

CULTURAL REVOLUTION IN RUSSIA, 1928-1931

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PASHUKANIS AND THE WITHERING AWAY OF LAW IN THE USSR

Indiana University Press • Bloomington and London [1978]



Studies of the Russian Institute, Columbia University

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* Sheila Fitzpatrick (orig.)

SHARLET, Robert, *Pashukanis and withering away of law in the
URSS, in Cultural Revolution in Russia, 1928-1931*, Bloomington,
Indiana University Press, 1978, pp. 169-189.

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Pashukanis and the Withering Away of Law in the USSR

Robert Sharlet

The first Soviet experiment in implementing the Marxist concept of "*otmiranie prava*" or the "withering away of law" began less than a month after the Bolshevik Revolution of 1917. The new regime's first legislation on the judiciary abolished the hierarchy of tsarist courts, which were soon after replaced by a much less complex dual system of local people's courts and revolutionary tribunals.¹ This initiated a process of simplification and popularization that in the immediate postrevolutionary days and months swept away most of the inherited tsarist legal system, including the procuracy, the bar, and all but the most basic laws needed to regulate a society. Even the remaining legal minimum was subject to interpretation by a new breed of judges, mostly untrained in law, who were encouraged to guide themselves by their "revolutionary consciousness" in applying the law. The Bolsheviks' objective was that even these remnants of a legal system would ultimately become superfluous and "wither away" or disappear after the anticipated short transitional "dictatorship of the proletariat." Their vision, formed by Marx and Engels and focussed by Lenin's *Gosudarstvo i revoliutsiia* (1917), was of a new society in which people would be able to

settle their disputes "with simplicity, without elaborately organized tribunals, without legal representation, without complicated laws, and without a labyrinth of rules of procedure and evidence."² However, harsh reality quickly impinged upon this vision as civil war engulfed the country. Confronted with the imperatives of governing under the most difficult conditions, the Bolsheviks, as Hazard has conclusively demonstrated, deferred their dream of a new world and, as early as 1918, began the process of relegalizing the society, which culminated in a fully articulated legal system based largely on foreign "bourgeois" models during the early years of the New Economic Policy.

This study is devoted to the second Soviet experiment in the "withering away of law," which began during the NEP period with the slogan "*revoliutsiia prava*"³ ("the revolution of the law"), gained momentum during the years of the "proletarian cultural revolution" and First Five-Year Plan, peaked during the Second Five-Year Plan, and came to a definitive halt only with the arrest and purge of the jurist E. B. Pashukanis and his associates beginning in January 1937.

As the author of *Obshchaia teoriia prava i marksizm* (1924), which presented his "commodity exchange theory of law," Pashukanis was the paramount figure in the second attempt to fulfill the Marxist vision of a world without legal coercion. At a time when Marxist jurists were struggling to develop a "Marxist" theory of law as a critique of the "bourgeois" legal system of NEP, Pashukanis' theory emerged as the most persuasive approach. It was soon accorded the status of the Marxist theory of law, and a school of "commodity exchange" jurists gathered under Pashukanis' theoretical leadership. The commodity exchange school of law included both jurists, and specialists in "soviet construction" (*sovetskoe stroitel'stvo*). Besides Pashukanis, the best known representatives of the school were P. I. Stuchka and N. V. Krylenko, both of whom were "Old Bolsheviks" as well as jurists.

The commodity exchange school of law was centered within the Communist Academy. Most of its adherents wrote for the Academy's law journal, *Revoliutsiia prava*, which began publication in 1927, and a number of them taught in the law section of the related Institute of Red Professors. In addition, the commodity exchange jurists occupied a network of strategic positions that enabled them to maximize and extend their

influence over Soviet jurisprudence, including major academic positions, key publishing posts, official legislative drafting commissions, and executive rank in the justice apparatus. A few, notably Krylenko and Stuchka, even held higher Party office. Pashukanis exercised his leadership of the commodity exchange school from an interlocking series of prestigious academic and editorial positions in law and the social sciences, through which he increasingly projected his influence over legal research, codification projects, and legal education.⁴

The "revolution of law" initiated by the commodity exchange jurists preceded the call for a general "cultural revolution" in 1928. But their recognition that it was a part of the wider movement is indicated by Stuchka's adoption of the phrase "the cultural revolution of the law."⁵

There were differences within the commodity exchange school between Pashukanis' utopian goal orientation and Stuchka's more practical concern over the means for realizing their common dream of a future society free of legal coercion. However, during the late twenties these essentially theoretical differences were deliberately muted and carefully contained within the halls of the Communist Academy in order that a unified commodity exchange school could better confront its opponents on the "legal front" of the cultural revolution. By the end of the decade, Pashukanis and his "school" had effectively driven from the field all competing theories of law and successfully eliminated or extended their control over all nonaffiliated law journals, legal research institutes, and law faculties. This meant that all legal research and codification projects, as well as control over legal education, were henceforth concentrated within the Communist Academy's newly reorganized Institute of Soviet Construction and Law. Pashukanis, who headed the Institute, became the virtual leader of the Soviet legal profession.

The triumph of the commodity exchange school of Soviet jurisprudence meant greater emphasis on its long-term goal of the withering away of law. To its critics, this meant the spread of "legal nihilism," especially among Marxists, Communists, members of the intelligentsia, and even some officials. In 1929 *Pravda* reported what was probably a typical example of the growing contempt for the law: a local official had "found Soviet laws inconvenient for him and declared that no laws existed for Marxists."⁶ Commenting on this example, a Soviet jurist wrote in 1929 that "in more

serious and qualified circles, one comes across attempts to create *ad hoc* a whole theory on this subject,"⁷ an allusion to Pashukanis' commodity exchange theory of law.

To appreciate the impact of the commodity exchange school on the second Soviet experiment in the withering away of law, a précis of Pashukanis' theory is necessary.⁸ Pashukanis began from the premise that law was rooted in the institution of private property, and that its primary purpose was to facilitate and regulate the exchange processes of private enterprise. From this narrow premise was derived his complex theory of law as a uniquely "bourgeois" phenomenon. Since, for Pashukanis, law was the juridical expression of commodity exchange based on the principle of equivalency in the capitalist economy, his theory was known as the "commodity exchange theory of law." Conceptualizing all law as private law, Pashukanis derived public law from the equivalent relations of commodity exchange. Consequently, he represented the state in its capacity as guarantor of commodity exchange in the marketplace "as law and only law," while the state as an organization of class domination was designated a meta-judicial phenomenon beyond the scope of legal theory. Therefore, proceeding from Marxist principles, the commodity exchange theory anticipated the early "withering away" of law and of its state-guarantor as the socialist sector gained ascendancy over the capitalist sphere of the Soviet economy and the planning principle superseded the process of commodity exchange.

To elaborate, Pashukanis conceived of all legal relationships as contractual relationships reflecting the objective economic relationships of commodity exchange. Since commodity exchange was based on the equal relationship between property owners as legal persons with the right to acquire and alienate property in a market economy, the "form" or structure of the corresponding legal relationship was based on "equivalency," the principle that the contracting parties exchange with one another given commodities in equal amounts. From this point of view, even crime and punishment (and thus criminal law) was an expression of an *ex post facto* contractual relationship between a criminal and the state: the criminal, as one party to the "contract," committed a crime, and the state, as the other party, meted out punishment equivalent to the damage sustained by the victim.

For Pashukanis, even the state was reducible to private law. He conceptualized the state as a dual phenomenon—the "legal state," which manifested itself indirectly through legal norms based on the equivalency principle, and the "political state," which expressed its power directly by means of the "technical rules" of administration based on the principle of political expediency.

Since Pashukanis considered the economic institution of commodity exchange to be peculiar to capitalism, he concluded that private law and its derivative, the legal state, were exclusively capitalist phenomena. He argued that law in Soviet society was "bourgeois law," which was primarily necessary for the regulation of the capitalist elements of the NEP economy. From his point of view, there neither was nor could be in the future any such phenomenon as "proletarian" or "socialist" law.

Pashukanis predicted that law (that is, private law and the legal state) would gradually begin to "wither away," as soon as its economic prerequisites of private property and commodity exchange were replaced by a public property economy based on the principle of economic planning. In Soviet terms, that meant the termination of the New Economic Policy, which Pashukanis and his associates anticipated, and which in fact took place at the end of the 1920s.

The impact of the commodity exchange school of law on the withering away process began to become apparent in the late twenties. Pashukanis and his colleagues assiduously devoted themselves to bringing about the realization of his prediction that private law and the legal state would gradually begin to wither away upon the elimination of the institutions of private property and the market. From their point of view, the prevailing political and economic trends were favorable. The doctrine of "socialism in one country," signaling the forthcoming end of the strategic retreat of the New Economic Policy, was first officially expressed in 1925 at the Fourteenth Party Conference. Later in the same year, the Fourteenth Party Congress adopted the policy of industrialization, which meant that a substantial growth of the socialist sector of the economy could be anticipated. In the language of the commodity exchange school of law, the imminent end of the New Economic Policy and the subsequent growth of the state sector meant a significant weakening of the juridical superstructure. By

1927 the Fifteenth Party Congress was calling for the construction of a socialist society, an objective that for Pashukanis and his colleagues required the gradual elimination of law. A. Ia. Estrin, speaking for the commodity exchange school, wrote in *Revoliutsiia prava*:⁹

The basic conclusion which those of us working in the field of the theory and practice of Soviet law and in the work of legal construction can draw is that not only has the necessity of moving forward, decisively breaking away from the inertia of the juridical institutions and forms, . . . become acutely urgent, but now all the preconditions are present so that the achievements in the field of legal form and legal "superstructure" can conform to the achievements in the field of the planned construction of the "base."

The growth of the socialist base, Estrin argued, meant "the simplification and contraction" of the "legal form"—in other words, a withering away of the law.

It was a time, as Hazard has aptly expressed it, when "simplification of institutions and procedures seemed realistic and not utopian. . . ."¹⁰ Another perceptive observer of Soviet jurisprudence described the climate of opinion around 1930, when, "under the influence of the successes of the Five-Year Plan, it was officially announced that socialism had won finally and irrevocably":¹¹

The line of reasoning which proves the inevitable disappearance of law under socialism by connecting law with the free exchange of commodities appealed chiefly to lawyers and generally educated people. Hundreds of thousands of single-minded communists, amongst them judges, investigators, and procurators, sincerely believed in the more orthodox assumption that socialism would make any state authority unnecessary, and in this way do away with law. Hearing from all sides that socialism had already won, many of them decided to draw the necessary conclusions.

"Withering away" was, of course, a familiar concept in the Marxist-Leninist vocabulary, but probably no one in the 1920s did as much to call attention to it and bring it into focus as did Pashukanis. Reviewing the first twelve years of Soviet legal development, Stuchka acknowledged Pashukanis' role in this connection. At the beginning of NEP, he wrote,

The majority of communists referred to the law of the Soviet power skeptically, to say the least. When Lenin . . . initiated the laws concerning the

New Economic Policy, voices were openly heard saying: "Well, this is for them (the Nepmen) and not for us." And finally, when a genuinely scientific theory of law emerged here, . . . [the fact that it] held Soviet law in low esteem contributed significantly to its popularity.¹²

The concept of withering away had practical as well as theoretical implications, and the commodity exchange school, through the many strategic positions and editorships held by its adherents, was actively engaged in propagandizing the problems of the withering away of private law and the legal state on both levels. Considerable interest in the problems contingent upon the withering away process was reflected in a report to the Fifteenth Party Congress by N. M. Ianson, a prominent member of the Central Control Commission of the Party and of the Workers' and Peasants' Inspectorate, who was soon to succeed D. I. Kurskii as RSFSR Commissar of Justice. Ianson, reporting on an inspection of the lower judiciary, noted that the inspection had uncovered "a colossal quantity of litigation," which had caused "an enormous logjam." In language familiar to the commodity exchange school, Ianson criticized the fact that the defense of legality was being "converted into pedantry," at which point Krylenko, sitting in the audience, shouted "Right!" Ianson went on to warn against those "comrades with good juridical baggage" who were mainly concerned with "the forms of justice" and approached their duties with "a professional juridical bias." The legal system should be "linked with the requirements of life (voice: 'Right!'), with final expediency (applause)"; and the lower judiciary required "not just reforms . . . but even a small revolution."¹³

The spirit of the "revolution of the law" was also apparent among other government officials. One such official expressed the opinion that the legal system would be necessary only until there were enough administrators who could "decide each individual case according to its merits and the interests of the Soviet state."¹⁴

The idea of withering away was not confined to high political, administrative, and legal circles, but was even popularized for mass consumption. The article on "The Law" in *Malaia sovetskaia entsiklopediia* (1930) stated that

Law reaches its peak in bourgeois societies, as the most developed historical type of commodity producing society. . . . [Law will wither away] in the

future society of communism, in which the class division will disappear and the planned regulation of the economy will fully replace the market regulation of production and exchange. . . . The regulation of the relations of production and exchange and all other social relations by means of the legal norm will be replaced by purely technical regulation. . . .¹⁵

The commodity exchange school initially had its greatest impact on criminal law and procedure. As early as 1927, Krylenko began to draft new criminal codes consistent with the goal of withering away. That year Krylenko, under Pashukanis' influence, played a major role in drafting criminal codes for the Ukrainian and Armenian republics. Both of these codes were patterned after the Criminal Code of the RSFSR of 1926 and contained the "analogy" (see p. 181) and "social danger" principles, which, from the point of view of the commodity exchange school, were essential to the transition from equivalency to expediency.¹⁶

Pashukanis and Krylenko believed that the first step in the withering away of criminal law was the elimination of the most basic features of "bourgeois" criminal law from the Soviet codes. Consequently, they directed their attack against the "dosage system" of punishment and against the distinctions between intention, negligence, attempt, and participation.¹⁷ According to Hazard, Pashukanis and Krylenko received the support of "practically every writer and researcher on criminal law in the Soviet Union."¹⁸

Pashukanis and his colleagues in criminal law had succeeded in replacing the term "punishment" with the words "measures of social defense" in the RSFSR Criminal Code of 1926. From their perspective, this was a modest step away from what Krylenko called the "price-list system" of code writing.¹⁹ Next, the commodity exchange school began to argue forcefully within the Communist Academy in favor of the advantages of "direct action" (expediency) over "action by means of a general statute" (equivalency, or juridical action).²⁰ Pashukanis and Krylenko urged that a reformed Criminal Code of the RSFSR should have only one section—a general section laying down the fundamental principles that would guide the courts in the administration of justice. They argued that the section of the code that defined specific crimes in each article followed by a prescribed penalty should be eliminated. Their main concern at this point was that the judge should not be bound by narrow limitations, but that he should be able to "apply whatever penalty he thought necessary to assure the protection of society."²¹

In effect, the commodity exchange school proposed that repressive measures should not be equated with the type of crime committed or the individual's guilt, but should conform instead to the principle of expediency, which could mean a greater or lesser "measure of social defense," depending on the judge's discretion. Article 6 of Krylenko's draft criminal code of 1930 clearly reflects this objective of the commodity exchange school:²²

Measures of class oppression and of enforced educational influence may be applied to persons who have committed a certain delinquency as well as to persons who, in spite of not having committed a definite crime, justify the serious apprehension that they eventually may commit delinquencies, in consequence of their relations to criminal surroundings or of their own criminal past.

In 1931 the first national conference of Marxist jurists, dominated by the commodity exchange school, approved Pashukanis' and Krylenko's proposal to abolish the section of the criminal code dealing with specific crimes and punishments. The resolution of the conference stated that the substantial progress in industrialization and collectivization and the strengthening of the planning principle in general had

created the conditions that have made it possible actually to attempt to eliminate the theory of value for value in criminal repression and to replace it by repression based on the principle of expediency as the guiding principle for the judge in each particular case.²³

Along with the criminal law reforms, Pashukanis, Krylenko, and Estrin addressed themselves to the task of simplifying criminal procedure with a view to its eventual elimination. The interaction of autonomous contesting parties in the criminal process was regarded by the commodity exchange school as a reflection of market relationships and hence as a bourgeois phenomenon. In 1927 Krylenko had advocated "abolishing the Criminal Procedural Code [of the RSFSR] . . . and replacing it by a collection of technical rules. . . ." ²⁴ There were indications by 1929 that the codifiers had been experimenting with the simplification of criminal procedure,²⁵ and a present-day Soviet legal historian (and contemporary of Pashukanis) has written that by characterizing "controversy" (*scstiazatel'nost'*) in criminal procedure as "bourgeois," the commodity exchange school adversely

affected "the whole system of procedural guarantees and at the same time weakened interest in the scientific elaboration of Soviet procedure."²⁶

Krylenko had a fairly explicit conception of the ways in which public order would be maintained after the eventual withering away of the court. Moral or educational measures would be applied to violators of the community rules. These measures would include suspended sentences, public censure, expulsion from the community, denial of the right to participate in social and political organizations, and deprivation of political rights. The elaborate pyramidal judicial system, with its different types of tribunals, would be abandoned, and control by the central authorities would cease. The judge would be guided by ethical rules that would reflect the society's complete achievement of socialism.²⁷

This was a large order, but Pashukanis, Krylenko, Estrin, and others attempted to fulfill it. As a start, Krylenko felt that judicial behavior had to be changed so that judges would not approach the function of imposing punishment from "that damn idea of equivalence which sticks so firmly in the heads of all."²⁸ In effect, he and his colleagues wanted to introduce a new criminal code that would allow the judge to deal more "with the man" than with his actions.²⁹

To facilitate the gradual simplification of the judicial process, the commodity exchange school, especially Krylenko, also promoted the further development and extension of the comrades' courts from the late twenties. The comrades' courts had first been organized in the Red Army, following the October Revolution, as peer courts for the punishment of minor offenses. However, it was in the course of the "revolution of the law" in the late twenties that the institution began to flourish.³⁰

The jurisdiction of the comrades' courts was enlarged to include several heretofore criminal offenses and even civil suits. Up to this time, comrades' courts were primarily located in industrial enterprises, but from 1929 the institution was extended to housing associations and other residential units and, for the first time, into rural areas. This entailed further broadening of their jurisdiction into the traditional branches of family, land, labor, and housing law. The rural comrades' courts, for example, could hear child support cases and some alimony, land, and labor disputes; while the comrades' courts in housing developments had jurisdiction over thirteen categories of cases involving the use of housing facilities. The volume of

cases heard by comrades' courts began to increase rapidly, with a comparable decline in the number of cases based on private complaints going through the regular "people's" courts.³¹

The process of the withering away of criminal law and procedure was also fostered by the encroachment of medicine, especially psychiatry, into the traditional jurisdiction of criminal law. In 1925, the first All-Union Conference of Psychiatry and Neurology resolved that

the idea of imputability . . . must be eliminated from Soviet legislation and replaced by the idea of socially dangerous conditions produced by the neuropsychiatric deviation of the criminal.³²

In subsequent years, the concept of legal responsibility was eroded in practice: legal criteria for insanity, involving will and intellect, were ignored. Harold J. Berman and Donald Hunt, in their study of forensic medicine in the Soviet Union, observed that "although the Criminal Code provided for legal tests of insanity, the tests actually applied were medical-psychiatric tests of mental illness."³³ Psychiatric criteria were very widely applied. For instance, drug addicts were not considered legally responsible, and sometimes even slightly intoxicated persons who had committed criminal acts were considered nonimputable. By 1929 the criminal law specialist I. P. Trainin was writing that strong emotional excitement caused by a serious insult "might well serve as a basis for a finding of non-responsibility on the ground of 'pathological affect.'"³⁴

In civil law, the impact of the commodity exchange theory became apparent only at the very end of the twenties, partly because the theorists themselves assumed that nothing could be done in this area until a basic political decision was taken to abandon the economic relations of NEP. Nevertheless, there was discussion of civil law among the commodity exchange group during the twenties, with Stuchka rather than Pashukanis taking the leading role. Ultimately, the theorists contemplated, the civil law regulating the exchange of commodities both within and between the private and public sectors of the mixed economy of the NEP period would be converted into a series of technical rules (or, in Stuchka's terminology, "economic law") dictated by the imperatives of administering a publicly owned and operated industrial economy. "Sale and purchase is a bourgeois institution," Stuchka told a conference of justice officials in 1929. "So-

cialism does not recognize sales and purchases. It recognizes only direct supply."³⁵ Under socialism, state enterprises would gradually succeed individuals as the predominant subject of a right or juridical person.³⁶ It was anticipated that the Five-Year Plan would produce "a new contraction of law in favor of administrative regulation";³⁷ and in 1929 the Sixth All-Russian Congress of Workers of Justice adopted a resolution that stressed the necessity to begin "to reduce and simplify our civil law."³⁸

With spontaneous action of the market curbed and the principle of economic planning extended, preparations for the withering away of civil law proceeded more rapidly. L. Ia. Gintsburg published the first "Program" or syllabus for economic law in 1929. The second edition of the program, which went to press in mid-1930, stated that the Civil Code of the RSFSR was rapidly withering away and being replaced by economic law, or technical rules. Quoting Pashukanis, Gintsburg observed that the intensive growth of planning was causing the "displacement of legal form," which meant that the importance of "the formal juridical aspect in the organization of the social exchange of material things" was being reduced.³⁹ Outlining the process of the withering away of civil law, Gintsburg wrote that

the social exchange of material things will be effected... not by the mechanism of separate, uncoordinated equivalent civil law contracts, each of which is the result of an agreement between autonomous economic wills, but by a system of organized and reciprocally coordinated acts originating from the single center for planned targets.⁴⁰

By 1930 the impact of the commodity exchange school of law on the Soviet legal system was already becoming noticeable, especially in criminal and civil law and procedure and the administration of criminal justice. It had become rare "to encounter a direct defense of the system of legal principles that corresponds to the capitalist economic structure," noted an editorial in one of the group's journals in the summer of 1930. In the opinion of the journal, rationalization, collectivization, and the extension of planning had now made it possible to begin to eliminate legal regulation from all sectors of society—although, as it admitted, much still remained to be done in this respect.⁴¹ An Englishman visiting the Soviet Union in the same year was told by a high official of the RSFSR Commissariat of

Justice that he expected that "all litigation, civil or criminal, would disappear within the next six or seven years. . . ."⁴²

But Pashukanis' and Krylenko's hopes that their draft criminal code would be adopted in 1930 were disappointed (in spite of which they continued to produce new drafts annually from 1930 to 1935). However, their drafts did have an effect on the administration of criminal justice, since they encouraged the belief that the 1926 Code was soon to be replaced.⁴³ It was reported that these draft codes "were more generally distributed in some areas than were copies of the criminal code in force": official commentators on the RSFSR Criminal Code actually advised judges to disregard certain of its provisions; and this apparently led to numerous errors in sentencing, with the courts giving insignificant penalties for stealing, disorderly conduct, and evasion of alimony payments, while meting out heavier penalties for lesser offenses.⁴⁴ Some Russian Republic courts even disregarded the laws on a wholesale basis, for which they were criticized by the Supreme Court of the RSFSR.⁴⁵ As Hazard reported,

Encouragement of complete disregard of the precise provisions of the [criminal] code [of 1926] led to a broad application of the section promoting application by analogy to punish an act for which there was no definite section. The court practice had led to the result that no citizen could foretell what was a possible criminal act, since the analogies section might be applied to cover any act.⁴⁶

In the field of criminal procedure, the "triumph of the simplifiers" was the Tadjik Criminal Procedural Code of 1935, which contained only 154 articles.⁴⁷ The impact of the commodity exchange school on the judiciary was especially dramatic. Judges actually began to close their courts in some places, and Vyshinskii recalled in 1934 that

only two years ago . . . the Chairman of the Mordov Regional Court issued a circular to all the subordinate courts urging the necessity of closing the organs of justice, in view of the fact that we were already entering the stage of socialism. . . . Only a year ago another judge wrote to the [RSFSR] Commissariat of Justice inquiring whether it was not time to close all the organs of justice in connection with the creation of a classless society. . . .⁴⁸

A second area in which the commodity exchange school had great impact was legal education. The organization and content of legal educa-

tion in turn had profound implications for the future of law in Soviet society. Just as Pashukanis and his colleagues attempted to influence the withering away of the extant legal system, so also they sought to cut off any future legal and administrative development at the source by reshaping legal education to conform to their conception of the kind of legal personnel appropriate to preside over the gradual withering away of law.

The priority tasks in Soviet legal education as Pashukanis described them in 1927 were the struggle against "bourgeois" legal scholarship and a Marxist reorientation of teaching in the university faculties of Soviet law. He observed that there was only a thin stratum of Marxist scholars on the teaching staffs in the departments of state and law. The Law Department of the Institute of Red Professors—in effect a competitor of the old university faculties of law—had only recently been established and did not yet have many students. But Pashukanis was confident that the enrollment would grow and a new Soviet generation would receive "the correct Marxist methodological line for research on questions in the field of state and law."⁴⁹ The "line" to which Pashukanis was referring was, of course, the position of the commodity exchange school of law.

Pashukanis was especially concerned that bourgeois jurists tended to dominate the teaching of law in the Soviet Union. When the Collegium of the RSFSR Justice Commissariat adopted a resolution concerning the necessity of improving the Marxist character of law teaching and research, Pashukanis stressed that the resolution warned against placing jurisprudence "in strange hands, in the hands of specialists who neither have nor desire to have anything in common with Marxism-Leninism."⁵⁰ By 1928 Pashukanis observed that the core of Marxist jurists had grown sufficiently strong to dispense with bourgeois law professors. His group supported the purging of non-Marxist and bourgeois jurists from the legal superstructure, and especially from the law schools (on the university purge as a general phenomenon, see Lapidus, this volume, pp. 91-92). After the purge of bourgeois professors from the Soviet Law faculty of Moscow University in 1929-30 two adherents of the commodity exchange theory expressed the opinion that this had strengthened the Marxist position and cleared the way for reconsideration of traditional ideas on legal education "which had been uncritically received from bourgeois jurisprudence."⁵¹ During this period many bourgeois jurists, especially the group around the journal *Pravo i*

zhizn' and those connected with the Institute of Soviet Law, were accused of "smuggling bourgeois doctrines into Soviet jurisprudence and were expelled from the universities. . . ."⁵²

By mid-1930, sufficient progress had been made in eliminating bourgeois professors from Soviet legal education for the commodity exchange school to be able to turn its attention to the bourgeois legal advisors in the state apparatus. M. Dotsenko cautioned that "the dangerous bourgeois juridical world view" still permeated the state apparatus because of a shortage of Marxist cadres.

The actual 'carriers of evil' are primarily the enormous army of legal advisors to various [governmental] institutions, right up to the central institutions, and the so-called scientific advisers who are educated in juridical dogmatism and who not only apply the seal of their metaphysical world view to series of legislative acts . . . but also propagate their "scientific theories" through Soviet journals and particular institutes in which they artificially breed the bacteria of the juridical world view for mass consumption.⁵³

Simultaneously, while eliminating bourgeois jurists from the law schools and advocating their removal from the state apparatus, the commodity exchange school was in the process of reconstructing the organization and content of legal education. The curriculum of the Law Department of the Institute of Red Professors served as their laboratory and provided the basic pattern that guided the Marxist reorganization of legal education in the Soviet Union. This curriculum included the commodity exchange school's version of Marxist methodology and law, the main themes of bourgeois jurisprudence, an analysis of major bourgeois legal institutions, and an examination of the doctrines of Marx, Engels, and Lenin on law and the state.⁵⁴

Marxist course "programs" were drafted or at least planned by commodity exchange school men for every branch of law, including legal history.⁵⁵ The two syllabi most central to the process of the withering away of law and state were Gintsburg's *Programma po khoziaistvenno-administrativnomu pravu* and Iezuitov's and Rezunov's *Uchenie o sovetskom gosudarstve*. Gintsburg's program was the first on the new branch of "economic law" that was to supersede civil law; and the pronounced influence

of the commodity exchange school may clearly be seen, for example, in its third topic: "The expanded socialist offensive, the transformation of exchange relations, and the fate of the Civil Code."⁵⁶ The new syllabus on the state prepared by Iezuitov and Rezunov was based on the premise of "a unified Marxist doctrine of the Soviet state," which was, in effect, a doctrine of the "political state"; and the authors rejected all "attempts to theoretically represent the Soviet state as a legal state."⁵⁷ Again, the influence of Pashukanis' and Stuchka's ideas was clear.

Under Pashukanis' leadership, the influence of the commodity exchange school was extended to correspondence courses in law. The Correspondence Division of the Institute of Red Professors, established in 1929, had a law section⁵⁸ whose journal was edited by Pashukanis (who at this time held the position of Rector of the Institute of Red Professors). The law section of the Correspondence Division was oriented toward the popularization of Marxist legal education, and its journal was especially designed to reach Party activists and teachers in Party schools and graduate schools, as well as the regular correspondence students.⁵⁹

The freshman law student, whether in regular attendance or studying by correspondence, was quickly introduced to the basic positions of the commodity exchange school. His first course was the seminar on the general theory of law, taught by Pashukanis as, in effect, a seminar on the commodity exchange theory of law.⁶⁰ The occupations of Pashukanis' first class of correspondence students suggest the possible reach of his influence beyond the legal profession. The students included a military procurator in the Ukraine, an employee of the secret police in Belorussia, a high school teacher, a propagandist, and the assistant chief of the legal department of a credit bureau.⁶¹

Pashukanis' journal published grades and evaluations of student papers that indicate the type of intellectual monopoly to which the commodity exchange school aspired. On the theory of law, student papers were generally criticized for deviating from the commodity exchange interpretation and praised for following it. The result was that the papers sounded like regurgitations of Pashukanis' ideas, or fulsome affirmations that "the most correct point of view is the conception of Comrade Pashukanis, who first developed a Marxist understanding of the legal form of production relations. . . ."⁶²

There was, however, one basic disadvantage to the position of the

commodity exchange school: by talking about the withering away of law its members were cutting the ground from under their own profession. Law students noted that the prospects for a career in law were beginning to look dim and passed resolutions expressing doubt that they should continue their studies.⁶³ Vyshinskii later reported that the prevailing nihilism toward law had had an especially "pernicious" effect on "the organization of legal education and the training of legal personnel."⁶⁴

From 1930 very few students specialized in criminal law.⁶⁵ Those who took the new "economic law" courses that replaced courses in civil law emerged in some ways poorly equipped. As Hazard noted, lawyers, graduates of the law school, practicing attorneys, and judges knew very little about the legal rights of individuals, although they were extremely proficient in resolving disputes between two state enterprises.⁶⁶

The subject of the legal state was gradually disappearing from the curricula of the law schools. The course on the Soviet governmental system at Sverdlov Communist University was dropped at the end of the academic year 1929. The study of Soviet government was also increasingly ignored in the Soviet law faculty of Moscow University and in the preparatory section of the Institute of Red Professors. As an editorial in *Revoliutsiia prava* reported in 1929,

The study of the Soviet Constitution, the governmental machinery of the proletarian state, is little by little being dropped from the curricula of our institutions of higher learning and the Party graduate schools.⁶⁷

By mid-1930, one of Pashukanis' associates observed that "one often hears it said that there is no reason to get absorbed in the study of the state, since it . . . is withering away in the period of the dictatorship of the proletariat."⁶⁸

The efforts of Pashukanis and the commodity exchange school of law had a major impact on Soviet jurisprudence, and by the end of the 1920s the impact had extended to the practice of law and the system of legal education. Pashukanis saw the introduction of the First Five-Year plan as a turning point.⁶⁹ As he wrote late in 1929:

The role of the pure juridical superstructure, the role of law, is now diminishing, and from this one can infer the general rule that [technical]

regulation becomes more effective as the role of law becomes weaker and less significant.⁷⁰

Hazard reports that Pashukanis boldly predicted that the withering away process would reach a decisive stage by the end of the Second Five-Year Plan.⁷¹

In the 1930s, an atmosphere of legal nihilism permeated the Soviet legal system.⁷² Although the closing of local courts was eventually stopped, the comrades' courts continued to absorb more and more of the case load of the people's courts. The percentage of persons judged by the people's courts of the RSFSR on private complaints, beginning in 1929, fell to 26.9 in 1931, 16.9 in 1932 and 6.5 in 1933. "when social [i.e. comrades'] courts were formed everywhere."⁷³ Legal education had fallen into very low esteem. Hazard, reporting on his student days in Moscow, wrote:

In 1934 we had an old building in bad repair, poorly decorated, unheated so that we sat in lectures fully clothed for the street. We had a schedule which changed so often without notice that it became a joke, and no one even knew from one semester to the next what would be the subjects which would be taught. Our students were men and women in their late twenties or early thirties, and they came for the most part because they had tired of other work they had previously been doing.⁷⁴

Satisfactory though all this was from the point of view of withering away of law, there were problems for Pashukanis and the commodity exchange school.⁷⁵ Stalin and the Party leadership rejected the idea that the state itself was withering away (see Fitzpatrick, this volume, p. 00 and note 65). In 1930-31, the Marxist legal profession underwent a process of recantation and self-criticism comparable with that occurring in other fields affected by cultural revolution. The major events of this phase were Pashukanis' "self-criticism" in late 1930, and the First All-Union Congress of Marxist Specialists on the State and Law, called in early 1931 and presided over by Pashukanis, which met to discuss the reconstruction of jurisprudence in conformity with the new emphasis on the strong state and the repudiation of "withering away" theories.

Pashukanis remained the unchallenged doyen of Soviet jurisprudence, but his "commodity exchange theory of law" did not fare so well. The imposition of positivist elements deprived it of much of its theoretical

coherence as a sociology of law. As Pashukanis abandoned economics and turned to politics as the source of law, the state became, in theory as well as fact, the author of legal norms. In Pashukanis' revised theory, law was an expression of the policy of the state. While he accepted the necessity of strengthening the state to carry out the political tasks of the day, he did not draw the same conclusion for law, which he insisted should be characterized by maximum "flexibility" befitting the policy of a revolutionary state. He continued to resist the idea that there could be a "socialist law," believing that once the law of the proletarian state had been used to facilitate the transition from socialism to communism, it was destined to wither away.

The emphasis given by Pashukanis and his colleagues to "flexibility" in the law was consistent with their previous emphasis on "simplification" of the law. In this spirit, Pashukanis and Krylenko continued until 1935 to draft new codes of "criminal policy and law" based on the principle of "political expediency," while Pashukanis and Gintsburg at the same time continued to work for the supplanting of civil law with "economic law" reflecting the "technical rules" of the Five-Year plans and based on production units as juridical persons. Both of these tendencies were influential in Soviet legal education during the first half of the thirties.

In short, the political situation had changed but the views of the Pashukanis group, in essence, had not. The contradiction became manifest in 1935-36, with the drafting, public discussion, and ratification of the new Constitution of the USSR. The implications for law of the new constitution were immediately clear: the Soviet system required a strong and stable criminal law for the protection of public property, and a predictable and differentiated civil law for the protection of the new constitutional right of "personal property." A stable legal system, in turn, required the systematic legal education of a sufficient number of professionally trained lawyers.

The "Stalin Constitution" was ratified in late 1936; Pashukanis was arrested and disappeared in early 1937. This ended the second Soviet experiment in the withering away of law, and cleared the way for a new drive for legal "stability" headed by A. Ia. Vyshinskii, who succeeded Pashukanis as the effective leader of the Soviet legal profession. It was a denouement that, in view of Pashukanis' views on the principle of politi-

cal "expediency," had its own irony. Almost immediately after Pashukanis' arrest, economic law was dropped from the law curriculum for the spring semester of 1936-37, and civil law restored. In the following years, the proposed codes of the Pashukanis school, especially the criminal codes, were subjected to exhaustive criticism by Vyshinskii and his associates. By 1941 new textbooks and course syllabi had been written by the Vyshinskii group for nearly every major branch of "Soviet socialist law," reincorporating many of the features that the Pashukanis school had eliminated in the interest of legal flexibility and simplicity.

Finally, Vyshinskii, as the new doyen of Soviet jurisprudence, redefined the theory of law as part of the general theory of "Soviet socialist state and law." The inference to be drawn from this was that law would wither away only with the withering away of the state. But for the foreseeable future, the state had to remain strong in view of the "capitalist encirclement." In effect, the new theoretical formulation postponed the "withering away of law" indefinitely.⁷⁶

Sharlet: Pashukanis and the Withering Away of Law in the USSR

1. See *Dekrety sovetskoi vlasti* I (1957), pp. 124-26.
2. J. Hazard, *Settling Disputes in Soviet Society: The Formative Years of Legal Institutions* (New York, 1960), p. vi.
3. See the editorial "Our tasks," *Revoliutsiia prava*, 1925 no. 1, p. 3.
4. See R. Sharlet, "Pashukanis and the Rise of Soviet Marxist Jurisprudence, 1924-1930," *Soviet Union*, 1974, vol. I, no. 2, esp. pp. 112-15.
5. P. I. Stuchka, "Culture and law," *Revoliutsiia prava*, 1928 no. 2, p. 20. Stuchka's emphasis was on the gradual reduction of legal compulsion in the society.
6. Quoted in P. N. Galanza, "The psychological theory of law and Marxism," *Uchenye zapiski Kazanskogo Gosudarstvennogo Universiteta* (1929), vol. 89, book 1, p. 116.
7. Galanza, loc. cit.
8. For an English translation of E. B. Pashukanis' *Obshchaia teoriia prava i marksizm*, see *Soviet Legal Philosophy* (Cambridge, Mass., 1951), ed. J. Hazard and trans. H. Babb. For a critical analysis of the initial construction and subsequent development of his theory, see Sharlet, "Pashukanis and the Commodity Exchange Theory of Law, 1924-1930" (Ph. D. diss., Indiana University, 1968), chs. I and III. A contemporary Soviet evaluation of the Pashukanis school is given in M. S. Strogovich, "On the treatment of certain legal problems in the works of P. I. Stuchka, N. V. Krylenko and E. B. Pashukanis" in S. N. Bratus', ed., *Voprosy obshchei teorii sovetskogo prava* (Moscow, 1960), p. 397. (Academician Strogovich was a contemporary of Pashukanis, and in this article he partially "rehabilitated" the conception of a theory of law separate from the theory of the state.)
9. A. Ia. Estrin, "XV Congress of the Party and questions of law," *Revoliutsiia prava*, 1928 no. 2, p. 13.
10. Hazard, *Settling Disputes in Soviet Society*, p. 487.
11. S. Dobrin, "Soviet Jurisprudence and Socialism," *Law Quarterly Review* (1936) vol. 52, pp. 420-21.
12. Stuchka, "Twelve years of the revolution of the state and law" (1929), in Stuchka, *Izbrannye proizvedeniia po marksistsko-leninskoi teorii prava* (Riga, 1964), p. 461.
13. XV syezd VKP (b). *Stenograficheskiĭ otchet* I (1961), p. 527.
14. Paraphrased in R. Schlesinger, *Soviet Legal Theory* (2d ed., London, 1951), p. 202.
15. N. I. Cheliapov, "The Law," in *Malaia sovetskaia entsiklopediia* VI (Moscow, 1930), pp. 811-12.
16. See Hazard, *Settling Disputes in Soviet Society*, pp. 222, 393, 487; J. Starosolskij, "The Principle of Analogy in Criminal Law: an Aspect of Soviet Legal Thinking" (unpublished manuscript, 1954), p. 36.
17. See Hazard, "The Abortive Codes of the Pashukanis School," in D. D. Barry, F. J. M. Feldbrugge, and D. Lasok, eds., *Codification in the Communist World* (Leyden, 1975), pp. 158-67.
18. Hazard, "Reforming Soviet Criminal Law," *Journal of Criminal Law and Criminology* (1938) vol. 29, p. 160. The most active supporters were Estrin, Ia. V. Staroselskii, G. I. Volkov and S. Ia. Bulatov.
19. *Ibid.*, p. 164, note 20.
20. Stuchka, "Twelve years of the revolution of the state and law," loc. cit., p. 461.
21. Hazard, "Reforming Soviet Criminal Law," loc. cit., p. 165.
22. *Proekt novogo ugovolnogo kodeksa RSFSR* (Moscow, 1930), p. 33.

23. *Sovetskoe gosudarstvo i revoliutsiia prava*, 1931 no. 4, p.132.
24. N. V. Krylenko, "It is time!", *Revoliutsiia prava*, 1927 no. 4, pp.88-89.
25. See Hazard, *Settling Disputes in Soviet Society*, pp.393-94.
26. N. N. Polianskii, *Ocherk razvitiia sovetskoi nauki ugovnogo protsessu* (Moscow, 1960), p.40.
27. See Hazard, *Settling Disputes in Soviet Society*, pp.434-35.
28. N. V. Krylenko, *Reforma ugovnogo kodeksa* (Moscow, 1929) p.64.
29. See Dobrin, "Soviet Jurisprudence and Socialism," loc.cit., p.419.
30. See A. Ia. Vyshinskii, *Sudostroistvo v SSSR; Sudy obshchestvennoi samodeiatel'nosti* (2d ed., Moscow, 1935), chs. 2-6.
31. See H. Berman and J. Spindler, "Soviet Comrades' Courts," *Washington Law Review* (1963), vol. 38, pp.849-52.
32. Quoted in H. Berman and D. Hunt, "Criminal Law and Psychiatry: The Soviet Solution," *Stanford Law Review* (1950), vol. 2, p.640.
33. *Ibid.*, p.642.
34. *Ibid.*, p.643.
35. Quoted in L. Ia. Gintsburg, *Programma po khoziaistvenno-administrativnomu pravu* (1st ed., Moscow, 1929), p. 5.
36. See S. I. Racych, in *Sovetskoe pravo. Zapiski Instituta Sovetskogo Prava* (1929), vyp. 2, p.171.
37. Iu. Geiman, "Economic law approaching the 12th anniversary of October," *Ezhenedel'nik sovetskoi iustitsii*, 1929 no. 44, pp.1029-30.
38. Quoted in Gintsburg, op.cit., p.3.
39. *Ibid.*, p.5 and Gintsburg, *Programma po khoziaistvenno-administrativnomu pravu* (2d ed., Moscow, 1931), p.7.
40. Gintsburg, op. cit. (2d ed., 1931), p.5.
41. Editorial, "On the legal front," *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 8, pp.3-4. This journal was edited by Pashukanis and staffed by adherents of the commodity exchange school.
42. D. Pritt, "The Russian Legal System," in M. Cole, ed., *Twelve Studies on Soviet Russia* (London, 1933), p.165.
43. Hazard, "Housecleaning in Soviet Law," *American Quarterly on the Soviet Union* (1938) vol. 1, no. 1, p.15.
44. Hazard, "Reforming Soviet Criminal Law," loc.cit., pp.166-67.
45. *Sbornik postanovlenii plenuma Verkhovnogo Suda RSFSR* (Moscow, 1932), p.31.
46. Hazard, "Reforming Soviet Criminal Law," loc.cit., p.166.
47. Hazard, *Settling Disputes in Soviet Society*, pp.393-94. The new Uzbek and Turkmen Codes of Criminal Procedure also contained very few articles—175 and 180 respectively. In contrast, the extant RSFSR Code had 465 articles.
48. *Za sotsialisticheskuiu zakonnost'*, 1934 no. 5, p.16.
49. Pashukanis, "On the law department of the Institute of Red Professors," *Revoliutsiia prava*, 1927 no. 3, pp.160-61.
50. Pashukanis, "On the theoretical training of workers of Justice," *Revoliutsiia prava*, 1928 no. 4, p.92.
51. V. Iezuitov and M. D. Rezunov, *Uchenie o sovetskom gosudarstve* (Moscow, 1931), vyp. 2, pp.2-3.

52. See V. Gsovski, "The Soviet Concept of Law," *Fordham Law Review* (1938) vol. 7, p.28, note 104, for the names of twenty-seven legal scholars who were affected.
53. M. Dotsenko, "Training of scientific cadres in socialist construction," *Biulletin' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 8, p.36.
54. Pashukanis, "On the law department of the Institute of Red Professors," loc.cit., p.161.
55. These course programs or syllabi were prepared by members of the Section for the Preparation of Cadres of the Institute of State, Law and Soviet Construction of the Communist Academy. Overarching all these syllabi was A. K. Stal'geovich's *Programma po obshchei teorii prava* (Moscow, 1929), which embodied Pashukanis' general theory of law.
56. Gintsburg, *Programma po khoziaistvenno-administrativnomu pravu* (2d ed., Moscow, 1931), p.9.
57. Iezuitov and Rezunov, *Uchenie o sovetskom gosudarstve*, pp.9-10.
58. The purpose of the law section was the preparation of qualified Marxist researchers in the field of Soviet law and construction for scientific research institutes, Marxist teachers of Soviet law for Party schools and graduate schools, and theoretically equipped Communists for supervisory work in institutions concerned with questions of Soviet law and construction. *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 2, p.64.
59. Editorial "On the question of training Marxist-Leninist scientific cadres," *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 5-6, p. 3.
60. See the syllabus for the freshman seminar on the general theory of law in *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 2, pp.65-69. In general, the seminar themes were similar to the chapter headings of Pashukanis' *Obschchaia teoriia prava i marksizm*, with the exception of the "class" theme, which was not emphasized in the book.
61. *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 2, pp.98-104.
62. Quoted A. Bystrova and L. Gittel', "A short review of the work of the seminar on the general theory of law," *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 1, p.46.
63. *Sovetskoe gosudarstvo*, 1934 no. 2, p.40.
64. A. Ia. Vyshinskii, *K polozheniiu na fronte pravovoi teorii* (Moscow, 1937), p.18.
65. *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 2, pp.98-104.
66. Hazard, "Housecleaning in Soviet Law," loc.cit., p.13. Hazard wrote: "Law concerning the rights of the individuals was relegated to a few hours at the end of the course in economic-administrative law and given apologetically as an unwelcome necessity for a few years due to the fact that capitalist relationships and bourgeois psychology had not yet been wholly eliminated."
67. "The Five-Year Plan and the Soviet state," *Revoliutsiia prava*, 1929 no. 4, p.9.
68. O. Dzenis, "Current problems of the state," *Biulleten' zaochnoi konsul'tatsii Instituta Krasnoi Professury*, 1930 no. 8, p. 6.

69. "The Five-Year Plan and the Soviet state," *Revoliutsiia prava*, 1929 no. 4, p.6.
70. Pashukanis. "Economics and legal regulation," *Revoliutsiia prava*, 1929 no. 5, p.37.
71. See Hazard. "Housecleaning in Soviet Law," loc.cit., p.12.
72. Interview with a Soviet jurist in Moscow, 1964. The respondent specifically referred to the draft criminal and criminal procedural codes inspired by the commodity exchange theory of law as examples of the tendency toward legal nihilism.
73. Berman and Spindler, "Soviet Comrades' Courts," loc.cit., p.852.
74. From a letter of John N. Hazard from Moscow dated 6 September 1937, in D. Barry, W. Butler, and G. Ginsburgs, eds., *Contemporary Soviet Law* (Leyden, 1974), pp. xxv-xxvi.
75. For an analysis of the criticism and revision of Pashukanis' commodity exchange theory of law, and a discussion of the decline of the commodity exchange school, see Sharlet. "Pashukanis and the Commodity Exchange Theory of Law, 1924-1930" (Ph.D. diss., Indiana University, 1968), chs. V-VII.
76. Vyshinskii, gen. ed., *The Law of the Soviet State*, trans. H. Babb, Intro. by J. Hazard (New York, 1948), p. 52. For the impact of Vyshinskii's redefinition, see R. Sharlet, "Stalinism and Soviet Legal Culture," in *Stalinism: Essays in Historical Interpretation*, ed. R. C. Tucker (New York, 1977), pp.155-79.