

CRIME AND LAW AFTER SOVIET REVOLUTION. THE CASE OF PASHUKANIS

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ABSTRACT *Evgeny Pashukanis was an imaginative Marxist, the most imaginative to appear among Soviet scientists of law immediately after the October Revolution. For Westerners Pashukanis works have a fascination, because they trace the evolution of his thought as he tried to bring to bear his sense of what was needed programmatically upon the doctrines as he understood them. In the present we outline the importance of a question confronted but unanswered in Pashukanis' project (and unaddressed, in our time). How, precisely, are we to understand the historical configuration of state and law in social formations where capitalist property has been abolished but where communism has by no means yet been achieved? How are we to resolve the apparent paradox that the legal practices of most, if not all, social formations dominated by the political rule of the proletariat have included the form, and very often the content, of the legal rules typically associated with capitalist models of production?*

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1. INTRODUCTION

Evgeny Bronislavovich Pashukanis (1891-1937) has been the only Soviet Marxist legal philosopher to have achieved significant scholarly recognition outside of the USSR, served as a local and circuit judge in the Moscow region, and then for several years into the early 1920s worked as a legal adviser in the People's Commissariat of Foreign affairs.

In 1924 Pashukanis emerged from relative obscurity with the publication of his major theoretical work **The General Theory of Law and Marxism**, which quickly placed him in the front ranks of the field of aspiring Soviet Marxist philosophers of law.

Pashukanis saw that it was not accidental that Marx had begun his analysis of the inner dialectic of the capital-labour relationship (the production of surplus value) with a critique of the categories of bourgeois political economy. It was not simply that the categories of rent, interest, industrial profit etc. mystified the essential qualities of this relationship. Pashukanis consistently argues that there is a homology between the logic of the commodity form and the logic of the legal form.

The central forms and categories of bourgeois law are direct corollaries of forms which are embodied in capitalist commodity exchange. Law thus gives legal expression to a specific form of economic relations in a way which both legitimizes and facilitates the latter. Legal categories of the person define individuals as isolated egoistic subjects, the bearers of autonomous private interests and ideal property owners, who relate to one other through the forms of contract, ownership and exchange. In taking this form, the law reproduces conceptions of the person and of social relations which are specifically capitalist, though it

does so in a way which implicitly denies any such partiality. In effect, the law materializes and universalizes categories which are specific to a particular class-based mode of production.

All the above analysis can be extended to cover the sphere of criminal law, crime and punishment as well, since the commodity form predominates there as elsewhere. Criminal law is a form of equivalence between egoistic and isolated subjects. Indeed, criminal law is the sphere where juridical intercourse attains its maximum intensity.

But he says earlier, agreeing with Bentham that law creates justice, thus generating crime. The legal relationship has historically acquired its peculiar character, above all in connection with the infringement of law.

He states that within the strange world of court-room, individuals come to be seen as legal subjects, bearing all the attributes of free-will and responsibility which the standard bourgeois individual is deemed to possess. In the same way the practice of sentencing, punishment should be an 'equivalent' of the offence, so that justice consists in a kind of equity or fair trading which exchanges one harmful action for another that equals it. This idea of an equivalent, which Pashukanis traces back to the commodity form, makes punishment itself into an exchange transaction in which the offender 'pays his debt' and where in crime becomes 'an involuntarily concluded contract'. Moreover imprisonment must also be seen as a specifically bourgeois invention, utilizing conceptions of the person and of value which reproduce bourgeois mentality in the process of punishing. Capitalist economic relations gave rise to the idea of man as a possessor of labor power and of liberty, both of which could be calibrated and measured in terms of time, and it was thus capitalism gave rise to modern imprisonment, which is premised upon precisely this mentality. Thus, Pashukanis uncovers a layer of significance which was submerged beneath its very 'naturalness'.

In this chapter, Pashukanis asks clearly. Only when classes are fully secured, then a criminal system will be created from which any competitive element will be excluded. But in such a case, will any criminal system still be necessary? To give a very clear answer, he explains it as follows:

The theoretical critiques of progressive criminologists are so often limited in their practical effects since the irrational commitments of the penal system are over-determined symptoms which have a reason for their existence and will not be removed by gentle criticism: in reality this absurd equivalent form results, not from the aberrations of individual criminologist, but from the material relations of the society based on commodity-production which nourish it. The only way to dissipate these appearances which have become a reality is by overcoming the corresponding relations in practice that is by realizing socialism.

Pashukanis concludes his argument in **The General Theory of Law and Marxism** by opposing those who would wish to construct a *proletarian* system of law after the 1917 revolution. Marx himself, especially in **The Critique of the Gotha Programme**, had grasped the profound inner connection between the commodity form and the legal form, and had conceived of the transition to the higher level of communism not as a transition to new legal forms, but as the dying out of the legal form in general. If law has its real origin in commodity exchange, and if socialism is seen as the abolition of commodity exchange and the construction of production for use, then proletarian or socialist law was a conceptual, and therefore a practical, absurdity.

The purportedly proletarian system of law operative under NEP was, Pashukanis asserts, mere bourgeois law. Even the new system of criminal administration contained in the RSFSR Criminal Code (1922) was bourgeois law. Pashukanis notes that although the **Basic Principles of Criminal Legislation of the Soviet Union and Union Republics** had substituted the

concept of “measures of social defence” for the concept of guilt, crime and punishment, this was nevertheless a terminological change and not the abolition of the legal form. Law cannot assume the form of commodity exchange and be proletarian or “socialist” in content.

2. MATERIALS

The leitmotif of early Soviet Marxist thought on law at the time of the October Revolution and immediately thereafter, was the imperative of implementing the Marxist concept of the withering away of law.

The first Soviet attempt to implement the process of the withering away of law began less than a month after the October Revolution. The Bolsheviks’ 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. This initiated a process of simplification and popularization that in the immediate post-revolutionary days and months swept away most of the inherited tsarist legal system, including the procuracy, the bar, and all but those laws vital to the transitional period between capitalism and communism (e.g. **Decree Abolishing Classes and Civil Ranks**, Nov. 1917). Even the remaining legal minimum was subject to interpretation by a new type of judge, usually untrained in law. These new judges were encouraged to guide themselves by their “revolutionary consciousness” in applying the law. The Bolsheviks’ objective was that even these remnants would ultimately become superfluous and wither away or disappear. Their vision was of a new social formation 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”. However, harsh reality quickly impinged upon this vision as civil war engulfed the country. Confronted with the exigencies of governance under the most difficult conditions, the Bolsheviks deferred this transformative process and, as early as 1918, as John Hazard (1979) has conclusively demonstrated, began the process of re-legalization, which culminated in a fully articulated legal system based largely on foreign bourgeois models and perfected in the first federal constitution (1924) during the early years of the New Economic Policy.

The General Theory of Law and Marxism was written during NEP at a critical juncture in Soviet development. The general feeling among the Bolsheviks, then, was that NEP was a temporary, necessary and regulated retreat: one step backward, and two steps forward.

According to Pashukanis (1927) “when we were confronted with the necessity of smashing the old judicial machine immediately after the October Revolution, this basically practical matter necessitated an immediate solution... For it was obvious that the revolution could neither leave the mass of old tsarist laws and the laws of the Provisional Government intact, nor immediately replace all the rules superseded and destroyed by the revolution with new rules. Consequently, the question arose as to how these courts would exercise justice and upon what this justice would be based. In order to extricate ourselves from this dilemma and solve the problem posed above, some type of general conception of law was needed and one was proposed; unfortunately, it was the psychological theory of intuitive law borrowed from Petrazhitzky rather than Marxist conception of law.

Moreover, soviet legislators and jurists were not creating a proletarian or socialist system of law, but were merely putting to their own use the bourgeois law that they had inherited. Thus, there was no new legal form in process of creation, but only a transformation by degrees of content to meet the needs of those engaged in creating Soviet public order during

the limited period required for the state and its handmaiden, the law, to wither away with the achievement of a classless society.

Stalin, as General Secretary, in his address before the Central Committee Plenum of April 1929, warned against promoting hostile and antagonistic attitudes towards law and state among the masses. He argued instead that the intensification of the class struggle by the kulaks required the strengthening, rather than the weakening, of the dictatorship of the proletariat.

The Communist Party's rejection of the gradualist notion of withering away made it necessary, therefore, to redefine the transitional role of law and state and seriously undermined the theoretical foundations of the commodity exchange school of law.

In 1929, it was the year of the great turning point, as Stalin himself defined it in *Pravda* in November of that year. The political end of the two largest opposition representatives and theorists against Stalin (Bukharin-Trotsky) had already been launched. The Party had set its uneasy course for industrialization and collectivization, the first Five Year Plan had been launched in pursuit of this goal, and Stalin had consolidated the supremacy of his own political line at the expense of other possibilities available with the demise of the NEP. Stalin demanded the intensification of the class struggle and the consolidation of the dictatorship of the proletariat. In effect, both demands seemed to require the increased use of state and administrative agencies. Pashukanis adapted his thought to the new Party conception of Soviet State and Law by a lengthy essay the same year (1929) "Economics and legal Regulation", on the necessary role of the state in times of economic and political crises.

By 1936, the Soviet State had accomplished most of its economic and political tasks and its incipient proclivities for greater legal formality and stability were now becoming increasingly apparent. The trend towards greater legal stabilization and towards a greater reliance on law as an instrument of regulation and control was readily evident. Pashukanis was a symbol of the earlier legal policy, had originally characterized all law as bourgeois, and popularized this view. Sensing that he was officially and publicly out of step with the Party's changing policies on state and law, Pashukanis rushed into print with his final self-criticism. In his essay "State and Law under Socialism (1936), stated that socialism demands the highest concentration of state power. He admits that his General Theory had been seriously deficient in that socialism in practice consisted not in the imminent withering away of the legal form, but in the preparation for the conditions of this process. Under socialism the legal form disappears only with respect to the ownership of the means of production, but it necessarily remains in operation in the sphere of distribution. Only a Soviet socialist system of law can create the conditions for the transformation to the higher phase of communism.

This recantation was, however, insufficient to save Pashukanis from the purges. A month later, in January 1937, Pashukanis was denounced in *Pravda* as an "enemy of the people".

In the process of destalinization after Stalin's death in 1953, Pashukanis' name was cleared. Today Pashukanis is posthumously honoured as one of the founders of the jurisprudence of Soviet socialist state and law, a formulation the full implications of which he had resisted almost to the eve of his arrest.

3. DISCUSSION

What are the lessons that this story can teach us? How can they be understood and employed today?

The revolutionary Soviet scientists of crime and law had to face real problems and offer real solutions. Not only the example of the development of Pashukanis' theories in relation to concepts such as law, justice, crime, their understanding and implementation, but also the important question this thinker asked whether law and criminal system are necessary in a revolutionary government are indicative. The specific theory could not have guided political developments; it would have been the other way around.

Were there any inherent weaknesses in the theory behind this? Yes, as there were pioneering perspectives that left their mark on our science. Let's look at a few ones: for a Marxist analysis it is not enough to make a generic reference to issues such as: base – superstructure, state coercion or the class character of law. There is a need for a more in-depth study on the elements of an embedded legitimation process caused by understanding and participation in any way in criminal justice system, and not just justice. On the other hand, and while you are fighting against the bourgeois vision that law is autonomous, you should not give it the characteristics that make it seem transcendental by itself, non-flexible. While Pashukanis sees the non-autonomous and the historical link between the legal form and the commercial economic relationship, he does not understand that this link is also established with the political or state relationship. Perhaps having been dazzled by anti-fascist warfare, he puts aside the political phenomenon, does not deepen its link with the commodity-capitalist mode of production and ends up viewing the legal phenomenon as economic. Yes, the belief in justice in the civil regime conceals a corresponding belief in the established production relations. But you ought to wonder. Is there only one justice or does it take a special form, depending on the form of the bourgeois regime in which it takes place? Concepts such as: justice, law, crime cannot be empty of content. So cannot the values that protect and hide interests and corresponding class and other social conflicts which, depending on their outcome, render different meaning. Crime against property may take the form of civil property, but it can take another form if there were labour property in a proletarian state. Is justice in a transitional programme of socialist revolution the same as in an urban or feudal regime? And finally, is there a need for a justice programme (and a state system) that expresses the interests of specific social groups lost in the social conflict so far and will criminalize the social harm suffered by capitalist sovereignty as a political revolutionary programme in the transition period?

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