

---

# Debate STANDING PASHUKANIS ON HIS HEAD

Ronnie Warrington

---

Peter Binns has performed a useful function in drawing Pashukanis's work to the attention of *Capital and Class* readers.[1] Pashukanis is essential reading for those concerned with the nature of legal control in capitalist society, with the problems of moving to socialism, and above all with the potential for a classless society, a non-legal social order. I do not want for a moment to suggest that there is room for only one interpretation of a book as complex and rich as Pashukanis's *The General Theory of Law and Marxism*. However, I do think that Peter Binns has presented at best a one-sided summary of Pashukanis and it might be useful if another view could be outlined.

The most surprising aspect of Peter Binns's paper is not what it says, but what it omits. Pashukanis was concerned above all with demonstrating not the importance of law, but its irrelevance to full communism as sketchily described by Marx in his *Critique of the Gotha Programme*. Binns is concerned to stress Pashukanis's commitment to technical regulation as a replacement for law. This, says Binns, is authoritarian and elitist. It leads to a form of 'imposed socialism' which is clearly a contradiction in terms. But in fact, what concerned Pashukanis most was *planning* as a counterpart to law. The plan as Pashukanis envisaged it had little to do with authoritarian structures. Planning was the necessary opposite of the anarchy of production of the capitalist market. Of itself, the concept of socially-organised attempts to satisfy the requirements of people in society is neither inherently Stalinist nor inherently socialist. But it is clearly something which in post-capitalist society will have to be carried out in the interests of everyone.

There are exceptional problems in Pashukanis's overwhelming, almost tenacious commitment to the withering of law.[2] Above all he failed to come to grips with the serious theoretical problems of the concept of a society not controlled by laws. But there was nothing that was of more concern to him than this concept when he wrote *The General Theory*, when he attempted the genuine defences of it (until about 1930) and possibly even in his later more abject apologies to the Stalinist machine.

Peter Binns's argument is that Pashukanis's work is a reactionary 'pipe dream'; it played into the hands of Stalin.[3] Whilst Pashukanis on a personal level was clearly something of an authoritarian,[4] his theory can be seen as totally opposed to Stalinism. As Binns explains, Stalin had to eliminate Pashukanis. Stalin did this for sound reasons. Pashukanis had constructed a theory which was far removed from Stalin's build-up of an authoritarian state structure. From 1930 onwards Pashukanis re-

canted and dropped parts of his theory wholesale. His final recantations published just before his disappearance are almost unreadable repetitions of Stalinist dogma. Yet Pashukanis was still eliminated because it was impossible for him totally to deny his major premise. *The General Theory* proclaimed loud and clear that there is no such thing as proletarian law and that the law of the Soviet State was simply a form of bourgeois law frozen into immobility. In 1929 Pashukanis wrote: 'The problem of the withering of law is the cornerstone by which we measure the degree of proximity of a jurist to Marxism'.[5] A theoretician with such a commitment could have no place as a leading figure (if not the leading figure) in the jurisprudence of the worst years of Stalinism. Pashukanis was replaced because his opposition to Stalinism was at least as fundamental as any of the theoretical positions taken by the Trotskyists.[6] To claim that the technical aspects of Pashukanis's theory all too plainly, 'cut with the grain of Stalinism . . .' (p. 111) is remarkable.

A closely related problem, something picked up by Pashukanis's critics as early as the 1920s, is that Pashukanis almost totally excluded force from legal relations. By basing his approach on the voluntary uncoerced exchange of equivalents, Pashukanis produced a theory that failed to take account of the coercive nature of any legal system. Pashukanis had over-reacted to previously existing theories of law as merely force, and the critiques of Pashukanis on this point were fairly obvious. But it seems somewhat strange for Binns to suggest that a theory which analyses even bourgeois law in terms of non-coercion could be appropriate for one of the most coercive systems ever known.

As is evident, my reading of Pashukanis is so fundamentally different from that offered by Peter Binns that I could not do justice to either Pashukanis's or Binns's argument in the space of this brief note. However, I could perhaps suggest that in addition to the above the following points made by Binns are at least contentious:

1. Binns says that Pashukanis's concentration on technology (i.e. planning) meant the elimination of discussion; whereas in socialism, according to Binns, (pp. 110-111) there will be more conflict not less. Socialism according to Binns will foster and nurture the articulation of conflicts other than those of class. It ought to be considered whether Binns is here guilty of the same mistake that he levels against Pashukanis in relation to technology, i.e. a sort of trans-historicism. The talk of increased conflict in socialism is, I suggest misleading. Socialism will articulate the potential for *solving problems*. However to equate problems with conflicts is to turn an aspect of capitalism into a feature of socialism. Nor I suggest does Pashukanis's *General Theory* encourage a view that discussions will be closed when socialism (communism) has been achieved.

2. Peter Binns says Pashukanis is not sufficiently concrete and that his theory suffers from being too abstract. All theories of course are abstract. But given that, Pashukanis was totally con-

cerned with 'reality' and 'the concrete'. He kept comparing his work with that of bourgeois and quasi-Marxist theorists, arguing that his theory explained 'reality' whilst theirs did not. Pashukanis was obsessively concerned with the production of a theory that was 'sociological' i.e. that accounted for the actual nature of legal systems. He said the 'ought-is' dominated positivistic tradition of his time was concerned only with tracing one rule from another thus ignoring what he called 'the facts of reality, that is of social life . . .' On the other hand, he thought his own theory dealt with the 'facts', to which he would refer to support his argument.

Pashukanis's failure was that he blissfully assumed that 'reality' or the 'facts' were unproblematic concepts. He made no attempt to question what was meant by reality and therefore failed to analyse the nature of 1917 itself or the post-1917 development properly. But it is almost impossible to argue that the 'reality' of capitalist society 'in general', i.e. a reality similar to that which Marx attempted to analyse, did not concern Pashukanis. Readings of Pashukanis's works other than *The General Theory* amply support this view. What has to be asked of course is whether Pashukanis did succeed in his object, i.e. the explanation of the failures of bourgeois theories of law to explain 'reality', and whether his own attempts were any more successful.

3. It is in medieval society according to Binns, 'that his theory is most illuminating' (p. 103). Likewise, Binns claims that Pashukanis correctly argued from his theory as to categorisations of pre-capitalist theories of punishment. I would suggest that Pashukanis's theory is totally unhistorical and that his categorisation of feudal law (and of the equivalence theory of punishment) is one of the most striking failures of his thesis. Whilst one has to be very careful with Pashukanis's recantations,[7] there is to my mind little doubt that Pashukanis genuinely realised that the categorisations of pre-capitalist law to which his commodity theory led were hopelessly inaccurate. What Pashukanis actually declares in *The General Theory* is that pre-capitalist law was not law at all. This gives his theory a spurious rigour, but is of course historically and theoretically untenable.

4. Peter Binns argues that Pashukanis makes law part of the 'base' of society, and not part of the superstructure where it is traditionally placed by Marxist theories. Without discussing the failures of Marx's base/superstructure metaphor,[8] I suggest that this is also a misleading interpretation of Pashukanis. One of the fundamental defects in Pashukanis's theory is his failure to deal with the 'base'. Pashukanis concerned himself with the circulation of commodities only, and, as an 'orthodox' Marxist who took a somewhat simplistic view of Marx's inadequate base/superstructure metaphor, he did not consider that commodities had anything to do with the base. The thrust of Pashukanis's work, it has been generally agreed, was the close relation or homology[9] between the commodity form and the legal form.

But Pashukanis approached commodities without asking how commodities were produced. Indeed Binns points out that Pashukanis does not draw the distinction between simple pre-capitalist commodity production and complex commodity production. This results in a total misreading by Pashukanis of the laws of commodity production as applied to capitalism (i.e. it is unhistoric) But one of the chief failures is the elimination of the production process from his theoretical system altogether. Pashukanis's failure to consider problems of production in relation to legal theory was one of his theory's major defects.[10] The law for Pashukanis is merely a *product* of the base, which is not to say, as Peter Binns does, that it 'is part of the base of society' (p. 104).

5. Most bourgeois jurists divide law into 'public' and 'private'. 'Pashukanis accepts this division' (p. 101) says Binns; again a most arguable suggestion. What Pashukanis actually says is that the bourgeois distinction is unhistorical. The concept of public law for Pashukanis has to be developed through 'its workings' (back to 'reality' again, I am afraid). In doing so, says Pashukanis, it returns to private law. Pashukanis actually collapses the distinction public/private, since he says all laws are the product of commodity exchange, and that so-called public law is merely a branch of private law. Public law, 'attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity'.[11]

Pashukanis's work is of great interest and I am far from saying that Peter Binns's review is without merit.[12] In particular Binns raises the important question of Pashukanis's utter misreading of *Capital* and the consequent misuse by Pashukanis of Marx's notion of fetishism. However, the real worth of Pashukanis, i.e. his fanatical commitment to working towards a non-legal social order, has been lost completely in Binns's review, and the very strong criticisms that need to be made against Pashukanis are not properly raised.

## FOOTNOTES

- 1 See *Capital and Class* 10 (Spring 1980, p. 100. All page references are to this article unless otherwise stated.
- 2 His attempt was so strong he even slipped his thesis of withering away into some of his infamous recantations, on which see below.
- 3 Pashukanis's work did to an extent do so, but not for the reasons suggested by Binns. See Beirne and Sharlet's introduction to *Pashukanis: Selected Writings on Marxism and Law*, New York: Academic Press (1980), and Sharlet, 'Stalinism and Soviet Legal Culture', in R. Tucker (ed.), *Stalinism: Essays in Historical Interpretation*, New York: W. W. Norton & Co. (1977). These papers give a more considered approach to the problems of the result of Pashukanis's theory and his liquidation.
- 4 See Hazard, in Beirne and Sharlet, *op. cit.* In a brief discussion I had with Professor Hazard after a paper he gave in London (Summer at 1979), Hazard was most concerned to

- stress that on a personal level Pashukanis was a petty tyrant!
- 5 See Beirne and Sharlet, *op. cit.*, p. 268, and also Dobrin, 'Soviet Jurisprudence and Socialism', *Law Quarterly Review*, Vol. 52 (1936), p. 402.
  - 6 Incidentally, it would be a mistake to link Pashukanis with Trotsky inspired opposition. The evidence as to Pashukanis's position is at the best equivocal.
  - 7 See Beirne and Sharlet, *op. cit.*
  - 8 For an introductory discussion of the metaphor in relation to modern Marxist theories of law, see D. Sugarman, 'Theory and Practice in Law and History: a prologue to the study of the relationship between law and economy from a socio-historical perspective' in A. Hunt (ed.), *Law, State and Society*, London: Croom Helm (1980).
  - 9 See I. Balbus, 'Commodity Form and Legal Form: an Essay on the Relative Autonomy of the Law', *Law and Society Review*, Vol. 2 (1977), p. 571.
  - 10 See B. Fine, 'Law and Class', and S. Picciotto, 'The Theory of the State Class Struggle and the Rule of Law', in B. Fine et al. (eds.), *Capitalism and the Rule of Law*, London: Hutchinson (1979).
  - 11 See Pashukanis: *General Theory of Law and Marxism*, London: Ink Links (1978), p. 106.
  - 12 I should stress though that I have by no means exhausted the contentious points in this brief response.