

A Marxist perspective on jurisprudence

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Evgeny Pashukanis, *A Critical Reappraisal*, Michael Head, Routledge-Cavendish, 2008, 271 pp., \$55.95.

Bourgeois jurisprudence's state of decay, manifesting itself most sharply in the perversion of constitutional law and the systematic destruction of democratic rights, can be understood only through an analysis of law in its historical development on an ever-shifting socio-economic foundation.

Such an approach is almost non-existent in legal academia. Instead, academia is dominated by a militantly empirical, practice-based orientation characterized by the meticulous study of individual cases, largely disconnected from history, politics, current social reality and even international law treating the same topics. In most university law libraries today one would be hard pressed to find any serious consideration of the origins and development of what has been virtually deified as the "rule of law."

In this cloistered atmosphere, Michael Head's book, *Evgeny Pashukanis, A Critical Reappraisal*, shines the light of day on one of the most important legal theories to come out of "the boldest and most sweeping experiment of the 20th century"—the October 1917 Russian Revolution. Head is a law professor at the University of Western Sydney in Australia and a regular contributor to the *World Socialist Web Site*.

Prior to the revolution, as now, the "rule of law" routinely put its seal of approval on economic exploitation, political repression and state murder. Upon seizing power, the Soviet government disposed of the previous courts, legal system and legal profession in its effort to radically refashion society and facilitate the ultimate "withering away" of the state.

Head notes, at the outset, that the Soviet legal experiment spearheaded a great expansion of basic rights worldwide, particularly in the areas of labor protection, social welfare, domestic relations and gender equality. This period in Soviet law is characterized by groundbreaking achievements such as the eight-hour work day, the establishment of social insurance, rent control and rent-free public housing. Moreover, Soviet women were the first in the world to enjoy full voting rights and—at a time when Great Britain allowed divorce only for women where adultery was proven—the Soviet legal system afforded divorce on demand to all.

In the same vein, the first Soviet criminal code replaced the archaic notions of crime and punishment with the concepts of "social danger" and measures of "social defense," because the former concepts, rooted in religious concepts of evil and individual guilt, served only to obscure the social roots of crime, thereby forestalling any real solutions to anti-social behavior.

Head aptly summarizes the Soviet legal project: "Overall, the Soviet government sought to make a fundamental shift from private property and individual rights to social ownership and collective rights and responsibilities... accompanied by far-reaching efforts to develop more humane and civilized approaches to social problems."

Revolutionary legal debates

Although the goals of the revolution were clearly defined, the tactics for realizing these goals—given the material limitations of the unfolding Russian revolution—could not be rigidly predetermined.

Following the seizure of power in 1917 by the soviets, or workers' councils, the Bolsheviks inherited a society burdened by backward feudal relations, exhausted by years of imperialist war, increasingly isolated from the developed capitalist economies of Western Europe and surrounded on all sides by imperialist predators. A period of civil war ensued in which the displaced Russian ruling elite, backed by imperialist powers, sought to retake the country by force.

From mid-1918 until 1921, the survival of the revolution was the most pressing issue, consuming nearly all the time, energy and, ultimately, the lives of masses of people. This was a harsh period, and, as Head points out, "hardly conducive to theoretical contemplation." Nonetheless, many of the legal concepts and conflicts that would emerge in a more developed form in the following period made their first appearance in the brief window of time preceding the civil war.

The post-civil war period from 1921 to 1924 saw the flowering of legal debates involving a host of soviet jurists and a variety of schools—including what have been described as the sociological, psychological, social function and normative schools. Head cites one scholar's description of the legal discourse in the 1920s as "a dynamic and prolific period in the history of soviet legal thought ... characterized by intellectual ferment, optimism and impatience."

All those involved in the debates were ostensibly seeking the transitional form of law best suited to carry out the revolutionary social transformation, while ensuring sufficient stability for the revolution's day-to-day survival. At the same time, the participants attempted to elaborate a comprehensive Marxist theory of law. Head manages to parse these debates into three core questions: "1) What was the class character and function of the Soviet state and Soviet laws? 2) Whether and how quickly the state would wither away into communism? and 3) What is the underlying role of law in socialist and communist society?"

Within this milieu, the work of Evgeny Pashukanis has evoked more interest than that of any other figure. As Head points out, this is in large part due to an enduring and growing interest in Marxism, the Russian Revolution and the contemporary relevance of Pashukanis's analysis of the law.

In 1924, Pashukanis published his most important work, *The General Theory of Marxism and the Law*. With this, he sought to probe deeper than other Soviet jurists of the period into the very essence of law itself.

Pashukanis's argument in a nutshell was that law is a historically limited form of regulation peculiar to class societies, peaking under capitalism and destined to fade away with the

elimination of socio-economic classes and class conflict—in other words, in a truly socialist society. The most important implication of the theory was that the use of the traditional legal form in post-revolutionary Russia was a continuation of bourgeois law, although in the hands of the proletariat.

The *General Theory* is best known for its elaboration of the "commodity exchange theory of law," which traced the modern legal form not directly to class interests, but rather to the elemental logic operative in capitalism itself—a process occurring "behind the backs" of both the ruling class and the working masses. Head describes the theory as "the kernel of an historical materialist approach to the rise and evolution of the legal form."

The commodity exchange theory emerged from Pashukanis' debates with the then-dominant legal "instrumentalists"—represented by Piotr Stuchka—who viewed the law as nothing more than a "blunt instrument" of class domination, whose social function was considered as either purely ideological or, at most, just another form of coercion in the arsenal of the ruling elite.

Although Pashukanis did not deny the class instrumentalism and coercive functions of the law, he viewed them as secondary to the nature of the legal form itself. He wrote: "Having established the ideological nature of particular concepts in no way exempts us from the obligation of seeking their objective reality... external and not merely subjective reality." His analysis was unique, in that it was not limited to the role of law under capitalism, but extended to the very concept of law itself as an intrinsic and longstanding instrument of social regulation.

The commodity exchange theory of law

In order to present the basics of Pashukanis' commodity exchange theory, it is necessary to briefly review some points from the first chapter of Marx's *Capital*.

Capital identifies a duality—an immanent contradiction—within the commodity, as an immediate unity of both a use value and an exchange value. The former embodies what is particular to the commodity, its unique utility and the unique type of labor required for its production. If a useful object, for example a broom, were produced by an individual for his own use, it would be merely a product and not a commodity. However, when such a product is produced for the purpose of exchange on the market and is actually exchanged for another commodity, its value, its social nature, is revealed.

Exchange value is a quantitative ratio of exchange between commodities rooted in the amount of socially necessary labor time that went into the production of the commodities. Although initially this abstract labor time is reflected in a ratio of exchange between two given commodities—i.e., two gallons of milk for one broom—it is eventually represented by a third commodity—the universal equivalent of money.

In this process, the inherent differences between the commodities—the different types of labor required to produce them and their distinct uses—are masked. Quality is transformed into quantity and substance into form, and money is worshiped as the universal equivalent.

Pashukanis argues that this same process—the exchange of commodities in the market place—produces not only the value form, but also the legal form. In the legal form, individual human beings are abstracted into a juridical subject or something akin to the "reasonable man

in law," and—ignoring the inherent class differences between these individuals—they are all considered formally equal before the law as juridical subjects.

He finds the origin of this development in the necessities of efficient commodity exchange in the market place. All enter the market place as inherently different from each other, akin to use values. However, all must enter into a definite relationship for purposes of exchange.

At the moment of exchange, Pashukanis identifies three forms which appear in the process: 1) Each merchant must recognize the other as an equal for purposes of the exchange, despite any inherent differences; 2) Each merchant must recognize the free will of the other to exchange the commodity; and 3) Each merchant recognizes the other as the rightful owner of the commodity.

Therefore, the constant exchange of commodities on the market gives rise to three phenomenal forms: equality, free will and a private ownership interest, which find ideal legal expression in the notion of the juridical subject as an abstract bearer of these rights before the law. The individual has thus been transformed into a juridical subject.

Pashukanis argues that this is the essence of the legal form which came into being wherever there was commodity exchange—initially on the periphery of ancient and feudal societies and finally predominating in capitalist society.

Although the legal form finds its fullest expression in contract law, as it is rooted in the concrete requirements of commodity exchange, the victorious bourgeois revolutionaries of Western Europe managed to raise this legal form "to the heavens," enshrining it as a set of "god-given" constitutional principles: liberty, property and equality before the law, as distinguished from the enforced inequality of the outgoing feudal regime, which divided individuals into separate castes from birth, each with distinct rights and responsibilities.

Pashukanis argues that, in its application to the spheres of constitutional law and criminal law, the legal form is effectively disembodied and devoid of any concrete content. Therefore, he asserts, "Outside Contract... the very concepts of subject and will exist only as lifeless abstractions in the legal sense."

The commodity exchange theory, by extension, impacts the concepts of morality and of crime and punishment under capitalism. Ideas of morality, Pashukanis argues, were based on the abstract notions of the rational individual and abstract equality before the law. He asserts that "if moral personality is nothing other than the subject of commodity production, then moral law must reveal itself as the rule of exchange between commodity owners."

By this token, he argues that the capitalist idea of "justice" is also derived from the process of commodity exchange, referring to the concepts of crime, punishment and guilt as examples of the "radical individualism of the bourgeois." As opposed to the concept of collective responsibility which dominated the ancient world, Pashukanis demonstrates that the requirements of equivalent exchange manifest themselves in the notion of equivalent punishment and finally become dominant under capitalism.

On this basis, bourgeois law injects an extreme notion of individual responsibility into criminal law. This is most easily recognized in the notion of "pay-back," or the idea that the legal subject must lose a certain amount of personal freedom as payment for a crime, without

regard to the social causes of the anti-social behavior or to any real solution to such recurring, systemic social problems.

As opposed to a system of retribution, Pashukanis advanced the idea of social defense as a response to crime. This approach would abandon the market-based abstract equivalence principle, focusing not on the proportionality of the punishment to the crime, but rather on the correspondence between the measures taken and the ultimate goal of social defense.

With such a non-judicial approach, attention would shift from proving individual guilt to a more all-encompassing focus on the social and psychological symptoms. Examination of the social, cultural and economic environment associated with anti-social forms of behavior would replace the isolated focus on "the facts" of a single incident as the decisive factor in the process.

The commodity exchange theory is firmly rooted in the proposition that the legal superstructure grows necessarily out of the individualization and opposition of interests inherent in the capitalist mode of production. In this socio-economic context, the law suit (or controversy) is the basic mode of resolution of legal matters, whereas a social unity of purpose is the premise for a purely technical regulation—for example, the administration of a system of mass transit or standardized medical procedures. In this manner, Pashukanis draws a fundamental distinction between bourgeois law and what would emerge as socialist regulation.

The theory holds that the legal form would wither away as commodity exchange and market relations gave way to social production and distribution. Pashukanis put it best, saying, "Only when the individualistic economic system has been superseded by planned social production and distribution will this unproductive expenditure of man's intellectual energies (the law and law suits) cease."

In other words, as private interests are replaced by collective interests, society's governance will no longer require the compulsion of formal legal instruments to manage myriad individual disputes, and social regulation will increasingly take the form of simple technical coordination and management.

Although Head notes that this conclusion has been routinely assailed by bourgeois academics as utopian, he points out that "if masses of people actually controlled their own lives as well as the economic, political, social and cultural direction of society" the "unity of purpose"—made possible by socialist revolution—could be a reality.

The demise of Pashukanis and his enduring relevance

Like the revolution itself, the Soviet legal experiment which produced Pashukanis was cut short by the consolidation of the Stalinist bureaucracy and its attack on Marxism in the form of the nationalist theory of "socialism in one country." The legal complement to "socialism in one country" was the concept of "socialist legality"—a complete abandonment of the classical Marxist perspective of the "withering away" of the state and law. Ultimately, the bureaucratic caste isolated itself from and dominated the masses, necessitating not only the permanency of the state and "the rule of law," but an unprecedented strengthening of their invasive and repressive powers.

With the publication of his *General Theory*—the same year Stalin unveiled his theory of "socialism in one country"—Pashukanis became the preeminent Soviet jurist, and his book was required reading at universities around the country. Within a period of 12 years, however, Pashukanis found himself under increasing pressure to adapt his ideas more openly to the needs of the Stalinist bureaucracy. Pashukanis was eventually labeled a "Trotskyite saboteur" and executed by Stalin in 1937. His writings were subsequently expunged from the universities.

Pashukanis was by no means a recanting anti-Stalinist, nor was he a Trotskyist. Head successfully tackles this myth by clarifying the political record, which demonstrates that Pashukanis lined up against the Left Opposition, which was led by Trotsky, from at least 1925. Moreover, by putting Pashukanis' theoretical work in the correct economic and political context, Head shows how it was used as Marxist window-dressing for the bureaucracy's counter-revolutionary policies.

He highlights the fact that Pashukanis' *General Theory* debuted in 1924, after the institution of the New Economic Policy—enacted in 1921 as a temporary policy necessitated by the defeats of the European revolution and enforced isolation of the backward Soviet economy. The NEP made key concessions to capitalist market relations, thus promoting a return to traditional legal forms to protect private ownership in some of the means of production.

Head notes that although the *General Theory* was shaped by the requirements of the NEP, Pashukanis' theoretical work makes little reference to the NEP. When Pashukanis did refer to the NEP, he merely asserted that it represented an insufficient level of development for the building of socialism. Inherent in this was a bowing to mounting fears that a long period would have to ensue before socialism could be realized in the Soviet Union.

The period of the NEP was laden with political pressures exerted by the growing bureaucratic caste, anxious to consolidate its power on the national arena by abandoning the struggle for international revolution. Head finds the theoretical reflection of these pressures in aspects of the *General Theory* which naturally appealed to the bureaucratic caste—in particular, its assumption that the struggle for revolutionary social change would have to be shelved for an indefinite period and its general lack of emphasis and clarity on the repressive role of law and the state.

Head illustrates the political logic behind these theoretical failures by tracking Pashukanis' growing and ultimately futile capitulation to the Stalinist bureaucracy, to which he had wedded himself—from his denunciation of "Trotskyism" in 1925, his acceptance of "socialist legality" in 1927, to his repeated revisions of Lenin's *State and Revolution* in 1936. In that year, Pashukanis repudiated the theoretical core of the *General Theory* but was nevertheless executed the following year.

Pashukanis made a genuine contribution to understanding the nature of the legal form. But, as Head notes, "by lining up against the Left Opposition, he helped deprive the debates of the analysis and programme that could have combated the political and theoretical degeneration." Ultimately, Pashukanis became a casualty, not because of any principled political stance against the Stalinists, but rather because he still represented a link to the Marxist heritage of the revolution and thus a threat to the bureaucracy.

Head's book also corrects a tendency in other works to isolate the *General Theory* from its foundations in the Russian revolution and decades of Marxist cultural development in 19th century Europe. In particular, Head is careful to attribute the foundational concepts of Pashukanis' theory—the "withering away" of repressive instruments of government, law as an outgrowth of society's economic development, and the materialist analysis of the state and law—to the works of Marx and Engels.

Beyond this, Head traces key elements of Pashukanis' *General Theory*—the distinction between law and regulation, the rejection of law as an eternal form of social regulation, and the dual character of Soviet law—to the earlier works of lesser known, but important, Marxist legal scholars such as Lunacharsky, Reisner, Magerovsky, Podvolotsky, Krylenko and Goikhbarg.

Head ends the book by discussing Pashukanis' contemporary relevance. He examines the current assault on civil liberties as a component part of the "war on terror," the crisis in criminal justice and the prison explosion (citing statistics showing that, as of 2005, one in every 136 Americans was under the control of the penal system), from the standpoint of Pashukanis' theoretical perspective.

In the final chapter, Head demonstrates how the *General Theory* provides a framework for a materialist analysis of the American criminal justice system, which has severed nearly all connection with its stated purpose of protecting society and maintaining the peace, and is rapidly becoming an instrument of intimidation and political repression and a means for systematically stripping away the basic rights of masses of people.

In the context of the "global war on terror," Head's examination is particularly timely. The *General Theory* demonstrates that the traditional forms of bourgeois democracy and constitutional law are increasingly at odds with the class interests and social policies of the bourgeoisie in times of crisis. Thus they are increasingly abandoned, allowing politically-vetted judges an almost unlimited discretion in constitutional interpretation, and ultimately the freedom to abandon age-old democratic norms altogether, or to place a judicial seal of approval on the executive's efforts to do so.

On this topic, he quotes Pashukanis: "For the bourgeois has never, in favour of purity of theory, lost sight of the fact that class society is not only a market where autonomous owners of commodities meet, but it is at the same time the battlefield of a bitter class war, where the machinery of state repression represents a very powerful weapon... The state as a power factor in internal and foreign policy—that is the correction which the bourgeois was forced to make to the theory and practice of its 'constitutional state.' The more the hegemony of the bourgeois was shattered, the more compromising these corrections became, the more quickly the constitutional state was transformed into a disembodied shadow, until finally the extraordinary sharpening of the class struggle forced the bourgeois to discard the mask of the constitutional state altogether, revealing the nature of state power as the organized power of one class over the other."

These words have renewed currency at the close of 2008. The economic crisis of world capitalism and the explosion of imperialist militarism across the globe, politically manifested in the "global war on terror" or the "long war," have led US imperialism and all national ruling elites to lay the legal groundwork for just such an "unmasking." Bourgeois democracy and the "rule of law" are giving way to authoritarian capitalism.

