them and how ambitious the proposed target is.

On this note, I think that I have accounted for the relaunching of my essay, forty years after its publication. It clarified the Marxist themes we advocate in order to show the greatness of Pashukanis’s work.

*Antonio Negri, 12 September 2016*

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