

# Pashukanis on crime and punishment

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## OPSOMMING

### Pashukanis oor Misdaad en Straf

Evgeny Pashukanis is bekend vir die sogenaamde kommoditeits-vorm regsteorie. Die teorie is gebaseer rondom die verhouding tussen die regsvorm en die kommoditeitsvorm, wat wentel om die beginsel van ekwivalensie. Pashukanis het dit as 'n algemene teorie ontwikkel en hy het dit nog altyd as sulks aanvaar.

Sedert die publikasie daarvan in 1924, was die Pashukanis regsteorie die teiken van volgehoue kritiek. Een van die mees prominente punte van kritiek is die bewering dat die teorie nie algemeen toepasbaar is nie en dat die teorie nie van sy historiese oorsprong in kontraktereg kan ontsnap nie. Terwyl die beginsel van ekwivalensie toegepas kan word in privaatreg, weerspieël dit nie die verhoudings in die publiekreg nie. Pashukanis se poging om misdaad en straf as 'n integrale aspek van die kommoditeits-vorm teorie aan te bied, is nie oortuigend nie. Die teorie kan slegs slaag as 'n teorie van privaatreg, maar nie as 'n algemene teorie van die reg nie.

Hierdie artikel beoog om die argument dat Pashukanis se teorie nie 'n algemene teorie is nie, te ondersoek. Dit word gedoen met spesifieke verwysings na die ontleding van misdaad en straf, en poog om te wys, histories en analities, dat die beginsel van ekwivalensie ook in hierdie gebiede van toepassing is. Die ontleding sluit in pleitonderhandeling, borgtog, noodweer, toestemming en toerekeningsvatbaarheid. In die algemeen word die onderlinge verhoudings tussen kontrakte, delikte en misdaad ook ondersoek. Die impak wat die beginsel van ekwivalensie op straf het word ook verduidelik. Ten slotte is die gevolgtrekking dat daar geen teenstrydighede tussen strafreg en die beginsel van ekwivalensie is nie. Inteendeel, strafreg is 'n vertakking van die reg waar hierdie regsvorm die opvallendste is. Die Pashukanis-regsteorie kan dus beskou word as 'n algemene regsteorie.

## 1 Introduction

Evgeny Pashukanis deservedly is famous as the author of the so-called commodity form theory of law. In his *Law and Marxism* he postulated that the form of legal relations held the key to the Marxist critique of law and that, in turn, the key to comprehending the legal form lay in its relation to the commodity form. The crucial concept here is the principle of equivalence or the equality postulate, which Pashukanis classifies variously as the “first truly juridical idea”<sup>1</sup> or the “juridical soul” of

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1 Pashukanis *Law and Marxism: A General Theory* (1978) 168.

criminal proceedings.<sup>2</sup> Just as commodity exchange pivots upon mutual recognition by commodity owners of one another as equals, so legal exchange stipulates reciprocal acceptance by legal subjects of one another as compeers. Indeed, juridification is the *alter ego* of commodification, in that the evolution of the legal form tracks the evolution of the commodity form. In a word, Pashukanis theorised the legal form as the homologue of the commodity form, with both delimited in terms of the principle of equivalence.

Pashukanis made it clear always that the historical genesis of his general theory lay in private law, specifically the law of contract. It is the branch of law which is both the historical and logical repository of the notion of equivalence.<sup>3</sup> By contrast, criminal justice appears to be far removed from the commodity form and the idea of equivalence. This article investigates the relationship between Pashukanism and criminal justice, attempting to prove that the private law derivation of the commodity form theory does not preclude its extrapolation to public law in general and to criminal law in particular. It seeks to convince that the disjunction between Pashukanism and criminal justice is more apparent than real. Pashukanis formulated the commodity form theory as a general theory of law, and the argument herein thus may be read as a defence of that generality.<sup>4</sup>

## 2 Crime and the Principle of Equivalence

The principle of equivalence, as the centrepiece of the Pashukanist general theory of law grounds the concept of justice in all social formations structured by the commodity economy. It thus also governs the comprehension of criminal justice. However, it is not unusual for commentators to espy a deficiency pertaining to criminal justice in Pashukanis's theory. They submit that it is, at bottom, a theory of private law and, as such, unable to account for criminal law. This position is exemplified by Warrington:

Pashukanis's theory is really concerned with private law and the chapter on criminal law is only added to attempt a spurious theoretical consistency. Pashukanis merely tries to apply his commodity form theory which had a certain logical force for private law, to criminal law, where in the formulation of Pashukanis at least, it clearly has no place.<sup>5</sup>

2 Pashukanis 177.

3 See Pashukanis 121.

4 See Pashukanis 40. See also Lipson "Is there a Marxist Theory of Law? Comments on Tushnet" in *Marxism: NOMOS XXVI* (eds Pennock & Chapman) (1983) 192: "He maintained ... that law as a general form – not merely piece by piece, but as a general form – was linked in history to that economic relationship that he said Marx said was at the bottom of all societies that obtained in the interval between the end of primitive family subsistence and the beginning of true socialism: namely, the relationship of commodity exchange".

5 Warrington "Pashukanis and the Commodity Form Theory" in *Legality, Ideology and the State* (ed Sugarman) (1983) 62.

For Warrington, criminal law “fits uncomfortably into Pashukanis’s project”.<sup>6</sup> Hirst, too, is unconvinced by the Pashukanist approach to criminal law. He comments:

Crime in capitalism is conceived on the analogy with private law as the violation by the criminal of a right borne by society, a violation of obligation which requires recompense. But this extension of the legal form is a mere ideological cover.<sup>7</sup>

According to Hirst, the relationship between the commodity form theory and criminal law is bedevilled by “Pashukanis’s crudities”,<sup>8</sup> which include the “vulgar Marxist-Leninist conception of the state as a coercive apparatus in the hands of the exploiting class”.<sup>9</sup> In other words, Pashukanis comprehends the criminal law as an instrument of class domination and his incorporation of it into the legal form is unable to conceal his alleged instrumentalism. Hirst, it seems, would concur with Warrington that Pashukanis’s approach to criminal law involves theoretical artifice to generalise his theory beyond its origins in private law.

The scepticism regarding the compass of the commodity form theory of law amounts to a serious assault upon the coherence of Pashukanism. It is necessary, therefore, to examine what Pashukanis has to say on the matter. For him, crime is a special form of contract, a retrospectively imposed contract.

“Felony can be seen as a particular variant of circulation, in which the exchange relation, that is the contractual relation, is determined retrospectively, after arbitrary action by one of the parties.”<sup>10</sup>

The party who has taken the arbitrary action is the offender. He wishes a one-sided relation, from which he is the sole beneficiary,<sup>11</sup> with the victim as utter loser.<sup>12</sup> The criminal law intervenes to abolish the privilege of asymmetry claimed by the offender. The state impresses him into a contract after he already has had his satisfaction, and he is forced to render performance to his victim. By his crime, the offender has

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6 Warrington 62.

7 Hirst *On Law and Ideology* (1979) 115.

8 Hirst “Introduction” in *Ownership of the Image: Elements for a Marxist Theory of Law* (Edelman) (1979) 10.

9 Hirst *On Law and Ideology* (1979) 114.

10 Pashukanis 168. Melossi & Pavarini *The Prison and the Factory: Origins of the Penitentiary System* (1981) 2 refer to this formulation as “the famous thesis of Pashukanis”.

11 See Ripstein *Equality, Responsibility and the Law* (1999) 10: “Crime consists in the pursuit of private rationality in the face of the rights of others, of the wrongdoer’s substitution of his private rationality for public terms of reasonableness”.

12 See Ripstein 144: “The criminal, by intentionally or recklessly violating the victim’s rights, expresses a denial of the victim’s value. In substituting private rationality for public standards of reasonableness, the criminal declares the victim’s rights irrelevant”.

violated the principle of equivalence which defines all things juridical. The criminal law exists to reinstate this juridical prime directive.

The notion of founding the comprehension of crime upon the principle of equivalence has an ancient provenance. As Pashukanis observes, it was Aristotle who was the progenitor of the “definition of crime as an involuntarily concluded contract”.<sup>13</sup> This definition constitutes one aspect of the Aristotelian category of remedial or corrective justice which is “manifested in the adjustment of balance in transactions between man and man” (as opposed to distributive justice which is concerned with the “distributions of honour, wealth or whatever else is divisible among those who enjoy citizen rights”).<sup>14</sup> Aristotle divided remedial justice into voluntary and involuntary transactions, the former referring to “transactions based on a contract between the parties, which one or the other has broken”, and the latter to “transactions independent of any consent, in which one party has wronged the other”.<sup>15</sup>

Aristotle’s domain of involuntary transactions includes crimes as non-consensual contracts.<sup>16</sup> The offender has trashed the normal relationship of equality with his victim, and claimed a position of superiority for himself. The aim of remedial justice is “to restore a violated and interrupted equality”.<sup>17</sup> Aristotle understands justice as “a sort of equality” as opposed to injustice which is a “sort of inequality”.<sup>18</sup> He argues thus:

It makes no difference whether a good man has defrauded a bad man or *vice versa*, nor whether adultery has been committed by a good or a bad man. If one person is in the wrong and another is suffering wrong, ie if one has inflicted and the other sustained an injury, the law looks only to the specific nature of that injury. This kind of injustice, therefore, is an inequality, and the judge tries to equalise it. Even where one person has been wounded, or has suffered death, at another’s hands the ‘being done to’ and the ‘doing’ are represented by a line divided into unequal segments; but the judge tries by means of the penalty he imposes to equalise the wrong suffered and the wrong done, subtracting from the ‘gain’.<sup>19</sup>

In Pashukanist terms, Aristotelian equalisation is achieved by the retrospective construction of the crime as a contract in order to

13 Pashukanis 169.

14 Aristotle (trans J Warrington) *Ethics* (1963) 1130b18-1131a6. See also Ross *Aristotle* (1949) 210.

15 Barker *The Politics of Aristotle* (1952) 363. Aristotle 1130b18ff identifies two classes of involuntary transactions, namely, clandestine and violent. The former include theft, adultery, poisoning, procuring, enticement of slaves, assassination and false witness; the latter span assault, imprisonment, murder, robbery with violence, mutilation, abuse and insult.

16 See Ross 211; Barker *The Political Thought of Plato and Aristotle* (1959) 343.

17 Barker (1959) 343.

18 Aristotle 1131b36-37.

19 Aristotle 1132a2-25.

rehabilitate the equality postulate between the offender and victim as involuntary contractants.<sup>20</sup>

## 2 1 Plea Bargaining

The contemporary exemplar of the Aristotelian contractarian approach to crime is the so-called plea bargain. The standard plea bargain involves the accused pleading guilty in exchange for a sentence lighter than that likely to follow a trial conviction.<sup>21</sup> Despite its criminal justice setting, the plea bargain is a contractual transaction, which complies with all the essential requirements of classical contract law.<sup>22</sup> Indeed, the very notion of a bargain entrains a bundle of contractual relations. Scott and Stuntz explain: “Plea bargains are, as the name suggests, *bargains*: it seems natural to argue that they should be regulated and evaluated accordingly.”<sup>23</sup>

They submit further that in the United States, plea bargaining is so routine and ubiquitous that it “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>24</sup> It seems that contract is constitutive of criminal justice as a system, at least in the land of the plea bargain.<sup>25</sup>

## 2 2 Bail

Unlike the USA, most other criminal jurisdictions continue to rely upon the criminal trial as the barometer of liability. However, even in trial-based systems, contractual relations feature prominently in the crucial issue of bail.<sup>26</sup> Van der Berg is explicit:

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20 See Ripstein 134: “The criminal law serves primarily to protect and vindicate fair terms of interaction”.

21 Thus, the standard plea bargain is really a plea and sentence bargain. Variations include pleading guilty to lesser or fewer charges in exchange for sentence reduction or bargaining only about the plea and leaving the sentence to the discretion of the court. The commodified character of the plea bargain is apparent to Sandefur “In Defence of Plea Bargaining” 2003 *Regulation* 31: “The courtroom may not seem like a place for haggling, but that is exactly what it is, in both civil and criminal contexts. A civil defendant can settle his case for a certain sum; a criminal defendant for a certain amount of time”.

22 For a thorough discussion and defence of the contractual core of plea bargaining, see generally Scott & Stuntz “Plea Bargaining as Contract” 1992 *Yale LJ* 1910 who, *inter alia*, advise that the courts have developed “a body of contract-based law to regulate the plea bargaining process”. See also Sandefur 28.

23 Scott & Stuntz 1910, original emphasis. See also Sandefur 28.

24 Scott & Stuntz 1912, original emphasis.

25 See generally Fisher *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2003).

26 Caldwell *Criminology* (1965) 350 defines bail pithily as “security furnished to the court for the appearance of the defendant whenever his presence is needed.” See also De Haas “Concepts of the Nature of Bail in English and American Criminal Law” 1946 *U Toronto LJ* 387.

The granting of bail is in the nature of a contract in terms of which the state commits itself to the accused's continued interim freedom once the court has authorised his release, while the accused commits himself to standing trial. It is apparent that the contracting parties are the state and the accused, although the discretion to grant bail vests in the court<sup>27</sup>

He considers that bail should be governed entirely by freedom of contract and argues that "the court's involvement in the bail contract is anomalous and even undesirable, more so where the state and the accused have agreed upon acceptable terms of the bail contract".<sup>28</sup> He would have the court ejected from the process as far as possible and leave the settlement of the quantum and conditions of bail to the contractants. He wishes freedom of contract to be properly constitutive of this pivotal pre-trial dimension: contractants are to be left to their own devices; only if they are unable to reach consensus would the court have to intercede to resolve the impasse. He even proposes that the Criminal Code be amended to this effect.<sup>29</sup>

### 2.3 Private Defence

Contractual relations and the equality postulate feature also in two popular substantive criminal law defences, namely, private defence and consent. Both are justifications, in the sense that conduct which complies with their criteria is considered not to be unlawful.

One of the requirements of private defence is that the response of the accused to an unlawful attack, upon himself or a third party, be reasonable. This requirement translates into a measure of proportionality or equivalence between the harms on either side of the criminal confrontation. In other words, the violence deployed by the defender should be commensurate, more or less, with that perpetrated or threatened by the attacker. An excessively violent defence is, *per definitionem*, unreasonable and will transform the defender himself into an unlawful attacker.<sup>30</sup>

In Pashukanist terms, the defender who responds reasonably to an unlawful attack has adhered to the principle of equivalence; and, provided the other requirements of the defence have been satisfied, he will not be liable for the harm suffered by the attacker. The reasonableness of the defence operates to refute the assertion of advantage, of "private rationality", entailed in the original attack and to reconstitute the principle of equivalence. Despite its public law-ness, there is a relatively comfortable fit between private defence and Pashukanis's notion of crime: the contractual *leitmotif* of equivalence is embedded in the composition of the defence.

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27 Van der Berg *Bail: A Practitioner's Guide* (2012) 9.

28 Van der Berg 10.

29 Van der Berg 11.

30 See Burchell *Principles of Criminal Law* (2005) 239-242; Snyman *Criminal Law* (2008) 109-112.

## 2 4 Consent

Consent is perhaps the prime example of a contractual justification in the criminal law. It is a defence which proceeds from the autonomy of the legal subject, accepting that each has the freedom to transact with his interests as he sees fit, including assenting to their being violated by another. Subject autonomy is extensive and comprehensive, provided its exercise does not conflict with the *boni mores*.<sup>31</sup> The freedom to consent to harm evidently is analogous to freedom of contract. Both are derived from the philosophy of individualism which pervades the commodity economy and both are grounded in the autonomy of the legal subject as the juridical materialisation of the commodity owner.

It is well established that consent to being harmed must be real, that is, it must not be given under duress or extracted by way of a fraud pertaining to a material aspect of the transaction in question. Also, the consent in question must be lawful, and the person consenting must have the capacity to do so.<sup>32</sup> These stipulations are integral also to the consensus which is required for all valid contracts.<sup>33</sup> In other words, there is a discernible contractual dimension to the criminal law defence of consent. At first blush, the equality postulate may appear inapplicable to situations where one person allows another to infringe his rights or interests. However, consent probably is raised most often in cases of sex crimes and medical treatment. In such cases it is not difficult to relate the postulate to notions of sexual gratification or to therapeutic or non-therapeutic satisfaction.

## 2 5 Criminal Capacity

In South African law, the accused must possess the intellectual apparatus needed to commit a crime. That is, he has to be able to comprehend the distinction between right and wrong, and to modulate his conduct according to this distinction. An accused who, for whatever reason, lacks either of these abilities at the time of the offence, will escape liability for lack of criminal capacity.<sup>34</sup> This absence founds such defences as youth, insanity, provocation, intoxication and non-pathological criminal incapacity.

Contractual capacity or “the competence to create rights and duties by concluding a contract with another person or persons”,<sup>35</sup> is the counterpart of criminal capacity. As with crime, contractants must be

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31 It usually stops short only at death: in most jurisdictions the legal subject is not free to consent to being murdered. See Snyman 125; Burchell 326.

32 See Snyman 127; Burchell 340-346.

33 See Van der Merwe *et al Contract: General Principles* (1993) 13-14, 73-74, 85-86, 91-92, 139-141.

34 See Snyman 160; Burchell 358.

35 Kuschke “Criminal Capacity” in *The Law of Contract in South Africa* (eds Hutchison & Pretorius) (2012) 150.

endowed with the intellectual wherewithal to enter into contractual relations, and

the extent to which a person has capacity to contract depends upon his ability to form and express a legally relevant will, which in turn depends upon the ability to appreciate the nature and effect of his or her act.<sup>36</sup>

Contracts purported to be concluded by persons who do not possess the requisite capacity generally are invalid. Thus, for example, *infantes* do not possess the capacity to contract, and contracts concluded by the insane and heavily intoxicated persons may be voided for lack of contractual capacity or voidable for deficient contractual capacity. Given the historical priority of contract over crime, the roots of criminal capacity lie deep in the soil of contractual capacity.

## 2.6 Contract, Delict and Crime

Examples, however many or compelling, by themselves cannot comprise a finished argument for the Pashukanist position on crime. Still, the examples considered above, in combination, are highly evocative of the contractual core of criminal law, and give a sense that Pashukanis's "famous thesis" perhaps is not as exotic as critics have insinuated. They suggest that his contractual theory of crime well may be a licit derivation from the commodity form theory of law. The sequel will attempt to theorise this proposition by examining briefly the interrelations of contract, crime and delict.

The law of delict probably stands abreast with the law of contract as being quintessentially private and governed by the principle of equivalence.<sup>37</sup> The "contractual" nature of delict is apparent in the plaintiff's claim for recompense for the harm suffered at the hands of the defendant. Indeed, it is acknowledged generally that a complete overlap between contract and delict is possible, in that a breach of contract may amount also to a delict.<sup>38</sup> However, unlike breach of contract, an action in delict does not take place in the context of a pre-existing voluntary agreement. Hutchison explains:

The essential difference between contractual and delictual obligations is that the former are, as a general rule, voluntarily assumed by the parties themselves, whereas the latter are imposed by law, irrespective of the will of the parties.<sup>39</sup>

<sup>36</sup> Kuschke 150.

<sup>37</sup> See Ripstein 246.

<sup>38</sup> See Boberg *The Law of Delict: Volume 1 Aquilian Liability* (1984) 1; Burchell *Principles of Delict* (1993) 3-4; Hutchison "The Nature and Basis of Contract" in *The Law of Contract in South Africa* (eds Hutchison & Pretorius) (2012) 8-9.

<sup>39</sup> Hutchison 8. See also Lubbe & Murray *Farlam & Hathaway: Contract* (1988) 1: "Contractual obligations are created by agreement (or apparent agreement) of parties. Unlike many other obligations, they are supposed to arise voluntarily. An obligation based on delict, on the other hand, arises *ex lege* when a legal subject wrongfully and without adequate justification,



Thus, in the law of delict the equality postulate is animated imperatively, when the plaintiff demands satisfaction by way of litigation. Not unlike the criminal law, then, the law of delict also operates in coercive conditions, with the defendant being drafted against his will into a determinate legal relation with the plaintiff, to answer for the damage which his errantry has occasioned. His conduct has violated the principle of equivalence and introduced disproportion into his relationship with the plaintiff. The law operates to countermand the inequality between the parties caused by the delict. Contractants have an *ex ante* commitment to the principle of equivalence; with a delict, the principle of equivalence is deployed *ex post facto* at the instance of the plaintiff.<sup>40</sup>

The overlap between the law of delict and criminal law around the principle of equivalence may be extrapolated directly from the routine coincidence of circumstance between delict and crime. According to Van den Heever:

A delict is not a distinct factual concept; it is merely a wrong regarded from the individual's point of view and in the light of procedure. When the state assumes the right to pursue a wrong, to exact punishment and so effect atonement we call the proceedings criminal and the wrong, regarded from this point of view, a crime. The state may also allow the individual directly harmed by the wrong to sue for a readjustment of his interests infringed by it.<sup>41</sup>

Thus, delict and crime occupy more or less the same factual space insofar as "all of the crimes against person and property are also delicts".<sup>42</sup> The distinctions between them are socio-legal and pertain primarily to their definitional limits and juridical classification. As a result of the different jurisprudential lenses through which they are viewed, crime is understood to have an eminently public law face whereas delict is demarcated in private law terms. However, the disparate perspectives cannot obfuscate completely their common contractual countenances. As seen above, the contractualisation of delict to enforce the principle of equivalence is uncontroversial. There appears to be no opposition of substance to the idea that the plaintiff's demand for recompense according to the contractual principle of equivalence is dependent upon the *ex lege* and *ex post facto* imposition of delictual obligations upon the defendant. Since delict and crime are juridical obverses, it seems logical to extend the contractual view of delict to crime. In this context, the Pashukanist formulation of crime as an involuntary contract concluded *ex post facto* acquires a meaning which is both sensible and defensible. In an economy of generalised commodity production, the principle of

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39 intentionally or negligently, infringes a recognised interest of another to the detriment of that person."

40 See Loubser "Concurrence of Contract and Delict" 1997 *Stell LR* 113-114.

41 Van den Heever *Aquilian Damages in South African Law: Volume 1* (1944) 2. See also Turner *Kenny's Outlines of Criminal Law* (1962) 1.

42 Burchell *Principles of Delict* (1993) 2. See also Snyman 4; Boberg 1-3.

equivalence is the necessary fundament of the legal form and juridical relations needs to be premised upon subject equality. Both crime and delict obey this juridical requisite, albeit from opposite ends of the public law-private law divide.

The intersections of contract, delict and crime reflect the fact that their differences are more ostensible than intrinsic, given that one course of misconduct may qualify as either a breach of contract or as a delict, and that behaviour which is *prima facie* criminal simultaneously may be delictual. Contract, delict and crime evidently comprise an integrated circuit of liability structured by a collective obeisance to the principle of equivalence. Burchell observes that crime and delict differ formally but not materially.<sup>43</sup> This insight may be extended readily to the opposition between contract and delict, to produce a triad of commingled concepts each substantively indistinguishable from the others. From a Pashukanist perspective, however, it is the contract component of the triad which is pivotal. Contract may be comprehended as the *grundnorm* from which is derived the criminal and delictual components. In other words, crime and delict are variants of the equality postulate which is the constitutional core of contract.

Hence, the homology between the commodity form and the legal form is valid also for criminal law. Indeed, Pashukanis considers that “the characterisation ‘criminal law’ becomes utterly meaningless if this principle of the equivalent relation disappears from it”.<sup>44</sup>

Such is the intended reach of the general theory: The notion of equivalence which is a structural feature of every contract is comprehended also to be a compositional trait of every crime.<sup>45</sup> His critics notwithstanding, Pashukanis’s approach to the criminal law is neither crude nor contrived.

### 3 Punishment and the Principle of Equivalence

Pashukanis embraces the equality postulate as a theoretical imperative. Unsurprisingly, therefore, he invokes it also in his analysis of punishment. For him, punishment is about equivalent requital. It is an exchange transaction which places the offender on an equal footing with his victim. The offender has asserted a claim to unrequited priority over his victim; punishment puts him in his place, literally, by coercing his

<sup>43</sup> Burchell *Principles of Delict* (1993) 57.

<sup>44</sup> Pashukanis 176.

<sup>45</sup> See Arthur “Editor’s Introduction” in Pashukanis *Law and Marxism: A General Theory* (1978) 15; Jakubowski *Ideology and Superstructure in Historical Materialism* (1990) 49. See also Stone “The Place of Law in the Marxian Structure-Superstructure Archetype” 1985 *Law and Soc R* 44-45. Interestingly, Stone, who is no friend of Pashukanis, considers that Pashukanis’s “views on criminal law are insightful” and submits that they “may be analogised to many other areas of law”, identifying “tortious conduct” as one such area.

acquiescence in the principle of equivalence.<sup>46</sup> Punishment, like crime, is governed by the law of the commodity. The criminal sanction is the performance due by the offender under the contract which perforce he has concluded with his victim. If crime is the violation of the equality postulate then punishment is its vindication.

Pashukanis's theory of punishment has elicited objections similar to those heaped upon his theory of crime. For example, Hunt alleges vociferously that Pashukanis's theorisation of a correspondence between the commodity form and punishment is tantamount to lexical sleight of hand:

The weakness of his treatment lies precisely in the fact that the identity he seeks to establish lies in nothing more than the verbal equation achieved by the dual usage of equivalence and the assertion that the verbal correspondence evidences a real correspondence.<sup>47</sup>

For Hunt, it seems, Pashukanis is a latter-day Schoolman stretching the subtleties of logic beyond their legitimate limits. Warrington, too, will have no truck with the theory of equivalent punishment and dismisses it summarily and contumeliously as "faintly comic".<sup>48</sup> The remainder of this section attempts to defend Pashukanis against such criticism.

As with his theory of crime, Pashukanis's theory of punishment is grounded in very reputable historical precedent, this time in the jurisprudence of Hugo Grotius. The Dutch master was unequivocal about punishment as equivalent requital: "It is undoubtedly one of the first principles of justice to establish an equality between the penalty and the offence".<sup>49</sup>

His explanation of this first principle of justice expressly attributes an unmistakable contractual texture to the nature of punishment:

Now in the eye of the law, every penalty is considered as a debt out of a crime, and which the offender is bound to pay to the aggrieved party. And in this there is something approaching to the nature of contracts. For as a seller, though no *express* stipulation be made, is understood to have bound himself by all the *usual*, and *necessary* conditions of a sale, so, punishment being a natural consequence of crime, every heinous offender appears to have *voluntarily* incurred the penalties of law.<sup>50</sup>

Grotius highlights punishment as a voluntary aspect of the contract between offender and victim. This voluntariness may be understood as supplementary to the involuntariness of the contract as a whole. In other words, if crime entails the retrospective imposition of a contract upon the offender, then that contract entails a prior conscious acceptance by the

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46 See Ripstein 160-161.

47 Hunt *Explorations in Law and Society: Toward a Constitutive Theory of Law* (1993) 81.

48 Warrington 62.

49 Grotius (trans A Campbell) *The Rights of War and Peace* (1979) 2 20 2.

50 Grotius 2 20 2, original emphasis.

offender of the punishment prescribed by law for his crime. In this connection, every decision to break the law may be taken as “a voluntary contract to submit to punishment”.<sup>51</sup> Grotius considered this conception of punishment to be Aristotelian in origin:

For, as Michael the Ephesian observes on the fifth book of Aristotle's *Nicomachean Ethics*, the ancients gave the name contract, not only to the voluntary agreements which men made with each other, but to the obligations arising from the sentence of the law.<sup>52</sup>

All in all, then, it seems that Pashukanis took his cue from jurisprudential sources which confer upon the contractual theory of punishment the same historical legitimacy accorded the contractual theory of crime. In the Pashukanist analytic, crime and punishment constitute a juridical dialectic which is mediated by the principle of equivalence embedded in their common contractual constitution.

Historically, the evolution of the principle of equivalence echoed the evolution of the commodity economy. However, commodity production emerged comparatively late in the pantheon of social development. Humankind's aboriginal mode of production was primitive communism, a form of social organisation born of the precariousness of existence in inhospitable natural conditions. The fundamental prehistoric social unit was the primitive commune which was premised upon the practice of equality in all things.<sup>53</sup> Prehistoric justice was blood revenge: given the ethos of egalitarianism, an injury to any member of the primitive commune, because it put the existence of the commune at risk, was experienced as an injury to the commune as a whole.<sup>54</sup> Blood revenge was a mechanism of self-preservation<sup>55</sup> and meant that any and all members of the victim commune could exact revenge against any and all members of the offender commune.<sup>56</sup> Thus, blood revenge was indiscriminate, and would lead routinely to the blood feud, that is, an open and inconclusive vendetta between communes.

However, over time the primitive communards came to appreciate the real dangers of mutual destruction embedded in the blood feud, and transformed it into the *lex talionis*. The law of retaliation determined that revenge had to be moderated by the principle of equivalent requital. In other words, the blood feud had to be controlled to the extent that there had to be a literal correspondence between harm suffered and revenge taken: an eye for an eye, a tooth for a tooth and so forth.<sup>57</sup> The prehistoric *lex talionis* meant, essentially, the customary regulation of blood revenge according to the primitive communist commitment to

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51 Grotius 2 20 2.

52 *Ibid.*

53 See Reed *Woman's Evolution: From Matriarchal Clan to Patriarchal Family* (1975) 197-198; Manfred *A Short History of the World: Volume 1* (1974) 12.

54 See Briffault *The Mothers* (1959) 267.

55 See Lafargue *The Evolution of Property* (1975) 161.

56 See Lafargue 166.

57 Pashukanis 168.

complete equality. During this epoch, commodity production was non-existent for the most part and episodic only during the transition from prehistory to history. Hence, the original *lex talionis* did not bear the imprint of the commodity form and its equality postulate.

Civilisation commenced with the break-up of the primitive commune and the installation of the commodity form as the economic centrepiece of the new society.<sup>58</sup> The penal correlate of this historic socio-economic transformation was the shift from blood revenge to composition.<sup>59</sup> The latter was “a system of expiatory payment”<sup>60</sup> which allowed offenders to pay for their infractions, literally, provided they could afford to do so.<sup>61</sup> It transformed the talionic notion of an eye for an eye into the pecuniary notion of an eye for value.<sup>62</sup> As Ripstein puts it:

Historically, criminal law begins to supplant revenge when the ideas of compensation and finality are introduced. The idea of compensation is always a commodity-bound idea, because it is the idea of the equivalent.<sup>63</sup>

Composition was the *lex talionis* commodified. With its advent, equivalence took on an economic character. Literal equivalence gave way to economic equivalence, and biological formulae were replaced by calculation of abstract values.<sup>64</sup> The juridical moment had arrived.

For an institution to be juridical it must adhere to the principle of equivalence.<sup>65</sup> Punishment, in its evolutionary aspect, is such an institution. Its genesis coincides with the genesis of the commodity form and its progression mirrors the advance of commodity production and circulation. It is constituted in terms of equivalent requital: the offender has to pay for the harm he has caused, and the payment must be commensurate with the degree of harm suffered by the victim.<sup>66</sup> In this context, the criminal sanction becomes “a form of exchange, a peculiar form of circulation, which has its place alongside ‘normal’ commercial circulation”.<sup>67</sup> For Pashukanis, then, punishment is a type of commodity exchange.

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58 See Mandel *Introduction to Marxism* (1979) 19; Novack *Understanding History: Marxist Essays* (1980) 44-45.

59 See Newman *Law and Economic Organisation* (1983) 163.

60 Pashukanis 168.

61 The indigent were excluded from the system of composition *ab initio* and had to endure the pain and indignities of physical punishment for their transgressions.

62 See Lafargue 174.

63 Ripstein 251.

64 Pashukanis 170. See also Melossi & Pavarini 2-3: “The transition from private vendetta to retributive punishment, that is, the transition from an almost ‘biological’ phenomenon to a juridical category, requires as a necessary precondition the cultural dominance of the concept of equivalents based on exchange value.”

65 Pashukanis 170 theorises an identity between “the juridical idea” and “the idea of the equivalent”.

66 See Pashukanis 169.

67 Pashukanis 176.

As an attribute of the commodity economy, punishment is governed by the measure of value of every commodity: labour and time. The form of punishment in which the development of criminal justice under capitalism has summated is imprisonment, that is, the exchange of a determinate portion of the offender's freedom, measured in time, for the harm his crime has caused. As Pashukanis demonstrates, the jail term is an obvious derivative of the exchange transaction which underlies the legal form. Despite the emergence of many other forms of criminal sanction, incarceration has remained dominant in all capitalist social formations. It has turned out to be the hardy perennial.<sup>68</sup>

Imprisonment articulates the principle of equivalence most completely, more so even than the pecuniary sanction. Not every offender can afford to pay a fine. But every offender can be incarcerated. The prison (despite whatever sordid conditions the offender may have to endure) is the ironic flagship of equality in the criminal justice system. Imprisonment is the penal materialisation of the principle of equivalence. It is the paradigmatic means whereby the state is able to recover the juridical relation which the crime has infringed, and to secure the preservation of the legal form.

Imprisonment, in any form, including periodical imprisonment and imprisonment with hard labour,<sup>69</sup> is essentially an exchange transaction, in which the currency is freedom, measured in determinate time periods. For Pashukanis:

Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense.<sup>70</sup>

He continues:

The offender answers for his offence with his freedom, in fact with a portion of his freedom corresponding to the gravity of his action. This conception of liability would be quite superfluous in a situation where punishment has lost the character of an equivalent. Were there really no trace of the principle of equivalence remaining, then punishment would entirely cease to be punishment in the juridical sense of the word.<sup>71</sup>

It is a logical requisite of the commodity economy that its penal regime be centred upon the prison sentence. It is the great leveller, not only as

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68 See Melossi & Pavarini 185, original emphasis: "Punishment in prison – as the deprivation of a *quantum* of liberty – becomes punishment *par excellence* in a society producing commodities; *the idea of retribution by equivalent* thus finds in prison punishment its most complete realisation precisely in so far as (temporary) loss of liberty represents the most simple and absolute form of 'exchange value'".

69 Hudson "Punishment and Control" in *The Oxford Handbook of Criminology* (eds Maguire *et al*) (2002) 251 notes "the return of hard labour" in contemporary imprisonment regimes.

70 Pashukanis 180-181.

71 Pashukanis 179.

regards the inequality between offender and victim, but also as regards offenders *inter se*.

Incarceration creates the abstract offender, the generic criminal, who concentrates in his person all manner and method of criminal behaviour. It is thus a device of equalisation. It ensures that the offender gives satisfaction to the victim, and that he does so on terms which are equal relative to every other offender. The expanded reproduction of the commodity economy depends crucially upon the ordered reproduction of the legal form. The prison sentence is the one form of punishment which has proved itself indispensable thus far to the reproduction of the legal form in the sphere of criminal justice.

Punishment, then, is necessarily about equivalent requital. It is a conception which is derived historically from the dissolution of the natural economy and the concomitant evolution of generalised commodity production as an economy of labour time. Pashukanis explains:

For it to be possible for the idea to emerge that one could make recompense for an offence with a piece of abstract freedom determined in advance, it was necessary for all concrete forms of social wealth to be reduced to the most abstract and simple form, to human labour measured in time.<sup>72</sup>

The archetypal capitalist form of criminal punishment thus is linked intimately to the archetypal capitalist form of production and exchange. The spirit of the commodity is so ubiquitous that it penetrates even the steel gates and concrete walls of the prison.

As the penal manifestation of commodity exchange, the notion of equivalent requital applies also to all other forms of punishment, including such non-custodial sanctions as the fine, correctional supervision, property forfeiture and community service. They, too, are structured according to the desideratum of parity which makes of state punishment the juridical phenomenon that it is. Pashukanis observes:

In principle, punishment in keeping with guilt represents the same form as retaliation in proportion to the injury. Its most characteristic feature is the arithmetical expression of the severity of the sentence: so and so many days, weeks, and so forth, deprivation of freedom, so and so high a fine, loss of these or those rights.<sup>73</sup>

The form of the criminal sanction is thus of little consequence. The essence of each form, whether custodial or non-custodial, is given by the principle of equivalent requital. As Pashukanis notes, this principle is an

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72 Pashukanis 181. See also Melossi & Pavarini 184-185: "The idea of the deprivation of an abstractly determined quantity of liberty, as the dominant form of penal sanction can in fact only be realised with the advent of the capitalist system of production, that is, in that economic process which reduces all forms of social wealth to that most simple and abstract form of human labour measured in time".

73 Pashukanis 180.

“essentially absurd idea”. From the non-judicial point of view it is nonsensical to attempt to equate every harm occasioned by every crime with deprivation of freedom measured in time. But this is an absurdity which cannot be avoided for “so long as the commodity form and the resultant legal form continue to make their mark on society”.<sup>74</sup> A rational basis for punishment is possible only if and when it may be reconstructed outside of the juridical paradigm. And it likely will take a social revolution to transcend this paradigm and deprive it of its current authoritative status.

In sum, Pashukanis’s theory of punishment accords completely with the commodity form theory of law. Certainly, there is nothing either comical or concocted about comprehending the criminal sanction as a variant of commodity exchange. Warrington deployed mockery as a weapon of criticism without making any attempt whatsoever to ground it analytically.<sup>75</sup> Hunt sought to trivialise Pashukanis’s theoretical sophistication by portraying it as a scholastic rhetorical device. Such facile attempts at critique matter little for a theory of punishment which is anchored in the materiality of the commodity form.

#### 4 Crime, Class and Coercion

The state is a party to every criminal justice transaction. The offence is construed as a contravention of a state norm and the state generally directs the prosecutorial process. Criminal justice is, in a word, an affair of state. But the contemporary state is the capitalist state, and criminal justice is thus also capitalist justice. This is the context of Pashukanis’s contention that, in the capitalist epoch, state hegemony over the criminal justice system is one of the weapons at the disposal of the bourgeoisie to protect its class rule and to fend off the demands of the dominated classes.<sup>76</sup> Indeed, Pashukanis tells us that “criminal justice in the bourgeois state is organised class terror”.<sup>77</sup> Such is the class content of the criminal law. It is that branch of the law which expresses most directly the violence immanent in the rule of the bourgeoisie, including its most advanced legal form of the *Rechtsstaat*.<sup>78</sup>

<sup>74</sup> Pashukanis 185.

<sup>75</sup> Norrie “Pashukanis and the Commodity Form Theory: A Reply to Warrington” 1982 *International Journal of the Sociology of Law* 432 makes the following astute observation about Warrington’s effort to ridicule Pashukanis’s theory of punishment: “This amusing quality of the theory is apparently self-evident since we are not told why it is faintly comic.”

<sup>76</sup> Pashukanis 173. It must be noted that the class nature of the state is not Pashukanis’s primary concern. He deals with it only after he has established the role of the state in the reproduction of the commodity and legal forms. These two aspects of “bourgeois stardom” operate at distinct levels of abstraction, the latter at a higher level than the former. It is the latter aspect which is integral to the general theory of law.

<sup>77</sup> Pashukanis 173.

<sup>78</sup> See Jessop *The Capitalist State: Marxist Theories and Methods* (1982) 84-85.



Hunt considers that Pashukanis's highlighting the class content of the criminal law imports a dualism into his analysis of law:

Thus he introduces a sharp polarity between two modes of law, the criminal law as a means of securing class domination and the civil law as the mechanism governing the exchange relations between atomised legal subjects.<sup>79</sup>

Hirst, too, is concerned about the disintegrative impact of class conflict upon the regular contours of the legal form:

For Pashukanis criminal law is merely the derivative extension of the form of law (a form which has a necessary and autonomous function as private law, the regulation of production through property) to class oppression. In conditions of acute class conflict the ideological nature of the legal form in criminal law is revealed, the juridic mask is discarded to reveal class force unlimited by legal rules or procedure.<sup>80</sup>

Thus, both Hunt and Hirst perceive a deep divide in the Pashukanist general theory, which purportedly bifurcates law into criminal law and private or civil law. And whereas civil law is consonant with the principle of equivalence embedded in the commodity form, criminal law merely pays lip service to this principle, exploding it regularly in favour of the coercion of class command and control. The implication of such an alleged dualism is, of course, to endorse the argument that the fit between the commodity form theory of law and the criminal law is, at best, an awkward one. Indeed, it appears, from Hunt's and Hirst's perspective, that the criminal law is not subsumed within the homology between the legal form and the commodity form and, hence, that the so-called general theory, after all, is pretty circumscribed in its juridical ambit and explanatory power.

However, this argument fails to comprehend the theoretical requisite that the role of the state as an instrument of class control has to be assessed on a quite different level of abstraction from its relation to the general theory of law. To be sure, the class analysis of the role of the state ought not to be conflated with the analysis of the state from a juridical perspective. The former is essentially a political analysis and is concerned to expose the day-to-day complicity of the state in the dictatorship of the bourgeoisie; the latter operates at a higher level of abstraction and is concerned to make sense of the role of the state in relation to that juridical "absurdity" denominated in the principle of equivalence. Certainly, the fact that the criminal law is Janus-faced, secreting behind the legal form its connivance in bourgeois class terror does not place it outside the pale of nor does it bifurcate the general theory. The real issue is to make sense of the role of the criminal law, as a state competency, in relation to the legal form and its private law manifestations. Jakubowski's insights are especially valuable here:

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79 Hunt 81.

80 Hirst "Introduction" in Edelman *Ownership of the Image: Elements for a Marxist Theory of Law* (1979) 10.

The legal form and the commodity form work their way into the existing relations hand in hand. As a relatively independent political power develops, serving the interests of the ruling class as a whole, so too does public law. Public law regulates the relations between the state and public institutions, and between these and the citizens; it serves to execute and protect private or civil law by means of the power of the state. The foundation of all these relations is still legal subjectivity and the recognition of the legal capacity of man, which give the relations of domination a general form.<sup>81</sup>

As a branch of public law, criminal law evidently helps to create the juridical milieu required for the uniform operation of contract law, property law, the law of delict and the like. It simultaneously expresses and facilitates the workings of the legal form. The criminal law was not imbricated in the birth of the legal form, but its imprimatur is indispensable to the continued existence and reproduction of that form.

Criminal law may not be linked as conspicuously to the principle of equivalence as the law of contract and the other branches of private law. Yet, it is the branch of law in which the legal form is most conspicuously present, for it is here that the legal subject is found in its most impersonal and abstract form. It is in the criminal trial that “the juridical element first and most crudely detaches itself from everyday life and becomes fully autonomous”.<sup>82</sup> It is here that the juridical moment peaks, in the “transformation of the actions of a concrete person into the proceedings of a legal party, that is of a legal subject”.<sup>83</sup> In other words, criminal law sets the high-water mark for legal intercourse. It is the branch of law which depersonalises actors most fully in order to equalise them as legal subjects most completely. Criminal law is synecdochic for law itself.<sup>84</sup> It represents, in telescoped terms, all the characteristics of the legal form. There is no more loyal commitment to the notion of equivalence than the literal replacement of the victim by the state in a criminal matter. Prior to the replacement, the offender, as individual, had lorded it over the victim, as individual, and unilaterally had violated the principle of equivalence. With the intervention of the state, both offender and victim are transformed from specific individuals into general legal subjects, the advantage of the offender is eradicated, and the principle of equivalence is rehabilitated.

The coercive constitution of criminal law is the guarantor of the *Rechtsstaat* as exemplar of “market relations among formally free and equal individuals”.<sup>85</sup> From this perspective, criminal law is as much a part of the legal form as any other branch of law. Criminal law is not ejected from the compass of the legal form because of its terroristic aspect; on the contrary, it cements their interdependence. Criminal law is a second-generation materialisation of the legal form and serves to

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81 Jakubowski 49.

82 Pashukanis 167.

83 *Ibid.*

84 *Idem* 168.

85 Jessop 85.

ensure the propagation of both the legal form itself and its first-generation manifestations. Critics such as Hunt and Hirst have been quick to perceive a contradiction between criminal law and the legal form and hence to allege that the commodity form theory does not withstand scrutiny as a general theory. However, scrutiny of the critics' concerns reveals quickly that they are groundless. For example, Hunt argues that Pashukanis commits theoretical heresy trying to reconcile private law and criminal law:

To provide a bridge that overcame the dualism between private law and state law he introduces what is undoubtedly the weakest feature of his general theory. He subsumes his attempt to theorise state and criminal law into a theory of punishment.<sup>86</sup>

This is a proposition which beggars belief. Pashukanis's theory of punishment is just that, a theory of punishment derived from his theory of law. There is nothing in his work to suggest that he was attempting the converse, to extrapolate his theory of punishment into a theory of law. Also, Pashukanis formulated a theory of crime which is by no means a by-product of his theory of punishment and which was constructed directly from the fundamentals of the general theory. Hunt wants to have his cake and eat it: he charges Pashukanis with dualism; and then charges him with theoretical aberrance in attempting to resolve the dualism. However, both charges are trumped up, with neither having a basis in anything which Pashukanis postulates. And certainly, Pashukanis did not conflate levels of abstraction as do his critics when they attempt to fragment the general theory of law or even to annihilate it.

## 5 The Public Law-ness of Criminal Justice

Criminal law is a branch of public law and criminal justice is statist. The entire criminal justice process takes place under the auspices of the state and its juridical apparatuses. Against this backdrop, Stone alleges: "Pashukanis's approach does not explain why the state, and not the victim or his or her relatives, is the plaintiff in criminal cases."<sup>87</sup>

Pashukanis, it appears, is unable to account for the public nature of criminal law. In other words, Stone reckons that the commodity form theory of law is deficient for neglecting to elucidate the statist structure of criminal justice.

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<sup>86</sup> Hunt 81.

<sup>87</sup> Stone 45. Ignatieff "State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment" in Cohen & Scull (eds) *Social Control and the State: Historical and Comparative Essays* (1985) 96-99 has raised the same issue by challenging the "assumption in Marxist social theory" that capitalism requires the "state penal sanction", and suggesting that the threat of force is not necessary for the reproduction of "exploitative social relations".

Stone's concern is misplaced. Pashukanis comprehended fully that criminal law was coercive in its operations. However, he understood also that the fundamentally juridical nature of the commodity economy requires such coercion to be public, in the sense that it is separated formally from the exercise of personal power. Thus, he observes:

Coercion as the imperative addressed by one person to another, and backed up by force, contradicts the fundamental precondition for dealings between the owners of commodities ... For in the society based on commodity production, subjection to one person, as a concrete individual, implies subjection to an arbitrary force, since it is the same thing, for this society, as the subjection of one owner of commodities to another.<sup>88</sup>

The core principle of equivalence which defines the commodity economy is violated, and the reproduction of the commodity economy itself is rendered precarious, if the coercion which structures it is personalised or privatised. Pashukanis again states:

This is also why coercion cannot appear here in undisguised form as a simple act of expediency. It has to appear rather as coercion emanating from an abstract collective person, exercised not in the interest of the individual from whom it emanates ... but in the interest of all parties to legal transactions.<sup>89</sup>

In other words, a public authority with coercive competence is inscribed in the constitution of the commodity economy. So too, by extension, is the public nature of criminal justice, as the branch of law which is concerned most, and most conspicuously, with the exercise of that coercive competence.

The Pashukanist position reduces to the proposition that capitalism needs a public criminal justice system. That is the answer to Stone's complaint.<sup>90</sup> Private law may be the "natural" law of the commodity economy, and may provide the foundation of all legal discourse and interaction. But it is public law, and criminal law in particular, which is necessary to secure the conditions for the reproduction of the juridical physiognomy of capitalism. It is not possible for the bourgeoisie to entrust its criminal justice system to the operations of private law, as it has its contractual and proprietary regimes. In other words, criminal justice in the commodity economy cannot but be statist in its essentials.<sup>91</sup>

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88 Pashukanis 143.

89 *Ibid.*

90 It is also the answer to Ignatieff's challenge to the necessarily statist texture of criminal justice.

91 There has been a recent rapid growth of private prisons. See Bates "Prisons for Profit" in Haas & Alpert *The Dilemmas of Corrections: Contemporary Readings* (1999) 595; Morgan "Imprisonment: A Brief History, the Contemporary Scene, and Likely Prospects" in *The Oxford Handbook of Criminology* (eds Maguire *et al*) (2002) 1147-1149. However, this development does not entail a move away from the basic idea of state punishment. The private prison continues to enforce a public disposition of criminal matters.

Justice in the *Rechtsstaat* must proceed from the equality postulate. The parties to a legal transaction may not be equal in fact and one may have at his disposal many more resources than the other. But the stronger party cannot expect to rely upon this power differential being translated into an automatic legal advantage. Formally, at least, he has to accept the equality postulate which makes his counterpart his peer at law.<sup>92</sup> This is the necessary consequence of the uniform legal subjectivity conferred upon them by the juridical complexion of the commodity economy.

However, every crime plunges the idea of legal subjectivity and its accompanying equality postulate into crisis. Every crime is an exercise in inequality, a practical failure of the principle of equivalence. It is a manifesto of personal power or “private rationality” against the juridical and its core value of equivalence. The offender asserts his interests to be prior to those of his fellow legal subjects, and thereby approves “the subjection of one owner of commodities to another”.<sup>93</sup> His crime is a revolt against the levelling effect of legal subjectivity in the commodity economy. He is a true champion of “the concrete individual” against its negation, the abstract legal subject,<sup>94</sup> and he is not averse to one such concrete individual enthralled another. He is a recalcitrant legal subject, challenging the logic of the juridical worldview which is integral to the ideational life of the capitalist mode of production.<sup>95</sup> He is an inveterate anti-egalitarian, a devotee of the pre-legal, who lives surely, if unconsciously, by Marx’s famous dictum that equal right is, in its content, a right of inequality.<sup>96</sup>

By committing the crime, the offender has adjudged the constraints upon arbitrariness inscribed in the sphere of privatised legal relations to be inadequate to the defence of and, by the same token, the re-assertion of the equality postulate. The fate of the latter thus becomes a public concern, that is, a matter for state action. Logically, that which the offender has sundered cannot be relied upon to reconstruct him as a compliant legal subject. Criminal justice is thus inexorably public justice. Only the state, as the embodiment of the acquiescent legal subject, has the capacity to extract from the offender the conformity which is required to reconcile him to the idea of legal subjectivity, both his own and everybody else’s. It is one of the dialectical ironies of the legal form that the efficient reproduction of the private sphere is dependent, ultimately and unavoidably, upon the public power. The public is the true guarantor of the private.

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92 See Pashukanis 143-144.

93 *Idem* 143.

94 *Ibid.*

95 See Engels “Lawyers’ Socialism” in Marx & Engels *Collected Works: Volume 26* (1990) 598 who describes the juridical worldview as “the classical one of the bourgeoisie”.

96 Marx “Critique of the Gotha Programme” in *The Marx-Engels Reader* (1978) 530 (ed Tucker). The offender likely is blissfully unaware of both the man and his dictum.

As noted, criminal justice is perhaps the most eminently public branch of law. It is in this sphere where the violent nature of the law is most evident, and hence it is here where it is necessary to restrict the use of coercion to the formal organs of the state.<sup>97</sup> The private settlement of criminal disputes is not properly legal, in that it is not an organ of state which has the final say in the disposition of the matter. Such private resolutions either hark back to a pre-legal past or portend a post-legal future. Criminal justice is thoroughly legal. Not only is it dispensed by the state, but it is also the only variant of justice which involves the state as a party. It cannot be otherwise.

Civil and criminal cases differ essentially in the fact that the former involve private parties on both sides while the latter involve a public party on one side. On the face of it, both parties to a civil matter proceed from the premise that the principle of equivalence is a valid one. Of course, each is operating from self-interest, submitting that the other has violated the principle, and both seek from the court a decision that will re-establish the principle *inter se*. While the submissions of either are entirely self-serving, there is no argument about the cogency of the juridical relation. Civil disputes are about using that relation to self-advantage. They do not require state intervention, except as ultimate arbiter regarding the interpretation of the principle of equivalence.

The offender has no such agenda. He does not seek to use the principle of equivalence to his advantage. Instead, he rejects the principle, albeit usually unthinkingly or unwittingly. He asserts a claim to operate outside the parameters of law, and not only in the sense of breaking the letter of the law. Objectively, a crime is, therefore, an act of outright subversion of the legal relation. The offender has no stake in co-operating or even competing with the victim in curial proceedings to settle the interpretation of the principle of equivalence. In these circumstances, it is necessary for the state to become a party to the matter and to compel the offender to respect the principle and to participate in its operation. If a crime is a repudiation of the principle of equivalence, then the criminal trial is its affirmation.

It has been held that: "From a Marxist perspective, state control over deviance is an integral feature of modern capitalism and is not likely to be relinquished."<sup>98</sup> The truth is that relinquishment of "state control over deviance" is not only unlikely but also unthinkable. Such control is an indispensable feature of modern capitalism and its criminal justice system and hence cannot be forsaken. The capitalist social formation requires a criminal justice system which operates under the aegis of its state. The notion of a private criminal justice does violence to the idea of the legal subject who lives (and dies) by the principle of equivalence.

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97 Seagle *The History of Law* (1946) 6-7.

98 Minor & Morrison "A Theoretical Study and Critique of Restorative Justice" in *Restorative Justice: International Perspectives* (1996) 124.

Despite their origins in private law, the legal form and its concomitants cannot survive without the patronage of the state.

## 6 Excursus: Pashukanis in South Africa

There is a vibrant and admirable jurisprudence promoting constitutional democracy and defending human rights in South Africa. However, the commodity form theory of law falls outside the ambit of this jurisprudential matrix and seldom, if ever, is given considered philosophical attention. This neglect of Pashukanis may be due to the fact that South African jurisprudence, in the main, yet has to confront the capitalist character of the South African social formation. The capitalist mode of production long has been dominant in South Africa, and certainly throughout both the *apartheid* and the post-*apartheid* eras. Whereas *apartheid* may have obscured somewhat the capitalist fundamentals of society, the transformation to a non-racial democracy has rendered them starkly visible. Indeed, this politico-legal transformation was simultaneously a process of normalisation: South Africa lost its racist exceptionalism and took its place as a regular member of the capitalist world system.<sup>99</sup>

Capitalist normalisation calls for a jurisprudence which transcends the conventional liberal concern with liberty, equality and the rule of law. Liberal jurisprudence stands perplexed in the face of the scandalous socio-economic inequalities and the epidemic of criminality, violent and economic, which continue to embarrass a country in the van of constitutional democracy internationally. These debilities are linked intimately to its idealist conception of law as a system of norms, obstructing comprehension of the material foundations of legal relations.

Pashukanism is about excavating the material basis of the juridical in the commodity economy and apprehending the structural comity between legal relations and capitalist relations of production. It has been argued persuasively that “without a theory of the legal form, the specificity of law itself is impenetrable”.<sup>100</sup> Pashukanism supplies the theory of the legal form which liberal jurisprudence lacks. The commodity form theory of law well could provide the analytical roadmap needed to comprehend the explosive contradictions between the politico-legal and the socio-economic which bedevil the South African transformation, and to grasp the logic of the post-*apartheid* crime emergency. And it well could hold the key to the development of a jurisprudence which engages properly the capitalist context of legal relations. Certainly, a South African jurisprudence which continues to ignore Pashukanis is depriving itself of a rich and robust epistemological resource.

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99 See generally Alexander *An Ordinary Country: Issues in the Transition from Apartheid to Democracy in South Africa* (2002).

100 Miéville *Between Equal Rights: A Marxist Theory of International Law* (2005) 2.

## 7 Conclusion

The private law origins of the commodity form theory of law cannot constitute an ontological barrier to its extension to public law. Pashukanis's derivation of the general theory from the law of contract was a necessary one, dictated by the real history of the legal form. Of course, theories cannot be confined within the narrow limits of their birth, and the generalisation of the commodity form theory was a natural occurrence, more or less. What is more, unlike so many other general theories of law which tend to be ahistorical, Pashukanis's has the virtue of laying bare its own material parentage in the evolution of the commodity economy.

This article has rebutted the argument that the general theory is insufficient in that it is unable to explain crime and its punishment. It has shown that substantial aspects of the criminal justice process and of criminal law may be read as manifestations of the principle of equivalence. It has demonstrated, also, that the principle of equivalence is able to account for criminal punishment easily and without resort to rhetorical device. Of course, the general theory cannot explain all the specificities of criminal justice doctrine. However, that is not its function. No general theory of law can be expected to traverse every nook and cranny of every branch of law. The primary task of the Pashukanist general theory of law is to clarify why law as a whole takes the form it does. It achieves this task with some considerable proficiency and élan. Thus, it may be contended confidently that there exist "good grounds for taking seriously Pashukanis's claim that his is a general theory of law, and not one illicitly generalised from private civil law".<sup>101</sup> In its turn, South African jurisprudence would do well to take Pashukanism seriously as a general theory of law.

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101 Norrie 434.