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PASHUKANIS AND VYSHINSKY: A STUDY IN THE
DEVELOPMENT OF MARXIAN LEGAL THEORY

Lon L. Fuller*

Reading Andrei Y. Vyshinsky's *The Law of the Soviet Union*¹ ought to be a stimulating and rewarding experience. It is an exposition of Soviet legal philosophy and of the theory and practice of Soviet public or "state" law. Throughout it purports to compare the premises that underlie Soviet law with those on which "bourgeois" legal systems are based. Vyshinsky, a famous world figure and the present minister for foreign affairs of the U.S.S.R., wrote part of the book and supervised compilation of the remainder. The decision of the American Council of Learned Societies to sponsor a translation of the work attests the Council's conception of its importance to Americans seeking to understand modern Russia. According to the introduction by Professor Hazard, the book presents in authoritative form the doctrine now taught in Soviet law schools. More than that, it exemplifies "Soviet pedagogical methods" generally, and the habits of thought that have become characteristic of Soviet citizens. These methods and habits in turn help to explain, Professor Hazard assures us, "much of the determination of Soviet soldiers in the war just ended." Here, in other words, is what makes the Soviet system tick.

With these auspices and this introduction, the reader approaches the book with high hopes. He expects to gain from it a new understanding of the intellectual and emotional forces operative behind the Iron Curtain. He hopes further that a real saturation in the premises of a legal system radically different from that familiar to him will bring a fresh insight into the meaning of his own system, just as economists who reject Marxism have enriched their understanding of economics by studying Marx.

These hopes are, however, doomed to disappointment. The book dodges every real problem its thesis might seem to suggest and substitutes for reasoned analysis the scurrilous and abusive recriminations for which its author-editor has become famous in international conferences. As for its contents, the book is made up of the most miscellaneous ingredients, compounded in the greatest disorder. About fifty per cent of it is taken up with a tedious and unenlightening exposition of the details of the Soviet political and legal system. Another twenty per cent is devoted to refighting doctrinal battles within the Marxist

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¹ Vyshinsky, general editor. Translated by Hugh Babb. New York: The Macmillan Co. 1948. Pp. xvii, 749. \$15.

ranks and to nailing down more securely the lids on the coffins of the "deviationists," "wreckers" and "Trotskyists" who have been liquidated by the Stalin regime. The remaining thirty per cent is given over to disclosing the frauds of bourgeois political and legal ideologies. In the course of this exposé some remarkable misinformation is conveyed. President Truman, for example, would be surprised to learn that in this country the separation of powers is a fraudulent cover for "the hegemony of the executive power over the legislative," and that the President has the unlimited power to prevent any statute from becoming law.

The book contains no genuine comparison of Russian and bourgeois legal and political institutions. Throughout, the object is to establish the proposition that things which look alike in the capitalist and Russian systems, and that may even bear the same names—law, government, the bicameral system, elections, courts, prosecutors, property, legal rights—are in theory and in fact "radically different." In most cases the difference involved rests more on table-pounding affirmation than on demonstration. The mode in which these questions are treated is well illustrated in the short section on statutory interpretation. Sprinkled among the usual platitudes on this subject, of the type one would encounter in any similar American discussion, we find the assertion that with the Soviet courts statutory interpretation "merely reveals the meaning and content of the statute," while in capitalist countries "the class essence of juridical chicanery" distorts interpretation from its true purpose. They merely draw out of the statute what it means; we put into it our exploitative biases. So it is with every other legal device and institution. On the one side, there is vigor, purity, honesty; on the other, decadence, fraud, cynical exploitation and "putrid vapors." Incredibly enough, this position is maintained even with respect to civil liberties. According to Vyshinsky it is only in Russia that there exists "true" freedom of the press, "true" freedom from illegal searches and seizures, etc., etc.

In studying those parts of the book devoted to quarrels with other Marxists, particularly the first chapter, the reader who attempts any close analysis of the thought will experience a considerable malaise. In this field, it seems, labels are more important than ideas. The book opens by rejecting the opportunistic perversion of Marxism which teaches that the proletariat should "take over" the bourgeois state. On the other hand, Stalin himself has unmasked "Bukharin's anti-Marxist, counterrevolutionary theory of 'blowing up' the state." The true doctrine is that the state must not be "taken over" or "blown up," but instead must be "shattered" and "demolished." This turns out to

mean, about sixty pages later, that the existing bourgeois machine of the state must be "utilized" and, over a period of years, purged of its bourgeois elements.

When one has struggled through demonstrations of this sort, trying vainly to see just what it is that is being rejected and what accepted, one recalls with bewilderment Professor Hazard's introduction, in which it is asserted that the Soviet student "who reasons his way through the ponderous passages of this and similar works" has prepared himself to deal with Western thought. I submit that anyone who seriously attempted "to reason his way" through this first chapter would have prepared himself for nothing so much as a nervous breakdown.

These, then, are the disappointments and frustrations that the book brings for one who attempts to derive something of intellectual substance from its contents. But for all its vacuity, its abusiveness, and its platitudes, the book remains a significant milestone in the development of attitudes toward law and government within the Soviet system. What meaning or lesson can we extract from it? I think the best way to approach this question is to begin by comparing the book with what it superseded. Before the ascendancy of Vyshinsky, the leading jurist of Russia was Eugene Pashukanis, who enjoyed a decade of glory prior to his mysterious disappearance in the early months of 1937.

Pashukanis' principal work is called *General Legal Theory and Marxism*.² In this short book, Pashukanis expounds with clarity and coherence an ingenious development of Marxist theory that has been called the "Commodity Exchange Theory of Law." His work is in the best tradition of Marxism. It is the product of thorough scholarship and wide reading. It reaches conclusions that will seem to most readers perverse and bizarre, yet in the process of reaching these conclusions it brings familiar facts of law and government into an unfamiliar but revealing perspective. It is the kind of book that any open-minded scholar can read with real profit, however little he may be convinced by its main thesis.

Pashukanis' legal theory is founded on two principles well-established in the writings of the Soviet founding fathers: (1) law and the state are a superstructure reflecting the basic economic organization of society, and (2) in the socialist economy of the future, both law and the state will "wither away."

Proceeding from these premises, Pashukanis then expounds his own theory, which is briefly as follows: the basic institution of capital-

² Being unable to read Russian, I am familiar with this book through the German translation of the third Russian edition, which appeared in 1929 under the title ALL-GEMEINE RECHTSLEHRE UND MARXISMUS. An English translation by Professor Babb is now awaiting publication.

ism is *exchange*; all goods (including labor) are viewed as "commodities," that is, as destined for exchange on the market. In keeping with Marxist theory, therefore, we should expect bourgeois law to be permeated with the concept of exchange, and to take its origin in the act of trading or bartering.

This expectation is confirmed by history and sociology. The first appearance of the criminal law in its rudest form is in connection with bartering, that is, in the buying off of the blood feud.³ Throughout history the development of law has gone hand in hand with the development of trade.

Most definitions of law mistakenly try to make it equivalent to an authoritative ordering of social relations, but this does not expose its real essence. The ideal type of an authoritative ordering would be a military company marching in perfect step, ready to follow every command of its captain. Yet such a phenomenon is not only not legal in nature, but actually stands at the opposite pole from law. This is true generally of mere relationships of power. Slavery, for example, requires no legal form. If the relation of master and slave is in any sense legal, it is only because the master can exchange the slave for other goods, or because the law recognizes some semblance of a right in the slave against the master. Law appears as a distinct social phenomenon not when we have one man standing over another, but only when we have men standing toward one another with rights and duties.

The basic concept of law is, then, the legal subject, the possessor of rights and duties. The legal subject is, however, merely the economic trader seen in his juristic aspect. Take from the legal subject the power to settle or compromise his differences with his fellows by a process of barter and he ceases to be a legal subject. Legal rights wholly removed from the area of trade are not legal rights at all. Every legal subject is therefore a potential trader, and his capacity to possess rights and duties and to enter legal relations with others derives from this fact. The economic institution of exchange is accordingly presupposed in the conception of a legal right. The whole legal order, in turn, has its reason for being in the vindication of rights. The modern notion that the individual derives his rights from the law or from the state is the symptom of a decadent capitalism. When capitalism was itself a revolutionary force it was universally thought that law exists to protect rights, that rights precede law.

³ The theory of a great anthropologist concerning the origin of law in primitive society presents a surprising parallel to Pashukanis' conception. Malinowski in effect sees law becoming a distinct social phenomenon when *reciprocity* becomes explicit and formalized: *CRIME AND CUSTOM IN SAVAGE SOCIETY* 58 (1926).

In modern criminal law, a first cousin of economic exchange appears in the notion of retribution. The criminal code is a kind of schedule of compositions, setting the price (in terms of punishment) appropriate for each crime. According to the principle of *nulla poena sine lege* the criminal must be given a chance to know in advance what the price of each kind of misconduct is. Advanced bourgeois criminologists have long condemned these conceptions as irrational. They continue, however, to be entertained by the bulk of society and to be applied by the courts. When the public follows a criminal trial in the newspapers it is not interested in learning whether the criminal can be rehabilitated, or whether he is maladjusted to social life, but whether he actually did what he is accused of doing and whether he is going to get what is coming to him. The attitudes engendered by an economy founded on exchange are too deeply rooted to be destroyed by learned treatises.

Though in bourgeois society, law is an instrument of domination by the ruling classes, it is so only in an indirect sense. To say that law is a means of domination or exploitation fails to reveal its essence. The domination of one class by another can exist without law, where, for example, it is founded on religious superstition or military power. The exploitation of the proletariat by the capitalist takes a special and peculiar form. On its economic side, it is primarily through the market; on the legal side, it is through the notion that the worker sets his legal relations with his employer through contract. It is an exploitation through exchange, and, in keeping with the Marxian theory of the primacy of the economic form, its essential nature is determined by this fact.

This analysis of law is not simply an analysis of bourgeois law, but of law generally. In truth, the only law is bourgeois law. To be sure, legal institutions in embryo can be found in a feudal or slave society, where they are intertwined with religious and military elements. Modern scholars are likely to misinterpret these rudimentary legal elements in pre-capitalistic society as the equivalent of modern law. Actually, these embryonic and undifferentiated legal elements are like the first tentative gropings toward a capitalistic organization that can be detected in even the most primitive societies. The full inner logic of the conception of law can assert itself only under capitalism. The ideal of law is realized at the same time as the ideal of the market; both present man as the trader, as an autonomous agent setting his relations with his fellows.

Not only is law founded on the concept of exchange, but the same thing may be said of morality. Morality has to do with conflicts of interests between individuals who are conceived to have it within their

power to determine what they shall do or not do toward one another. Such individuals are simply economic traders seen in the light of ethics. Moral treatises lay down a kind of minimum standard of conduct designed to maintain the principle of reciprocity. They do not answer such questions as whether a man should volunteer on a suicide mission; acts of heroism or of extraordinary devotion to the group fall outside the competence of ethical philosophy. Kant's conception that every man should be treated as an end in himself, as a *Selbstzweck*, implies a trading economy. Only in such an economy can a man who is conceived to be an end in himself be brought, through self-interest, to serve the ends of others—a result essential if any collective activity is to be achieved.

From these premises it follows that law and morality will disappear when, and only when, the last vestiges of the economic institution of exchange have been rooted out of society. The Soviet system still contains important elements of exchange. These exist not only in the area set aside for private trading, but in the relations of government corporations to one another, and in the payment of workers, who are compensated on the basis of work performed, in violation of the formula of mature communism, "From each according to his capacities, to each according to his needs."

On the other hand, when the notion of economic exchange has been completely eliminated in every form, then—with some allowance for a lag in time—the superstructure of law, the state, and morality will dissolve and disappear. Man will have become a "group-creature," no longer thinking of his own interest as something distinct from that of his fellows. The concept of justice and the notion of demanding measure for measure will have become as inapplicable to this situation as they now are, say, to a mother and child between whom there is a complete identity of interest.

This is, then, in summary, the legal philosophy of Eugene Pashukanis. It is ostensibly because he held this philosophy that Pashukanis was first forced to make an ineffective recantation and was later erased from the Soviet scene, to make way for Andrei Vyshinski, who began publishing the materials of *The Law of the Soviet State* shortly thereafter. "Reasoning their way through" this work, Soviet students now learn that Pashukanis was "a wrecker," "a spy," "a traitor," and the propounder of a "rotten theory."

With all this vituperation one asks naturally, just what is the difference between the theories of the discredited and liquidated Pashukanis and those of the now triumphant Vyshinsky? This question is much harder to answer than might be supposed. Indeed, when one

first puts Vyshinsky's book down, one is apt to believe it cannot be answered. We seem to have before us, not a development from one system of thought to another, but a deterioration of Marxist doctrine that has brought it to such a level of vacuity that comparisons cease to be possible. Yet, on reflection, certain crucial points of distinction do emerge between the two writers. Their principal differences seem to be the following:

First. Both writers in form accept the orthodox communist view that law and the state will ultimately "wither away." Even for Vyshinsky, although the present Soviet order is "perfect and complete socialism," it is a step toward an eventual communism. Judged by the standards of that final goal, present Soviet methods of wage payment are, Vyshinsky concedes, "unjust," since they compensate a man for what he does instead of giving him what he needs. (It may be remarked that even if Vyshinsky did not agree with this conception, it would have been imposed on him, not only by a long tradition of Marxist thought, but by the Stalin Constitution itself, the glories of which his book celebrates.) Though Pashukanis was somewhat vague as to just how near at hand the withering process was, he was fairly clear as to the conditions under which it would occur. In accordance with the Marxian theory of the primacy of economic factors, the withering would occur when, and only when, the element of exchange or reciprocity of performances was rooted out of the Soviet economic system. For Vyshinsky, on the other hand, the disappearance of state and law cannot occur until men have been so trained and conditioned that they will follow, without the need for coercion, the rules necessary to social order. He implies that this transformation of man's nature is a long way off; the withering will be a very slow process. Some uneasiness about the consistency of this view with the inherited doctrine may be betrayed in the emphasis Vyshinsky gives to Stalin's dictum that Russia must embrace "creative Marxism," not "dogmatic Marxism."

Second. Pashukanis was clear and emphatic in asserting that as long as you have exchange you will have law, and as long as you have law it will be bourgeois law. There is no use pretending that socialist law is something of a higher nature, or different from capitalist law; to think otherwise is to engage in self-deception. This is, however, exactly the self-deception which takes up a large part of Vyshinsky's book. The law of the Soviet Union is in every way bigger, better and purer than bourgeois law. Strangely, the effort is repeatedly made to demonstrate that Soviet law is superior *in terms of the premises underlying bourgeois law*; it really does the things bourgeois law pretends

to do. This is a new note, completely out of tune with the implications of Pashukanis' theory.

Third. There is no suggestion in Vyshinsky's book that morality, in the sense of some standard regulating the relation of man to man, will ultimately disappear along with law and the state. On the contrary, only when morality has become so strong that men will obey its rules without constraint can law wither away.

Fourth. Vyshinsky, for all his excoriation of Pashukanis, makes a very careful detour around the central thesis of Pashukanis' book: the relation of law and the economic concept of exchange or reciprocity. In one all-too-obvious case, that is, in the matter of wage payments, he has to concede that the present system has not achieved the ultimate goal of Marxism. He makes little mention, however, of the exchange elements involved in the trading that goes on among government corporations, and lays down no program (as did Pashukanis) for the elimination of this socialistic "market." At one point he even praises "contract discipline" as a needed supplement to central economic planning.

Fifth. The orthodox communist conception regards law as the expression of the will of the ruling class. It was with respect to this conception that Pashukanis was most bold in his deviation from accepted doctrine. He insisted that this view of law was only a kind of truism, which failed to reveal the real essence of legal phenomena, since it was incapable of explaining how something called "law" could reinforce or sanctify the brute fact of domination. The orthodox conception is, at least in form, reinstated in Vyshinsky's book, where the difficulties raised by Pashukanis are simply passed over in silence. Pure, fine and noble as it is, the Soviet law of today is "the totality of the rules of conduct expressing the will of the dominant class" and it is designed to promote those relationships that are "advantageous and agreeable to the dominant class." Yet Vyshinsky does not himself seem very much at ease with this definition, and he makes tentatives in the direction of identifying "the dominant class" with the community as a whole, even though it is admitted that Soviet society has not as yet become classless. At any rate, the extravagant claims he makes for Soviet law really go further than anything Pashukanis wrote toward relegating to the attic of discarded doctrine the notion that law, even in a socialist economy, is simply an instrument of power. If it is this, it is so much in addition according to Vyshinsky's professions that the old conception has really lost its meaning.

The causes that have produced the shifts in doctrine outlined

above are not, I think, obscure. In the process of attempting to operate a great governmental machine, the Soviet leaders have rediscovered some ancient truths. They have learned that the state without justice is impossible, or at least that it is impossible unless people believe that the state is attempting in some degree to render to each his due. They have also seen that some respect must be paid, sooner or later, to the principal of legality; men must know, or think they know, where they stand under the law and before the courts. The despised bourgeois virtues turn out, in the end, not to be mere copybook maxims, but indispensable ways of getting things done, rooted in the very nature of the human animal.

This was a discovery for which the Soviet leaders were poorly prepared by Marxist doctrine. That doctrine gives no explicit guidance in conducting the transition from revolutionary terror to stability and legality, and such implicit guidance as can be deduced from it is fantastically wrong. The molders of the Soviet state found themselves caught with an untenable and unworkable theory. Instead of being able to purge their system gradually of all bourgeois conceptions, they found themselves under a compulsion to employ progressively the same procedures and institutions that had been found essential to social stability in bourgeois society. It was necessary to cover a major intellectual retreat; the time had come when some beclouding of doctrine was necessary as a face-saving operation. This was no assignment for a studious theoretician like Pashukanis. It demanded the thundering obfuscations of an old court-room performer like Vyshinsky.

On this basis we may explain not only the erasure of a whole chapter of Soviet legal philosophy, but also why it was necessary to find a new man to expound the party line in matters jurisprudential. As my colleague Harold Berman has suggested,⁴ we may in the same way also explain some of the most offensive features of Vyshinsky's style. When you are caught in a position where you dare not argue, billingsgate has its uses. In a country ostensibly ruled by a dogma, silence is not only embarrassing; it can be positively dangerous.

On this reading, *The Law of the Soviet State*, which at first visits on its reader only an acute intellectual nausea, turns out to contain an important message of hope. The hard line of Marxism *can* bend before the compulsions of life. If it can bend to the extent of permitting the Soviet system itself to live, it may perhaps bend enough to save humanity from an Armageddon. If the theory that all law is capitalist

⁴ 97 UNIV. PA. L. REV. 593 (1949).

law can find its way to the ash heap, the same thing can happen to the theory of an inevitable conflict between capitalism and communism—no matter how many times this theory may have been affirmed in the writings of the prophets.

I believe that one of the greatest dangers now confronting us is that we will become more Marxist than the Marxists themselves in interpreting the motives and future conduct of Russia. One of the sad necessities imposed by modern government is that many different organizations must be controlled by a single "policy" dictated from above. Our occupying forces and our State Department must act according to some coherent, general plan. Such a plan cannot be changed from day to day if the work of many individuals is to be coordinated and their morale preserved. Yet the formulation of such a plan depends in large measure on a prediction of the future behavior of those with whom we must deal. We have to make this prediction knowing that it really lies beyond our powers. If our best experts are incapable of predicting the actions of our own electorate, it is folly to suppose that we can anticipate the future aims of the Politburo.

The perplexities of this situation are such that the easiest way out is likely to seem the only way out. The temptation is overwhelming to take the clues for our own conduct from the taught doctrine of communism. Our experts in the State Department are commissioned, in effect, to lay a slide-rule on the writings of Marx, Lenin and Stalin, and to come up with the Answer. This is a very hazardous procedure, which, if taken too seriously, can become disastrous.

In our present predicament, we need above all else to keep some sense of contingency, some feeling for the pressures that lie behind the printed page, some awareness of the complexity and the possible internal contradictions in the motives of our potential enemy. We must have the intellectual forbearance to let time and nature work on our side; we must not be like the farmer in the Chinese proverb who pulled his crops out by the roots trying, as he explained, "to help them grow."⁵

Meanwhile, of course, we should keep our powder dry and plentiful, and we should not be distracted from our goal of peace by the abusive epithets of a Vyshinsky, who is, after all, playing a game at home into which we are at best imperfectly initiated.

⁵ The eloquent appeal for this point of view made by the former director of the laboratory that developed the atomic bomb should be required reading for all of our "policy-makers." See Oppenheimer, "The Open Mind," *ATLANTIC* 28 (Feb. 1949). Perhaps two readings of this article ought to be recommended, for its thought is much too profound and subtle to be absorbed in a single reading.