

THE ROLE OF AND NEED FOR LAW IN POST-CAPITALIST SOCIETY

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INTRODUCTION

This essay will write in favour of the statement upon critically examining Marxist views on the need and purpose of laws. The first half of this essay will outline the arguments for the redundancy of law and indulge in and explore the views of Marxist writer Pashukanis. The essay will then discuss why certain needs and purposes will remain post-revolution and areas where the Marxist perspective unreasonably dismisses classic law in a rush to discredit all associations with capitalism. This essay recognises Marxist critiques on capitalism and the law but also notes the unclear guidance on alternatives to life post-capitalism.

PASHUKANIS AND THE COMMODITY EXCHANGE THEORY

Pashukanis advances a view that the need for laws will wither away following the transition to “communist public self-administration”¹. This theory was based on Marx and Engels’ theory of “historical materialism” whereby institutions of society such as its government, its values and its laws are inspired by, and the outgrowth of, its economic system². The base (economic system) and the superstructure (law and values) both shape and maintain each other. Pashukanis’ theory spends time explaining the capitalist influence embodied in different parts of the law, and so when capitalism (base) ceases to be the society’s economic system, the effect would be to end the need for law (superstructure) as a framework for society³. Pashukanis notes the legal process has three main characteristics. First, it creates and vests entities with arbitrary power. Second, it allows those entities to exercise that power for private enterprise. Third, it creates and enforces order and predictability for private enterprise to take place.

1 Abstraction and agency

The basis of private law is its vesting of humans with rights including the ownership of property. Since commodities cannot take themselves to market, humans are endowed with agency to act for their property⁴. The legal processes transform humans into legal subjects bound by the law’s holdings. But it also entitles them to certain rights such as exclusive control

¹ Rett Ludwikowski, 'Socialist Legal Theory in the Post-Pashukanis Era' (1987) 10(2) *Boston College International & Comparative Law Review* 330, Stephen Powell, *The Legal Nihilism of Pashukanis* (UF Law Scholarship Repository, 1967) 18.

² Karl Marx, *A Contribution to the Critique of Political Economy* (Progress Publishers, 1977) 1.

³ Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 101.

⁴ Karl Marx, *Capital, Volume I* (Regnery Publishing, 1996) ch 2.

of property based on ownership. These rights form the basis that we are “a society of commodity owners” in “extreme individual competition and conflict”⁵.

By assigning ownership to commodities and rights to persons, exchange and enterprise can occur. Pashukanis advances a view which recognises capitalism’s need for rules-based exchange, and the law’s ability to provide it⁶. Private law such as the law of property, is fundamentally an institution of capitalism because it provides for private ownership⁷. Contracts enforce the exchange of commodities and tort protects personal interests⁸. However, because the law is an “application of an equal scale” onto persons of differing abilities, Pashukanis notes that it is inherently unequal in constitution⁹.

2 *Public law*

Pashukanis goes further and draws parallels between the characteristics of private and public law. Where civil society is comprised of human relationships between other humans and property, public law contributes to a political superstructure and state apparatus which provides enforcement and regulation of the natural order¹⁰. Hence, unlike private law which directly facilitates commodity exchange, public law indirectly facilitates capitalism through its maintenance of institutions like governments which enforce private laws.

3 *Law and regulation*

Pashukanis argues that since law is the product and guardian of capitalism, law is not required in a post-capitalist society¹¹. Instead, post-capitalism will lead to the end of opposing interests. With unity of purpose, technical regulation can set the framework of rules to be applied¹². Regulations work on the assumption that all stakeholders are working towards same goal. Developing train timetables, maximising train capacities and maximising health outcomes are examples of technical goals¹³.

⁵ Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 95, Stephen Powell, *The Legal Nihilism of Pashukanis* (UF Law Scholarship Repository, 1967) 20.

⁶ Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 89, Stephen Powell, *The Legal Nihilism of Pashukanis* (UF Law Scholarship Repository, 1967) 26.

⁷ *Ibid* 91.

⁸ *Ibid* 94, Stephen Powell, *The Legal Nihilism of Pashukanis* (UF Law Scholarship Repository, 1967) 20.

⁹ *Ibid* 89.

¹⁰ *Ibid* 91.

¹¹ Rett Ludwikowski, 'Socialist Legal Theory in the Post-Pashukanis Era' (1987) 10(2) *Boston College International & Comparative Law Review* 330.

¹² Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 91.

¹³ *Ibid*.

CONTINUING NEED FOR LAW

1 Criminal law

Pashukanis' all-encompassing legal theory where it attempts to include criminal laws with other types of capitalistic law is weak. He argues that punishment is transactional in nature, where one trades the ability to commit an offence with time in custody¹⁴. A prosecutor argues for a long detention period whereas a defendant would argue for the opposite. The exchange-based nature of procedure in criminal law provides it capitalistic attributes which can be discarded post-capitalism¹⁵. To Pashukanis, moral offending should be dealt with not by lawyers but by experts who aim to achieve a unified goal of ending offences. These experts may be "doctors, teachers or even executioners"¹⁶.

The doing-away with law for its capitalist like operation ignores the essence of criminal law; that it is just as much about dishing out punishment as it is about providing due process and procedure to those who's liberty is at risk. State imposed consequences to actions requires certainty in a person's guilt and this certainty cannot be assured without claims tested and explanations provided. Arbitrary detention without avenues of appeal cannot replace criminal law in any society notwithstanding economic philosophy.

Additional grievances contained in Pashukanis' work include how criminal law appears to be offended more over the violation of established rules rather than the harm to a victim¹⁷. Punishment in his view should lean less on retribution and more on incapacitation, rehabilitation, and reparation¹⁸. This view however is legally agnostic and can be applied within the criminal law via a recalibration of the purposes of punishment. Further, Pashukanis' dismissal of "equivalency" in criminal law fails to recognise its contributions to fairness and deterrence within society¹⁹. In maintaining predetermined standards for punishment, consistency and predictability can be assured to offenders while discouraging would be offenders²⁰. Pashukanis can rightly take issue with these attributes of criminal law, but they do not warrant its redundancy.

¹⁴ Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 104.

¹⁵ Stephen Powell, *The Legal Nihilism of Pashukanis* (UF Law Scholarship Repository, 1967) 21.

¹⁶ *Ibid.*

¹⁷ Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 104.

¹⁸ *Ibid.*

¹⁹ *Ibid.* 105.

²⁰ Jeffery Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* (SUNY Press, 1997) 119, 174.

2 *International Interfaces*

Reflecting on the experiences of the USSR, legal systems or a similar surrogate will be required post revolution to maintain an interface with the rest of the world²¹. Since it would be manifestly unlikely for the entirety of the world to shift simultaneously to post-capitalism, international recognition, respect for sovereignty and collaboration depends on predictable and codified rules for interactions. These rules pertain to treaties for trade, treaties on environmental regulation, criminal collaboration (Interpol), defence coordination, recognition of foreign intellectual property. Hence, even post-revolution, some legal systems along with institutional superstructures must remain to maintain international recognition for national sovereignty.

STRUCTURAL SHORTCOMINGS

Defining the difference between law and technical regulation as regulation of conflict versus regulation of unified interests limits what the latter can do before resorting to law-like means.

1 *Alignment of interests*

The core assumption of Marxism and Pashukanis' commodity exchange theory is that after removing alienating and abstractive systems like capitalism and the law, humans will be free to return to its natural form of species-being²². Without the motivations of capitalism, humans need not act individualistically, selfishly, or exclusively and that an alignment of interests can be reached in all social matters. This theory fails to account for the strength of the human survival instinct and by extension motivators such as greed, pride, and love²³. Capitalism, through competition, has mobilised these instincts to act in alignment with the wider social system²⁴. Law forms the framework of this system, limiting the extremes of these instincts. A communist or Marxist system would almost always limit acting on those human inclinations/motivators. Limiting everyone to collectively determined goals only increases the potential gain to those in non-compliance. If humans inherently possess these individualistic characteristics irrespective of the economic philosophy and a society seeks the alignment of interests, it needs a system of law to compel compliance.

²¹ Stephen Powell, *The Legal Nihilism of Pashukanis* (UF Law Scholarship Repository, 1967) 19.

²² Rett Ludwikowski, 'Socialist Legal Theory in the Post-Pashukanis Era' (1987) 10(2) *Boston College International & Comparative Law Review* 330.

²³ Edi Karni, David Schmeidler, *Self-preservation as a foundation of rational behaviour under risk* (Journal of Economic Behavior & Organisation, 1967) 71-81.

²⁴ Richard Ebeling, *Creativity and Competition are the Heart of Capitalism* (FEE Stories, 2017).

2 *Dissent and non-compliance*

Whereas law regulates conflicting interests, technical regulation assumes and relies on unified interests²⁵. When technical regulation begins to handle opposing interests, then by Pashukanis' definition, it has become law. Dissent and non-compliance in civil society is guaranteed. Within the currently capitalist dominated society, there is a huge range of views from extreme left to extreme right and it can be assumed that post-revolution, differences of interests and beliefs within the population will remain. How will a Marxist society deal with conduct that is capitalist for example? Returning to our earlier discussion on criminal law, if technical regulation of dissent simply assigns specialists to reform behaviour, is that not a punishment too? Regardless of whether technical regulation includes due process and defence rights for the accused or not, is this not within the realm of law? Because dissent is inevitable and because law deals with conflicting interests, any response to dissent will be of form and substance like law.

A PRAGMATIC CONCLUSION

Having examined the details and issues surrounding Pashukanis' theory of law, the pragmatic conclusion would be that yes, Marxism is not particularly good at teaching us how to live post-legally and thus yes, we do need some surrogate for law. These conclusions can coexist with many Marxist critiques of capitalism and the law. But the redundancy of all laws has not been comprehensively proved and enduring needs for law remain, even in a post-capitalist system.

²⁵ Evgeny Pashukanis, *Selected Writings on Marxism and Law* (London & New York, 1980) 91.

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